

A SALUTE TO JUDGE DAVID F. HAMILTON

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Judge David F. Hamilton is passing the gavel at an appropriate time after twenty-eight distinguished years as a Federal Judge. As someone who has known him throughout the entirety of his legal career, and relied upon him for legal counsel during a portion of it, I am pleased to join the Indiana Law Review's salute to his service. No one is more deserving.

David Hamilton is an individual of great intelligence and high integrity, and in this brief essay, I will recount some of my own recollections of his work as a practicing lawyer, Counsel to the Governor of Indiana, and District and Circuit Court Judge. But I want the record to reflect as well that he is a member of a distinguished Hoosier family and is a devoted husband and a loving father to his two daughters. Not only a brilliant jurist, he is a good man.

I.

When the good people of Indiana did me the high honor of electing me our Governor in 1988, more than two decades had passed since a Democrat had occupied the Governor's office. There was no cadre of individuals with recent experience holding senior positions in Democratic administrations. With the assistance of my Chief of Staff-to-be, D. William Moreau, Jr., I set out to identify women and men who, though not having state government experience, had the vision, capacity, and ability to help lead our state. I quickly concluded that I wanted David Hamilton to serve as Counsel to the Governor.

My decision to ask him to serve was based on at least three considerations.

First, he had developed a reputation as a practicing lawyer of great capacity, including being on the winning legal team in several notable lawsuits. I remember, for example, that he was one of the Barnes & Thornburg lawyers who won a great victory for historic preservation when a court held that the White River State Park Development Commission had improperly demolished a historically protected public school building.¹ And he was also among the Barnes & Thornburg lawyers who prevailed at the United States Supreme Court in a case vindicating the constitutionality of an Indiana statute that strengthens management's ability to act in the best interests of their corporations when faced with a hostile takeover attempt.²

Second, I had worked closely with him in 1986 during a recount of ballots in Indiana's Third Congressional District. This matter requires a few words of background. In 1984, there had been an extremely close congressional race in southwestern Indiana's Eighth Congressional District. The decentralized, county-by-county recount process exposed Indiana election law as being at best

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1. Patrick T. Morrison, *School 5 Wall Ordered Rebuilt; Open Door Law Violation Cited*, THE INDIANAPOLIS STAR, Sept. 21, 1985, at 1.

2. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

inefficient and at worst unreliable.³ The Legislature immediately moved to correct the situation, centralizing Congressional recounts in a single "Recount Commission," consisting of one appointee each from the Democratic and Republican state parties, and chaired by the Secretary of State.⁴ As Secretary of State, I chaired the Commission; David Hamilton was the Democratic Chair's appointee.⁵ Although both Democrats, we did not see eye-to eye on every ballot.⁶ Nevertheless, during that intense process, I saw his capacity, his commitment to hard work, and his unfailing adherence to applying the law as he understood it to the facts as proven.

Third, my wife Susan practiced with him at Barnes & Thornburg and attested to his sterling reputation there as a lawyer of the highest character and most pleasant colleague.

There was one other thing of consequence.

Article V, section 7 of the Indiana Constitution requires that gubernatorial candidates be residents of the state for the five years preceding the election. In 1987, I asked David Hamilton for his analysis of whether I was eligible to run for Governor in 1988 given that, from July 1, 1983, until December 1, 1984, I had practiced law in a Washington, D.C., law firm. His advice was that my work in Washington did not disqualify me from running. His analysis was that a "resident of" Indiana for these purposes was a person whose "domicile" is in Indiana and that a person's domicile is "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning."⁷ So long as I could prove to the satisfaction of the court that when I was practicing in Washington, I intended to return to Indiana, he told me, I met the constitutional residency requirement. It had always been my intent to return to Indiana: during the time in question, I always voted in and paid taxes in Indiana; was a member of the Indiana bar and paid Indiana State Bar Association dues; and regularly returned to Indiana for political events. Armed with his analysis, I declared my candidacy for Governor and, adjudicating a challenge brought by the Republican Party, the Indiana Supreme Court also took the position that "resident of" meant "domicile" and that Indiana was my domicile.⁸

Suffice it to say that without David Hamilton's advice on the constitutionality of my residency, this Article would not have been written . . . at least not by me!

