March 4, 2019

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our hundreds of thousands of members throughout the United States, People For the American Way strongly opposes the nomination of Kenneth K. Lee of California to be a judge on the Ninth Circuit Court of Appeals. His legal views are out of the mainstream and would damage the judiciary's core purpose of fairly protecting all of the people's rights under the law. He joins the long list of individuals selected by Donald Trump to occupy a position he is not at all suited for, in order to drive a political agenda from the bench that will favor corporations, the powerful, and the wealthy over the rights of all Americans. In addition, because he is opposed by both home state senators, his confirmation would continue the abuse of power that is increasingly inseparable from Republican rule.

Across an enormous range of legal issues, Lee's record makes it clear that he is not a principled constitutionalist. One way this manifests itself is his misguided approach to restoring the franchise to individuals convicted of crimes who have served their sentences.

For instance, in 2006, he coauthored an article denigrating the restoration of voting rights for formerly incarcerated individuals who have paid their debt to society:

> Although forty-eight states have already spoken in their support for felon disenfranchisement, the legal and political left has championed felon voting rights as its latest cause célèbre.[i]

As an initial matter, laws are not set in stone, and it is deeply disturbing that Lee casts aspersions on Americans simply because they are exercising their First Amendment right to petition for legislation to change existing laws. Second, a principled constitutionalist would recognize that the prevalence of a practice does not tell you whether it is right or wrong, ethically or legally.

And perhaps most importantly, someone who casually dismisses the right to vote as just the "latest cause célèbre" has no place in America's judiciary. The Senate should not give a lifetime judgeship to someone who shows such disrespect for the fundamentals of constitutional democracy.

In the same article, Lee wrote that Congress lacks the constitutional authority to address states' racially discriminatory prohibitions on voting against formerly incarcerated people. Such bans cannot be considered racially motivated, he wrote, in large part because a number of states had passed such laws before the Civil War, when African-Americans were already disenfranchised.

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But regardless of what came before, the flood of voting bans enacted during the Jim Crow era were clearly intended to disenfranchise African Americans.[ii] In addition, southern states expanded their criminal laws to punish offenses that they believed formerly enslaved people were most likely to commit.[iii] Through the Fifteenth Amendment, the American people gave Congress wide latitude to eradicate racial discrimination in voting. Racially-motivated voting bans may be of long standing, but the decision of the white elite not to enforce the Constitution when those laws were enacted did not make them constitutional.

Lee has also extensively defended corporations in class action suits, which are often the most efficient vehicle for holding large companies accountable when they deceive or do other harms to their employees and the general public. In many cases, victims do not even realize they are being harmed. Those who do know may lack the resources to protect their rights, or the cost of asserting their legal rights would exceed the benefit. When the harm to an individual is relatively small, she might decide it is not worth the trouble to expend time and money on legal action. Without class actions, a corporation can take in large sums of money from thousands or millions of people who it knows won't defend their legal rights. Class actions empower individuals by allowing them to consolidate their claims—and their power—to match the enormous resources available to the business that have harmed them.

As a defense attorney, Lee is expected to argue positions that would impede class actions against his clients. But his writings make clear that his hostility to class actions represents his own reading of the law, which would be reflected in his legal opinions.

For instance, in a 2013 article he wrote in his personal capacity entitled "Questionable Classes,"[iv] he repeatedly framed class actions as frivolous litigation that serves only the plaintiffs' attorney. When a judge starts a case with a presumption of bad faith or frivolity, plaintiffs are denied the fair-minded justice they should expect in a court of law. Such judges look for ways to rule in favor of the corporate defendant. Indeed, Lee wrote positively that:

> many judges, especially at the federal level, have become more receptive to dismissing class action lawsuits at the pleading stage, often through preemption.[v]

It is difficult to square his approval of such limitations on individuals' ability to pursue class actions with the idea of a judge as a neutral party where all parties stand equal under the law.

Lee's record also shows a stunning inability—or unwillingness—to acknowledge much of the longstanding discrimination that still affects numerous populations within the United States. Our criminal justice system is rife with implicit racial bias that is only perpetuated if judges do not make themselves aware of it. Furthermore, when a judge has a legal decision that revolves around party's state of mind, and what a reasonable person in that situation would perceive, it is essential that the judge understand the experiences and perceptions of others, regardless with whether he agrees with the party's interpretation of them.

For instance, Lee once wrote that "[e]thnic studies classes have stoked this fire of intolerance by perpetuating the victimization culture." He stated that "by dwelling on the West's racism (without having any world perspective), students become ultra-sensitive. They border on paranoia as they see racism in virtually everyone."[vi]

In an article criticizing affirmative action, Lee agreed with the assertion that "economic factors have virtually eliminated rampant racism."[vii] While many of the explicit manifestations of racism during Jim Crow have abated, racism itself remains "rampant," and not only in the Old South. Hashtags such as #LivingWhileBlack and #BlackLivesMatter exist because everyday life for African Americans is vastly different than for white people in ways that many of the latter are unaware. But judges must be aware of such fundamental differences if we are to have a judicial system that provides fairness and justice under the law.

