

**Responses of Richard H. Honaker
Nominee to the U.S. District Court for the District of Wyoming
to the Written Questions of Senator Joseph R. Biden, Jr.**

1. In a speech before the Wyoming Christian Legal Society in 1992, you said, “...in our law schools, Charles Evans Hughes’ statement has become true: ‘The law is only what the judges say it is.’ Law students don’t study the law; they study what the judges say the law is. They study appellate opinions. They don’t concern themselves with the source of the law, with the source of justice.” What, in your view, is the source of justice? Please explain what role, if any, judicial precedent, including opinions of higher federal courts, should play in decision-making by a federal district court.

Response: In that speech I quoted President Kennedy’s statement that “...the rights of man come not from the generosity of the state but from the hand of God.” President Kennedy also said, in his Inaugural Address, that “here on earth God’s work must truly be our own.” I agree that the source of justice can be conceived of in both metaphysical and practical terms. As a prosecutor and defender and civil litigator, representing clients over the course of a 32-year career in the federal and state courts, I know that, practically speaking, the source of justice is found in judges and juries.

Judicial precedent plays a central role in decision-making by a federal district court. The judge has a duty to come to each case with an open mind, to provide a fair and impartial tribunal marked by an atmosphere of civility and professionalism, to give the litigants wide latitude to present their cases and make their records, to ensure that only relevant and admissible evidence comes before the jury, to decide all motions and issues of law based upon a fair reading of the law and faithful application of the precedent of higher courts, and to instruct the jury based upon precedent and sound principles of law. The faithful application of precedent is an essential component of the rule of law, and, in my view, adherence to the rule of law is an issue of judicial integrity. I have been committed to this noble process throughout my career, and I will continue to be committed to it if confirmed as a federal trial judge.

2. In a letter dated March 24, 2007, in reference to your record on abortion, you said, “In any event, on such a controversial subject, the losing party would appeal to the Tenth Circuit, and perhaps on to the United States Supreme Court, and nobody would remember what the trial judge did anyhow. Trial judges simply don’t make substantive constitutional law.” What is your view of the federal district court’s role in our legal system? What impact, if any, do you believe federal district courts have on constitutional law?

Response: The intent of the March 24, 2007 letter was to convey my commitment to approach each case with an open mind and to decide cases fairly

and impartially. I regret the quoted statement, which conveyed an inaccurate impression that federal trial judges do not decide important constitutional questions. A federal district judge, committed to extending the protections and liberties of the Constitution of the United States to citizens who are being denied those protections or liberties, can make substantive constitutional law – subject to review by the higher courts – and does have enormous power to do positive things for our citizens. It is not power, so much as it is duty. If confirmed, I would take that duty very seriously.

I have tried many cases to judges and juries, and also have handled more than 50 appellate matters. The review of an appellate court is limited to the record made in the trial court. I have a great appreciation for the necessity of a complete record, and for how that record ought to be made. First and foremost, the federal district court must be a fair and impartial tribunal in which litigants are given wide latitude to introduce relevant evidence and to thoroughly present their theory of the case, both by evidence and by law. I believe in wide latitude in argument, limited only by the widely accepted boundaries set by case law. The trial judge has an obligation to present a complete and orderly record to the circuit court. At the same time, the federal trial judge has an obligation to apply the precedent of the circuit court and the United States Supreme Court on all issues of federal constitutional and statutory law, both substantive and procedural, and the precedent of his or her State's supreme court on all issues of substantive state law. Where there is a lack of applicable precedent, the federal trial judge must exercise wisdom to identify and apply sound rules of law, consulting the precedent of other circuits and of state courts that have considered the particular issue – but keeping his or her eyes firmly upon the north star of the Constitution of the United States.

3. You have criticized the principle of neutrality – the principle that the First Amendment prevents the government from acting with the purpose of advancing religion or promoting a particular point of view on religious matters. In a speech before the Wyoming Christian Legal Society you said, “Neutrality was not neutrality at all. It was a calculated method of moving American society away from its Christian base and toward a secular base. It was a calculated method of pushing Christians into a corner from which they could have little or no impact on society. The idea of neutrality relied upon the myth that law and government can function with relying upon shared moral premises. The upshot of neutrality was that some moral premises could be considered in the formulation of law and policy, but that Christian moral premises could not.” What, in your view, is the proper application of the protections of religious liberty enshrined in the First Amendment?

Response: What I was attempting to communicate in my speech was a concern that the Court's Establishment Clause tests, including the neutrality test, not be interpreted so as to justify hostility toward religious believers. Justice Breyer, for one, has also taken up this concern, articulating it in his recent concurrence in Van Orden v. Perry, 545 U.S. 677, 699 (2005):

“[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case. Where the Establishment Clause is at issue, tests designed to measure ‘neutrality’ alone are insufficient, both because it is sometimes difficult to determine when a legal rule is ‘neutral,’ and because ‘untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.’” (citations omitted).

I have not litigated an Establishment Clause case, and I do not claim to fully understand the complexities of the various Establishment Clause “formulas” -- as Justice Breyer calls them -- that the Court has used in detail. One thing, however, is crystal clear: that my duty, as a trial judge, would be to apply the precedent of the Supreme Court in Establishment Clause cases. Were such a case to come before me, I would do my very best to study the Court’s Establishment Clause jurisprudence, and apply it as accurately and completely as possible.

4. You have said that *Roe v. Wade* contravenes the “higher law of God.” As a federal judge, would you apply the Supreme Court’s holding in *Roe* even if it conflicts with your personal beliefs?

Response: I do not recall having made such a statement, and I do not believe that. I reiterate my testimony before the Committee that, if confirmed, I shall apply the letter and spirit of Roe as the settled law of the land.

I was only 35 years old when I came to the Wyoming legislature as a Democrat, representing a blue collar constituency of mining families who often were characterized as “pro-union” and “pro-life.” My constituents elected me three times, by increasingly larger margins.

My record demonstrates that I have long accepted Roe as settled law. My legislative efforts on the subject of abortion ended on February 20, 1992, when the “Human Life Protection Act” failed introduction in the Wyoming House. Casey was decided by the United States Supreme Court on June 29, 1992, and, in my view, foreclosed any further attempts to revisit Roe through state legislation.

In 1994, I was retained to represent a group of citizens who sought to put the 1991 bill on the ballot as an initiative. The Wyoming Supreme Court ruled in my clients’ favor in Wyoming NARAL v. Karpan, 881 P.2d 281 (Wyo. 1994), and the initiative went on the ballot where it was defeated. As I testified, that vote settled the issue in Wyoming.