

Responses of Max O. Cogburn, Jr.
Nominee to be United States District Judge for the Western District of North Carolina
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. The Constitution is a document which can only be modified by amendment.

2. **Justice William Brennan once said: Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

Response: Constitutional interpretation should take into account the text of the Constitution, the intent of the framers, and the precedent established by the Supreme Court and Courts of Appeal.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: A judge should follow the text of the Constitution, the intent of the framers, and the precedent established by the Supreme Court and Courts of Appeal.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

Response: No. A judge must apply the law to the facts.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

Response: No. The Supreme Court has set limitations and identified guidelines for determining Congress' authority in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). As a district judge I will follow the law as held by the Supreme Court.

6. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: The Supreme Court has held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) that there is an individual right to bear arms with certain limitations. I will follow the law as determined by the Supreme Court in regard to those limitations.

a. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: The questions about what limitations there are on individuals continue to be litigated. I will follow whatever precedent the Supreme Court or the Fourth Circuit Court of Appeals set on these matters.

7. 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: As a district court judge I am bound to follow current Supreme Court precedent.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: The decisions of the Supreme Court will determine what punishment constitutes cruel and unusual punishment. I will follow that precedent.

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

Response: I would follow the law of the Supreme Court and Fourth Circuit Court of Appeals. As a district judge I would not determine "evolving" standards of decency.

c. 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. The Supreme Court has ruled that the death penalty is not unconstitutional in all cases.

d. What factors do you believe would be relevant to the judge's analysis?

Response: In the unlikely event I had to conduct such an analysis I would use the factors determined by the Supreme Court.

8. 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, unless required to do so by the Supreme Court or the Fourth Circuit Court of Appeals.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: No.

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

Response: There are no circumstances under which I would use foreign law to interpret the United States Constitution.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No.