

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Jeff Sessions**

1. **During his campaign, President Obama announced: “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’ll be selecting my judges.” Which, if any, of these categories do you believe best describes your judicial philosophy as laid out by the President?**

RESPONSE:

Federal judges take an oath to administer justice without respect to persons and to do equal right to the poor and to the rich. Empathy for all parties – to be distinguished from sympathy – is important in fulfilling that oath. If confirmed, I will apply the law fairly and accurately to all parties before me.

2. **In his questionnaire, Judge Gerard Lynch noted that he got several cases wrong and that the appeals court reversed him appropriately. In which of the following cases where your decisions were either reversed or vacated do you believe the appellate court decided the case correctly? Please explain why.**

- a. **Grossbaum v. Indianapolis-Marion County Building Authority, 870 F. Supp. 1450 (S.D. Ind. 1994).**

RESPONSE:

I agree with the Seventh Circuit’s reversal, 63 F.3d 581 (7th Cir. 1995). The Seventh Circuit relied heavily on an intervening Supreme Court decision, *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), which provided helpful guidance in applying First Amendment free speech protections (as distinct from free exercise of religion protections) to these issues.

- b. **American Amusement Machine Ass’n v. Cottey, 115 F. Supp.2d 943 (S.D. Ind. 2000).**

RESPONSE:

I recognize the Seventh Circuit’s decision, 244 F.3d 572 (7th Cir. 2001), as controlling law within the circuit. I respectfully disagree with it for the reasons stated in my opinion. In summary, I do not believe the Seventh Circuit’s opinion gave sufficient weight to parents’ interests in limiting their minor children’s unsupervised access to extremely violent games in public arcades.

- c. **Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005).**

RESPONSE:

I have no disagreement with the ultimate reversal on the issue of taxpayer standing, see 506 F.3d 584 (7th Cir. 2007), which was based on an intervening decision by the Supreme Court, *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007), which sharply curtailed reliance on taxpayer standing in Establishment Clause cases.

- d. **United States v. McCotry, 2006 U.S. Dist. LEXIS 62777 (S.D. Ind. 2006).**

RESPONSE:

On the issue on which my decision was reversed, see 495 F.3d 795 (7th Cir. 2007), whether the police violated a mother's constitutional rights by interrogating her young daughter at public school to pursue a criminal investigation of her mother, I recognize the Seventh Circuit's decision as controlling law within the circuit. I respectfully disagree with it for reasons stated in my opinion.

3. **The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."**

- a. **Do you believe that the Second Amendment is an individual right or a collective right? Please explain.**

RESPONSE:

I believe it is an individual right, as held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

- b. **Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

RESPONSE:

I have not considered the question before with the kind of care needed to make a court decision. However, I believe the Supreme Court's decision in *District of Columbia v. Heller* did not limit the individual right to the context of military service or hunting, but extended it to traditionally lawful uses of firearms, including defense of property and persons.

- c. **What restrictions, if any, do you believe would be constitutional against an individual's Second Amendment rights?**

RESPONSE:

The Court's opinion in *District of Columbia v. Heller* made clear that the right is important and that any restrictions on it would need to be justified by powerful reasons. At the same time, the Court said that its decision "should not 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. Lower courts will need to examine those examples of still-valid laws and apply their teachings to other restrictions that are challenged.

- d. **What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?**

RESPONSE:

I have not had occasion to study the matter, and have not had the benefit of full adversarial presentations of competing views. Since *District of Columbia v. Heller* declined to adopt a particular standard of review for laws regulating gun ownership, possession, and use, lower courts will need to examine the cited examples of still-valid laws and apply their teachings to other restrictions that are challenged.

- e. **Do you believe that the Second Amendment should be incorporated against the State?**

RESPONSE:

I have not had occasion to study the particular question or the broader case law on incorporation of specific provisions in the Bill of Rights into the liberty protected by the Fourteenth Amendment, and I have not had the benefit of full adversarial presentations of competing views. If the question were presented to me, I would do my best to apply faithfully the doctrines and case law developed in earlier incorporation cases.

4. **Do you believe that the spontaneous questioning of a private citizen by another citizen could ever implicate the Fifth Amendment? If so, please explain.**

RESPONSE:

I do not believe so. I understand the Fifth Amendment privilege against self-incrimination to apply to questioning by government actors, not by private individuals acting in an entirely private capacity.

5. In *Video-Home-One, Inc. v. Brizzi*, Civ. No. 105CV1712DFHVSS (Nov. 22, 2005), you granted a temporary restraining order blocking enforcement of an Indiana criminal law that barred the sale or display of sexually explicit material within 500 feet of a church or school. By contrast, you upheld an Indianapolis ordinance that restricted unaccompanied minors' access to violent video games in *American Amusement Machine Ass'n v. Cottey*, 115 F. Supp.2d 943 (S.D. Ind. 2000). In *Cottey*, you wrote that you saw no "principled constitutional difference between sexually explicit material and graphic violence. You were reversed in *Cottey* by the Seventh Circuit.
- a. Your statement in *Cottey* is remarkable next to your decision in *Brizzi*. You stated that there was no "constitutional difference between sexually explicit material and graphic violence," yet you upheld a restriction on graphic violence but enjoined enforcement of an obscenity restriction. Please explain this discrepancy.

