Responses of Jeffrey J. Helmick
Nominee to be United States District Judge for the Northern District of Ohio
to the Written Questions of Senator Chuck Grassley

1. **In your Senate Questionnaire, and in Senator Brown's testimony, reference is made to former-Senator Voinovich's participation in recommending your nomination. You were nominated in May 2011, approximately six months following the election of Senator Portman. Did you have any interviews or meetings with Senator Portman, since he was elected to the Senate, prior to your nomination? If so, please update your Senate Questionnaire, question 26.a, to reflect those meetings.**

   Response: I did not have any interviews or meetings with Senator Portman prior to my nomination.

2. **During your hearing, I asked you about the terrorist you previously represented, Wassim Mazloum. You know that he was convicted by a jury of conspiracy to kill U.S. troops overseas and of providing material support to terrorists. Those are very serious crimes. According to the Sentencing Guidelines, Mazloum deserved life in prison. When asked if you believe that eight years was an appropriate sentence, you replied: "I don't know that I have an opinion about what an appropriate sentence should be." You represented this terrorist, should have known the facts of his case better than almost anyone—including the sentencing judge, sat through the sentencing hearing, and listened to the arguments made by the prosecutors.**

   a. **How is it the case that you do not have an opinion about what sentence is appropriate?**

      Response: I do not have an opinion because I do not feel it is my role as an advocate to opine about the appropriateness of the judge's sentencing decision for my client. The decision of what is an appropriate sentence is for the sentencing judge alone. My role as Mazloum's appointed counsel was that of an advocate. Since a sentence of life imprisonment is the most serious non-death sentence the law provides, it was my constitutional and ethical duty as his counsel to advocate for a lower sentence, provided it was supported under the law. The district court judge, James G. Carr, then a judge on the United States Foreign Intelligence Surveillance Court, made his sentencing decision after hearing evidence presented over the lengthy trial and chose the sentence he deemed appropriate.

   b. **What evidence or assurances can you provide the Committee that you have sufficient experience or judgment to determine appropriate sentences, should you be confirmed?**

      Response: For more than twenty years, I have been before judges at every level of the criminal justice system and have had the benefit of observing the processes

they undergo in determining an appropriate sentence. I believe I have learned much from that experience. Relatedly, many of my cases have been settled through negotiated pleas rather than trials. Accordingly, I have gained experience in what the government considers an appropriate sentence in a variety of cases.

In addition, if I were fortunate enough to be confirmed, I would have the federal sentencing guidelines to assist me in the determination of the appropriate sentence. Calculation of the correct guideline range is not only the first step in the sentencing process, but also provides the "starting point and initial benchmark" in determining an appropriate sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007).

c. If confirmed, when you have less information before you than you had in the Mazloum case, what factors will you apply to determine an appropriate sentence?

Response: If I were confirmed, my role in the sentencing process as a judge would be very different from my role as an advocate in the Mazloum case. As a judge, I would rely upon information contained in the Presentence Report, the information and advice provided by the U.S. Probation Officer who prepared the report, and the relevant evidence and argument brought forth for consideration by the parties. I would then determine the legally appropriate sentence by applying the sentencing guidelines and the relevant statutes to the facts above.

3. In your response to my questions on the Mazloum case, you also stated that you did not ask for a specific sentence, but that you argued "that perhaps the life sentence that was called for in the advisory sentencing guidelines was too severe or too harsh."

a. Do you normally refrain from recommending a sentence? If not, why did you refrain from doing so in this case?

Response: Yes, I normally refrain from recommending a sentence.

b. What was the basis for arguing the life sentence that was called for in the advisory sentencing guidelines was too severe or too harsh?

Response: The basis for arguing that the life sentence was inappropriate in Mazloum's case was due to the individualized and comparative nature of his conduct. Mazloum was the last of the three defendants sentenced in the case. All three had an advisory guideline range of life imprisonment. Defendant Amawi, arguably the most culpable, had already received a sentence of 20 years. Defendant El-Hindi had already received a sentence of 12 years. Defendant Mazloum, compared to these two co-defendants, was less culpable because his contacts with the government's cooperating witness were fewer and shorter in duration, his actions were generally less egregious, and because he voluntarily

ceased any continued participation or activity in furtherance of the conspiracy months before arrests were made in the case. Under the circumstances, I had an ethical obligation to my client to argue that his comparatively less culpable conduct justified a sentence of less than life in prison.

c. Please clarify your use of the word "perhaps" in your hearing response. Was this word used in your argument to the court or did you make stronger arguments for leniency?

