

**Responses of Max Oliver Cogburn, Jr.
Nominee to be United States District Judge
for the Western District of North Carolina
to the Written Questions of Senator Jeff Sessions**

1. In 2008, President Obama said,

"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."

Do you agree with the President's statement?

Response: Judges are to make decisions without regard to bias, prejudice, or sympathy. Decisions must be based on the law and the facts. Empathy for a litigant or a position should play no role in deciding a case.

2. **When Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee with "a keen understanding of how the law affects the daily lives of the American people." Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: Decisions should be based solely on the law and facts presented. A decision based on a judge's desired outcome would be improper.

3. **During her confirmation hearings, Justice Sotomayor rejected President Obama's 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: I agree with Justice Sotomayor's statement.

4. **Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?**

Response: The Supreme Court in *Gall v. United States* 552 U.S. 38 (2007) has ruled on how the district courts are to handle this issue. After determining the applicable sentencing guideline, the court must consider the factors in 18 U.S.C. 3553(a). Most of the time this analysis will lead to a sentence within the guideline range. But on occasion the analysis might lead to a departure upward or downward. These occasional departures must be explained and are subject to appellate review.

5. **According to an October 28, 2010 article in the *Legal Intelligence*, there is a recent trend among federal judges to reject the sentencing guidelines for child pornography crimes as "too harsh." What are your views with respect to these particular guidelines?**

Response: The sentencing guidelines for child pornography crimes have been subject to the same careful consideration in their formulation as the guidelines for other offenses and are due the same great deference in the sentencing process.

6. **In 2009, you represented a former teacher and retired Air Force major for soliciting sex over the Internet from someone he believed to be an 11-year old girl. He was sentenced to 11 years in prison. You were quoted by the *Asheville Citizen-Times* as stating:**

"We've got 57 years of exemplary conduct against a very brief period of time. There is no child victim in this case. This is a good man who's done a bad thing, and it's his first offense."

- a. **Did the *Asheville Citizen-Times* accurately report your statement?**

Response: Although I do not have a transcript of the sentencing hearing, I believe the *Asheville Citizen-Times* correctly quoted a portion of my sentencing argument in that case.

- b. **Is it your view that, in cases such as this, where there is no child victim but rather a law enforcement officer on the other end of an Internet communication, a defendant should receive a lesser sentence?**

Response: It is unlikely that any one factor at sentencing would bring about a lesser sentence. As an advocate for my client I argued a number of factors including the degree of victim impact. I was representing my client to the best of my ability. During my years as a federal prosecutor I gave the same degree of representation to the United States on occasion getting an upward departure. As a district court judge my role will not be as an advocate, but to apply the sentencing factors in a way that is fair and just, follows the laws set by Congress and avoids unwarranted sentencing disparity.

7. **Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?**

Response: I do not believe that I have publically expressed an opinion on this matter.

8. **Do you have a personal view regarding whether the death penalty is constitutional?**

Response: The Supreme Court has determined that the death penalty is a constitutional and acceptable form of punishment. If confirmed I will follow that precedent.

9. **Do you believe that the death penalty is an acceptable form of punishment?**

Response: Yes.

10. **Do you hold any personal views that would preclude you from enforcing the death penalty?**

Response: No.

11. **At your hearing, Senator Whitehouse asked for your comments on the following:**

"It is my belief that judges must do a number of things. One is to respect the role of Congress as the duly elected representatives of the American people in our system of American democracy. Two is to decide cases based on the facts and the law, nothing else. Three is to not prejudge any case, but listen to every party that comes before you, powerful or weak, rich or poor, irrespective of station or position; to respect the precedent that the Supreme Court and the circuit courts for your districts have laid down and the precedent that exists within your own district; and, finally, to limit yourself in your decisions to the issues that the court must decide that are properly presented before it. It is my belief that those disciplines, which must be self-imposed by judges, are key to the successful operation of the carefully balanced system of government that the Founding Fathers created and that we all honor and enjoy the fruits of.

You responded:

"Senator, I agree with everything you said, absolutely. That is what a judge is - that is exactly what a judge has to do, be impartial, be fair, and follow the law."

Do you also agree that when Congress, in its role as the legislative branch, enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?

Response: Yes.

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

Response: I received these questions on November 23, 2010 from the Department of Justice's Office of Legal Policy. I prepared a draft of these answers which I sent to OLP on November 24, 2010. I then discussed that draft with OLP on November 27, 2010 and submitted my final draft on November 27, 2010 for transmission to the Committee.

13. Do these answers reflect your true and personal views?

Response: Yes.