

**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*.