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DAVID DAVIS AND THE LINCOLN SUPREME COURT

by

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ABSTRACT

David Davis (1815-1886) is distinguished for his work as Abraham Lincoln's campaign manager during the Republican nominating convention at Chicago in 1860 and as Associate Justice of the Supreme Court of the United States from 1862-1877. This essay is an analysis of the mechanics of Davis' appointment to the Supreme Court in 1862. It examines the intricate set of political considerations that influenced the first three appointments which Lincoln made to the Supreme Court.

Once Lincoln ascended to the presidency, literally thousands of office seekers beseeched him for a share of the spoils of Republican victory. Among the throng of office seekers was a small band of lawyers from Ilinois. These men had known Lincoln since the days he "rode the circuit" in that state as a young lawyer in the 1830's. They wanted Lincoln to place David Davis on the Supreme Court in recognition of his many years of service as a Illinois state judge and for his contribution to Lincoln's successful bid for the presidential nomination of the Republican Party in

1860. By organizing a lobbying effort that combined a letter writing campaign with a series of personal interviews (which included a great deal of arm-twisting), Davis' associates were able to secure his nomination to the Supreme Court from Lincoln.

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And lastly, to Hemlock, my regards.

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INTRODUCTION

The process of judicial selection is a subject that has seldom been a matter of dispassionate public debate. The mechanics of the procedure--the evaluation of a nominee's professional qualifications, the interpretation of his judicial philosophy, and the balancing of public and private interests--are usually left to the legal community for consideration. One notable exception to this generalization was the nomination of Robert H. Bork to the United States Supreme Court by President Ronald Reagan on July 1, 1987. Bork's nomination was certainly one of the most controversial in the two-hundred year-history of the Supreme Court. Bork was described by liberals as a right-wing ideologue and by conservatives as "principled and neutral." The confirmation hearings became the focus of national attention and the media, including the American press had a field day trying to define his judicial philosophy.[1] Fearing that, if confirmed, Bork would try to overturn liberal court decisions, such groups as Common Cause, the N.A.A.C.P., the National Organization for Women and the

National Abortion Rights Action League participated in countless anti-Bork rallies held across the United States. Reluctant to mimic such activities, conservative organizations drummed up support among their members for Bork's nomination by using direct mail campaigns.[2] Subsequently, the national campaign to defeat the Bork nomination was successful--the Senate Judiciary Committee rejected the nomination in October of 1987.[3]

The Bork controversy is an anomaly in the history of judicial appointments to the Supreme Court. Robert Bork's nomination occurred at a time when cynicism about judicial review had reached unprecedented levels.[4] The Bork nomination was a "first" in Supreme Court history for another reason: the massive negative advertising campaign undertaken by Bork's opponents turned the Senate Judiciary Committee hearings into a national referendum on the ideological course of the Supreme Court.

In comparison, Lincoln had little trouble with the Senate over the nominations he made to the Supreme Court. While President Reagan's nominee faced a Democrat majority in the Senate and a group of liberal senators who were determined to exert great political pressure on their undecided colleagues, Lincoln's selections were sent to a Republican Senate for approval. Although there was political infighting among the members of the Senate over the candidacy of one favorite son or another, the aspirants were Union men who supported the Republican Party.

Moreover, the Senate Judiciary Committee of the 37th Congress did not hold confirmation hearings; discussions were held among the committee members and the nominations were approved without difficulty.

Unlike the Bork affair, appointments made to the Lincoln Court during the Civil War did not attract intense public interest. Concern about the nominees and their viewpoints on the issues of the day was largely confined to members of Congress, the Lincoln administration, jurists, and the aspirants' supporters. Further evidence of the lack of public interest in Supreme Court appointments is reflected in the media coverage of the nominating process. Whether the source was a large city publication like the Chicago Tribune or a state or local newspaper, little space was devoted to Supreme Court appointments. Since descriptions of the day's military battles filled the pages, a report on a particular aspirant's chances of receiving a nomination or even news of an appointment to the bench was usually provided in only a sentence or two; such stories rarely exceeded a paragraph in length.

The fact that interest in Supreme Court appointments was confined for the most part to politicians and concerned members of the legal profession is also a reflection of the manner in which people were selected for government service. In the Civil War era, individuals were culled for public service through a system of political patronage. A person's attributes were brought to the attention of the President

via personal contacts, letters of introduction and by word of mouth. This reliance on political patronage to select qualified candidates does not mean that the nomination process should be defined as "political" in the pejorative sense of the word. There was no national media in existence at the time to bring the public's attention to a slate of the most qualified jurists in the country. Naturally, Lincoln had to rely on the advice of his colleagues within the Republican Party in order to select the prominent legal minds from across the Union for the Court.

During the Lincoln presidency, the judicial lobby that was at the heart of the appointment process was not very sophisticated. The tactics used by those individuals trying to promote the qualifications of a favorite aspirant varied tremendously. On the one hand, a group of lawyers belonging to a particular state bar might organize a petition that would attest to the good character and legal qualifications of a colleague interested in a judicial appointment. These petitions usually were accompanied by a polite covering letter which respectfully asked the President to consider the appeal. Such requests were also made in private interviews with President Lincoln by congressmen and those persons and delegations who made the trip to Washington in hopes of receiving some personal guarantee that their candidate would receive the nomination. At times, these meetings with Lincoln in the White House included a great deal of vociferous argument and arm-twisting. Politicians,

associates, and friends of Lincoln hounded him to make judicial appointments on the grounds of personal loyalty and political expediency.

This latter method of lobbying was made possible by the accessible nature of the presidency in Lincoln's time. Unlike that of his twentieth century counterparts, Lincoln's schedule was not so tightly controlled and meticulously organized by a chief of staff, secretaries or other presidential aides. It was not unusual for a throng of office seekers to gather in the upstairs hall outside Lincoln's office, waiting for an opportunity to talk to the President long enough to secure some appointment.[5] This situation was made worse by the vast amount of patronage dispensed at that time through presidential appointments:

> Abraham Lincoln came to the presidency in the halcyon days of the spoils system and when pressure for a "clean sweep" on the part of the victor had never been more insistent . . . [of] the 1,520 presidential officeholders no less than 1,195 were removed as a result of the Republican victory of 1860--an almost complete sweep if allowance is made for the vacancies in the South occasioned by the Secession.[6]

Among the hordes of office seekers were prominent Republican Party members, congressmen and state politicians who wanted Lincoln to appoint "favorite sons" from their home states. In 1861, there were two powerful groups within the Republican Party competing with one another for the lion's share of the patronage pie. A member of one of these groups was Judge David Davis of Bloomington, Illinois. Davis had had a long and close association with Lincoln

since the days when they rode the circuit together as young lawyers in the 1830's. Their friendship continued after Davis was selected state judge for the Eighth Illinois judicial circuit in 1848, and reached a high point with Davis' work as Lincoln's manager during the Republican presidential nominating campaign of 1860. During the Republican convention in Chicago, Davis made a number of patronage promises in Lincoln's name in order to get delegates to support his nomination. After the election, he continued to pull strings; Davis and other members of his group put great pressure on Lincoln to reward them for putting him in the White House by distributing patronage according to their own preferences.[7] For his personal contribution to the Republican victory and Lincoln's rise to the presidency, Davis preferred an appointment to a federal judgeship that was higher than the position he held in the Eighth Illinois judicial circuit.

This thesis is a study of the appointment of David Davis to the Supreme Court by Abraham Lincoln. It details the complex political considerations, other than professional merit, that influenced the first three of Lincoln's Supreme Court appointments. These considerations included: patronage; strategic considerations of loyality and political support from the border states; balancing rivalries between the radical and conservative wings of the Republican Party; expectations of judicial support for Lincoln's prosecution of the war effort; and the influential

role of his wife, Mary Todd, on Davis' appointment. It is my contention that Davis' major rivals for the Supreme Court justiceship of the Eighth Circuit all possessed the qualifications necessary to make them viable candidates for selection by Lincoln. Yet, Davis received the nomination because his supporters mastered the politics of judicial appointments. They survived the political infighting that developed as influential supporters tried to advance the qualifications of their favorite sons. More importantly, the members of the Davis campaign waged a persuasive lobbying effort which attempted to convince Lincoln that their candidate was a loyal Union man whose appointment would satisfy the various political considerations mentioned above, and at the same time, place on the Supreme Court someone who possessed views in accordance with the President's in regard to sensitive war issues.

