Responses of John M. Gerrard
Nominee to be United States District Judge for the District of Nebraska
to the Written Questions of Senator Chuck Grassley

1. **Do you believe a Judge should ever rely on his or her own personal experiences when rendering a decision?**

   Response: No. As I testified at the September 20, 2011, confirmation hearing, I firmly believe that a judge should rely on the admissible evidence and applicable law (and nothing else) when rendering a decision. My record as a judge confirms this belief.

   a. **Could you explain to me what you meant by saying "Female and minority representation is crucial on the [Nebraska] Supreme Court … This is a court that decides doctrine, and people of color and women look at some of those things differently"?**

      Response: The above quotation was reported in an Omaha World-Herald newspaper article dated November 15, 1997. In November 1997, a legislative subcommittee was examining the representation of women and minorities in the state judiciary and in other areas of state government. In my role as chair of the court's Gender Fairness Implementation Committee, I was asked to address the subcommittee. Unfortunately, I did not keep my notes from the meeting and there is no transcript of my remarks before the informal study committee. But I do recall the tenor and context of my remarks. I did comment that diversity, and particularly diversity of legal training and prior legal experience, enriches and helps fully inform decisions on a collegial appellate body like the Nebraska Supreme Court. For example, a collegial appellate body that includes judges with a vast array of training and experience in many areas of civil, criminal, and administrative law, makes for a rich and informed bench. But I did not believe then, and I certainly do not believe now, that women judges or minority judges approach judicial decisiomaking, or view the law, in any substantively different way than their colleagues. I am not certain of the context of this lone quotation; however, I know that I said much more about the importance of diversity and richness of legal training and prior experience than I said about anything else. To the extent that I said or implied, in the abstract, that women or minorities view the law or judicial decisionmaking differently than their colleagues, I am sorry if this caused any misunderstanding. I did not believe that in 1997, and I do not believe that now.

   b. **What are some of the things that you believe women and people of color look at differently?**

      Response: Please see my response to Question 1(a). I do not believe that women judges or minority judges approach judicial decisionmaking, or view the law, in any substantively different way than their colleagues.

c. Do you agree it is important they make every effort to put their personal experiences behind them in order to live up to their responsibility to be a fair and impartial arbiter of the facts before them?

Response: I believe that all judges, regardless of gender or race, must set aside their personal experiences in order to be fair and impartial arbiters of the facts before them. This also is my personal responsibility as a judge; I have done so in the past, and I will continue to do so in the future.

2. In a 2008 speech before a Rotary club you stated that "One of the things that I think is important for judges at all levels is that each case affects human beings, and sometimes it affects many human beings … The appellate bench sometimes gets caught up [on] the rules of law and I think it's important to remember that real human beings will be affected."

a. Do you believe judges should ever base their decisions on a desired outcome, or solely on the law and facts presented?

Response: A judge should always base his or her decision(s) solely on the applicable law and the properly admitted, or considered, facts. There are no circumstances under which a judge should base any decision on some preconceived desired outcome—and I have never done so in my 16 years as a judge on the Nebraska Supreme Court.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means?

Response: No, I do not believe a judge should consider his or her own values or policy preferences in determining what the law means--and I have never done so at any time in my judicial career.

c. If so, under what circumstances?

Response: None. Please see my response to Question 2(b).

3. Your statements regarding how a case affects human beings sounds a lot like statements made by then Senator Obama in opposing the confirmation of Justice Roberts where he argued, judges must base their rulings on "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." Justice Sotomayor rejected President Obama's so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor? Please explain your response.

Response: Yes, I agree with Justice Sotomayor. I have always believed and, more importantly, have rendered all of my rulings on the tenet that judges apply the law to the facts. I do not apply my feelings or personal preferences to the facts of any case.

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

   Response: I believe two of the most important attributes of a judge are discipline and judicial humility. That is, a judge must have the discipline and commitment to adhere to, and fairly apply, the rule of law, regardless of one's personal views. Hopefully, my 16-year judicial record shows that I possess these attributes.

5. **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: Judges should be open minded, calm, patient, courteous, and respectful in their interactions with litigants, attorneys, jurors, and all staff. I believe these qualities should be reflected on and off the bench. I believe I meet that standard.

6. **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.

7. **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 question of first impression arose from a statute, I would look first to the language of the provision itself with the goal of determining the statutory purpose intended by the legislative branch. Consideration of the statutory language includes, of course, examination of how the provision contextually fits into the entire statutory scheme. If the text is clear, I will simply apply the provision as written. If an ambiguity exists after considering the language itself, I may consider the legislative history of the provision if it is helpful, putting the greatest weight on the history that provides a reliable indication of the intent of the legislative body as a whole. If the meaning of the statute is still unclear and no binding precedent exists, I will look for guidance from Supreme Court and Eighth Circuit precedent and decisions rendered by other circuit courts. In those circumstances, I would consider the most closely analogous controlling precedent and the reasoning of the circuit courts for guidance.

If the question of first impression involved a constitutional issue, I would start with the language of the constitutional provision, and then consider the most closely analogous controlling precedent and reasoning for guidance.

8. 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 district court judge, I would be bound by the precedent of the Supreme Court and the Circuit in which I would sit as a judge. If confirmed, my role as a district court judge would be to apply that precedent irrespective of any personal views I might hold--and I would do so.

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

Response: Federal statutes are entitled to a presumption of constitutionality, but it is the role of federal courts to declare a federal statute unconstitutional if the statute violates a constitutional provision or if Congress exceeded its authority when it enacted the statute. Federal courts, and district courts in particular, are bound by the Constitution, and by Supreme Court precedent and controlling circuit court precedent when making this determination.

10. 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. To interpret and apply the United States Constitution, a judge should first consider the language of the pertinent provision of the Constitution itself, and then consider controlling Supreme Court and Circuit precedent interpreting and applying the provision. Foreign law is not part of this analysis.

11. 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: If confirmed, I intend to utilize rules for litigants (modeled on the most effective among the rules and practices developed by other judges in the District of Nebraska) that would provide litigants with clear guidance on my expectations for procedures and timeframes. To ensure the just, speedy, and inexpensive determination of each civil action, I would set meaningful deadlines for conducting discovery and filing motions, promptly set motions hearings and trials, and make myself available for resolution of discovery disputes. In criminal cases, I would set motions hearings, deadlines, status conferences, and trials in a manner that would ensure compliance with the Speedy Trial Act. I would render decisions on all matters as quickly as possible, consistent with fair and reasoned analysis. Finally, I would continue the District's current practice of fully utilizing magistrate judges in civil and criminal cases to ensure the District's many cases are timely heard and resolved.

12. 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: I believe that judges have an important role in controlling the pace and conduct of litigation. A judge must ensure that litigation is promptly resolved without undue expense. I would maintain a consistent pace toward the earliest possible resolution of matters by requiring litigants to comply with scheduling orders unless they present a compelling reason for alteration. And, if confirmed, I would employ the case management techniques discussed in my answer to Question 11.

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

Response: I carefully read the questions presented and then personally drafted the answers to these questions. After reviewing my answers for completeness and accuracy, I sent the answers to the Office of Legal Policy for submission to the Committee.

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

Response: Yes.