

**Responses of Andrew D. Hurwitz
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Chuck Grassley**

- 1. You clerked for Judge Newman, then a District Court Judge for the District of Connecticut, when he presided over the two abortion cases, known as *Abele I* and *Abele II*. Over 30 years later, in 2003, you wrote a lengthy law review article entitled “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” Your article chronicled the influence *Abele II* had on the Supreme Court’s *Roe v. Wade* decision.**

In footnote 55 of your article, you wrote that in fall of 1972, just after you finished clerking for Judge Newman, you interviewed for a Supreme Court clerkship. Is it fair to say that this interview occurred after the *Abele II* opinion was issued but before the Supreme Court ruled in *Roe v. Wade*?

Response: Yes.

- 2. In your article, you state that Judge Newman hoped to “side-step” the constitutional confrontation in *Abele I* by holding Connecticut’s interest in protecting the life and morals of the mother was not a sufficient state interest to overcome the right to privacy. You then disclosed the following about Judge Newman’s rationale:**

“The clear unstated premise of Judge Newman’s approach (made express in conversations with his law clerk) was that the Connecticut legislature... would leave well enough alone and not provoke a constitutional attack on a second statute.”

You seem to be suggesting Judge Newman believed the *Abele I* decision not only struck down a 110 year-old statute outlawing abortion, but at the same time, had effectively precluded the legislature from offering a revised statute.

Do you believe Judge Newman’s approach was the appropriate?

Response: 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. I did not mean in the article, however, to suggest that Judge Newman’s concurring opinion in *Abele I* had precluded the legislature from offering a revised statute (it did not), but rather to document his prediction (which turned out to be incorrect) that such a statute would not be passed.

- 3. You note in your article that, contrary to what Judge Newman believed would happen, the Connecticut legislature quickly responded to *Abele I* and passed a new statute. The new statute included all of the same prohibitions as the original, but this time it expressly stated the State’s interest was in protecting the life of the unborn child. You wrote:**

“[Judge Newman] candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.”

Do you agree that Judge Newman should have deferred to the legislature upon recognizing that the court could never resolve these “philosophical” questions?

Response: As noted above, 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. Judgments about policy matters are within the province of the legislature, and courts should not second-guess such judgments. However, a court may be required to determine whether a statute before it is constitutional, notwithstanding the good faith belief of the legislature that the statute rests on sound policy grounds.

- 4. You also observed that the development of *Roe*’s much-criticized trimester framework “provides the most direct evidence of Judge Newman’s influence on the . . . decision.” In your article, you emphasize a portion of Judge Newman’s opinion in *Abele II* that suggests viability as an appropriate threshold. You then chronicled how, originally, Justice Blackmun’s draft opinion drew the line for legal abortion at the first trimester. But, Judge Newman’s opinion influenced the Justices’ thinking. You therefore conclude:**

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.

Even though Judge Newman expressly stated in *Abele II* that “we need not and should not express any conclusion about statutes advancing more limited interests” such as preserving life after viability, he nonetheless speculated that “the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense.” Judge Newman then took the opportunity to note that there “appears to be a medical consensus that the fetus normally becomes viable approximately 28 weeks after conception.” Ultimately, Judge Newman’s dictum on viability became the line the Supreme Court chose to draw in *Roe*.

- a. Do you agree that Judge Newman’s discussion of viability was dictum?**

Response: Yes. He described it as such in *Abele II*.

- b. Please explain your view on the proper use and role of dictum in judicial opinions.**

Response: I believe that courts should not decide issues not posed by the case before them. As I have said in several opinions, if the issue is important, it will be posed by a subsequent case in which the court will have the benefit of arguments by counsel and, in the case of an appellate court, the benefit of an opinion below. If a judge believes that it is important to flag an issue for future consideration, he can do so simply by noting that the issue was not decided because it was not argued, as I have done in the past. *See, e.g., Gipson v. Kasey*, 214 Ariz. 141, 148 ¶ 41, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring).

c. In what circumstances do you believe it is appropriate for a judge to opine on matters not essential to the disposition of the case?

Response: As noted above, I do not think it appropriate for judges to decide an issue not before the Court.

5. Do you believe there is a right to privacy in the U.S. Constitution?

Response: Yes, the Supreme Court has so held in a line of cases that includes *Griswold v. Connecticut*, 381 U.S. 479 (1965).

a. Where is it located?

