

Senator Jeff Sessions
Supplemental Questions for Magistrate Jane Magnus-Stinson
Nominee, U.S. District Court, Southern District of Indiana

1. In my written questions to you, I asked you to identify the specific provision of the Code of Judicial Conduct that prohibits you from explaining the reasons for your request to be removed from capital cases while a judge on the Marion Superior Court. You cited Canon 2.10(A) of the Indiana Code of Judicial Conduct, which reads:

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

You also stated that Canon 3A(6) of the Code of Conduct for United States Judges precludes you from explaining the reasons for your request. Canon 3A(6) provides:

A judge should not make public comment on the merits of a matter pending or impending in any court...

As you noted, the commentary to that Canon provides:

The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A.

- a. Do any of the capital cases to which you were assigned when you asked to be removed remain pending?
- b. Regarding those same cases, is the appellate process complete for each of them?
 - i. The commentary to Canon 3A(6) provides that the admonition against making public comment continues "until the appellate process is complete." If the appellate process for each case that was pending when you made your request is complete, please explain how Canon 3A(6) bars you from explaining the reasons for your request.
- c. According to the Indiana Code of Judicial Conduct, an "impending matter" is "a matter that is imminent or expected to occur in the near future."

- i. **Do you believe that Indiana’s Code of Judicial Conduct Canon 2.10(A)’s admonition against making any public statement regarding an “impending” matter precludes you from commenting? If so, why?**
- ii. **Do you consider all future Indiana capital cases to be “impending” matters for purposes of Canon 2.10(A)?**
- iii. **Do you consider all future Indiana capital cases to be “impending matters” for the purposes of Canon 3A(6) of the Code of Conduct for United States Judges?**
- d. **Given that you are no longer a judge on the Marion Superior Court, please explain how providing the reasons for your request at present could affect the “outcome or impair the fairness of a matter pending or impending.”**
- e. **Given that you are no longer a judge on the Marion Superior Court, please explain whether your request related in any way to a personally held objection to the imposition of the death penalty.**

Response: In my prior testimony and written submissions regarding the three capital cases assigned to me in 1999 while I was a judge of the Marion Superior Court, I relied on ethics advice I received at the time of the reassignments not to publicly discuss the specific circumstances that led to them. Trial proceedings and direct appeal of those cases are completed.

I understood that the advice I received at the time of the reassignments continued to apply even after I no longer served as a judge of the Marion Superior Court and after all appeals were complete. In light of these supplemental questions, I sought new ethics advice today from the current counsel of the Indiana Judicial Qualifications Commission and the office of the general counsel to the Codes of Conduct Committee of the Administrative Office of the United States Courts, which governs my conduct as a magistrate judge. Neither entity now interprets the canons to preclude my public comment about the cases.

At the time the three capital cases were assigned to me in 1999, Indiana law provided for the capital sentencing decision to be made by the judge, rather than the jury. Ind. Code § 35-30-2-9 (1999) (“the Court shall make the final determination of the sentence”), *amended by* Ind. P.L. 117-2002 § 2 (2002). I fully respected and continue to respect the prerogative of the legislature to determine the mechanism for capital sentencing determination, as well as to determine the circumstances in which capital punishment is appropriate. In fact, while serving as Counsel to the Governor, I advised Governor Evan Bayh during clemency proceedings that resulted in the denial of clemency and the carrying out of the death penalty.

Despite my legal comfort with the death penalty, I was uncomfortable about personally, on my own, choosing between life and death (in light of the jury providing a mere non-binding recommendation). I had then and have now no reservation about my ability to

impose the death penalty or uphold a capital sentence properly found by a jury (as is done in the federal system and under today's Indiana law) or by another judge (as was the case under Indiana law until 2002.) At the time, I consulted with our Presiding Judge and together we agreed that a reassignment of cases was the best way to give the full effect to both the state law and the court's interest in efficient docket management. To account for the cases being transferred, I took on 50 major felony drug cases.

- 2. During the course of the vetting process, have you contacted the Counsel for the Indiana Commission on Judicial Qualifications and inquired as to whether disclosing your reasons for your request to the Judiciary Committee would violate the Code of Judicial Conduct? If so, precisely state the question you posed and precisely what they advised.**

Response: Prior to this week, I relied on the advice I received concurrent to the case reassignments that I should, without limit, avoid public statements about those reassignments. In responding to prior Questions for the Record, I contacted the counsel for the Indiana Judicial Qualifications Commission solely to confirm a citation, as I understood that the canons had been re-codified subsequent to my state judicial service. In response to these supplemental questions, I have sought new counsel today, from both the counsel to the Indiana Judicial Qualifications Commission and the office of the general counsel to the Codes of Conduct Committee of the Administrative Office of the United States Courts. I received new advice that neither entity now interprets the applicable canons to preclude my public comment.

- 3. If confirmed as a United States District Court Judge, you will be required to hear and decide collateral attacks on Indiana death penalty cases, such as motions filed under 28 U.S.C. 2254.**
- a. Do you intend to recuse yourself from these matters?**
 - b. If you intend to preside over these cases, why are you able to do so now, when you were not able to do so as a judge on the Marion Superior Court?**
 - c. What opinions have you expressed concerning the death penalty in general and its constitutionality?**

Response: As with any recusal question, I would follow the applicable statutes, canons, and practices of the Court. Because I do not have any reservation about my ability to uphold a death penalty properly decided by a jury and/or imposed by another judge, I would not state a blanket policy of recusal from collateral attacks on Indiana death penalty cases, or on death penalty cases generally. In *Gregg v. Georgia*, the Supreme Court of the United States held that the death penalty is permissible under the constitution. 428 U.S. 153 (1976). If confirmed as a district judge, I would apply this and all other law concerning the death penalty with the diligence and efficiency I pledge to every case.

Similarly, because I have no problem in upholding a capital sentence properly decided by a jury or imposed by another judge, I would have no problem reviewing death penalty cases from Indiana state court. In addition, I understand the strictly limited avenue for relief provided by the habeas statutes. If confirmed as a United States District Judge, I would follow the law, including applicable Supreme Court precedent, in evaluating any collateral attack on a capital case.

4. If confirmed as a United States District Court Judge, you will be required to hear and decide capital cases under federal law.

a. Do you intend to continue your policy of recusal from such cases?

b. If not, why do you feel that you can now rule impartially in such cases?

Response: As with any recusal question, I would follow the applicable statutes, canons, and practices of the Court. Because I do not have any reservation about my ability to impose the death penalty properly decided by a jury, I would not state a blanket policy of recusal on capital cases under federal law. I fully respect the determination of the Congress about the circumstances in which the death penalty may be imposed, subject only to the limits of the Constitution as determined by the Supreme Court of the United States and the United States Court of Appeals for the Seventh Circuit. I appreciate the special gravity of any question about capital cases, and I represent without reservation that I can rule impartially and follow the law in these cases.

5. Have you disclosed to anyone at the White House and/or the Department of Justice the reasons for your request to be removed from capital cases while on the Marion Superior Court? If so, please explain why disclosing that information to the White House and/or Department of Justice does not violate the Canons you cite, but disclosing that information to the Committee would violate those same Canons.

Response: I shared privately with attorneys from the White House and Department of Justice the same information about the reassigned cases contained in these answers. As private conversations, they were consistent with the advice I previously had received to avoid public statements on these cases.