Senator Grassley
Questions for the Record

Travis Randall McDonough
Nominee, U.S. District Judge for the Eastern District of Tennessee

1. **Your current position is Chief of Staff for the mayor of the city of Chattanooga, a Democrat. What assurances can you give the Committee that you will be fair to all litigants who come before you, particularly those with different political beliefs than your own?**

Response: It has been an honor to spend time away from private practice to engage in public service, which has been my goal since before becoming a Truman Scholar in 1993. Although the mayor of Chattanooga is a Democrat, the City of Chattanooga's municipal officeholders, including the mayor, are chosen in nonpartisan elections, and our mayor earned a great deal of support from Republicans, Democrats, and independents both before and after the election in 2013. As his chief of staff, I have worked closely and successfully with stakeholders and officeholders from across the political spectrum and have a history of supporting candidates from both major parties. I believe strongly in doing my best at every job. When I was in private practice, I zealously represented my clients, regardless of political ideology. If confirmed, as a judge, I will faithfully execute the obligations of judicial office, without regard for litigants' and attorneys' political beliefs. Partisan politics has no place in our judicial system, and I believe that my legal career and public service record are convincing evidence that, if confirmed, I will carry out the responsibilities of judicial office without regard for politics or the identity of those who appear before the court.

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

Response: The most important attribute of a good judge is humility. Humility ensures a judge will subjugate his own preferences to controlling precedent and the rule of law, will never assume that he or she is capable of doing the job without hard work and preparation, will not prejudge the merits of a case before careful consideration of admissible facts and precedent, and will conduct courtroom proceedings in a manner that promotes efficiency and confidence in our justice system. I do believe I possess this attribute, and I will continue to adhere to these principles.

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 should be humble, decisive, fair, impartial, always prepared, and mindful of the importance of efficiency to the litigants and attorneys who appear before the court. While no judge can perfectly attain these qualities, if confirmed, I will do my very best to strive to meet these attributes. In addition, please see my response to Question 2.

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: I am fully committed to applying precedent issued by the United States Supreme Court ("Supreme Court") and the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). If confirmed, any personal beliefs will have no effect on my duty and commitment to following these courts' binding precedent.

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: If confirmed, I will apply the law as reflected in the text of the Constitution, statutes, and binding precedent. If confronted with a true issue of first impression, I will apply the plain text of the statute, contract, or constitutional provision at issue. If this approach does not settle the issue, I will turn to well accepted canons of construction approved by the Sixth Circuit and the Supreme Court, again grounding the analysis in the text at issue. Assuming this attempt at construction of the language does not resolve the matter, I will look to precedent governing analogous provisions in similar texts and persuasive authority from other courts. In doing so, I will keep in mind my obligation to discern and to apply the law as it exists rather than to legislate what I believe the law should be.

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 will apply binding precedent to every dispute that comes before me, without regard for whether I agree with the rationale or conclusion of that precedent.

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

Response: Only very rarely does a federal court's limited authority allow it to declare unconstitutional a statute enacted by Congress. Clear precedent describes the narrow circumstances in which a court should strike down a statute as inconsistent with the Constitution. This precedent, generally, provides as follows. Initially, a court should ensure that there exists a valid case or controversy that necessarily raises the issue of constitutionality. A court should also ensure that the parties before it have proper standing to bring the issue before the court. A court should review the facts and law presented very carefully to determine whether the case can be decided without determining the constitutionality of the statute. Only if there is no alternative manner of resolving the case

but to address the constitutionality of the statute may a court even consider the question of constitutionality. The Supreme Court has long held that an act of Congress enjoys a strong presumption of constitutionality. Therefore, in the event that a court must decide constitutionality, the statute must be upheld as constitutional unless there is no viable construction of the statute that would avoid conflict with the Constitution.

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: A district court should not rely on foreign law or the views of the "world community." It should rely on binding precedent handed down by the Supreme Court and the corresponding court of appeals.

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 have been a member of the bar and a litigator for nearly two decades, and I understand firsthand the critical importance of an impartial judge who applies governing precedent and the text of the law without regard for his or her political ideology. A judge who grounds decisions in personal political preferences rather than the law commits a breach of the obligations of judicial office. I have a great deal of respect for our federal system of justice and understand that, for that system to continue to work and for the citizens to continue to have confidence in that system, I must, if confirmed, make decisions that are based solely on the facts and governing law.

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: Please refer to my responses to Questions 1 and 9.

