

took all the people who are out of work, it would be about 11.1 or 11.2 percent. But among government workers, the unemployment rate is 4.2 percent.

Compare that with unemployment in some other sectors. In agriculture, it is 9.5 percent; 8.1 percent in the wholesale and retail trade; 9.7 percent in leisure and hospitality, to name just a few industries. In each of these I named—I think each of them would be thrilled to have unemployment at 4.2 percent. When the President says the real problem is with government employment, the private sector is doing just fine, the facts simply belie that. The President was wrong; he was incorrect.

Finally, let me address his theory of how an economy grows. Unemployment, as I said, is 8.2 percent nationwide. Labor force participation is at historic lows—the number of people actually working or looking for work. GDP growth in the first quarter of 2012 was a very anemic 1.9 percent. This is not enough for this country to grow and prosper and the President wants to borrow or raise taxes from that segment of our society so taxpayers can finance more government workers? That does not make sense.

I think not only is the President wrong on the facts about the private sector doing just fine, he has it wrong as to what the solution would be. The solution to help government workers is to have the private sector do better so it can afford to help—to hire more government workers and to pay them better benefits. Government stimulus spending and aid to States has not grown the economy so far and it is obviously not going to do so in the future.

Rather than divide the country into public versus private sector workers, Federal versus State and local workers, rich versus poor, men versus women, as the President is wont to do, I hope we work hard to represent all Americans. No one benefits in the long run from an enormous government with an appetite to grow more and more, crushing economic growth and crowding out the private sector, a government that drives up costs for job creators and forces companies to lay off private sector workers. None of us benefits from that. Yet that is what we are seeing playing out right now. The total number of unemployed and underemployed is over 23 million people in the United States. Think of that. That is the number of people who are looking for work who have stopped looking for work or who do not have the kind of work they could be doing. Economic growth last quarter, as I said, was only 1.9 percent; only 69,000 new jobs added. We need more than twice that many jobs added each month in order to keep pace with the new workers coming into the economy, so we are losing ground in terms of jobs created. I don't think the President's solution of more spending on government employees is the answer. I think that is a recipe of another 40 months of 8 percent-plus unemployment. At that rate we are not going to get out of the economic difficulties we

are in right now. Let's do things that support the private sector, things that help the private sector. The healthier the economy is, the more growth we have, the more we are able to do for the public sector as well. That is the ultimate answer.

Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MANCHIN). Without objection, it is so ordered.

#### EXECUTIVE SESSION

##### NOMINATION OF ANDREW DAVID HURWITZ TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination.

The legislative clerk read the nomination of Andrew David Hurwitz, of Arizona, to be United States Circuit Judge for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, there will be 60 minutes of debate equally divided and controlled between the two leaders or their designees.

Mr. LEAHY. Mr. President, I understand that the intent was to have the vote at 5:30.

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. I ask unanimous consent that the time be divided in such a way that the vote will occur at 5:30.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Last week's confirmation of Jeffrey Helmick to a judicial emergency vacancy in the Northern District of Ohio marked the 150th confirmation of a Federal circuit or district court nominee of President Obama's. I do not say that for self-congratulations because we should acknowledge that we had already confirmed 150 of President Bush's circuit and district court nominees 9 months earlier, in September of his third year in office.

In other words, to have matched what we had done so far for President Obama, we would have had to have had this number late last year. I mention that because it is one measure of how far behind we are in the consideration of President Obama's nominees. Part of that is because a very large number of nominees who went through the Judiciary Committee unanimously last year who would normally be confirmed by voice vote within 1 week or so after they went through Committee were delayed on the Executive Calendar until this year.

I would point out another thing, which is that today is June 11, but by

June 15 of President Bush's fourth year in office, the Senate had already confirmed 180 Federal circuit and district court judges—150 for President Obama, 180 for President Bush—30 more judges for President Bush than we have been allowed to consider and confirm during President Obama's administration to date.

There are still more than 70 judicial vacancies around the country. That is more than when President Obama came into office. One of the reasons it is more is that when Democrats were in control, we moved President Bush's nominees much faster than Republicans have allowed us to move President Obama's.

The unprecedented delays in the consideration of President Obama's nominations were confirmed by a recent Congressional Research Service report on judicial nominations. The median number of days President Obama's circuit court nominees have been delayed from Senate consideration after being voted on by the Judiciary Committee has skyrocketed to 132 days. As the report notes, that is "roughly 7.3 times greater than the median number of 18 days for the 61 confirmed circuit nominees of his immediate predecessor, President G.W. Bush." Similarly, district court nominees are being unnecessarily delayed. The median time from Committee vote to Senate vote has gone from 21 days during the George W. Bush presidency to 90 days for President Obama's district nominees.

There are 18 judicial nominees sitting here waiting for final Senate consideration. They have been approved by the Judiciary Committee with bipartisan votes. It is my hope the Senate will be allowed to consider those other nominees and make real progress.

In fact, today the Senate is voting on whether to end a partisan filibuster against the nomination of Justice Andrew Hurwitz of Arizona to fill a judicial emergency vacancy in the Ninth Circuit. He is supported by both the Senators from Arizona, Mr. KYL, the deputy Republican leader, and Mr. MCCAIN. Last month, the Senate finally began taking actions I have been urging for months. We were finally able to consider and confirm the nominations of Judge Jacqueline Nguyen and Judge Paul Watford of California to judicial emergency vacancies on the United States Court of Appeals for the Ninth Circuit. The delay in the consideration of all these nominees follows the pattern also seen with Judge Morgan Christen of Alaska last December despite the strong support of the senior Senator from Alaska, Senator MURKOWSKI. I commend Senators from both sides of the aisle who rejected the misguided effort to filibuster the nomination of Judge Watford.

Normally, on a nomination such as Justice Hurwitz's, we would not even

be having a cloture vote, but we seem to have a new standard that is required for President Obama that was not required of the other Presidents since I have been here. It was not required for President Ford or President Carter or President Reagan or President George H.W. Bush or President Clinton or President George W. Bush.

I mention those because those are the only Presidents with whom I have served. We did not have that standard. Suddenly, we have this brand new standard for President Obama. So for the 28th time, the majority leader has been forced to file for cloture to get an up-or-down vote on one of President Obama's judicial nominations.

By comparison, during the entire 8 years, not 3½ years but 8 years, that President Bush was in office, cloture was filed in connection with 18 of his judicial nominees, most of whom were not confirmed or were not passed out of the Judiciary Committee by a bipartisan majority. Most were opposed as extreme ideologues.

Justice Hurwitz is not a nominee who should be filibustered or require cloture in order to be considered by the Senate. He is a nominee with impeccable legal credentials and qualifications. I urge Senators to see through the specious and unfair attacks from the extreme right and narrow special interest groups. Senator KYL and Senator MCCAIN are right to support his nomination, and this good man and excellent judge should be confirmed. Justice Hurwitz is a respected and experienced jurist on the Arizona Supreme Court. His nomination has the strong support of his home state Senators, Senator JOHN MCCAIN and Senator JON KYL. Justice Hurwitz was reported favorably out of Committee with bipartisan support over three months ago. His nomination received the highest possible rating of the American Bar Association Standing Committee on the Federal Judiciary after their non-partisan peer review found him to be "well qualified." He has all the credentials anyone could want, has exhibited good judgment on the bench, and has the right judicial temperament. He is the kind of nominee who would at any other time in our history be confirmed unanimously or nearly so by the Senate in an expeditious manner. Not so this year, during this presidential administration. Despite the fact that this President has reached across the aisle to work with Republican home state Senators, Justice Hurwitz faces partisan opposition.

When Senator KYL introduced Justice Hurwitz to the Judiciary Committee at his hearing in January, he underscored what a qualified nominee he is. Senator KYL said:

It is very easy to see and it is obvious to those of us who have been in Arizona a long time why Justice Hurwitz was awarded the ABA's highest rating, unanimous well qualified. So it will be my privilege to support his nomination, and I am honored to be able to introduce him to the panel today.

Justice Hurwitz is an outstanding nominee with impeccable credentials and qualifications. He has had nine years of experience as a judge on Arizona's highest court, and has shown a record of excellence as a jurist. No one has criticized a single decision he has made from the bench in his nine years as justice. Let me repeat that: No one can point to a single decision he has made and be critical. It is because of his record that he has the strong support of both Republican Senators from Arizona as well as many, many others from both sides of the political aisle.

A graduate of Princeton University and Yale Law School, Justice Hurwitz served as the Note and Comment Editor of the Yale Law Journal. Following graduation, he clerked on every level of the Federal judiciary: First for Judge Jon O. Newman, who was then U.S. District Judge on the District of Connecticut. Subsequently, he clerked for Judge Joseph Smith of the U.S. Court of Appeals for the Second Circuit. Then he clerked for Justice Potter Stewart of the U.S. Supreme Court.

He then distinguished himself in private practice, where he spent over 25 years at a law firm in Phoenix, Arizona. While in private practice, Justice Hurwitz tried more than 40 cases to verdict or final decision. He argued numerous times in the Ninth Circuit and other state and Federal appellate courts. One of the Supreme Court cases he argued was *Ring v. Arizona*, a case which he won 7-2, with the votes of Justices Scalia and Thomas.

Justice Hurwitz has also taught classes at Arizona State University's Sandra Day O'Connor College of Law for approximately 15 years on a variety of subjects including ethics, Supreme Court litigation, legislative process, civil procedure, and Federal courts.

By any traditional measure, he is the kind of judicial nominee who should be confirmed by an overwhelming bipartisan vote, and I find it very disappointing that notwithstanding the strong support of Senator KYL and Senator MCCAIN, so many Republican Senators seem eager to oppose this nomination.

An unfair campaign is being mounted by the extreme right against this outstanding nominee. The apparent basis of that campaign is not any decision that Justice Hurwitz made, incidentally. He has never been overturned. So it is not from any decision he made but rather a decision Judge Newman made while Justice Hurwitz was a young law clerk 40 years ago.

Anyone who knows Judge Newman especially knows this was his decision, not that of a clerk. Judge Jon Newman makes his own decisions. He always has. Actually, in this particular case, the decision he made was ultimately accepted by the U.S. Supreme Court as the law of the land.

Why Senators who know better would suggest that somehow, 40 years ago, a law clerk could convince a judge how to vote—law clerks traditionally

are asked by the judge to give them what is the law. What is the law for this position, what is the law for the opposite position, give that to me.