This work will examine in detail the process by which Davis received Lincoln's nomination to the Supreme Court of the United States in 1862. It will analyze the mechanics of Davis' appointment to the bench, his attitude towards the prospect of being nominated for the position and the conflicting claims made for it by his rivals. Most importantly, the lobbying effort initiated and sustained by Davis' close friends and legal associates securing his nomination will be carefully examined.

The first chapter, entitled "The Three Vacancies", is designed to show that Lincoln's primary objective was to

select jurists who would not threaten the principal goal of his administration--the preservation of the Union--by the constitutional decisions which they made. For a President presiding over a government involved in a civil war, Lincoln devoted a considerable amount of time and energy to the organization of the federal judiciary and the composition of the Supreme Court. This chapter also emphasizes how conscientious Lincoln was about appointments made to the Court and examines yet another side of the appointment process--the lobbying efforts initiated by candidates and their supporters to secure vacant positions on the bench. In particular, the study of the appointment process in this chapter centers around the campaigns begun by Davis' supporters and those of his main rival in Illinois, Orville Browning for a seat on the Court.

Competition from Browning and other rivals was not the only threat which faced Davis' campaign. A number of Radical Republican Congressmen were opposed to his confirmation once it reached the Senate for consideration. Labelled the "Fremont-McKinstry influence" by one of Davis' associates, these men were so named because they denounced the findings of a commission chaired by Davis. The commission investigated charges of corruption that were brought against Major-General John C. Fremont and Quartermaster Justus McKinstry during their administration of a Union Army post in Missouri known as the Department of the West. Chapter two, "The Trouble With Fremont", examines

the investigation of the Department of the West made by Davis' Commission on War Claims at St. Louis and discusses the political implications which the Commission's negative report on Fremont's command had on Davis' campaign.

The Radical Republicans were not the only congressmen who had reason to influence an aspirant's chances of receiving a nomination. For instance, politicians boosting certain candidates recognized the importance of having prominent aspirants compete for judicial posts from different circuits. Naturally, an individual's chances of receiving a nomination improved when distinguished candidates were not competing for the same vacancy. Members of the 37th Congress tried to arrange the judicial circuits in a manner that would place prominent aspirants in different circuits. The reorganization of the circuit court system was an important issue for Congress in the 1860's. Various circuit reorganization plans were brought before Congress and most were designed to exclude Illinois from one particular circuit or another. Since Lincoln was determined to appoint at least one jurist from his home state to the Supreme Court, it was essential for a congressman to get his own state placed in some circuit, other than the one including Illinois.

Chapter three, entitled "The Right Man In The Right Place" analyzes the controversies and political infighting in Congress over circuit reform. The lobbying effort by the aspirants and their supporters directed at influencing

Lincoln is a continuing theme. After Lincoln appointed Noah Swayne and Samuel Miller to the Court, both Davis and Browning intensified their efforts to secure the third vacancy.

The final chapter, "The Reluctant Justice", discusses Davis' misgivings about receiving the very appointment he had so long sought and finally obtained from Lincoln. As the title of the chapter suggests, Davis did not rush to embrace his new status. Deeply insecure about his ability to meet the requirements of this arduous position, Davis regretted the appointment from the moment he ascended to the Supreme Court.

David Davis was a large man, five feet eleven inches tall, with blue eyes, a ruddy complexion, and thick black hair parted to the right side. An oil portrait and steel engraving made of him during his tenure on the Supreme Court show him with a beard. He was cleanshaven to the chin, and the graying stubble covered his throat, accenting the full features of his face. The dominant characteristic of Davis' physique was his obesity. After his marriage to Sarah Walker in 1838, he started to gain weight steadily until he weighed over three hundred pounds. The severity of this condition is illustrated in a photograph taken of the Supreme Court Justices in 1865 in which Davis is sitting in the foreground. His waistcoat and trousers are stretched noticeably by a protruding abdomen.[8]

Davis' contemporaries often described him as honest and an impartial judge of men. Yet, while he was praised for his fair-mindedness, some of his legal associates also made reference to the expedient manner in which the Judge disposed of the cases that appeared on his docket. "Davis shunned and abhorred all technicalities: and got right down to the essential merits of any law-suit or proposition."[9] When he was adjudicating cases in the courthouses of his circuit in Illinois, he was known on occasion to browbeat lawyers who embellished their arguments with superfluous details. However, Davis left this no-nonsense attitude in the courtroom once the proceedings had been adjourned for the day, and enjoyed spending his evenings while on the circuit in the company of fellow lawyers, swapping stories and listening to their amusing anecdotes.

The contrast between Davis' private and public demeanor was evident in other areas of his life as well. He was a devoted family man. Long periods of separation from his wife and family while he rode the circuit as frontier lawyer, judge and eventually Supreme Court Justice were hard on him. Davis was loyal to his friends and various associates--the politicians, businessmen, newspaper editors, merchants and farmers--who made up what one biographer called the "Davis coterie."[10] A prolific writer, Davis often sent letters of introduction or even direct appeals to various politicians in order to secure some office or appointment for a friend or acquaintance. However, while

Davis was characterized as an honest and generous person, he was also a shrewd businessman.

David Davis made his millions as a land speculator--buying tracts of prairie, usually at bargain prices. At times he would acquire a farm up for foreclosure at a fraction of its value. Davis would also take control of thousands of acres of land in Illinois or Iowa through the use of a land warrant or by buying defaulted tax titles.[11] It has been estimated that land which Davis had purchased for $1.25 an acre was worth $100.00 at the time of his death in 1886.[12]

Actually, land development was the basis for Davis' first meeting with Lincoln in Vandalia in December of 1835. Davis was chosen by the citizens of his town, Pekin, Illinois to attend the state legislature at Vandalia. The purpose of the trip was to secure a railway charter from Pekin through Bloomington, Illinois. The charter was granted, but the rail line was never built.[13] Nevertheless, Davis' further involvement in politics and the practice of law in the frontier continued to bring him and Lincoln together for the rest of their lives.

Historical materials on the Lincoln Supreme Court are not comprehensive. "Few political histories of Supreme Court appointments and their impact have been written, and those that exist are not the work of anyone steeped in constitutional law, either as a scholar of the subject or as an advocate before the Court."[14] Few monographs cover

either the personnel or the work of the Supreme Court during the Lincoln administration in a comprehensive manner. For example, Carl Swisher's The Taney Period: 1836-64 (1974), (volume five in the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) includes a cursory treatment of the personnel of the Lincoln Court and analyzes the issues which they faced. The next volume in the series, Reconstruction and Reunion: 1864-88 (1971) by Charles Fairman, has two chapters devoted to the Lincoln Court during the Civil War. The second chapter, entitled: "The work of the Supreme Court" is an interesting account of the Court's business in 1864-1865. However, this work is primarily a history of the Supreme Court during Reconstruction. David Silver's Lincoln's Supreme Court (1956) concentrates on the Supreme Court's relationship with Lincoln and its judicial function during the Civil War. While these books treat Davis in some detail in chapters dealing with the membership of the Lincoln Court, little has been written specifically on Davis' judicial career, especially the years he spent on the Supreme Court from 1862-1877.

The two biographies of Davis have the same shortcoming. The first scholarly biographical work was a Ph.D. dissertation published by Harry Pratt at the University of Illinois in 1930. Pratt claims that his study was the "first attempt at a biography of . . . the eminent jurist."[15] The work is poorly written--and tends to dwell

on insignificant details. However, the information provided by recollections of associates and personal interviews with individuals who knew Davis or his associates make the dissertation a valuable source for research. The other biography is entitled Lincoln's Manager, David Davis by Willard L. King. This is based on over ten years of research, during which the author collected thousands of letters and items now comprising the Davis papers. Published in 1960, King's book emphasizes Davis' political career from his early involvement in Whig politics in Illinois in the 1830's and 1840's to his candidacy for president under the Labor Reform banner in 1872 and subsequent Senate career from 1877 to 1883.

