Responses of Robert E. Bacharach
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Chuck Grassley

1. **According to guidelines of ABA Standing Committee on the Federal Judiciary, an appellate nominee is expected to possess "the ability to write clearly and persuasively, to harmonize a body of law, and to give meaningful guidance to the trial courts and the bar for future cases." Please elaborate on your experiences as a Magistrate Judge or otherwise that demonstrates this ability.**

   Response: In over 13 years as a magistrate judge, I have shown my ability to write well and harmonize bodies of law through the authorship of over 1,600 judicial opinions. These abilities are also illustrated in six law articles that I have written for publication in the Indiana Law Review, Oklahoma Law Review, Memphis State University Law Review, Oklahoma City University Law Review, and Washington University Law Quarterly. And in 12½ years of legal practice, I demonstrated my writing skill and ability to harmonize existing law through the drafting of hundreds of legal briefs. I was honored to receive a unanimous rating of "well qualified" by the ABA.

   a. **How many of your opinions or Report and Recommendations that District Judges adopted have been published as binding precedent for future cases?**

      Response: Four of my decisions have been published. *See Stanphill v. Health Service Corp.*, 627 F. Supp. 2d 1244 (W.D. Okla. 2008); *Petzold v. Jones*, 619 F. Supp. 2d 1143 (W.D. Okla. 2008), *aff'd*, 349 Fed. Appx. 295 (10th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 3394 (2010); *Galloway v. Howard*, 624 F. Supp. 2d 1305 (W.D. Okla. 2008), *certificate of appealability denied*, 352 Fed. Appx. 2009 (10th Cir. 2009); *Jones v. Oklahoma*, 567 F. Supp. 2d 1309 (W.D. Okla. 2008). (In my questionnaire, I stated on pages 37-38 that only one of my decisions had been published. Upon re-review, I realized that statement was incorrect and I apologize for the oversight regarding the number of published opinions.)

2. **According to your Senate Questionnaire, a District Judge has refused to adopt your Report and Recommendation in 19 cases. Three of the cases that I find troubling involved prisoners bringing what could be construed as frivolous and harassing suits against correctional employees. *See Parker v. Standifird,* 2011 U.S. Dist LEXIS 129966 (District Judge grants motion to dismiss where inmate sued parole board based on Equal Protection grounds claiming he was treated differently than similarly situated inmates because he killed "white police officer."); *Henry v. Stewart,* Case No. CIV-01-1374-R (2003) (District Judge grants defendants summary judgment motion where inmate brought multiple claims against correctional employees); *Thomas v. Jordan,* Case No. CIV-04-1716-L (2005) (District Judge grants defendants summary judgment motion where inmate brought Eighth Amendment suit based on visibly exposed electrical wires).**

a. Looking back on these cases and focusing on *Parker* and *Henry* in particular, are there any parts of your original analysis that you recognize as being inadequate or incorrect based on the law? Please explain.

Response: As requested, I have focused on *Parker* and *Henry* in my answer. In *Parker*, the Respondent presented the district judge with an 18-page brief that had not been submitted at the time of my ruling. Respondents' Oklahoma Pardon and Parole Board Objection to the Report and Recommendation of April 8, 2011, *Parker v. Standifird*, Case No. CIV-10-1395-D (W.D. Okla. May 12, 2011). And in *Henry*, the Defendants presented the district judge with a 32-page brief and eight exhibits that had not been submitted when I issued the report and recommendation on the summary judgment motion. *See* Defendants' Objection to September 10, 2003 Report and Recommendation on Preliminary Review and Dispositive Motions, Brief and Exhibits 1-8, *Henry v. Stewart*, Case No. CIV-01-1374-R (W.D. Okla. Oct. 30, 2003). I do not know if the district judges' contrary conclusions in *Henry* or *Parker* were affected by the briefs or exhibits presented for the first time after my issuance of the rulings. Although I respect the district judges' contrary decisions, I continue to believe that my analysis in all three cases was correct based on the briefs and evidence that had been presented to me.

b. Please explain your approach to distinguishing between frivolous lawsuits and non-frivolous lawsuits. Does a Judge have any role in weeding out frivolous lawsuits?