3. Douglass T. Davidoff, *Legislators Agree Changes Needed in Counts*, THE INDIANAPOLIS NEWS, Jan. 9, 1986, at 13.

4. Pub. L. No. 7-1986, § 18 (codified as amended at IND. CODE § 3-12-10-1); see IND. CODE § 3-12-10-2.1.

5. See Patrick J. Traub, *Recount Panel Rules for 2 Democrats*, THE INDIANAPOLIS STAR, Dec. 30, 1986, at 27.

6. *Id.*

7. *Bd. of Med. Registration & Examination v. Turner*, 168 N.E.2d 193, 196 (Ind. 1960).

8. *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1316, 1318 (Ind. 1988).

II.

I could not have been more pleased—and grateful—that David Hamilton was willing to set aside his very successful private law practice and join the new administration. As Counsel to the Governor, his principal responsibility was to provide legal advice to the Governor, other members of the staff, and agency directors. The importance of the position was heightened by the fact that our state's elected Attorney General, Linley Pearson, was of the opposite political party and entertained ambitions of himself becoming Governor. (Although we were of opposing parties and did run against each other in 1992, I never remember Pearson using his office in a partisan way to either the State's or the Bayh Administration's detriment.)

One issue with legal implications that immediately confronted the new administration had to do with personnel matters. When the State last had a Democratic governor, rank-and-file state jobs were frequently filled based on partisan affiliation. Following the 1988 election, many Democrats remembered that and quickly sought positions with the state. But the law had changed in the intervening decades. In 1976, the United States Supreme Court held that it had been unconstitutional for a county sheriff to fire non-policymaking employees solely because of their political party affiliation after a change in leadership.⁹ It fell to the new Governor's Counsel to deliver this unhappy news to many of the Democratic faithful seeking positions in the new administration.

When the new administration took office, several major lawsuits were pending that threatened the State with potential liabilities of hundreds of millions of dollars—enough to disrupt the state budget and the Governor's programs. Those lawsuits included several class actions seeking tax refunds,¹⁰ a class action by former patients of mental hospitals seeking payment for work performed at mental hospitals,¹¹ and a state constitutional challenge to the school funding system.¹² David Hamilton managed those cases closely. By combining aggressive defenses and selective settlements, he reduced the threats to the administration's programs and the state budget.

He was also the chief ethics officer for the administration and helped develop and implement a new, tougher ethics policy, first for the Governor's staff and then for the entire executive branch through legislation and rulemaking. He also coordinated appointments of judges and prosecutors. While he was in that position, I appointed one justice of the Indiana Supreme Court, four judges to the Indiana Court of Appeals, and approximately fifteen trial court judges.

David Hamilton indicated to me his desire to return to private practice following approximately two years of service in the Governor's office. We agreed that he would continue until the adjournment of the 1991 Legislative session—and this provided him with one last major assignment.

9. *Elrod v. Burns*, 427 U.S. 347 (1976).

10. *E.g.*, *Ind. Dep't of State Revenue v. Felix*, 571 N.E.2d 287 (Ind. 1991).

11. *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991).

12. *Lake Cent. v. State*, No. 56 C01-8704-CP81 (Newton Cir. Ct. 1987).

The Indiana House of Representatives had a small Democratic majority (52-48) and the Senate a small Republican one (26-24).¹³ At the end of their regular session in April, the legislators were unable to reach an agreement on new election boundaries required by the 1990 Census. To avoid the appearance that the legislators were unable to complete their work because of such a parochial concern as their own election districts, they held the state budget hostage. Negotiations continued past Memorial Day, raising the fear that the State would have to enter its new fiscal year on July 1, 1991, without a budget.

