

AFJ NOMINEE REPORT

# KENNETH LEE



*U.S. Court of Appeals for the Ninth Circuit*

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# INTRODUCTION

On November 13, 2018, President Trump [nominated](#) Kenneth Lee to the Ninth Circuit Court of Appeals for the seat previously held by [Judge Stephen Reinhardt](#). The Senate did not act on Lee's nomination before the end of the Congress, and on January 3, 2019, Lee's nomination was [returned](#) to the President. On February 6, 2019, President Trump [renominated](#) Lee.

Lee's nomination takes place against the backdrop of President Trump's intense dissatisfaction with the Ninth Circuit. The President has repeatedly attacked the independence of the judiciary overall. But his ire towards the Ninth Circuit and specific judges in the circuit has been particularly vocal and vicious. The President has said the court is a "big [thorn](#)" in his side, and has called the court a "[dangerous disgrace](#)," a "[complete & total disaster](#)," and "[out of control](#)." He has threatened to "[put in a major complaint](#)" about the court.

Decisions by the Ninth Circuit (and district court judges) that have most enraged the President include rulings that struck down his Muslim Ban, that enjoined the Administration's order withholding federal funds from cities that failed to enforce immigration laws,

and that enjoined policies that made individuals crossing the southern border ineligible for asylum. The President, moreover, has already preemptively [attacked](#) the Ninth Circuit for what he anticipates will be an adverse ruling on his emergency order to fund the border wall for which Congress has refused to appropriate money:

[W]e will have a national emergency and we will then be sued, and they will sue us in the Ninth Circuit even though it shouldn't be there, and we will possibly get a bad ruling, and then we'll get another bad ruling, and then we'll end up in the Supreme Court and hopefully we'll get a fair shake and we'll win in the Supreme Court just like the [travel] ban. They sued us in the Ninth Circuit and we lost, and then we lost in the Appellate Division, and then we went to the Supreme Court and we won.

Given President Trump's repeated attacks on the independence of the Ninth Circuit and his desire to obtain different rulings, it is clear that he brings an agenda to any nomination he makes to the circuit. There is an overwhelming likelihood that the White House will seek out reliable partisans and ultraconservatives for Ninth Circuit seats, and Lee's record strongly suggests that he meets those requirements.

Lee – a Federalist Society member for over 20 years – has a record of attacking “liberals,” Democrats, and “left-leaning lawyers” who have sought to enforce rights and legal protections in court. He has opposed voting rights and equal opportunity programs. He has advocated on behalf of wealthy corporations to make it harder for workers and consumers to have their day in court. And, like circuit court nominees Ryan Bounds and Neomi Rao, Lee in his student years amassed a record of intolerance. During those years he harshly criticized “multiculturalism” (a “[malodorous sickness](#)”) and fought activists advocating for racial justice, women’s rights, and LGBTQ equality.

Among other things, Lee wrote that ethnic studies on campus perpetuated a “victimization culture,” that a resource center for LGBTQ students was nothing but “a token to appease the more militant gay activists on campus,” and that “phony feminist statistics on rape, anorexia, and discriminatory treatment of girls” were rife on campus.

Lee’s record has drawn criticism from his home-state senators, Dianne Feinstein and Kamala Harris. But because the Trump White House was determined to nominate a reliable ideologue, it pointedly avoided meaningful consultation with either senator before

nominating Lee. As Senator Feinstein [wrote](#), “I repeatedly told the White House I wanted to reach an agreement on a package of 9th Circuit nominees, but...the White House moved forward without consulting me, picking controversial candidates from its initial list.”

Tellingly, Trump’s conservative base insisted he not even negotiate with home-state senators or make any effort to nominate a consensus pick. After initial (but incorrect) reports that Trump was negotiating with Senators Feinstein and Harris, conservative talk show host Hugh Hewitt [said](#), “[c]aving on the 9<sup>th</sup> Circuit Court of Appeals nominees burdens every GOP senator up for re-election in 2020 and may cost President Trump a significant percentage of the vote in key swing states.” The Wall Street Journal [said](#) that “remaking the federal judiciary may be the only thing a Republican Senate can accomplish in divided government. The White House shouldn’t water down” its nominees “to please Democrats.”

In fact, Lee himself appears to have been so dismissive of the role of Senators Feinstein and Harris that he did not bother to disclose controversial articles he authored to Feinstein’s and Harris’s state judicial committees. This omission is similar to those committed by [former judicial nominees Ryan](#)

[Bounds](#) and [Gordon Giampietro](#), both of whom came under fire for their actions and ultimately failed to be confirmed. In the wake of those failures, Lee chose to avoid disclosure even though he must have known that the writings he failed to disclose would garner heightened scrutiny and opposition from his home-state senators. As Feinstein and Harris [wrote](#), “We made clear to the White House that we could not support Kenneth Lee in this package, in part because he failed to turn over controversial writings to our judicial selection committees, which is an important part of the vetting process. Instead, the writings were later discovered by staff and press.”