RESPONSE:

The principal difference between the two cases is that the violent video game case dealt with limits on children's unsupervised access to violent video games in arcades, while the *Video-Home-One* case dealt with the location of stores selling sexually explicit material that is legal for adults to buy or rent. The city's violent video game ordinance contained similar restrictions on children's access to sexually explicit video games. Those restrictions were so clearly constitutional that the industry did not even try to challenge them.

Under controlling Supreme Court precedents discussed in the *Video-Home-One* opinion, restrictions on locations of stores selling legal but sexually explicit materials can be justified based on the so-called "secondary effects" they cause, such as increases in local crime. For the court to have upheld the statute, the state needed to offer evidence showing that businesses like the plaintiff (a general-audience video rental store that had a small collection of sexually explicit videos in a separate, adults-only section) would have such secondary effects on the neighborhood. The state had no such evidence. Instead, the state conceded that the statute was unconstitutional and agreed to a permanent injunction.

6. In an interview with *NUVO: Indianapolis's Alternative Voice*, you discussed procedural rules and appeared to distance yourself from the judicial role described by Chief Justice Roberts during his confirmation hearing. You stated:

"[T]he rules are so complicated that there can be traps for even very capable lawyers. So judges are given some discretion - not in deciding what the rules are, but in how tightly they will be enforced. Reasonable and conscientious judges reach different decisions from time to time. In that sense, the call is not was that a ball or strike. But taking into account what happened and its effect on both parties, what are the practical consequences. . . ."

I'm alarmed and very troubled by your statement that a judge's job is not to call the game fairly, but instead to be results-oriented. From a procedural perspective it makes little sense to rule on anything other than the law that is clearly set by Congress and to do so consistently between all litigants.

- a. Please explain your statement and how it comports with the Civil Rules of Procedure and Criminal Rules of Procedure.**

RESPONSE:

I did not say that the judge's job is not to call the game fairly, nor did I say that the judge should be "results-oriented" I was addressing situations that arise frequently in managing cases, especially in civil litigation, in which one side, and often both sides, might miss a deadline or fail to fulfill every detail of their obligations in discovery, or where a defendant might fail to answer the complaint on time and be subject to a default judgment. Many provisions in both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and the cases interpreting them expressly give the judge both the power and the obligation to use discretion in deciding whether to excuse some failures to comply and in choosing an appropriate sanction.

In the quoted interview, I was making the point that in exercising the discretion given by the Rules in such instances, I try to evaluate the results of the party's failure to comply with a deadline or other rule. Was the mistake inadvertent and excusable? Was it a deliberate tactic to gain an unfair advantage? Did the failure cause prejudice to the opposing party or to the court? Those judgments are routine in district courts, but they are not as simple as calling a ball or strike. They call for the exercise of discretion and judgment to ensure that the court will be fair to all parties.

- 7. During your hearing, you responded to a question from Senator Cardin that asked you to share "a moment during your career where you stood up for something that was not popular, stood up for people who were disadvantaged, whether it was against government or big companies, that indicated your willingness to step forward in order to protect the rights of individuals." As part of your response, you pointed to your time spent as a District Court judge, stating: "I try not to go out of my way to be unpopular. That's just not the way we decide cases. Sometimes the right result turns out to be the popular result; sometimes the right result is unpopular. You just go with the right result."**

- a. I agree that a judge's decision should not be based on what is popular versus what is unpopular. However, the way that a judge should decide cases is through a correct application of the law to facts - not on what he or she personally believes is the "right result." Please explain how you define the "right result."**

RESPONSE:

I define the “right result” as the result that follows from correct application of law to the facts of the case.

8. In a 2003 speech you made a statement that “part of a judge’s job is to write a series of footnotes to the Constitution.” During your hearing, Senator Coburn asked you about this statement and you stated that: “[A] least to me, the concept of the footnote implies what we’re trying to do is not something new, but work out the details of how those principles apply to new situations.”

a. Your reference to judge-made “footnotes to the Constitution” is very confusing to me. Please list and describe all the “footnotes” which you believe you have added to the Constitution during your 14-year tenure on the bench.

RESPONSE:

The phrase “footnotes to the Constitution,” described by my late colleague Judge S. Hugh Dillin, refers to the case law interpreting the Constitution. By that phrase, I believe he meant that the general provisions of the Constitution take on their life and meaning in their application to specific cases, that the case law is not the Constitution itself, and that constitutional decisions must always stay grounded in the Constitution itself. In my view, judges do not “add” footnotes to the Constitution itself. They apply the Constitution to the facts of the particular case and add to the body of case law interpreting the Constitution.

b. Are any of the “footnotes” that you added contrary to the express language or original intent of the Founding Fathers?

RESPONSE:

I have not added footnotes to the Constitution. I believe the constitutional decisions I have made have been consistent with the express language and original intent of the Founding Fathers.

c. In which areas do you believe “footnotes” remain to be written in the Constitution?

RESPONSE:

I do not believe judges write footnotes into the Constitution. Judges will continue to decide the constitutional cases that come before them.

9. **During your hearing, Senator Coburn asked you whether you believed courts should look to international law in interpreting the Constitution. In response, you stated:**

“There are situations that we’ve seen in which the Supreme Court or other courts, in struggling with a difficult question, will look to guidance from wise commentators from many places, professors from law schools, experts in a particular fields who have written about it. And in recent years the Supreme Court has started to look to some courts from other countries where some members of the court may believe that there is some wisdom to be gained. As long as it’s confined to something similar to citing law professors’ articles, I don’t have a problem with that, but I think that all of us remember that the Constitution, after all, is the product of a rebellion against a foreign power, and it is an American document that we are interpreting and applying.”

