

**Responses of Nancy D. Freudenthal  
Nominee to the U.S. District Court for the District of Wyoming  
to the Written Follow-up Questions of Senator Jeff Sessions**

**1. Throughout your career, you have lobbied on behalf of approximately 12 businesses and organizations, which required you to advocate certain policy positions. Some have criticized you for continuing your lobbying efforts while your husband serves as Governor of Wyoming.**

**a. How did you handle conflicts between your clients' positions and those positions advocated by your husband in his official capacity as governor?**

Response: I declined representation if my clients' positions created a conflict with the positions advocated by my husband in his official capacity as governor.

**b. Was there ever a time during your career when you advocated a policy position that was contrary to your own?**

Response: Yes.

**c. If confirmed, will you be able to put aside your policy beliefs and follow precedent?**

Response: Yes.

**2. In your questionnaire, you indicated that you have no experience litigating criminal cases. Criminal cases account for a substantial portion of the docket you will handle if confirmed.**

**a. How has your professional experience prepared you for the position to which you have been nominated?**

Response: I have nearly thirty years experience working with statutes and constitutional provisions. I have six years of quasi-judicial experience as chairman of the Wyoming Board of Equalization, adjudicating tax disputes. I have fourteen years handling a primarily litigation-based practice. Criminal law, like tax law and other matters in litigation, is governed by the Constitution and statutes, with court interpretation. I believe this thirty-year professional experience has prepared me for the position to which I have been nominated.

**b. If confirmed, how do you plan to educate yourself with respect to federal criminal law and procedure?**

Response: If confirmed, I plan to study the criminal statutes, the case law, the Benchbook, and the numerous criminal publications issued by the Federal Judicial

Center. I also plan to take advantage of the educational opportunities offered by the Federal Judicial Center. Finally, I plan to confer with the two active district court judges and the one senior district court judge for the District of Wyoming.

**3. As I mentioned during your hearing, I believe that the federal sentencing guidelines, although now advisory rather than mandatory, are an incredibly valuable tool for federal judges. Following the Supreme Court’s decision in *Gall v. United States*, appellate courts must apply the highly deferential “abuse of discretion” standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is very little substantive review on appeal.**

**a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

**b. During your hearing, I was concerned by your responses to my questions regarding sentencing. You stated that you would give the guidelines “consideration” and that you “appreciate that sentencing is done on an individual case by case basis.” But as I noted during the hearing, while it is true that sentences are meted out on a case by case basis, it is also true that Congress established the sentencing guidelines to reduce unwarranted sentencing disparity, which often occurred precisely because federal judges imposed sentences without considering the sentences other defendants received for the same crime. With this in mind, under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?**

Response: I believe the sentencing calculation should begin with an accurate determination of the applicable sentencing range under the guidelines as the best compilation of consistent sentencing practices. The consideration of any departures or variances from the guidelines should be consistent with applicable guideline commentary and statutory factors. One example to depart downward might be a recommended plea agreement that includes specific justification for a departure, like substantial assistance to the government.

**4. You have been somewhat active in Wyoming politics throughout your career. If confirmed, how will your prior involvement in the political process influence your opinions as a judge?**

Response: My prior involvement in the political process will not influence my opinions as a judge.

**5. Do you think it is ever proper for a judge to advocate or express his or her political beliefs or policy positions? If so, under what circumstances?**

Response: A judge may only express his or her political beliefs privately. *See, Ethics Essentials*, Committee on Codes of Conduct, Judicial Conference of the United States, p.13. In my view a judge should avoid advocating or expressing policy positions because doing so would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary.

6. **On October 20, 2006, the Wyoming Tribune-Eagle published a recent letter to the editor, which quotes you as saying that you and your husband are “for a woman’s right to choose, but are not pro-abortion.”**

- a. **Please explain this statement, specifically how an individual can be for a “woman’s right to choose” but not “pro-abortion.”**

Response: I believe a woman’s right to choose relates to privacy and the woman’s ability to make her own choice. I don’t believe one can automatically conclude her personal choice will be for (pro) an abortion.

- b. **If confirmed, how would your belief in a “woman’s right to choose” influence your decisions as a judge?**

Response: If confirmed, my personal beliefs would not influence my decisions as a judge and I would strictly adhere to Supreme Court and Tenth Circuit precedent.

7. **As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:**

**“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. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: I believe I am well qualified for nomination. Not knowing what the President meant by the quoted statement, I cannot speak to President Obama’s selection criteria which are his own.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes.

- c. What role do you believe empathy should play in a judge's consideration of a case?**

Response: Empathy toward a person or a cause should not influence a judge's consideration of a case from the perspective of the application of the law to the facts, as such would be inconsistent with impartiality. I believe empathy only has a role in judicial temperament. Its presence influences the judge's treatment of participants with dignity, courtesy, patience and respect.

- d. Do you think that it is ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. If so, under what circumstances?**

Response: See response above.

- ii. Please identify any cases in which you've done so.**

Response: I have not done so.

- iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: In ad valorem tax matters, I was sympathetic to the situation of property taxpayers, particularly elderly taxpayers, who experienced steep increases in the assessed values of their homes based on the sale and development of surrounding properties. Notwithstanding my own subjective sense of empathy toward these taxpayers, I was required to rule based solely on Wyoming law which generally provides that property tax assessments for residential properties are based on comparable sales.

- 8. Supreme Court precedent is binding on all lower federal courts and Circuit Court precedent is binding on the district courts within the particular circuit.**

- a. 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.

- b. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision?**

Response: I would rule based on established precedent.

