Responses of Kathleen M. O'Malley
Nominee to be U.S. Circuit Court Judge for the Federal Circuit
to the Written Questions of Senator Jeff Sessions

1. In *U.S. v. Stern*, you departed downward and sentenced a defendant convicted of possessing 1,000 pages of child pornography on his computer to only 12 months and one day in prison. The Sentencing Guidelines recommend a range of imprisonment between 46 and 57 months. In your opinion you stated: "The individual who possesses child pornography, while demanding punishment, is considerably less culpable than a producer or distributor of the exploitative materials and is a marginal player in the overall child exploitation scheme."

a. Your explanation for your downward departure cited the greater culpability of producers and distributors of child pornography.

i. Do you acknowledge that separate statutes provide greater penalties, including mandatory minimum sentences, for those who produce and distribute child pornography?

Response: Yes.

ii. Do you acknowledge that the U.S. Sentencing Guidelines provide higher offense levels for individuals who produce and distribute child pornography?

Response: Not necessarily. Because of the manner in which sentencing enhancements are considered under U.S.S.G. §2G2.2(b), the Guidelines sometimes recommend a lower sentence for a given defendant who distributed child pornography than they recommend for a defendant who possesses, but does not distribute, child pornography.

iii. Based on the higher statutory and guideline sentences for those who produce and distribute child pornography, do you acknowledge that the greater culpability of these offenders is already built into our federal sentencing law even in the absence of downward departures?

Response: Not always, as explained in my answer to question 1(a)(ii).

b. Do you believe the Sentencing Guidelines are too harsh on child sex crimes?

Response: No, generally. In particular, as I note in *Stern*, I have "consistently imposed harsh sentences upon defendants who possess child pornography" and I have rarely "disagreed with the Government's recommended sentences." *United States v. Stern*, 590 F. Supp. 2d 945, 947 (N.D. Ohio 2008). As noted in response to question 1(a)(ii), however, in light of how these particular guidelines operate, there are instances in which the guideline range for possession of child pornography can be higher than the recommended range for distribution or crossing state lines to engage in sexual intercourse with a minor.

i. If not, why did you cut the sentence so dramatically in this case?

Response: Given the sentencing factors that I was mandated to consider under 18 U.S.C. § 3553(a), *Stern* presented "an extraordinary and unique case." *Stern*, 590 F. Supp. 2d at 947. Many circumstances differentiated *Stern* from any other over which I have presided during my almost 16 years on the bench. These circumstances included, but were not limited to, the fact that: (1) the defendant began his crime by looking at pictures of other 14-year old girls when the defendant was himself 14; (2) expert testimony indicated that, at that young age, the defendant's adolescent brain was particularly susceptible to suggestion and addiction; (3) the Government did not suggest that Stern posed a risk of recidivism and expert testimony confirmed he did not; (4) the defendant sought therapy and counseling before any charges were brought; (5) the defendant completed college and began a productive career after, and in the face of the shame caused by, the charges; (6) the defendant's remorse was credible; (7) the images downloaded, while reprehensible, were less graphic or violent than those downloaded by other defendants I have sentenced; and (8) expert medical testimony indicated that a lengthy prison term for an offender who began viewing pornographic images at age 14 would interfere with, rather than enhance, rehabilitation.

ii. What factors did you consider when you decided to depart downward in this case?

Response: As required by law, I considered all factors outlined under 18 U.S.C. § 3553(a) and the advice provided by the Sentencing Guidelines. I outlined the factors I considered in my previous answer to question 1(b)(i). Notably, the Government did not appeal the sentence I imposed in *Stern*, which I believe indicates that my consideration of all relevant sentencing factors and exercise of my sentencing discretion were reasonable in the unique circumstances presented.

c. You criticized the Sentencing Guidelines in your opinion stating:

"In short, the national sentencing landscape presents a picture of injustice. In the absence of coherent and defensible Guidelines, district courts are left without a meaningful baseline from which they can apply sentencing principles. The resulting vacuum has created a sentencing procedure that sometimes can appear to reflect the policy views of a given court rather than the application of a coherent set of principles to an individual situation. Individual criminal sentences are not the proper forum for an expansive dialogue about the principles of criminal justice. Such conversation, though vital, should not take place here – lives are altered each and every time a district court issues a sentence: this is not a theoretical exercise."

i. Why do you believe the Sentencing Guidelines do not provide a "meaningful baseline" and lack coherent and defensible guidelines?

