

**Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Tom Coburn, M.D.**

- 1. In response to questions 1d., 2c., and 2e., you stated that if any of the individuals who wrote or solicited letters of recommendation on our behalf appeared before you in court, you would consult and follow the applicable ruled of ethics regarding recusal, including either the Virginia Canons of Judicial Conduct or the Code of Conduct for United States Judges.**

a. How do you think recusal should be approached generally?

Response: In every case that a judge is assigned to hear, the judge must consider whether an issue of recusal exists. These issues may arise from a judge's own consideration of the case, or from issues that the litigants present to the judge. A judge must consider any issue of recusal very thoroughly and carefully. This includes giving extended consideration to issues involving the appearance of impropriety, as well as to issues of actual impropriety. Litigants must be assured that the judge deciding their case will be free from bias, whether actual or perceived. In addition, full consideration of recusal issues is necessary to maintain public confidence in the integrity and impartiality of the judiciary.

b. When determining whether recusal is required do you believe the rules should be interpreted narrowly or broadly?

Response: The applicable standards for recusal should be interpreted broadly, so that a judge will recognize and consider all issues involving the appearance of impropriety and of actual impropriety, including those that are not immediately apparent, in making a recusal decision.

i. Please explain your reasoning.

Response: Often, issues involving recusal are complex in nature. A judge must be certain that he or she has considered all aspects of the issues presented, including issues of the appearance of impropriety as well as issues of actual impropriety. When a judge determines that recusal is an issue in a particular case, a judge should consider all perspectives of the parties to the case and always resolve any reasonable question in favor of recusal.

c. How will you evaluate whether you should recuse yourself in cases involving the individuals from whom you or your husband solicited letters of support for your potential nomination for a position on the U.S. court of appeals for the Fourth Circuit?

Response: In every case that I hear as a judge, I always evaluate whether an issue of recusal is presented. In cases involving individuals from whom I or my

husband solicited letters of support for my potential nomination, I would disclose this fact on the record of the case and ask the parties if they wish to be heard on the question whether I should remove myself from the case. I would also informally consult with my judicial colleagues regarding the issue and resolve any remaining reasonable question in favor of recusal.

2. **Canon 3C(1) of the Code of Conduct for United States Judges states that “a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonable be questioned ...” Do you believe that your impartiality might reasonably be questioned by a litigant if you participated in a case involving Mr. Sims, Mr. Mastracco, Mr. Heilig, Mr. Johnson, or Ms. Puller given you and your husband’s solicitations for letters of support from them relating to your potential nomination?**

Response: As a general matter, I do not think that my impartiality might reasonably be questioned by my participation in a case involving the above individuals. However, in the event that other persons participating in such a case have a different perspective, I would carefully consider their different perspectives, informally consult with my colleagues regarding the matter, and resolve any remaining reasonable question in favor of recusing myself from such a case.

i. If not, why?

Response: Such letters solely addressed my professional qualifications based on my public record of judicial service. However, in a future case of the above-referenced nature, I would disclose on the record the fact that these individuals were asked to send letters of support on my behalf. I also would informally consult with my judicial colleagues and consider their perspectives on the subject. Further, I would invite the parties to state whether they would prefer that I recuse myself from the case. I would consider fully their perspective and would be strongly inclined to grant any reasonable recusal request simply to avoid any appearance of impropriety. To date, in the rare instances in which I have been asked to recuse myself for any particular reason, I have never refused such a request.

- ii. Do believe that your impartiality might reasonably be questioned by a litigant if you participated in a case involving legislation that Ms. Puller had sponsored or cosponsored given your solicitation of a letter of support from her?**

Response: No, I do not believe that my impartiality might reasonably be questioned by a litigant if I participated in a case involving legislation that Ms. Puller had sponsored or cosponsored. Although I did not see any letter that she may have written on my behalf, I would expect that it stated my professional qualifications for the job on the basis of my public record

of judicial service. However, in a future case of the above-referenced nature, I would disclose on the record that I had asked Ms. Puller to write a letter on my behalf. I would invite the litigants to state any concerns on the record and would give those concerns my full consideration. I would informally consult with my judicial colleagues on the issue and consider all points of view that they express. I would invite the parties to state whether they prefer that I recuse myself from the case. I would consider fully their position and would be strongly inclined to grant any reasonable recusal request simply to avoid any appearance of impropriety. To date, in the rare instances in which I have been asked to recuse myself for any particular reason, I have never refused such a request.

iii. Please explain your reasoning.

Response: Although I do not believe that my impartiality might reasonably be questioned in such instances, I must always be aware that other persons may entertain a different point of view on the subject. When individuals entertaining a different point of view have a case before me, I must be very careful to consider their perspectives. In any question of recusal, a judge must always consider the issues from the differing perspectives presented. I think that the fact that I have never refused a recusal request demonstrates my commitment to the principles of impartiality and integrity in the judicial process, and my general willingness to recuse myself from a case when asked to do so based on a reasonable concern.

- 3. You stated in response to question 1b. that: “[a]s a matter of practice, [you] never conduct research or otherwise attempt to determine who was a sponsor or cosponsor of legislation that is before [you] as a judge.” If you do not conduct such research, how do you determine whether there might be a conflict of interest or recusal issue in the case?**

Response: The identity of a sponsor or cosponsor of legislation is never part of my analysis of a case, and I cannot recall ever having been aware of the sponsor or cosponsor of legislation that was litigated before me either as a trial judge or as an appellate judge. Therefore, the identity of such a legislator does not present an issue of conflict of interest or recusal sua sponte.

- a. Will you begin conducting this type of research if confirmed as a circuit court judge, especially in light of the letter of support you solicited from a legislator to help obtain the position?**

Response: I do not plan to undertake this type of research if confirmed as a circuit court judge, because such an inquiry has never been part of my procedure in analyzing a statute. Further, I am not aware of any federal judge who conducts such research, despite the fact that many of those judges have personal

relationships with legislators on both the federal and state level. However, I will fully and carefully consider any motion for recusal made by a party to a case. I have never refused a request for recusal that a party has placed on the record of a case. I believe that this fact demonstrates my awareness of the sensitivity and importance of recusal issues. I will consider each such future request from all perspectives presented.

b. If you do not conduct this type of research, do you take the position that legislative history is not relevant to determine the meaning of a statute?

Response: Legislative history, in certain cases, can be important in determining the meaning of the text of a statute. In Virginia, however, there is rarely any substantive legislative history to be considered. In the future, if confirmed as a circuit court judge, I will consider legislative history whenever appropriate in the context of the issues presented.

c. If you do think legislative history is relevant to statutory interpretation, how can you determine legislative history without knowing the sponsor or cosponsor of the legislation?

Response: I agree that when considering the legislative history of a statute, I likely will learn who was the sponsor or cosponsor of a particular statute.

d. Do you consider yourself a textualist?

Response: I am not certain what you mean by the term “textualist.” However, if your inquiry seeks my approach to statutory analysis, I offer the following answer: A court is required to apply the plain meaning of a statute, whenever possible. In most instances, the language of a statute is plain on its face. However, there are unusual instances in which the language of a statute is ambiguous, in that the language can be interpreted to have more than one meaning. In such instances, a court should consider the intent of the legislative body in enacting a particular statute, in order to assist the court in interpreting that statute. In these types of cases, a court seeks to interpret the statute at issue to enable the enactment to remedy the particular situation at which it is directed.