Response: The Supreme Court has indicated that the right to privacy is a liberty interest protected by the due process clauses of the Fifth and Fourteenth Amendments. As a Ninth Circuit judge I would be bound by and would follow those Supreme Court decisions.

b. From what does it derive?

Response: The Court has held that the due process clauses protect certain fundamental rights and that the right to privacy is one of those rights.

c. What is your understanding, in general terms, of the contours of that right?

Response: The Court has described the right to privacy protected by the due process clause as including “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

6. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

- a. **Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?**

Response: The Supreme Court has held that there are certain fundamental rights protected by the Constitution that are not expressly enumerated. I do not think, however, that those rights are identified by “reading between the lines” of the Constitution. The Supreme Court has held that those rights are identified by determining whether they are “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

- b. **Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?**

Response: No. Although some Justices have so suggested, I do not think that the Supreme Court has adopted such an approach and I believe that the job of a judge interpreting the Constitution is difficult enough without requiring a judge to search for “penumbras” and “emanations.”

7. **During an ABA-sponsored panel covering capital punishment cases and the affects they have on civil litigation, you said Judges presiding over capital cases often ‘take the easy way out’ by relying on the harmless error standard of review rather than confronting the “real issues of the case.”**

- a. **Please explain what you meant by this comment?**

Response: I do not have a transcript or notes from that panel, but my recollection is that I spoke at that panel about a problem peculiar to capital cases, where the jury is not only the finder of fact on guilt but also makes the decision on sentencing. Appellate courts correctly find error at trial harmless when the proof of guilt is overwhelming, as it often is in capital cases. But I was concerned that some courts did not independently determine whether trial error could have affected the jury’s sentencing decision, given that *Chapman v. California*, 386 U.S. 18 (1967), requires the state to establish beyond a reasonable doubt that error of a constitutional dimension could not have affected a jury verdict.

I did not suggest that the harmless error doctrine is not applicable in capital cases. I have both written and joined opinions in which harmless error was found and death sentences were affirmed.

- b. **How are judges shirking their duty by hiding behind the harmless-error standard rather than confronting the real issues of the case?**

Response: See above. Because in many cases there is overwhelming evidence of the guilt of a capital defendant, the issue of importance is often whether the penalty phase of the trial has been conducted without prejudicial error, and courts

should separately determine whether harmless error during the guilt phase contributed to a verdict in the penalty phase.

8. Are you personally opposed to the death penalty?

Response: As a sitting judge, I do not believe that is appropriate to express personal opinions as to matters that come before our courts. The Supreme Court has made clear that, except in very limited instances, the death penalty is not cruel and unusual punishment, and I have voted in scores of cases to impose a death penalty.

9. Do you believe capital punishment is a constitutionally valid form of punishment?

Response: Yes. The death penalty is a constitutionally appropriate form of punishment with very limited exceptions (youth, mental retardation) specified by the Supreme Court.

10. While a member of the Arizona Board of Regents, the Board confronted the issue of affirmative action on several occasions. In fact, it undertook two formal studies on minorities in the Arizona university system, one in 1989 and another in 1996. During the 1989 study, you chaired a sub-committee on the task force.

a. What was the name of the sub-committee and its particular function in the study?

Response: I cannot recall, or find any records, as to the nature of the subcommittee I chaired.

b. Please describe your roll in the context of the overall study process.

Response: In 1989, I was one of 31 citizens (and 5 members of the Board of Regents) asked to study the issues of minority recruitment, retention, and graduation in the Arizona University systems as a member of the Ad Hoc Committee on University Access and Retention. The Committee eventually submitted a report, entitled "Our Common Commitment," to the Board of Regents, and I have supplied a copy of that report to the Judiciary Committee. I left the Board in 1996, and did not participate in the study undertaken that year.

11. Beginning in 1995, questions were raised in Arizona about the propriety of the affirmative action policies used by the state's universities. In 1996, the Board of Regent's commissioned a follow-up study to the 1989 study.

Part of the genesis of this debate was California's then-recently passed Proposition 209, which prohibited, in part, the use of "race, sex, or ethnicity" in public school admissions criteria. You cited Proposition 209 in a 1999 article for the Arizona Business Gazette that praised affirmative action and criticized Proposition 209.

Since that time, the U.S. Supreme Court ruled in *Grutter v. Bollinger*, which declared a 25-year sunset on Constitutionally-permissible affirmative action policies.

- a. In light of *Grutter*, have your views on affirmative action changed? If so, how?