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

Response: If confirmed, I will assemble a staff that is committed to the efficient operation of the court, will use the organizational resources provided by the court clerk to ensure that the staff and I use our time wisely, will set reasonable deadlines and require compliance with them, will rule on motions in a timely manner, will refer appropriate issues to magistrate judges when they can more efficiently decide such issues, and will consult with more experienced judges in order to model successful caseload management practices.

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 a very important role in controlling the pace and conduct of litigation. A judge must strive to achieve efficiency in order to ensure justice

consistent with the rule of law. In order to achieve appropriate control of the pace and conduct of litigation, I would put into practice the principles described in response to Question 11.

13. President Obama said that deciding the "truly difficult" cases requires applying "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 . . . the critical ingredient is supplied by what is in the judge's heart." Do you agree with this statement?

Response: I had never heard this statement prior to reviewing it in this question and am not familiar with the context surrounding the statement. If confirmed, as a judge, my core concerns and values will be the perpetuation of the rule of law through the application of governing statutes and binding precedent to facts properly before the court.

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

Response: I received the questions on June 17, 2015, from the Department of Justice. After reviewing the questions, I drafted responses on my own on June 17 and 18, 2015. I submitted these draft responses to representatives of the Department of Justice on June 18, 2015, and finalized my responses and authorized their submission to the Judiciary Committee.

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

Response: Yes.

Senator Cruz
Questions for the Record

Travis Randall McDonough
Nominee, U.S. District Judge for the Eastern District of Tennessee

Judicial Philosophy

1. Describe how you would characterize your judicial philosophy.

Response: If confirmed, I will strive to ground my judicial philosophy in humility. Humility ensures a judge will subjugate his own preferences to controlling precedent and the rule of law, will never assume that he or she is capable of doing the job without hard work and preparation, will not prejudge the merits of a case before careful consideration of admissible facts and precedent, and will conduct courtroom proceedings in a manner that promotes efficiency and confidence in our justice system and the rule of law. A judge should be humble, decisive, fair, impartial, always prepared, and mindful of the importance of efficiency to the litigants and attorneys who appear before the court.

2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?

Response: I have been a member of the bar and a litigator for nearly two decades, and I understand firsthand the critical importance of an impartial judge who applies governing precedent and the text of the law without regard for his or her political ideology. A judge who grounds decisions in personal political preferences rather than the law commits a breach of the obligations of judicial office. I have a great deal of respect for our federal system of justice and understand that, for that system to continue to work and for the citizens to continue to have confidence in that system, I must, if confirmed, make decisions that are based solely on the facts and governing law, consistent with precedent of the Supreme Court of the United States ("Supreme Court") and the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). Judges who share these values are able to put the rule of law before their own preferences.

3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?

Response: Respectfully, as a litigator, I did not focus primarily on whether precedent was rightly or wrongly decided. Instead, I sought precedent on which I could build my advocacy for my clients' interests and argued against precedent that was contrary to my clients' interests. If confirmed, as a judge, I expect to have no interest in pointing out my own views of the soundness of the Supreme Court's decisions, unless such an approach is necessary in order to decide the matter before me. Finally, as a judicial nominee, I do not believe it would be appropriate for me to offer criticism of precedent that I might later be obligated to apply without regard for my personal views.

4. Which sitting Supreme Court Justice do you most want to emulate?

Response: Given the traditions by which Supreme Court conducts business, I have no significant knowledge of the justices' professional habits. In general, however, I have a great deal of respect for any person of such talent who forgoes the opportunity to enrich himself or herself in favor of public service. I hope to emulate this quality, as well as the justices' devotion to the rule of law and our federal system of justice.

5. 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, other)?

Response: The Supreme Court has held in District of Columbia v. Heller that, in interpreting the Constitution, a court should consider the original meaning that "citizens in the founding generation" would have attributed to its text. 554 U.S. 570, 576-77 (2008). If confirmed, I will faithfully apply this precedent as well as other Supreme Court and Sixth Circuit precedent prescribing how the text of the Constitution is to be appropriately interpreted.

6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?

Response: A district court should not rely on the constitutional rulings and doctrines of foreign courts and international tribunals. Instead, it should rely on binding precedent handed down by the Supreme Court and the corresponding United States Court of Appeals.

7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?

Response: In general, federal courts are not ideally equipped to administer such institutions and should not do so unless such administration is required by binding precedent. If confirmed, I will follow such precedent but will not decide such issues unless it is necessary to resolve the dispute before the court.

8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?

Response: My general understanding is that the theory of a living Constitution espouses that the Constitution evolves over time, depending on the changing and prevailing values of society over time. Adherence to such a theory is problematic, because it encourages judges to inject their personal beliefs into decision-making and increases the likelihood that courts will not ground their decisions in the text of the Constitution, which was intended to capture and to preserve the country's core, immutable principles. The doctrine of judicial restraint generally requires that courts resolve only those issues properly before the court. Adherence to this doctrine makes it less likely that judges will have an opportunity to inject their personal beliefs into decision-making.