Not only that, but weeks after providing his supposedly completed Senate Judiciary Committee questionnaire, which required submission of all writings, Lee chose to make a last-minute delivery to the committee of a sizable trove of additional writings. It is notable that the writings omitted from his original SJQ filing contain some of his most offensive statements about racial equity, women, and LGBTQ Americans.

When Goodwin Liu, President Obama’s nominee to the U.S. Court of Appeals for the Ninth Circuit, had to supplement his original questionnaire for the Senate Judiciary Committee, there was an

outcry from Republicans. Then-Senator Jeff Sessions, Ranking Member of the Judiciary Committee, along with every Republican on the committee including current Chairman Chuck Grassley, wrote that Liu’s “unwillingness to take seriously his obligation to complete these basic forms is potentially disqualifying and has placed his nomination in jeopardy.” The Committee Republicans wrote that “[a]t best, this nominee’s extraordinary disregard for the Committee’s constitutional role demonstrates incompetence; at worst, it creates the impression that he knowingly attempted to hide his most controversial work from the Committee.” Senator Sessions even suggested that Liu had committed a felony. Later, Republicans successfully filibustered his nomination, and Liu withdrew his name from consideration.

In light of this background, there can be no pretext that Kenneth Lee is being nominated because of his legal ability or to neutrally apply the law. Rather, he is being nominated to achieve specific ideological results, and to carry out the partisan agenda articulated by President Trump and vocal supporters such as Hugh Hewitt. Lee’s record provides strong evidence that he would do exactly that.

AFJ strongly opposes Lee’s confirmation.

# BIOGRAPHY

Lee [earned](#) his B.A. from Cornell University in 1997 and J.D. from Harvard Law School in 2000. He was a law clerk to Judge Emilio M. Garza on the Fifth Circuit from 2000-2001 and then worked as an associate at Wachtell, Lipton, Rosen & Katz. He spent three years as Associate Counsel and Special Assistant to President George W. Bush, and since 2009 has been a lawyer at Jenner & Block LLP in Los Angeles.<sup>1</sup>

In addition to his corporate practice, he has taken a broad range of pro bono cases, including asylum cases, prison litigation, and excessive force cases. He also [advocated](#), pro bono, in [Vergara v. State of California](#), 246 Cal. App. 4th 619 (2016) to [eradicate](#) educators' job protections, a position rejected by California's Court of Appeals, 246 Cal. App. 4th 619 (Cal. App. 2d Dist., 2016) and [not reviewed](#) by the state Supreme Court. 2016 Cal. LEXIS 8387 (Cal. Aug. 22, 2016).<sup>2</sup>

# IDEOLOGICAL AND PARTISAN BIAS

In an op-ed for The American Enterprise, written while he was a law clerk, Lee [attacked](#) "left-wing lawyers" claiming "the Left has for years been relying on courts to accomplish what it could not achieve in the voting booth." He continued:

From freeing the mentally ill in New York City to defending racial preferences in California to contesting the presidential election in Florida, left-leaning lawyers have successfully waged a "rights revolution" over the last three decades. Trial lawyers increasingly litigate new entitlements for favored groups, establish exotic new individual rights, and overturn well-established legal and legislative prerogatives.

While raising the question of what court decisions he considers "new entitlements for favored groups" or "exotic" rights, importantly, Lee did not – nor has he ever – made a similar criticism of litigation initiated by conservatives. Conservatives have repeatedly sought to invalidate policies enacted by the

democratically elected branches of government, such as efforts to provide health care and protect individuals with preexisting conditions,<sup>3</sup> the Voting Rights Act,<sup>4</sup> the Violence Against Women Act,<sup>5</sup> efforts to address gun violence,<sup>6</sup> environmental laws, money in politics,<sup>7</sup> or immigration reforms. Lee does not criticize any of these efforts, exclusively reserving his criticism for efforts by “left-wing lawyers.”

His silence on the subject of politically-motivated litigation by conservative forces exposes the agenda at the heart of Lee’s [complaint](#) about “relying on courts to accomplish what it [the Left] could not achieve in the voting booth.” It appears that his objection is not based on any neutral principle, but on a results-oriented approach that he can justify if he supports the litigation (and goals) in question.

Lee’s bias is further evidenced by his extreme partisanship in other contexts. Lee, who once [wrote](#) that “Watergate had a tinge of political witch hunt,” has repeatedly been vicious in his attacks on Democrats. For example, in writing about a congressional investigation into the 1996 House election of Loretta Sanchez, he [suggested](#) that “Democrats, cynically but shrewdly play[] the race card.” He [said](#) Democrats “patronizingly offer[] race-based programs.” He also [wrote](#) that

“liberal Democrats” “lure Asian-Americans into the ‘victimization culture,’ in which only benevolent white liberals in the government can come to the rescue of inexorably oppressed minorities.”