- a. **In which Supreme Court decisions do you believe it was valid for the Court to look for other countries for “some wisdom to be gained”? Please explain.**

RESPONSE:

The example I had in mind was from Justice Stevens' dissenting opinion in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133 (2001), regarding statutory interpretation. Justice Stevens quoted Justice Aharon Barak of the Supreme Court of Israel, who had written “that the ‘minimalist’ judge ‘who holds that the purpose of the statute may be learned only from its language’ has more discretion than the judge ‘who will seek guidance from every reliable source.’” That point is valid in any legal system that requires statutory interpretation. After quoting Justice Barak, Justice Stevens went on to point out that a “method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”

- b. **Based on your answer to Senator Coburn, do you believe it was appropriate for members of the Supreme Court to look to international law in striking down the death penalty for person under the age of 18 in Roper v. Simmons, 543 U.S. 551 (2005)?**

RESPONSE:

No.

10. In Hinrichs v. Bosma, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), you permanently enjoined sectarian prayers invoking the name Jesus Christ, yet explicitly noted that Muslim clerics could still pray to Allah. Please explain how this comports with Supreme Court precedent by not favoring one religion over another.

RESPONSE:

In my decision in *Hinrichs v. Bosma*, I applied the standard and reasoning of *Marsh v. Chambers*, 463 U.S. 783 (1983), which required attention to the content and circumstances of the prayers. Under the reasoning of that case, some official prayers are permissible and some are not. The reasoning applies to sectarian prayers of any faith. A prayer asserting that Christ is divine would ordinarily be considered “sectarian.” See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (a government endorsement of religion would be “sectarian” if it “specif[ied] details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)”). Under this reasoning, similarly, a prayer asserting that Mohammed was God’s prophet would ordinarily be considered a sectarian Muslim prayer. In the observation about use of the Arabic word for God, “Allah,” I pointed out that one might use the terms for God from many languages without making a prayer sectarian. That reasoning would not foreclose the possibility that other aspects of a Muslim cleric’s prayers’ content and setting could lead one to conclude that they were sectarian.

11. If standing had been appropriate in Hinrichs, do you believe your opinion should stand?

RESPONSE:

Yes, based on the evidence before me showing repeated and consistent sectarian official prayers. On the merits, the decision followed the controlling Supreme Court precedent in *Marsh v. Chambers* and was consistent with all other lower court decisions I knew of addressing comparable practices of official, sectarian prayer. When the Seventh Circuit addressed the merits in the decision on a stay pending appeal, the court agreed with my view of the merits. 440 F.3d 393 (7th Cir. 2006).

12. In United States v. Rinehart, 2007 U.S. Dist. LEXIS 19498 (S.D. Ind. Feb. 2, 2007), you sentenced a 32-year-old defendant to fifteen years in prison for engaging in and video-taping sexual relations with two young girls, one age 16 and one age 17. In your written opinion, you found that the sexual relationship was “consensual.” You disapproved of the fifteen year mandatory minimum sentence and noted that “this court could not impose a just sentence in this case.” Further, you wrote: “The only way that [the defendant’s] punishment could be modified to become just is through an exercise of executive clemency by the President. The court hopes that will happen.”

a. Do you stand by your statement?

RESPONSE:

Yes, because of the unusual circumstances detailed in the opinion, including the facts that under applicable Indiana law, the defendant's sexual relationships with the two girls were legal because they were of lawful age to consent, and there was no indication of any intent to distribute the photographs any further.

b. Do you believe it was appropriate for you to urge for clemency in your written opinion? Please explain.

RESPONSE:

Yes. Congress must enact legislation with broad application, and as I explained in the opinion, Rinehart's conduct fell within the letter of the law but did not, in my view, reflect the much more heinous conduct that Congress targeted with the mandatory minimum 15-year sentence. I applied the law in the case, but recognized that the President has the power to grant clemency. My understanding is that it would be unusual for a President to grant clemency in a case without giving the prosecutor and sentencing judge the opportunity to comment on the case. I thought it was appropriate to set out my views while the case was still very fresh in my mind rather than try to remember it years later.

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Orrin G. Hatch**

- 1. Judge Hamilton, I believe that the qualifications to be a federal judge include not only what your resume tells us but also your judicial philosophy. By that I mean your understanding of a federal judge's power and role in our system of government. In a 2003 speech for the dedication of the Birch Bayh Courthouse, you agreed with the notion that "part of our job as judges is to write a series of footnotes to the Constitution." You addressed this briefly in your hearing, but I would like a fuller explanation as well as a few examples of footnotes you have added to the Constitution?**

RESPONSE:

The phrase "footnotes to the Constitution," described by my late colleague Judge S. Hugh Dillin, refers to the case law interpreting the Constitution. By that phrase, I believe he meant that the general provisions of the Constitution take on their life and meaning in their application to specific cases, that the case law is not the Constitution itself, and that constitutional decisions must always stay grounded in the Constitution itself. In my view, judges do not "add" footnotes to the Constitution itself. They apply the Constitution to the facts of the particular case and add to the body of case law interpreting the Constitution.

