Senator Chuck Grassley
Questions for the Record

Nancy Jo Rosenstengel
Nominee: U.S. District Court for the Southern District of Illinois

1. What characteristics have you seen in federal judges that you will seek to avoid, if confirmed?

Response: If confirmed, I would avoid being a federal judge who displays impatience, makes hasty decisions, speaks improvidently, or is unavailable to the lawyers and litigants when needed.

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

Response: The most important attribute of a judge is integrity. A judge must have the ability to apply the law without bias, sympathy, or prejudice. Integrity requires keeping an open mind, listening to all sides, and fairly deciding the legal issues. I possess this attribute.

3. 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 and humble. The judge also must be an attentive listener and set the standard for courtroom decorum. I meet this standard.

4. 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. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I would follow the precedent of higher courts without regard to my personal opinions. Our legal system depends on this approach to resolving disputes.

5. 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: When analyzing an issue, I would start first with the text of the legal provision. If the text was clear, my analysis would end there. If the text was ambiguous and there was no binding legal authority, I would research analogous cases from the Supreme Court, the Seventh Circuit, and other federal appellate courts for persuasive authority.

6. 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 confirmed, I would faithfully apply the precedent of the Seventh Circuit Court of Appeals and the United States Supreme Court without regard to my personal opinion.

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

Response: It is presumed that statutes enacted by Congress are constitutional, and a court must start its analysis of a challenge to a statute with that premise. A statute should be declared unconstitutional only when it is established that Congress exceeded its authority when it enacted the statute. Additionally, analysis of the constitutionality of a statute should be guided by the "principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter.'" *Jones v. United States*, 529 U.S. 848, 857 (2000) (*quoting United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), and *citing Jones v. United States*, 526 U.S. 227, 239 (1999)). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (reiterating cardinal rule of statutory construction that a court should construe a statute to avoid serious constitutional problems unless such construction is plainly contrary to the intent of Congress).

8. 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? Please explain.

Response: No. I cannot envision a case in which I, if confirmed as a district court judge, properly could or would rely on foreign law to decide the meaning of a provision of the United States Constitution.

9. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: I give my utmost assurance. The stability of our legal system depends on the predictability that results from adherence to precedent. My legal career has trained me to approach issues from a neutral perspective and to research the law and apply it to the facts. If confirmed, I would approach legal issues in cases before me in this way. I would have no other motivation.

10. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: A judge must put aside personal views and decide motions and cases based on the record before her and the applicable law. Litigants are entitled to an impartial tribunal to resolve disputes. If confirmed, I would be wholly committed to fairly deciding the matters before me.

11. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I would be proactive in managing my docket. I would personally review daily reports from the court's Case Management/Electronic Case Filing ("CM/ECF") system to monitor the progress of cases and the status of pending motions. I would hold hearings on dispositive matters, be available for the lawyers as needed, and always be well-prepared. In civil cases, I would work with the magistrate judges to ensure discovery is completed in a timely fashion, and I would endeavor to narrow the issues and promptly resolve every case before me. In criminal cases, I would schedule and conduct trials to honor defendants' statutory and constitutional rights to a speedy trial.

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: Yes. Federal Rule of Civil Procedure 1 directs that the rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. If confirmed, I would set firm but reasonable deadlines and expect the lawyers to meet them. I would likewise promptly rule on motions and regularly monitor the status of cases before me, with the help of reports generated by the CM/ECF system.

13. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".

a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.

Response: No.

b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Response: No.

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

Response: I received these questions on January 15, 2014. I drafted my answers on January 15-16, 2014. A draft was submitted to the Department of Justice Office of Legal Policy, and then I finalized my answers on January 23, 2014.

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

Response: Yes.

Nancy J. Rosenstengel
Nominee, United States District Court for the Southern District of Illinois
Responses to Questions for the Record
from Senator Ted Cruz

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: If confirmed, my judicial philosophy would be to follow the rule of law and decide the case before me by applying binding precedent. I would decide matters promptly without bias, sympathy, or prejudice and treat all parties fairly. I have not carefully studied the judicial philosophies of specific Supreme Court Justices, but I suspect that many Justices shared this approach.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: The meaning of words as understood at the time of the ratification of a constitutional provision must be considered when interpreting the Constitution, as the Supreme Court noted in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). Specifically, the Supreme Court explained in *Heller*, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning" *Id.* (*quoting United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Heller*, 554 U.S. at 576-77. If confirmed, I will follow Supreme Court and Seventh Circuit precedent regarding interpreting the Constitution.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If confirmed as a district court judge, I would be bound by the precedent of the Seventh Circuit Court of Appeals and the United States Supreme Court. I would not be empowered or authorized to overrule precedent from superior courts. I would follow binding precedent at all times.

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: In *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that the

Court's judicially created limitation on the Commerce Clause power was unworkable. In this particular case, the Court held that the Commerce Clause empowers Congress to enforce provisions of the federal Fair Labor Standards Act against states. *See Alexander v. City of Evansville, Indiana*, 120 F.3d 723, 725 (7th Cir. 1997); *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir.), *cert. denied*, 488 U.S. 824 (1988). If confirmed as a district court judge, I would be bound by the Court's decision in *Garcia*, and I would apply it without regard to any personal thoughts or beliefs I may have.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: If presented with a question under the Commerce Clause and the Necessary and Proper Clause, I would research the issue and rely on authoritative precedent. The United States Supreme Court has held that Congress may regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000). Moreover, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that this power extends to the regulation of intrastate, non-commercial activity (*i.e.*, possession and manufacture of medical marijuana). As Justice Scalia stated in *Gonzales*, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring). *But see United States v. Comstock*, 560 U.S. 126, 164 (2010) ("Under the court's precedents, Congress may not regulate noneconomic activity . . . based solely on the effect such activity may have . . . on interstate commerce.") If confirmed, I would follow these cases and all binding precedent.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). These limitations on Presidential authority are judicially enforceable when presented in a justiciable case or controversy by a litigant with proper standing. A court would analyze whether the President acted (1) pursuant to an express or implied authorization of Congress; (2) in absence of either a congressional grant or denial of authority but with support from congressional inertia, indifference or quiescence; (3) in a manner incompatible with the expressed or implied will of Congress. *Id.* at 524-25. The judiciary is most likely to sustain executive action under the first scenario and less likely to defer to the President under the third scenario.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has established a method for analyzing substantive due process claims. Under the Court's precedent, fundamental rights are those that objectively are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). If confirmed, I would follow Supreme Court and Seventh Circuit precedent with respect to determining whether a right is "fundamental" for purposes of substantive due process.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Strict scrutiny applies when a statute classifies by "race, alienage, or national origin." *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). As the Supreme Court has explained, "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Id.* Moreover, legislative classifications based on gender also call for heightened scrutiny. "Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." *Id.* at 441.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I would apply the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003) and any other legal precedent on this issue, regardless of any personal belief or expectation concerning the specific termination point appropriate for any admissions policy.