His critiques of the “Left” have not been limited to the government. He has [characterized](#) much of the “Left” as “intellectually fraudulent and morally bankrupt.” He once sarcastically [asked](#), “[A]fter all, why would any sane person want to be a leftist?” He said that professors “proselytize their left-wing gospel” and [criticized](#) what he perceived as “epidemic lying in the ivory tower” and liberalism at universities. He wrote that “[f]rom Afrocentric claims of Cleopatra’s being black to phony feminist statistics on rape, anorexia, and discriminatory treatment of girls, academia has in recent years been beset by revelations of fraudulent facts and spurious studies.”

Moreover, Lee’s writings raise serious concerns about his ability to act as a neutral arbiter with the ability to fairly weigh evidence and apply the law. In several writings, Lee dismissed reports demonstrating inequality when the data did not comport with his established ideological biases.

For example, Lee [criticized](#) an author who cited an Equal Employment Opportunity Commission report that

Asians with professional degrees earn less than similarly educated whites. Lee retorted that “[s]tatistics can often be misleading when not handled properly.”

In another [article](#), discussing “supposed bigotry towards” women, Lee writes of the gender pay gap, “As for income inequality, **statistical subterfuge** once again emerges” [emphasis added]. In that same piece, Lee wrote:

A close scrutiny of [minorities’] claims exposes their spurious “facts” and assumptions. Cries of racism often stem from isolated incidents or from **unreliable studies based on statistical chicanery**. Homosexual groups hurl epithets whenever one refuses to swallow their [argument] hook, line and sinker. And charges of sexism often amount to nothing but irrelevant pouting [emphasis added].

These views are troubling considering that Lee is nominated for a position in which he would regularly weigh factual evidence, including statistical evidence, to determine legal outcomes of controversial issues.

# VOTING RIGHTS

In a 2006 article, Lee [criticized](#), as “the latest cause célèbre” of the left, the restoration of voting rights to individuals once they have returned to their communities after being released from incarceration.<sup>8</sup> He called the argument for restoration of voting rights “unconvincing and problematic.”

It bears noting that in the United States in 2016, an [estimated](#) 6.1 million adult citizens were disenfranchised as a result of a criminal conviction. Most recently, in 2018, the citizens of Florida, by 65 to 35 percent, [voted](#) to amend their state constitution to automatically restore the right to vote for most individuals with prior felony convictions.

Lee also [suggested](#) that if a state were going to restore “an ex-convict’s voting right” it “should be done on a case-by-case basis through an administrative mechanism because it would be difficult to draft a statute that draws a bright-line rule taking into account factors such as the seriousness of the crime, the potential for recidivism and the number of prior offenses.”<sup>9</sup>

Lee's case-by-case scheme is precisely what Florida formerly used. Under the previous law, people with prior felonies never regained their right to vote in Florida unless a state board used its discretion to individually restore their voting rights. As the Brennan Center [noted](#):

By December 2015, nearly five years after taking office, Gov. Scott's administration had restored voting rights to fewer than 2,000 Floridians statewide, while over 20,000 applications remained pending. Meanwhile, in the period between 2010 and 2016, the disenfranchised population [of] Floridians grew by nearly 150,000 to a staggering estimated total of 1,686,000.

In 2018, Florida's felon disenfranchisement system, the type of system that Lee endorsed, was [struck down](#) by a federal court as unconstitutionally discriminatory.<sup>10</sup> Lee's support for such a system is deeply problematic.

Lee also condemned efforts to register students to vote. He [wrote](#):

To complement this left-wing rhetoric, Cornell spent thousands of dollars last year to send voter registration ballots to all its students. Some people may view this as an attempt to encourage civic responsibility. That would be too

na-ve [sic]. Considering that young people tend to be liberal and that professors and administrators routinely bash Republicans, Cornell knows that most students will vote Democratic. Maybe Cornell's Professional Ethics Committee should look into this matter – if it isn't too busy conducting sexual harassment witch hunts.

Lee's contempt for supporting and facilitating the right to vote is concerning in a nominee to a lifetime seat on the federal bench.

## RACIAL JUSTICE

Lee's record suggests that he does not adequately understand or respect the impact or role that race has in the United States. For example, he once [commented](#) that, as someone on a panel "explained during [a] debate, **economic factors have virtually eliminated rampant racism**" [emphasis added].

