Responses of Gloria M. Navarro
Nominee to the U.S. District Court for the District of Nevada
to the Written Questions of Senator Jeff Sessions

1. At your hearing, I asked you whether you believed that the death penalty violates the Constitution as being "cruel and unusual." You testified that you had "not expressed an opinion on that," but then stated "I'm not sure that I have a particular opinion on that. There's a case-by-case basis that, in my personal view, if I was sitting on a jury, I would have to decide."

a. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution?

Response: The U.S. Supreme Court has upheld the constitutionality of the death penalty except in specific limited circumstances and if confirmed, I would follow the Court's precedent and apply the law as required by the doctrine of *stare decisis*.

b. Please explain what you meant by "case-by-case basis."

Response: Section 3593(e) of the Federal Death Penalty Act requires that a judge must impose a sentence of death when it is recommended by the jury; that is why I stated that, "at the end of the day… the juries are the individuals who have to decide and pass judgment." If confirmed as a judge, I would of course follow this law. In response to the question about my personal belief, if I were a member of a jury, I would likewise follow the law and not impose the death penalty automatically but rather review the existence of the aggravating/mitigating factors presented to me and determine the appropriateness of the death penalty for each of the defendants on a "case-by-case basis."

c. Justice Marshall maintained that the death penalty was always unconstitutional. Do you agree or disagree? Please explain your answer.

Response: The U.S. Supreme Court has upheld the constitutionality of the death penalty and if confirmed, I would follow the Court's precedent as required by the doctrine of *stare decisis*.

d. Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.

Response: The U.S. Supreme Court has upheld the constitutionality of the death penalty as an acceptable form of punishment except in certain limited circumstances and if confirmed, I would follow the Court's precedent and apply the law as required by the doctrine of *stare decisis*.

2. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on "evolving standards of decency" in holding that capital punishment for any murderer under the age of 18 was unconstitutional.

a. Do you agree with Justice Kennedy's analysis?

Response: Whether or not I agree with Justice Kennedy's analysis, the doctrine of *stare decisis* requires that I accept the U.S. Supreme Court's decision and if I were to be confirmed, I would apply its analysis.

b. How would you determine what constitutes "evolving standards of decency"? What factors would you consider?

Response: After the *Roper* decision, the U.S. Supreme Court in *Kennedy v. Louisiana*, explained that the determination is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions. Consensus is not dispositive, however. Whether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." 128 S.Ct 2641, 2649 – 2651 (2008). If confirmed, I would follow Supreme Court precedent as required by the doctrine of *stare decisis* and apply the Court's analysis.

c. Do you think that a judge could conclude that "evolving standards of decency" dictate that the death penalty is unconstitutional in all cases? Please discuss what factors you believe would be relevant to the judge's analysis.

Response: No. The U.S. Supreme Court has held that the death penalty is a constitutional punishment. Therefore, it would not be appropriate for a District Court judge to utilize the "evolving standards of decency" analysis or any other analysis to overrule a decision made by the U.S. Supreme Court. If confirmed, I would accept and follow Supreme Court precedent.

3. In *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008), the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. The majority opinion was based, in part, on the fact that 37 jurisdictions (36 states and the federal government) did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.

a. Given the heinousness of the crime, as well as the information on the federal government's codification of capital punishment in child rape cases under

the UCMJ, is it your opinion that *Kennedy v. Louisiana* was wrongly decided? If not, why?

Response: Regardless of my own personal opinion, the doctrine of *stare decisis* requires that I accept this U.S. Supreme Court decision and if I were to be confirmed, I would follow and apply the Court's decision.

b. Following the Supreme Court's decision, President Obama announced at a press conference: "I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime." Do you agree with that statement? Why or why not?

Response: I do agree that the rape of a small child is a heinous crime, however, the doctrine of *stare decisis* requires that I accept the U.S. Supreme Court's decision and if I were to be confirmed, I would follow and apply this decision.