But I have never known a judge, certainly no Federal judge, whether appointed by a Republican or Democrat, who did not make up their own mind. No judge had their law clerks make up their mind. Law clerks give them the material on both sides. So the opposition to this nomination marks a new low. I say that in a way that pains me, after 37 years in this body.

Some are attempting to disqualify a nominee who has impeccable credentials, who has the highest possible rating, because a Federal judge, now retired, for whom that nominee clerked some 40 years ago, decided a case with which some Senators disagree, even though that is the law that has been upheld, even by a very conservative Supreme Court.

Come on. They are against *Roe v. Wade*. They oppose the constitutional right for women to have privacy recognized in that case. That is their right. But what is not right is them attributing responsibility for the judge's decision which properly construed the Constitution, to his clerk.

To then say, because this judge properly construed the Constitution the way it has been upheld by the Supreme Court, we have to look at the man who was his clerk 40 years ago and vote him down.

Come on, that is Alice in the Wonderland. If we start doing that sort of thing, then we can vote down anybody for anything. Oh, when they were 11 years old, they stayed out late one night. We can't have a judge on our court who disobeyed the rules, the laws laid down by their families, and they were out late. What about that time when they were a freshman in college and they stayed out too late? Oh, throw that man out. The fact that Justice Hurwitz served on the Arizona Supreme Court and never had one of his cases overturned—the heck with that. Forty years ago his qualifications were such that he was able to be a law clerk, but out of the thousands of decisions of the judge he clerked for, we disagreed with one—even though that is the law of the land today—therefore, we cannot do anything about that judge, so we will get the guy who clerked for him. I wonder who turned the lights on in that building at that time. Maybe we should make sure they never get a job anywhere else either. Come on.

This opposition follows after we saw the opposition to Judge Paul Watford, who clerked for a very conservative judge, Judge Alex Kozinski, who had been appointed by President Reagan and now serves as chief judge of the Ninth Circuit. Judge Kozinski strongly supported his nomination. But somewhere in the ether, they found something that went against him. The 34 Senate Republicans who voted against the confirmation of Paul Watford did not credit him for having clerked for a

conservative judge who wrote conservative opinions with which they agreed. So this is another one-way street, another ratcheting down of the process, another excuse for opposing a highly qualified nominee. And it is wrong.

This also follows a pattern. Senate Republicans have attacked nominees by attributing the position of the nominee's legal client to the judicial nominee. That is something, incidentally, that Chief Justice Roberts strongly condemned at his confirmation hearing, and I agree with him. In fact, I voted for Chief Justice Roberts. The fact is, lawyers are often asked to represent people on one side or the other.

John Adams, who became our President, who worked so hard to have us break free from Britain, defended the British soldiers who were involved in the Boston Massacre because he said we have to show not only our new country but the world that we stand for the rule of law and that everybody in court gets adequate representation. I mention that because when they opposed Judge Helmick, they argued that because he served as a court-appointed lawyer for a defendant in a terrorism case, that means he supports terrorism. Baloney. I represented criminals when I was in private practice, and I prosecuted criminals when I was a prosecutor. Now, what does that mean? It means I followed the law and played the part a lawyer should play in these proceedings. That is why, after what they did with Judge Helmick, I reminded them of John Adams defending the British soldiers after the Boston Massacre. I had a person ask me: Is it possible that you have Senators who have never read a history book? I said that I never thought so before.

I also looked at how they filibustered Caitlin Halligan, who served as her State's top appellate lawyer. They filibustered her because she defended the constitutionality of her State's law. Let's take a look at what a Hobson's choice we have there. If you are the State's top lawyer and you defend your State's law, we cannot possibly support you. Let's say that she was the State's top lawyer and she opposed the State's law. Then they would say: Oh, we obviously cannot support you. So you are damned if you do and damned if you don't.

They opposed the nomination of Jesse Furman. Why? Well, he wrote something when he was a freshman in college, before he even went to law school. Oh my goodness gracious, let's hope we don't have a judicial nominee who may have written for a college newspaper. Can you imagine? I might ask every Senator to go back and look at some of the papers they wrote in high school and college.

If somebody brought those up today, they would probably say: Who wrote this garbage?

Well, you did, Senator. So following your standards, I assume you are going to retire today and notify the government.

I have seen Senate Republicans grossly distorting a nominee's record to make him out to be a caricature, as with Goodwin Liu.

Now we are seeing Senate Republicans attack a nominee for serving as a law clerk to a distinguished Federal judge. By those standards, does that mean Democrats should oppose anybody who clerked for Justice Scalia or Justice Thomas because we disagree with some of their decisions? Are we saying we won't confirm those clerks? Boy, I have cast some bad votes if we are using that standard because I have voted for people who have been law clerks for judges whose opinions I disagreed with. I was there to vote on the law clerk who may have had a distinguished career in the law, and I look at their career.

I urge Senate Republicans to reject this attack, as Senator KYL and others do, and vote to confirm Justice Hurwitz. Let him be a judge on his own substantial record as a judge. This nominee has been a judge on the Arizona Supreme Court for 9 years. Let's judge him on that record. Let's accept the fact that President Obama did what I urged him to do. He talked to the Senators of the State and got their support for his nominee. It didn't matter whether they were Republicans or Democrats.

In March when the Judiciary Committee voted on Justice Hurwitz's nomination, Senator KYL stated:

[The real question is . . . how he has comported himself in the place where you can really judge [him]—on the Arizona Supreme Court. Not once has an opinion that Justice Hurwitz wrote or joined in been overturned by a higher court.

Senator KYL further stated:

[Justice Hurwitz] is a good example of a person who probably has some views personally that are different from mine, but whose opinions obviously carefully adhere to the law. And, after all, I think that is what most of us are looking for in judicial nominations. So I am pleased to support him without reservation and would urge my colleagues to support his nomination as well.

I agree with Senator KYL and commend him.

In direct and express answer to a question from Senator SESSIONS, Justice Hurwitz explained that his personal views would have no role in his decisions as a judge, and that they have never played a role in all his years as a judge. We know from Justice Hurwitz's record that he is a judge's judge. He is a person who meticulously analyzes the law and applies the facts of the case to the law. There is no evidence to contend that Justice Hurwitz would not do the same on the Ninth Circuit.

The Chief Judge of the Ninth Circuit along with the members of the Judicial Council of the Ninth Circuit, wrote to the Senate months ago emphasizing the Ninth Circuit's "desperate need for judges," urging the Senate to "act on judicial nominees without delay," and concluding "we fear that the public will suffer unless our vacancies are

filled very promptly." The judicial emergency vacancies on the Ninth Circuit are harming litigants by creating unnecessary and costly delays. The Administrative Office of U.S. Courts reports that it takes nearly five months longer for the Ninth Circuit to issue an opinion after an appeal is filed, compared to all other circuits. The Ninth Circuit's backlog of pending cases far exceeds other Federal courts. As of September 2011, the Ninth Circuit had 14,041 cases pending before it, far more than any other circuit.

When Senate Republicans filibustered the nomination of Caitlin Halligan to the D.C. Circuit for positions she took while representing the State of New York, they contended that their underlying concern was that the caseload of the D.C. Circuit did not justify the appointment of another judge to that Circuit. I disagreed with their treatment of Caitlin Halligan, their shifting standards and their purported caseload argument. But if caseloads were really a concern, Senate Republicans would not have delayed action on the nominations to judicial emergency vacancies on the overburdened Ninth Circuit for months and months.

We are still lagging behind what we accomplished during the first term of President George W. Bush. During President Bush's first term we reduced the number of judicial vacancies by almost 75 percent. When I became Chairman in the summer of 2001, there were 110 vacancies. As Chairman, I worked with the administration and Senators from both sides of the aisle to confirm 100 judicial nominees of a conservative Republican President in 17 months.

We continued when in the minority to work with Senate Republicans to confirm President Bush's consensus judicial nominations well into 2004, a presidential election year. At the end of that presidential term, the Senate had acted to confirm 205 circuit and district court nominees. In May 2004, we reduced judicial vacancies to below 50 on the way to 28 that August. Despite 2004 being an election year, we were able to reduce vacancies to the lowest level in the last 20 years. At a time of great turmoil and political confrontation, despite the attack on 9/11, the anthrax letters shutting down Senate offices, and the ideologically driven judicial selections of President Bush, we worked together to promptly confirm consensus nominees and significantly reduce judicial vacancies.

In October 2008, another presidential election year, we again worked to reduce judicial vacancies and were able to get back down to 34 vacancies. I accommodated Senate Republicans and continued holding expedited hearings and votes on judicial nominations into September 2008. We lowered vacancy rates more than twice as quickly as Senate Republicans have allowed during President Obama's first term.

By comparison, the vacancy rate remains nearly twice what it was at this point in the first term of President

Bush, and has remained near or above 80 for nearly three years. If we could move forward to Senate votes on the 18 judicial nominees ready for final action, the Senate could reduce vacancies below 60 and make progress.

Once the Senate is allowed to vote on this nomination, we need agreement to vote on the 17 other judicial nominees stalled on the Executive Calendar. Another point made by the Congressional Research Service in its recent report is that not a single one of the last three presidents has had judicial vacancies increase after their first term. In order to avoid this, the Senate needs to act on these nominees before adjourning this year.

As the Congressional Research Service report makes clear, in five of the last eight presidential election years, the Senate has confirmed at least 22 circuit and district court nominees after May 31. The notable exceptions were during the last years of President Clinton's two terms in 1996 and 2000 when Senate Republicans would not allow confirmations to continue. Otherwise, it has been the rule rather than the exception. So, for example, the Senate confirmed 32 in 1980; 28 in 1984; 31 in 1992; 28 in 2004 at the end of President George W. Bush's first term; and 22 after May 31 in 2008 at the end of President Bush's second term.

So let us move forward to confirm Justice Hurwitz. We need to work to reduce the vacancies that are burdening the Federal judiciary and the millions of Americans who rely on our Federal courts to seek justice. Let's work in a bipartisan fashion to confirm these qualified judicial nominees. If we do that, we can address the judicial crisis facing this country. We may not only restore the faith of the American people in the Federal judiciary but start restoring their faith in the U.S. Senate, which is a body I love, which the American people see as being far too polarized. I think that is the right thing to do.