Just as [Bounds](#) and [Rao](#) criticized multiculturalism on college campuses, so did Lee. For example, he criticized "ethnic theme houses" and "separate study lounges" in an [article](#) titled "Separate & Unequal: Segregation on Campus." He wrote:

- “[R]acial separatism on campus is rife with ironies. . .**The same universities that enact affirmative action programs to foster diversity and mutual understanding also encourage self-segregation along ethnic lines.** Their motivations arise partly in response to intimidation, and partly from well-intentioned but misguided liberal paternalism” [emphasis added].
- “**Soft-hearted liberal paternalism** explains some of these actions. Administrators truly want to make the school more hospitable to minority students, and many also see racial consciousness as the healthy expression of a multicultural community. But a more insidious rationale also exists. Minority students drop out at higher rates than whites, and critics have attributed this to **affirmative action programs that admit unqualified students** to challenging schools where they are likely to fail. . .So by paying special attention to minority students, universities hope to retain more of them and quell criticisms of affirmative action” [emphasis added].
- “From the moment minority students are accepted at Cornell, the school isolates them and treats them like delicate commodities.”

As a fervent opponent of affirmative action policies, Lee [alleged](#) that “[t]he main problem with affirmative action is not that it hurts a white or Asian student,” but instead that “[t]he real problem is that it hinders progress for black Americans.” Regarding his own university, Lee [complained](#) that “[i]t is a sad day when students at an elite Eastern university feel a need to portray themselves as oppressed to **participate in a pernicious ethnic spoils system**” [emphasis added].

He also [compared](#) African Americans’ fight for equality since slavery to the experiences of other immigrants to the United States:

Does anybody believe that Irish and Jewish immigrants would have overcome discrimination had they cried “victim”, [sic] and labeled other people as insensitive oppressors and demanded preferential treatment? Of course not. Those actions would have exacerbated racial tensions and created a backlash against them, thus reinforcing negative stereotypes and fueling a vicious cycle. But this is exactly what is happening today. And empirical evidence – from the US to Malaysia to Nigeria – shows that preferential treatment inflames racial tensions.

In another article, titled “End Racist Policies,” Lee [wrote](#), “Like the McCarthy era in the 1950s, the reigning politically correct orthodoxy suppresses free thought and dissenting views in the academe. The main culprits espousing this new intolerance tend to be affiliated with the ethnic/multicultural classes.” He said that “[e]thnic studies classes have stoked this fire of intolerance by perpetuating the victimization culture.” He added 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.”

In fact, Lee [wrote](#) that he “adamantly despise[s] the victimization culture pervasive in America” and how “[e]very single person in America considers themselves a ‘victim.’” Moreover, Lee alleged that “[w]henver minorities do not succeed, they cry racism. And when whites fail in their endeavors, they attribute it to ‘reverse racism.’ We have become a nation of whiners, and I deplore that.” He then wrote:

I’d personally like to see this ubiquitous oppressor that subjugates all races. He must be some sort of pseudo-black/white/Asian/Latino/native-American [sic]/Michael Jackson mutant on a wrathful rampage to wreak havoc in America.

Lee further [wrote](#), “[w]e can see this victimization culture in effect as virtually every group on the Cornell campus purports itself to be ‘oppressed’. The ethnic minorities claim that their culture is quashed by a hegemonic Eurocentric society. Gays and lesbians argue that we live in a heterosexist world.” He also added, “Latino students have also employed the victimization culture as well.” Further, Lee noted that “some of the Asian activists are afflicted with what one may call the **‘Me too’ syndrome**. Since Asians have not reaped the same benefits as other minority groups, they want a share in piece [sic] of the pie” [emphasis added].

In an [article](#) about Latino protesters at Cornell, who demanded “more Latino faculty, more vigorous affirmative action programs, more funding for Latino organizations,” Lee described the “administration’s naïve effort to curry favor with the multiculturalists on campus.”

Lee’s writings also demonstrate a profound trivialization of America’s racial history and laws enacted to ensure equal rights for people who have historically faced discrimination, including persons of color.

For example, in an [article](#) titled “Time to Fight Back: An Anti-Discrimination

Campaign Waiting to Happen,” Lee advocates for “stealing a few pages from the civil rights handbook” in order to increase the proportion of Republican and conservative faculty at universities. He wrote:

The simple legal logic underlying much of contemporary civil rights laws applies equally to conservative Republicans, who appear to face clear practices of discrimination in American academia **that are statistically even starker than previous blackballings by race** [emphasis added].

Lee also [equated](#) Cornell’s Program Houses – self-selected dorms based on hobby or cultural identity – with pre-*Brown v. Board of Education* segregation. Although campus affinity groups exist to support diversity on campus, he called them “racial apartheid.” He added:

It is ironic that this battle over the “new self-segregation” has occurred on the 40th anniversary of *Brown v. Board of Education*. The landmark decision not only ruled that segregated public schools was [sic] unconstitutional but also challenged the racist ethos existing in America at the time. **Ending this “new segregation” may be as painful and**

**divisive as it was in Alabama 40 years ago** [emphasis added].

Further, Lee, in an [article](#) about sexual harassment allegations brought by four women against a professor, lamented that even if the professor was innocent, the prevailing attitude was “we’ll lynch him anyway.”

