

SMALL KINDNESSES: A TRIBUTE TO JUDGE HAMILTON

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Judge Hamilton was President Obama's first judicial nominee.¹ I am the longtime president of the Indianapolis Lawyers Chapter of the Federalist Society, a group of conservatives and libertarians interested in the current state of the legal order.² To state the obvious, Judge Hamilton and I do not exactly run in the same legal circles. So, given the social and political climate of late, riven as it is between those on the left and those on the right, you might think Judge Hamilton would have nothing to do with me, at least outside the courtroom. After all, there is nothing in it for him, so why even bother?

Fortunately for me, you would be mistaken. Over the years I have been the beneficiary of many small kindnesses, given to me freely by Judge Hamilton without expectation or obligation, as I am sure so many others have been as well. And it is in these seemingly insignificant and fleeting acts that lies a lesson—a lesson about how to treat others, especially those who may not be of equal professional standing, and who perhaps are not necessarily of like mind on the important issues of the day. It is, to be sure, a lesson for our fraught times.

As I recall, I first met Judge Hamilton when he was still a District Court judge.³ It was sometime in the early-to-mid 2000s. I was participating in a project of the Seventh Circuit Bar Association, and the idea was to encourage district court judges in the Circuit to experiment with some newly drafted form jury instructions. Judge Hamilton happily agreed to participate in the endeavor. I do not remember our discussion about the project (indeed, I remember very little about the project itself), but I do distinctly remember how Judge Hamilton made me feel about my work on the project—as if it was important, as if I was contributing something of significance to the legal process.

This might seem inconsequential, and I am sure it was to him and probably would have been to most others, but it was not to me. Judge Hamilton did not have to participate in the project, let alone give me—a still rather green, rather undistinguished lawyer whom he did not know—any credit for superintending a small corner of this minor project. The mere fact that he did so, however, has stuck with me all these years later.

As I would learn over time, this sort of interaction with Judge Hamilton was not out of the ordinary. It is simply how he operates.

Once he was on the Court of Appeals, I asked Judge Hamilton if I could interview him for the Seventh Circuit Bar Association's publication, *Circuit*

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1. See *David Hamilton (Seventh Circuit)*, BALLOTPEDIA, [https://ballotpedia.org/David_Hamilton_\(Seventh_Circuit\)](https://ballotpedia.org/David_Hamilton_(Seventh_Circuit)) [<https://perma.cc/3UJK-LN9Q>] (last visited Nov. 4, 2022).

2. See *Brian J. Paul*, THE FEDERALIST SOCIETY, <https://fedsoc.org/contributors/brian-paul> [<https://perma.cc/UZ8F-KQDJ>] (last visited Nov. 4, 2022).

3. Judge Hamilton was a District Court Judge for the Southern District of Indiana from October 1994 until his appointment to the Seventh Circuit in November 2009. See *David Hamilton (Seventh Circuit)*, *supra* note 1. Judge Hamilton was nominated to the District Court by President Bill Clinton. *Id.*

Rider.⁴ Again, though no doubt busy with other more important and pressing matters, he enthusiastically agreed to help. I would have settled for a written exchange, or maybe a phone call. But Judge Hamilton would not have it and invited me to his chambers, then still in Indianapolis,⁵ to talk face to face. Flanked by stacks of papers, books, and briefs, for an hour and maybe more, Judge Hamilton answered all of my questions and then some.

In looking back at that interview, I am reminded of a couple of things that help to shed additional light on Judge Hamilton's generosity of spirit. The first is that his nomination to the Court of Appeals garnered support not just from then Senator Evan Bayh,⁶ which one would have expected given Bayh's shared party affiliation with President Obama, but also from then Senator Richard Lugar, a high-ranking, highly respected Republican.⁷ Although Senator Lugar believed that judicial appointments should not be an entirely partisan affair, and thus was more apt than many of his conservative colleagues to vote for a Democrat nominee (a fact that may well have led to his subsequent primary defeat), his vote was not a given. In introducing Judge Hamilton to the Senate Judiciary Committee, Senator Lugar attested not only to Judge Hamilton's legal ability, but, of more enduring importance, he attested to his character.⁸ "[My] confidence in David Hamilton's character and abilities," stated Senator Lugar, "[is] shared by all who [know] him, regardless of political affiliation, throughout Indiana's legal and civil communities."⁹ How alien this spirit of bipartisanship must seem to some in this day and age—indeed, how alien it may seem to have had a Republican actively promoting a nominee of the other party—and yet not all that long ago, bipartisan support for qualified judicial nominees was the rule rather than the exception. That Judge Hamilton received such enthusiastic backing from Senator Lugar is a testament to the seeds that Judge Hamilton had sown through countless interactions with those of different views, different political affiliations, and different stations in life—not unlike the interactions he has had with me.

The other thing that the interview reminded me of is Judge Hamilton's statement about his thought process in making judicial decisions. (I purposefully avoid calling it a philosophy because Judge Hamilton himself has disavowed

4. See *Circuit Rider*, THE SEVENTH CIR. BAR ASS'N, <https://www.7thcircuitbar.org/page/A9> [https://perma.cc/93WE-GRD4] (last visited Nov. 4, 2022).

5. See Michael W. Hoskins, *Circuit Judge Relocating Chambers to Maurer School of Law*, THE IND. L. (June 4, 2010), <https://www.theindianalawyer.com/articles/24034-circuit-judge-relocating-chambers-to-maurer-school-of-law> [https://perma.cc/3V9Q-JVA8].