9. What is your favorite Supreme Court decision in the past 10 years, and why?

Response: I do not have a favorite Supreme Court decision from the past 10 years.

10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.

Response: In order to make such an assessment, I would have to study the full record of the case in order to have a complete understanding of the facts and issues before the Supreme Court. I have not had the opportunity to do so and, respectfully, do not believe it would be proper to speculate about the appropriateness of any Supreme Court decision under these circumstances.

11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?

Response: Although I am not a scholar of philosophy, it is my understanding that natural law is a philosophical concept that attempts to explain the universal social contract governing the conduct and rights of people in their relationships with one another and with society at large. In interpreting the Constitution or statutes, I would rely on their text and binding precedent of the Supreme Court and Sixth Circuit rather than an understanding of natural law.

Congressional Power

12. 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: If confirmed as a district court judge, I would be obligated to apply the binding precedent of the Sixth Circuit and the Supreme Court, including Garcia, whether or not I personally agree with such precedent.

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

Response: In United States v. Lopez, the Supreme Court observed that Congress may regulate three broad areas of activity under the authority of the Commerce Clause: (1) "the use of the channels of interstate commerce"; (2) "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 having a substantial relation to interstate commerce." 514 U.S. 549, 558-59 (1995). More specifically, in a concurring opinion in Gonzales v. Raich, Justice Scalia has observed that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. 1, 37 (2005). If confirmed, I would be obligated to apply binding precedent of the Sixth Circuit and the Supreme Court in my consideration of issues concerning the Commerce Clause and the Necessary and Proper Clause.

14. What limits, if any, does the Constitution place on Congress's ability to

condition the receipt and use by states of federal funds?

Response: The Supreme Court has observed that Congress may not use the authority granted by the Spending Clause to "undermine the status of the States as independent sovereigns in our federal system." National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2602 (2012). Consistent with the text of the Constitution, the Supreme Court has held: (1) that the Spending Clause power may only be used in pursuit of the general welfare, with Congress's judgment being afforded substantial deference in this inquiry; (2) that Congress may not condition the use of federal funds unless it does so unambiguously in order to allow states to make a knowing choice of whether to accept the conditional funding; (3) any condition imposed on the receipt by states of federal funds should be germane to the federal interest in national programs; and (4) the condition imposed may not be contrary to other provisions of the Constitution. South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). If confirmed, I will faithfully apply this and other binding precedent to disputes involving the Spending Clause.

15. Is Chief Justice Roberts' decision in *NFIB v. Sebelius,* 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?

Response: Courts have disagreed on this point since the NFIB v. Sebelius opinion, and the Sixth Circuit has not ruled on this issue. The Supreme Court has described the precedential effect of opinions not joined by a majority of the justices in Marks v. United States, 430 U.S. 188 (1977), and, if confirmed, I would follow this guidance.

Presidential Power

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

Response: Presidential actions must be based on authority granted by the Constitution or by an act of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). If confirmed, I will apply Youngstown and other binding precedents of the Supreme Court and the Sixth Circuit to questions concerning the limits of executive power.

17. Does the President possess any unenumerated powers under the Constitution, and why or why not?

Response: Please see my response to Question 16.

Individual Rights

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

Response: The Supreme Court has held that a right is fundamental if it is "deeply rooted" in the tradition and history of our country and "implicit in the concept of ordered liberty" such that, in its absence, there would be neither liberty nor justice. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

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

Response: When considering Equal Protection Clause claims, the Supreme Court has held that classifications that burden a fundamental right or that are based on race, alienage, national origin, gender, or illegitimacy are subject to heightened scrutiny. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

20. 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: Although I have no personal opinion on whether such preferences will be "necessary" in the future, if confirmed, I will faithfully apply binding precedent handed down by the Supreme Court and the Sixth Circuit on this issue, including Grutter v. Bollinger.

21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?

Response: Such policies are subjected to strict scrutiny, according to Supreme Court precedent. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013). Therefore, policies based on race must be narrowly tailored to fulfill a compelling government interest in order to survive judicial review.

22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?

