Responses of Michael P. Shea
Nominee to be United States District Judge for the District of Connecticut
to the Written Questions of Senator Chuck Grassley

1. **You submitted an amicus brief on behalf of the Connecticut Conference of Municipalities in the landmark Supreme Court case *Kelo v. New London*, decided in 2005. In this brief, you wrote that the "taking of some of the petitioners' homes" is "undeniably a genuine cost of realizing the City's goal of improving the economic well-being of its citizens."**

    a. **After *Kelo*, the project that purportedly justified the taking failed, and the property was turned into a dump. Did this result change your views on the policy of eminent domain in any way?**

    Response: The Connecticut Conference of Municipalities hired my firm to represent its interests as amicus curiae in the Supreme Court in *Kelo v. New London*. In the above-quoted amicus brief, I advocated the position of the Conference and other state municipal leagues. If confirmed as a district court judge, my role in any eminent domain case would, of course, not be to advocate a client's position but to follow the law, including the Supreme Court's decision in *Kelo*, any other applicable precedents of the Supreme Court or Second Circuit, and any applicable statutes that might restrict the exercise of eminent domain powers. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."). A judge should not allow any personal views on eminent domain he or she might hold to interfere with his or her application of the law to the particular facts of the case.

    b. **Do you think the government has the power to seize the property of private parties for the economic well being of the community as a whole?**

    Response: Citing its "longstanding policy of deference to legislative judgments in this field," *Kelo v. New London*, 545 U.S. 469, 480 (2005), the Supreme Court held in *Kelo* that the "public use" requirement of the Fifth Amendment did not prohibit a municipality – acting in accordance with a state statute that authorized the use of eminent domain to promote economic development – from taking land, for just compensation, as part of an economic development plan. The Court noted, however, that the Fifth Amendment would prohibit the government from taking private property either "for the purpose of conferring a private benefit on a particular private party" or "under the mere pretext of a public purpose, when [the government's] actual purpose was to bestow a private benefit." 545 U.S. at 477-78. In addition, as noted above, the Court made clear that states are free to adopt laws that restrict the taking of private property for economic development. *Id.* at 489 & nn. 22 & 23. If confirmed as a district court judge and faced with a challenge to the government's eminent domain authority, I would follow *Kelo*,

any other applicable precedents of the Supreme Court and Second Circuit, and any statutes imposing restrictions on the government's taking authority.

2. **In 2005, the Connecticut Supreme Court appointed your partner, Thomas Groark, to serve as Special Counsel for Michael Ross. Mr. Groark was charged with advocating that Mr. Ross was not acting competently or voluntarily in his decision to waive his rights and to forgo further challenges to his death sentence. At Mr. Groark's request, you assisted in this litigation, including conducting direct examination of two witnesses and cross-examination of Mr. Ross's psychiatric expert. Mr. Ross was found competent and later executed.**

   a. **Do you think a defendant's desire to forgo further appeals in a death penalty case should ever be considered a de facto "suicide" attempt?**

      Response: The law does not treat a decision to forgo further appeals in a death penalty case as being akin to a de facto suicide attempt. A defendant is free to choose to forgo further appeals in a death penalty case as long as he or she is competent to make that choice. *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (where question of death-sentenced habeas petitioner's competence was raised in connection with his direction to counsel to forgo further legal proceedings, District Court was directed to determine "whether [petitioner] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."). By contrast, the law has long recognized suicide as wrong, and some states still treat it as a crime. *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (noting that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."); *Wackwitz v. Roy*, 418 S.E.2d 861, 864 (Va. 1992) (noting that "[s]uicide … remains a common law crime in Virginia as it does in a number of other common-law states," and citing cases.)

   b. **In your view, is it ever appropriate for a judge to accuse a lawyer of being proximate cause in his or her client's death?**

      Response: I cannot think of a situation in which it would be appropriate for a judge to accuse a lawyer who was acting in accordance with his or her professional obligations of being the proximate cause of his or her client's death.

   c. **How would you approach a case, if confirmed, where a defendant wanted to forgo all appeals?**

      Response: I would apply binding precedent of the Supreme Court and Second Circuit to the particular facts of the case. This would include careful consideration of the Supreme Court's decision in *Rees v. Peyton*, 384 U.S. 312 (1966), in deciding any issue of the defendant's mental competence to waive his

or her rights, as well as any subsequent decisions that provided further guidance on the scope of *Rees*. (The Supreme Court recently granted certiorari in a case in which the questions presented involve the scope of *Rees*. *See Tibbals v. Carter*, S.C. Docket No. 11-218, http://www.supremecourt. gov/qp/11-00218qp.pdf.) If the case involved review of a state court's determination, I would apply appropriate deference to that determination, in accordance with applicable federal statutes and Supreme Court precedent. *See* 28 U.S.C. § 2254(d) & (e); *Demonsthenes v. Baal*, 495 U.S. 731, 735 (1990) (state court finding of competence to waive challenges to death sentence entitled to presumption of correctness in federal habeas proceedings).