Lee, in other words, compared the systematic and centuries-long national effort to deprive African Americans of equal rights and equal opportunity, often with violence and unchecked terrorism, to concerns that “conservative Republicans” do not have tenure-track positions at some universities. He compared the debate over diversity programs on campus to the organized effort, often with violence, to resist the Supreme Court order to desegregate schools in Alabama (efforts which involved, among other things, U.S. marshals and the national guard). He compared credible allegations of sexual harassment to lynchings.

These comments, at best, indicate an ignorance about American history. More importantly, they raise serious questions regarding Lee’s ability to properly apply some of our nation’s most critical laws.

As noted, Lee is extremely critical of equal opportunity programs. In 1996, he wrote in *The New Republic*, in an [article](#)

titled “Angry Yellow Men,” that Asian Americans were “caught between [affirmative action] policies that limit their admission to select colleges and opportunistic conservatives who see in them a way to further a larger social agenda.” He also alleged that certain California affirmative action policies were actually “special efforts to woo the Angry Yellow Male vote.”

In another [article](#), “Affirmative Action at the Bursar’s Window,” Lee wrote:

[Affirmative action] goodies are granted regardless of financial situation – Congresswomen’s children and dentists’ sons **of the right skin color** automatically qualify for full subsidy – making it clear that the university’s goal is not boosting the disadvantaged but rather building a publishable box score of enrollment by race that conforms to liberal decorum and the demands of the gene-counters [emphasis added].

He also [wrote](#) that “universities should recruit intellectually conservative professors with the same zeal they display for **balancing flesh tones**” [emphasis added].

After law school, Lee [advised](#) Republicans to “appropriate the language and logic of liberals’ most sacred shibboleth: affirmative action,” in order to obtain better representation of

“beleaguered Republicans and Christian conservatives” at universities.

Lee also encouraged the Supreme Court to invalidate affirmative action programs. In reference to [Regents of the University of California v. Bakke](#), 438 U.S. 265 (1978), he [wrote](#) that “indecisive and conflicted, Justice Powell opted for a politically palatable but practically unfeasible approach.”<sup>11</sup> He [explained](#) that “[l]iberals have increasingly relied on the ‘diversity’ rationale to defend racial preferences. As a purely legal proposition, the diversity rationale for racial preferences remains questionable.”

## WOMEN’S EQUALITY

Lee wrote a number of pieces that reflect an attitude that is hostile to women’s rights and women’s equality. His writings on women’s issues range from problematic views on sexual harassment, to skepticism regarding the reported prevalence of rape on college campuses, to reproductive rights. He even broadly [claimed](#) that “charges of sexism often amount to nothing but irrelevant pouting.” Lee’s expressed views raise serious concerns that he would not be a fair-minded jurist when it comes to women’s rights.

Lee's record is rife with statements in which he mocks and minimizes women's fight for equality. For example, in one [article](#) (in which Lee also misspelled "women" six times in an apparent effort to mock the feminist term "womyn"), Lee wrote:

Some egalitarians have charged that womon [sic] should be treated equally in all cases; this would include putting womein [sic] into the front-line battlefield. Unfortunately, no matter how many times they cry that both genders are equal, the reality is that men and womoen [sic] are biologically different, e.g. men are usually innately physically stronger than womin [sic] (although exceptions to that rule exist, especially in the author's case). Any one [sic] who disputes that fact disputes nature. **Some tasks are better suited for men, and others for women. This is not sexism; it is reality** [emphasis added].

In another [article](#), Lee identified what he considered "some of the schizophrenic contradictions in feminist shibboleths," such as:

Feminists have argued that women are just as strong and competent as men – they deserve to be on the front-lines of the military; they should

be fire-fighters; they should attend the Citadel. But feminists suddenly complete a 180 degree turn and claim that women are meek and helpless victims of men: they need to be protected from things such as Playboy. So which is it?

Additionally, Lee [argued](#) that "reasoning with some feminists is futile" because "[f]eminism today, unfortunately, is not about extending equal rights and opportunities to women. Instead, it is about adhering to a stifling orthodoxy."

Particularly troubling is an [article](#) Lee wrote defending a Cornell University professor accused of sexual harassment. The main thrust of this piece is less a defense of the professor himself, his character or record, than an all-out attempt to discredit the women who came forward. In so doing, Lee traffics in every harmful stereotype and misunderstanding about women and survivors. For example, he criticizes a student who alleged that the professor once grabbed her breasts on a work trip, questioning why she would then continue to work as his assistant on four more trips. Lee deduced that "[i]f 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 on to a part-time job." This false narrative reinforces negative

stereotypes that scrutinize the reactions of survivors of sexual violence instead of the actions of the perpetrator, and flies in the face of what is known about survivors' frequent reluctance to come forward and jeopardize their work and relationships.