Although King concentrated on Davis' political interests and experience, only six of thirteen chapters are devoted to Davis' judicial career. While the early chapters on Davis' work as a circuit lawyer are interesting and well developed, the later chapters on his Supreme Court career lack depth or analysis. The reason for this imbalance probably lies in the nature of the primary source material collected and scrutinized for this work. Whether the subject be the state of the Whig Party in Illinois or the probability of gaining an office on behalf of an associate, the preponderance of Davis' correspondence deals primarily with political matters. If Davis was not writing about the "damn abolitionists" or some other topic, he usually filled his letters with details about family affairs. Few of his

letters deal with his judicial duties; most of them contain only an occasional reference to the length of a term of court in one of the many towns and villages he visited while riding the circuit.

The nature of Davis' correspondence is not solely responsible for the political slant of King's biography. At times, it appears as if King only uses Davis' judicial activities in order to bring some continuity to the Judge's political affairs. The author moves from one development in Davis' life to the next without providing the necessary background information. After finishing the biography, the reader is left with bits of information linked together in order to justify the great amount of research that King completed. This form of organization is especially evident in the fifteenth chapter. Entitled "Appointment, 1861-1862," it covers Davis' appointment to the Supreme Court in only six and one half pages. In discussing the appointment, King merely organizes the correspondence between Davis and his associates in chronological order. Except for brief descriptions of the rivalries present among a few of the other aspirants, there is little analysis of the lobbying effort engaged in by these men and their supporters in order to obtain one of the vacancies on the Court.

The impetus for this thesis has been the desire to make a more thorough investigation of the Davis papers, to throw new light on the career of a Supreme Court Justice named by Lincoln in 1862, in the midst of a Civil War, and to

illuminate the politics behind the appointment process itself.

NOTES FOR THE INTRODUCTION

[1]Jacob V. Lamar Jr., "Defining the Real Robert Bork", Time, 24 August 1987: p. 10., and Richard Vigilante, "Who's Afraid of Robert Bork?", National Review, 28 August 1987: p. 27.

[2]Jacob V. Lamar Jr., "Advise and Dissent: The Verdict on Robert Bork could change the course of U.S. law", Time, 21 September 1987: p. 17.

[3]The strenuous opposition to the Bork nomination that was organized by hundreds of liberal organizations was probably spurred on by the failure of the Left to prevent the rise of other conservatives to the Supreme Court. For instance, liberal groups were unable to prevent the promotion of William H. Rehnquist to chief justice on 26 September 1986. On that day, a conservative jurist, Antonin Scalia, was sworn in as associate justice. Scalia, a former judge on the U.S. Court of Appeals in Washington, D. C., filled Rehnquist's position on the Supreme Court. Rehnquist succeeded Warren E. Berger, who retired. With the retirement of Justice Lewis Powell, the appointment of Bork could have enhanced the conservative bloc within the Court. Of the remaining justices who supported liberal opinions of the Court, three aging justices (Harry Blackmun, William Brennan, and Thurgood Marshall) had been hospitalized during the summer of 1987.

[4]F.L. Morton, "The Bork Affair: Politics as Usual or Constitutional Crisis?," American Political Science Association, Washington, D.C., 1-4 Sept. 1988.

[5]Jean H. Baker, Mary Todd Lincoln (New York: W. W. Norton, 1987), p. 185.

[6]Harry J. Carman and Reinhard H. Luthin, "Lincoln Distributes the Spoils," Lincoln And Civil War Politics, ed. James A. Rawley (Huntington, N.Y.: Robert E. Krieger Publishing Co., 1977), p. 20.

[7]Ibid., pp. 20-21. In 1861, Davis' group within the Republican Party was comprised of: Simon Cameron, William H. Seward, Caleb B. Smith and Thurlow Weed. The other faction was made up of: Hiram Barney, William Cullen Bryant, Schuyler Colfax, Norman B. Judd and Alexander K. McClure. During the battle over which members of the party would occupy Lincoln's Cabinet, Davis' group wanted Cameron appointed and Salmon P. Chase excluded. Judd's faction wanted the opposite. Even though the President was angered by Davis' promise to the Pennsylvania delegates that Lincoln would put their leader in the Cabinet, he made Cameron Secretary of War. However, Lincoln refused to keep Chase

out of the Cabinet and made him Secretary of the Treasury. This example shows that whenever Lincoln made political appointments, he was careful to balance the interests of the differing factions of his party.

[8]Stanley I. Kutler, Judicial Power And Reconstruction Politics (Chicago: Univ. of Chicago Press, 1968), photograph, p. ii.

[9]Henry C. Whitney, Life on the Circuit with Lincoln (Caldwell, Idaho: Caxton Printers, 1940), p. 77.

[10]Ibid., p. 80.

[11]Whitney, p. 76. and King, p. 52.

[12]"In Memory of Judge Davis," Chicago Legal News 19 (1886): p. 207.

[13]King, pp. 22-24.

[14]Laurence Tribe, God Save This Honorable Court: How The Choice of Supreme Court Justices Shapes Our History (New York: Random House, 1985), p. x.

[15]Harry Pratt, "David Davis 1815-1886" (Ph.D. diss., Univ. of Ill., 1930), preface.

CHAPTER ONE

THE THREE VACANCIES

Abraham Lincoln made five appointments to the Supreme Court during his presidency. The first three, made in 1862, will be discussed in this thesis. The fourth appointment came on March 6, 1863, when Stephen J. Field of California became the first and only Justice to represent the Tenth Circuit, consisting of California and Oregon.[16] Lincoln's last appointment occurred on December 6, 1864, when Salmon P. Chase was chosen to replace the late Roger B. Taney as Chief Justice. While Lincoln committed his energies to winning the Civil War and preserving the Union, he was preoccupied at times with the determination to make the "right" appointments to the bench. Like other presidents, Lincoln was inclined to place individuals on the Court who held similar ideological views. He was also not above using the vacancies on the Court as a way to repay debts of political obligation. Yet, the selection process was complicated further by political issues that were peculiar to the Civil War era. When making his nominations, Lincoln had to consider how an appointment might affect the problem

of keeping the border states in the Union; he also had to deal with problems caused by the exclusion of certain states from circuit representation and the subsequent plans made for judicial reorganization in Congress.

The Constitution of the United States gives the President the responsibility of nominating candidates for all federal judgeships--including justices of the Supreme Court. Article II, section 2, states that "the President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the Supreme Court." The Constitution does not, however, offer any indication of what sort of criteria should be used by the President when he considers the appointment of an individual to the bench. At the Constitutional Convention in Philadelphia in 1787, exhaustive discussions were held over which procedures should be used in making judicial appointments. Yet, the question of what standards should be established for such nominees to meet was not a subject of debate. "Delegates simply assumed . . . that those selected as federal jurists would be chosen on the basis of merit."[17] Obviously, every presidential appointment could be included in this category. Scholars, legal historians, and jurists have tried to give some coherence and definition to the nomination process by creating various sets of criteria which they believe have been or should be used for the selection of men and women to the federal judiciary. Henry J. Abraham has identified four "ascertainable decisional

reasons or motivations for the presidential selections of members of the Supreme Court."[18]

> In no particular order of avowal or significance, the reasons are: objective merit; personal friendship, balancing geographical representation or representativeness on the Court; and real political and ideological compatibility.[19]

Abraham also includes an additional requirement, mentioned by Madame Justice Sandra Day O'Connor in a speech delivered at the annual dinner of the American Law Institute on May 19, 1983:

> [W]hile there are many supposed criteria for the selection of a Justice, when the eventual decision is made as to who the nominee will be, that decision from the nominee's viewpoint is probably a classic example of being the right person in the right spot at the right time. Stated simply, you must be lucky.[20]

Naturally, these factors (in combination with countless other variables) have each played a part in presidential nominations to the Court. The influence which each factor has on the nomination process varies from one president to the next, with the political circumstances at the time of the appointment, and with each potential candidate, because every president has his own individual perception of the qualities which a Supreme Court Justice should possess. The influence which a particular factor can have on an appointment is also governed by circumstance. For example, one important prerequisite for appointment in the early years of the Court's history was physical stamina, because Supreme Court Justices were required to ride the circuit. This meant that presidents were apt to appoint only those

men who were capable of enduring the strain of circuit travel.[21] In fact, "[s]ome refusals of nomination or resignations from the Court were in large part motivated by a reaction against the discomforts and hardships of circuit travel. This was true of Robert Harrison, Thomas Jefferson and John Jay (second nomination) among others."[22]

The one factor which has dominated the history of presidential selections of Supreme Court nominees is their political and ideological compatibility. Since judges appointed to the Court serve for life, and because they are the chief interpreters of the Constitution, the attitudes and philosophies they bring to the bench are important. Even though it is very difficult to predict how a judge might act after his appointment to the high court, presidents do try to tilt the Supreme Court membership towards a favorable ideological position by the appointments they make.