3. **Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justice to tilt it in the favor of the proverbial little guy. Justice Roberts addressed this issue at his hearing saying that "If the Constitution says that the little guy should win, the little guy's going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy's going to win."**

    a. **To what extent does empathy have a place in the judicial process?**

    Response: A judge should decide issues by applying the law to the particular facts established by the evidence, and should not allow sympathy or feelings for either party or his or her own personal views to interfere.

    b. **In your view, what is determinative as to who wins or loses?**

    Response: The law – applied carefully and fairly to the particular facts established by the evidence – should determine who wins or loses a case.

    c. **In your opinion, what is the role of the judge in protecting the interests of the "little guy?"**

    Response: A judge's role is not to protect the interests of any party in litigation; that is the role of the party's attorney. The judge's role is to uphold the rule of law fairly and impartially.

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

    Response: The most important attribute of a judge is a deep commitment to applying the law fairly and faithfully, without regard to the identities of the parties and without regard to the judge's own personal views. I believe I possess this attribute.

5. **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 demonstrate patience and open-mindedness, a willingness to listen carefully to the parties' arguments, and a respectful demeanor. The most important element of a good judicial temperament is humility, a quality that captures each of the foregoing traits and also embodies an appreciation of the court's limited role in our system of government. I believe I meet this standard.

6. **In general, Supreme Court precedents are binding on all lower federal courts, and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

   Response: Yes.

7. **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 the case involved the interpretation of a statute, I would examine closely the text of the statutory provision at issue and its relationship to surrounding provisions. If the text of the statute was clear, I would apply the plain language of the statute to resolve the issue. If the text was ambiguous, I would consult other sources to ascertain the statute's meaning, including any precedents from the Supreme Court and Second Circuit addressing similar statutory provisions, any decisions from federal courts outside the Second Circuit that addressed the statute at issue, and any legislative history that was sufficiently clear to provide insight into the meaning of the text. The principle that would guide me would be to apply the law fairly and faithfully, without regard to my personal views.

8. **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 follow and faithfully apply Supreme Court or Second Circuit precedent even if I believed it to be seriously in error.

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

   Response: Statutes carry a presumption of constitutionality, and the party challenging the statute bears the burden of establishing that the statute violates a provision of the Constitution. Further, when a statute is ambiguous such that there are two plausible constructions, one of which would raise constitutional problems, the court must adopt the construction that would render the statute constitutional, under the canon of constitutional

avoidance. If the plain language of the statute contravenes a constitutional provision, or if Congress has exceeded its authority in enacting the statute, however, it is the court's duty to declare the statute unconstitutional.

10. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

    Response: If confirmed, I will use all the tools available to district court judges actively to manage my docket, including holding early Rule 16 conferences to set firm but realistic deadlines for each case, exploring early on in litigation, and at later stages as well, the possibility of settlement, and making myself available to decide issues promptly. I would also use procedures to make the discovery process more efficient, such as having the parties resolve routine discovery disputes in appropriate cases by submitting short letters to the court setting forth their positions, rather than proceeding with full-scale motion practice.

11. **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 do believe that judges should play an active role in helping the parties move their cases to resolution expeditiously and fairly. If confirmed, I would monitor my docket carefully and use the tools described in response to question 10 to carry out this role.

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

    Response: I received these questions on April 4, 2012. I then drafted my responses. I reviewed my responses with a representative of the Department of Justice and then asked him to forward my responses to the Committee.

13. **Do these answers reflect your true and personal views?**

    Response: Yes.

Responses of Michael P. Shea
Nominee to be United States District Judge for the District of Connecticut
to the Written Questions of Senator Amy Klobuchar

1. **If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

   Response: A judge should adjudicate cases fairly and promptly by applying binding precedent to the particular facts of each case, without regard to his or her own personal views, and should treat the parties, counsel, witnesses, jurors and court staff with dignity and respect. The role of a district court judge in our constitutional system is an important but limited one. It includes presiding over trials fairly and deciding issues within the court's jurisdiction by applying precedent of higher courts to the particular facts of each case.

2. **What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

   Response: If confirmed, I will take an oath, among other things, to "administer justice without respect to persons, and do equal right to the poor and to the rich." I would regard adherence to that oath as a solemn commitment that was central to my day-to-day duties and critical to the rule of law in our society. I also note that, as a practicing attorney, I have had the opportunity to represent a broad range of clients – from indigent individuals to large corporations, and both plaintiffs and defendants.

3. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

   Response: Stare decisis promotes stability in the law, helps ensure that courts respect the limits on their authority, and is a critical principle in a society based on the rule of law. All judges – but especially district court judges, who are required to follow precedent of the Supreme Court and Courts of Appeals – are bound by the principle of stare decisis. The Supreme Court, and Courts of Appeals sitting en banc, may on rare occasions overrule their own decisions, and have articulated the narrow circumstances in which it is appropriate for them to do so.