

**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.