

**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 Woman'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.