Mr. President, I suggest the absence of a quorum, and I ask that the time be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

#### HURWITZ NOMINATION

Mr. GRASSLEY. Mr. President, I come to the floor to tell my colleagues why they should not support cloture on the Hurwitz nomination.

On Saturday, December 2, 1989, this 4-year-old boy in the photo, Christopher, was dressed in his favorite clothes by his mother Deborah Milke. She told him James Styers, who shared the apartment with Debra, would take him to the mall to see Santa Claus. After picking up another man, Roger Scott, they stopped at a couple drug stores and then the two men and Christopher had pizza for lunch.

Rather than taking Christopher to see Santa Claus at the mall, they drove

him to the desert. Christopher was told they were going to look for snakes. Instead, Christopher was shot three times in the back of the head by Styers, his body left in the desert.

James Styers, 63, was convicted of first-degree murder of the 4-year-old boy, conspiracy to commit first-degree murder, child abuse, and kidnapping—all supposedly at the request of the boy's mother. Debra Milke, James Styers, and Roger Scott were all sentenced to death for the killing.

After years of appeals, the case found itself in Federal Court, making its way to the Ninth Circuit. In 2008, nearly 19 years after the terrible crime took place, the Ninth Circuit sent the Styers case back to Arizona, claiming that the State court did not adequately consider the post-traumatic stress disorder Styers suffered because of his military service in Vietnam.

Just about 1 year ago, in June 2011, some 22 years after this horrific, evil event occurred, the Arizona Supreme Court heard the appeal. In a 4-to-1 decision, the court acknowledged Styers' post-traumatic stress disorder but nonetheless ruled it didn't outweigh the aggravating factors found during trial. Styers' death sentence was upheld, and he remains on Arizona's death row.

The nominee before the Senate, whom we will be voting on, Justice Andrew Hurwitz, was the lone dissenter in that 4-to-1 decision. He was the sole person on the Arizona Supreme Court who believed that Christopher's murderer should be given another trial.

Another trial would have resulted in another round of delays. If he had his way, the victim in this crime would still be awaiting justice. Arizona taxpayers would be facing unnecessary expenses, and society at large would still be waiting for a resolution to this case.

Today, we are asked by the President and by the majority leader to confirm this judge to be a U.S. circuit judge for the Ninth Circuit. I strongly disagree he should be rewarded with a lifetime appointment to the Federal bench. For reasons I will outline, I oppose this nomination and urge all Senators to do likewise. I urge you to vote no on cloture, and, if it occurs, on any vote on final confirmation.

In the Styers case, Justice Hurwitz acknowledged his position would result in further delay in the case and also conceded it was unlikely a new sentencing proceeding would produce a different result. In his dissent, he cited *Ring v. Arizona*.

*Ring v. Arizona* was a case Judge Hurwitz had personally argued before the Supreme Court of the United States in 2002, before his appointment to the Arizona Supreme Court. In that case, he argued that Arizona's capital punishment sentence law was unconstitutional, although the Supreme Court had previously upheld the Arizona statute in a 1990 decision.

Let me make this clear: Mr. Hurwitz, as an attorney, advocated against the

death penalty. This was not just advocacy for a paying client or as a court-appointed attorney. As I have said before, judicial nominees should not be judged by the clients they represent. But in this case, Mr. Hurwitz volunteered for this case. He did it on a pro bono basis. Then, after advocating in this case in private practice, he used the same case as the basis for dissenting in another Arizona death penalty case.

Timothy Stuart Ring was sentenced to death in 1996 by an Arizona Superior Court judge for the 1994 killing of John Magoch, an armored car driver. Mr. Hurwitz successfully challenged the Arizona death penalty statute. He then argued before the Arizona Supreme Court on behalf of the 29 inmates then on death row in Arizona. Mr. Hurwitz asked the Arizona Supreme Court to either throw out each man's death sentence and order a new trial or to resentence each to life imprisonment with the possibility of parole. According to press accounts at the time, Hurwitz said the next step following the *Arizona v. Ring* ruling should be to resentence the inmates to life in prison, saying that allowing the previous death sentence to stand would be a "dangerous precedent." However, the State's high court refused to overturn the convictions and death sentences on a blanket basis, ruling that the trials were fundamentally fair and that the U.S. Supreme Court's ruling didn't require throwing out all death sentences.

I believe there is strong evidence that Justice Hurwitz is unable to differentiate between his personal views and his responsibility as a judge. I believe Judge Hurwitz's record suggests that he allows his own personal policy preference to seep into his judicial decisionmaking. Others share this view. The fear that political activism would translate into judicial activism once on the bench was expressed in the following quote from a 2003 article summarizing the various candidates for the seat now occupied by Justice Hurwitz:

But the final name on the list, Andrew Hurwitz . . . will be a controversial choice for Napolitano, in some ways. He is considered the most liberal of the candidates, even labeled by some as an ideologue. . . . He wears his passion for the law in the open, and eagerly engaged in debates with the commission members about recent death penalty decisions and his past as a member of the Arizona Board of Regents. . . . In the end, the commission almost didn't include Hurwitz's name on the list; he got just eight votes, barely a majority.

We certainly do not need more of that on the Ninth Circuit.

The Styers case was not the only death penalty case in which Justice Hurwitz was the lone dissenter. In another death case, Donald Beaty was convicted of the May 9, 1984, murder in Tempe of 13-year-old Christy Ann Fornoff. She was abducted, sexually assaulted, and suffocated to death by Beaty while collecting newspaper subscription payments for her Phoenix Gazette newspaper route.

Beaty, who has been on death row since July 1985, was scheduled to die by lethal injection at an Arizona Department of Corrections prison in Florence at 10 a.m. on May 25 last year. Again, the victim's family and Arizona citizens had to wait 27 years for justice to be served, but they would have to wait a few more hours. Beaty's execution was delayed for most of the day as his defense team tried to challenge the Arizona Department of Corrections' decision to substitute one drug for another in the State's execution drug formula. State and Federal courts denied requests by inmate Donald Beaty to block his scheduled execution because of a last-minute replacement of one of three execution drugs. The Arizona Supreme Court ruled 4 to 1 to lift the stay. The majority held that Beaty's lawyers hadn't proved he was likely to be harmed by the change. Again, there was one dissenter: Justice Hurwitz. If he had his way, the State would have had to start over with the death warrant process, leading to additional delays and pain to the victim's family.

Meanwhile, U.S. district judge Neal Wake, in Phoenix, refused to block the execution, and the Supreme Court declined to consider two stay requests for Beaty. Beaty was pronounced dead at 7:38 p.m., more than 9 hours after his execution had initially been scheduled. Arizona attorney general Tom Horne called the daylong delay a "slap in the face" to the Fornoff family.

These cases are not just anecdotal evidence or isolated incidents taken out of context. A study by court watcher and Albany law school professor Vincent Bonventre validated the prodefendant posture of Justice Hurwitz. Let me summarize his results, which I have borrowed from the Professor's Web site.

In a 2008 study, Professor Bonventre examined the criminal decisions in which the Arizona Supreme Court was divided over the past 5 years. His graph, the graph I have up here, portrays the voting spectrum—the ideological prosecution versus prodefendant spectrum—of the justices. As shown in the graph, the greatest contrast is between the record of then-Chief Justice McGregor and Justice Hurwitz. At one end is her record of taking the more prosecution position in all the divided cases during the 5-year period, and at the other end is Judge Hurwitz's record. According to this professor, Justice Hurwitz sided with the prodefendant position 83 percent of the time. This is well outside the mainstream for other members of this court.

All of this leads me to believe that Justice Hurwitz, who in private practice only devoted about 2 percent of his litigation practice to criminal law, has deeply held views on the criminal justice system in general and the death penalty in particular. We do not need to add another prodefendant, activist judge to the Ninth Circuit or to any other court. Victims such as Chris-

topher and Christy, their families, and society as a whole deserve better.

There is another issue I find extremely troubling regarding Justice Hurwitz. In 2002 he authorized a Law Review article entitled "John O. Newman and the Abortion Decision: A remarkable first year." His article examined two 1972 abortion decisions by Judge Newman, a district court judge for the District of Connecticut. Both of Judge Newman's decisions struck down Connecticut's law restricting abortions.

Justice Hurwitz's article detailed how those two decisions proved to be incredibly influential on the Supreme Court's *Roe v. Wade* decision less than a year later. In fact, Judge Hurwitz argued that Judge Newman's opinions provided the framework for *Roe*. More specifically, the much criticized viability cutoff point that formed the basis of *Roe* came directly from Judge Newman's opinion.

In his article, Judge Hurwitz noted how influential Judge Newman's opinion was on the Supreme Court's decision to adopt viability as a cutoff point for legal abortion, rather than the first trimester. He stated:

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.

Justice Hurwitz had a unique perspective and insight into how these events unfolded. As a young lawyer, Justice Hurwitz clerked for Judge Newman in 1972 when he drafted the abortion decisions. Then, in the fall of that year and several weeks after Judge Newman's second abortion decision was released, Justice Hurwitz interviewed for Supreme Court clerkships. At the time, the Supreme Court Justices were considering *Roe*. In fact, they were trading drafts of the Court's opinion which was eventually handed down in January of 1973.

Justice Hurwitz further noted in his article that when he interviewed for Supreme Court clerkships, it became clear to him how influential Judge Newman's opinion was on the Court, meaning the Supreme Court. Justice Hurwitz wrote:

The author received some small inkling of the influence of *Abele II* on the Court's thinking in the fall of 1972, when interviewing for clerkships at the Supreme Court. Justice Powell devoted over an hour of conversation to a discussion of Judge Newman's analysis, while Justice Stewart (my future boss) jokingly referred to me as "the clerk who wrote the Newman opinion."

Now, I recognize that Judge Hurwitz was clerking for a Federal judge. It was Judge Newman who signed those abortion opinions and Judge Newman who was ultimately responsible for them. My primary concern rests on the article Justice Hurwitz wrote 30 years later, in 2002, embracing and celebrating the rationale and framework for *Roe v. Wade*. Justice Hurwitz praised Judge Newman's opinion for its "careful and meticulous analysis of the

competing constitutional issues." He called the opinion "striking, even in hindsight." Let me remind everyone that the constitutional issues and analysis he praises are Newman's influence on the Supreme Court's expansion of the "right" to abortion beyond the first trimester of pregnancy. This, Hurwitz wrote, "effectively doubled the period of time in which States were barred from absolutely prohibiting abortions."