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

Response: I read the questions and considered the issues raised in each question. I typed up my draft responses. I provided the draft responses to representatives from the Department of Justice and discussed the draft responses before they were finalized and submitted.

**10. Do these answers reflect your true and personal views?**

Response: Yes.

**Responses of Nancy D. Freudenthal  
Nominee to the U.S. District Court for the District of Wyoming  
to the Written Follow-up Questions of Senator Grassley**

**1. What is your view of the role of a judge?**

Response: The role of a judge in the U.S. District Court for the District of Wyoming is to follow the rule of law based on precedent from the United States Supreme Court and the Tenth Circuit, and to apply that law in an impartial manner to the established facts in the case at issue.

**2. Do you believe it is ever appropriate for judges to indulge their own values in determining the meaning of statutes and the U.S. Constitution?**

Response: No.

**a. If so, under what circumstances?**

Response: See my response above.

**b. Please provide an example of a case in which you have done so.**

Response: I have not done so.

**c. Please provide an example of a case where you have had to set aside your own values and rule based solely on the law.**

Response: I cannot recall having done so.

**3. Do you believe it is ever appropriate for judges to indulge their own policy preferences in determining the meaning of statutes and the U.S. Constitution?**

Response: No.

**a. If so, under what circumstances?**

Response: See my response above.

**b. Please provide an example of a case in which you have done so.**

Response: I have not done so.

**c. Please provide an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.**

Response: As chairman of the Wyoming State Board of Equalization, excise tax cases were considered by the Board wherein the taxpayer asserted a statute of limitations defense against the collection of unpaid taxes. Based solely on the law, I set aside my own policy preference and ruled that the unpaid taxes could not be collected.

**4. How do you define “judicial activism?”**

Response: I have no personal definition for this term. I understand the phrase to mean a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy are willing to ignore precedent.

**Responses of Nancy D. Freudenthal  
Nominee to the U.S. District Court for the District of Wyoming  
to the Written Follow-up Questions of Senator Tom Coburn, M.D.**

**1. On October 20, 2006, the Wyoming Tribune-Eagle published a recent letter to the editor, which quotes you as saying that you and your husband are “for a woman’s right to choose, but are not pro-abortion.”**

**a. Please explain this statement, specifically how an individual can be for a “woman’s right to choose” but not “pro-abortion.”**

Response: I believe a woman’s right to choose relates to privacy and the woman’s ability to make her own choice. I don’t believe one can automatically conclude her personal choice will be for (pro) an abortion.

**b. If confirmed, how would your belief in a “woman’s right to choose” influence your decisions as a judge?**

Response: If confirmed, my personal beliefs would not influence my decisions as a judge and I would strictly adhere to Supreme Court and Tenth Circuit precedent.

**2. In your questionnaire submitted to the Committee, you indicated that you have no experience litigating criminal cases. Criminal cases account for a substantial portion of the federal. You also indicated that you have never tried a case to a jury.**

**a. How has your professional experience prepared you for the position to which you have been nominated?**

Response: I have nearly thirty years experience working with statutes and constitutional provisions. I have six years of quasi-judicial experience as chairman of the Wyoming Board of Equalization, adjudicating tax disputes. I have fourteen years handling a primarily litigation-based practice. Criminal law, like tax law and other matters in litigation, is governed by the Constitution and statutes, with court interpretation. I believe this thirty-year professional experience has prepared me for the position to which I have been nominated.

**b. If confirmed, how do you plan to educate yourself with respect to federal criminal law and the federal sentencing guidelines?**

Response: If confirmed, I plan to study the criminal statutes, the case law, the Benchbook, and the numerous criminal publications issued by the Federal Judicial Center. I also plan to take advantage of the educational opportunities offered by the Federal Judicial Center. Finally, I plan to confer with the two active district court judges and the one senior district court judge for the District of Wyoming.



**3. Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

**a. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

**b. Why or why not?**

Response: The Supreme Court said that *Lopez* and *Morrison* are consistent with earlier Commerce Clause decisions when it observed that both cases "preserved" "the larger context of modern-era Commerce Clause jurisprudence." *Gonzales v. Raich*, 545 U.S. 1 (2005). That jurisprudence historically recognized limits on Congress' power under the Commerce Clause. In *Lopez* and *Morrison*, the Supreme Court concluded that the two statutes in question had no logical connection to interstate commerce or any sort of economic enterprise, and were not related to a larger regulation of economic activity. Also, neither statute contained a jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce. This analytical approach is consistent with earlier Commerce Clause decisions.

**4. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No. Society does not interpret the Constitution. The Constitution is interpreted by the courts consistent with Supreme Court precedent. However, I do believe that constitutional principles established by precedent apply to new situations.

**5. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

Response: If confirmed I would apply Supreme Court precedent.

**a. How would you determine what the evolving standards of decency are?**

Response: If required to determine the evolving standards of decency, I would follow the analysis established by Supreme Court precedent.

**6. At your hearing, I asked you whether, in your view, it is ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution. You answered "no," for which I commend you. However, in a couple of cases including *Roper v. Simmons*, and *Lawrence v. Texas*,**

**539 U.S. 558 (2003), a majority of the Supreme Court considered and cited foreign law in its majority opinion. Do you believe the majority was incorrect in these cases? Please explain.**

Response: No. As I read *Lawrence v. Texas*, that decision relied on the U.S. Constitution. While foreign law was discussed, it was not the basis for the decision. In *Roper v. Simmons*, the Supreme Court discussed “international opinion” but expressly held that international opinion was not controlling.

- a. Do you believe foreign law has any bearing on a court’s interpretation of the Eighth Amendment? What about any other amendments?**

Response: No.