It fell to David Hamilton to research the emergency powers of the Governor and develop a blueprint to keep the essential functions of state government operating, should the state enter the new fiscal year without the appropriations needed to fund its operations. He developed an excellent contingency plan which, fortunately, was not needed as the budget was passed on June 14, 1991.¹⁴

III.

In May 1992, a momentous event in Indiana legal history occurred when Federal District Court Judge S. Hugh Dillin announced his retirement from active service. I had observed Judge Dillin at close hand when I was a law clerk for his colleague Judge James E. Noland, and he was a paragon of intelligence, courage, and wit. (That wit was on full display when he was asked whether he delayed his decision to retire until a Democratic administration was in place, and he answered, "My gracious. What a thought."¹⁵)

David Hamilton quickly emerged as the leading contender to replace Judge Dillin, and he had my full support. To some, he had not been admitted to the bar for a sufficient number of years to be qualified for the appointment, but that argument likely had little weight with a President who had taken office as Governor at age thirty-two and as President at age forty-six.¹⁶ President Clinton nominated David Hamilton on June 8, 1994, and he was confirmed by the Senate by a voice vote on October 7, 1994.¹⁷ Throughout the process, he enjoyed the particularly strong support of Senator Richard Lugar, with whom I, and my father before me, always enjoyed a strong, bipartisan relationship.

Judge Hamilton would serve on the United States District Court for the Southern District of Indiana for approximately fifteen years, serving approximately the last two as Chief Judge. During that decade-and-a-half, he

13. *Democrats Will Control the House*, THE INDIANAPOLIS STAR, Jan. 6, 1991, at C1.

14. See Susan Hanafec, *Budget Is In, but Fate of Teachers Still Out*, THE INDIANAPOLIS STAR, June 15, 1991, at 1.

15. John R. O'Neill, *Judge Dillin Asks to Go on Senior Status*, THE INDIANAPOLIS STAR, March 13, 1993, at A4.

16. See William J. Clinton, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/william-j-clinton/> [https://perma.cc/YJ9S-3ZY2] (last visited Dec. 5, 2022).

17. DENIS STEVEN RUTKUS, CONG. RSCH. SERV., 96-567 GOV, JUDICIAL NOMINATIONS BY PRESIDENT CLINTON DURING THE 103RD AND 104TH CONGRESSES 13 (1997).

presided over the closing of approximately 8,000 cases.¹⁸ Approximately 3,000 of those went to judgment based on either a trial or a decision he made with respect to which he issued approximately 1,150 written opinions.¹⁹ Of the cases over which he presided, approximately 60% were civil proceedings and 40% or criminal proceedings.²⁰

Difficult and controversial cases did not avoid his courtroom.

One such case was *Hinrichs v. Bosma*,²¹ a lawsuit against the Speaker of the Indiana House of Representatives alleging that the sectarian prayers offered to open legislative sessions violated the Establishment Clause of the First Amendment. Following the guidance of the United States Supreme Court in *Marsh v. Chambers*,²² Judge Hamilton issued a permanent injunction directing the Speaker to take steps to ensure that official prayers to open legislative sessions were non-sectarian.²³

Another was *A Woman's Choice-East Side Women's Clinic v. Newman*,²⁴ a challenge to Indiana legislation imposing a new informed-consent requirement for abortions that effectively required a woman to make two trips to an abortion clinic, one to be provided the information and a later trip for the procedure. It was a case I watched closely because the challenged legislation had been enacted over my veto as Governor.²⁵ The case was one of the first in the country to examine the meaning of the "undue burden" test enunciated by the controlling plurality opinion in the United States Supreme Court's *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁶ After lengthy discovery and a trial, Judge Hamilton issued a permanent injunction prohibiting some but not all of the provisions of the statute from taking effect.²⁷

With the incredibly broad swath of federal statutory law, coupled with the range of issues presented via diversity jurisdiction, there were few areas of American law that Judge Hamilton did not encounter during his fifteen years on

18. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. 997, 1010 (2009), available at <https://www.judiciary.senate.gov/imo/media/doc/CHRG-111shrg61992-2009-04-01.pdf> [<https://perma.cc/4D88-7M6R>].