Furthermore, Newman's opinion in *Abele II* was even more drastic and far-reaching than *Roe* turned out to be. He said that the "right" to abortion could be found in the ninth amendment, a theory about unenumerated rights that the Supreme Court rejected in *Roe* and has not endorsed elsewhere.

Hurwitz's article was clearly an attempt to attribute great significance to the decisions in which the judge for whom he had clerked had participated. I think that by any fair measure, it is impossible to read Justice Hurwitz's article and not conclude that he wholeheartedly embraces *Roe* and, importantly, the constitutional arguments that supposedly support *Roe*. He takes this view despite near universal agreement among both liberal and conservative legal scholars that *Roe* is one of the worst examples of judicial activism in our Nation's history. For example, Professor Tribe, a liberal constitutional law scholar, wrote:

One of the most curious things about *Roe* is that behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.

Stuart Taylor wrote:

*Roe v. Wade* did considerable violence to the constitutional fabric. When the 7-2 decision came down in 1973, very few scholars thought its result could plausibly be derived from the Constitution; not one that I know of considered Blackman's opinion a respectable piece of constitutional reasoning.

Even Justice Ginsburg has repeatedly criticized *Roe*. She wrote that the Court's "heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."

We are not talking about an article published shortly after graduating from law school. Mr. Hurwitz published it 30 years after graduating from law school, when he was well established and a seasoned lawyer. In fact, he published this article shortly before joining the Arizona Supreme Court. All of this leads me to question his ability to be objective should this issue come before him if he is confirmed to the Ninth Circuit.

I would note the following groups have expressed opposition to this nomination: the National Right to Life, Heritage Action, Concerned Women for America, Faith and Freedom Coalition, Liberty Counsel Action, Family Research Council, Eagle Forum, Traditional Values Coalition, Americans United for Life, Susan B. Anthony List, American Center for Law and Justice, Judicial Confirmation Network, and

Judicial Action Group have written in opposition to this nomination. I ask unanimous consent to have printed in the RECORD a copy of these letters.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NATIONAL RIGHT TO LIFE  
COMMITTEE, INC.,

Washington, DC, June 8, 2012.

Re NRLC scorecard advisory in opposition to cloture on the nomination of Andrew Hurwitz to the U.S. Court of Appeals for the Ninth Circuit.

Sen. CHARLES GRASSLEY,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR GRASSLEY: On Monday, June 11, the Senate will vote on whether to invoke cloture on the nomination of Andrew D. Hurwitz to the U.S. Court of Appeals for the Ninth Circuit. The National Right to Life Committee (NRLC), the nationwide federation of state right-to-life organizations, urges you to vote against cloture, and reserves the right to include the roll call on cloture in the NRLC scorecard of key right-to-life votes of the 112th Congress.

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 a long steel Sopher clamp. (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.” 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.

NRLC urges you to oppose cloture on the nomination of Judge Hurwitz, and reserves the right to include the cloture vote in the NRLC scorecard for the 112th Congress.

Respectfully,

DOUGLAS JOHNSON,  
Legislative Director.

[From Heritage Action for America, June 8, 2012]

KEY VOTE ALERT: “NO” ON THE NOMINATION  
OF ANDREW HURWITZ

On Monday (June 11), the Senate is scheduled to vote on the nomination of Andrew Hurwitz to the Ninth Circuit Court of Appeals. Mr. Hurwitz's previous actions and writings raise serious questions as to whether he'd be able to follow the rule of law from the bench.

In the past, Mr. Hurwitz has encouraged courts to legislate from the bench. In the Supreme Court case of *Ring v. Arizona*, he suggested the Supreme Court change the wording of the Constitution in order to achieve a ruling based on his beliefs, which would have

made the state's death penalty sentencing unconstitutional. He believed so strongly in the cause of this case that he worked pro bono.

His foray into activist-legislating was not limited to that case, though. He has also said that would look to previous Supreme Court decisions on relevant issues before consulting the United States Constitution. He also believes that Judges have the power—and supposedly the better judgment—to bestow rights upon American citizens, outside of the law.

Placing personal beliefs ahead of the law and the Constitution, as Mr. Hurwitz appears to do, is a dangerous subversion of the rule of law. Those who support the rule of law, and the role it plays in civil society, cannot allow such judges to be confirmed.

Heritage Action opposes the nomination of Andrew Hurwitz and will include it as a key vote in our scorecard.

CONCERNED WOMEN FOR AMERICA,  
LEGISLATIVE ACTION COMMITTEE,  
Washington, DC, February 15, 2012.

SENATOR,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR: Concerned Women for America Legislative Action Committee (CWALAC) and its more than half a million members around the country respectfully ask that you oppose the nomination of Andrew David Hurwitz to be a United States Circuit Judge for the Ninth Circuit.

*Roe v. Wade* represents one of the most blatant disregards for the U.S. Constitution and our founding principles in American history. Nearly every sincere legal scholar, including many committed liberal ones, admit its arguments are not based in law.

Edward Lazarus, for example, who clerked for *Roe*'s author, Justice Blackmun, has said, “As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. . . . Justice Blackmun's opinion provides essentially no reasoning in support of its holding.”

That is why it is inexcusable for Mr. Hurwitz to take pride in helping craft the decision that provided the underlining arguments for it, as he helped craft a similar decision when he clerked for District Judge Jon O. Newman of the District of Connecticut. Hurwitz proudly recounts how he was referred to as “the clerk who wrote the Newman opinion,” the decision that served as the basis for *Roe*, when he went on to apply for clerkships at the Supreme Court.

As a women's organization we simply cannot overlook the pain that Mr. Hurwitz's radical view of the Constitution has brought women. As the Supreme Court finally admitted on its recent partial-birth abortion decision in *Gonzalez v. Carhart*:

“It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child.”

That grief and anguish are the practical results of Mr. Hurwitz's legal theory refusing to recognize the unborn baby as a “person” until the baby is born. We urge you to oppose this nomination, and we plan to score each and every vote on it.

Sincerely,  
PENNY NANCE,  
President and Chief Executive Officer.



FRC ACTION,

Washington, DC, February 29, 2012.

SENATOR,  
U.S. Senate,  
Washington, DC.

DEAR SENATOR: On behalf of Family Research Council Action (FRC), the legislative arm of the Family Research Council, and the families we represent, I want to urge you to vote NO on the confirmation of Andrew Hurwitz to the U.S. Ninth Circuit Court of Appeals. In a 2003 Law Review article entitled John O. Newman and the Abortion Decision, Mr. Hurwitz praises a Connecticut District Judge for the prescient and seminal role he played in informing *Roe v. Wade*. This article revealed, not only his admiration for the Judge (for whom he was clerking at the time), but also a disquieting admiration for *Roe* and its tenuous foundation.

A modicum of privilege can be sensed as Mr. Hurwitz recounts his clerkship during the “remarkable” months of 1972 as *Roe* was being argued. That year he had caught the attention of the Supreme Court while aiding Judge Newman in casting the swing vote in a case ushering abortion into Connecticut. Indeed, in one footnote (55) of his essay, Hurwitz speaks candidly of the reputation he had with Supreme Court Justice Stewart as “the clerk who wrote the Newman Opinion.”

It is telling that at a time when many scholars are abandoning the divisive and indefensible position of *Roe*, Hurwitz comes to its defense for reasons that, given his history, cannot be ruled out as personal.

In his article, Mr. Hurwitz commends Judge Newman for his “careful and meticulous analysis of the competing constitutional issues.” Hurwitz wrote, “He [Newman] placed primary reliance on the natural implications of *Griswold*: if the capacity of a fetus to be born made it a person endowed with Fourteenth Amendment Rights, the same conclusion would seemingly also apply to the unfertilized ovum, whose potentiality for human life could be terminated under *Griswold*.” One can hardly call the analysis that fails to see the difference between an unfertilized ovum and a fetus “meticulous” yet Hurwitz claims its still, “striking after 30 years.”

This failure to distinguish a fetus from an unfertilized ovum is part of a larger inability to understand the question of when life begins through a biological lens. Hurwitz recalls a “candid concession” made by Newman (presumably shared by himself) who confided he felt the issue of when life begins was ultimately philosophical rather than legal when, in fact, it is neither.

Finally, Mr. Hurwitz praises Judge Newman on his insight regarding allowing limitations to abortion after viability as opposed to the first trimester. This stance he claims greatly influenced Blackmun in the *Roe* decision to “effectively double the period of time in which states were barred from absolutely prohibiting abortions.” This position is one that many state and congressional lawmakers have found morally objectionable due to medical research demonstrating the fetus’ ability to feel pain as early as 18 weeks.

Mr. Hurwitz’s vaulting regard for *Roe*, his personal involvement in its formulation and his inability to see its shortcomings, offer no assurances he will arbitrate impartially from the bench. For these reasons we urge you to oppose the nomination of Andrew Hurwitz to the Ninth Circuit Court of Appeals.

Sincerely,

THOMAS MCCLUSKY,  
Senior Vice President.

Hon. JEFF SESSIONS,  
Russell Senate Office Building,  
Washington DC.

DEAR SENATOR SESSIONS: Andrew David Hurwitz is the self-titled architect of *Roe v. Wade*, a court decision responsible for the 55 million abortions performed in the United States since 1973 while proudly trumpeting his repeal of the death penalty in Arizona as “the best episode” of his career in private practice.

Babies get the death penalty. But murderers don’t? Hurwitz is unqualified to serve on the federal bench.

Not only are Hurwitz’s views on justice way beyond the mainstream, Hurwitz’s pride—for lack of a better term—over *Roe v. Wade* is simply appalling even to the most jaded observer of American politics. Such is this pride that Hurwitz has gone out of his way to specifically identify himself with the license *Roe v. Wade* introduced into American culture, despite some question as to his actual influence.

Moreover, Hurwitz refuses to do what most members of the legal community have already done, namely back away from the legal premise underlying *Roe v. Wade*.

The confirmation of such a nominee to an already extremely liberal Ninth Circuit court would be an immediate disaster. Anyone who allows Hurwitz a free pass sends an extraordinary clear sign that Senate Republicans would govern no differently than the liberal Senate we have today.

Traditional Values Coalition on behalf of our 43,000 churches and ministries and the millions of Americans we represent will be scoring this critical make-or-break vote. If not on Hurwitz, where will our conservative leaders make a stand?