In Lincoln's case, he wanted those whom he placed on the bench to possess views in accord with his own with regard to the political issues generated by the crisis of the Civil War:

> He wanted men whose views on the exercise of war powers by the president or congress would not prove embarrassing to the government, men who believed strongly in the desirability of preserving the Union, and men who would exercise the utmost prudence in determining the constitutionality of measures taken to prosecute the war to a successful conclusion.[23]

Obviously, Lincoln wanted to fashion the membership of the Court in such a manner that forthcoming decisions on

constitutional questions would not threaten the preeminent goal of his administration--the preservation or restoration of the Union. This does not mean, however, that Lincoln was willing merely to appoint men to the Court and hope that their judicial philosophies would support his political agenda. He refused "to grant to the Court the right to provide the final answer on questions that were of a political nature."[24]

Lincoln's idea that the Supreme Court did not have the last word on constitutional questions is illustrated by his criticism of the Dred Scott decision. In Dred Scott v. Sandford [19 Howard 393 (1857)] the Supreme Court denied Congress or the people of a territory the authority to outlaw slavery. Lincoln believed that the Dred Scott decision was a dangerous one because it ruled that "[t]he right of property in a slave is distinctly and expressly affirmed in the Constitution."[25] He feared that once the idea that property in a slave as a constitutional right was accepted de facto by the American public, the courts would feel safe to extend the principles of the Dred Scott case in a subsequent decision. Lincoln did not say that another Dred Scott decision was imminent. However, he warned that the day might come when a court would also declare that no state had the power to prohibit slavery.[26]

Lincoln did not believe that the right of property in slaves was expressly affirmed in the Constitution. During his debates with Stephen A. Douglas in 1858, he denounced

the Supreme Court's rejection of congressional authority over slavery in the territories. During the Galesburg debate, he also stated that the political obligation of a Supreme Court decision was not absolute. Quoting Thomas Jefferson in this speech, Lincoln said: "whenever a free people should give up in absolute submission to any department of government, retaining for themselves no appeal from it, their liberties were gone."[27] At Galesburg, Lincoln brought up the subject of political obligation in order to undermine Douglas' reasons for adhering to the Dred Scott decision. Yet, his denounciation of Douglas' doctrine (that a Supreme Court decision was "absolutely obligatory upon every one simply because of the source from whence it comes") shows that he did not believe that the Court was the final arbiter on constitutional questions.

Despite his serious concern about the implications of the Dred Scott case, Lincoln refused to view the decision as an enduring precedent:

> [I]t is my opinion that the Dred Scott decision, as it is, never would have been made in its present form if the party that made it had not been sustained previously by the elections. My own opinion is, that the new Dred Scott decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections.[28]

The Republican solution to the threat posed by the Dred Scott decision was a straightforward one: win the election of 1860 and obtain a reversal of the decision by changing the membership of the Supreme Court.[29]

Lincoln mentioned the subject of the Supreme Court and the scope of its authority in a number of important addresses during the first year of his presidency. He even made reference to the Dred Scott decision in his First Inaugural Address on March 4, 1861:

> At the same time the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[30]

By including such a frank statement in his inaugural address, Lincoln was sending a clear message to the Supreme Court. He was not going to allow the Court's decisions to interfere with his political agenda.[31]

The President had more to say on the subject of the judiciary on December 3, 1861 in his first Annual Message to Congress. He did not attack the Dred Scott decision or the Supreme Court again, but, rather, did say that the United States had outgrown the existing judicial system and suggested a number of modifications to the Supreme and the circuit courts. Lincoln offered three different solutions for implementation, each of which would change the circuit duties traditionally held by Supreme Court Justices. The President asked for the country to be divided into circuits

of convenient size, the number of which would correspond to the membership on the Court. Lincoln said that independent circuit judges should be provided for those areas not included in a reorganization of the judiciary. Or, he suggested, the Supreme Court could be relieved of its circuit duties altogether. This responsibility could be handed over to circuit judges who would be selected for each circuit. A third option involved the entire dissolution of the circuit courts; thereby leaving the adjudication of federal law to the district court judges.[32]

Lincoln devoted a significant portion of this message to judicial reform. The Annual Message to Congress was just the latest in a long line of campaign speeches, debates and addresses Lincoln employed to promote the Republican plan of reversing the Dred Scott decision by gaining control of the judiciary. The Dred Scott case became a symbol of Republican efforts to redress the sectional imbalance which existed in the American federal court system.[33] In the decades before the Civil War, the southern states enjoyed over-representation in the Congress, and this disproportionate influence was also present in the courts. Under the Judiciary Act of 1837, the United States was divided into nine circuits, in which the nine Supreme Court Justices presided over circuit courts in cooperation with the federal district judges. Although the Act may have been adequate for a nation of twenty-seven states with a

population of 17,000,000 people in 1840, it had turned into a very inequitable system twenty years later:[34]

> [In 1860] ... [f]ive of these [circuits] consisted exclusively of slave states, with a population of a little over eleven million, while the remaining four contained over sixteen and a half million. The Ninth Circuit, embracing Mississippi and Arkansas, had little more than a million people; the Seventh consisting of Ohio, Indiana, Illinois, and Michigan, had over six million. Eight of the newer states, six of them free states, were not assigned to any circuit.[35]

The Republicans were also concerned with the strong Democratic representation on the Supreme Court. All of the judges on the Supreme Court in 1860 were appointed by Democratic presidents; only one, Justice John McLean, supported the Republican Party in 1860.[36] Since the Republicans had just gained control of the White House, and, to a lesser extent, the Congress, the party now had an opportunity to eliminate the sectional imbalance in the courts and the Democratic party's domination of the federal government.

Although the Republicans were eager to adjust the configuration of the circuits in order to conform to the growth in population and the judicial needs of the United States in the 1860's, the actual mechanics of circuit reform fell victim to political infighting. The reorganization of the circuit court system became an important issue for the Thirty-Seventh Congress, despite the attention that was paid to the problems associated with the war. Every congressman realized that the way in which the states were aligned under

the new circuit system would be the critical factor in determining future appointments to the Supreme Court.

> [As far as the] . . . political leaders who were campaigning on behalf of particular candidates were concerned, it was of vital consequence to them to see to it that states with equally prominent aspirants were thrown into different circuits rather than into the same one--otherwise the possibility of dominating over an appointment was seriously threatened.[37]

The greatest threat facing a prominent aspirant was the possibility of his state being placed in the same circuit as Illinois. Such an occurrence would sound the death knell for a candidate's chances because it was known that the President "desired to make an appointment from his own state, where he had political associates of long-standing."[38] The members of the Iowa delegation in the House and the Senate respected this political reality, and they pushed for their state to be placed in a circuit with Kansas, Minnesota, and Missouri. If Iowa were put in the same circuit as Illinois, it would be unlikely that Iowa hopeful Samuel F. Miller would be chosen over such Republican candidates in Illinois as Orville H. Browning, David Davis and Thomas Drummond.[39]

While the battle lines were being drawn in Congress over judicial reorganization in December of 1861, Lincoln still had not filled the three vacancies that then existed on the Court. The first of these was created on May 31, 1860, when Justice Peter V. Daniel, a conservative Democrat and states-righter died. President Buchanan tried to appoint his Attorney-General, Jeremiah S. Black in his

place on February 5, 1861. However, with Lincoln's succession only weeks away, the Republicans were not willing to allow a seat on the Supreme Court to be filled with another Democratic nominee. "But Black's real liability in the confirmation contest was that he opposed the outright abolition of slavery--not a popular position on the eve of the Civil War."[40] The Senate confirmation vote was close: Black was defeated by only one vote--25:26. Republican senators successfully blocked the nomination.[41]

