Senator Grassley
Questions for the Record

Responses of Dale Alan Drozd
Nominee, United States District Judge for the Eastern District of California

1. **In *Lewis v. Mayle,*[1] a case involving a *habeas* petition, you found that petitioner had effectively waived his right to conflict-free counsel by signing two written waivers and consenting verbally before the court and that the conflict did not adversely affect counsel's performance. The Ninth Circuit reversed and remanded, finding the waiver of conflict invalid because petitioner was not informed of continuing duties of loyalty to past clients. The Court also found that the conflict adversely affected counsel because he failed to impeach the witness and held that to conclude alternatively was "an objectively unreasonable application of clearly established federal law."[2] After reading the Ninth Circuit's opinion in this matter, do you believe the Court was correct in its conclusions?**

   Response: Given my judicial oath and the Code of Conduct for United States Judges, I believe it would be inappropriate for me, as a sitting United States Magistrate Judge, to express a personal opinion regarding binding circuit precedent. In this regard, Canon 2 of the Code of Conduct states that "a judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In issuing my findings and recommendations in *Lewis v. Mayle*, as I have in all cases, I applied binding precedent to the record before me to the best of my ability. I concluded that the state court decision was not contrary to or an unreasonable application of clearly established federal law and that recommendation was adopted by the assigned District Judge. The United States Court of Appeals for the Ninth Circuit reversed that decision. I am bound by this circuit precedent and, if fortunate enough to be confirmed, would apply and follow it as well as all other precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit.

2. **You mentioned in your questionnaire that you have given several speeches on judicial independence. Please describe your current thoughts on what it means to be an independent judge as well as the importance of judicial independence.**

   Response: An independent judge is one who upholds his or her oath of office, recognizing the limited but important role of the federal courts. An independent judge follows binding precedent in addressing all issues that come before the court, avoids addressing the constitutionality of a statute unless required to resolve the case before the court, and presumes statutes enacted by Congress to be constitutional. An independent judge does all of this without any bias or concern of reprisal for judicial acts. Judicial independence is of vital importance to the enforcement of the rule of law and the

[1] No. 2:99-cv-1751 FCD DAD, Docket No. 31 (E.D. Cal. Apr. 15, 2003).
[2] 391 F.3d 989, 997 (9th Cir. 2004).

protection of individual freedoms. Without it, our constitutional democracy – with its system of checks and balances among the three branches – would break down.

3. **Please identify the speeches by Justice O'Connor that you read, which are referenced multiple times in your questionnaire in response to Question 12(d).**

   Response: For seven years I've been invited by the American Legion to address the high school students participating in California's Boys State. On each of those occasions I read a short excerpt from remarks given by Supreme Court Justice Sandra Day O'Connor in 2005. Justice O'Connor's complete speech was entitled "Remarks on Judicial Independence" and was delivered on September 9, 2005 at a dedication ceremony at the University of Florida, Levin College of Law. I used an excerpt of Justice O'Connor's remarks, with attribution, because it used language that high school students could quickly understand and because it made an important point about our constitutional democracy, the rule of law and judicial independence. Justice O'Connor's speech may be found in its entirety at 59 *Florida Law Review* 1 (January 2006).

4. **In *Anderson v. Terhune*, you were faced with a Fifth Amendment issue. The petitioner in the case claimed that he had invoked his Fifth Amendment right to remain silent by stating the words "I plead the fifth," although he continued to respond to questions after that statement. You held that that was not an invocation of his right to remain silent. The Ninth Circuit disagreed with you, finding the statement to be an unambiguous declaration of the right to remain silent.**

   a. **I recognize that the Ninth Circuit's opinion is now binding. As a general matter, what is your approach regarding the scope and breadth of constitutional rights?**

      Response: As a United States Magistrate Judge I address any issues presented to me regarding the scope and breadth of a constitutional right by first considering the language of the provision at issue. My analysis is guided by United States Supreme Court precedent and then that of the United States Court of Appeals for the Ninth Circuit.

   b. **As a general matter, should constitutional rights be interpreted narrowly or broadly?**

      Response: The scope and breadth of constitutional rights should be interpreted in the manner prescribed by United States Supreme Court and federal circuit court precedent. As a United States Magistrate Judge, when called upon to do so, I have interpreted constitutional rights by attempting to faithfully follow that binding precedent to the best of my ability.

5. **In *South v. Gomez*, you were faced with an Eighth Amendment issue regarding the right to hormone therapy for transgender inmates. Your decision is fairly narrow,**

relying heavily on the sudden termination of the therapy and the medical issues that causes. Do you believe that denying taxpayer funded hormone therapy to an inmate would violate the Eighth Amendment?