19. *Id.*

20. *Id.*

21. 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *rev'd for lack of standing*, 506 F.3d 584 (7th Cir. 2007).

22. 463 U.S. 783 (1983).

23. *Hinrichs*, 400 F. Supp. 2d at 1131.

24. 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev'd*, 305 F.3d 684 (7th Cir. 2002).

25. Under article V, section 14(a)(2)(B) of the Indiana Constitution, a Governor's veto is overridden by the vote of a constitutional majority of the members of the Indiana House of Representatives and Senate, unlike under Article I, Section 7 of the United States Constitution where the override of a President's veto requires a two-thirds vote of the U.S. House of Representatives and Senate. Compare IND. CONST. art. V, § 14(a)(2)(B), with U.S. CONST. art. I, § 7.

26. 505 U.S. 833 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

27. *A Woman's Choice*, 132 F. Supp. 2d at 1151.

the District Court. One type of case that particularly captured his interest involved claims brought by the families of children with disabilities seeking to vindicate their rights under the Individuals with Disabilities Education Act (IDEA).²⁸ The Act seeks to “ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living.”²⁹ After adjudicating many IDEA disputes, Judge Hamilton came to admire the spirit and purpose of the statute very much. “I am aware of no more generous and humane example of legislation and public policy in the United States. It is, in my view, a great success story.”³⁰

IV.

On September 1, 2008, Seventh Circuit Judge Kenneth F. Ripple, a very fine individual who had been an enormously popular professor at the Notre Dame Law School prior to his appointment to the Seventh Circuit in 1985, took senior status. At that time, I had the honor of representing Indiana in the United States Senate, and when Barack Obama was elected President later that fall, I recommended to the White House that Judge Hamilton be appointed to succeed Judge Ripple. My Hoosier colleague in the Senate, Richard Lugar, enthusiastically joined that recommendation.³¹

The White House embraced our recommendation, and in fact, David Hamilton was the very first individual nominated by President Obama to be a Federal Circuit Court Judge.³² The New York Times praised the nomination: “President Obama has done well with his first judicial nomination David Hamilton, a well-respected federal district court judge in Indiana for the Chicago-based United States Court of Appeals for the Seventh Circuit. . . . The Senate should confirm him quickly.”³³

Senator Lugar and I presented Judge Hamilton to the Senate Judiciary Committee on April 1, 2009.³⁴ Senator Lugar delivered a thoughtful and eloquent statement, making not only a very strong case for Judge Hamilton’s confirmation,

28. *E.g.*, *D.F. v. W. Sch. Corp.*, 921 F. Supp. 559 (S.D. Ind. 1996); *Nein v. Greater Clark Cnty. Sch. Corp.*, 95 F. Supp. 2d 961 (S.D. Ind. 2000).

29. 20 U.S.C. § 1400(d)(1)(A).

30. Judge David F. Hamilton, U.S. Ct. Appeals, Seventh Cir., Remarks at Indiana University Robert H. McKinney School of Law Program: Celebrating the 40th Anniversary of the Individuals with Disabilities Education Act 16 (Nov. 16, 2016) (transcript available from *Indiana Law Review*).

31. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. (2009) (prepared statement of Hon. Richard Lugar, U.S. Sen., Ind.) available at https://www.judiciary.senate.gov/imo/media/doc/lugar_statement_04_01_09.pdf [<https://perma.cc/P4PV-TZY6>].

32. Editorial, *An Impressive First Nominee*, N.Y. TIMES (Apr. 14, 2009), <https://www.nytimes.com/2009/04/15/opinion/15wed3.html> [<https://perma.cc/84KG-YZU6>].

