



December 6, 2017

**NOMINATION OF JAMES HO TO THE
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT – SERIOUS CONCERNS**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write to express serious concerns about the nomination of James Ho to the U.S. Court of Appeals for the Fifth Circuit.

Every day, federal courts make decisions that impact many aspects of the lives of all who live in the United States, and safeguard our most fundamental rights and freedoms from attack. From our civil and human rights, to our educational opportunities, to the safety and fairness of our workplaces, to the quality of the air we breathe, the federal judiciary is the independent guardian of our rights and freedoms. We must act to safeguard the independence of the federal judiciary and the vital role it plays in our constitutional system of checks and balances.

Mr. Ho has a troubling record of taking conservative legal policy positions. If confirmed to the Fifth Circuit, Mr. Ho would likely be a consistent and reliable vote against civil and human rights litigants in cases that came before him.

Equal Opportunity and Affirmative Action: Mr. Ho has expressed strong personal views in opposition to equal opportunity programs such as affirmative action. In a 1996 op-ed, he passionately endorsed a California referendum, Proposition 209, that banned the state from using race-conscious considerations in university admissions. In his op-ed, Mr. Ho wrote a mock rejection letter which sarcastically stated: “Please take comfort in the fact that we consider you fully qualified on the merits. Your grades, test scores, extracurricular achievements and recommendations are all outstanding. However, we have too many people of your race, so in the interests of racial diversity, we’re admitting somebody else in your place.”¹ He also declared that “preferences don’t help” and asserted: “If I, 5 feet 6 and uncoordinated, were told I could someday make the NBA, I’d try real hard. Then I’d spend the rest of my life cursing the system that lied to me, rather than exert my energies on more fruitful – and realistic – pursuits.”²

Mr. Ho’s fierce opposition to equal opportunity and affirmative action led him to become one of the nation’s foremost critics of the appointment of Bill Lann Lee to serve as acting

¹ James C. Ho, “Two Wrongs Don’t Make a Right,” Rafu Shimpo, October 9, 1996.

² Id.

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head of the Justice Department's Civil Rights Division in the late 1990s. Mr. Ho wrote that President Clinton's "nominee to head the civil rights division – whose job would be to enforce all civil rights law – was loyal to the cause of racial preferences. That agenda cost Mr. Lee Senate confirmation, but Mr. Clinton appointed him anyway."³ Mr. Ho also made the alarming proposal that – as a result of Mr. Lee's appointment – the Senate should retaliate by defunding the Civil Rights Division and refusing to confirm all other nominees. He wrote:

The Senate could reject Mr. Lee. It could reject him because he supports racial preferences, or because he disrespects the Senate's constitutional role in approving presidential appointments. But senators must then finish the job and ensure that a rejected nominee does not take office, rather than allow Mr. Lee this form of fictional consent. For example, the Senate could refuse to confirm other nominees until Mr. Lee steps down; after all, similar threats have been carried out in the past. The Senate could refuse to fund the division, or Mr. Lee himself. But it hasn't.⁴

Mr. Ho also made the questionable argument that courts should invalidate Civil Rights Division enforcement actions because of Mr. Lee's acting status. He wrote:

Mr. Lee's unlawful power grab may even jeopardize civil rights enforcement. Because he sits illegally, any act he takes alone under the express authority of the assistant attorney general – powers ranging from the authorization of wiretaps to the certification of criminal civil rights prosecutions – is invalid. Defendants should demand that courts invalidate such actions. The president's determination to enforce his racial preferences agenda apparently has no limit.⁵

In addition, Mr. Ho wrote an op-ed in which he analogized Mr. Lee's support of equal opportunity and affirmative action to efforts by racist southern politicians to flout the law in the 1950s. Mr. Ho wrote: "Mr. Lee heads Civil Rights in violation of the Constitution, while his lieutenants preserve racial preferences by violating court orders. In 1957, Arkansas Gov. Orval Faubus trampled on civil rights by refusing to comply with a federal court order, forcing President Eisenhower to send federal troops to Little Rock to ensure compliance with the order. Forty years later, Mr. Lee's office is doing the same thing. This time, however, the recalcitrant is the federal government."⁶

When the Bush administration came into office in January 2001, Mr. Ho was one of the first appointees brought into the Ashcroft Justice Department's Civil Rights Division to help reverse Bill Lann Lee's policy positions and usher in a right-wing civil rights agenda.