Response: A judge bears a substantial role in weeding out frivolous lawsuits. For example, a judge bears a duty to screen the initial complaint for frivolousness when the claimant:

- appears *in forma pauperis*,
- is a prisoner suing the governmental entity or employee, or
- is an inmate suing over prison conditions.

See 28 U.S.C. §§ 1915(e)(2)(B)(i), 1915A(b)(1); 42 U.S.C. § 1997e(c)(1). In determining whether a lawsuit is frivolous, I focus on the existing precedents. Under these decisions, a claim is considered "frivolous" if the "factual contentions are clearly baseless" or the legal theory is "indisputably meritless." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). In 13 years, I have issued hundreds of reports and recommendations to summarily dismiss complaints — without a motion being filed — based on my conclusion that the complaint was facially invalid.

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

   Response: In my view, the most important attribute of a judge is the ability to put aside one's own ego and personal feelings and to focus solely on application of the existing law to the facts. I believe that I have this attribute and that it is reflected in each of my judicial decisions over the last 13 years.

4. **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: I believe that every judge should be courteous and respectful to all of the court participants, including the attorneys and parties. The most important element of judicial temperament is humility. This quality allows judges to listen more effectively and maintain courtesy to others. I believe that I have shown the temperament that I would desire in the judiciary.

5. **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.

6. **At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on 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: In cases of first impression, I would look first to the underlying text. For example, if the issue involved statutory interpretation, I would initially consider the wording of the law. If the matter involved constitutional interpretation, I would turn first to the underlying constitutional provision. If the meaning of the words is unambiguous within the context of the factual scenario, I would regard the text as dispositive. If ambiguities remained, I would closely consider decisions by the Tenth Circuit Court of Appeals and Supreme Court in related contexts. In some circumstances, other secondary sources — such as the legislative history of a statute, the drafters' intent with respect to a constitutional provision, or persuasive authority from other courts — would bear consideration.

7. **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 best judgment of the merits to decide the case?**

Response: If I were fortunate enough to be reported out of the committee and confirmed, I would continue to apply precedents of the Tenth Circuit Court of Appeals or Supreme Court even if I believed they involved serious errors.

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

Response: The Court would begin with a strong presumption of constitutionality behind the statute. However, if the matter is otherwise justiciable, the Court should declare a federal statute unconstitutional if it determines that Congress exceeded its constitutional powers or infringed a constitutional right.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution?

Response: No.

10. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Generally, I think the principle of stare decisis weighs against a court's repudiation of its own precedents. If the Tenth Circuit Court of Appeals is sitting en banc, however, the court could overrule its earlier precedent if it conflicts with another of its precedents or a Supreme Court decision.

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

Response: I received the questions on May 16, 2012, drafted responses over the next few days, discussed them with an official of the Department of Justice, and asked him to submit my answers.

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

Response: Yes.

Responses of Robert E. Bacharach
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Amy Klobuchar

1. **If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

   Response: My judicial philosophy is that a judge's function is to apply the law to the facts in every case without regard to his or her own feelings, sympathies, or ideology. To carry out this important function, the judge should work hard to determine what the law actually is rather than what it should be.

   The judge's role in our constitutional system is fundamental. As Chief Justice Marshall stated in *Marbury v. Madison*, 1 Cranch. 137, 2 L. Ed. 60 (1803), the judge bears an important role in reviewing the constitutionality of laws. More broadly, however, judges often represent the last resort for resolution of private disputes and allegations of criminal wrongdoing. The establishment of an objective, fair forum for resolution of these private and public issues — through a judge's work — is central to the judiciary's function in Article III, Section 2 of the Constitution.

2. **What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

   Response: For 13 years as a United States Magistrate Judge, I have attempted to treat every litigant — rich or poor, plaintiff or defendant — with respect and fairness. I believe that these efforts are reflected in the procedural handling and analysis in all of my cases.

3. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

   Response: My view is that judges in the district court and circuit court of appeals are bound by stare decisis. In our judicial system, a magistrate judge or district judge bears an obligation to follow precedential decisions issued by the Tenth Circuit Court of Appeals and United States Supreme Court. In the absence of *en banc* consideration, a Tenth Circuit judge bears the same obligation. The Supreme Court has the opportunity to overrule its own precedents. But this opportunity should only be exercised sparingly and in a principled manner.