



February 24, 2012

(202) 626-8820

RE: In opposition to confirmation of Andrew D. Hurwitz
to the U.S. Court of Appeals for the Ninth Circuit

Dear Senator:

The National Right to Life Committee (NRLC), the nationwide federation of right-to-life organizations, urges you to vote against advancing the nomination of Andrew D. Hurwitz, currently a justice on the Arizona Supreme Court who has been nominated by President Obama to the U.S. Court of Appeals for the Ninth Circuit.

In 1972, Hurwitz was a clerk to Jon O. Newman, a U.S. District Judge for the District of Connecticut. During the time that Hurwitz was Newman's clerk, Newman issued a sweeping ruling that struck down a recently enacted Connecticut law that prohibited abortion except to save the life of mother. The Newman ruling -- styled as *Abele II* -- was issued the year before the U.S. Supreme Court handed down *Roe v. Wade*, but after the Supreme Court had conducted the first of two rounds of oral arguments in that case.

In *Abele II*, Newman enunciated a new constitutional doctrine under which state prohibitions on abortion prior to "viability" would be deemed to be violations of a constitutional "right to privacy." Newman's ruling left it an open question to what extent a state would be permitted to apply limitations on abortion even after "viability."

In 2002, when Hurwitz was 55 years old and already a justice on the Arizona supreme court, he authored an article titled, "Jon O. Newman and the Abortion Decisions," which appeared in the *New York Law School Law Review*. In this article, Hurwitz argues that Newman's *Abele II* ruling heavily influenced the then-ongoing deliberations of the U.S. Supreme Court in *Roe v. Wade*. Hurwitz makes a persuasive case for his thesis, citing comments made by Supreme Court justices during the second round of oral arguments in the *Roe* case, information from the now-public archives of some of the justices who were involved, and personal conversations with Justice Stewart (for whom Hurwitz clerked in 1973-74) and others who were directly involved in the crafting of *Roe v. Wade*.

Hurwitz provides particularly detailed and plausible evidence that Newman's opinion was instrumental in persuading Justice Blackmun to abandon a draft opinion that would have limited the "right to abortion" to the first three months of pregnancy, and to adopt instead the more sweeping doctrine laid down in the final *Roe v. Wade* ruling, under which states were barred from placing any meaningful limitation on abortion at any point prior to "viability" (and severely circumscribed from doing so even after "viability").

Hurwitz wrote: "This viability dictum, first introduced by Justice Blackmun into the *Roe* drafts only after Justice Powell had urged that he follow Judge Newman's lead, effectively doubled the

period of time in which states were barred from absolutely prohibiting abortions. . . . Judge Newman's *Abele II* opinion not only had a profound effect on the United States Supreme Court's reasoning, but on the length of time that a pregnant woman would have the opportunity to seek an abortion." The entire tone of Hurwitz's article leaves no doubt that he considers Newman's role in leading the Supreme Court majority to adopt a much more expansive right to abortion than otherwise might have occurred, to be a major positive achievement of Newman's career.

Roe v. Wade has been critiqued as constitutionally indefensible even by liberal legal scholars who agree with legal abortion as social policy. Many others believe that Newman and the Supreme Court justices who Hurwitz asserts followed Newman's "lead," were engaged in a super-legislative activity -- an exercise memorably denounced by dissenting Justice Byron White as "an exercise in raw judicial power." Of these critiques, there is no hint in Hurwitz's presentation, which is laudatory from start to finish.

The recasting of the draft *Roe* ruling, which Hurwitz credibly attributes to Newman's influence, had far-reaching consequences. The absolute number of abortions performed nationwide in the fourth, fifth, and sixth months of pregnancy increased greatly after *Roe* was handed down. Abortion methods were refined, under the shield of *Roe*, to more efficiently kill unborn human beings in the fourth month and later. The most common method currently employed is the "D&E," in which the abortionist twists off the unborn child's individual arms and legs by brute manual force, using ultrasound to guide his steel forceps. (This method is depicted in a technical medical illustration here: <http://www.nrlc.org/abortion/pba/DEabortiongraphic.html>) Well over four million second-trimester abortions have been performed since *Roe* was handed down.

This carnage is in part the legacy of Jon O. Newman – but Judge Hurwitz clearly wants to claim a measure of the credit for himself, as well. In footnote no. 55 of his article, Hurwitz relates a 1972 interview in which Justice Stewart "jokingly referred to me as 'the clerk who wrote the Newman opinion'." Hurwitz remarks that this characterization "I assume . . . was based on Judge Newman's generous letter of recommendation, a medium in which *some exaggeration* is expected." [italics added for emphasis] It is impossible to read Footnote 55 without concluding that Judge Hurwitz could not resist the opportunity to put on record his personal claim to having played an important role in the development of the expansive abortion right ultimately adopted by the U.S. Supreme Court.

We urge you to oppose the elevation of Judge Hurwitz to the U.S. Court of Appeals for the Ninth Circuit. Thank you for your consideration of NRLC's position on this important nomination.

Respectfully,



Douglas Johnson
Legislative Director