

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

1. In 2002, you published an article in the *New York Law School Legal Review* entitled, “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” The article analyzes two opinions (*Abele I*, *Abele II*) authored by Judge Newman, then on the U.S. District Court of Connecticut, and their influence on the Supreme Court’s decision in *Roe v. Wade*. According to your article and your Senate Questionnaire, you clerked for Judge Newman at the time he authored these opinions.

- a. In your article, you praised Judge Newman’s reasoning in these cases as a “careful and meticulous analysis of the competing constitutional issues” and described his decision in *Abele II* as “striking, even in hindsight.” Are these your opinions today?

Response: The article was written for a New York Law School Law Review Symposium dedicated to Judge Newman’s first thirty years on the bench, and I was invited as one of his former clerks to submit an article. I tried at that time to document the historical record about the effect of Judge Newman’s decisions on subsequent Supreme Court jurisprudence without expressing my personal opinions as to the correctness of the Judge’s reasoning, something I think it would be improper for a law clerk to do, either then or now. As a sitting judge, I would regard it as inappropriate to express such opinions today (the article was written before I joined the bench, although published thereafter). Whether or not one agrees with his conclusions, I do believe that Judge Newman carefully identified the important competing constitutional interests involved in the *Abele* case, particularly in light of then-existing Supreme Court jurisprudence, and that the Supreme Court’s attention to this new district judge’s opinion was striking.

- b. In your article, you wrote that Judge 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 clearly could lawfully be terminated under *Griswold*.” Do you believe that there are any significant differences between an unfertilized ovum and a human fetus? Please explain your answer.

Response: The quoted language is an accurate description of the starting point of Judge Newman’s analysis in *Abele II*. He eventually did conclude, however, that a state has a substantially greater interest in protecting a fetus than an unfertilized ovum. There are obvious biological differences between an unfertilized ovum and a human fetus. Subsequent Supreme Court decisions reflect those distinctions, allowing greater state regulation of abortion than of contraception.

- c. **In your article, you wrote that 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 believe that the question of when human life begins is a matter of biology or of philosophy? Please explain your answer.**

Response: The quoted language is an accurate description of what Judge Newman said in *Abele II*. I recognize a wide variety of sincere views are held by reasonable people as to this issue, but, as a sitting judge, I believe that I should not express personal views on such matters. I can assure the Committee that my personal views on this subject, or any other, would not play a role in my judicial decision making, and never have.

- d. **Do you believe that the Constitution, properly interpreted, confers a right to abortion?**

Response: The Supreme Court has held that, although states may regulate a woman’s access to abortion, they may not entirely prohibit the procedure. As a circuit judge, I would be bound to follow all Supreme Court precedent.

- e. **Do you believe that the Constitution, properly interpreted, compels taxpayer funding of abortion?**

Response: No. The Supreme Court held in *Harris v. McRae*, 448 U.S. 297 (1980), that the Constitution does not compel such funding.

- f. **Do you believe that the Constitution, properly interpreted, prohibits informed consent and parental involvement provisions for abortion?**

Response: No. The Supreme Court held in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that the Constitution does not prohibit informed consent and parental involvement provisions.

- g. **In your article, you wrote: “In sweeping dictum, Judge Newman then went on to confront the state’s argument that its laws were necessary to prevent the abortion of viable fetuses.” Do you believe that it is appropriate for judges to engage in “sweeping dictum”? Please explain your answer.**

Response: No. I believe that courts should not unnecessarily decide issues not posed by the case before them. As I have said in several opinions, if the issue is truly important, it will be posed by a subsequent case in which the court will have the benefit of arguments of counsel and in the case of an appellate court, the benefit of an opinion below. See, e.g., *Gipson v. Kasey*, 214 Ariz. 141, 148 ¶ 41, 150 P.3d 228, 235 (2007) (Hurwitz, J., concurring).

