Responses of Richard B. Jackson
Nominee to be United States District Judge for the District of Colorado
to the Written Questions of Senator Charles Grassley

1. **You have participated in two different three-judge panels to determine whether the death penalty was appropriate. In both instances, the panel unanimously concluded that the death penalty was not appropriate. I recognize that in one of them, *People v. Page*, you criticized the panel's reasoning and said that while the decision is the most difficult that a judge has to make, it is "part of our criminal law and it's the responsibility of judges to impose the sentence on appropriate cases."**

   a. **Is there any doubt in your mind that the death penalty is constitutional?**

      Response: No.

   b. **Do you have any personal views that would prevent you from applying the death penalty, if confirmed?**

      Response: No.

   c. **In *People v. Page*, you wrote that although you had felt that "Page deserves the death penalty," you were unable to conclude beyond a reasonable doubt that the death penalty was appropriate. Please explain the reasoning for your conclusion in that case.**

      Response: The three judges on the panel (the judge who presided during the guilt phase of the trial plus two others, including me, who were randomly selected) agreed that aggravating factors outweighed mitigating factors, making Page eligible for the death penalty. Although all of us concluded that the death penalty was not appropriate in this case, our reasoning in reaching that conclusion diverged. The majority contrasted Page's crime, which was described as an impulsive reaction to his being surprised by the unexpected arrival of the homeowner during a burglary, with prior Colorado death penalty cases, each of which involved premeditation. The majority concluded that, based upon "evolving standards of decency," imposing the death penalty in this case would "lower the bar for executions in the State of Colorado, a precedent that we feel would be inconsistent with what we perceive to be the state-community's disposition to impose the death penalty only in the most egregious and extreme cases." I disagreed and concluded in a concurring opinion that the crime was sufficiently heinous to deserve the death penalty, and that the majority's analysis could effectively create a premeditation requirement for the use of the death penalty.

      My conclusion that the death penalty was inappropriate primarily focused on the requirement in Colorado law that death penalty sentencing panels consider factors such as the history and characteristics of the defendant, which led me to consider

whether Page had a brain injury that affected his ability to control impulsive behavior. There was PET scan evidence that a neuroscientist interpreted as indicating such brain damage. As the majority opinion states, "[t]he brain dysfunction testimony raises a reasonable doubt concerning the unimpaired functioning of Mr. Page's brain during the course of the crime." In my concurring opinion, I wrote, "I cannot exclude the possibility, even probability, that prolonged child neglect and abuse, sexual abuse, head injuries, unavailability of supportive parents, and the lack of societal support at critical times, in combination, contributed to the explosion that occurred in Ms. Tuthill's bedroom."

Therefore, because I concluded that I could not find "beyond a reasonable doubt" that the death penalty was appropriate, I concurred in the decision to sentence Page to life in prison without the possibility of parole.

2. **You received considerable criticism from your community for altering the sentence of a convicted child rapist. Seven months after sentencing the defendant to 10 years in prison, you held another sentencing hearing and changed the sentence to two years in prison and 10 years of probation.**

   a. **Please explain what led you to holding a new hearing seven months after the original sentencing.**

      Response: Lawyers representing the defendant filed a motion for reconsideration of the sentence under Rule 35(b) of the Colorado Rules of Criminal Procedure.

   b. **What factors led you to change the sentence?**

      Response: During my 12 plus years on the bench I would estimate that I have sentenced in the range of 300 to 400 sex offenders, many of whom are serving very long prison sentences, including indeterminate to life sentences. In these cases as in all criminal sentences I consider public safety including the possibility of recidivism as well as the rights and feelings of victims of these crimes and their families.

      In this case my decision was based on my concern for community safety and, specifically, what the defendant would be like when he completed his sentence. Charles Brooks was hearing impaired and communicated through sign language interpreters. The motion for reconsideration reported that Brooks would not be placed on the list to receive offender specific treatment in the Department of Corrections because there was no sign language interpreter available to attend the sessions with him. This issue was further developed at the hearing on the motion, and an alternative approach was proposed. The alternative was to incarcerate him in our local jail where it was said he could receive sex offense specific treatment, and if he successfully completed that treatment, he could serve the remainder of his sentence on "Intensive Supervision Probation" with zero tolerance for any

violation. Given the public safety concern about treatment in the Department of Corrections, the fact that Brooks would be in a locked facility for two years and if then released would be under very strict supervision, and the fact that Brooks had no prior sex offenses or any other reported criminal convictions, I believed that this alternative approach was the better one from an overall community safety perspective.

I also believe that the concern motivating my decision was reflected in the findings of Colorado's "Lifetime Supervision of Sex Offenders Act" which became effective five months after Brooks' crime and therefore did not apply to his case but was in effect when he was sentenced. The legislative declaration states:

> The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision.

C.R.S. §18-1.3-1001.

Unfortunately, Brooks did not successfully complete the offense specific treatment that he received. He refused to admit significant parts of the crime, which is a requirement for ultimate completion of the program, and he tested positive one time for marijuana. As a result, I promptly re-imposed the 10-year prison sentence and returned him to the Department of Corrections to serve it.

3. **Do you believe that our federal government is one of limited and enumerated powers?**

Response: Yes. That was the structure of the Constitution and is specifically reinforced in the Tenth Amendment.