- 2. In those remarks, you said that supporters of the Equal Rights Amendment had lost the battle but won the war because the Supreme Court has since taken positions very similar to the ERA. To be honest, I find that observation disturbing because it suggests that it does not matter how the Constitution is changed, whether by the people or by judges. The Supreme Court can amend the Constitution just as much, perhaps even more, by changing its meaning as the people can by changing its words. Do you believe it was legitimate for the Court to accomplish what it would have required the ERA to accomplish? Do you believe that judicial amendments are as legitimate as popular amendments?**

RESPONSE:

I believe the development of equal protection law applied to sex discrimination over a series of cases is legitimate, similar to the development of the case law on racial classifications, from the separate-but-equal standard in *Plessy v. Ferguson* to the gradual erosion of that standard and its eventual overruling in *Brown v. Board of Education*. At the same time, of course, the courts are not justified in disregarding amendments adopted under Article V of the Constitution. Both the process of case-by-case adjudication and the Article V amendment processes are constitutionally legitimate, and were both, in my view, expected by the Framers, provided that case-by-case interpretation follows the usual methods of legal reasoning and interpretation. If there were a conflict between the two, an amendment adopted under Article V clearly would take precedence over conflicting case law.

3. **In that same vein, let me ask you about your remarks at a 2001 naturalization ceremony when you spoke about how the temptation to limit freedom can be very strong. You gave examples of limiting an *individual*'s freedom of speech, religion, or property. But there is also the *collective* freedom of the people to govern themselves. When judges change the meaning of statutes or the Constitution, they change the law and undermine the ability of the people to govern themselves. I would like your comment on that.**

RESPONSE: I agree with your observation about the risk that judges can, if they err, undermine the ability of the people to govern themselves. The role of the courts is to ensure that statutes and constitutional provisions are given their intended scope and effect and are not erroneously narrowed or broadened.

4. **Judge, I have a few questions about some of your decisions. These are also directed at your judicial philosophy, your approach to judging. First, let me ask you about your decision last year in *United States v. Woolsey*. The defendant in that case received a mandatory sentence because of two previous drug felony convictions. You ignored one of those previous convictions because you thought it should have been set aside. As you put it, you treated as having been done what you believed should have been done. I find this stunning. Applying the law to the facts that were actually before you apparently would have led to a result you did not like, so you changed the facts. You, in effect, decided a different case than the one that was before you, I assume in order to reach a result you preferred. The Seventh Circuit unanimously reversed you and stated that judges do not have the authority to decide cases based on their personal views of what is wise or appropriate. I thought that was just a given. What made you think that you could, in effect, make up facts in order to achieve a particular result? Please explain why you thought you had authority to take the approach you did, treating as having been done what had not been, but which you thought should have been, done.**

RESPONSE:

When I received the Seventh Circuit's opinion in *United States v. Woolsey*, 535 F.3d 540 (7th Cir. 2008), I agreed that I had made a mistake in imposing on a 55 year old man a 25 year mandatory sentence rather than a mandatory life sentence. In making that mistake, I was not acting on the basis of personal preferences or beliefs. I was trying to apply to a conviction under the repealed Youth Corrections Act the standards Congress has set forth in 18 U.S.C. § 3553(a) for sentencing and 21 U.S.C. §§ 841 and 18 U.S.C. § 924(c) for mandatory minimum sentences in drug and firearm cases. I agree that judges should not make decisions based on their personal views of what is wise or appropriate.

5. **In your 2005 decision in *Hinrichs v. Bosma*, you held that prayers using “Christ’s name or title” or making specific theological claims about Jesus violated the First Amendment while there was “little risk” in using the name “Allah.” Against the backdrop of the Supreme Court decision upholding the constitutionality of legislative invocations, and since no one need even listen to, let alone participate, in such a prayer, isn’t such regulation of the content of prayers what America’s founders sought to guard against and the sort of “entanglement” with religion that the Supreme Court has warned against?**

RESPONSE:

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court held that official legislative prayers did not violate the Establishment Clause where those prayers had not been used “to proselytize or advance any one, or to disparage any other, faith or belief.” Under the reasoning of that case, some official prayers are permissible and others are not, depending on the content and circumstances. As a district judge, I applied the standard and reasoning of *Marsh v. Chambers*, which required attention to the content and circumstances of the prayers.

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Charles E. Grassley**

- 1. In your opinion, what is the role of a judge in society? How would you define "judicial activism?"**

RESPONSE:

The role of a judge in our society is to decide cases within the court's jurisdiction according to the law and the evidence.

I would define "judicial activism" as the use of judicial power beyond the clear constraints on the court's jurisdiction, the use of biased fact-finding to reach a preferred result, and decisions that are not based on reasonable interpretations of applicable constitutional, statutory, or regulatory provisions or common law precedents. I would also apply the term to decisions that give too little deference to legislative policy judgments and/or fact-finding.

- 2. In notes from a March 2008 speech to the Indianapolis Bar Association, you wrote, in reference to Federalist Paper 78, "judges could and should refuse to enforce federal laws that were 'contrary to the manifest tenor of the constitution.'" The quote "contrary to the manifest tenor of the constitution" is from Federalist Paper 78. What do you think that Hamilton meant when he used the words "manifest tenor of the constitution?"**

RESPONSE:

In context, I believe that Hamilton simply meant by the phrase "the manifest tenor of the constitution" the provisions of the Constitution. He used the phrase immediately after referring to specific constitutional prohibitions on bills of attainder and ex post facto laws.

