

**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.