

**Responses of Elizabeth Erny Foote
Nominee to the U.S. District Court for the Western District of Louisiana
to the Written Questions of Senator Jeff Sessions**

1. In the questionnaire that you submitted to the Committee, you indicated that only one percent of the cases you have handled involved criminal law. Criminal cases account for a substantial portion of the federal district court docket.

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

Response: Although my experience in representing criminal defendants has been limited to appointed cases early in my career, my first jury trial tried to verdict was a criminal case which lasted several days. The defendant - charged with felony rape - was acquitted.

My experience as a state bar leader has educated me on criminal justice issues that affect the judiciary. These issues include: the design and implementation of a new statewide indigent defense system in Louisiana; an examination of the statutory law pertaining to and the treatment of juveniles in Louisiana's judicial system versus other states; and the effect of reclassification of offenses on law enforcement and the courts.

Additionally, if confirmed, I will bring to the bench more than 30 years experience litigating commercial and tort cases. My clients have included individuals and businesses of all sizes. I have taught legal writing and oral advocacy. My professional experience as a bar leader increased my understanding of "big picture" issues facing the judiciary, such as the importance of maintaining the public's confidence. I will bring to the bench the perspective not only of a seasoned litigator, but of a student of the judicial system.

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

Response: In preparing for the nomination, I have familiarized myself with the federal sentencing guidelines and the applicable precedent. If confirmed, I intend to continue my personal study, to avail myself of the resources of the Federal Judiciary Center and other educational programs, and to rely on the assistance of my colleagues on the bench.

i. Now that the guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum. What are your views of the guidelines?

Response: I respect the substantial work of the U.S. Sentencing Commission and Congress to insure fair, consistent and predictable sentencing through the guidelines. The Supreme Court has held that the guidelines can be used as the FIRST consideration in sentencing. Especially for a new judge, the guidelines provide a compendium of wisdom and are entitled to deference.

ii. Do you commit to follow the guidelines?

Response: I commit to follow the precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals as to the use of the guidelines in sentencing. Under this law, departures from the guidelines are rare.

iii. 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.

2. 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. I recognize that you do not know 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: If what the President meant was that a good judge makes decisions not based on emotion but treats all individuals equally – with fairness, respect, and dignity – then I hope I will meet those criteria if confirmed.

b. What role do you believe that empathy should play in a judge’s consideration of a case?

Response: I agree with your (Senator Sessions’) statement, “Empathy is not a legal standard.” Empathy instead is a tool which assists a judge to treat all individuals in the system with respect, dignity, and fairness.

c. Do you think that it’s 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 above

3. What in your view is the role of a judge?

Response: A judge is a neutral arbiter whose limited job is to decide the dispute before him or her in a fair and impartial manner; to treat the litigants and attorneys with respect and dignity; and to make timely, well-reasoned decisions based on the facts, applicable statutory law, and controlling precedent.

4. What is your definition of “judicial activism?”

Response: The term “judicial activism” as I understand it describes the practice of a judge who ignores clear statutory law and controlling precedent in order to obtain a predetermined result or to promote a personal agenda.

5. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are 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? Would you nevertheless apply that decision to the facts presented before you?

Response: In such a case, I would apply the controlling precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals to the facts before me.

6. Do you think it is ever proper for judges to indulge their own values in determining what the law means? If so, under what circumstances?

Response: No.

7. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

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

Response: I received the questions from attorneys in the Department of Justice. I drafted my responses and discussed them with Department of Justice attorneys. I then finalized my answers.

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

Response: Yes.

**Responses of Elizabeth Erny Foote
Nominee to the U.S. District Court for the Western District of Louisiana
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. 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. For a district court judge, constitutional interpretation is governed by the language of the Constitution and the controlling Supreme Court precedent.

- 2. 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: In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court explained the consistency of *Lopez* and *Morrison* with the court’s historical precedent. The Justices noted that the statutes under scrutiny in *Lopez* and *Morrison* did not regulate economic activity. Current Supreme Court precedent interprets the power of the federal government under the Commerce Clause as broad, but not unlimited.

- 3. 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: Whether or not I agree with Justice Kennedy’s analysis, I would be bound by the majority’s decision in the case and I would follow it.

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

Response: If confirmed, my job as a district court judge will not be to determine “evolving standards of decency” but to apply the Supreme Court and other appropriate precedent to the dispute before me.

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No, a district court judge could never find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases.

- c. What factors do you believe would be relevant to the judge’s analysis?**

Response: In deciding whether or not the death penalty was unconstitutional in a case before me, I would apply the controlling precedent of the United States Supreme Court and the Fifth Circuit.

- 4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: No.

- a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: See above response.

- b. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?**

Response: No, I would not consider foreign law in interpreting the Eighth Amendment. No, I would not consider foreign law in interpreting other amendments.