Response: I do not believe it would be appropriate for me to address this issue since it is one that could come before me as a magistrate judge or, if confirmed, as a district judge. It is my understanding that at least one district court in California has recently addressed a similar issue and that decision is now on appeal before the United States Court of Appeals for the Ninth Circuit. If the issue was presented in a case before me, I would faithfully follow the binding precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals in resolving it.

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

Response: I believe that the most important attribute of a judge is a true commitment to uphold the law. That commitment requires adherence to binding precedent and to the oath in which a judge swears to treat all who come before the court fairly under the law and with dignity and respect. That commitment also includes the pledge to produce thoughtful and well-reasoned decisions to the best of the judge's ability. During my almost eighteen years as a United States Magistrate Judge, I have demonstrated my commitment to uphold the law.

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: A judge should be patient and treat everyone who comes before the court courteously and with dignity and respect. While remaining conscious of the need for efficiency, a judge must give litigants and their lawyers an opportunity to be heard fully and to have their positions considered fairly by the court. I believe that I have demonstrated this temperament throughout my judicial career.

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: If I am fortunate enough to be confirmed, I would faithfully apply and follow the controlling precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. I would abide by the doctrine of stare decisis and appropriately employ judicial restraint even were I to disagree personally with that binding authority or the result of its application. These principles must be followed in order to ensure that the citizenry has faith in the judicial branch and our system of justice.

I have followed these principles for the nearly eighteen years I have served as a United States Magistrate Judge and will continue to do so.

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: In resolving questions of first impression, I would first look to the plain meaning of the language used in the text of the statute or other authority at issue. In keeping with the canons of statutory construction recognized by the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit, where that language is clear and unambiguous, I would apply its plain meaning. Where the language at issue is ambiguous, I would first determine whether decisions of the Supreme Court or the Ninth Circuit have addressed analogous language in other contexts and, if so, would apply that guidance to the issue of first impression before me. If there was no such guidance provided by the decisions of the Supreme Court or the Ninth Circuit, I would then turn to the decisions of the other federal circuit courts and, finally, to those of district courts in searching for guidance as to how to interpret the language in question.

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: If I am fortunate enough to be confirmed, I would faithfully apply and follow the controlling precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit regardless of my personal beliefs. During my career as a United States Magistrate Judge, I have done exactly that and would continue to do so.

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

    Response: At the outset, a federal court is to avoid addressing the constitutionality of federal statutes unless required to resolve the case before it. Beyond that, federal statutes are presumed to be constitutional, and if there is a reasonable interpretation of the statutory language that permits the statute to survive a constitutional challenge, that interpretation should be employed. It is appropriate for a federal court to declare a federal statute unconstitutional only in those rare instances in which Congress has exceeded its authority under the Constitution in enacting the statute or where the statute otherwise violates a constitutional provision.

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.

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: I give the Committee my complete assurance in that regard. As for evidence, in almost eighteen years as a United States Magistrate Judge, I have issued over 30,000 orders and 5,500 findings and recommendations that demonstrate my commitment to the rule of law and my adherence to the doctrines of stare decisis and judicial restraint. If I am fortunate enough to be confirmed, I would continue to be faithful to that commitment and would follow and apply the precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit to the very best of my ability.

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: My record as a United States Magistrate Judge over the last almost eighteen years stands as evidence that I will always put aside any personal views I may have and remain fair to all who appear before me if I am fortunate enough to be confirmed. My commitment in that regard has earned me the reputation of being a fair and impartial judge who treats both lawyers and litigants courteously and with respect. I assure the Committee I will do everything I can to honor and maintain that reputation.

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

Response: Given my almost eighteen years of experience on the bench of the United States District Court for the Eastern District of California, I fully appreciate how challenging it will be to manage what will be a very high caseload by any standard. As a magistrate judge, I have relied upon all of the available electronic case management tools available to me to track cases and deadlines. I also recognize that effective case management requires a total team effort by all chambers staff, often in coordination with the magistrate judges of the court and their staffs. If fortunate enough to be confirmed, I would continue to use all of those techniques. In addition, I would strive to make time for early, in-person scheduling conferences with the parties at which I would, with their input, set reasonable deadlines, anticipate and plan for issues likely to arise in the course of the litigation, and do all else necessary to avoid disruption of the court's scheduling orders. Finally, I will strive to issue prompt rulings to the very best of my ability.