Response: I do not. As to the Sentencing Guidelines generally, I believe they serve the important purpose of promoting uniformity in sentencing, are well and carefully conceived, and are deserving of great deference. The quotation listed here from *Stern* applied only to child pornography Sentencing Guidelines. As noted in *Stern*, I am troubled that the specific Guidelines at issue there have been adjusted repeatedly in a manner that is contrary to recommendations made by the United States Sentencing Commission, "do not reflect the kind of empirical data, national experience, and independent expertise that are characteristic of the Commission's institutional role," and, in certain, though not all cases, can suggest illogical results. *See Stern*, 590 F. Supp. 2d at 960 (citing *United States v. Ontiveros*, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, *20 (E.D. Wis. July 24, 2008)).

ii. Do you think a judge should be able to impose whatever sentence he or she pleases based on each individual's circumstances?

Response: No.

iii. Do you believe empathy should play a role in sentencing?

Response: No. A court's sentencing determinations must be based upon the sentencing factors set forth in 18 U.S.C. § 3553(a), the advice provided by the Sentencing Guidelines, and a careful and reasonable exercise of the court's discretion in keeping with binding legal precedent.

d. On May 21, 2010, the *New York Times* published an article discussing Brooklyn Judge Jack Weinstein's "crusade" to thwart federal child pornography laws. *See,* A.G. Sulzberger*, Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES (May 21, 2010). Judge Weinstein defied congressionally set criminal penalties and decided cases based on his own policy preferences. I ask that you read the *New York Times* article on Judge Weinstein and answer the following questions:

i. Do you agree with Judge Weinstein that "those who view [child pornography] images, as opposed to producing or selling them, present [no] threat to children?" Why or why not?

Response: No. As I said in *Stern*:

> The Court finds that possession of child pornography is an exceedingly serious offense, among the most serious class of offenses that do not involve the direct use of violence or coercion on the part of the perpetrator. *See, e.g.*, *United States v. Holtz*, 285 Fed. Appx. 548, 553 (10th Cir. 2008) ("Possession of child pornography is a serious matter. It's not just the possessing of it; it's what is done to innocent victims worldwide in order to allow adults to knowingly possess it."). . . .
>
> Laws criminalizing the possession of child pornography are in place to reduce the market for exploitation of the children that are severely victimized by this crime. . . . This crime shocks the conscience: "Children are exploited, molested, and raped for the prurient pleasure of [the defendant] and others who support suppliers of child pornography." *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007). The written word seems inadequate to describe the horrors of this crime.

Stern, 590 F. Supp. 2d at 951-52 (some citations omitted).

ii. Do you agree with Judge Weinstein that, through application of federal child pornography laws, "[w]e're destroying lives unnecessarily?" Why or why not?

Response: No. As I said in *Stern*, possession of child pornography must be punished with a term of imprisonment to discourage its creation and the exploitation of children.

iii. Do you agree with Judge Weinstein that "[a]t the most, [possessors of child pornography] should be receiving treatment and supervision?" Why or why not?

Response: No.

iv. Do you agree with Judge Weinstein that criminal defendants have "a constitutional right to have a jury know the punishment that would accompany a guilty verdict?" Why or why not?

Response: No. Neither the Supreme Court nor the United States Court of Appeals for the Sixth Circuit has found such a right to exist.

2. The Sixth Circuit criticized you in reversing your denial of qualified immunity to two police officers in *Chappel v. City of Cleveland.* The court stated that your analysis

> **"represents exactly the sort of theoretical speculation that the courts are prohibited from engaging in…It represents the impermissible substitution of the district judge's own personal notions – about what might have been, could have been, or should have been – in a 'sanitized world of…imagination' quite unlike the dangerous and complex world where the detectives were required to make an instantaneous decision."**

a. Do you accept the Sixth Circuit's criticism of your decision in this case?

Response: I accept the Sixth Circuit's decision as binding precedent. I respectfully disagree, however, with their characterization of my opinion.

b. Why did you believe it was proper to speculate about the facts in this case?

Response: I do not believe that I engaged in speculation. The role of a district court on summary judgment is to construe the facts in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. This includes drawing all reasonable inferences in favor of the non-moving party. I believe I adhered to that obligation and avoided resolving factual questions which were in dispute.

c. Why did you believe it was proper to question the two officers' actions after they were confronted by a criminal suspect who emerged in the dark from a closet holding a knife?

