QUESTIONS AND ANSWERS

James Browning's Responses to Follow-Up Questions
from Senator Richard J. Durbin
on
July 15, 2003

1. You have made statements that suggest you may have a difficult time keeping an open mind in cases involving the separation of church and state. In a lecture you gave at a university you stated: "One of the greatest false myths is that religion and society can be separated." You also stated: " Neutrality is no more practical in politics than it is in religion, law, business, or anything else."

   A. What did you mean by these comments?

   RESPONSE:

   These comments were made to a church group that historically has not been active in politics. The comments were, for the most part, made to non-lawyers, and were political science observations, not legal views. In my talk, I attempted to make the point that abstaining from involvement in politics in fact amounts to taking a political position. I hoped to convey to the church group that not being involved in politics in fact has an impact on policy decisions.

   B. How do you reconcile these comments with the Establishment Clause?

   RESPONSE:

   These comments were not directed at legal precedent. All citizens, including those of religious faith, should be encouraged to participate in the political process. The Supreme Court, however, has interpreted the Establishment Clause and has made clear that governments -- both state and federal -- cannot do anything to establish a religion. My statements were not intended to conflict with this interpretation as I had no intention to advocate a government sponsorship or establishment of a particular religion.

   C. Based on your comments would you feel compelled to recuse yourself from cases involving the constitutional rights of those who have no religious affiliation? Why or why not?

   RESPONSE:

   No. My comments were not intended to address at all the constitutional rights of those who have no religious affiliation. The Supreme Court of the United States had made clear, in a number of First Amendment cases, including in Wallace v. Jaffree, that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." As a federal judge, I would be bound by that precedent and would faithfully follow it.

2. What is your view on the appropriateness of displaying the Ten Commandments in public arenas such as a state court house?

RESPONSE:

The question of the appropriateness of displaying the Ten Commandments in a public arena is necessarily a fact-intensive one. The United States Court of Appeals for the Eleventh Circuit recently held that, under the specific facts before it, the placement in the Rotunda of the Alabama Supreme Court of a two-and a half ton monument depicting the Ten Commandments was a violation of the Establishment Clause. See Glassroth v. Moore (2003). In addition, the Third Circuit recently decided two cases in which it held that a bronze plaque hanging in a county courthouse and depicting the Ten Commandments did not violate the Establishment Clause, nor did attaching "lechis" on utility poles by Orthodox Jews to create an "eruv" and facilitate attendance at synagogue violate the Establishment Clause. See Freethought Society v. Chester County (2003); Tenafly Eruv Association, Inc. v. Borough of Tenafly (2002).

Because such a case might come before me if I were confirmed as a judge, I hesitate to offer my personal views on this subject. If such an issue came before me, I would review the facts presented, the precedents and briefs, and faithfully apply the law as established by the Supreme Court and by the Tenth Circuit to the facts of the particular case.

3. I would like to ask about some of the statements you have made about abortion rights.

A. You have stated: "For those that are so-called pro-choice, I call upon you then to make the choice of life, not holocaust." Do you believe that abortion is equivalent to the Holocaust? Why or why not?

RESPONSE:

I do not believe that Abortion is equivalent to the Holocaust. The Holocaust involved the state intentionally taking human life. Abortion involves the personal decisions of women, often with family, friends, and doctors, to abort. The state is not taking life in an abortion.

B. You have stated: "Pro-choice seeks to give in effect the most irresponsible in our society the right to take the life of the weakest. Pro-choice is the tyranny of the majority over the minority." What did you mean by these comments?

RESPONSE:

From a political philosophy point of view, I believe that individual rights can be best explained in terms of majority and minority rights. Because the majority can usually protect itself in the political process, it is important that society protect its minorities and weakest members by recognizing that they have rights that cannot be overridden by the political process.

C. You have stated: "Let us stop this Herod and the slaughter of innocents that masks itself as contemporary liberal thought." What did you mean by this comment?

RESPONSE:

This is a rhetorical reference to the story in Matthew 2: 13-18. I intended to compare the fact that King Herod took the lives of innocent infants two thousand years ago, with the concern that abortion similarly impacts the innocent unborn.

D. You have also said: "Pro-choice, while perhaps popular with the press and sounds liberal, is the manifested excesses of a sinful society. It trades the truth for political expediency. It calls darkness light. And good evil. And it stains the hands of the perpetrator as well as the head of the victim." How could you in good conscience morally reconcile this belief with your judicial responsibility to sustain the Supreme Court's decision in *Roe v. Wade*?

RESPONSE:

For our constitutional system to function, it is imperative that a district judge put aside his or her personal and moral views on an issue and follow the precedents of the Supreme Court and the Court of Appeals. I did so as a law clerk for Justice Powell as I assisted him in drafting three opinions on the abortion issue. Roe v. Wade is the established law of the land, and, as a district judge, I would be bound in good conscience to do my judicial responsibility and apply and follow that precedent.

4. In *Griswold v. Connecticut*, the Supreme Court for the first time recognized the constitutional right to privacy. It went on to reaffirm and expand this right in *Eisenstadt v. Baird*. Following from these decisions, the Supreme Court then recognized constitutional protections for a woman's right to choose in *Roe v. Wade*.