6. See Michael W. Hoskins, *Judge Hamilton Nominated for 7th Circuit*, THE IND. L. (Jan. 1, 2009), <https://www.theindianalawyer.com/articles/21809-judge-hamilton-nominated-for-7th-circuit> [https://perma.cc/689F-H77E].

7. *Hearing on Nominations Before the S. Judiciary Comm.*, 111th Cong. (April 1, 2009) (statement of Hon. Richard Lugar, U.S. Senator from Indiana), available at https://www.judiciary.senate.gov/imo/media/doc/lugar_statement_04_01_09.pdf [https://perma.cc/P4PV-TZY6].

8. See *id.*

9. *Id.* at 1.

“consciously subscrib[ing] to any particular philosophy or approach.”¹⁰) Here is what he said in relevant part:

I . . . want to make a point about a related issue that played prominently in the debate over both my nomination and the nomination of Justice Sotomayor to the Supreme Court. I believe empathy does have an important role to play in judging. 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. The public criticism of President Obama’s “empathy standard” seems to have confused empathy and sympathy. They are not the same things. An emotional response of sympathy toward one or both sides is not a legitimate basis for deciding a case. But empathy—the effort to understand the perspectives of others—is essential.¹¹

One may argue with whether empathy, even properly understood, is an indispensable attribute of a good judge—and in fact some in good faith do take issue with that notion¹²—but it is exceedingly hard in my view to argue against empathy as an ethical virtue. Cultivating the ability to understand and appreciate another’s feelings or experiences cannot help but make one a better person. A person who is truly empathetic is a person who is truly respectful of others, regardless of status; he is the embodiment of the Golden Rule. Whatever this interview may reveal about how Judge Hamilton decides cases, it reveals at least as much about how he treats others.

And so, it should be little surprise that Judge Hamilton values those lawyers who value others, including those who do so by engaging in pro bono service. Attorneys who represent the indigent show empathy for their clients in a very real, very concrete way. They do so not only in the sense that they demonstrate concern for the less fortunate (that might more properly be called compassion), but also because they come to identify with their clients in such a way as to understand, sometimes deeply so, their feelings of having been treated unjustly. The attorney might not necessarily believe those feelings are justified—empathy does not

10. Brian J. Paul, *Q&A with the Newest Judge on The Seventh Circuit Court of Appeals, David F. Hamilton*, CIR. RIDER, April 2010, at 8, https://cdn.ymaws.com/www.7thcircuitbar.org/resource/resmgr/circuit_rider/the_circuit_rider_vol_8.pdf [<https://perma.cc/CBT5-9YGG>].

11. *Id.*

12. *E.g.*, Ilya Somin, *Is There a Conflict Between Empathy and Good Judging?*, LOS ANGELES TIMES (May 28, 2009, 12:00 AM), <https://www.latimes.com/opinion/opinion-la/la-oev-chemerinsky-somin28-2009may28-story.html> [<https://perma.cc/6CHV-W5NA>].

demand approval—but the attorney can at least in some small way relate to what the client is going through, particularly in cases where there is a good legal argument.

Perhaps this can explain a couple more interactions that I have had with Judge Hamilton. At least twice that I can recall, I have argued pro bono cases in which Judge Hamilton was on the panel. And in both, after the cases had ended, Judge Hamilton personally thanked me for my service. To my knowledge, once an argument has concluded, the presiding judge always thanks pro bono counsel for their work—in open court, on the record. This is a cherished practiced (at times, even a humane one depending on how the argument has gone), but that is not what I am talking about. In the situations that I am referencing, the cases were briefed, argued, decided, and done. And in both, Judge Hamilton went out of his way to compliment my service, personally, once at a bar association event and another time by phone. I do not relate this anecdote to pat myself on the back; my service was no more extraordinary than that of the many other attorneys who have generously taken on pro bono appointments in the Seventh Circuit. I relate this story because, consistent with the theme, it is another window into how Judge Hamilton treats others.

One more anecdote. Several years ago, I had the good fortune to host a Federalist Society event¹³ where the featured speakers were Judge Hamilton and then Judge (now Chief Judge) Diane Sykes, who, I think it is fair to say, is one of the Court's more conservative members. At this event Judge Hamilton and Judge Sykes discussed their perspectives on Judge J. Harvie Wilkinson's book, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*.¹⁴ Although they do not see eye to eye on certain matters of judicial method, their exchange about the book could not have been more civil or more decent; it was even light-hearted at times. In this way, both judges were modeling the vanishing virtue of respectful debate.

Make no mistake: none of this is to say that Judge Hamilton is irresolute in his beliefs. He is not. In my experience, Judge Hamilton is quite firm in his beliefs and quite willing to challenge others about theirs. He is as tough a questioner as any on the court. But so often these days, particularly in law and politics, people tend to confuse a person's ideas for the person and act as though the two are the same. You believe X; I think X is bad; therefore, you are bad and must be shunned, or shouted down, or, to use the word of the day, cancelled. Or so the thought process seems to go.

Thankfully, Judge Hamilton does not think like that. The way he has treated me is a minor testament to that fact. Innumerable others have shared the same experience. The task for those who have benefited from Judge Hamilton's small kindnesses is to emulate his example. In my way of thinking, there could be no finer tribute.

13. See *The Death of Jurisprudence?*, THE FEDERALIST SOCIETY (Dec. 12, 2012), <https://fedsoc.org/events/the-death-of-jurisprudence> [<https://perma.cc/4JUH-9J74>].

14. J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).