4. **Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances?**

Response: Yes. That principal was established in *Marbury v. Madison* and has been a part of our jurisprudence ever since. However, statutes are presumed to be constitutional. They must be interpreted and applied if possible so as to be constitutional. Striking down an act of Congress should be done rarely, narrowly, and only when it is clear based upon existing precedents that the act in part or in whole cannot be construed or applied in a manner that is consistent with the Constitution.

5. **What is the most important attribute of a judge, and do you possess it?**

Response: The most important attribute of any judge is a commitment to apply the law, whether statutory or in the form of existing appellate precedent, impartially and fairly, and not to let the judge's personal feelings or desires regarding a result play any role. The rule of law is absolutely fundamental, and I have followed it without fail in my years as a judge. There are several other important attributes of a trial judge: (1) treating people who come before the judge with courtesy and respect; (2) listening with an open mind, and making lawyers and litigants feel that they have been heard; (3) deciding issues promptly; and (4) explaining decisions so that those affected by them understand the judge's reasoning. I have always striven to act according to those qualities in my years as a state court trial judge. I certainly cannot claim perfection, but some of the honors that are listed in my Senate Judiciary Questionnaire perhaps indicate that I have been perceived as having these attributes.

6. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A trial judge must recognize that some of the lawyers and most of the non-lawyers who come before him or her are nervous, scared, and of course, worried about the outcome of what may be the most important legal matter in their lives. We also deal with many people who cannot afford attorneys and are trying to represent themselves pro se. A judge must treat all of these people with courtesy, respect and often with patience. The judge's demeanor often means even more to the public than his intelligence and knowledge of the law. There is an expression, "black robe disease," that describes judges who are arrogant, sarcastic, short-tempered, and impatient. I do not have that disease. I cannot claim that I have never been short or impatient with someone. However, I can honestly say that any such lapses have been rare. I believe that I have, and that I am perceived to have, a good judicial temperament. My evaluations by the Judicial Performance Commission in 2000 and 2006 reflect that. I will strive to continue that demeanor and perception if I am confirmed as a federal judge.

7. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

8. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to**

what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If the issue involves interpretation of a statute, I would start with the plain language of the statute. If that did not provide a clear answer, I would try to determine from any legislative history that might be available the intent of the drafters of the statute. I would also attempt to find any useful analogy that might guide me to an appropriate interpretation. I would expect the parties, if represented by counsel, to address all these different avenues in their briefs. In the end, I know that my responsibility is to do everything within my power to determine what the intent of the legislative body was and not to make a policy decision.

9. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?**

Response: As a trial judge my responsibility and obligation are to follow the appellate precedents, whether or not I agree with them. There have been occasions during my years on the trial bench when I have questioned in my own mind the results reached by higher courts, but that has never and would never cause me not to follow them.

10. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: The only real answer is to be willing to roll up your sleeves and work hard. During my years on the bench I have done that, and I have instilled in my staff the same attitude. I have listed in response to question 11 a number of specific practices that have helped me to manage my large caseload as a state trial judge. These all are practices that I desired as a trial lawyer, that I have implemented as a judge, and that I have promoted among the 21 trial judges in my courthouse. The First Judicial District of Colorado, of which I am the Chief Judge, was just ranked in Colorado Law Week (April 11, 2011 ed.) as the "best" of the 22 judicial districts in the State in terms of getting civil cases resolved promptly and sixth best (first among the large metropolitan districts) in getting criminal cases resolved promptly. I am proud of our record, and I will be dedicated to running a similar docket if I am confirmed as a federal judge.

11. **Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes, particularly in civil cases. Early case management conferences among the lawyers, parties and judge can be a great help in establishing schedules and narrowing

issues, and I will conduct those if I am confirmed as a federal judge. I have always required parties to set a trial date very early in the case, and to stick with it absent extraordinary circumstances, and I will continue to do this. It is very important to decide motions, such as motions to dismiss and motions for summary judgment, promptly. My staff knows this and gets motions to me immediately after they are "ripe" (briefs filed). I have tried to get most motions decided within a couple of weeks after they are brought to my attention. I have been and will continue to be willing to grant dispositive motions such as motions for summary judgment or partial summary judgment when appropriate in order to narrow issues and to reduce unnecessary delay and cost to the parties. For the whole bench to function efficiently, it is important that a judge be willing to cover hearings and trials for other judges when the other judge is overbooked in order to avoid unnecessary delays. Our bench functions that way, and I will bring that attitude with me to the federal bench if I am confirmed. These things can be done without being overbearing, unreasonable or discourteous. I came to the state bench with a background of 26 years as a trial lawyer, and I have a pretty good understanding of what the lawyers and their clients need and want in terms of moving cases forward.

12. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A judge must respect the policy-making role of the legislature. A judge must also assume that a statute that has been enacted by Congress and signed into law by the President was intended to be and likely is constitutional. However, the role of an independent judiciary includes preserving and protecting the Constitution, including finding a statute or part of a statute unconstitutional or unconstitutional as applied. It is a role that must be exercised narrowly and rarely.

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

Response: I drafted my answers, discussed them with officials of the Department of Justice, finalized my answers and requested that they be submitted to the Senate Judiciary Committee.

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

Response: Yes.