Response: Some Circuit Courts of Appeal have determined that the Second Amendment protections do extend beyond the home, and the Sixth Circuit has held that courts must apply strict scrutiny to the enumerated protection found in the Second Amendment. The Second Amendment protects a person's right to have a firearm "in case of confrontation," including self-defense in the person's home. District of Columbia v. Heller, 554 U.S. 570, 592 (2008). The Supreme Court has observed that this Second-Amendment protection is "not unlimited." Heller at 595. The Supreme Court has not decided whether the Second Amendment protects the right to possess a gun in public, but the Sixth Circuit has granted an en banc hearing in a related case. Tyler v. Hillsdale County Sheriff's Dept., 775 F.3d 308 (2014). If confirmed, I would apply these precedents to the consideration of the constitutionality of restrictions on the right to keep and bear arms.

Senator Vitter
Questions for the Record

Travis Randall McDonough
Nominee, United States District Judge for the Eastern District of Tennessee

1. **What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?**

Response: In response to this question, I briefly reviewed the opinion of the United States Supreme Court ("Supreme Court") in NLRB v. Canning. My understanding of the case follows. The Recess Appointments Clause (the "Clause") makes an exception to the President's duty to obtain the advice and consent of the Senate prior to appointing certain federal officeholders. The Clause empowers the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." In Canning, the Supreme Court held that a break of three days between Senate sessions "is too short a time to bring a recess within the scope of the Clause" and concluded that the President did not have the power to make recess appointments during such a break. The Court went on to hold that a break of fewer than 10 days but more than three days is presumptively too short to trigger the Clause. If confirmed and, if faced with this issue, I will apply this governing precedent of Canning, as well as other precedent of the Supreme Court and the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit").

2. **In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women's health and, as a result, all abortion clinics in the state are shut down?**

It appears that this issue is the subject of a pending petition to the Supreme Court for a writ of certiorari from the decision in Jackson Women's Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014). If the Supreme Court grants the petition and rules on that case, and if I am confirmed, I will follow any precedent the Supreme Court establishes in the case, as well as additional binding precedent of the Supreme Court and the Sixth Circuit.

3. **The Court's ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?**

I am not aware of any Supreme Court decision overruling the holding of Roe v. Wade. If confirmed, therefore, I will be bound to apply the precedent of that case, as well as other Supreme Court and Sixth Circuit precedent governing the issue, including Gonzales v. Carhart, 550 U.S. 124 (2007), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), regardless of any personal opinions concerning such precedent.

4. Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court's previous ruling in Baker?

Response: In DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), the Sixth Circuit recognized Baker v. Nelson as binding Supreme Court precedent that precluded a lower court from considering whether a state's refusal to recognize same-sex marriage is contrary to the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. The Sixth Circuit also held that U.S. v. Windsor did not contradict the Supreme Court's decision in Baker v. Nelson. DeBoer at 400. The Supreme Court subsequently granted certiorari in the DeBoer case. If confirmed, I will faithfully apply the binding precedent of the Sixth Circuit and the Supreme Court.

5. What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?

Response: I have been a practicing member of the bar and a litigator for nearly two decades, and I understand firsthand the critical importance of an impartial judge who applies precedent and the text of the law without regard for his or her political ideology. A judge who grounds decisions in personal political preferences rather than the law commits a breach of the obligations of judicial office. I have a great deal of respect for our federal system of justice and understand that, for that system to continue to work and for the citizens to continue to have confidence in that system, I must, if confirmed, make decisions that are based solely on the facts and governing law.

6. How do you reconcile the 2nd Amendment basic right under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?

Response: In District of Columbia v. Heller, the Supreme Court held that the Second

Amendment was violated by the District of Columbia's "ban on handgun possession in the home" and the District's "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. 570, 635 (2008). In McDonald v. City of Chicago, the Supreme Court confirmed that the Fourteenth Amendment makes this Second Amendment protection applicable against actions of states. 561 U.S. 742, 791 (2010). I am not familiar with the lower federal court rulings to which the question refers. If confirmed, I will apply binding precedent from the Supreme Court and the Sixth Circuit concerning Second Amendment protections. Decisions from other district courts are not binding precedent on the United States District Court for the Eastern District of Tennessee.

7. Do you support suspending capital punishment sentencing pending the Supreme Court's decision on the use of lethal injection drugs in Oklahoma?

Response: It is my understanding that the Supreme Court recently heard argument on the constitutionality of Oklahoma's method of carrying out capital punishment in Glossip v. Gross. It is also my understanding the Supreme Court stayed the executions of the petitioners in that matter. While I do not believe that, under these circumstances, it would be appropriate for a judicial nominee to comment on the particular issues at hand, if confirmed, I will apply the law announced by the Supreme Court in that case and other binding precedent of the Sixth Circuit to cases involving the same issues. It is my understanding that neither the Supreme Court nor the Sixth Circuit have issued binding precedent generally preventing district courts from announcing a sentence of capital punishment.