

Responses of Scott M. Matheson, Jr.
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

- 1. During your campaign for Governor of Utah, you said in a public debate that you would oppose allowing law-abiding citizens who held concealed carry licenses from taking concealed handguns into schools and churches.**

- a. Do you personally agree with the Supreme Court’s decision in *District of Columbia v. Heller* that the Second Amendment protects an individual’s right to keep and bear arms?**

Response: I agree, based on the Supreme Court’s decision in *Heller*, that the Second Amendment protects an individual right to keep and bear arms. If confirmed, I will follow and apply that holding.

- b. Do you believe that holding would have any effect on laws that restrict the places a duly-licensed person can possess a firearm?**

Response: In his majority opinion in *Heller*, Justice Scalia wrote that “nothing 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.” 128 S.Ct. at 2816-17. However, the specific issue raised in your question was not before the Court in *Heller*. As a judge, I would keep an open mind on any such issue and follow applicable precedent.

- 2. In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ____ (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you personally believe the right to bear arms is a fundamental right?**

Response: The Supreme Court will decide this issue in *McDonald v. City of Chicago* in the next few weeks. If confirmed, I will follow and apply that holding.

- a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: The Supreme Court has recognized that almost all of the rights enumerated in the Bill of Rights are applicable to the states through the Due Process Clause of the Fourteenth Amendment and are fundamental rights.

- b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Please see my previous response.

- c. ***Heller* further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: This statement in Justice Scalia’s majority opinion in *Heller* is based on the Supreme Court’s historical analysis of the period leading to the ratification of the Second Amendment. The conclusion that the Second Amendment codified a pre-existing right stands as Supreme Court precedent, which I would follow as a judge.

- d. **Some have criticized the Supreme Court’s decision in *Heller* saying it “discovered a constitutional right to own guns that the Court had not previously noticed in 220 years.” Do you believe that *Heller* “discovered” a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: As noted in the previous response, the Supreme Court did not “discover” a new right in *Heller*. The *Heller* case was the Court’s first opportunity to address the meaning of the Second Amendment at length. Through a textual and historical analysis, the Court held there is an individual right to keep and bear arms under the Second Amendment.

3. **While running for governor, you stated that a 2004 Utah ban on late-term abortions should include an exception for fatally deformed fetuses. Can you please explain what you meant by that statement?**

Response: The *Deseret Morning News* candidate questionnaire asked the following question: “As we saw recently, a family had to seek an abortion for a severely deformed fetus (which could not survive outside the womb) from a clinic because her hospital refused to perform the late-term abortion because a law passed by the 2004 Legislature restricts funding for entities that perform abortions. The new law doesn’t make allowances for the health of the fetus or the mother. In light of these problems, do you still favor or still oppose the new law? If oppose, how should the law be changed?”

My response to this question was as follows: “When this bill was being debated, my running mate, Sen. Karen Hale, proposed an amendment that would have provided an exception for fetuses known by competent medical authority to have fatal defects. As the author of the original bill acknowledged, the bill should permit an exception for fatally deformed fetuses.”

My Republican opponent, Jon Huntsman, Jr., took the same position in answer to the same questionnaire. He supported “changes to include abortion for fatal fetal abnormalities” as an “appropriate remedy [for] the concerns raised by the current law.”

a. How do you define “fatally deformed fetuses”?

Response: The definition contained in the question: a severely deformed fetus that could not survive outside the womb, as determined by competent medical authority.

b. Please explain how such an exception would comply with the federal Partial Birth Abortion Ban?

Response: If confirmed and if presented with this issue as a judge, I would closely examine the text of the state and federal statutes as well as the factual record, and I would apply the applicable law and Supreme Court and Tenth Circuit precedents to the case.

4. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?

Response: Whether a statute infringes an individual right depends on proper understanding of both the statute and the Constitution. The starting point is the text of the statute and the plain meaning of its words. If the text is not clear, the next step is examination of the legislative history to determine legislative intent. Case law precedent interpreting and applying the statute should be considered. The constitutional analysis calls for careful consideration of the relevant textual provision, history, and case precedent. This legal analysis would be applied to the factual record in the case. I would follow Supreme Court precedent for principles of constitutional interpretation.

5. Please describe in your own words the criteria and legal methodology the Supreme Court employs to determine whether a right is a “fundamental right?”

Response: The Supreme Court in a series of decisions has determined whether individual rights, including the rights enumerated in the Bill of Rights, are incorporated and protected under the Due Process Clause of the Fourteenth Amendment. In *Duncan v. Louisiana*, the Supreme Court summarized the criteria for deciding whether a provision of the Bill of Rights is incorporated: “The question has been asked whether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’ whether it is ‘basic in our system of jurisprudence,’ and whether it is a ‘fundamental right, essential to a fair trial.’ 391 U.S. 145, 148-49 (1968) (citations omitted). The Court will address the criteria and legal methodology again in *McDonald v. City of Chicago* in the next few weeks. If confirmed, I would follow and apply the Court’s precedents.

6. **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. The Constitution established the structure and powers of the federal government, the relationship between the federal and state governments, and principles regarding the relationship between the government and individuals. It can be changed only through the constitutional amendment process. The Framers meant the Constitution to endure and to apply to changing circumstances, but not to evolve “as society interprets it.”

7. **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. **Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes. The Supreme Court in *Lopez* and *Morrison* discussed earlier Commerce Clause decisions and did not overturn them.

- b. **Why or why not?**

Response: The Constitution conferred enumerated powers on the federal government. As an enumerated power, the Commerce Clause both authorizes Congress to act but also limits what Congress can do. The *Lopez* and *Morrison* decisions reaffirmed the principle of limits on enumerated powers.

8. **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?**

Response: As a judge, I would be bound to follow and apply the holding in *Roper* whether or not I agree with it.

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

Response: I would follow Supreme Court precedent and apply the analysis that the Court has held should be applied.

- 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: The Supreme Court has held that the death penalty is constitutional as a general matter. If confirmed, I would follow and apply that precedent.

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

Response: I would follow Supreme Court precedent to determine the relevant factors.

9. 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: Please see my previous response.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: Foreign law should not have a binding effect on and should not influence a judge's interpretation and application of U.S. law.

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

Response: No.