

**Responses of Jane E. Magnus-Stinson  
Nominee to the U.S. District Court for the Southern District of Indiana  
to the Written Questions of Senator Jeff Sessions**

- 1. During your hearing, I asked you to explain your reasons for your request to be removed from capital cases while a judge on the Marion Superior Court. You testified as follows: “At the time that issue arose, I sought counsel from the Counsel for the Indiana Commission on Judicial Qualifications, which is the disciplinary entity that regulates judicial behavior, and at that time was advised to make no public statement on the issue, as to do so would implicate the code of judicial conduct. I continue to believe that the Code of Conduct that applies to my work now precludes me from making a public statement.”**
- a. What specific provision of the Code of Judicial Conduct prohibits you from explaining to this Committee the reasons for your request?**

Response: At the time in question, I was relying upon the advice of Counsel for the Indiana Commission on Judicial Qualifications, who advised me not to comment, and relying on the then-existing version of Canon 2.10(A) of the Indiana Code of Judicial Conduct, which currently reads:

- (A) 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.

At the hearing I was also referring to Canon 3A(6) of the Code of Conduct for United States Judges:

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

The commentary to that Canon further provides:

Canon 3A(6). 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.

I would reaffirm that the circumstances that prompted the transfer will not prevent me from fairly applying federal law and precedent, including enforcement of the death penalty, in the event I am confirmed.

**b. Did your request relate in any way to a personally held objection to the imposition of the death penalty? Please explain your answer.**

Response: As explained in response to question 1.a. above and the canons and commentary cited therein, I must respectfully decline further explanation.

**2. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: No, the United States Supreme Court has affirmed the death penalty as a constitutional form of punishment, and I will follow controlling precedent.

**3. Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: Yes, the United States Supreme Court has affirmed the death penalty as a constitutional form of punishment, and I will follow controlling precedent.

**4. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on “evolving standards of decency” in holding that capital punishment for any murderer under the age of 18 was unconstitutional.**

**a. Do you agree with Justice Kennedy’s analysis?**

Response: Justice Kennedy’s analysis constitutes the majority opinion of the United States Supreme Court, is controlling precedent, and I will follow it.

**b. How would you determine what constitutes “evolving standards of decency”? What factors would you consider?**

Response: I would follow the analytical framework established by the United States Supreme Court. In *Roper*, the Court stated:

“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment ....”  
*Roper v. Simmons*, 543 U.S. 551, 564 (2005).

- c. **Do you think that a judge could conclude that “evolving standards of decency” dictate that the death penalty is unconstitutional in all cases? Please discuss what factors you believe would be relevant to the judge’s analysis.**

Response: No, I do not think any district judge following current controlling precedent could find that “evolving standards of decency” dictate that the death penalty is unconstitutional in all cases. The United States Supreme Court has consistently held otherwise. The factors quoted from *Roper* in response to question 4b, as well as any factors contained in subsequent United States Supreme Court or Circuit precedent, would be relevant to the district judge’s analysis.

5. **In *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008), the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. The majority opinion was based, in part, on the fact that 37 jurisdictions (36 states and the federal government) did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.**

- a. **Given the heinousness of the crime, as well as the information on the federal government’s codification of capital punishment in child rape cases under the UCMJ, is it your opinion that *Kennedy v. Louisiana* was wrongly decided? If not, why?**

Response: The United States Supreme Court addressed the significance of the military code’s provisions in its decision on petition for rehearing cited in the question. It also addressed the undisputed heinousness of the crime in its original opinion. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2647 (2008). I am bound to follow its decisions.

- b. **Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you agree with that statement? Why or why not?**

Response: I agree with both statements. The United States Supreme Court has determined that the death penalty “must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (internal quotation marks omitted). And the *Kennedy* Court further recognized “rape has a permanent psychological, emotional, and sometimes physical impact on the child... [resulting in] years of long anguish that must be endured by the victim” *Id.* at 2658.

6. In 2005, you commented on a bill that was proposed in the Indiana Legislature that would have required Superior Court judges be appointed rather than elected. Your particular concern was the lack of a provision for racial, gender, or political diversity with regard to such appointments.

a. What were your reasons for your concern?