- h. **In your article, you cited correspondence between Justices Blackmun, Powell, and Marshall concerning “when the State’s legitimate interests might allow restriction of abortion rights” – after the first trimester, following viability, or at some other point. Ultimately, the Justices were influenced by Judge Newman’s choice of viability as the point at which a state may place restrictions on a woman’s “abortion freedom.” The Justices agreed to this cut-off despite the fact that, as you wrote, “Justice Powell recognized that the Court did not have to treat the issue at all.” Do you believe that it is appropriate for judges to decide an issue not before the court in order to choose among competing policy considerations? Please explain your answer.**

Response: As noted above, I do not think it appropriate for judges to decide an issue not before the Court, and I do not think that choosing among competing policy considerations justifies doing so.

2. **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.”**

- a. **Assuming the *Arizona Attorney* accurately quoted you, please explain whether you were referring to the experience of arguing before the Court, or the outcome of the case.**

Response: I was referring to the experience of arguing before the Supreme Court.

- b. **Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

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

- c. **Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: No. The Supreme Court has made clear that the death penalty is not cruel and unusual punishment. I have voted in scores of cases to impose a death penalty, and could not have done so consistent with my oath to support and defend the Constitution if the penalty were per se cruel and unusual.

3. **In *Roper v. Simmons*, Justice Kennedy relied in part on “evolving standards of decency” in holding that capital punishment for any murderer under the age of 18 was unconstitutional.**

- a. **Do you agree with Justice Kennedy’s analysis? Please explain your answer.**

Response: As a judge, I am bound to follow Supreme Court precedent, whether or not I would have employed the same analysis as the opinion of the Court in any particular case. I therefore would be required to conclude that capital punishment could not constitutionally be imposed on a murderer under the age of 18.

- b. **How would you determine what constitutes “evolving standards of decency” and how it determines constitutionality? In your answer, please include what factors you would consider in that analysis.**

Response: All legislation begins with a presumption of constitutionality, and it is the job of the political branches of government to determine matters such as standards of decency. Supreme Court decisions since *Trop v. Dulles*, 356 U.S. 86 (1958), have required use of “evolving standards of decency” in evaluating Eighth Amendment claims, and if confronted with such a claim, I would be mandated to first look to Supreme Court precedent, and, if none existed, then to precedent in the court on which I am serving. I do not believe that a judge’s personal opinions play any role in determining whether a statute violates the Eighth Amendment.

- c. **In your view, could a judge conclude that “evolving standards of decency” dictate that the death penalty is unconstitutional in all cases? In your answer, please include what factors you believe are relevant to a judge’s analysis.**

Response: I do not believe that a judge could so conclude, given that the death penalty is mentioned in the Constitution and has been repeatedly held constitutional by the Supreme Court.

- d. **Could a judge conclude that a “changing legal landscape” dictates that the death penalty is unconstitutional in all cases? In your answer, please include what factors you believe are relevant to a judge’s analysis.**

Response: I do not believe that a judge could so conclude, given that the death penalty is mentioned in the Constitution and has been repeatedly held constitutional by the Supreme Court.

- e. **In your view, is it possible for something to be constitutional one day and unconstitutional the next in light of a “changing legal landscape”?**

Response: 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. That is one reason why the Court should be very cautious in doing so.

4. In a 2007 speech to Planned Parenthood, then-Senator Obama said:

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

a. Do you agree with the President’s statement?

Response: I would not presume to tell the President by what criteria he should be selecting judges, a task given to his discretion (subject to the advice and consent of the Senate) under the Constitution. Nor can I speak with authority as to what other criteria the President uses in judicial selection, although I can say that I was never asked about empathy during the selection process. I emphasize that I have, and will continue to, base my judicial decisions on the law, not on personal beliefs or other extraneous matters.

b. Do you believe you fit the President’s criteria?

Response: I believe that the law must govern a judge’s decisions, and that they should not be based on personal characteristics of the judge or his or her personal beliefs. I believe that judges must treat all who come before them with courtesy and humility, and I believe that I possess and have exhibited those traits.

c. Do you believe judges should ever base their decisions on a desired outcome as opposed to the law and facts presented? If so, under what circumstances?

Response: No.

d. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.