Sincerely,

ANDREA LAFFERTY,  
President, Traditional Values Coalition.

WASHINGTON, DC,  
February 27, 2012.

DEAR SENATOR: I am writing today on behalf of Americans United for Life Action (AUL Action)—the legislative arm of Americans United for Life (AUL), the oldest national pro-life public-interest law and policy organization—to express our strong opposition to the nomination of Justice Andrew David Hurwitz to the 9th Circuit Court of Appeals. We respectfully urge you to oppose his nomination.

We believe that it is important to focus on the period of Justice Hurwitz’s clerkship for United States District Judge Jon O. Newman, despite the fact that it was four decades ago. His clerkship is important because it reveals Hurwitz to be a supporter both of judicial activism and of extreme pro-abortion views.

Justice Hurwitz clerked for Judge Newman during his first year on the court. During this time, Newman authored opinions in two abortion decisions striking down Connecticut’s abortion restrictions, commonly known as *Abele I* and *Abele II*.

It became well known that Hurwitz played a significant role in shaping these decisions. Hurwitz admitted that Supreme Court Justice Potter Stewart, for whom he later clerked, “jokingly referred to me as ‘the clerk who wrote [Abele II].’”

*Abele II* was a radical opinion, the anti-life influence of which is still with us today. Two features of *Abele II* are pillars of *Roe*: the conclusion that a “fetus” is not a “person” under the Fourteenth Amendment, and the singling out of “viability” as the point in time before which the state has no interest in protecting the lives of unborn babies.

Hurwitz has done nothing to distance himself from these extreme positions in the intervening years. To the contrary, he has em-

braced—and even celebrated—them. In his article from 2002 on Judge Newman, he praised the *Abele II* ruling.

Americans want judges who apply the law, not make policy. As someone who greatly influenced one of the most divisive and constitutionally unfounded Supreme Court decisions in our nation’s history, Justice Hurwitz is not qualified to serve on a federal circuit court.

We respectfully ask that you vote against Justice Hurwitz’s nomination.

Sincerely,

CHARMAINE YOEST,  
President & CEO,  
Americans United for Life.

AMERICAN CENTER  
FOR LAW & JUSTICE,  
Washington, DC, February 27, 2012.

Hon. PATRICK J. LEAHY,  
Chairman, U.S. Senate Committee on the Judiciary,  
Dirksen Senate Office Building, Washington, DC.

Hon. CHARLES E. GRASSLEY,  
Ranking Member, U.S. Senate Committee on the Judiciary,  
Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: The American Center for Law and Justice (ACLJ) is writing to express its concerns about the nomination of Andrew D. Hurwitz to the United States Court of Appeals for the Ninth Circuit.

Justice Hurwitz’s outspoken defense of *Roe v. Wade* forces us to conclude that he is unable to be a neutral and impartial judge and will likely attempt to legislate from the bench. Not only does he support the holding of *Roe*, but he also adamantly supports its long discredited reasoning. As explained by the law clerk who assisted Justice Blackmun in authoring the *Roe* opinion, “As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible” and “*Roe* must be ranked among the most damaging of judicial decisions.”

In a 2002 law review article, Justice Hurwitz praised the reasoning of *Roe* and proudly discussed how he helped author the opinion that influenced the *Roe* decision. In 1972, he was the clerk for Connecticut District Court Judge Jon O. Newman when Judge Newman wrote the opinion in *Abele v. Markum* (commonly known as *Abele II*, which used a “viability” standard in evaluating a right to abortion. *Abele II* was released just three weeks before the Supreme Court heard re-argument in *Roe* and eventually ruled that a woman had a constitutional right to an abortion before viability. Justice Hurwitz states that the reasoning in *Abele II* “was in almost perfect lockstep” with *Roe*, and it “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 pride Justice Hurwitz takes in having helped author the opinion that influenced *Roe* reveals the scope and passion of his judicial activism. In his 2002 article he states of his Supreme Court clerkship interviews:

Justice Powell devoted over an hour of conversation to a discussion of Judge Newman’s analysis, while Justice Stewart (my future boss) jokingly referred to me as ‘the clerk who wrote the Newman opinion.’ I assume that the latter was based on Judge Newman’s generous letter of recommendation, a medium in which some exaggeration is expected.

*Roe* and *Abele II* are two notorious examples of judges legislating from the bench. Given his involvement with *Abele II* and his pride in its effect on *Roe*, Justice Hurwitz confirms his admiration for an activist judiciary. Every judge must be neutral, objective, and faithful to the Constitution and our

laws. This must be especially true of appellate judges. Because the United States Supreme Court hears very few cases (approximately 100 per year), federal circuit courts have the final say on the vast majority of cases in the federal system. Between April 1, 2010 and March 31, 2011, the Ninth Circuit terminated more than 13,000 appeals. Because of the vast number of cases heard by the federal Courts of Appeals, especially the Ninth Circuit, it is critical that only neutral, impartial judges are elevated to those courts. Justice Hurwitz's support for the long discredited reasoning and activism of Roe and his role in constructing the Abele II opinion that influenced Roe starkly indicate his bias, his comfort with extra-constitutional decision making, and a desire to legislate from the bench.

We urge the Committee to carefully consider the important issues noted above as they review Justice Hurwitz's nomination.

Sincerely,

JAY A. SEKULOW,  
Chief Counsel.

JUDICIAL ACTION GROUP,  
Washington, DC.

ANDREW DAVID HURWITZ—

NOMINEE TO THE 9TH CIRCUIT COURT OF  
APPEALS

HURWITZ: THE "THE ARCHITECT" AND "LONE  
REMAINING DEFENDER" OF ROE V. WADE

Action: Contact the Senate Judiciary Committee Members and tell them to vote "no" on Hurwitz on Thursday, 3/1/12.

Hurwitz acted as a key author of abortion court decisions that were eventually relied upon by the Supreme Court in Roe v. Wade. As a young law clerk to Judge Jon O. Newman (U.S. District Court Judge for the Dist. of Connecticut) Hurwitz played a key role in authoring two 1972 decisions which the U.S. Supreme Court mimicked and expanded in the majority opinion of Roe v. Wade. According to Hurwitz in his law review article dedicated to the 1972 pro-abortion decisions that he helped author, Newman "had an enormously productive and influential first year. Twice confronted . . . with cases challenging the constitutionality of Connecticut's anti-abortion statute, he [we] produced two memorable [pro-abortion] opinions." As Judge Newman's Law Clerk, Hurwitz played a significant role in authoring these opinions. Hurwitz claims that these pro abortion decisions influenced the Supreme Court's decision in Roe and Hurwitz makes it clear that he is very proud of his role in these pro-abortion decisions. Hurwitz claims:

"One need no longer speculate on the point: it is now clear that Jon O. Newman [and Hurwitz] had, in words of one historian, 'crucial influence' on both the outcome and the reasoning in the [Roe v. Wade] case."

"[I] received some small inkling of the influence of Abele II [Judge Newman's pro-abortion decision] on the [Supreme] Court's thinking [in Roe v. Wade] in the fall of 1972, when interviewing for clerkships at the Supreme Court . . . Justice Stewart (my future boss) jokingly referred to me as 'the clerk who wrote the [pro-abortion] Newman opinion.'"

Hurwitz's continued celebration of Roe places him far outside the mainstream even among liberal legal experts. While legal experts on both ends of the Abortion debate have wisely chosen to back away from the indefensibly extrapolative arguments made in the Court's decision in Roe, Hurwitz instead chooses to celebrate the patently activist conclusions of this ruling.

Hurwitz continues to take pride in his role crafting the case that had "'Crucial Influence' on both the outcome and the reasoning in Roe v. Wade." Roe is not only a constitu-

tional abomination but also a moral abomination that has resulted in judicial sanction of the killing of tens of millions of unborn children. Hurwitz should be ashamed of his role in Roe. His pride in his role in Roe is expressed not only as a young law clerk in 1972 but as recently as 2003, at the age of 52. Hurwitz's pride in his role in Roe is cause for great concern.

Hurwitz refused to answer the questions of Senators Grassley and Sessions regarding his role in the pro abortion decision, even though he previously wrote about and praised it. In response to several questions from Senator Grassley and Senator Sessions, Hurwitz refused to answer, claiming "I do not think it appropriate for a former law clerk to comment on the correctness of an opinion written by a judge during the clerkship term." However, Hurwitz previously commented extensively on the same (Abele) decisions extensively in a law review article, bragging about his role in the decision and even going so far as to praise the decision as a "careful and meticulous analysis of the competing constitutional issues." The decision was not a "careful and meticulous analysis," and reasonable legal scholars (liberal and conservative) do not differ on that point.

Hurwitz celebrates his role in the Supreme Court's activist decision striking down Arizona's death penalty scheme as the best episode of his private practice. Senator Sessions asked Judge Hurwitz to explain his role in Ring:

"You served as pro bono as lead counsel in the seminal Supreme Court case of Ring v. Arizona, which struck down Arizona's death penalty sentencing scheme as unconstitutional, and also invalidated several other States' statutes as well. You were quoted in an article by the Arizona Attorney newsletter as saying that the experience was 'the best episode in [your] wonderful career in private practice.'"

Hurwitz responded tersely: "I was referring to the experience of arguing before the Supreme Court."

Hurwitz's response fails to acknowledge, however, that he invited and encouraged the Court to legislate from the bench and to effectively change the very wording of the Constitution to arrive at a brand new result. Hurwitz invitation for the court to usurp legislative power is a shameful act and would not be made by any attorney who respects the text of the constitution. Moreover, Hurwitz so believed in the activist cause of the Ring case that he performed his legal services for free, i.e., pro bono.

Hurwitz would side with activist judges, even when in conflict with the Constitution. In response to written questions from Senator Jeff Sessions, Hurwitz states: "I do not believe that the Constitution changes from one day to the next, although I recognize that the Supreme Court may effectively produce that result when it overrules a prior decision." Even while recognizing that the Court cannot legislate from the bench and change the meaning of the Constitution, Hurwitz states that he would not look first to the constitution and other laws, but would only consider the Constitution if other judges had not already addresses an issue in a given case. Hurwitz replied to Senator Sessions: "I would of course look to binding Supreme Court precedent first. If there were none, I would then look to precedents within my circuit. Assuming that neither my circuit nor the Supreme Court had addressed the issue, I would then analyze the language of the statute and the Constitution."