The Seventh Circuit (consisting of Illinois, Indiana, Michigan, and Ohio) was left without representation when Justice John McLean of Ohio died on April 4, 1861. McLean, an abolitionist, was known more for his political sagacity than his judicial work.[42] The third vacancy occurred when Justice John Campbell resigned his seat on April 28, 1861. Even though he had tried to convince political leaders of his native Alabama that the Southern states should work towards a compromise of their differences with the rest of the Union, Campbell pledged to stand by his state in any event.[43] Despite personal opposition to Alabama's act of secession and to the war itself, Campbell left the Supreme Court to serve as Assistant Secretary of War for the Confederate States of America.[44]

As Lincoln completed his first year in the White House, the Supreme Court was losing its ability to function properly.[45] Vacancies on the Court left three circuits without representation: after the secession of the Carolinas

and Georgia from the Union, Justice James M. Wayne "represented the Sixth Circuit Court of the United States in name only; part of the circuit of Justice Catron was lost for a considerable period. Chief Justice Taney's circuit was the scene of intense border strife."[46]

To make matters worse, Taney, Justice Nathan Clifford and Justice John Catron were ill throughout most of the year.[47] In reality, the Supreme Court in 1861 consisted of three men: Justices James M. Wayne of Georgia, Samuel Nelson of New York and Robert C. Grier of Pennsylvania.[48]

Even though the Supreme Court was in dire need of new blood, judicial appointments were not among Lincoln's principle concerns. The events of the war in that first year - the acts of secession, the instability of the border states, the Union defeat at First Bull Run, and the defenseless condition of Washington - demanded Lincoln's immediate attention.

Moreover, since the Supreme Court was in recess from March 14, 1861 until December 2, 1861, Lincoln did not have to consider making an appointment until the end of the year. Understandably, the President used the respite provided by the recess to defer the responsibility for making the appointment until it became an absolute necessity to do so; yet, the pressures on Lincoln to satisfy the insatiable appetites of office-seekers was enormous. Those who felt responsible for the Republican victory in 1860 lobbied the President-elect by the thousands for their share of the

spoils.[49] After he had been President for only five months, Lincoln

> was so harassed with applications for appointments that he sometimes thought that the only way that he could escape from them would be to take a rope and hang himself on one of the trees in the lawn south of the President's House . . . .[50]

The quest for the patronage plums of the Department of Justice--the federal attorneyships, marshallships and judgeships - began in earnest soon after the 1860 elections. From the moment that Abraham Lincoln entered the White House in March of 1861, efforts were underway to secure a seat on the Supreme Court for his friend David Davis. On March 6, two days after Lincoln's inauguration, Henry Winter Davis wrote the President on behalf of his older cousin, David. H. W. Davis, Congressman from Maryland, and a former Know-Nothing begged Lincoln to appoint Davis to the vacancy created by the death of Justice Daniel in 1860:[51]

> Though not entitled to intrude on you any suggestion [for] your appointments, I beg to be allowed to express to you the interest I feel in the filling of the vacancy on the Supreme Court Bench: and I venture to press on you the peculiar fitness both in experience, learning, judicial habits and judicial cast of [the] mind of the Hon. David Davis. I know that you are [better] acquainted with his capacity than even I am. The vacancy must not be filled by a gentleman from a slave state for . . . Judge Daniel though a resident in Virginia held his court in the extreme South. The slave states have won their <u>full</u> share on that <u>Court</u>: that consideration is therefore out of the way and Judge Davis is himself at any rate a Marylander by birth and a large landholder in that State. He is in the full maturity of his age and capacity and would give [?] of a long term so essential to the stability of the administration of justice. No appointment would better grace your administration.[52]

The death of Justice Daniel had left the Court's membership divided evenly between Northern and Southern justices. As an ardent Unionist, Congressman H. W. Davis obviously did not want the new appointee to come from the South. This concern is expressed plainly enough. Other points raised in the letter were mentioned to influence Lincoln's consideration of David Davis as a candidate for the bench. The phrase "I know that you are acquainted with his capacity [more] than even I am" represents a phrase common to most letters written to Lincoln on David Davis' behalf. Those individuals who supported Davis' candidacy for the Supreme Court constantly reminded Lincoln of the time he had spent with Davis while practicing law in Illinois. And if Davis' judicial skills were not impressive enough, the contribution which he made to the Republican victory in 1860 as Lincoln's loyal and hard-working campaign manager was also mentioned. It was not unusual for a letter in those days to be accompanied by a frank appeal for the appointment to be made in part as a reward for Davis' service to the Republican Party, if not to the President personally.

In his letter to President Lincoln, Henry Winter Davis described David Davis as a "Marylander by birth and a large landholder in that State." Congressman Davis must have recognized the importance of identifying David Davis as a native of a border state, for in making this appointment, Lincoln had to consider the instability of the border

states. Even though any candidate for the bench would have to support both the war effort and Lincoln's policies for preserving the Union, the situation which existed in the early months of the war meant that the candidate should also be acceptable to the border states and the upper South. Since Lincoln wanted to bring these regions back into the Union as soon as possible, he was consistently careful not to alienate them through his choice of federal appointments.[53]

It was no coincidence, therefore, that the two men thought to be under consideration for Daniel's seat were both from Kentucky. Throughout March of 1861, newspapers in Baltimore and New York were predicting that John J. Crittenden and Joseph Holt were the candidates most likely to receive the nomination.[54] Kentucky's Crittenden had served in both houses of Congress and as Attorney General under Presidents Harrison, Tyler, and Fillmore. He was the sponsor of the "Crittenden Compromise," an unsuccessful attempt to preserve the elements of the Missouri Compromise from Congressional interference by ratifying its articles as amendments to the Constitution. Although his sponsorship of the Crittenden Compromise had brought the Senator a great deal of national attention, he appealed to the Lincoln administration because he was a prominent legislator from a border state which had not as yet seceded from the Union. Lincoln was so intent on keeping Kentucky in the Union that he was reported to have said that he hoped to have God on

his side, but he must have Kentucky. "At one time he said, 'I think to lose Kentucky is nearly the same as to lose the whole game. Kentucky gone, we cannot hold Missouri, . . . nor. . . Maryland.'"[55]

The way was prepared for Crittenden's nomination by William H. Seward just as he was commencing his duties as Secretary of State. In the early morning hours of March 5, 1861, Seward requested Edwin M. Stanton, Buchanan's Attorney General, to draw up a formal nomination of the seventy-three year-old Senator before Stanton relinquished his office.[56] The eagerness with which Seward worked to secure a nomination for Crittenden illustrates the importance which the Lincoln administration attached to a resolution of the precarious relationship which then existed between the Union and the border states.

Despite Seward's attempts to secure Crittenden's nomination to the seat left vacant by Justice Daniel, Lincoln did not submit the appointment to the Senate for approval. Opposition to Crittenden's nomination began to build in the Senate from the extreme wings of both parties, and the candidacy died before it ever reached the Senate floor.[57] Nor did Joseph Holt's bid for a seat on the Supreme Court materialize. As Buchanan's Secretary of War, Holt had declared his support for the Union cause, made speeches, and circulated letters in order to persuade his fellow Kentuckians not to declare neutrality and thus, in effect, secede from the United States.[58] Such actions made

him a favorite among Republicans and a close ally of the Lincoln administration. Holt was mentioned a number of times as an acceptable candidate for the Court, but never received the nomination. Lincoln did, however, appoint Holt Judge Advocate General in the War Department under Stanton in September of 1862.[59]

Since Lincoln chose to procrastinate in filling the vacancy left by the death of Justice Daniel, aspirants for the bench had to wait patiently for Justice McLean to die before another opening was available on the Supreme Court. The death of McLean on April 4, 1861, "precipitated large numbers of recommendations and applications for the position."[60] Two Republican newspapers, the Chicago Journal and the Chicago Daily Democrat, boosted David Davis for the vacancy as soon as Justice McLean's death became known. A portion of the recommendations sent to Washington were from lawyers who rode horseback from courthouse to courthouse with David Davis in Illinois' Eighth Judicial Circuit. One member of Davis' coterie was Lawrence Weldon, who practiced law in Bloomington.[61] On April 6, 1861, two days after Justice McLean's death, Weldon wrote as follows while attending court with Judge Davis in Urbana:

> I see that Judge McLean has departed this life. The question is who shall succeed to the ermine as worthily worn by him. If Abraham Lincoln, on account of his ability and honesty should be taken from the humble walks [?] of an American [c]itizen to be President of the United States why should not David Davis with the same characteristics be taken from his present position to be honored with a seat on the supreme bench--especially when he was so instrumental in giving the position to him