Response: *Grutter* holds that law schools can have a compelling interest in attaining a diverse student body and can use narrowly tailored admission programs to achieve that goal consistent with the equal protection clause of the Fourteenth Amendment. The *Grutter* opinion endorses Justice Powell's opinion in *Regents of California v. Bakke*, 438 U.S. 265 (1978). My view before *Grutter* was that Justice Powell's opinion effectively was the controlling opinion in *Bakke* -- and thus binding on lower courts -- as it stated the narrowest ground for the Court's disposition of the case. By endorsing Justice Powell's opinion (although finding it not necessary to conclude whether it was formally binding as precedent), *Grutter* was consistent with my previous views.

- b. Justice Thomas, in his opinion concurring in part and dissenting in part in *Grutter*, cited more recent Boalt Hall admission statistics. He noted that, despite Prop. 209, Boalt Hall eventually was able to increase the representation of minority students in its entering class to levels higher than when affirmative action policies were in place. In light of this information, do you still believe that affirmative action policies are necessary to avoid a "mediocre" legal profession?

Response: I have no reason to question the statistics cited by Justice Thomas. Nor am I aware of the measures taken by Boalt Hall before *Grutter* to recruit and retain qualified minority applicants. In the article cited, I suggested that law school classes "made up of *only* the majority" would lead to a mediocre profession and suggested that there were appropriate mechanisms available under the Constitution to avoid that result. I believe those statements are consistent with the later opinion of the Court in *Grutter*. Since *Grutter*, all law schools of which I am aware have managed to avoid admitting classes made up of only the majority, while still maintaining high standards of quality.

12. What is the most important attribute of a judge, and do you possess it?

Response: I think that the most important attribute of a judge is fidelity to the law and the ability to decide cases solely on the facts and law before the court. I believe that my record on the Arizona Supreme Court demonstrates that I possess this attribute, and the surveys conducted by the Arizona Judicial Performance Review Commission confirm that those who have appeared before me believe I have this attribute.

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- 13. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: Above all, a judge must have humility. Humility requires that a judge understand that his role in our system of government, while important, is limited. The role of a judge is not to make policy decisions or second-guess the other branches of government, but rather to apply the law to the facts of the case before him. Humility requires that judges recognize that they are not infallible. Humility also requires that judges interact with all who come before them in a courteous and professional fashion and accord all a fair judgment of their cases. I believe that my record on the Arizona Supreme Court demonstrates that I possess this temperament, and the surveys conducted by the Judicial Performance Review Commission confirm that those who have appeared before me believe I have such a temperament.

- 14. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

- 15. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If the case of first impression involved statutory or constitutional interpretation, my first resort would always be to the language of the relevant provision. If the language is clear and unambiguous on the point at issue, there is no need to resort to other sources. If not, I would consider the historical context in which the provision was adopted, the intent of the drafters of the provision, and in the case of statutory construction, the provision's relationship with the broader statutory scheme as a whole. I would also review relevant decisions of the Supreme Court and the Ninth Circuit. Even when there is no controlling precedent that conclusively resolves the issue at hand, there is often precedent which gives some guidance. If the issue were one on which neither the Supreme Court nor the Ninth Circuit had spoken, but which other courts (including state courts) had addressed, I would also look to such out-of-circuit authority for guidance.

- 16. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own best judgment of the merits?**

Response: As a circuit judge, I would be obliged to follow a Supreme Court decision even if I believed it in error. As a state court judge, I have the same obligation. A circuit

judge should follow previous decisions of the Circuit unless and until they are reexamined through the en banc procedure or overruled by the Supreme Court.

17. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A statute enacted by Congress is entitled to a strong presumption of constitutionality. Members of Congress take an oath to support and defend the Constitution, and courts should start from the premise that other branches of government have acted in a constitutional fashion. If, however, a court concludes that a statute was not authorized by the powers granted Congress under Article I of the Constitution, or infringes upon rights protected under the Constitution, it has a duty to say so.

18. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: In general, I think that the principle of stare decisis dictates against an appellate court overturning its own precedent within the circuit. If, however, a panel decision is contrary to Supreme Court precedent, contrary to another decision of the circuit (something that should very rarely be the case), or otherwise manifestly flawed, the en banc procedure provides a mechanism for overturning the decision.

19. Please describe with particularity the process by which these questions were answered.

Response: I personally drafted these responses and reviewed the draft with an official of the Department of Justice before submitting them.

20. Do these answers reflect your true and personal views?

Response: Yes.