Response: While I do not recall any specific language I used at sentencing, I do recall making the argument that Mazloum was less culpable than the two co-defendants who had been previously sentenced due to his lesser contact with the government's cooperating witness, actions that were generally less egregious, and his voluntarily ceasing participation or activity in the conspiracy well before termination of the investigation.

4. The information we learn from terrorists indicates that 100 months in jail has little deterrence value and represents a very low risk for terrorists, compared to the opportunity to kill Americans. Do you believe that a sentence of 100 months is sufficient punishment for a convicted terrorist who conspired to kill U.S. soldiers?

Response: The appropriate sentence for any offender who was convicted of very serious crimes, including terrorism, or any crime, must be determined based on consideration of the sentencing guidelines, information in the Presentence Report and through adherence to 18 U.S.C. § 3553(a) and other relevant statutes. Section 3553(a) requires a judge to consider factors, including but not limited to, the nature and circumstances of the offense, the history and characteristics of the offender, and the need to punish the offender, protect the public and deter others from such conduct. As I explained in response to question 2a, I do not believe it would be appropriate for me to give my personal view about the sufficiency of the sentence given to Mazloum because my role and responsibility in that case was to serve as his court-appointed advocate.

5. If confirmed, how would you apply the Sentencing Guidelines, particularly in terrorism cases? What, in your view, would justify downward departures from the advisory guidelines?

Response: In every case, I would first determine the appropriate guideline sentencing range, which would serve as the starting point and initial benchmark for the sentence. I would then consider all other relevant information, including the Presentence Report, recommendations from the probation officer, evidence and argument from the parties and other factors mandated under 18 U.S.C. § 3553(a) and other relevant statutes.

Downward departures within the guideline structure are limited to select instances and may only be granted sparingly as expressly authorized in the United States Sentencing Guidelines Manual, and relevant case law. Only when evidence and the law supported such a recognized downward departure would I allow such a departure. The Supreme Court has also held that the district court is required to consider the other factors set forth in Section 3553(a), including the "history and characteristics of the defendant," the need to "afford adequate deterrence to criminal conduct," and the need "to protect the public from further crimes of the defendant," and should impose a sentence above or below the advisory guideline if those factors require it. *Gall v. United States*, 552 U.S. 38, 50 (2007).

6. During your hearing, when I asked you about your regular use of accusing the government of outrageous conduct—which is essentially accusing them of unethical behavior—you responded that you "feel compelled or have a duty to file those motions so that the record is preserved… to protect the record… in the event that there might be some change in constitutional precedent or law at a later time."

a. While I appreciate your candor in describing your routine practice, do you feel it is appropriate conduct, as an officer of the court, to accuse another lawyer of unethical behavior or outrageous conduct without evidence of actual misconduct?

Response: I have never accused a government lawyer of unethical behavior. To be clear, the term "outrageous government conduct" is a legal term of art, used by the courts to connote a defense based upon a constitutional due process violation, akin to the defense of entrapment. *See, e.g., United States v. Russell*, 411 U.S. 423, 431 (1973) (suggesting the possibility that entrapping conduct by law enforcements agents could be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"). In Mazloum's case, the defense did not challenge the government's description of the acts he committed, but did challenge the circumstances surrounding his involvement in the offense, which was initiated by a paid government witness.

All three defendants argued that the offenses would not have occurred without government interaction. "Outrageous conduct" is the legal term used to characterize such circumstances. The defense did not create that term, and at no time did we accuse any prosecutor or other persons of unethical conduct.

The motion to dismiss was supported by a long-standing general entrapment doctrine that prohibits government officials from "implant[ing] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

As recently as 1999, the Sixth Circuit acknowledged the existence of this general constitutional principle, which permits a court to dismiss the charges when the government's involvement in creating the crime is so great "that a criminal prosecution violated the fundamental principles of due process." *United States v. Warwick*, 167 F.3d 965, 974 (6th Cir. 1999), *quoting Russell*, 411 U.S. at 430. In *Warwick*, the Sixth Circuit chose to continue its lack of recognition of this defense when the defense sounds squarely in inducement, despite some Supreme Court precedent and other Circuit Court cases to the contrary. We clearly stated in the motion that the Sixth Circuit precedent was against us, but filed the motion because we needed to preserve the issue for higher review. The government filed no memorandum in opposition. The issue is part of the pending appeal before the Sixth Circuit.

While I regularly file all legal motions necessary to protect a client's rights, I do not regularly file motions raising the outrageous government conduct defense because that issue is not presented in most cases.

b. Please explain how accusing the government of outrageous conduct or unethical behavior preserves the record for a potential, future constitutional change in the law.