Similarly, Lee inappropriately characterized – and unfairly criticized – the alleged mental state of this same student following the alleged incident. He [wrote](#):

Co-workers testified that the complainant did not seem depressed during this time period, and they failed to note any change of behavior in the complainant. 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.

Lee continued in the same article by [speculating](#) about the true “motives” behind the four survivors' allegations. “The two main instigators of this witch hunt were twin sisters” who worked for the professor. He characterized the survivors' claims as a “witch hunt” in [several additional](#) publications he authored. Their “witch hunt,” in Lee's opinion, derived not from reality, but because they were brainwashed by

“radical” “feminist” ideas the students took from their coursework at the university:

They had described their working relationship with [the professor] as “fun” until they took a human sexuality course in the Human Ecology College and became teaching assistants for the courses [sic]. The class propagated the pernicious view that all women are victims of the inexorable sexism inherent in our patriarchal society. Indeed, a central tenet of some radical strands of feminism is the quasi-Marxist notion that the [sic] all actions of the “oppressors” (males, in this case) are used to perpetuate their dominance over the “oppressed” (females).

Moreover, Lee [noted](#) that “[a]fter being exposed to these feminist ideas, the twins joined a date rape and a Violence Against Women organization. They then suddenly construed [the professor's] kindly acts – the same actions that they had previously welcomed – as sexual harassment.”

In another [article](#), Lee criticized efforts by “feminists” on his university's campus fighting against objectification of women and its relationship to sexual assault. Lee – once again placing the responsibility to deter sexual assault on women instead of perpetrators – argued,

“If feminists truly want to deter sexual crimes, they should support strict and harsh punishments against sexual offenders.” Notably, Lee failed to provide any evidence that the “feminists” did not support such punishments for offenders. Instead of listening to and supporting survivors, Lee focused on telling survivors how to deter and respond to sexual assault.

Lee’s harsh and misinformed rhetoric regarding sexual harassment highlights problematic stances he has taken when considering women’s rights issues. His dismissal of survivors’ experiences demonstrates a lack of understanding and empathy as it relates to the reality of sexual violence that women face every day, and he should be questioned closely about the views he has expressed.

Additionally, Lee has expressed doubts about the prevalence of rape and sexual assault on college campuses. He wrote in an [article](#) titled “Untruth in Academe”:

If political power is the most important element in society, then being untruthful is not terribly wrong if it helps “your” side gain power. This postmodern playing with facts has thoroughly infected feminist arguments about the oppression of women. On most college campuses, professors repeat the mantra “one in

four girls is a victim of rape or attempted rape.”

Lee then asserted that “this claim is deeply flawed.” In fact, [RAINN](#) (Rape, Abuse & Incest National Network) estimates that “[a]mong undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation.” Lee was factually inaccurate in his critique of sexual assault statistics on college campuses. More importantly, his comments highlight how dismissive attitudes toward women’s experiences reinforce a culture that overlooks the epidemic of sexual violence against women.

Lee also expressed hostility towards “feminists” and reproductive rights. He [claimed](#) that “[i]n fact, most feminists support unfettered abortion-on-demand.” Further, he said these “feminists” “want the government to subsidize abortions for 16 year olds without parental consent, and they have no moral qualms about it.” Lee continued, asking, “Why? **Because they see abortion in terms of purely ‘rights’ and not morality**” [emphasis added].

Lee’s disdain for women’s rights is not limited to domestic politics. Lee also criticized “leftists” for using a human rights framework to advocate for

women's rights and equality around the world. He [argued](#):

Contrary to what one may think, leftists repeatedly condemn other cultures as “barbaric” and “savage”. [sic] Of course, they don't use those words; **they couch it in the diplomatic jargon of human rights** [emphasis added].

Lee argued that “a salient example” of this was the U.N. Conference on Women, where Hillary Clinton [stated](#) that “human rights are women's rights, and women's rights are human rights.” Instead of supporting women's rights abroad, Lee [argued](#) that:

Liberals like Hillary Clinton, in an arrogant display of closed-mindedness and intolerance, lambasted countries for not conforming to American cultural standards. China, for instance, was excoriated for its mistreatment of women. Most Muslim countries were equally denounced for treating women as virtual property of men. But how can American liberals criticize these countries?.. [I]t may offend us, but it is natural for them.

# LGBTQ EQUALITY

Lee's record includes extremely troubling views on LGBTQ equality, ranging from harmful stereotypes about the LGBTQ community and the AIDS epidemic, to characterizing LGBTQ campus advocacy as the work of “militant gays.”

He [dismissed](#) the need for LGBTQ advocacy, explaining his view that “[w]hile 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.” He [wrote](#) “[h]omosexual groups hurl epithets whenever one refuses to swallow their [argument] hook, line and sinker.”

