Senator Chuck Grassley
Questions for the Record

Douglas L. Rayes
Nominee, U.S. District Judge for the District of Arizona

1. **Your opinion in Volpe v. Yavapai was overruled. The appellate court held that there was, in fact, "substantial evidence in the record" of an offense whereas you found there was not sufficient evidence. You will not be bound by this court if confirmed as a federal judge. Do you agree with the appellate court's decision?**

   Response: Yes, the opinion of the appellate court represents the final word in the case.

2. **Your opinion in State v. Levens was overruled. The appellate court reversed held that the defendant's response to questions by police were not compelled whereas you ruled that the defendant's statements violated Miranda and should be excluded. You will not be bound by this court if confirmed as a federal judge. Do you agree with the appellate court's decision?**

   Response: Yes, the opinion of the appellate court represents the final word in the case.

3. **While serving as a judge, you wrote an article detailing the steps you and others took to reduce the capital case backlog in the Superior Court. Part of that process entailed educating victims' families on death penalty cases, including the time it took to litigate the case and execute the sentence, the possible appeals, and "an explanation of the high rate of reversals of the sentence as compared to almost no reversals from guilty pleas with a life sentence." In that article, you state: "Victims' families seeking justice and closure would often accept the information about the capital cases process more readily from a judge than from the attorneys litigating the case." "Although that was not the goal of the court, sometimes after such meetings, the victims advised the state that they did not object to a plea agreement where the death penalty was waived."**

   a. **Why do you think the families of victims accepted this information more readily from the court than the attorneys litigating the case?**

      Response: I believe the families of the victims accepted this information more readily from the court because the judges conducting these conferences were some of the most experienced in capital cases, and unlike the attorneys, were not acting as advocates. The court's role in the case resolution conference included the role of educating and informing families about the process.

b. Given the court's role as the final arbiter in the case, do you have any concerns that the court's actions in advising victims' families about the negative aspects of seeking the death penalty had an undue influence on their decision or pressured them to accept a plea agreement?

Response: The court is very sensitive to the needs of victims and to the burdens brought on by their situation. Arizona has extensive and detailed victims' rights laws. In conducting the case resolution conference, the court followed the requirements of the Arizona Rules of Criminal Procedure, Rule 17.4, regarding plea negotiations and Rule 39 and A.R.S. Section 13-4401, *et. seq*. regarding victims' rights. Judges with capital trial experience, who had no other connection to the case, conducted these conferences. By having experienced judges, other than the trial judge, as required by Rule 17.4 of the Arizona Rules of Criminal Procedure, explain the unusual and unique procedures, time frames and consequences of a capital case to victims, I do not feel that victims were pressured into accepting a plea agreement. The judges helped victims better understand their rights, choices and the consequences to them of a capital murder trial. Victims often expressed gratitude for the time spent by the court educating them.

4. You listed the case of State v. Al-Tarrah as one of your most significant, but did not provide a written opinion. According to press reports, the case involved a foreign college student from Kuwaiti (Al-Tarrah) who was charged with hit-and-run and DUI after her vehicle struck and killed a man riding a motorized skateboard. The student's blood alcohol was nearly twice the legal limit. At Al-Tarrah's arraignment, the Judge Talamante directed her to surrender her passport to her attorney, David Cantor. He told Cantor, "I am going to expect that you take possession of that passport and that that passport remain in your possession during the pendency of these hearings." The court order directed Cantor to "submit an affidavit to the court within 24-hours affirming that passport has been surrendered." Cantor did not take possession of the passport and Al-Tarrah fled the country.

As a result, Judge Richard Gama held Cantor in contempt of court for failure to collect the passport and failure to file the affidavit with the court. You heard the case involving the contempt charges and found Cantor to be not guilty. According to press reports, you concluded Cantor could have interpreted Judge Talamante's order to mean he should file an affidavit within 24-hours of taking possession of the passport whenever he received it. The author of the article called this is a strained interpretation of the judges' order. The author stated: "If one is to assume that 'I am going to expect you to take ... that passport' means accepting it from young Al-Tarrah whenever she happened to fishtail into Cantor's parking lot, then you also have to wonder why the judge ordered Cantor to take the passport at all."

Please explain why you found Cantor not guilty of contempt of court and provide any supporting information if possible.