Hurwitz asserts that Constitutional Rights—such as the right to privacy—can be created by judges. Hurwitz believes that rights can be created outside of the law, by judges who decide on their own whether

those rights are 'deeply rooted in this Nation's history and tradition.' *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)." Hurwitz wrote to Senator Grassley: "The Court has held that the due process clauses protect certain fundamental rights and that the right to privacy is one of those rights."

Mr. GRASSLEY. In addition, I ask unanimous consent to have printed in the RECORD a letter signed by a variety of leaders expressing their opposition to this nomination.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MAY 24, 2012.

Re Opposition to Andrew David Hurwitz.

Hon. JON KYL,  
Hart Senate Office Building, U.S. Senate,  
Washington, DC.

DEAR SENATOR KYL: Your long and distinguished career in the Senate has given us many opportunities to agree with each other, particularly on the issues of life and defense of the unborn. In recognition of this legacy, we respectfully ask that you vote "nay" on the question of the confirmation of Andrew David Hurwitz to the United States Court of Appeals for the Ninth Circuit, and that you encourage your Senate colleagues to do the same.

Hurwitz was a key author of two pro-abortion court decisions whose rationale was significantly relied upon by the Supreme Court in Roe v. Wade. As a young law clerk to Judge Jon O. Newman (U.S. District Court Judge for the Dist. of Connecticut) Hurwitz played a key role in authoring two 1972 decisions which the U.S. Supreme Court mimicked and expanded in the majority opinion of Roe v. Wade. Hurwitz accurately claims that these pro-abortion decisions influenced the Supreme Court's decision in Roe and Hurwitz makes it clear that he is proud of his role in these pro-abortion decisions. Hurwitz wrote:

"One need no longer speculate on the point: it is now clear that Jon O. Newman [and Hurwitz] had, in words [sic] of one historian, 'crucial influence' on both the outcome and the reasoning in the [Roe v. Wade] case."

Hurwitz continued:

"[I] received some small inkling of the influence of Abele II [Judge Newman's pro-abortion decision] on the [Supreme] Court's thinking [in Roe v. Wade] in the fall of 1972, when interviewing for clerkships at the Supreme Court . . . Justice Stewart (my future boss) jokingly referred to me as 'the clerk who wrote the [pro-abortion] Newman opinion.'"

While legal experts on both ends of the abortion debate have wisely chosen to back away from the constitutionally indefensible "reasoning" of the Court's decision in Roe, Hurwitz instead chose to celebrate it. Hurwitz's recent and continued celebration of Roe places him far outside the mainstream of legal thought and demonstrates his fundamental misunderstanding of the Constitutional role of the Judiciary. As such, Hurwitz is one of President Obama's most controversial and dangerous nominees.

Hurwitz's professional record is distinguished by his significant contribution to—and defense of—one of the most activist Supreme Court opinions in history. As such, any vote for Hurwitz would stand as a tacit—if not outright—endorsement of his radical views on abortion and the constitutional role of the judiciary. One of the most enduring legacies of United States Senators is determined by the records of judges that they voted to confirm. In light of your past work to defend life, we ask that you withdraw



your support for Hurwitz and that you encourage your colleagues to vote against his confirmation. We respectfully ask for your response to our request.

Respectfully,

Penny Nance, President and CEO, Concerned Women for America;\* Tom McClusky, Executive Vice President, Family Research Council Action;\* Phyllis Schlafly, President, Eagle Forum;\* Dr. Day Gardner, President, National Black Pro-Life Union;\* Kristan Hawkins, Executive Director, Students for Life of America;\* Troy Newman, President, Operation Rescue;\* Rev. Robert Schenk, President, National Clergy Council;\* Andrea Lafferty, President, Traditional Values Coalition;\* Rev. Rick Scarborough, President, Vision America;\* Gary Bauer, President, American Values;\* Gary A. Marx, Executive Director, Faith and Freedom Coalition;\* Laurie Cardoza-Moor, President, Proclaiming Justice to the Nations;\* Janet Porter, President, Faith2Action;\* Kyle Ebersole, Editor, Conservative Action Alerts;\* Linda Harvey, President, Mission America;\* C. Preston Noell III, President, Tradition, Family, Property, Inc.;\* Kent Ostrander, The Family Foundation (KY).\*

Diane Gramley, President, American Family Association of Pennsylvania;\* Rabbi Moshe Bresler, President, Garden State Parents for Moral Values;\* Mike Donnelly, Home School Legal Defense Association;\* Rabbi Yehuda Levin, Rabbinical Alliance of America;\* Rabbi Noson S. Leiter, Executive Director, Torah Jews for Decency; Founder, Rescue Our Children;\* Rabbi Jonathan Hausman Chaplain Gordon James Klingenschmitt, PhD, The Pray In Jesus Name Project;\* Virginia Armstrong, Ph.D., National Chairman, Eagle Forum's Court Watch;\* Keith Wiebe, President, American Association of Christian Schools;\* Dr. Carl Herbster, AdvanceUSA;\* Brian Burch, President, CatholicVote.org;\* Dr. William Greene, President, RightMarch.com;\* Dr. Rod D. Martin, President, National Federation of Republican Assemblies;\* Rick Needham, President, Alabama Republican Assembly;\* Charlotte Reed, President, Arizona Republican Assembly;\* Dr. Pat Briney, President, Arkansas Republican Assembly.\*

Celeste Greig, President, California Republican Assembly;\* Rev. Brian Ward, President, Florida Republican Assembly;\* Paul Smith, President, Hawaii Republican Assembly;\* Ken Calzavara, President, Illinois Republican Assembly;\* Craig Bergman, President, Iowa Republican Assembly;\* Mark Gietzen, President, Kansas Republican Assembly;\* Sallie Taylor, President, Maryland Republican Assembly;\* David Kopacz, President, Massachusetts Republican Assembly;\* Chris Brown, President, Missouri Republican Assembly;\* Travis Christensen, President, Nevada Republican Assembly;\* Nathan Dahm, President, Oklahoma Republican Assembly;\* Ray McKay, President, Rhode Island Republican Assembly;\* Paula Mabry, President, Tennessee Republican Assembly;\* Hon. Bob Gill, President, Texas Republican Assembly;\* Patrick Bradley, President, Utah Republican Assembly;\* Ryan Nichols, President, Virginia Republican Assembly;\* Mark Scott, President, West Virginia Republican Assembly;\* Joanne Filiatreau, Board Mem-

ber, Arkansas T.E.A. Party;\* Mandi D. Campbell, Esq., Legal Director, Liberty Center for Law and Policy;\* Phillip Jauregui, President, Judicial Action Group.\*

\*Organizations listed for identification purposes only.

Mr. GRASSLEY. Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Arizona.

Mr. KYL. Mr. President, I wish to speak on a different subject primarily, but in view of my colleague's comments and my disagreement with them, let me just make a note of my position.

Mr. KYL. Mr. President, I certainly respect my colleague from Iowa. Like him, my views on the issue of abortion are very decidedly pro-life, and I too disagree with the decision in *Roe v. Wade*. I agree with him that many legal scholars believe that decision rests on very shaky legal grounds.

But I would say this about Andrew Hurwitz, the nominee who will be before us: Never in any decision he has rendered as a member of the Arizona Supreme Court has anybody I know believed he let his personal views, his personal philosophic or political views determine his judicial rulings. To the contrary, everyone with whom I have spoken, and to the degree I have been able to study his career of about a decade on the Arizona Supreme Court, it is remarkably free of the kind of politics that sometimes infuses judicial decisionmaking.

His opinions are well considered, based on the law, well written, and generally a part of a consensus court. There are both Republicans and Democrats on the Arizona Supreme Court, and Justice Hurwitz is usually with his other colleagues on the court in deciding these matters.

I think it is unfair to an extent that because he wrote a Law Review article several years ago in which one can assume he expressed a pro-choice point of view that therefore somehow he would be disqualified from serving on the Ninth Circuit Court of Appeals. In fact, here is some breaking news: President Obama nominates pro-choice candidates to courts. Obviously, I am being facetious.

I suspect most of President Obama's nominees are pro-choice. I don't ask the nominees I consult with, the ones we recommend from the State of Arizona, what their view is on any particular issue, including that issue. But I can assume the nominees of President Obama are probably more liberal—and are pro-choice—on that particular issue than my views. But President Obama is the President. He gets to nominate people. So I have to work with his White House Counsel to try to find the best possible people with two primary qualifications: One, how good a judge would that individual be in intelligence, judicial temperament, the kinds of things that make a good judge?

Secondly—and this is very important to me—will this judge decide cases

based on the law, period, the facts of the case and the law, and the U.S. Constitution or will the nominee potentially allow his or her own personal preferences, political points of view, and philosophy to be a part of the decisionmaking process?

If I believe it is the latter, then I will not support a nominee. I have opposed nominees right here on the Senate floor based on that test where I thought that based on the hearing and the record of the nominee that the individual could have a hard time separating out their own political judgments from deciding cases. Then I voted no.

This is a nominee I not only gladly vote yes on, but I am, frankly, asking my colleagues to vote yes because I absolutely, totally believe he will decide cases based upon the merits of the case, the facts, and the law, not based on the politics.

Interestingly, on this one particular issue, to my knowledge there has not been an issue before the Arizona Supreme Court in the last decade, while he has been on the court, which would call on him to decide it one way or the other. So neither side can say, well, he didn't allow it to happen or he did allow it to happen. We have not been able to find any case like that.

There have been other political kinds of issues that have come before the court—issues dealing with the death penalty and things of that sort. As I said, neither my conservative friends back in Arizona nor I have been able to find a case in which Justice Andrew Hurwitz's decisions have been based on anything other than a pretty clear reading of the law as applied to the facts of the case. I have every reason to believe in his honesty and his integrity in continuing that practice, which he has manifested over the last decade, if and when he is confirmed to the Ninth Circuit Court of Appeals or I would not have recommended him to the administration, and I would not be recommending him to my colleagues.

So with all due respect to my good friend from Iowa, whose views I share on the question of abortion, I think it would be wrong to oppose this nominee based on that fact.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. FEINSTEIN. Mr. President, I rise today to speak in strong support of the nomination of Arizona Supreme Court Justice Andrew Hurwitz to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit is the busiest Federal appellate court in the Nation. It has over 1,400 appeals pending per three-judge panel. This is the most of any circuit, and it is over two times the average of other circuits combined. Think of that: It is twice as heavily busy with cases as the average of the other circuits combined.

