

Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

- 1. Given your writings on the constitutional interpretation employed in *District of Columbia v. Heller*, I previously asked whether you believed the right to bear arms was a fundamental right. You responded that, although you have analyzed the *Heller* opinion, you could not answer my question. Now that the Court has decided *McDonald v. Chicago*, do you personally agree with the Court's majority opinion that the right to bear arms is fundamental?**

Response: The Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), held that the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the states. The Court reached this holding by determining that the right to keep and bear arms is a fundamental right deeply rooted in our nation's history and tradition. *See id.* at 3036-44. If confirmed, I would faithfully follow the Supreme Court's holding that the right to keep and bear arms is a fundamental right. I have not previously expressed any view on the question decided in *McDonald*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so now.

- a. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

Response: In *District of Columbia v. Heller*, the Supreme Court said that "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.... [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008); *see McDonald*, 130 S. Ct. at 3047 (quoting *Heller*). Moreover, noting the "historical tradition of prohibiting the carrying of dangerous and unusual weapons," the Court recognized "another important limitation on the right to keep and carry arms"—namely, "the sorts of weapons protected [are] those in common use at the time." *Heller*, 554 U.S. at 627 (internal quotation marks and citations omitted). *Heller* addressed the scope of the Second Amendment right in relation to the federal government; *McDonald* held that the Second Amendment right has the same scope in relation to the states.

- b. Do you agree that the *McDonald* decision left certain questions unanswered – such as what are protected places – that lower court judges will have to decide?**

Response: *McDonald* reaffirmed the Court's statement in *Heller* that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are not cast into doubt by the Court's decisions. 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626). The Supreme Court has not indicated whether there are places other than schools and government buildings that qualify as "sensitive places" within the meaning of *Heller*. To the extent that issue is raised in litigation, lower court judges will have to address it.

c. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: The Supreme Court stated its holding in *Heller* as follows: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635. The Court in *McDonald* stated its holding similarly: "In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.... We ... hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."). While the Court has not said that the Second Amendment right is limited only to possession of a handgun for self-defense in the home, it has not had occasion to determine what the Second Amendment right encompasses beyond possession of a handgun for self-defense in the home.

2. I asked you previously whether you personally believed the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by states. You responded that it was "a question upon which you had not previously expressed a view." As a law professor in California and a participant in the Prop 8 litigation, have you really never expressed a view on this issue, even in casual conversation?

Response: I joined an amicus brief filed in the California Supreme Court in 2007, arguing that state laws prohibiting same-sex marriage violated the California Constitution. The California Supreme Court invalidated those laws in May 2008; six months later, the voters of California passed Proposition 8. I have not participated in any litigation concerning Proposition 8. In October 2008 testimony before the California Assembly and Senate Judiciary Committees, I predicted (correctly) that Proposition 8 would be upheld under applicable state constitutional law precedents. As to the validity of Proposition 8 under *federal* constitutional law, I explained that it is "an open question" under *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and I predicted (incorrectly) that "Prop. 8 will not be invalidated under federal law in the near future." That is the extent of any views I have expressed on whether the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by states.

a. If you have expressed a view, please disclose that view?

Response: Please see the response above.