Most disturbingly, Lee propagated harmful and offensive views about the LGBTQ community and the AIDS epidemic. In one article, Lee [wrote](#):

The media and Hollywood spokespersons have worked assiduously to dispel the notion that AIDS is a ‘gay-disease.’ They reiterate the mantra that AIDS is everybody's disease. But the fact remains **that 9 out of 10 people with AIDS in**

**America are either gay or drug users** [emphasis added].

Lee – who has no demonstrated medical or scientific expertise on the issue of AIDS – callously [proclaimed](#) that the explanation for his claim connecting LGBTQ individuals to AIDS is that:

**Homosexuals are generally more promiscuous than heterosexuals, and thus their risk factor increases exponentially.** Another reason stems from the nature of homosexual sex. To be rather blunt, homosexual sex often involves blood. And blood is the most conducive bodily fluid for the AIDS virus (more so than semen). Promiscuous heterosexuals are also susceptible to AIDS, but at a lower risk factor than homosexuals and drug users because blood is not often involved in heterosexual sex [emphasis added].

Confident in his amateur explanation of how AIDS is transmitted, Lee also cast doubt on the ability or need to find a cure for AIDS. Lee suggested that it was more useful to address the “values” involved than to conduct research. He [argued](#):

Research should continue, but we must not put inordinate hopes on a scientific breakthrough. Instead we must focus on values and

responsibility. **To avoid AIDS, one has to only abstain from drug-use and promiscuity.** So simple, yet so hard to grasp [emphasis added].

He then [compared](#) efforts to address AIDS with efforts to address the plague in Europe:

When the black plague destroyed much of Europe, this pernicious disease was eradicated not by some miracle antidote, but through some fundamental changes (sanitation methods, in this case). In the battle against AIDS, we should not hopelessly place our faith on a vaccine, but **instead focus on personal responsibility** [emphasis added].

Lee also [supported](#) the military’s ban preventing gay individuals from serving their country. He argued against the so-called “[m]yth” that “[t]he military’s ‘hostile’ policy toward homosexuals shows America’s homophobia.” Instead, Lee argued that “the truth” was that “to hurl epithets such as ‘homophobe’ and ‘bigot’ for opposing gays in the military is unscrupulous.” He defended the proposition that:

Many tolerant, rational-thinking people oppose the lifting of the ban not because they detest homosexuals, but because they believe that such an integration would **diminish the**

camaraderie of the military’s macho ethos” [emphasis added].

Lee also [criticized](#) the opening of a Gay, Lesbian and Bisexual Resource Office at Cornell. He said the school’s argument that the center was necessary was “specious at best” and that the “money could have been better used.” In fact, he said “[a]lthough the administrators vehemently deny it, the Gay Resource Office is more political in nature than anything . . . a token to appease the more **militant gay activists** on campus” [emphasis added].

In his criticism of a Latino Living Center, Lee also [chastised](#) LGBTQ students:

There is a reason for the homosexual groups’ eager support of the Latino Living Center that is not immediately obvious from the popular frontism of their rhetoric. (In an open letter, the Gay/Lesbian/Bisexual Coalition declared, “We share many of [the Latinos]’ goals and realize that this is a common struggle.”) Although the Student Assembly passed the gay dorm proposal last year, [Cornell’s President] vetoed the resolution. The homosexual groups see the Latino Living Center as a stepping stone to a dorm of their own.

He [added](#), “[Cornell President] Rhodes and the rest of the administration blew

the lid off altogether by not pursuing disciplinary action against protesters. Those who watched the evolution of this campus donnybrook believe that it will someday be regarded as a dry run for militant gay activists who now have no reason not to make *their* move” [emphasis in original].

## NATIVE AMERICAN RIGHTS

Lee’s disparagement of “victimization culture” extended to offensive commentary on Native Americans. In an [article](#) titled “The Native Americans vs. the Indigenous People,” Lee mocked the “politically correct clique” for criticizing professional sports teams that use offensive Native American caricatures and stereotypes in their mascots and cheers.

This rhetoric is especially concerning considering Lee’s nomination to the Ninth Circuit. If confirmed to the Ninth Circuit, which [covers](#) nine states and two Pacific Island jurisdictions, Lee would adjudicate cases in a circuit with [427 federally recognized tribes](#). The National Congress of American Indians [notes](#) that “the Ninth Circuit hears more

tribal cases than any other” court of appeals, often taking a leading role in Indian law matters.

# ACCESS TO JUSTICE

During his time in private practice, Lee represented corporate interests and criticized those who sought to vindicate their rights using class-action lawsuits. In his writings, he supported making it more difficult to hold corporations accountable when they act illegally and harm the American people.

In a 2013 [article](#) titled “Questionable Classes: Recent decisions in false advertising class actions have shown less favor to plaintiffs,” Lee wrote specifically about false advertising claims. His comments, though, reflect a general disdain for the ability of aggrieved consumers with common claims to join together in challenging corporations or institutions in positions of power. As the Supreme Court recognized, class actions “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” [Amchem Prods. v. Windsor](#), 521 U.S. 591, 617 (1997) (internal quotation marks omitted).