Response: This was a criminal contempt trial, which required proof beyond a reasonable doubt that Cantor had intentionally and deliberately violated a court order. There was no written opinion because I ruled from the bench. The contempt trial lasted three days and included the testimony of several witnesses including legal ethics experts presented by both sides. There was little, if any, dispute about the facts. The trial court's order was issued in October 2005 and the client fled in January 2006. During that time Cantor pursued an appeal of the trial court's order to the Court of Appeals and then to the Arizona Supreme Court. The Supreme Court declined jurisdiction of the appeal in January 2006 and Cantor's efforts to obtain his client's passport were unsuccessful. After the Supreme Court declined jurisdiction, Cantor scheduled a meeting with his client, but instead her father appeared to explain that she was sick. Sometime in the following two to three weeks, she fled. Cantor then moved to withdraw as her attorney.

The issue before me was whether Cantor had intentionally and deliberately violated the trial court's order. The expert witnesses were in agreement that the order was ambiguous and that Cantor's interpretation of the order was reasonable. Furthermore, the experts agreed that in the face of an ambiguous order, Cantor had an ethical obligation not to disclose his client's failure to surrender her passport. However, the state's expert faulted Cantor for not moving to withdraw sooner after she missed the January meeting. After considering this evidence I found that the state had not proved beyond a reasonable doubt that Cantor had intentionally and deliberately violated a court order. Even though he was unsuccessful in his efforts to obtain his client's passport, the evidence was that he had attempted to do so and that in light of the ambiguous order, his ethical duty of loyalty to his client prevented his reporting her non-compliance.

5. Do you believe judges should look to the original meaning of the words and phrases in the Constitution when applying it to current cases? If so, how would you determine the original meaning?

Response: An Arizona District Court Judge interpreting the Constitution should follow the methods of interpretation prescribed by the Supreme Court and the United States Court of Appeals for the Ninth Circuit. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the public understanding of the constitution at the time it was adopted was used as the method of interpretation by the Supreme Court in its analysis of the Second Amendment. If I am fortunate enough to be confirmed I would faithfully follow *Heller* and other binding precedent.

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

Response: The most important attribute of a judge is the ability to decide cases impartially, following statutory law and legal precedent while treating those who

appear in his courtroom with dignity and respect. As a state court judge for fourteen years, I have diligently adhered to those principles and applied those attributes.

7. 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 it is not enough for the judge to be fair and impartial. I feel it is just as important for the lawyers and litigants to feel that they were treated fairly and impartially. In my view a judge's temperament should be respectful and patient so that those appearing in his court understand that an open-minded judge is carefully considering their evidence and arguments before a decision is rendered. I believe I possess that temperament.

8. 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: I am committed to following the precedents of higher courts faithfully and will give them full force and effect even if I personally disagree with such precedents.

9. 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: As an Arizona State trial judge for fourteen years, the method I have employed when deciding cases of first impression has been to first determine the meaning of the applicable section of the statute. If the text of the statute is not ambiguous, then the inquiry ends there. If the meaning of the section of the statute in dispute is ambiguous, then I look to higher court precedence. I then try to determine the meaning from the statute as a whole, applying the rules of statutory construction established by the Arizona Supreme Court and the Arizona Court of Appeals. If from those efforts I am not satisfied that I have a correct interpretation I look for persuasive guidance from high court rulings from other states or federal courts on similar statutes.

10. 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: I would disregard my opinion and follow the precedent of the Supreme Court or the Court of Appeals.

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

Response: A judge should not reach the issue of the constitutionality of a statute if the case could be resolved without such a determination. If in a judiciable case or controversy the constitutional issue cannot be avoided, a judge should follow well-established case law that the court must start with the presumption that federal statutes are constitutional and declare a statute unconstitutional "only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

12. 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. Our Constitution is uniquely American and the meaning is not going to be determined by foreign law or the views of the "world community".

13. 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: My decisions have always been grounded in precedent and the text of the law. I have never let my political beliefs affect my decisions and I give the Committee my most solemn assurance that I will never do so.

14. 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: I have never let my personal views affect my decisions and I give the Committee my most solemn assurance that I will never do so. If confirmed, I give my most solemn assurance that I will be fair to all who appear before me.