- i. Does the Defense of Marriage Act, which defines marriage to be between a man and a woman, go against the "manifest tenor of the constitution?"**

RESPONSE:

I have not studied the question or had the benefit of adversarial presentation of views, but I am not aware of any court decision concluding that such a provision would violate the United States Constitution.

- ii. **What about a law requiring women seeking abortions to receive certain medical information before undergoing the procedure?**

RESPONSE:

The answer would depend on the application of the Supreme Court's "undue burden" standard to the purpose and effects of the specific law. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

- iii. **What about laws that impose tough mandatory minimums on individuals who possess child pornography?**

RESPONSE:

No.

- iv. **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?**

No, the Constitution is a written text that does not evolve other than through the amendment process. However, the world to which it applies does change.

- 3. **In *United States v. Rinehart*, you issued a separate written order of judgment and conviction "so that it may be of assistance in the event of an application for executive clemency." In this case, you found the applicable mandatory minimum sentence to be unjust. The defendant, a 32 year-old local police officer had "consensual" sexual relations with two young girls, ages 16 and 17. According to your opinion, the sexual relationships were legal under state and federal law. The defendant, however, took pictures of one of the girls engaged in "sexually explicit conduct" and took videos of him and the other girl engaging in sexual relations. These images were on the defendant's home computer, and he was charged under the Child Protection Act of 1984, which requires a mandatory minimum of 15 years. You sentenced him to that 15 year minimum since you "could not impose a just sentence in this case." You further stated, "The only way that Rinehart's punishment could be modified to become just is through an exercise of executive clemency by the President. The court hopes that will happen."**

- a. **The Child Protection Act of 1984 passed the House by a vote of 400-1 and passed the Senate by voice vote. Do you believe that the punishments that this law sets forth are unconstitutional?**

RESPONSE:

No, I do not believe the punishments are unconstitutional.

- b. If they are not unconstitutional, shouldn't the judgment of whether or not the punishments are "just," which is clearly a policy matter, be addressed by the elected, legislative branch?**

RESPONSE:

Decisions about just punishments begin with the decisions of the legislative branch in enacting the laws. Congress has also enacted legislation requiring judges to consider a number of factors and goals in imposing just sentences, in 18 U.S.C. § 3553(a). Judges have the duty of applying those laws in individual cases.

- c. Do you stand by your actions in Rinehart?**

RESPONSE:

Yes, I imposed the sentence that the law required. Several circumstances made the case unusual, including the facts that under applicable Indiana law, the defendant's sexual relationships with the two girls were legal because they were of lawful age to consent, and there was no indication of any intent to distribute the photographs any further. I believe the opinion was correct for the reasons stated in the opinion, pointing out how far Rinehart's conduct was from the more heinous conduct that Congress targeted with the 15-year mandatory minimum sentence.

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Lindsey Graham**

- 1. In 2005, you ruled that the prayers offered to open Indiana House sessions were sectarian Christian prayers, in violation of the Establishment Clause. You ruled that the prayers at issue were "expressly and consistently sectarian" and that such prayers may not use "Christ's name or title or any other denominational appeal." In contrast, on a post-judgment motion you ruled that the use of "Allah" in such a prayer would likely not advance a particular religion. After an intervening Supreme Court case, the Seventh Circuit dismissed the case for lack of standing.**

Please explain why you ruled that using "Allah" in such a prayer would not violate the Establishment Clause, but using "Christ" would. Under your reasoning at the time, would using "Mohammad" in such a prayer have violated the Establishment Clause?

RESPONSE:

In my decision in *Hinrichs v. Bosma*, I applied the standard and reasoning of *Marsh v. Chambers*, 463 U.S. 783 (1983), which required attention to the content and circumstances of the prayers. The reasoning applies to sectarian prayers of any faith. A prayer asserting that Christ is divine would ordinarily be considered "sectarian." See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (a government endorsement of religion would be "sectarian" if it "specif[ied] details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)"). Under this reasoning, similarly, a prayer asserting that Mohammed was God's prophet would ordinarily be considered a sectarian Muslim prayer. In the observation about use of the Arabic word for God, "Allah," I pointed out that one might use the terms for God from many languages without making a prayer sectarian. That reasoning would not foreclose the possibility that other aspects of a Muslim cleric's prayers' content and setting could lead one to conclude that they were sectarian.

- 2. In 2006, you suppressed evidence obtained through a warrant based on information revealed by a 9-year-old about her mother during questioning by a school social worker. You ruled that there was a violation of the mother's constitutional right of family privacy and integrity under Fourteenth Amendment substantive due process. The Seventh Circuit unanimously reversed your ruling.**

Given that law enforcement officials had some reason to believe that the child's mother was engaged in illegal activity, please explain why you did not view the government's interest in speaking to the child in this case as compelling, unlike the Seventh Circuit. Given that the child voluntarily confided in the school officials,

please explain your ruling that the method with which the evidence was obtained "shocked the conscience."

RESPONSE:

As detailed in my opinion, 2006 WL 2460757 (S.D. Ind. 2006), the child voluntarily told the principal that her mother and her boyfriend would need to get "the stuff" out if school officials visited the home. All further information was obtained when the police used the social worker to question the child for purposes of the police investigation. The police investigation was carried out for the sole purpose of a possible prosecution of the child's mother, without taking steps associated with child protection. The case was a difficult one in an area of constitutional law that does not arise often.