In contrast, Lee [wrote](#) that “a large number” of suits are “essentially lawyer-manufactured lawsuits in which there has been no real harm to the consumers.”<sup>12</sup> He was extremely supportive of heightened pleading standards created by the Supreme Court in [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544 (2007) and [Ashcroft v. Iqbal](#), 556 U.S. 662 (2009), calling their policy rationale “doubly persuasive in the class action context.” He applauded judges who have “relied on common sense to dismiss class action lawsuits.”

In another piece, he [criticized](#) the “surge of wage-and-hour class action lawsuits” in California,<sup>13</sup> including one case where Walmart had “to pay \$172 million in damages for failing to provide 30-minute meal breaks to its employees in accordance with California labor law.” As he wrote, “[t]hese lawsuits can dent the bottom line of Fortune 500 companies and potentially cripple small businesses.” Absent from his article, “California, Home of Wage and Hour Lawsuits,” is any concern for the [116,000 workers](#) whose rights were violated or any criticism at all for a company that was flagrantly violating the law. In contrast to Lee, as one juror in the Walmart case pointed out, “state law is the only protection that a lot of workers have for basic rights, like meal breaks and getting their breaks on time.”

Additionally, Lee [criticized](#) civil discovery, emphasizing that “named plaintiff can demand defendant companies to spend hundreds of thousands of dollars to scour for internal documents.”<sup>14</sup> At a time when conservative judges are trying to [curtail](#) discovery, his remarks are concerning.

While Lee did not articulate specifics in his criticism of discovery, any effort to limit it could have disastrous consequences for those trying to hold corporations accountable. Discovery is the stage of a court case where information to prove or disprove a claim can be obtained. Discovery is typically the only way for those whose rights have been violated to obtain the necessary facts to prove their claims. Limiting plaintiffs’ access to important information – which is often only in the control of defendant corporations – would have the effect of further harming workers and consumers.

## CONCLUSION

President Trump’s own words and actions make it abundantly clear that he is eager to bring about a dramatic change in the makeup of the Ninth Circuit. His selection of Kenneth Lee for a seat on the court indicates that the President and his advisors have high confidence that Lee would be a reliably

right-wing vote on the court – and Lee’s record confirms that.

The views Lee has expressed over the years about women’s rights, racial equity and LGBTQ rights are not just conservative: they are extreme. He has demonstrated his affinity for corporate interests over the rights of consumers and workers. His views on voting rights ignore racial and other inequities perpetuated by the disenfranchisement of those formerly imprisoned for felonies. Finally, Lee’s nomination is being forced to proceed over the strong objections of his two home-state senators, who note that he failed to disclose controversial writings to in-state screening committees.

Based on these factors, we believe Kenneth Lee would bring a partisan agenda to the court at the expense of many who would come before him, and that his nomination represents yet another agenda-driven and cynical end-run around the normal nomination process. AFJ strongly opposes his confirmation.

## ENDNOTES

1. Senn. Comm. on the Judiciary, 116th Cong., Kenneth Kiyul Lee Questionnaire for Judicial Nominees, at 1-2, available at <https://afj.org/wp-content/uploads/2019/02/Kenneth-Lee-Senate-Questionnaire-1.pdf>.
2. *Id.* at 25-27.
3. See, e.g., *Tex. v. United States*, 340 F. Supp. 3d 579 (N.D. Texas 2018).
4. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).
5. See *United States v. Morrison*, 529 U.S. 598 (2000).
6. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).
7. See, e.g., *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).
8. Kenneth Lee, Roger Clegg and George T. Conway III, *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 *Ann. U. J. Gender Soc. Pol'y & L.* 1, 4 (2006).
9. *Id.* at 25.
10. *Hand v. Scott*, 285 F. Supp. 3d 1289 (N.D. Fl. 2018), *stayed* 888 F.3d 1206 (11th Cir. 2018).
11. Kenneth Lee, *The Supreme Court's Previous Dodge*, *American Enterprise*, Apr./May 2003.
12. Kenneth Lee, *Questionable Classes: Recent Decisions in False Advertising Class Actions Have Shown Less Favor to Plaintiffs*, *Los Angeles Lawyer* (published by the Los Angeles County Bar Association), Nov. 2013.
13. Kenneth Lee and Jerry Oshinsky, *California, Home of Wage and Hour Lawsuits*, *Daily Journal*, May 10, 2010.
14. Kenneth Lee, *Questionable Classes: Recent Decisions in False Advertising Class Actions Have Shown Less Favor to Plaintiffs*, *Los Angeles Lawyer* (published by the Los Angeles County Bar Association), Nov. 2013.