

United States Senate

WASHINGTON, DC 20510-0104

October 30, 2009

Dear Colleague:

I review the nominations for the federal judiciary carefully and hope to be able to support most of the President's nominees. I write to set forth my concerns about the nomination of Judge David Hamilton to the Seventh Circuit Court of Appeals and to explain why promoting Judge Hamilton is not warranted.

In more than a few instances, Judge Hamilton, has used his position as a district court judge to drive a political agenda. Judge Hamilton stated in a 2003 speech that the role of a judge includes writing footnotes to the Constitution: "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 In explaining this statement to Senator Hatch, Judge Hamilton wrote that he believes the Framers intended judges to amend the Constitution through evolving case law. "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." This view evidences an activist judicial philosophy. Judges are not given the power to amend the Constitution or write footnotes to it.

Unfortunately, this is not an isolated comment. Judge Hamilton has also written that empathy should factor into the judicial decision making process. In a response to a follow-up question after his hearing, Judge Hamilton stated: "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." This view was, in essence, rightly rejected by Associate Supreme Court Justice Sonia Sotomayor during her confirmation hearing.

¹ David F. Hamilton, *Dedication of Birch Bayh United States Courthouse*, 37 IND. L. REV. 613 (2004).

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Unfortunately Judge Hamilton's activism has not been restricted to his speeches. In *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), Judge Hamilton prohibited prayers in the Indiana House of Representatives that expressly mentioned Jesus Christ as violative of the Establishment Clause, yet he allowed prayers which mentioned Allah. The Seventh Circuit reversed his ruling.

In *Grossbaum v. Indianapolis-Marion County Building Authority*, 870 F. Supp. 1450 (S.D. Ind. 1994), Judge Hamilton denied a Rabbi's plea to allow a Menorah to be part of the Indianapolis Municipal Building's holiday display. The Seventh Circuit unanimously reversed, finding that Judge Hamilton failed to acknowledge the Rabbi's right to display the Menorah as symbolic religious speech protected by the First Amendment.

Judge Hamilton's problematic rulings are not limited to religious cases. Lawyers in the *Almanac of the Federal Judiciary* describe Judge Hamilton as one of the most lenient judges in his district in criminal matters. His rulings on the bench have lived up to that reputation. In *United States v. Rinehart*, 2007 U.S. Dist. LEXIS 19498 (S.D. Ind. Feb. 2, 2007), Judge Hamilton used his opinion to request clemency for a police officer who pled guilty to two counts of producing child pornography. The 32-year-old officer had engaged in "consensual" sex with two teenagers and videotaped his activities.

In *United States v. Woolsey*, 535 F.3d 540 (7th Cir. 2008), the Seventh Circuit faulted Judge Hamilton for disregarding an earlier conviction in order to avoid imposing a life sentence on a repeat offender. In reversing the decision, the Seventh Circuit reminded Judge Hamilton he was not free to ignore prior convictions regardless of whether he deemed the penalty for recidivists inappropriate.

Judge Hamilton's most determinately activist decisions might be his series of rulings in *A Woman's Choice v. Newman*, 904 F. Supp. 1434 (S.D. Ind. 1995). Through his rulings in this case, Judge Hamilton succeeded in blocking the enforcement of an Indiana informed consent law for 7 years. In reversing, the Seventh Circuit noted that Judge Hamilton had abused his judicial discretion:

[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 [meaning Hamilton]) 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. 305 F.3d 684, 693 (7th Cir. 2002).

These cases give every indication that Judge Hamilton abused his lifetime appointment to block the carrying out of a state law for 7 years, depriving the people of

Indiana of their domestic and constitutional rights until being slapped down by the appellate courts. In addition to delay, his rulings harmed the people of Indiana in effecting their lawful will. The people of Indiana were unnecessarily caused to expend great sums of money to overcome his obstructionism.

This is not the type of service that should be rewarded with a promotion. Indeed, this is one of those extraordinary circumstances where the President should be informed that his nominee is not qualified. That is why every Republican member of the Judiciary Committee voted against reporting Judge Hamilton favorably.

As we weigh the decision on whether to support moving forward with the nomination of Judge Hamilton, I hope you will thoroughly review his record and cases as I have. After doing so, I believe that you will also find that promoting him to the Seventh Circuit Court of Appeals is unwarranted. Please call on me or my staff for more information.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jeff Sessions", is written over a printed name. The signature is stylized and cursive.

Jeff Sessions

JS:ph