Response: My comments were in response to assertions made by the bill's proponents that the proposed bill would improve diversity on the court. The experience in our county showed that elections produced a more diverse bench than a prior selection commission had. As for political diversity, the bill in question sought to eliminate a decades old statutory election scheme that provided for a nearly bi-partisan court, whose goal was neutralizing politics in the county's judicial branch.

b. Do you believe that an individual's race, gender or political persuasion influences his or her judicial decisionmaking? Please explain your answer.

Response: No, a judge's race, gender or political persuasion should not influence judicial decisionmaking, which should be based on both a fair and objective determination of the facts, and adherence to controlling legal precedent.

i. If so, please provide an example of a case in which your race, gender or political persuasion influenced your judicial decisionmaking.

Response: See above.

c. Do you believe that an individual's race, gender or political persuasion affects the quality of his or her judicial decisionmaking? Please explain your answer.

Response: No, the quality of judicial decisionmaking is determined by hard work, fair treatment to all litigants, and adherence to precedent and law.

7. During your time as Deputy Chief of Staff and Counsel to then-Governor Bayh, you worked on a half million dollar settlement of a federal lawsuit against your husband, who was sued in his official capacity as deputy commissioner of the Bureau of Motor Vehicles and his individual capacity by the Indiana Civil Liberties Union for alleged political firings. According to press reports, you and your husband were married during the course of the litigation. Although you did not litigate the suit, you acted as the Governor's liaison and monitored developments in the litigation. And, although you reportedly told the Governor's Chief of Staff that you did not believe you should participate in the settlement negotiations alone because you believed it to be an improper conflict of interest, you were the only representative of the Governor at the settlement conference.

- a. What factors led to your decision that it was no longer a conflict of interest for you to represent the Governor in the settlement negotiations?**

Response: After I raised my concerns about a potential conflict to the Chief of Staff, we agreed that while I would attend the conference in person, he would be available by phone. I attended the conference, lead counsel negotiated the settlement, the Chief of Staff was consulted by phone, and he approved the final settlement.

- b. If confirmed, what process will you employ to determine whether you have a conflict of interest?**

Response: If confirmed, as throughout my service as United States Magistrate Judge, I would consult the Federal recusal statutes and the Code of Conduct for United States Judges to assist me in identifying and, where necessary, resolving or avoiding any conflicts. I also would seek the advice of my colleagues and of the Judicial Conference as needed. I would continue to carefully monitor ordinary conflicts, such as those arising from mutual fund investments, any entity listed on my financial disclosure form, and relatives' employers.

- 8. 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. While I understand that you cannot know what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: Yes, in certain respects. Through the work I have done as a federal magistrate judge facilitating settlement conferences, I have learned the impact of litigation on plaintiffs and defendants, and used the knowledge gained to help the parties work toward crafting mutually acceptable resolutions. The success of this process requires a significant level of understanding of all parties' points of view.

- 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, I agree with Justice Sotomayor’s statement.

- c. What role do you believe empathy should play in a judge’s consideration of a case?**

Response: Unlike the unique role of settlement facilitator described above, in a more traditional judicial role, the bounds of “empathy” are limited to the role of judge as

one who “should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity” and who “should accord to every person who has a legal interest in a proceeding, and that person’s lawyer, the full right to be heard according to law.” Code of Conduct for United States Judges, Canon 3(A)(3),(4).

**d. Do you think that it’s ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

**i. If so, under what circumstances?**

Response: See above.

**ii. Please identify any cases in which you have done so.**

Response: See above.

**iii. If not, please discuss 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 Social Security disability appeals, I often serve by consent of the parties as the reviewing judge. A petitioner in such a case almost always suffers from a severe medical impairment, but the case is before me because an administrative law judge has determined the petitioner is not disabled. The standard of review is very deferential, and even in cases where another ALJ (or I) might have found differently, I uphold the ALJ’s decision where required by law.

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

Response: The questions were forwarded to me by the Department of Justice. I considered them, conducted research, and prepared answers. I discussed my answers with representatives of the Department of Justice, finalized them, and forwarded them for submission to the Committee.

**10. Do these answers reflect your true and personal views?**

Response: Yes.