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 know from my experience as a United States Magistrate Judge that the judge or judges to whom a case is assigned set the tone in maintaining a timely pace and proper conduct in all litigation. Employment of available electronic case management

tools and in-person scheduling conferences at the outset of the litigation are valuable in this regard. I also believe it is important that the assigned judges remain available to parties for conferences regarding discovery disputes or other matters that arise during the course of the case. If I am fortunate enough to be confirmed, I would continue these practices, which I have employed over the past eighteen years.

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: Throughout my career as a magistrate judge, I have authored thousands of decisions. Before writing each such decision, I first review the briefing of the parties. While the briefing is obviously quite important, I also believe oral argument plays a vital role in the decision-making process. I listen carefully to the arguments of the parties. Oral argument provides the parties an opportunity to address my questions and concerns regarding the arguments they have presented. After determining the facts before the court, I discern the applicable legal principles as established by the relevant statutes and the binding (or if no binding, instructive) precedent. I then prepare a reasoned, written order fully explaining the basis for my decision to the parties.

18. 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 am not familiar with this quote or the context in which the President made this statement. A judge must always make decisions in a fair and impartial manner, applying binding legal precedent to the facts established by the evidence after fully considering the positions of the parties. Any personal beliefs or opinions of the judge have no role in that decision-making process.

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

Response: On May 13, 2015, I received these Questions for the Record from the Office of Legal Policy. I reviewed the Questions and drafted my answers. I submitted those answers to the Office of Legal Policy for review and then finalized my responses before submitting them to the Committee

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

Response: Yes.

Senator Vitter
Questions for the Record

Responses of Dale Alan Drozd
Nominee, United States District Judge for the Eastern District of California

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 *N.L.R.B. v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2567 (2014), the Supreme Court concluded that: "a recess of more than 3 days but less than 10 days is presumptively too short to fall within the [Recess Appointments] Clause. We add the word 'presumptively' to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break." If fortunate enough to be confirmed, I will continue to faithfully apply and follow all precedent of the United States Supreme Court, including the decision in *N.L.R.B. v. Noel Canning*, and of the United States Court of Appeals for the Ninth 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?**

   Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed the essential holding of *Roe v. Wade* but announced a new standard for determining the validity of laws restricting abortions. The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 877. Applying this "undue burden" standard, the Court invalidated the spousal notification requirement of the Pennsylvania Abortion Control Act of 1982, but it upheld other provisions of that Act. Because the issue presented in this question is being litigated in various federal courts, I do not believe it would be appropriate for me to address the issue in advance of a case that could come before me. If confirmed as a district judge, I would faithfully apply and follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit in addressing such issues.

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?**

   Response: The Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), has not been overturned. Moreover, the Supreme Court has reaffirmed the holding in *Roe* that

"[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992). The Supreme Court holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which the court rejected a facial challenge to the Partial-Birth Abortion Ban Act of 2003, is also binding precedent. These precedents of the Supreme Court are entitled to respect under the doctrine of stare decisis. If confirmed as a district judge, I would faithfully follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit.

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 *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), the Minnesota Supreme Court held that a state law limiting marriage to persons of the opposite sex did not violate the United States Constitution. The United States Supreme Court dismissed appellant Baker's appeal "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the United States Supreme Court held the federal Defense of Marriage Act to be unconstitutional. In doing so, the court recognized that the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Id*. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). However, the court acknowledged that state power to define and regulate marriage was subject to Congress' authority "in enacting discrete statutes [to] make determinations that bear on marital rights and privileges" and "subject to constitutional guarantees." 133 S. Ct. at 2690 & 2692 (internal quotation marks omitted). Earlier this year, the Supreme Court granted certiorari in *Obergefell v. Hodges*, to determine whether the Fourteenth Amendment to the U.S. Constitution requires states to issue marriage licenses to same sex couples and to recognize same sex marriages lawfully licensed and performed out-of-state. *See* 135 S. Ct. 1039 (Jan. 16, 2015). The Supreme Court's resolution of these issues will be binding on all other federal courts. If fortunate enough to be confirmed as a district judge, I would faithfully follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit with respect to these issues.

5. **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: The Supreme Court has held that "the Second Amendment protects an individual right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010)." *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir.

2015). However, the Supreme Court has also stated that the right conferred by the Second Amendment is "not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 554 U.S. at 595. The Ninth Circuit has employed the following two-prong test in determining whether a firearms regulation comports with the Second Amendment: (1) the court should ask "whether the challenged law burdens conduct protected by the Second Amendment;" and (2) if so, what level of scrutiny should be applied. *Fyock*, 779 F.3d at 996 (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). If I am confirmed, I would follow the binding precedent of both the United States Supreme Court, including the decisions in *Heller* and *McDonald*, and the United States Court of Appeals for the Ninth Circuit in analyzing the scope of the rights conferred by the Second Amendment if confronted with a case presenting that issue.