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator John Cornyn**

- 1. In a speech that you gave in 2003 at the dedication of the Birch Bayh United States Courthouse, you said “Judge S. Hugh Dillin of this court has said that part of our job here as judges is to write a series of footnotes to the Constitution. We all do that every year in cases large and small.”¹ Do you think that it is the role of a judge to write “footnotes to the Constitution?” What does that mean to you?**

RESPONSE:

The phrase “footnotes to the Constitution,” described by my late colleague Judge S. Hugh Dillin, refers to the case law interpreting the Constitution. By that phrase, I believe he meant that the general provisions of the Constitution take on their life and meaning in their application to specific cases, that the case law is not the Constitution itself, and that constitutional decisions must always stay grounded in the Constitution itself. I think it is the role of judges to write such “footnotes to the Constitution,” in this sense of applying the Constitution to the facts of the particular case and adding to the body of case law interpreting the Constitution.

- 2. In notes from a March 2008 speech to the Indianapolis Bar Association, you wrote, in reference to Federalist Paper 78, “judges could and should refuse to enforce federal laws that were ‘contrary to the manifest tenor of the constitution.’”² The quote “contrary to the manifest tenor of the constitution” is from Federalist Paper 78. What do you think that Hamilton meant when he used the words “manifest tenor of the constitution?”**

RESPONSE:

In context, I believe that Hamilton simply meant by the phrase “the manifest tenor of the constitution” the provisions of the Constitution. He used the phrase immediately after referring to specific constitutional prohibitions on bills of attainder and ex post facto laws.

- a. Does the Defense of Marriage Act, which defines marriage to be between a man and a woman, go against the “manifest tenor of the constitution?”**

RESPONSE:

I have not studied the question or had the benefit of adversarial presentation of views, but I am not aware of any court decision concluding that such a provision would violate the United States Constitution.

¹ David F. Hamilton, *Dedication of Birch Bayh United States Courthouse*, 37 IND. L. REV. 613 (2004).

² David Hamilton, Remarks Before the Indianapolis Bar Association, March 18, 2008.

- b. What about a law requiring women seeking abortions to receive certain medical information before undergoing the procedure?**

RESPONSE:

The answer would depend on the application of the Supreme Court's "undue burden" standard to the purpose and effects of the specific law. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

- c. What about laws that impose tough mandatory minimums on individuals who possess child pornography?**

RESPONSE: No.

- d. 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 is a written text that does not evolve other than through the amendment process. However, the world to which it applies does change.

- 3. President Obama has described the types of judges that he will select 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." What role do you believe that empathy should play in a judge's consideration of a case?**

RESPONSE:

Federal judges take an oath to administer justice without respect to persons, and to do equal right to the poor and to the rich. Empathy - to be distinguished from sympathy - is important in fulfilling that oath. Empathy is the ability to understand the world from another person's point of view. A judge needs to empathize with all parties in the case - plaintiff and defendant, crime victim and accused defendant - so that the judge can better understand how the parties came to be before the court and how legal rules affect those parties and others in similar situations.

- a. Do you believe that following "the manifest tenor of the constitution" allows judges to consider empathy in their decision-making?**

RESPONSE:

Yes, because empathy is the ability to understand the world from another person's point of view, and I believe that is essential to decision-making that is fair to all parties. Empathy should not be confused with sympathy for one side or another, which has no role in the process.

- b. You are President Obama's first judicial nominee and numerous press reports have asserted that your nomination sets the tone for future judicial nominees. Do you believe that you fall into his mold for federal judges, as described in his quote?**

RESPONSE:

Yes, I believe I am the type of judge who will apply the law to the facts in every case fairly and impartially.

- c. According to local practitioners cited in the *Almanac of the Federal Judiciary*, you are "the most lenient of any of the judges in the district." Others quotes include: "He is one of the more liberal judges in the district. He leans toward the defense. He makes the government prove its case"; "He goes out of his way to make the defendant comfortable"; "In sentencing, he tends to be very empathetic to the downtrodden, or to those who commit crimes due to poverty." (emphasis added) What is your reaction to these statements?**

RESPONSE:

As a judge, I make decisions based on the facts and applicable law of each case. I do not make decisions based on what is popular with the public or members of the bar. I agree that I make the government prove its case. I disagree with the other statements, and I believe that prosecutors and a larger sample of defense attorneys in the district would disagree with them. In terms of "making the defendant comfortable," when I take a guilty plea, I treat the defendant with respect because that is appropriate and because it is important that the decision to plead guilty is a knowing and voluntary decision. In terms of empathizing with "the downtrodden," the victims of the crimes in such cases are often equally or more "downtrodden" than the defendant. The sentencing judge has an obligation to keep in mind those victims and their injuries and losses.

**Responses of David F. Hamilton
Nominee to the U.S. Court of Appeals for the Seventh Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

1. **President Obama has described the types of judges that he will select 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."**

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

RESPONSE:

Federal judges take an oath to administer justice without respect to persons, and to do equal right to the poor and to the rich. Empathy - to be distinguished from sympathy - is important in fulfilling that oath. Empathy is the ability to understand the world from another person's point of view. A judge needs to empathize with all parties in the case - plaintiff and defendant, crime victim and accused defendant - so that the judge can better understand how the parties came to be before the court and how legal rules affect those parties and others in similar situations.