It should be noted that when he served as the Texas solicitor general, Mr. Ho helped defend the University of Texas affirmative action program when it was legally challenged, but in light of his record of personal hostility to equal opportunity and affirmative action as outlined above, it is hard to see how

³ James C. Ho, "Don't consent to Bill Lann Lee," Washington Times, March 9, 1999.

⁴ Id.

⁵ James C. Ho, "The lawless tenure of Bill Lann Lee," Washington Times, September 3, 1998.

⁶ James C. Ho, "A Year of Bill Lann Lee," Washington Times, December 24, 1998.



Mr. Ho would have an open mind in cases involving those issues if he were confirmed as a judge, and he would need to recuse himself from such cases.

Voting Rights: Mr. Ho appears to be a supporter of Texas’s voter suppression laws, which have been repeatedly struck down by federal courts for violating the Voting Rights Act. In a 2014 op-ed endorsing Senator Cornyn’s re-election, Mr. Ho wrote:

He was also one of just two Republicans on the Senate Judiciary Committee who voted against the confirmation of Eric Holder to serve as President Obama’s attorney general. He may have felt a bit lonely when he spoke out against Holder back in January 2009. But his remarks seem prescient to conservatives today, given Holder’s clashes with Texas on a wide range of issues, including our state’s voter ID laws and the Fast and Furious gun-walking scandal. Sen. Cornyn has fought for Texas conservatives throughout his career. He deserves our support on March 4.⁷

Mr. Ho’s praise of Senator Cornyn is based, in part, on the fact that he believes the senator was vindicated for voting against Attorney General Holder based on Mr. Holder’s legal challenges to Texas’s discriminatory voting laws.

When he served as Texas solicitor general, Mr. Ho defended the state in a lawsuit filed by the NAACP of Austin, which alleged that the secretary of state had violated the Texas Constitution and state election law by failing to require a contemporaneous paper record for electronic votes. The Court of Appeals ruled in favor of the NAACP, but the conservative Supreme Court of Texas reversed. In his brief, Mr. Ho wrote disparagingly that “the court of appeals created a roadmap for activists to obtain legislative change through the courts, a result that offends the separation of powers and is repugnant to the democratic process.”⁸

LGBT Equality: In April 2016, the *San Antonio Express-News* editorialized against the appointment of Jeff Mateer as the number two person in the Texas Attorney General’s office. The newspaper’s opposition was based on Mr. Mateer’s anti-LGBT activities, including his opposition to local anti-discrimination ordinances protecting LGBT individuals, and his support for county clerks refusing to issue marriage licenses to same-sex couples in the wake of the Supreme Court’s *Obergefell v. Hodges* decision. In response to this editorial, Mr. Ho wrote an op-ed defending the Mateer appointment, sidestepping the anti-LGBT criticism and focusing on Mr. Mateer’s “diverse set of legal experiences.”⁹ In response to a question from Ranking Member Feinstein about whether Mr. Ho stood by his support of Mr. Mateer despite his infamous remark that transgender children are evidence of “Satan’s plan,” Mr. Ho refused to give a straight answer. She also asked Mr. Ho: “Do you agree with Mr. Mateer’s views on transgender children?” and Mr. Ho responded: “I believe that every child is a child of God.” This was a yes-or-no question, and it is troubling that Mr. Ho couldn’t just answer “No.” Although Mr. Ho stated he was unaware of Mr. Mateer’s comment at the time he wrote his op-ed, he also stated: “It is my

⁷ James Ho, “Sen. John Cornyn has fought for Texas conservatives throughout his career,” *Dallas Morning News*, February 4, 2014.

⁸ *Andrade v. NAACP of Austin*, 2009 TX S. Ct. Briefs LEXIS 1343 (2009).

⁹ James C. Ho, “Mateer appointment worthy of praise,” *San Antonio Express-News*, April 13, 2016.



understanding that Mr. Mateer is widely regarded as a strong and effective First Assistant Attorney General.”¹⁰ It is disconcerting that Mr. Ho will not withdraw his support of Mr. Mateer, who has also defended the controversial practice of “gay conversion therapy” and said that the treatment of Christians in America today is analogous to religious oppression in Nazi Germany.

