

March 12, 2019

The Honorable Lindsey Graham
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington D.C. 20510

RE: Lambda Legal Opposes Confirmation of Kenneth Lee to the Ninth Circuit Court of Appeals

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of Lambda Legal, we write to oppose the confirmation of Kenneth Lee to the Ninth Circuit Court of Appeals. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender LGBT people and everyone living with HIV, through impact litigation, policy advocacy, and public education. We oppose the confirmation of Mr. Lee because of his record of anti-LGBT writings, his disparaging comments about people living with HIV, and his failure to disclose important documents.

Mr. Lee's nomination has been fraught with procedural missteps. He lacks the support of both home state Senators Feinstein and Harris. This is the continuation of a trend by the Senate Judiciary Committee of disregarding the traditional blue slip process. The removal of these norms and safeguards renders the Senate little more than a rubber stamp for the executive branch, contrary to its duty to serve as an independent check to preserve the integrity of our federal judiciary and, by extension, the health of our democracy.

In addition, Mr. Lee, acting in tandem with the Trump Administration's lack of concern over consulting home-state senators, did not disclose several of his controversial writings to these senators' judicial selection committees.¹ Further, Mr. Lee did not submit these writings with his initial Senate Judiciary Questionnaire, but instead chose to supplement it only days before his hearing. In fact, Mr. Lee has had to supplement his record five times,

¹ Dianne Feinstein & Kamala Harris, *Feinstein and Harris: Kenneth Lee Nomination Hearing Should Not Move Forward*, PRESS RELEASES (March 4, 2019), available at <https://www.feinstein.senate.gov/public/index.cfm/2019/3/feinstein-and-harris-kenneth-lee-nomination-hearing-should-not-move-forward>.

and the documents that were discovered by others were the most inflammatory of his writings, including some of the most egregious writings regarding LGBT people.

Such conduct is part of a larger pattern of Trump Administration judicial nominees failing to disclose controversial writings. Indeed, several nominees have failed to disclose writings, the substance of which should be disqualifying by any reasonable standards. In the last two years, nominees Brett Talley,² John K. Bush,³ Jeff Mateer,⁴ Thomas Farr,⁵ Ryan Bounds⁶, and Gordon Giampietro⁷ have all failed to disclose personal writings in their application materials. To allow this practice to continue would undermine the credibility of the federal judiciary for generations to come. At a bare minimum, we must be able to expect honest compliance with the rules by those aspiring to become lifetime members of the federal judiciary.

In addition to his apparently intentional concealment of inflammatory material, Mr. Lee has demonstrated through a series of writings disparaging the LGBT community that he is ill-suited to serve as an impartial administrator of justice. Mr. Lee demonstrated his biases and inability to provide equal justice under the law for LGBT people and people living with HIV in an article responding to the then-decade old HIV epidemic. In 1994, Mr. Lee published an article entitled *AIDS at RPU*, in which he lambasted a Cornell University HIV awareness campaign warning students about the realities of HIV transmission. In the article, he dismissed as “patently false” the obvious public health facts that HIV can be acquired by anyone and

² See Mark Joseph Stern, *Trump Judicial Nominee Brett Talley Appears to Have Defended “the First KKK” in Message Board Post*, SLATE (Nov. 15, 2017), available at <https://slate.com/news-and-politics/2017/11/trump-nominee-brett-talley-appears-to-have-defended-the-first-kkk.html>.

³ Matt Apuzzo & Michael S. Schmidt, *Trump Judicial Pick Did Not Disclose He Is Married to a White House Lawyer*, NY TIMES (Nov. 13, 2017), available at <https://www.nytimes.com/2017/11/13/us/politics/trump-judge-brett-talley-nomination.html>.

⁴ Ted Barrett, David Shortell, & Ariane de Vogue, *Exclusive: Grassley urges Trump to reconsider controversial judicial picks*, CNN: POLITICS (Dec. 13, 2017), available at <https://www.cnn.com/2017/12/12/politics/trump-judicial-picks/index.html>.

⁵ Sam Levine, *Former DOJ Official Accuses Trump Judicial Pick of Misleading Senate About Past Work*, HUFFINGTON POST (Nov. 21, 2017), available at https://www.huffingtonpost.com/entry/thomas-farr-voter-intimidation-senate_us_5a0f0c98e4b0e97dffed03a2.