- **As President Obama's first judicial nominee, do you believe that you fit his criteria? Why, or why not?**

RESPONSE:

Yes, because I will continue to do my best to follow the law, to treat all parties who come before me with respect and dignity, and to understand how legal rules or decisions will affect behavior and incentives for different people and institutions.

- **Local practitioners quoted in the Almanac of the Federal Judiciary were quoted as saying: "[Hamilton] is the most lenient of any of the judges in the district." "He is one of the more liberal judges in the district. He leans toward the defense. He makes the government prove its case." "He goes out of his way to make the defendant comfortable." "In sentencing, he tends to be very empathetic to the downtrodden, or to those who commit crimes due to poverty."**
- **What is your reaction to these statements?**

RESPONSE:

As a judge, I make decisions based on the facts and applicable law of each case. I do not make decisions based on what is popular with the public or members of the bar. I agree that I make the government prove its case. I disagree with the other statements, and I believe that prosecutors and a larger sample of defense attorneys in the district would disagree with them. In terms of “making the defendant comfortable,” when I take a guilty plea, I treat the defendant with respect because that is appropriate and because it is important that the decision to plead guilty is a knowing and voluntary decision. In terms of empathizing with “the downtrodden,” the victims of the crimes in such cases are often equally or more “downtrodden” than the defendant. The sentencing judge has an obligation to keep in mind those victims and their injuries and losses.

2. **In your 1994 response to a confirmation questionnaire, you said that "members of the judiciary have a responsibility to exercise their power with restraint and deference to the elected branches of government, and with appropriate respect and restraint when dealing with state and local governments."**

- **How did your decision to obstruct, for seven years, Indiana's implementation of a statute requiring informed consent for women seeking abortion honor your responsibility to exercise restraint, respect, and deference to the state legislature?**

RESPONSE:

I believe my decisions in *A Woman's Choice v. Newman* were based on faithful application of the controlling “undue burden” standard to the evidence before me. That standard gives substantial respect and deference to legislatures, but still requires the court to consider actual evidence of the purpose and effects of a law restricting access to abortions.

3. **Would you agree that, in most basic terms, a judge's role is to interpret the law? If so, why, in a 2006 article, did you take issue with the popular analogy of a judge being like an umpire, calling balls and strikes? Instead, you seemed to advocate a more results-oriented approach by saying: "[T]aking into account what happened and its effects on both parties [and] what are the practical consequences...Judges do have an obligation to see that justice is done."**

RESPONSE:

I agree the judge's role is to interpret the law and to be fair to all parties. In the quoted comment in the interview, I was not advocating a “results-oriented approach” to deciding

cases. I was addressing situations that arise frequently in managing cases, especially in civil litigation, in which one side, and often both sides, might miss a deadline or fail to fulfill every detail of their obligations in discovery, or where a defendant might fail to answer the complaint on time and be subject to a default judgment. Many provisions in both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and the cases interpreting them give the judge both the power and the obligation to use discretion in excusing some failures to comply or in choosing an appropriate sanction.

In the quoted interview, I was making the point that in exercising discretion given by the Rules in such instances, I try to evaluate the results of the party's failure to comply with a deadline or other rule. Was the mistake inadvertent and excusable? Was it a deliberate tactic to gain an unfair advantage? Did the failure cause prejudice to the opposing party or to the court? Those judgments are routine in district courts, but they are not as simple as calling a ball or strike. They call for the exercise of discretion and judgment to ensure that the court will be fair to all parties.

4. **The Seventh Circuit chastised your obstruction of Indiana's informed consent statute at issue in *A Women's Choice v. Newman*. In the reversing opinion, Judge Easterbrook wrote, "[F]or seven years Indiana has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in *Casey*, by this court in *Karlin*, and by the fifth circuit in *Barnes*. No court anywhere in the country (other than one district judge in Indiana) has held any similar law invalid in the years since *Casey*...Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences."**
- **What is your response to this criticism? Did you ignore existing precedent to advance your own policy position on abortion?**
 - **Do you stand by your decision in the *Newman* case? Do you still believe that Indiana's informed consent requirements create an undue burden for women seeking an abortion?**

RESPONSE:

I believe my decisions in *A Woman's Choice v. Newman* were based on faithful application of the controlling "undue burden" standard to the evidence before me concerning the effects of similar laws. The Seventh Circuit found that my factual findings were not clearly erroneous. I did not ignore existing precedent to advance any personal views. To the extent the criticism is based on the time it took to resolve the case, I note that the State chose not to appeal my decisions granting and then modifying a preliminary injunction in 1995 and 1997. After resolving the preliminary injunction issues, I set a prompt trial date. All parties jointly asked me to postpone the trial date on more than one occasion so they could pursue discovery, especially into some complex statistical issues.

I believe my final decision on the merits was correct based on the evidence before me, and based on the applicable case law at that time. I have not seen later evidence on the actual experience under the Indiana law, after the Seventh Circuit's decision, so I could not express an opinion now about whether the law is now imposing an "undue burden."

5. Some of your statements in your rulings in the Newman case suggest a personal hostility to the law. For example, you complain in your 1997 ruling (980 F. Supp. 962) finally permitting the waiting-period and mandatory-disclosure provisions of the law to go into effect that these provisions "appear likely to be useless, patronizing, and annoying, and there is no evidence that these provisions will actually serve any constitutionally legitimate purpose."