As the Texas solicitor general from 2008-2010, Mr. Ho defended Texas’s ban on same-sex marriage. In the case *In the Matter of the Marriage of J.B. & H.B.*, the state filed a brief that said: “The naturally procreative relationship between a man and a woman is uniquely deserving of special societal support and protection, both to encourage responsible procreation and to increase the likelihood that children will be raised by a mother and a father in the context of stable, long-term relationships.”¹¹ In response to senators’ questions about whether he agreed with this statement, Mr. Ho demurred, stating that this was the position of the state of Texas.

Torture: In 2002, when Mr. Ho worked in the Ashcroft Justice Department’s Office of Legal Counsel (OLC), he wrote a memo on the Geneva Convention that was cited in the infamous “torture memo” written by OLC Assistant Attorney General Jay Bybee. The Bybee memo concluded that interrogation tactics such as waterboarding did not constitute torture because they did not cause pain equivalent to organ failure or death, and it cited Mr. Ho’s memo, entitled “Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War,” for the proposition that “CAT [U.N. Convention Against Torture] also distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.”¹² Judges must have respect for the rule of law, so it is quite troubling that Mr. Ho authored this secret memo that was cited in the discredited Bybee memo. It is also unfortunate that the Justice Department has refused to turn over the memo to the Senate Judiciary Committee as part of Mr. Ho’s confirmation process despite requests from Ranking Member Feinstein.

Campaign Finance Reform: I am also concerned about Mr. Ho’s views on the corrupting role of money in politics. In a 1997 op-ed, he criticized those who support expanding campaign finance laws, writing: “The inevitable result of such expansion, however, is the end of free speech. For truly radical but effective reform, we must reverse course and abolish all restrictions on campaign finance.”¹³ He went on to criticize the leading bipartisan congressional campaign finance proposal: “The McCain-Feingold bill combats independent expenditures by extending federal law to virtually all political expression, a cure far worse than the disease.”¹⁴ In addition, Mr. Ho represented a right-wing organization, First Liberty Institute, which brought a legal challenge to Texas campaign finance laws related to the selection of the speaker of the Texas House of Representatives. With this track record, Mr. Ho would need to recuse himself in cases that came before him involving questions of money in politics.

¹⁰ <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>.

¹¹ <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=5e6e4361-0476-4fb0-a8b1-61c2b22cd40e&coa=cossup&DT=BRIEFS&MediaID=88a655b7-9f5c-45f0-8736-1e7fd2383939>.

¹² <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>.

¹³ James C. Ho, “Free Speech, First and Foremost,” *Federalist Forum*, November 1997.

¹⁴ *Id.*



Federalist Society: All but one of President Trump’s circuit court nominees have been members of the Federalist Society. This arch-conservative legal organization represents a sliver of America’s legal profession – approximately 4 percent – yet 94 percent of Trump’s circuit court nominees have been members. Mr. Ho is one of the most fervent and vociferous supporters of the Federalist Society. He joined this organization in 1996, has held 10 different national and local leadership positions in the organization, and attended every one of the Federalist Society’s annual conventions since the late 1990s.¹⁵

History of Vacancy: Mr. Ho has been nominated to a Fifth Circuit vacancy that opened up on December 31, 2013. The Obama administration spent three years trying to work with the Texas senators to identify a mutually acceptable choice to fill this vacancy, but to no avail. The senators refused to negotiate in good faith because they sought to run out the clock in the hope that a future Republican president would have the opportunity to fill this vacancy.¹⁶

Lastly, I would like to acknowledge Mr. Ho’s service in 2011 on the advisory committee of The Leadership Conference’s Americans for Constitutional Citizenship coalition. This bipartisan coalition was put together to defend the birthright citizenship clause of the Constitution, which had come under attack by anti-immigrant politicians. I appreciate his service on our advisory committee. However, we cannot ignore his record on other civil rights issues and we believe he would move the most conservative circuit court in the country even further to the right.

Nominees to the federal courts must be qualified and committed to respecting the law, Constitution, and core American values of justice, fairness, and inclusivity. For the foregoing reasons, The Leadership Conference recommends that you carefully scrutinize Mr. Ho’s record before confirming him to the U.S. Court of Appeals for the Fifth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

¹⁵ <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>.

¹⁶ <https://www.americanprogress.org/issues/courts/reports/2016/05/05/136422/update-texas-where-are-the-judges/>.