

**Responses of Richard H. Honaker
Nominee to the U.S. District Court for the District of Wyoming
to the Written Questions of Senator Richard J. Durbin**

1. As a Wyoming state legislator, you introduced multiple bills designed to serve as challenges to the *Roe v. Wade* case. At your nomination hearing, you testified that despite your personal and legislative opposition to *Roe v. Wade*, you would “faithfully apply the precedent of all higher courts” as a judge.

Response: I appreciate the opportunity to clarify that, as a young Democratic legislator, I did introduce a bill in 1991 designed to serve as a challenge to *Roe v. Wade*. The same bill failed introduction in 1992.

a. Do you believe *Roe v. Wade* is the settled law of the land?

Response: Yes, I do.

b. Do you believe *Griswold v. Connecticut* is the settled law of the land?

Response: Yes, I do.

2. In a 1992 speech, you stated that people who support abortion rights are ethically similar to people who once supported slavery in the United States. You stated that during the debate over slavery, “Abraham Lincoln would say that one man cannot have property in the life of another, that slavery is wrong, and that no one should have the right to do what is wrong” and you called the other side “pro-choice” explaining: “I say ‘pro-choice’ because many of the pro-choicers, like Illinois Senator Stephen Douglas, were personally opposed to slavery, but felt that new states and territories ought to have the right to choose.”

Please explain why you believe that people who are “pro-choice” on abortion rights are ethically similar to people who you say were “pro-choice” about slavery.

Response: I regret having made that comparison in 1992. I do not believe that people who are pro-choice on abortion rights are “ethically similar” to people who favored the potential extension of slavery into new states. The decision of a woman not to bear a child is not analogous to the decision of one human being to enslave another and to pursue that “slave” across state lines. As a passionate young legislator, I was using rhetoric to advance a political position, and I regret having drawn that analogy at that time.

3. In light of your anti-abortion track record, many abortion rights organizations oppose your nomination. In a March 24, 2007 letter to the executive director of NARAL Pro-Choice Wyoming, you wrote you could be fair in cases involving abortion rights and would set aside your personal, political opinions as a judge. But

you went on to write: “In any event, on such a controversial subject, the losing party would appeal to the Tenth Circuit, and perhaps 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.”

I question your narrow vision of the role of federal district court judges. Throughout our nation’s history, federal district court judges have played an essential role in interpreting our Constitution and ensuring our rights and liberties.

For example, while serving as a federal district court judge in Alabama from 1955-1979, Judge Frank M. Johnson, Jr. issued many decisions involving substantive constitutional law. In 1955, he struck down the Montgomery, Alabama law that required Rosa Parks and other African Americans to sit in the back of public buses, because the law violated their constitutional rights to due process and equal protection. In 1965, Judge Johnson permitted Dr. Martin Luther King, Jr. to lead the voting rights march from Selma to Montgomery. And he issued many other rulings that safeguarded the constitutional rights of African Americans, voters, the mentally ill, criminal defendants, and prison inmates. As a federal district court judge, Judge Johnson helped change the legal and social fabric of our nation through his constitutional rulings.

- a. Do you believe Judge Frank Johnson overstepped his role as a federal district court judge by issuing substantive constitutional legal rulings?**

Response: Absolutely not. I have enormous respect for Judge Frank Johnson, and U.S. District Judges Elbert Tuttle and John M. Wisdom, for courageously extending the protections of the United States Constitution to African-American citizens who were being systematically denied their rights in the state courts. I have enormous respect for the perseverance of Attorney General Robert F. Kennedy in administering a Justice Department that prioritized civil rights. These were defining events in my generation, and they emphasize for me the great power of federal trial judges to do good by extending Constitutional protections and liberties to all citizens, without regard to poverty or wealth, weakness or power, race or gender or religion or sexual orientation or any economic, social or political factor. The example of Judge Johnson is inspiring to me.

- b. Do you stand by your statement that “trial judges simply don’t make substantive constitutional law?”**

Response: No. The example provided is one illustration of why my statement was wrong.

4. In a 2005 speech, you criticized President Bush for stating, in his 2005 inaugural address, that America’s ideal of freedom has been sustained by “the truths of Sinai,

the Sermon on the Mount, the words of the Koran, and the varied faiths of our people.” You wrote:

“By ‘the words of the Koran,’ the President was obviously referring to the Islamic faith. And yet, anyone who has studied history of the western world knows that the Koran and the Islamic faith played no role in the Reformation or in the development of Western political thought. It certainly played no role in the colonization of America, in the battle of independence, in the drafting of the Constitution, or in the establishment of freedom on these shores. We welcome a plurality of religious faiths in our country, but current cultural trends and changes simply cannot be allowed to rewrite the history of the past.”