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

   Response: Because this question calls for my opinion regarding a legal issue that is currently the subject of litigation, I do not believe it would be appropriate for me to address it. If confirmed as a district judge, I would continue to adhere to the precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit regarding all issues with respect to capital punishment.

7. **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: During my career as a United States Magistrate Judge I have faithfully applied and followed the controlling precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit regardless of any personal beliefs. I would continue to do so if fortunate enough to be confirmed.

8. **You gave seven speeches on the topic of judicial independence. In at least one of those speeches, you stated, "The main check the judicial branch has on the others is the power to declare statutes or executive acts unconstitutional, though sometimes we judges might check the political branches in a softer way, merely by interpreting a statute in light of constitutional values or by ruling that a regulation of executive act isn't authorized by statute." When you refer to "constitutional values," it appears as though you support the notions of the constitution as a living document and a non-textualist approach to statutory interpretation. Will you please explain your philosophy on judicial interpretation?**

   Response: This quote is from a short excerpt from remarks given by Supreme Court Justice Sandra Day O'Connor which I have read, with attribution, to high school students participating in the American Legion's California's Boys State program. I believe the Justice's remarks employed language that high school students could quickly understand and made an important point about our constitutional democracy, the rule of law and judicial independence. Justice O'Connor's speech may be found in its entirety at 59 *Florida Law Review* 1 (January 2006). If I am fortunate enough to be confirmed, I would

address any issues presented to me that could only be resolved on constitutional grounds by first considering the language of the provision at issue. My analysis of the text would be guided by precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. I would resolve the constitutional question, if necessary, in accord with the plain meaning of the provision's language and that binding precedent.

9. **You also said, "Chief Justice John Marshall, who spent thirty-five years trying to nurture a culture where the political branches were, by and large, willing to acquiesce in the judicial branch's interpretation of the law. They don't always acquiesce, but fortunately, most of the time, politicians don't challenge the courts to come enforce their judgments themselves, as Andrew Jackson did in the wake of the Supreme Court's decision in *Worcester v. Georgia*. Creating a culture in the early Republic where, usually, courts' judgments were enforced by the other branches of government is an accomplishment that entitles John Marshall to take his place in the fresco of great lawgivers …." This quote flies in the face of the checks and balances of government that is a cornerstone of the Constitution and suggests that you support judicial strong arming. Does this quote embody your judicial philosophy on checks and balances and the role of the judicial branch?**

   Response: This quote is also from remarks given by Supreme Court Justice Sandra Day O'Connor. Although I am not certain of her intent, I believe that it praises the role Chief Justice John Marshall played in establishing the federal judiciary as one part of a system of ordered liberty in a young American constitutional democracy. With respect to my judicial philosophy, I believe that the system of checks and balances among the three branches serves a critical role in our constitutional form of government.

10. **Is it necessary within our system of checks and balances for all branches to challenge unconstitutional acts of the other branches?**

    Response: It is the role of the courts to decide cases and controversies that are properly brought before the court and, in doing so, where necessary, to interpret the laws and Constitution of the United States in accord with binding precedent. It is not the role of the judicial branch to "challenge" the allegedly unconstitutional acts of the other two branches of government. That is left to parties who have standing to raise the particular constitutional challenge in court.

11. **In the same quote from above, you mention the case of *Worcester v. Georgia*, where the Supreme Court issued an order that would have caused the release from prison of Samuel Worcester, a Christian missionary to the Cherokee Indians, who was imprisoned pursuant to a Georgia law that the Supreme Court declared unconstitutional. President Andrew Jackson refused to enforce the Supreme Court's ruling and it appears that you disagree with his actions, is that fair to say?**

Response: No. In fact, the federal government was not a party in *Worcester* and the Supreme Court's ruling in that case imposed no obligation on the President. Moreover, Georgia essentially complied with the court's order by releasing the petitioners. To the extent anyone today may see virtue or vice in the notion of the executive branch refusing to enforce an order of the Supreme Court, such thought would have no effect on my duty as a federal judge to faithfully uphold the law and to order only what the law requires.

12. Along the same lines, are there cases where you believe a President, Congress, and/or other officeholders should have properly refused to acquiesce to a Court order?

Response: I believe the rule of law is absolutely vital to our system of ordered liberty. Willful disobedience of a lawful court order is completely at odds with that belief. Adherence to the rule of law is critical. Without it, our constitutional democracy – with its system of checks and balances among the three branches – would break down.