> who now holds the matter in the hollow of his hand. Dear Hill, if justice and gratitude are to be respected Lincoln can do nothing less than to tender the position to Judge Davis--his nomination to that office would be hailed all over the country as the dawning of a new patriotism and hope for a distracted country. I want you to suggest it to Lincoln and [see] what he says about it. The person will have to be taken from one of the four or five states constituting this circuit and I know of none of them more deserving than Illinois. She is now almost the first state in the district. I hope you will not fail to suggest the matter to Lincoln.
>
> P.S. Judge Davis would not ask anything--and is not an applicant as you know. I am acting entirely on my own.[62]

The correspondent Weldon referred to as "Hill" was Ward Hill Lamon. Born in Frederick County, Virginia, in 1828, Lamon settled in Danville, Illinois, in 1847. An intimate friend of both Davis and Lincoln, he was an impassioned Whig and extrovert who enjoyed playing the banjo while leading his fellow lawyers in singing "negro melodies" as they rode the circuit together. Lamon formed a law partnership with Lincoln in November of 1852; their firm served Vermillion County until 1856. As a member of Lincoln's campaign staff, Lamon worked to secure the Republican delegates from his native West Virginia during the Chicago Convention in May of 1860. Upon Davis' suggestion, Lincoln appointed Lamon United States Marshal for the District of Columbia. Lamon's primary task as Marshal was the protection of the President; he was also responsible for executing the orders and writs of the Supreme Court. Once Lamon's tenure ended in 1865, he became a law partner of former Attorney General Jeremiah S. Black.[63]

Weldon's letter of April 6, 1861, was typical of those sent to Lamon in Washington within days of John McLean's death by supporters of Davis in Illinois. As Lincoln's chief bodyguard, Lamon was in constant contact with him in the White House. Naturally, Lamon was selected to convey the idea to Lincoln that David Davis would be a logical candidate for the Supreme Court, and was asked to suggest to the President that he owed Davis a position on the Court, especially for the contribution he made as Lincoln's campaign manager in 1860.[64] In that capacity, Davis was involved in the intricate competition between the different factions of the Republican Party for the spoils of victory. Davis was instrumental in securing Cabinet appointments for Simon Cameron of Pennsylvania as Secretary of War, William H. Seward of New York as Secretary of State, and Caleb B. Smith as Secretary of the Interior.[65] Lamon later was to approach these three men and tell them of Davis' candidacy. He was also expected to remind them of the effort Davis had made to get them into the Cabinet. At times, the manner in which Lamon was told to call in favors in order to gain support for Davis was quite personal and direct in nature. For instance, Leonard Swett, a lawyer from Bloomington and associate of both Davis and Lincoln since 1849, wrote Lamon and told him to put pressure specifically on Caleb B. Smith: "Tell Smith what I know, that it is through the Illinois fight and Judge Davis that Judd went out and he went in, [to

the Cabinet] and we think we ought to be remembered for it."[66]

The Illinois fight to which Swett refers was between Smith and Norman B. Judd for a place in Lincoln's Cabinet.[67] At the Chicago Convention, Davis had promised Caleb Smith a Cabinet post if the Indiana delegates would support Lincoln's nomination. Although Lincoln was annoyed by Davis' practice of dispensing patronage in his name, and without consulting him in advance, he subsequently agreed to appoint Smith, along with Cameron. However, as Republican State Chairman, Judd had worked just as hard as Davis and Swett to obtain Lincoln's nomination for President--and he too wanted to be rewarded with a Cabinet post. He was supported by the Chicago faction of the Republican party in Illinois, which resented the influence of the Bloomington group (led by Davis and Swett) upon the President. Consequently, one of the leaders of the so-called anti-Davis wing of the Illinois Republican party, Senator Lyman Trumbull, started a campaign to secure for Judd a Cabinet seat.[68] As Senator Trumbull marshalled his forces to push for Judd's nomination, members of the Bloomington group wanted Davis to allow them to submit his name to Lincoln for the Cabinet. If Lincoln was to bring a member of his own state as a personal advisor into the Cabinet, Davis' selection over Judd would give the Bloomington Republicans the President's ear. Davis declined this offer because he had already promised to secure the appointment for Caleb

Smith. It is to this situation that Swett was referring when he wrote the phrase "it was through. . . Judge Davis that Judd went out and he [Smith] went in [the Cabinet]."

Even though Davis' friends were working hard to let all of Washington know that he was a candidate for the Supreme Court, Davis was more concerned about the effect of the war on the Union and the fate of the border slave states than with his chances of obtaining a seat on the Supreme Court.[69] Davis appreciated the effort that was being made by his associates on his behalf, but he did not expect them to go to any great lengths to secure the appointment for him.[70] For instance, when Lamon offered to resign as Marshal for the District of Columbia in order to ensure Davis' nomination, the Judge would have no part of it. On April 14, 1861, the morning after Davis received the telegram from Washington containing Lamon's proposal, he wrote to Lamon saying:

> Your appointment to the Marshallship rejoices my innermost soul . . . I feel greatly indebted, Hill for your offer to relinquish your claims if I was appointed Supreme [Court] Judge. It exhibits your true . . . friendship but I would not have had you relinquish your claims, for the world.[71]

Davis would not have Lamon relinquish his claims because he did not himself expect to get a seat on the Supreme Court; he believed that he lacked the experience necessary to be regarded as a viable candidate for the nomination, because his service as a jurist in Illinois had been restricted to the trial court. Perhaps Davis was aware that Lincoln

thought that "an excellent trial judge might not necessarily make the best Supreme Court Justice."[72]

Davis heard that Federal Judge Thomas Drummond of Chicago had been recommended by the bar of that city for the Supreme Court. Although Davis did not believe that Judge Drummond would be appointed, he did want the federal judgeship that would be relinquished by him if Drummond happened to reach the Supreme Court. Davis asked Lamon to bring this subject up with Lincoln, so the President would know that he wanted to be appointed to a higher judicial position than the Eighth Judicial Circuit in Illinois.[73] Davis had his eye on a seat on the United States District Court in Chicago, which was created in 1855 when Illinois was divided into two districts. When this division took place, Judge Thomas Drummond had been District Court Judge for ten years, and was assigned the northern district, with his court sitting in Chicago.[74]

Drummond's candidacy for the Supreme Court was instituted by William A. Bradley, a federal court clerk and Joseph R. Jones, United States Marshal, both of Chicago. These men enlisted the help of Illinois Congressman Elihu B. Washburne, who, like Drummond, resided in Galena, Illinois.[75] Washburne, an old political associate of Lincoln, was his chief sponsor in northwestern Illinois.[76] Since Washburne was close to Lincoln, Drummond's supporters hoped that he would be able to counter the influence of Orville H. Browning, another friend of the President, who

wanted the Supreme Court nomination for himself. Although William Bradley was confident that Lincoln would award Drummond the seat, he pressed Washburne to advance the Judge's case to the President, because he feared that Browning was bound to "worry it out of him."[77]

Orville Browning was born on February 10, 1806 in Harrison County, Kentucky. He studied law while working in his uncle's law office and was admitted to the bar in early 1831. In the spring of that year Browning migrated to Illinois and settled in the village of Quincy, about 140 miles north of St. Louis, Missouri. Browning gained his initial legal experience handling the hundreds of conflicting land titles between land speculating companies and veterans over the land known as the Military Tract--the area between the Illinois and the Mississippi, which had been set aside by Congress as bounty land for the enlistees who served in the War of 1812. Litigation generated by these land cases filled court dockets for years and Browning built up his practice by representing the land companies.[78] In addition to his legal practice, Browning was interested in building a political career.