⁶ Maxine Bernstein, *Senate Committee to consider Ryan Bounds’ 9th Circuit judicial nomination*, OREGON LIVE (May 7, 2018), available at https://www.oregonlive.com/portland/index.ssf/2018/05/senate_to_consider_ryan_bounds.html.

⁷ Bill Glauber, *Tammy Baldwin urges Donald Trump to withdraw Gordon Giampietro judicial nomination*, MILWAUKEE JOURNAL SENTINEL (May 1, 2018), available at <https://www.jsonline.com/story/news/politics/2018/05/01/tammy-baldwin-urges-donald-trump-withdraw-gordon-giampietro-judicial-nomination/569887002/>.

that condom use is recommended.⁸ Mr. Lee then argued that since a cure “will likely never be discovered,” the efforts should go—not into research—but into teaching “values and responsibility.” After repeating derogatory canards about gay people, he concluded by saying, “To avoid AIDS, one has to only abstain from drug-use and promiscuity. So simple, yet so hard to grasp.” His argument that the appropriate response to HIV is just exercising “personal responsibility” disregarded the then-well-known realities of transmission, and the pervasive mistreatment of those living with HIV. Mr. Lee’s callous remarks demonstrate deep hostility towards people living with HIV and gay, lesbian and bisexual people, and again demonstrate that he would be unable to move from being an antagonistic advocate to the role of an impartial administrator of justice for LGB litigants.

Mr. Lee also lent his ardent support to the then-existing ban on gay men, lesbians and bisexual people serving openly in the military. He asserted that the overt discrimination by our government was justified because “many people” believed that open service by gay people “would diminish the camaraderie of the military’s macho ethos.”⁹ He continued on to argue that America’s treatment of gay people should be considered “stellar,” implying that the military exclusion is a small price for LGB people to pay, compared with the Cuban government’s practice of jailing gay people and conditions in China, where, he claimed, “[homosexuals often meet the firing squad, receiving quite a blow to the head.”¹⁰

Mr. Lee’s view that discrimination by government is reasonable if based on common sexist prejudices is troubling enough. His view that LGB people should be grateful they don’t face jail time or a firing squad – in his words, a “blow to the head” – shows a degree of hostile disregard that is even more so. Mr. Lee’s animus toward LGB people in this article clearly demonstrates that he would be unable to provide LGB people equal justice under the law.

Mr. Lee later wrote to voice his disdain for Cornell University’s decision to create a Gay, Lesbian, Bisexual and Transgender Resource Office on campus, dismissing his fellow students’ claim of need for support and saying that the administration was only hoping to “appease militant gay activists.”¹¹ He characterized the opening of the Office as an ill-advised effort by Cornell to mollify Cornell’s LGBT community after the university created designated living spaces for some minority students but declined to open an LGB dorm. Mr. Lee

⁸ Kenneth Lee, *AIDS at RPU*, *The Cornell Review* (February 10, 1994), *available at* <https://afj.org/wp-content/uploads/2019/02/AIDS-at-RPU.pdf>.

⁹ Kenneth Lee, *Is America Evil?*, *THE CORNELL REVIEW* (November 11, 1993), *available at* <https://afj.org/wp-content/uploads/2019/02/Is-America-Evil.pdf>.

¹⁰ *Id.*

¹¹ Kenneth Lee, *Gay Office Opens*, *CORNELL REVIEW* (October 20, 1994), *available at* <https://afj.org/wp-content/uploads/2019/02/Gay-Office-Opens.pdf>.

continued in the article to praise Cornell's refusal to open an LGB dorm, again justifying lesser treatment of LGBT people based on popular prejudice. In this instance, he argued that the university's decision made sense because "potential and current donors would not be receptive to a gay dorm" and that it would "garner negative publicity."¹²

For all of the above reasons, we do not believe Kenneth Lee is capable of serving on the Ninth Circuit U.S. Court of Appeals with the impartiality required by that office. Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sasha Buchert, Senior Attorney at sbuchert@lambdalegal.org.

Signed,

Lambda Legal

¹² *Id.*