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

Response: As a trial judge in Maricopa County, the fourth largest court in the country, I have spent fourteen years managing large caseloads. I have taught new judges at the Arizona Supreme Court's New Judge Orientation Program caseload management. I believe it is the court's responsibility to actively control the calendar and manage the cases. The court cannot let the attorneys control the court's calendar. If confirmed I would establish a reasonable case management schedule for each case, schedule status conferences to monitor compliance with deadlines, enforce deadlines, promptly rule on motions, and be available for telephonic resolution of discovery

disputes. I would set firm trial dates that are not continued without a showing of good cause and actively encourage alternative dispute resolution.

16. 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 not only have a role, but also have a duty to control their caseload and the pace of resolution of cases. I would employ the methods set forth in my response to question 15 above.

17. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: When ruling on dispositive motions, such as a motion for summary judgment, I start with the parties' briefs and their arguments. I review the key cases cited by the parties and perform my own research. I then apply the applicable statutory and case law to the undisputed facts to reach a decision on whether there is a material issue of fact trial. When I am in a trial to the court, I gain an understanding of the factual and legal issues to be litigated before trial by reviewing the pretrial statements and by researching applicable statutes or precedent. I hear the evidence at trial, listen to arguments of counsel and then apply the law to the facts to reach my ruling. The sources of information for guidance on legal issues are the applicable statutes and decisions of the Arizona Supreme Court and Court of Appeals.

18. 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.

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

Response: I received the questions on February 4, 2014. After reviewing the questions I prepared my responses that day and the next day. I spoke with a Justice Department representative and authorized the submission of my answers to the Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Responses of Douglas L. Rayes
Nominee, United States District Court for the District of Arizona

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: My judicial philosophy has been to consider each case before me to be an important case, to treat those who come into my court with courtesy and respect, and to decide the narrow issue before me fairly, and consistent with the controlling legal precedent. My philosophy is that a judge needs to be a judge, interpreting the law and not making the law. Although I am familiar with decisions rendered by the Supreme Court while each of those Justices acted as Chief Justice, and have applied precedent created by those decisions, I have not compared my philosophy with any Justice's. Therefore, I am unable to state whether my judicial philosophy is analogous to any of the Justices above.

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: An Arizona District Court Judge interpreting the Constitution should follow the methods of interpretation prescribed by the Supreme Court and the Ninth Circuit. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the public understanding of the constitution at the time it was adopted, was used as the method of interpretation by the Supreme Court in its analysis of the Second Amendment. If I am fortunate enough to be confirmed, I would faithfully follow *Heller* and other binding precedent.

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 judge, there would never be a circumstance that I would overrule precedent.

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: Because *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), is Supreme Court precedent, all district judges are bound by it and must follow it. If confirmed, I would follow *Garcia* and all other relevant precedents.

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

Response: The Supreme Court has defined three broad categories of activity where Congress may use the Commerce Clause to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that have a substantial effect on interstate commerce. See *United States v. Morrison*, 529 U.S. 598, 608-609 (2000), *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Those cases do not hold that the Commerce Clause authority could never be used to regulate non-economic activity. More recently in *Gonzales v. Raich*, 545 U.S. 1, 37 (2005), Justice Scalia authored a concurring opinion where he indicated that Congress had the authority under the Commerce Clause to regulate non-economic activity "if that regulation is a necessary part of a more general regulation of interstate commerce." If confirmed, I would follow applicable Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court spoke on the President's authority to act in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) and in *Medellin v. Texas*, 552 U.S. 491, 524 (2008). The Supreme Court has determined that the President's authority to act must come from either an act of Congress or from the Constitution. In judicial cases and controversies those are judicially enforceable limits on the President's authority.

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

Response: The Supreme Court has decided that a right is "fundamental" for purposes of the Due Process Clause if it is "objectively, '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 Ninth Circuit precedent when confronted with an issue of whether a right is "fundamental" for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has decided that a classification should be subjected to heightened scrutiny under the Equal Protection Clause "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). The Supreme Court has stated that strict scrutiny applies when characteristics of a class, such as race, seldom provide a relevant basis for disparate treatment, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2418 (2013), and that intermediate scrutiny applies to gender-based classifications. *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed, I would follow Supreme Court and Ninth Circuit precedent when deciding any issue involving heighted scrutiny.

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 will follow whatever Supreme Court and Ninth Circuit precedent exists at the time concerning the use of racial preferences in public higher education including *Grutter* and the Supreme Court's more recent holding in *Fisher v. University of Texas at Austin,* 133 S. Ct. 2411 (2013).