Response: I did not question the officers' actions. That was not my role. I attempted to apply the law as it existed at the time to the facts presented. Ultimately, I concluded that there were material issues of fact regarding whether the officers' use of deadly force against a 15 year old boy who was hiding in his

bedroom closet and who was suspected of robbing a pizza delivery man was reasonable. As I said in *Chappell*:

> The Court does not, and would not presume to pass moral judgments upon McCloud, his family, or the Detectives. The very narrow question before the Court now is whether, on the record before it, there are genuine disputes of material fact that prevent judgment in the Detectives' favor on their claim of qualified immunity and require further inquiry before a jury. While the Court has found that certain legal and factual issues are not open to fair debate – such as whether McCloud was holding a knife when encountered – it also finds that there is genuine dispute over a host of other important facts. It is this reservoir of disputed facts which, at least under current, binding Sixth Circuit precedent, counsels against a judgment granting qualified immunity to the Detectives at this stage of the proceedings.

Chappell, 584 F. Supp. 2d at 1006.

d. In your personal opinion, when do you think a police officer should *not* be civilly liable for his or her actions while on duty?

Response: My personal opinion is not relevant. In this position and my former role as First Assistant to the Ohio Attorney General, I have worked closely with and formed close bonds with a variety of law enforcement officers. I have great respect for them and the difficult and dangerous jobs they do. Those agents and officers understand that, despite my relationship with and regard for them, my position requires a balancing of the facts of each individual case, and that there will be times when I am compelled to leave some decisions in the hands of the jury. The law dictates that these assessments be made on a case-by-case basis. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court established the test for analyzing objective reasonableness. I described this test in *Chappell* before applying it to the facts presented there:

> Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.
>
> Application of this test "requires careful attention to the facts and circumstances of each particular case, including the [1] severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight."

Chappell, 584 F. Supp. 2d at 990 (citations and footnote omitted). Importantly, as I also noted in *Chappell*,

> [I]t is not for the Court to substitute its own notion of the "proper police procedure for the instantaneous decision of the officer at the scene." "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

Id. (citations omitted).

3. 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. Do you believe that you fit President Obama's criteria for federal judges, as described in his quote?

Response: I assume that President Obama concluded that I am qualified to serve as a Judge on the United States Court of Appeals for the Federal Circuit and to handle its unique jurisdiction and docket.

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 that empathy should play in a judge's consideration of a case?

Response: To the extent one defines empathy as the capacity to understand what others are experiencing and how they perceive the way they are treated, a judge can and should show empathy for all parties by engaging in careful and rigorous analysis of all arguments presented, explaining thoroughly the bases for all decisions, and being temperate in the language employed in those decisions and used in the courtroom. I do not believe, however, that empathy plays any role in the application of the law to the facts presented, and, accordingly, in the ultimate disposition of a case.

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

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

ii. Please provide an example of a case in which you have considered your own subjective sense of empathy in determining what the law means.

Response: Not applicable.

iii. Please provide 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 2008, I considered a case in which a plaintiff contended that he had been terminated by his long-time employer in violation of the Americans with Disabilities Act and the Family and Medical Leave Act. The plaintiff had been an exemplary employee of the defendant for many years, but his performance declined as he succumbed to "the destructive power of alcoholism . . . ." *Seitz v. Lane Furniture Indus.*, Case No. 07cv171, 2008 U.S. Dist. LEXIS 79651, at *2 (N.D. Ohio Sept. 17, 2008). Ultimately, it was "clear that alcohol ruined [the Plaintiff's] career," and I empathized with what were clearly his "best efforts to overcome" his alcoholism. *Id*. at *2, *85. I concluded, however, that the "law [was] not designed to protect [the Plaintiff] from losing his job under the circumstances of th[at] case." *Id*. at 85. In my opinion, I "recognize[d] that this [was] a harsh result," for the Plaintiff, but concluded that the Defendant "had the right to keep its business running" and was under no legal obligation to "retain [the Plaintiff] if it decide[d] that his performance deficiencies [were] harming the company." *Id*. at 86.

e. 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: Solely on the law and facts presented.

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

Response: I reviewed the particular decisions about which I was asked, reviewed the May 21, 2010 *New York Times* article which I was asked to read, and pulled from memory a number of cases I believed were responsive to question 3(d)(iii). I then drafted these responses. Thereafter, I had discussions with my law clerks and with individuals from the Department of Justice.

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

Response: Yes.