A. Do you believe in and support a constitutional right to privacy?

RESPONSE: Yes.

B. If so, do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?

RESPONSE: Yes.

C. I assume that you will follow the law on abortion if confirmed, but will you feel morally bound to restrict the rights established in *Roe* if given that opportunity in cases that came before you?

RESPONSE:

No. A federal district judge must at all times fairly and faithfully follow the precedents of higher courts, even those precedents with which the judge may personally disagree.

5. In order to allay any concerns that litigants may have, are you prepared to recuse yourself in cases that came before you involving abortion rights?

RESPONSE:

I will follow the Code of Conduct for U.S. Judges and § 28 U.S.C. §455, in making all recusal decisions that came before me. Without being presented with a particular case, I am not prepared to recuse myself in all cases involving abortion rights. My comments about my views on abortion are thirteen years old, were made largely to non-lawyers, were directed at the political philosophy related to the issue, and did not specifically discuss the law. The Supreme Court has consistently reaffirmed the right to abortion over the last thirty years; as a district judge, I would be bound to, and would, faithfully apply those precedents.

6. In a speech to the Federalist Society, you expressed support for repeal of the 17th Amendment. Please explain why you believe that this country would be better off without the direct election of U.S. Senators.

RESPONSE:

I do not have a view whether this country would be better off without the direct election of U.S. Senators. The point of my talk was that, if federalism is a principle worth protecting, it should be done with structural and political changes, not with judicially created rules that arbitrarily restrict Congress' power under the commerce clause. One possible change is to make Senators more accountable to states qua states, but if that is done, other competing values -- such as a democratic participation -- may suffer.

7. You have stated: "We should not listen to legislators who see a problem within our borders and state it is a problem for the national government and the nation. And we should mock publicly Senators who say Senators can vote one way on national issues and still vote ok on local issues [sic]. If raising the minimum wage $1.50 an hour in one of the poorest states in the union is a national problem, not a local issue, then we are indeed a society of smoke and mirrors, not substance." What did you mean by these comments?

RESPONSE:

New Mexico is one of the most impoverished states in the Nation, and nothing is more important in my state than improving the quality of life for everyone, especially the poor. However, as stated in response to your question No. 6, the point of my lecture was that the courts should not use the Tenth Amendment to create arbitrary limits on Congressional power. If federalism is a principle worth protecting, it should be protected with structural or political solutions, not by the Courts creating restrictions that cannot be neutrally applied. One political solution is that, if the people decide federalism is important, and if they do not want Congress to regulate local issues, they should elect Senators and Representatives who also value federalism and do not apply all regulatory laws to states qua states. But courts should not attempt to restrict Congress under such broad provisions as the Tenth Amendment.

8. You have written: "The federal courts' narrow construction of the Second Amendment contrasts with its liberal interpretation of other provisions of the Bill of Rights, and is at tension with the amendment's plain language, the structure and text of the Constitution, and the history of the amendment's phrases and their meaning." You have stated that "the Second Amendment's limits should constrain the federal government's power when Congress tries to deny its citizens means of self-protection. Unreasonable waiting periods or a complete ban on handguns, which could effectively deny citizens the means of meaningful self-protection, may infringe the protected values."

This year is the 10th anniversary of the Brady Handgun Violence Prevention Act. Under this law, an applicant for a firearm may have to wait up to five days before obtaining a firearm, while the National Instant Criminal Background Check System (NICS) ensures that those seeking to purchase firearms are not criminals or other persons prohibited by law from possessing firearms. If a firearms dealer has not been notified by NICS within three business days that an applicant is ineligible to obtain a firearm, the dealer then can legally transfer the firearm to that individual. Although NICS can make an immediate determination for 91 percent of firearm purchases, this three-business-day period has been essential to its success. Since NICS was implemented in November 1998, it has denied over 563,000 firearm transfers to criminals and other prohibited individuals. In your view, how long is an "unreasonable waiting period"? Is this three-business-day period an "unreasonable waiting period"?

RESPONSE:

I note in my article that Congress clearly has the ability to enact reasonable restrictions on gun ownership, and courts have upheld the Brady Act's waiting period. See Kogg v. U.S. (1996). Because the question of the reasonableness of a shorter waiting period under the Second Amendment could come before me, I hesitate to offer my personal views on the propriety of a 3-day waiting period. I did not in 1991 have a view of how long an unreasonable waiting period would be, nor do I have one now. That determination might well depend on the facts presented to the court.

9. According to your Senate questionnaire, you are a member of the Federalist Society. Do you agree with the following passage from its mission statement?

"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."

RESPONSE:

The statement is a generalization and may be somewhat dated. I cannot comment with knowledge about other law schools, but my law school, the University of Virginia, enjoyed diversity of views, and I benefited from that diversity. I assume most law schools also enjoy similar diversity, and I think the Federalist Society has contributed to the diversity and exchange of ideas on campuses. I do not think the legal profession is monolithic in its views, but rather benefits from a strong tradition of advocacy of and dissent from a broad spectrum of viewpoints and ideologies.