The Judicial Conference of the United States has declared each Ninth Circuit vacancy a judicial emergency. So today we are considering a nominee to a judicial emergency vacancy. The nominee is Justice Andrew Hurwitz of the Arizona Supreme Court, and he is very well respected. He is seasoned. He has over 25 years of practical experience and 9 years on the State supreme court. He has the strong support of the two Republican Senators from his home State, JON KYL and JOHN MCCAIN.

Candidly, I am surprised that a cloture vote is necessary. This body should be able to confirm this nominee without controversy. So I urge my colleagues to vote for cloture and to support this nomination.

Justice Hurwitz earned his bachelor's degree from Princeton University, Phi Beta Kappa, in 1968. He earned his law degree from Yale Law School in 1972 where he was note and comment editor of the Yale Law Journal.

Following graduation, Justice Hurwitz clerked for three distinguished Federal judges: Jon O. Newman, then of the District of Connecticut; Joseph Smith of the U.S. Court of Appeals for the Second Circuit; and Potter Stewart of the Supreme Court of the United States.

Following these three clerkships, Justice Hurwitz worked in private practice for over 25 years in Phoenix, AZ, where he represented clients in State courts, Federal courts, and administrative agencies.

Hurwitz's clients have included AT&T, Lucent Technologies, ABC, Clorox, the city of Phoenix, PGA Golf, the Arizona State Compensation Fund, various Native American tribes, the U.S. Conference of Mayors, the National League of Cities, and the Council of State Governments. That is a wide and diverse cross-section of companies in our country.

Hurwitz has tried more than 40 cases to final judgment. That is actually more than most appellate court judges who have been before us. He has argued numerous cases before the Ninth Circuit and other State and Federal appellate courts and argued two cases before the U.S. Supreme Court.

Justice Hurwitz was appointed to the Arizona Supreme Court in 2003, where he has built a reputation as a fair-minded and highly skilled jurist. As Senator KYL said in the Judiciary Committee:

Everyone who has practiced in Arizona before the Arizona Supreme Court on which Justice Hurwitz sits . . . is complimentary of his legal skills, temperament, and he has received widespread support [in Arizona] for his appointment . . . to the ninth circuit.

Justice Hurwitz was appointed by Chief Justice Rehnquist to serve as a member of the Advisory Committee on the Federal Rules of Evidence and was reappointed to that position by Chief Justice Roberts.

In my view, Justice Hurwitz is one of the most qualified circuit court nomi-

nees I have seen, and I have served on the Judiciary Committee for 19 years now. There are two areas of dispute I would like to address.

First, some have criticized Justice Hurwitz on the death penalty. As a Democrat who supports the death penalty, I can tell you these charges are simply wrong. On the Arizona Supreme Court, Justice Hurwitz has voted to uphold numerous death sentences. Just this year, in *State v. Cota*, he authored an opinion for the court upholding the death sentence of a man who killed a married couple who had hired him to perform house work. He joined a similar opinion this year in *State v. Nelson* which upheld the death penalty for a man who hit his 14-year-old niece on the head with a mallet. Last year, in *State v. Manuel*, he joined an opinion upholding a death sentence for a man who shot and killed the owner of a pawn shop in Phoenix.

Justice Hurwitz did argue a case in the Supreme Court called *Ring v. Arizona*, which established that a jury, not a judge, must find the facts necessary to make a defendant eligible for the death penalty. The *Ring* decision was 7 to 2. It is part of a line of cases—beginning with *Apprendi v. New Jersey* in 2000—in which Justices Scalia and Thomas have been at the forefront of expanding defendants' rights to have certain facts found by juries, not judges. In fact, Justices Scalia and Thomas concurred in the decision. Justice Breyer dissented. So it is not something that breaks down along ideological lines.

There is simply no question Justice Hurwitz will follow the law on the death penalty if he is confirmed. He has done so for the last 9 years.

The second issue is a Law Review article Hurwitz wrote in 2002 about a decision by a district court judge 40 years ago that may have influenced—I say may have influenced—the Supreme Court's decision in *Roe v. Wade*.

In response, I would first say, as Senator KYL said in the Judiciary Committee, that Justice Hurwitz did not express his personal views on the *Roe* decision. Second, the real question is how Justice Hurwitz has comported himself as a judge because we have long years to look at. By all accounts, his record has been superb. Not once has an opinion he has written been overturned by a higher court. Let me repeat: Not once has he been overturned by a higher court. Yet it is my understanding that 60 votes is hard-pressed to get in this body, and that is hard for me to understand.

As Senator KYL has also said, Justice Hurwitz's "opinions obviously carefully adhere to the law . . . [and] that is what most of us are looking for in judicial nominations." And that is absolutely right.

In the Judiciary Committee I listened to Senator KYL's strong defense of Justice Hurwitz. JON KYL is not a liberal; he is a rock-rib conservative. I said at the time that Senator KYL's

statement was "music to my ears" because I thought we finally might be getting away from this effort to find a single statement or speech in someone's background to use to condemn him or her for all time.

In this case, it is a district judge's decision from 40 years ago and a Law Review article. If we have 41 Members who are going to vote against this man because he wrote a Law Review article about a case decided 40 years ago, that is a real problem, particularly because this man is a supreme court justice of the State of Arizona, and particularly because both Republican Senators support him. I, as a Democrat—and Democrats on our side in the Judiciary Committee—also support him. There may be something else that somebody wrote 40 years ago in college—and we have seen some of this too. It goes on and on, and it is wrong.

I agree with Senator KYL that this is a highly qualified nominee for the busiest circuit in the country and a circuit that has a judicial emergency. So I urge my colleagues to vote for cloture to support Justice Hurwitz's nomination by virtue of education, by virtue of training, by virtue of private practice, and by virtue of court record, his record is unimpeachable, and I stand by that.

So I thank the Chair. I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEE. Mr. President, I rise today to express my opposition to the nomination of Andrew Hurwitz to the U.S. Court of Appeals for the Ninth Circuit. I would first note that this year we have already confirmed 25 of President Obama's judicial nominees.

At this point in 2004, the last Presidential election year during a President's first term, the Senate had confirmed only 11 of President Bush's judicial nominees. At precisely the same point in 1996, during President Clinton's first term, the Senate had confirmed only three judicial nominees. So this year we have confirmed more than twice as many of President Obama's judicial nominees as we did during a comparable period for President Bush and more than eight times as many as we did for President Clinton.

Of the nominees we have already confirmed so far this year, two are now serving as appellate judges on the Ninth Circuit. The Ninth Circuit is an important appellate court in America, with jurisdiction over about 60 million Americans—roughly 20 percent of our country's total population.

Approximately one-third of all reversals handed down by the Supreme Court last term were from the Ninth

Circuit. Indeed, the Ninth Circuit has developed something of a reputation for eccentric legal theories and unusual results. As one commentator suggested, “There should be two Supreme Courts, one to reverse the U.S. Court of Appeals for the 9th Circuit, the other to hear all the other cases.”

We should therefore exercise some caution in confirming yet another liberal nominee to the Ninth Circuit. But Mr. Hurwitz is not simply another liberal nominee. Mr. Hurwitz has sought to claim credit for one of the most controversial and constitutionally indefensible decisions in Supreme Court history—*Roe v. Wade*.

In 1972, Mr. Hurwitz clerked for Judge Jon Newman on the U.S. District Court for the District of Connecticut. That year, as Mr. Hurwitz later put it: “[t]he abortion issue dominated [Judge Newman’s time],” and Mr. Hurwitz helped Judge Newman write two key abortion decisions known as *Abele I* and *Abele II*. These two decisions established the conceptual groundwork for the decision that became known later as *Roe v. Wade*. They relied on a single discredited, historical account to conclude that Connecticut’s abortion laws were not in fact passed to protect the life of the fetus; they relied on flawed science to conclude that there was no objective way of knowing when human life begins; and they relied on a fabricated and arbitrary legal framework of viability to analyze the competing rights of the individual and the State.

Given the woefully misguided reasoning behind these decisions, one would assume that a former law clerk would keep quiet about his personal role in drafting opinions that lack serious constitutional grounding. Indeed, most former law clerks—who have a certain duty not to discuss internal deliberations—would consider themselves ethically bound not to talk about decisionmaking in individual cases, and certainly would not seek to attract public attention to their role in particular decisions. But Mr. Hurwitz did just that.

In a 2002 law review article, Mr. Hurwitz recounted how he received a Supreme Court clerkship partly on the basis of his role in helping draft Judge Newman’s 1972 abortion decisions. Mr. Hurwitz wrote that Justice Potter Stewart, who hired Mr. Hurwitz as a clerk at the Supreme Court, “jokingly referred to [Hurwitz] as ‘the clerk who wrote the Newman [abortion] opinion.’” And Mr. Hurwitz made clear that the opinion had a “demonstrable effect” on the Supreme Court’s approach to abortion.

My concern with respect to Mr. Hurwitz’s asserted role in *Roe v. Wade* goes beyond his attempt to take credit for that decision. Mr. Hurwitz has been nominated to serve as a Federal appellate judge, and his endorsement of the reasoning underlying *Roe v. Wade* raises immense concerns about his constitutional jurisprudence. While Mr.

Hurwitz continues to write about *Roe* with fondness, nostalgia, and even pride, most legal scholars—including many who hold very liberal political views—concede that *Roe* was an extraordinarily flawed legal decision. For example, Prof. John Hart Ely has written:

[*Roe v. Wade*] is bad because it is bad constitutional law, or rather it is not constitutional law [at all] and gives almost no sense of an obligation to try to be.

Prof. Lawrence Tribe has written:

[B]ehind its own verbal smokescreen, the substantive judgment on which [*Roe*] rests is nowhere to be found.

Prof. Akhil Reed Amar has written:

*Roe*’s main emphasis is neither textual, nor historical, nor structural, nor prudential, nor ethical: it is doctrinal. But here too it is a rather unimpressive effort. As a precedent-follower, *Roe* simply string-cites a series of privacy cases . . . and then abruptly announces with no doctrinal analysis that this privacy right is broad enough to encompass abortion.

Prof. Cass Sunstein likewise has written:

In the Court’s first confrontation with the abortion issue, it . . . decided too many issues too quickly. The Court should have allowed the democratic processes of the states to adapt and to generate solutions that might not occur to judges.