Response: The motion to dismiss in Mazloum's case was filed in order to protect the defendants' due process rights under the United States Constitution in the event that the Sixth Circuit's decisions declining to recognize such a defense based on outrageous government conduct were later reversed by the court sitting en banc, or the Supreme Court. Failure to file such a motion would result in waiver of such a claim before appellate courts. Preserving such issues for appellate purposes is an essential responsibility for ethical and constitutionally-effective trial counsel.

7. Question 12A of the Senate Questionnaire requests nominees to provide "material you have written or edited, including material published only on the internet." In response to this question, you listed and attached a number of monthly and bi-monthly newsletters you produced on behalf of the Maumee Valley Criminal Defense Lawyers Association, an organization you also helped found.

In some of these publications, an informational side bar contains references to a website for members of the Association to access. These sidebars instruct members to "contact Jeff Helmick to obtain a username and password for the Members Only section." Other statements invite readers to visit the website because it contains "a wealth of useful information," especially the members' only section "since most of the goodies are protected there."

a. Why did you not include the web-only content as requested by the Senate?

Response: I have not written or edited any web-only content, on that site or any other. Further, I do not have any access to any of the web-only content. All content was lost in an off-site, third-party server failure several years ago. The site has not been functional for some time.

b. What type of information was available on the website?

Response: Information included only contact information, a few available case opinions of interest, membership information, a list of web sites as possible resources, a list of upcoming legal education seminars, plus a members' only section (discussed further below). The site contained no articles, analysis, opinions or advice written or edited by me or others.

c. Please describe the information available in the members' only section.

Response: The members' only section, as best as I can recall, contained only the judicial opinions of some cases of interest and back issues of the case summary newsletter. Since the newsletter was mailed to members and local judges, I was fortunate to have hard copies which I produced in response to the request in the Senate Questionnaire.

d. Please attach any and all online information you wrote, published, and/or edited as a part of this website, as well as any additional responsive material you may have omitted earlier.

Response: Again, I did not write, publish or edit anything other than that described in these responses and as contained in the newsletters, which I have provided. I also have not omitted any other material responsive to question 12A of the Senate Questionnaire.

8. In 2002, you and your law partner, Jeff Gamso, successfully lobbied Lucas County to raise the fee limit for court-appointed attorneys from $25,000 to $60,000 working each capital case. As a result of your efforts, the county also raised the $50/hour fee rate to $90/hour out-of-court and $100/hour in-court.

News articles about your efforts, which you included as attachments to your questionnaire, list the rates of similar, or larger counties, in Ohio. At the time, the highest rates appeared to be set at $50,000. Additionally, one article reports that only 22 attorneys were certified to handle these trials and only four were certified to handle appeals.

a. Why did you ask for a $60,000 fee limit, a 20% premium over the next highest counties?

Response: I did not ask for a $60,000 fee limit. I suggested when asked by the Chief of Staff of the Lucas County Board of Commissioners, which oversees and

sets fee schedules for court-appointed counsel, that Lucas County's rates be raised to comparable rates in other large counties. I suggested a rate of $80 per hour out-of-court, and $100 per hour in-court, with a cap to be shared by both attorneys of $50,000, a rate well below the market rates for litigators in this corner of Ohio.

Local law requires that the County Commissioners solicit the opinion of local bar associations before making any determination. The Toledo Bar Association unanimously recommended to the Commissioners a rate of $125 per hour for both in-court and out-of-court work, with a joint cap of $90,000. The bar association also recommended a fee cap of $25,000 for appellate cases.

Ultimately, the Lucas County Commissioners chose the rates and caps, at a rate higher than the one I suggested, but lower than that recommended by the Toledo Bar Association. I was not a member of the Toledo Bar Association at the time.

b. Prior to 2002, approximately how many death-penalty trials, for which you received compensation from the court, did you handle per year?

Response: In the years prior to 2002, I handled seven total death penalty cases, three of which went to trial, for which I received compensation from the court, an average of approximately three-quarters of one case per year.

c. Prior to 2002, approximately how many death-penalty appeals, for which you received compensation from the court, did you handle per year?

Response: I handled no death-penalty appeals in the years prior to 2002.

d. Beginning in 2003, once the fee hike was fully enacted, approximately how many death-penalty trials, for which you received compensation from the court, did you handle per year?

Response: Since the Lucas County fee increase in 2003, I have handled six death-penalty cases in Lucas County, two of which went to trial, for which I received compensation from the court. In addition, since 2003, I handled one death-penalty trial in a neighboring county at a much lower fee rate, and I handled one federal death-penalty trial that was unaffected by the rate change in Lucas County. The Lucas County cases after the fee hike average approximately two-thirds of one case per year.

e. Beginning in 2003, once the fee hike was fully enacted, approximately how many death-penalty appeals, for which you received compensation from the court, did you handle per year?

