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. **<u>Hinrichs v. Bosma</u>, 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. **<u>United States v. McCotry</u>, 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 <u>Video-Home-One, Inc. v. Brizzi</u>, 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 of school. By contrast, you upheld an Indianapolis ordinance that restricted unaccompanied minors' access to violent video games in <u>American Amusement Machine Ass'n v. Cottey</u>, 115 F. Supp.2d 943 (S.D. Ind. 2000). In <u>Cottey</u>, you wrote that you saw no "principled constitutional difference between sexually explicit material and graphic violence. You were reversed in <u>Cottey</u> by the Seventh Circuit.**

   a. **Your statement in <u>Cottey</u> is remarkable next to your decision in <u>Brizzi</u>. 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 <u>Roper v. Simmons</u>, 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.