Unlike these liberal legal scholars, Mr. Hurwitz fails to appreciate that *Roe* represents exactly the kind of constitutional activism Federal courts must avoid—inventing new rights without any substantive or significant constitutional analysis.

Given the chance at his Senate Judiciary Committee hearing to disassociate himself from *Roe v. Wade*, Mr. Hurwitz did not do so. Instead, his only relevant response—an assertion also unpersuasively made by some of my colleagues—has been that his 2002 law review article was merely descriptive and did not express any personal opinion as to the merits of *Roe*. But to anyone who has reviewed Mr. Hurwitz’s article and the laudatory tone with which it discusses the connection between Judge Newman’s opinions and *Roe v. Wade* itself, this assertion simply is not credible.

Mr. Hurwitz wrote that Judge Newman’s opinions on abortion were “memorable, innovative, careful, and meticulous.” He described them as exerting a “profound, critical, immediate, direct, and crucial” influence on *Roe v. Wade*, which he described as a landmark opinion of the Supreme Court.

Mr. Hurwitz cannot have it both ways. He cannot seek credit for his role in developing a jurisprudence that is unmoored from the Constitution and that has fundamentally disrespected human life, and then later claim he was only retelling a story. Mr. Hurwitz’s attempts to take credit for, and subsequent refusal to distance himself from, constitutional decisions that lack serious constitutional foundation casts an unacceptable degree of doubt on his ability to serve in the role of a Federal appellate judge.

Of the countless qualified individuals who would make excellent appellate judges to serve on the Ninth Circuit, President Obama chose to nominate the one person who, by his own account, was a key intellectual architect of the profoundly flawed legal arguments in *Roe v. Wade*—someone who fails to appreciate the illegitimacy of constitutional activism and who, even today, looks back on his role in that case with pride.

It is for this reason that I urge all of my colleagues to vote against the nomination of Andrew Hurwitz.

• Mr. VITTER. Mr. President. I oppose the nomination of Andrew Hurwitz to the Ninth Circuit Court of Appeals because I have serious concerns with his capability to serve in the role of a lifetime Federal appellate judge. His public statements regarding, and past contributions to, previous Supreme Court decisions give serious pause as to whether we should confirm him to serve on a Federal appellate court.

Mr. Hurwitz has effectively taken credit for helping develop the legal architecture for *Roe v. Wade* while serving as a law clerk to then-Judge Jon Newman. Judge Newman, a U.S. District Judge for the District of Connecticut, issued two 1972 decisions which are clearly reflected and expanded upon in the Supreme Court’s opinion in *Roe v. Wade*. Mr. Hurwitz played a key role in authoring these decisions and he has publicly expressed great pride in this fact. He wrote a 2002 law review article praising *Roe* and bragged that he helped craft Newman’s opinion that was reflected in “almost perfect lockstep” in the Supreme Court’s decision. This concerns me because not only is *Roe* a constitutional abomination, but a moral abomination that has resulted in the killing of tens of millions of unborn children.

Mr. Hurwitz has claimed credit for shaping a judicial decision that fundamentally disrespected human life and is completely unfounded in the Constitution. *Roe v. Wade* forever changed the debate about abortion in this country by creating a nationwide policy of abortion-on-demand through one of the worst cases of judicial activism in history. It is so poorly reasoned that both conservative and liberal legal experts and scholars acknowledge that *Roe* was a deficient opinion that lacks any legitimate legal reasoning in support of its holding.

His willful failure to recognize the legal deficiencies of the *Roe* opinion and his self-promotion for playing a part in such an unfortunate event in this country’s judicial history makes clear that he is not qualified to serve in the role of a Federal appellate judge.

I believe we must support the dignity and sanctity of all human life and defend those who cannot defend themselves. This judicial nominee would do the opposite, which is why I must oppose Andrew Hurwitz’s nomination to the Ninth Circuit Court of Appeals. •

Mr. KYL. I support the nomination of Justice Andy Hurwitz to the Ninth Circuit Court of Appeals.

Justice Hurwitz received his undergraduate degree from Princeton University (A.B. 1968) and his law degree from Yale Law School (J.D. 1972), where he was Note and Comment Editor of the Yale Law Journal.

He served as a law clerk to Judge Jon O. Newman of the United States District Court for the District of Connecticut in 1972; to Judge J. Joseph Smith of the United States Court of Appeals for the Second Circuit in 1972–1973; and to Associate Justice Potter Stewart of the Supreme Court of the United States in 1973–1974.

Justice Hurwitz has served on the Arizona Supreme Court since 2003. Before joining the Arizona Supreme Court, Justice Hurwitz was a partner in the Phoenix firm of Osborn Maledon, where his practice focused on appellate and constitutional litigation, administrative law, and civil litigation. He is a member of the bar in Arizona and in Connecticut; he received the highest grade on the Arizona Bar examination in the summer of 1974. He argued two cases before the Supreme Court of the United States. Justice Hurwitz served as chief of staff to two Arizona governors—from 1980 to 1983 and in 1988. He was a member of the Arizona Board of Regents from 1988 through 1996, and served as president of the Board in 1992–1993.

He has regularly taught at the Arizona State University College of Law, and was in residence at the College of Law as Visiting Professor of Law in 1994–1995 and as a Distinguished Visitor from Practice in 2001. He was appointed by Chief Justice Rehnquist in 2004 as a member of the Advisory Committee on the Federal Rules of Evidence and reappointed to a second term by Chief Justice Roberts in 2007.

His easy to see why Justice Hurwitz was awarded the ABA's highest rating: Unanimous "Well Qualified."

During his 9-year tenure on the Arizona Supreme Court, Justice Hurwitz has consistently demonstrated a commitment to faithfully apply existing law and precedent regardless of his own policy preferences. A few examples are quite telling:

In 2006, he upheld the constitutionality of a 200-year sentence for a man convicted of possessing twenty pictures of child pornography even though Justice Hurwitz personally felt that the sentence was too long. Responding to the dissent in *State v. Berger*, he wrote:

As a policy matter, there is much to commend Justice Berch's suggestion that the cumulative sentence imposed upon Mr. Berger was unnecessarily harsh, and my personal inclination would be to reach such a conclusion. As a judge, however, I cannot conclude under the Supreme Court precedent or even under the alternative test that Justice Berch proposes that Berger's sentences violate the United States Constitution.

In 2005, in *State v. Fell*, Justice Hurwitz, followed Supreme Court

precedent and held that "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed." In so doing, he rejected a position similar to the one he had advocated for at the Supreme Court just 3 years earlier.

Justice Hurwitz repeatedly reiterated his commitment to judicial restraint in his testimony to the Judiciary Committee. To briefly quote him: "Judgments about policy matters are within the province of the legislature, and courts should not second-guess such judgments."

Justice Hurwitz's steadfast commitment to this philosophy is likely the reason that no opinion written or joined by Justice Hurwitz has ever been overturned by the United States Supreme Court.

I support the nomination of Justice Hurwitz to the Ninth Circuit because I believe that his abilities, experience, and commitment to judicial restraint will enable him to serve the residents of the Ninth Circuit as ably as he has served the people of Arizona.

Today, I am very disappointed because a lot of friends of mine in the pro-life community are, to put it charitably, exaggerating one Law Review article that he wrote attributing to Justice Hurwitz all kinds of views which are not appropriate based upon the facts. It has to do with the pro-life issue.

I want to set the record straight on Justice Hurwitz's article about Judge Jon O. Newman, which has unfortunately been blown out of proportion. About 10 years ago, the New York Law School Law Review solicited Judge Jon O. Newman's former clerks to write articles for a symposium dedicated to Judge Newman's first 30 years on the bench. Five clerks agreed, including Justice Hurwitz, who wrote about the most influential opinion written by Judge Newman while Justice Hurwitz was clerking for him.

Justice Hurwitz wrote the Newman article to "document the historical record about the effect of Judge Newman's decisions on subsequent Supreme Court jurisprudence." [Hurwitz Responses to the Written Questions of Senator JEFF SESSIONS, question 1(a), pg. 1.] He did not express his "personal opinions" on the merits of Judge Newman's reasoning in *Abele I* or *Abele II*, something that Justice Hurwitz believes would be "improper for a law clerk to do, either then or now." [Hurwitz Responses to the Written Questions of Senator JEFF SESSIONS, question 1(a), pg. 1.]

Although Justice Hurwitz "assisted in the research," "Judge Newman wrote the [Abele II] opinion, as he did all opinions which bore his name during the time [Justice Hurwitz] clerked for him." [Hurwitz Responses to the Written Questions of Senator TOM COBURN, question 8, pg. 5.] Further, as a law clerk, Justice Hurwitz was required to implement Judge Newman's

preferences, not his own. Thus, Judge Newman's opinion cannot be attributed to Justice Hurwitz.

If someone told me that Justice Hurwitz was pro-choice, I would believe that, though he has never said, and he did not express his personal opinions in the Law Review article about the decision that his previous boss, a federal judge, had written. His boss, Judge Newman, wrote an opinion that was part of the basis for *Roe v. Wade*, a decision with which I wholeheartedly disagree. Andrew Hurwitz wrote about that. Somehow my friends in the pro-life community have turned this into a federal case against him. What do they suggest? That he approved of *Roe v. Wade*. The point is that Andrew Hurwitz has never in his career on the Arizona State Supreme Court evidenced any inability to separate his own personal views from the judging that he is required to do. And I would defy any of these people who think they know more about it than I do to show me a case if they can find one where that is not true.

Justice Andrew Hurwitz is known in Arizona as a very fair jurist who applies the law fairly and without regard to his personal inclinations. That is the kind of judge he will be on the Ninth Circuit of Appeals. If my reputation among my conservative colleagues means anything, I simply say I know the man; I have known him a long time; and my good friends in the conservative community have every confidence in Andrew Hurwitz.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEE. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### CLOTURE MOTION

Under the previous order, the cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

#### CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of Andrew David Hurwitz, of Arizona, to be United States Circuit Judge for the 9th Circuit.

Harry Reid, Patrick J. Leahy, Al Franken, Daniel K. Inouye, Bill Nelson, Amy Klobuchar, Jeff Bingaman, Michael F. Bennet, Herb Kohl, Patty Murray, Robert P. Casey, Jr., Tom Udall, Richard Blumenthal, Benjamin L. Cardin, Sheldon Whitehouse, Christopher A. Coons, Mark Begich.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.