

Congress of the United States
Washington, DC 20515

Monday, June 11, 2012

Dear Senators:

We urge you to oppose the pending nomination of Mr. Andrew David Hurwitz for appointment to the Ninth Circuit Court of Appeals. Although Members of the House of Representatives hold no official role in the confirmation of federal judges, we are obligated by the oath of office we swore to uphold the Constitution and act to defend against any proposed threats to it. Mr. Hurwitz's public statements regarding, and past contributions to, previous Supreme Court decisions give serious pause as to whether he is fit to serve as a life-tenured jurist on any Federal Court of Appeals.

As a young law clerk to Judge Jon O. Newman in the U.S. District Court Judge for the District of Connecticut, Mr. Hurwitz played a key role authoring *Able* and *Able II*; two 1972 decisions which are clearly reflected and expanded upon in the Supreme Court's ruling on *Roe v. Wade*. In a 2002 New York Law Review article, Mr. Hurwitz proudly recounts his widely-recognized influence on *Able* and *Able II*, and accurately cites the "crucial influence" these decisions had on the Supreme Court's decision in *Roe*.

Roe stands almost undisputed as an unprecedented judicial usurpation of legislative authority in its fabrication of a "right" to abortion—a "right" that had never before existed in the Constitution. Yet Mr. Hurwitz continues to distinguish himself among legal scholars of all stripes by standing almost entirely alone in his continued defense of what he calls "careful and meticulous analysis of the competing constitutional issues." Despite ample time and experience as both a lawyer and a judge, Mr. Hurwitz continues to hold firmly to these erroneous views.

Additionally, Mr. Hurwitz repeated this trend in his arguments to the Supreme Court in *Ring v. Arizona*. **Acting as a pro-bono attorney, Mr. Hurwitz suggested that the Supreme Court change the wording of the Constitution in order to arrive at a ruling based on his beliefs, not on the rule of law.** These two examples illustrate significant divergence from the standard we believe life-tenured federal judges should follow in deciding questions of law and fact.

Seldom does the Senate have the opportunity to review a nominee whose views on *Roe v. Wade* are so clearly known. Far more rarely, do you as Senators have the opportunity to consider a judge who proudly claims their significant contributions to the creation of that opinion, and the invention of "Constitutional" protection for abortion. A nominee like Mr. Hurwitz who played so notable a role in one of the most significant exercises of judicial activism in our nation's history must not be confirmed.

We urge the U.S. Senate to oppose Mr. Hurwitz's confirmation, and act to return his nomination to the President immediately. Such decisive action would provide President Obama the opportunity to consider nominating an Appellate Court justice who has a clear history of applying the law and Constitution to the set of facts before him or her—not a

jurist who has a history of reading new theories or personal beliefs into the legal questions presented.

Thank you,

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