

**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.