Lee displayed similar blindness to the experiences of women who have experienced sexual harassment or violence. He wrote an article criticizing the process Cornell used in a harassment case against a professor by four women.[viii] In setting forth the evidence he claimed exonerated the professor, Lee made general claims about survivors' behavior that show he would be unable to fairly approach a case involving sexual harassment.

With regard to a student who alleged the professor had grabbed her breast during a class-related trip to Japan, he wrote:

> After this alleged incident occurred in l988, the complainant continued to accompany Maas as his film crew assistant on four more trips. If a lecherous professor grabs a student's breast, **the last thing she would do** is continue to accompany him on another trip — let alone four more trips — just so she can hold onto a part-time job. (emphasis added)

In fact, regardless of what happened in this particular case, Lee's general assumption is false: women frequently continue to work for their harassers for any number of reasons. He also noted that coworkers had not noticed any change in her behavior after the alleged incident, writing:

> **One would expect** her to display some downtrodden emotions. After all, she claimed that she was so traumatized by this incident that she had run out of the room teary-eyed and locked herself in the bathroom for hours. (emphasis added)

In fact, one would be wrong to expect that in all cases. Again, independent of this particular incident, Lee's general assumptions about survivors do not bode well for his ability to fairly address sexual harassment cases. As with issues relating to African Americans, this is part of a pattern of a fundamental failure to understand the importance that other people have had different life experiences from him.

This same narrow-mindedness shows itself in the area of equality for LGBTQ people. For instance, calling it "egregious" and "quasi-Marxist" to have a campus seminar on heterosexism, he wrote:

While most people can agree that gays should be accorded respect and equal rights, the creation of another 'ism' (like racism) is yet another way to portray people as victims in need of preferential treatment.[ix]

Yet as the Supreme Court has repeatedly recognized, this population has long been targeted for legally-enforced discrimination for no legitimate reason. Lee's comment resembles the "equal rights, not special rights" framing used by virulently anti-gay groups in their numerous dishonest propaganda campaigns against LGBTQ equality.

Whether the narrow-mindedness that is clear from Lee's record is due to genuine naiveté or to ideological hostility, it is disqualifying for a lifetime position on a powerful appellate court. A principled and fair-minded constitutionalist cannot be detached from the reality of systemic societal racism and sexism. It calls to mind Chief Justice John Roberts' troubling assertion that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[x] But a court's rulings should be grounded in the reality of people's daily lives, rather than in the privileged world that so many judges have spent much of their lives in.

Senators Feinstein and Harris oppose Lee's nomination, not only because of his disturbing writings, but also because he failed to disclose some of them to their judicial nominations advisory commission.[xi] Many senators of both parties use such commissions, but they cannot effectively pre-vet nominees if those nominees don't provide material that they know the Senate Judiciary Committee will find relevant. (Several dozen additional articles were not provided to the committee until 15 weeks after his nomination and just one week before his hearing.)

Their objection alone would have prevented their confirmation in the era before Trump. Senators used to protect their colleagues (as well as their own interests) by respecting the prerogatives of a home state senator. Pressuring the White House to agree with senators of the other party on consensus nominees helped maintain the separation of powers. As a structural protection of liberty, the Constitution envisions a Congress that jealously guards its own powers and institutional interests rather than serving as an auxiliary of the executive branch.

We urge you to oppose the nomination of Kenneth K. Lee to the Ninth Circuit.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

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[i] Clegg, Roger, George T. Conway III, and Kenneth K. Lee. "The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes." American University Journal of Gender, Social Policy & the Law. 14, no. 1 (2006), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=jgspl.

[ii] See, e.g., "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002," Angela Behrens, Christopher Uggen, and Jeff Manza, 109 Am. J. Soc. 559, 564 (2003).

[iii] "Restoring the Right to Vote," Brennan Center, 2009, p. 6, https://www.brennancenter.org/publication/restoring-right-vote.

[iv] "Questionable Classes," Kenneth K. Lee, 36 Los Angeles Lawyer 32 (2013), https://www.lacba.org/docs/default-source/lal-back-issues/2013-issues/november-2013.pdf.

[v] Id. at 37.

[vi] "End Racist Policies!" Kenneth K. Lee, The Cornell Review, posted online at https://afj.org/wp-content/uploads/2019/02/End-Racist-Policies.pdf.

[vii] "The Review vs. MBSA, or Reason Against Silliness," Kenneth K. Lee, The Cornell Review, Nov. 29, 1993, posted online at https://afj.org/wp-content/uploads/2019/02/The-Review-vs-MBSA.pdf.

[viii] "Why Maas Is Innocent," Kenneth K. Lee, The Cornell Review, Sep. 15, 1995, posted online at https://afj.org/wp-content/uploads/2019/02/Why-Maas-is-Innocent.pdf.

[ix] "Asian Leftism," Kenneth K. Lee, The Cornell Review, April 6, 1995, posted online at https://afj.org/wp-content/uploads/2019/02/Asian-Leftism.pdf.

[x] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007).

[xi] "Feinstein, Harris on Ninth Circuit Nominees," https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=BA3CCC82-B45A-44AF-8A86-121B3A0D0780.