Response: Since the fee increase in 2003, I have handled no death-penalty appeals for which I received compensation from the court.

f. By how much did you see your practice's gross income increase as a result of the fee increase?

Response: As a result of the fee increase in Lucas County, my practice's gross income increased approximately $45,000 total over the nine years from 2003 through 2011, inclusive.

g. By what percentage did you see your practice's gross income increase as a result of the fee increase?

Response: As a result of the fee increase in Lucas County, my practice's gross income increased approximately 3.3 percent over the nine years from 2003 through 2011, inclusive.

9. I understand you have served as defense counsel in several death penalty cases. If confirmed, will you uphold and enforce the federal death penalty statute?

Response: Yes.

10. Do you believe that the death penalty is an acceptable form of punishment?

Response: With few exceptions, the death penalty has been held to be constitutional by the Supreme Court. If confirmed, I would adhere to this precedent and would uphold and enforce the federal death penalty statute.

11. In Roper v. Simmons, the Supreme Court relied on foreign law in holding that the execution of minors violated the Eighth Amendment. Do you think it is proper to look to foreign law to determine the meaning of the Eighth Amendment to the United States Constitution?

Response: No.

a. Do you believe it is ever appropriate for a Judge to consult foreign law, when determining the meaning of the United States Constitution?

Response: No.

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

Response: The most important attribute of a judge is integrity, for integrity encompasses fairness, honesty, decency, ethics and adherence to the rule of law. I believe I possess this attribute.

13. 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 judge must be patient, open minded, respectful and courteous at all times. Relatedly, a judge must never be influenced by sympathy, emotion or prejudice, but decide cases under the rule of law. I believe I meet this standard.

14. 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.

15. 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: I would always begin by reviewing the plain language and meaning of the words of the statute. If the plain language of the statute did not resolve the issue, I would also review any legislative history which might explain the meaning of the words used in the statute. Next, I would look for analogous cases from the Supreme Court and the Sixth Circuit Court of Appeals. If none of these steps resolved the issue, I would look for analogous cases from other federal circuits.

16. 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: I would apply binding Supreme Court and Court of Appeals precedent without regard to my personal judgment.

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

Response: A court should first look for controlling precedent on the constitutionality of any statute. Assuming there were no binding precedent and the case were before the court with valid jurisdiction and proper standing, a court would look to see if the statute could be construed fairly without reaching the constitutionality of the statute. A federal court should only declare a statute unconstitutional where it is clear that it violates the Constitution or where it is clear that Congress has exceeded its constitutional boundaries.

18. 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 would work diligently to move cases forward with scheduling orders, the prompt resolution of pending motions or other issues brought before the court, and I would monitor the cases carefully to see that they were adjudicated promptly. I would also make extensive efforts at alternative dispute resolution, including the use of magistrate judges and mediators to facilitate settlement, in addition to my own efforts.

19. 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, I believe judges have a vital role in controlling the pace and conduct of litigation in their courtrooms. If confirmed, I would set timely scheduling orders in every case and frequently monitor the progress of the litigation to ensure there were no undue delays in discovery and dispositive motion practice. I would rule as quickly as possible on pending motions and other dispositive matters and make regular use of alternative dispute resolution.

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

Response: I received these questions on February 22, 2012. I drafted my answers and forwarded them on February 23, 2012, to the Department of Justice for review. I spoke with representatives with the Justice Department and finalized my answers on February 27, 2012, for submission to the Senate Judiciary Committee.

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

Response: Yes.

Responses of Jeffrey J. Helmick
Nominee to be United States District Judge for the Northern District of Ohio
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: A judge's role is to resolve disputes between and among the parties in the way the applicable statutes, precedents, and other legal authorities require. By such adherence to the rule of law, a judge will allow every litigant to know that their case was decided under the relevant facts and in a way that precedent mandates. By treating all parties with respect, open mindedness, patience and dignity, judges ensure that no party can ever reasonably conclude that their case was decided by emotion, personal feelings, or prejudice.

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: My entire career has been as a litigator, largely at the trial level. I have represented individuals and businesses in a variety of civil matters, both in state and federal courts. I have also represented the criminally accused. As a result, I have a broad perspective on the experiences of many different types of litigants in a number of settings. I will remember those experiences should I be confirmed, and would always approach every litigant with patience, open mindedness, respect and dignity.

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: I believe judges must strongly adhere and be committed to the doctrine of stare decisis. Judges are obliged to adhere to precedent whether they personally agree with such precedent or not. Adherence to precedent will ensure the integrity of the judicial system and assure every litigant that their case was decided on the relevant facts and applicable law, and not on prejudice or personal feelings.