- a. Do you believe President Bush’s comments about the Koran in his 2005 inaugural address were an attempt to “rewrite the history of the past”?**

Response: No, I do not believe that President Bush’s comments were an attempt to rewrite history. I believe that the President was trying to emphasize the way in which all faiths do join together in this country to help sustain freedom.

- b. Do you disagree with President Bush that “the varied faiths of our people” have helped sustain America’s ideal of freedom?**

Response: No, I do not. In the speech referred to, I was speaking specifically about certain aspects of our nation’s past. I hope and believe that the past is simply one aspect of our nation’s lifeblood that, along with the present and the future, will continue to enrich our nation and sustain its ideals of liberty, diversity, mutual respect, justice, and peace.

- c. In your 2005 speech, you also stated: “We would like to see political liberty established in an Islamic country – Iraq – but the question is, how will political liberty sustain itself in the absence of a Judeo-Christian base?” Is it your belief that Muslims and others who do not practice religion in the Judeo-Christian tradition are less capable of safeguarding political liberty?**

Response: Absolutely not. I have a daughter who has made two trips to Baghdad in the past year as part of our country’s effort to help establish democratic self-government in Iraq. As an American who enjoys the blessings of political liberty, I would like to see nothing more than the spread of liberty throughout the world. I am confident that such liberty can spread and be sustained regardless of a country’s history or religion. I believe strongly in the First Amendment rights of all persons of all faiths, or of no faith at all, to freely exercise their beliefs.

5. The U.S. Supreme Court has interpreted the Establishment Clause of the First Amendment of the Constitution to ensure government neutrality when it comes to religion. The Supreme Court has stated: “The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”

You have criticized this approach. In a 1992 speech, you stated:

“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 upon society. . . . Autonomy is the new secular religion sanctioned by the United States Supreme Court. The Supreme Court no longer talks about America as a Christian nation. . .”

- a. Is it still your belief that the Supreme Court has been “pushing Christians into a corner from which they could have little or no impact upon society”?**

Response: No, I do not believe that. 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.

- b. If the Supreme Court were to talk about America as a “Christian nation,” wouldn’t it fly in the face of the Supreme Court’s admonition that government sponsorship of a religious message “sends the ancillary message**

to members of the audience who are non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”?

Response: Yes, it would. I agree with Justice O'Connor's concern. Our country has changed demographically and in many other ways since those early Supreme Court opinions in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) and *United States v. MacIntosh*, 283 U.S. 605 (1931). Our country's religious heritage has broadened, has deepened, and has become much more rich and diverse. In that 1992 speech, I traced some of those historical changes as chronicled by Supreme Court opinions, but did not propose – and would not propose now -- that the Court should revert to its earlier opinions. I do not believe America is a “Christian nation” or should be a “Christian nation.” I believe America is a nation in which people of all faiths, or of no faith at all, live together as equals under the Constitution and laws of the United States.

6. In a 1992 speech, you criticized a line from the Supreme Court's decision in *Planned Parenthood v. Casey* that said: “At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” Here's what you said about that line: “This is a wholesale abandonment of the concept that a fabric of common values binds this nation together. This statement means that there are no absolute truths, no absolute rights and wrongs, and that each individual, without accountability or responsibility, is free to define truth for himself. Each man becomes a law unto himself.”

Please explain in more detail why you believe this line in the *Casey* decision signifies “a wholesale abandonment of the concept that a fabric of common values binds this nation together” and why it means that “each man becomes a law unto himself.”

Response: I believe my quarrel with the phrase was purely semantic, and I surely overstated its effect with hyperbole. I firmly believe that the individual liberties and rights of the people, as enunciated in the Bill of Rights and elsewhere in the Constitution, must be fully and faithfully recognized and protected. I also believe in the American system of ordered liberty in which a free people is subject to the rule of law.

7. In a 1992 speech, you stated: “It doesn't take a legal scholar to perceive that the nation's highest court, its universities and law schools, its political institutions, and its news media have moved radically away from a Christian base toward a secular base in which man, not God, is the creator of values, of rights, of law, and of justice. . . . Historically, such an intellectual movement away from the concept of higher law, though the movement initially espouses liberty and autonomy, leads to tyranny, to totalitarianism.”

Is it your belief that the United States is on a path to tyranny and totalitarianism?

Response: I do not believe the United States is on any such path.

8. You are a board member of the Home School Legal Defense Association, whose website asserts: “the argument for gay rights is an argument that fundamentally erodes the very premise of all human rights as rights.” In a 1994 speech, you criticized “special interests for gays.” The Human Rights Campaign – one of the leading gay rights organizations in America – has written to the Senate Judiciary Committee indicating it is “deeply concerned” about your nomination.

