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.

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 Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: No, I do not agree with the reference to the Constitution as a living document that is constantly evolving as society interprets it. The Constitution is the permanent framework for our democracy.

2. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

   a. **Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

      Response: Perhaps the most accurate answer can come from the Supreme Court itself: "As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time." *Gonzales v. Raich*, 545 U.S. 1, 15-16 (U.S. 2005). *Lopez* and *Morrison* can perhaps be read as a further step in that evolution. Yet the Supreme Court has made clear that those decisions remain rooted in, and are therefore consistent with, earlier precedent.

   b. **Why or why not?**

      Response: As the *Raich* Court further noted: "[T]he larger context of modern-era Commerce Clause jurisprudence [was] preserved by those cases." *Id*. at 23.

3. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but 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.

a. How would you determine what the evolving standards of decency are?

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).

b. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in *all* cases?

Response: 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.

c. What factors do you believe would be relevant to the judge's analysis?

Response: The factors quoted from *Roper* in response to question 3a, as well as any factors contained in subsequent United States Supreme Court or Circuit precedent, would be relevant to the district judge's analysis.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: See above.

b. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: In interpreting the Eighth or any other amendment I would rely exclusively on United States law and controlling precedent.

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.