- **How would you characterize that statement today, upon reflection?**
- **Was your description - of provisions you were finally permitting to take effect - appropriate in your role as a judge?**
- **Do you stand by your characterization of the waiting-period and mandatory-disclosure provisions as "useless, patronizing, and annoying"?**
 - **Why, specifically, do/did you believe that it is "useless, patronizing, and annoying" for a pregnant woman considering abortion to be informed of:**
 - i. **the name of the physician performing the abortion?**
 - ii. **the nature of the proposed abortion procedure?**
 - iii. **the risks of and alternatives to the abortion?**
 - iv. **the probable gestational age of her baby?**
 - v. **the medical risks associated with carrying the baby to term?**
 - vi. **medical assistance benefits that may be available for prenatal care, childbirth, and neonatal care?**
 - vii. **that adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care?**

RESPONSE:

The quoted phrase reflects my view of the evidence before me as the issues were framed by the parties, not a personal policy preference. The parties and I all took the view that evidence of benefits of the challenged law, or lack of benefits, could be relevant in applying the "undue burden" standard or other standards that other Justices concluded were more appropriate. The parties presented evidence on that question of benefits, and I

made factual findings based on that evidence. The evidence indicated that most women seeking abortions gave the decision careful thought and that the doctors and clinics in Indiana were taking effective steps to ensure that all women were aware of their alternatives and had made a considered decision before having an abortion. The State had ample opportunity to present contrary evidence, subject to adversarial testing in the courtroom, showing that the informational requirements and waiting period would address real problems. The State was not able to do so, as I explained in detail. See 904 F. Supp. at 1450-52; see also 132 F. Supp. 2d at 1175 (State's attorney was unable to identify any evidence tending to show that the information requirements and waiting period actually persuaded women to decide not to have abortions they were considering).

The description of the evidence before me remains accurate with respect to the effects or lack of effects of such requirements on that record. If different evidence were presented to me in another case today, I would give that evidence a fresh look, recognizing that the evidence presented to one district court in one case ten years ago is not the complete word or the last word on the subject.

6. In *Hinrichs v. Bosma*, you enjoined the Speaker of the Indiana House of Representatives from permitting sectarian prayer, which you ruled included any prayer mentioning the name of Jesus Christ. You wrote: "If the Speaker chooses to continue any form of legislative prayer, he shall advise persons offering such a prayer (a) that it must be non-sectarian and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief, and (b) that they should refrain from using Christ's name or title or any other denominational appeal." You added: "The Speaker has also asked whether, for example, a Muslim imam may offer a prayer addressed to "Allah." The Arabic word "Allah" is used for "God" in Arabic translations of Jewish and Christian scriptures. If those offering prayers in the Indiana House of Representatives choose to use the Arabic Allah ... or any other language's terms in addressing the God who is the focus of the non-sectarian prayers contemplated in *Marsh v. Chambers*, the court sees little risk that the choice of language would advance a particular religion or disparage others."

- **Following your reasoning in *Hinrichs*, if state legislators in my home state of Oklahoma decided to begin their day with a prayer that made reference to Jesus Christ, you would find that was a violation of the Establishment Clause. Is that correct? Please explain.**
- **Also following your reasoning in *Hinrichs*, if state legislators in my home state of Oklahoma decided to begin their day with a prayer referencing Allah, you would not find that was a violation of the Establishment Clause. Is that correct? Please explain.**

RESPONSE:

In my decision in *Hinrichs v. Bosma*, I applied the standard and reasoning of *Marsh v. Chambers*, 463 U.S. 783 (1983), which required attention to the content and circumstances of the prayers. The reasoning applies to sectarian prayers of any faith. A prayer asserting that Christ is divine would ordinarily be considered “sectarian.” See *Lee v. Weisman* 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (a government endorsement of religion would be “sectarian” if it “specif[ied] details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)”). Under this reasoning, similarly, a prayer asserting that Mohammed was God’s prophet would ordinarily be considered a sectarian Muslim prayer. In the observation about use of the Arabic word for God, “Allah,” I pointed out that one might use the terms for God from many languages without making a prayer sectarian. That reasoning would not foreclose the possibility that other aspects of a Muslim cleric’s prayers’ content and setting could lead one to conclude that they were sectarian.

In the *Hinrichs* case, the finding of an Establishment Clause violation was based not on any one prayer, but on evidence showing a pattern of repeated and consistent sectarian prayers. If the evidence did not show such a pattern in the hypothetical cases you described, the conclusion would not necessarily be the same.

7. **In addition to having Dawn Johnsen as your sister-in-law, from 1999 to 2007 you were on the Board of Visitors of the Indiana University law school, where Ms. Johnsen was on the faculty.**
- a. **Have you ever read any of Ms. Johnsen's writings on abortion? Did you agree with them? Have you discussed them with her?**

RESPONSE:

I recall reading one “issue brief” that Professor Johnsen wrote on the subject a couple of years ago. If I recall correctly, I thought it was a concise and accurate description of the history of the Supreme Court’s treatment of the issue, and I recall telling her so after I read it.

- b. **Have you and Ms. Johnsen ever discussed the topic of abortion?**

RESPONSE:

I am sure that we have discussed the topic from time to time, most likely in the context of family gatherings.

- c. **Did you and Ms. Johnsen ever discuss your case involving the Indiana informed-consent statute?**

RESPONSE:

After a decision was issued in the case, we probably discussed it, but I don't recall any such discussion. She has sometimes read decisions of mine that have attracted some media attention, as this case did. I never sought or received any advice from her about the case.