33. *Id.*

34. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, *supra* note 31.

but also for a confirmation process not “based on partisan considerations, much less on how we hope or predict a given judicial nominee will ‘vote’ on a particular issues of public moment or controversy.”³⁵ Instead, Senator Lugar spoke on his vision “to evaluate judicial candidates on whether they have the requisite intellect, experience, character, and temperament that Americans deserve from their judges.”³⁶

It was the theme I echoed, saying that the judicial confirmation process had “too often been consumed by ideological conflict and partisan acrimony.”³⁷ I observed that during the preceding Congress, Senator Lugar and I had worked together to recommend Judge John D. Tinker as a bipartisan, outstanding consensus nominee for the Seventh Circuit.³⁸ It was my hope that Judge Hamilton would be accorded substantially similar treatment.³⁹

Much to my disappointment, Republicans circled the partisan wagons and attacked Judge Hamilton’s record, characterizing his rulings in, for example, the legislative prayer and Indiana abortion cases mentioned above as ideologically motivated rather than the careful decisions that they were.⁴⁰ In an era when the filibuster still applied to judicial nominations, it was necessary to invoke cloture⁴¹ before a vote could be taken on Judge Hamilton’s nomination. When he was confirmed on November 19, 2009, in a 59-39 vote, Senator Lugar was the only Republican to vote for him.⁴²

Judge Hamilton’s record on the Seventh Circuit over the past thirteen years has been exceptional and exceptionally productive. He is widely respected across the country for the strength of his intellect and clarity of his decisions.

During my tenure in the Senate, among the most consequential challenges facing the country was the financial collapse referred to as the Great Recession.

35. *Id.*

36. *Id.*

37. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. (2009) (prepared statement of Hon. Evan Bayh, U.S. Senator, Ind.), available at https://www.judiciary.senate.gov/imo/media/doc/bayh_statement_04_01_09.pdf [<https://perma.cc/QYP8-LH8V>].

38. *Id.*

39. *Id.*

40. *See Democrats End GOP Filibuster Against Judge*, L.A. TIMES (Nov. 18, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-nov-18-na-obama-judge18-story.html> [<https://perma.cc/W8GH-YBVT>].

41. *Roll Call Vote 111th Congress – 1st Session (On the Motion to Invoke Cloture)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1111/vote_111_1_00349.htm [<https://perma.cc/Y5TB-32PB>] (last visited Dec. 5, 2022). The vote was 70-29. *Id.* Republicans voting for cloture were Senators Alexander (R-TN), Chambliss (R-GA), Collins (R-ME), Cornyn (R-TX), Gregg (R-NH), Hatch (R-UT), Lugar (R-IN), Murkowski (R-AK), Snowe (R-ME), and Thune (R-SD). *Id.*

42. *Roll Call Vote 111th Congress – 1st Session (On the Nomination)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1111/vote_111_1_00350.htm [<https://perma.cc/K246-723K>] (last visited Dec. 5, 2022).

As a member of the Banking, Housing, and Urban Affairs Committee during that crisis, I was deeply involved in crafting the Emergency Economic Stabilization Act of 2008,⁴³ which had as its centerpiece the Troubled Asset Relief Program requiring the Treasury Secretary to assist homeowners by encouraging mortgage servicers to implement programs to minimize foreclosures.⁴⁴ The Treasury implemented this mandate by promulgating a Home Affordable Modification Program (HAMP).⁴⁵ Because of my own association with this legislation, I have been extremely interested in the fact that among Judge Hamilton's most frequently cited opinions is one that deals with a mortgagor's breach of contract claim against her mortgagee in a case that implicated HAMP.⁴⁶ Judge Hamilton proceeds very carefully, sorting out a mix of state common law and federal statutory claims, accepting some and rejecting others. It is, as Judge Ripple said in a concurrence, an "excellent opinion."⁴⁷