4. In a 1994 newsletter published by the Office of the Federal Defender for the District of Nevada, you encouraged attorneys representing non-English speaking defendants to "[a]lways remember that the cultural and historical background of these defendants, not just the language barriers, leave them more vulnerable to police pressures than the average individual."

a. Please explain what you meant by this statement.

Response: The purpose of the newsletter was to educate Criminal Justice Act lawyers of the status of the law and the article was a summary of relevant case law provided to assist them to effectively represent clients with a different cultural or historical background. The statement referenced above was a reminder to attorneys that in addition to language barriers, courts had recognized other vulnerabilities of this particular class of defendants.

b. Do you believe that the law should be applied differently to people based on their "cultural and historical background"? Please explain your answer.

Response: No. The law should be applied consistently to provide equal justice for all people.

c. Do you think that it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No

i. If so, under what circumstances?

Response: See Response above.

5. As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

a. While I understand that you cannot know what President Obama may or may not have meant by this statement, do you believe that you fit President Obama's criteria for federal judges, as described in his quote? Why?

Response: If empathy is defined as not just the willingness but also the ability to understand and consider several points of view and keep an open mind, then I believe I do fit President Obama's criteria.

b. During her confirmation hearing, Justice Sotomayor rejected this so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?

Response: I agree with Justice Sotomayor's statement.

c. What role do you believe empathy should play in a judge's consideration of a case?

Response: A judge should be able to understand and consider the views presented, keeping an open mind before applying the law to the facts of the case.

d. Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?

Response: No

i. If so, under what circumstances?

Response: See Response above.

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

Response: I received these written questions from the Department of Justice (DOJ). I reviewed my materials referenced in the questions, drafted my responses, discussed the answers with representatives of the DOJ and then finalized my responses.

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

Response: Yes.

Responses of Gloria M. Navarro
Nominee to the U.S. District Court for the District of Nevada
to the Written Questions of Senator Tom Coburn, M.D.

1. **In your lecture notes for a talk entitled, "Effective Communication with the Non-English Speaking Client: Cultural Issues," you described ways to use cultural factors to a defendant's benefit in criminal cases. Specifically, you made the following points:**

    - The burden to show voluntary consent is heavier when the defendant does not speak English.
    - Cultural factors can be used to invalidate a defendant's voluntary consent to a search.
    - Un-*Mirandized* statements taken during routine questioning and interviewing are involuntary and must be suppressed where defendant's subjective belief that he/she is not free to leave is reinforced by cultural factors.
    - *Mirandized* statements and consents to searches can be deemed involuntary where the defendant is not fluent in English.

    a. Can you explain why the burden to show voluntary consent is heavier when the defendant does not speak English?

    Response: The statement referred to above was a verbatim recitation of the language used by the Sixth Circuit court in *Kovach v. U.S.*, 53 F.2d 639 (6th Cir. 1931) which stated "[t]his burden is of course heavier where it appears that the owner is illiterate or a foreigner who does not readily speak and understand the English language." *Id.* at 639. During the same lecture, I also noted the Ninth Circuit Court's decision in *U.S. v. Moreno*, 742 F.2d 532 (9th Cir. 1984) which held that the defendant's "lack of familiarity with police procedures in this country, his alienage and his limited ability to speak and understand English contributed significantly to the quantum of coercion present." *Id*. at 536.

    b. Why do you believe the government should be tasked with this additional burden when someone does not speak English?

    Response: The statement referred to above was not a personal statement of my belief. This lecture was a discussion of relevant case law and the purpose was to educate the CJA lawyers of the status of the available existing case law to enable them to provide effective representation to their clients.

    c. Don't you agree that the imposition of these additional burdens on the government will result in criminals not being convicted?

    Response: The U.S. Supreme Court's decision in *Schneckloth v. Bustamonte*, recognized that "[t]wo competing concerns must be accommodated in determining the meaning of a "voluntary" consent to search: the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." 412 U.S.