Is it your belief that laws prohibiting hate crimes, employment discrimination, and other adverse actions against gays and lesbians constitute “special interests for gays” and that such laws erode the premise of human rights? If so, please explain why. If not, please provide examples of what you consider to be “special interests for gays” and what you meant by that term.

Response: Absolutely not. I was wrong when I criticized “special interests for gays” in a political speech in 1994.

My commitment to equal justice under the law is best demonstrated by the clients I have represented – people from all walks of life. I have represented women who have been victims of abusive relationships, employment discrimination, medical malpractice, and negligence. I have represented people with diverse racial and ethnic backgrounds, religious beliefs, and sexual orientations. I have represented unions and businesses. I have represented miners and oilfield workers and railroaders and doctors and sheepherders and teachers and children and senior citizens in nursing homes.

I believe that it further testifies to my principled commitment to the rule of law and to equal justice under the law that I was elected by my peers to serve as president of the Wyoming State Bar and the Wyoming Trial Lawyers Association, that I serve on the national board of the American Board of Trial Advocates and am co-chair of its committee on judicial independence, and that I serve as vice-chair of the Board of Professional Responsibility, sitting in judgment on attorney ethics cases. In addition, I have received the unanimous “Well Qualified” rating of the American Bar Association’s Standing Committee on the Judiciary, and my nomination has received the bi-partisan support of Wyoming’s legal community, and the support of Wyoming’s federal judiciary.

I am concerned that the website for Home School Legal Defense Association contains the quoted assertion. As a board member, I have asked the organization to eliminate it. My interest in HSLDA has always been in its primary mission of defending the constitutional rights of parents to choose viable educational alternatives for their children, including home schooling. Through HSLDA’s efforts, home schooling is now a valid educational alternative in all 50 states, and

that took 20 years of lobbying and litigation that sought to apply Wisconsin v. Yoder and other Supreme Court precedent.

9. In a 1994 speech, you criticized Democrats and the Democratic Party. You said: “The Democratic Party has aligned itself with a ‘government knows best’ mentality, a growing welfare state, and fringe anti-family groups which seek special rights. . . . Instead of being advocates for the people, the Democrats are advocates for government. When Democrats say ‘people,’ read ‘government.’”

Do you continue to hold these views about Democrats and the Democratic Party?

Response: No. This was a partisan political speech given at a Republican rally during a 1994 Republican primary campaign for a state legislative seat. Many of the phrases used were purely rhetorical. I was a registered Democrat from 1972 to 1994. I was press secretary to a three-term Democratic Governor of Wyoming, Ed Herschler, in 1978. I served three terms in the Wyoming legislature, from 1987-93, as a Democrat. I believe the positive impression of me among Wyoming Democrats is reflected by the fact that my nomination has been endorsed by prominent Democrats in Wyoming, including two-term Democratic Governor Michael J. Sullivan and former Democratic national committeeman and congressional candidate Robert P. Schuster.

10. Canon 3 of the Code of Conduct for U.S. Judges states: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”

In light of your views about abortion, the separation of church and state, and the Democratic Party, many litigants might reasonably question your impartiality with regard to these subjects. If you are confirmed, please indicate if you would agree to recuse yourself upon request of a litigant in a case involving the following:

a. abortion rights

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

b. the separation of church and state

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that

issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

c. the Democratic Party (such as a voting rights or redistricting matter)

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

11. At your nomination hearing, you stated: “I think that a judicial activist can be conservative, liberal, moderate, or of any viewpoint. But the essence of judicial activism is the substitution of one’s own personal viewpoints or opinions for the laws written by Congress.”

Please provide examples from Supreme Court opinions of the last half century that you believe constitute “conservative judicial activism” and examples that you believe constitute “liberal judicial activism” and explain the basis of your reasoning for each example.

Response: A judge who substitutes application of the law for his or her own political ideology – whatever that political ideology is – acts as an “activist,” in contravention of his or her duty to apply the law faithfully and to resist policy-making. I am not presently aware of nor can I cite Supreme Court opinions of the last half century that exemplify this kind of activism.

12. In a 1992 speech, you stated “we are seeing vicious political battles over judicial appointments which would not have occurred had the Court not politicized itself by creating rights rather than construing them.”

a. At the time you made this speech, which rights did you believe the Supreme Court had created rather than construed?

Response: This speech was given in the immediate aftermath of the 1991-92 legislative activity on the subject of abortion. The reference was to my disagreement with Roe v. Wade. Despite having taken that position at that time, I have sworn before this Committee that I will faithfully apply United States Supreme Court precedent, including the letter and spirit of Roe v. Wade.

b. Since the time you delivered this 1992 speech, do you believe there are additional rights the Supreme Court has wrongfully created? If so, please identify them.

Response: No, I do not.