Another most notable decision in which Judge Hamilton participated was *Baskin v. Bogan*,⁴⁸ challenging the constitutionality of Indiana's denial of marriage rights to same-sex couples. Federal District Chief Judge Richard L. Young had found for the plaintiffs on June 25, 2014,⁴⁹ and Judge Hamilton was a member of the three-judge panel for the Seventh Circuit that upheld the district court ruling in a unanimous decision on September 4.⁵⁰ On October 6, the Supreme Court denied a writ of certiorari, letting the Seventh Circuit decision stand.⁵¹ Same-sex marriage was thereafter legal in Indiana.

Among the most interesting episodes of Judge Hamilton's tenure on the Seventh Circuit was his widely publicized debate with fellow Seventh Circuit Judge Richard A. Posner over Posner's use of internet research in deciding an appeal. A prisoner claimed prison staff's deliberate indifference toward his medical needs violated his Eighth Amendment rights; the trial court had granted summary judgment in favor of the prison.⁵² Judge Posner, dissatisfied that there was no detail in the record as to the prisoner's medical condition, took it upon himself to research and cite to medical websites describing the prisoner's condition, the properties of his prescribed medication, and the qualifications of the prison physician.⁵³ With that information, he found a genuine issue of material fact as to whether the prisoner was the victim of deliberate indifference to a

43. Pub. L. No. 110-343, 122 Stat. 3765.

44. 12 U.S.C. § 5219(a).

45. *Relief for Responsible Homeowners: Treasury Announces Requirements for the Making Home Affordable Program*, U.S. DEP'T TREASURY (Mar. 4, 2009), <https://home.treasury.gov/news/press-releases/200934145912322> [<https://perma.cc/2L9Z-33VF>].

46. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

47. *Id.* at 586 (Ripple, J., concurring).

48. 766 F.3d 648 (7th Cir. 2014).

49. 12 F. Supp. 3d 1144 (S.D. Ind. 2014).

50. *Baskin*, 766 F.3d 648.

51. 574 U.S. 876 (2014), *denying cert. to* 766 F.3d 648 (7th Cir. 2014).

52. *Rowe v. Gibson*, 798 F.3d 622, 623 (7th Cir. 2015).

53. *See id.* at 623-28.

serious health need and ordered summary judgment reversed.⁵⁴

Judge Hamilton was appalled. Judge Posner's "decision is an unprecedented departure from the proper role of an appellate court," he thundered, running "contrary to long-established law" and raising a "host of practical problems."⁵⁵ Not only did Judge Hamilton's 5,000 word separate opinion detail why Judge Posner's factual research was contrary to law and the practical problems posed by Judge Posner's decision to do his own factual research, he also pointed out problems with the reliability of Judge Posner's factual research, showing that the "enterprise of judicial factual research is unreliable when it loses the moorings to the law of judicial notice."⁵⁶

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We are fortunate that David Hamilton will continue to serve our nation as a judge on senior status for what I hope will be many years to come. Nevertheless, it is appropriate that we pause now to recognize and express our appreciation for his near-three decades of service as a Federal District and Circuit Court Judge. In doing so, we pay tribute to the intellect, effort, integrity, and, if I may say so, empathy that he has shown in adjudicating the cases of all those who enter his courtroom. We also simultaneously celebrate one of the founding pillars of our society that makes America an exceptional nation: our devotion to the rule of law.

Thank you, Judge Hamilton, for helping to keep it so.

54. *Id.* at 630-31.

55. *Id.* at 636 (Hamilton, J., concurring in part).

56. *Id.*; see also *Dr. Posner Will See You Now: 7th Circuit Judges Reignite a Spirited Debate over Judicial Internet Research*, FOLEY & LARDNER LLP (Aug. 20, 2015), <https://www.foley.com/en/insights/publications/2015/08/dr-posner-will-see-you-now-7th-circuit-judges-reig> [<https://perma.cc/AP2J-7YER>].