In 1836, at the age of thirty, Browning was elected to the Illinois General Assembly, which brought him into contact with then Congressman Abraham Lincoln. As a state senator in the 1830's and a state congressman in the 1840's, Browning worked with Lincoln and other Whigs in Illinois, in addressing important issues of that era. Criticism of

state-sponsored internal improvements in 1838-39, and his fight with Stephen A. Douglas over the necessity for another Bank of the United States, along with Henry Clay's "American System" in the election of 1844 are but two of the issues which Browning championed.[79]

Through his involvement in Whig politics and his circuit work as a frontier lawyer, Browning's association with Lincoln turned into a friendship.[80] Their mutual interest in politics continued into the 1850s, as the two men worked to bring the divergent elements of the opposition to support the Kansas-Nebraska Act-- i.e. abolitionists, Independent Democrats, Know-Nothings and Whigs--which together formed the Republican Party. Although Browning worked with Lincoln in order to prepare the fledgling party for the election of 1856, he was indifferent to Lincoln's rise to power in the late 1850s. For instance, when Lincoln arrived to stay at Browning's house in Quincy on the occasion of a Lincoln-Douglas debate staged there on October 13, 1858, the host was absent.[81] Nor did Browning support Lincoln's bid for the presidential nomination in the election of 1860. He believed former Whig Edward Bates of Missouri would draw more votes than Lincoln, especially in the South where a Missourian could placate suspicions directed towards the new party. Browning tried to convince his fellow Republicans to support Bates' nomination as early as October of 1859.[82] When Lincoln secured the nomination, Browning was slow to reconcile himself to the fact,

believing that a mistake had been made in the selection of the candidate.[83]

Browning became interested in Lincoln's political fortunes once he became president. After the election, Browning took it upon himself to advise the President-elect on matters of policy. Like other Republican leaders, Browning "gave unsolicited advice about cabinet choices as well as minor Federal offices."[84] For example, he wanted Bates to be appointed Secretary of State, and was also interested in securing a high position in the Lincoln administration for himself. But above all else, Browning wanted an appointment to the Supreme Court.[85] The campaign to put Browning on the Court was started as early as January, 1861, when a petition was sent to Lincoln signed by Congressmen James H. Lane, Samuel C. Pomeroy and M. F. Townay, pleading with the President to make the appointment.[86] On April 8, 1861 a friend of Browning's, a Mr. Henry Asbury from Quincy, wrote to Edward Bates and asked the Attorney-General to take notice of Browning's abilities by nominating him. Asbury said that this request was made on his own accord; Browning knew nothing about it.[87]

If Browning had known about the existence of these letters, he would have preferred that they had not been sent, for he felt it inappropriate to make a direct application for such a distinguished position. It is for this reason that he refused to give his friends in Illinois

permission to submit his name for appointment as McLean's successor. He even went as far as to forbid the circulation of petitions for this purpose, because he thought the practice to be "incompatible with the dignity of the office."[88]

Despite the instructions which he gave to his supporters, Browning made a direct application for a seat on the Supreme Court anyway. Although he was embarrassed to do so, Browning sent a letter to Lincoln asking the President to consider him for the position:

> You know me about as well as I know myself; and in regard to my fitness for the office you know me better--for you occupy a far better standpoint for the formation of a fair and impartial judgment than I do. If, then, you shall think me competent to the duties of the office . . . there is nothing in your power to do for me which would gratify me so much as this. It is an office peculiarly adapted to my tastes, and the faithful and honest performance of the duties of which would be my highest pride and ambition.
>
> For twenty years, and more, I have been fighting the political battles of my party and my country under circumstances of exceeding difficulty, and without hope, or expectation of reward. . . .
>
> Heretofore, I have never asked . . . and whether this is granted or not I shall not ask again.
>
> I have asked nobody to aid me [I] have in fact refused to permit petitions to be gotten up by others. I felt that the relations between us justified me in addressing myself to you directly.
>
> I am willing <u>you</u> shall know that I do desire the office--I am <u>not</u> willing the world shall.
>
> I think Illinois is entitled to the office. She is now one of the first and most important states in the Union, and has never been honored with such an appointment. Ohio has had it for thirty years and has no right to claim it again. If it is to be given to Illinois, I do not think it egotism to say that my claims are, at least, equal to those of others.

> You will doubtless be beset by many whose claims will be more earnestly and more powerfully urged--yet I know that you can do as you please, and the great body of the people will not care a fig who the appointee is, so that he acquits himself of the duties of the office with integrity, fidelity, and a reasonable degree of ability.
>
> I do not think I would dishonor the position; but, as before remarked, you are more competent to judge than I am of my qualifications.
>
> One request, in conclusion, I make upon your friendship--if you reject my application you will not subject me to the mortification of letting it be known that I personally solicited the office and was refused. I have not written a line to any other person upon the subject--not even Mr. Bates--nor do I intend to, altho' I have been much urged to do so. I am willing to expose my wishes and feelings to you. I am not willing to exhibit them to others. The whole matter is in your hands.[89]

In this articulate appeal Browning touched upon an important point, one which was a matter of concern for all aspirants from Illinois: the question of Ohio. Like Browning, Lincoln's other associates in Illinois did not believe that Ohio was entitled to another Supreme Court appointment because that state had been represented by Justice John McLean for 32 years. In addition, these men felt that Ohio had already received its fair share of the so-called "first class" appointments, the most prestigious of which was the Secretaryship of the Treasury, awarded to Salmon P. Chase, former governor of Ohio.[90]

The question of what constituted a fair share of appointments for Ohio and Illinois respectively came up again when Davis learned that Chase was interested in McLean's former position. Davis was first notified that Chase was a candidate for the Court by William W. Orme, law

partner of Leonard Swett.[91] Orme then went to Washington on Davis' behalf to see if any progress was being made on the nomination. Reaching the Capitol on May 10, 1861, Orme settled into Lamon's quarters at the White House. The next morning, Orme accompanied Lamon as he was making his rounds, and saw Lincoln, Seward, Chase and Cameron on that particular day. Apparently Orme did not have an opportunity to talk to the President because Lincoln was in an early morning meeting with Thurlow Weed, the New York Whig politician and editor of the Albany Evening Journal. Although Weed would not divulge the substance of his interview with Lincoln, he did tell Orme that he "swore by the Judge and Swett in the dark."[92] This oblique endorsement was probably welcomed by Orme because Weed exerted considerable influence with Lincoln with respect to appointments.[93]

Orme also discussed Davis' candidacy with Simon Cameron. The Secretary of War believed that Lincoln had "frittered away his power of appointment in Illinois without doing himself any good."[94] Cameron told Orme that he would support Davis' bid for a position on the high court because he felt that vacancies should be filled by men from the Northern states.[95] Unfortunately for Davis, this pledge of support was to be of little consequence, because Cameron proved to be a liability to the chief executive. An inept administrator, Cameron was unable to manage the expansion of the War Department as it strove to meet the demands of an

unprecedented military build-up. The exigencies of the situation resulted in Cameron and his representatives awarding contracts for war materiel at exorbitant prices. When it became known that the federal government was purchasing everything from blankets to tugboats at three to five times the market price, Cameron's critics called for him to be held accountable for the corruption in the War Department. As if his implication in the contracts scandal was not enough, Cameron alienated Lincoln's trust with his arrogant attitude. Lincoln's secretary, John Nicolay, described him as "utterly ignorant . . . [s]elfish and openly discourteous to the President. Whatever influence Cameron had was lost as their relationship became strained."[96]

Despite the assurances made by Weed and Cameron, Orme concluded that there was little movement being made in Washington to fill the vacancies on the Supreme Court. The only other information which Orme could provide Davis was that Judge Stephen T. Logan, Lincoln's former law partner, was being presented as a candidate for the Supreme Court by his supporters in Springfield.[97] When Davis learned that the only development in Washington with regard to the vacancies was the news of Chase's candidacy, he remarked: "If Chase wants the appointment of Supreme [Court] Judge I would bet my farm he will get it. Neither Judge Logan nor myself would stand any chance against him."[98] Davis seems

to have resigned himself to the fact that Chase's nomination to the Supreme Court would be merely perfunctory.