218, 227, 93 S.Ct. 2041, 2048 (1973). Even if the enforcement of constitutional requirements may occasionally result in fewer convictions, if confirmed, the doctrine of *stare decisis* requires that I follow precedent regardless of its possible effect.

2. In a 1997 article for *Communiqué* magazine, you urged criminal defense lawyers to understand the immigration law consequences of criminal convictions for illegal immigrants. You stated:

"[t]he immigration laws show very little spirit of pity. Proof or mere addiction to a narcotic is ground for deportation or exclusion with one exception."

a. Do you think it is appropriate for a judge to add his or her own "spirit of pity" to laws that, in your view, lack such spirit?

Response: No.

3. The American Bar Association's Standing Committee on the Judiciary rated your nomination "Substantial Majority Qualified, Minority Not Qualified." In his statement recommending your nomination, Majority Leader Reid said that your rating was "upsetting" to him and that you were "not rated as high as [you] should be rated."

a. Were you satisfied with the ABA's review of your record?

Response: I do not know the methodology used by the ABA Committee; therefore I am unable to comment upon the process used to review my record.

b. Do you believe you deserved the rating you received?

Response: I do agree with the substantial majority that determined I am qualified to serve as a United States District Court Judge if confirmed.

c. Did the ABA explain why you received the "Not Qualified" rating?

Response: My understanding is that I did not receive a not qualified rating but rather that the ABA rated me "Substantial Majority Qualified, Minority Not Qualified." However, the ABA did not explain why this rating was given.

d. Did you agree with their analysis of the factors that resulted in the "Not Qualified" rating?

Response: My understanding is that I did not receive a not qualified rating but rather that the ABA rated me "Substantial Majority Qualified, Minority Not Qualified." Nevertheless, I am unaware of which factors resulted in the minority's rating, nor what analysis of the factors was applied; therefore I cannot determine whether I am in agreement or not.

e. Did you have an opportunity to provide contrary evidence prior to the Committee's vote to counter the findings that resulted in the "Not Qualified" rating?

Response: My understanding is that I did not receive a not qualified rating but rather that the ABA rated me "Substantial Majority Qualified, Minority Not Qualified." However, I was not specifically provided a prior opportunity to submit any contrary evidence because I have never been advised of the particular findings that resulted in the minority's rating.

4. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: No.

5. Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.

a. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?

Response: In *Gonzales v. Raich*, the U.S. Supreme Court indicated that its *Lopez* and *Morrison* decisions are consistent with earlier Supreme Court Commerce Clause decisions.

b. Why or why not?

Response: In *Gonzales v. Raich*, the U.S. Supreme Court deferred collectively to "the larger context of modern-era Commerce Clause Jurisprudence" and explained that an exclusive reliance upon only *Lopez* and *Morrison* provided an inappropriate "myopic focus."

6. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

a. How would you determine what the evolving standards of decency are?

Response: After the *Roper* decision, the U.S. Supreme Court in *Kennedy v. Louisiana*, explained that the determination is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions. Consensus is not dispositive, however. Whether the death

penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." 128 S.Ct 2641, 2649 – 2651 (2008). If confirmed, I would follow Supreme Court precedent as required by the doctrine of *stare decisis* and apply the Court's analysis.

b. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in *all* cases?

Response: No. The U.S. Supreme Court has held that the death penalty is a constitutional punishment. Therefore, it would not be appropriate for a District Court judge to utilize the "evolving standards of decency" analysis or any other analysis to overrule a decision made by the U.S. Supreme Court. If confirmed, I would accept and follow Supreme Court precedent.

c. What factors do you believe would be relevant to the judge's analysis?

Response: See Response above.

7. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: See Response above.

b. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: If confirmed and called upon to interpret the Eighth Amendment or any other Amendment, I would follow the analysis proscribed by the U. S. Supreme Court in each area as required by the doctrine of *stare decisis*.