In spite of his concern over Chase's candidacy, Davis did not abandon hope of receiving an appointment to a federal judgeship. In a hastily written letter, he ordered Orme not to leave Washington until he had discussed the whole subject of judicial reform with Lincoln. Davis believed that a reorganization of the Supreme Court was a necessity; it should consist of five judges who would hold court only in Washington. The circuit duties required of the justices would be undertaken by a group of judges sitting with the district judges. Davis derived this plan from the operation of a California circuit court, where a judge of the state Supreme Court sat with the district judge. He realized, however, that any attempt to reorganize the federal judiciary would be impeded by the war, and he did not see how the federal judgeships in the South could be filled, since they had been abandoned by the Confederate States. If the war continued for any length of time, Davis thought that public opinion would force the remaining Southern judges to resign.[99]

In his letter to Orme, Davis used the Seventh Circuit as an illustration of the inequities present in the federal judiciary. Davis said that Justice McLean's circuit was too large for one judge to administer properly. Twice as large as the eastern and southern circuits, the Seventh (consisting of Illinois, Indiana, Michigan and Ohio)

represented over six million people. Davis also mentioned the fact that the states which bordered on the Seventh Circuit on the north and west--Wisconsin, Iowa, Minnesota and Kansas--were not a part of any circuit, and reiterated the need for a reorganization of the Supreme Court, in order to provide these four states with the full benefits of representation by a Supreme Court Justice. Davis pressed Orme over and over to bring these matters up with Lincoln and to find out what the President's views were on these issues.[100]

William Orme had another opportunity to meet with Lincoln while he was in Washington, but while he had intended to discuss a position in the federal judiciary for Davis, he failed to bring the subject up at all. Instead, he began the discussion by asking the President for an office for Leonard Swett. Annoyed by Cameron's irresponsible dispensation of war contracts and by the persistent throng of office-seekers at the White House, Lincoln rebuffed any suggestion of an appointment for Swett. Shocked by Lincoln's reaction, Orme decided that this was not an appropriate time to petition the President for a judicial position for Davis.[101] Dissatisfied with his performance, Orme returned to Illinois.

Davis met Orme in Clinton, where the Judge was opening the court session there after a three week term in Danville. Davis responded to the news of Orme's failure to secure a commitment from Lincoln by saying: "I have never had any

expectation of getting on to the Supreme Bench."[102] Despite this pessimistic attitude, Davis still wanted to know what his chances were of receiving an appointment to the district judgeship. On May 31, he wrote Lamon, saying:

> I would like to know plainly how I stand with Mr. Lincoln. I entertain no doubts that interested persons have endeavored to prejudice him against me. Of course I shall never seek an explanation. When a good opportunity presents, I should like exceedingly if you would have a talk with Mr. Lincoln, and learn what his feelings are towards me, and also tell him, what my wishes are . . .[103]

Lamon did not send Davis a direct reply to his query; nor was this unusual, for Lincoln's bodyguard answered little of his mail.[104] Yet, Lamon did make reference to Davis' chances for a post in a letter to Orme a couple of months after Davis' inquiry. Lamon stated that he thought that Lincoln was considering Davis for an appointment to the Supreme Court. Lamon admitted, however, that the real contest for a seat was between Davis and Browning. Lamon was confident that Davis would prevail; for he considered him to be a shoulder above all the other aspirants from Illinois.[105]

The supporters of Orville Browning were also conscious of the race that was shaping up between their candidate and Judge Davis for a seat on the Supreme Court. Browning's most ardent supporter was his wife Eliza. Proud and ambitious, she worked diligently to promote her husband's political career.[106] Mrs. Browning believed that his modesty and unselfishness prevented him from gaining the recognition that he deserved. Since Browning's request for

the Supreme Court appointment on April 9 had not been granted, Eliza took it upon herself to write as follows to Lincoln on June 8:

> Mr. Lincoln I do not ask this because I am thirsting for distinction, far from it! I ask it because I know my husband to be one of the <u>wisest best</u> men in the nation. I know him to be an unselfish Patriot, and not a miserable office seeker . . . I ask it at your hands Sir because I know, . . . there has always been a class of cold-heartless politicians in Illinois, that have left no stone unturned, to defeat him, and prevent his taking that position that his talents and integrity so justly entitled him to . . . I could write volumes [e]numerating the sacrifices Mr. Browning had made for his country . . . [I] mention [one example] . . . to remind you . . . why I feel so anxious for my husband to get the appointment. Two or three years [ago] . . . whilst he was making laborious political speeches in the open air, he brought on a rupture of the bowels that gave him great pain and was considered imminently dangerous by his physician. By wearing a support all the time, he is able to attend to business; the difficulty must increase with age. and we have no incum [sic] except from his profession . . . I know Judge Davis wants the appointment and is pressing his claims. I know men in Indiana . . . [and] in Ohio . . . want it. Now I ask you Mr. Lincoln, in view of the whole matter, do you conscientiously think any of them have Stronger Claims than Mr. Browning?[107]

Mrs. Browning's desire to have Lincoln reward the sacrifice of her husband's bowels for the President's sake, while perhaps asinine, was not a presumptuous request. Eliza Browning and Abraham Lincoln had established a friendly dialogue with one another over the many years during which Lincoln and Browning were associated in legal and political activities. Lincoln found Mrs. Browning to be an intelligent woman who was willing to lend him a sympathetic ear from time to time.[108] Even though Lincoln

enjoyed Mrs. Browning's companionship, he did not yield to her request.

Although Mrs. Browning was confident that her husband would receive the appointment, she recognized the threat posed by Davis and others in Indiana and Ohio. In addition to Salmon P. Chase, another prominent member of the Republican Party from Ohio was a viable candidate for the position: Noah H. Swayne. An active member of the party from its inception, Swayne was an ardent supporter of Lincoln in 1860. He now turned to the heavyweights of the Republican Party in Ohio for assistance in his own campaign. On the day of Justice McLean's death, Swayne sent a letter to Chase, notifying the Secretary of the Treasury of his intentions. Swayne said that Chase's support would put him "under a lasting obligation." For a man who had his heart set on winning the Presidency in 1864, an offer of prospective support from such an eminent man as Swayne must have been enticing to Chase.[109]

Swayne had the support of a number of prominent Republican leaders and financial magnates in Ohio. One influential man in Swayne's camp was Ohio governor William Dennison, who pressed for Swayne's appointment by letter and in personal meetings with Lincoln. Dennison told Lincoln that Swayne's appointment as Justice McLean's successor would be consistent with the effort being made to organize Indiana, Michigan and Ohio in the same circuit.[110] Swayne also received support from Aaron F. Perry, a renowned lawyer

in Cincinnati, who said that if Chase were not appointed to the Court, he would prefer Swayne for the position. Perry told Chase that the Supreme Court would benefit from Swayne's strong anti-slavery convictions.[111] A letter was also sent to Lincoln on Swayne's behalf by William B. Ogden, real estate tycoon and railroad builder. In his petition to Lincoln, Ogden pointed to an advantage which Swayne possessed that only a businessman would emphasize--his wealth. Since inflation was present in the wartime economy Ogden reasoned, Swayne would be able to live on a Justice's pay because he had the " . . . means to live handsomely independent of his salary."[112]

In addition to this strong political support, Swayne had one further advantage over his competitors, especially over the other rivals from his own state. As a good friend of John McLean, Swayne was said to be McLean's own choice to succeed him on the bench.[113] However, if Swayne's status as heir apparent helped him to distance himself from his home state rivals, it did not intimidate his chief competitors--Browning, Davis and Drummond. These three men and their supporters continued to press their claim to the vacancy during the summer of 1861.

Since the Brownings' efforts to petition the President with personal appeals did not have the desired effect, Orville Browning tried a different approach--in the Senate of the United States. When Senator Stephen A. Douglas died on June 3, 1861, Governor Richard Yates of Illinois

appointed Browning to serve ad interim until the legislature could convene and make a new selection. Browning accepted the appointment and made his way to Washington to attend the special session of Congress that convened on July 4.[114] The special session was called in recognition of the urgent need for the nation's representatives to discuss the war and what the federal government should do to win it. Although Browning participated fully in the debates, he held only a temporary interest in the senatorship; his real ambition was to secure a seat on the Supreme Court.[115]

The special session of the 37th Congress lasted for five weeks. During this time, Browning made frequent informal calls on Lincoln. Their first meeting took place on the evening of Browning's arrival to Washington. Lincoln showed Browning the text of his message to Congress scheduled for the next day. After reading the address, the two men sat down to discuss the incident at Fort Sumter.[116] Browning's meetings with Lincoln throughout that summer were of this fashion. At the White House they would hold discussions, often reaching similar conclusions about the course of the war and the goals to be reached by its end.[117] Unfortunately for Browning, these conferences, instructive as they were, did not produce the one thing he wanted most: Lincoln's acceptance of his application. Empty-handed, Browning returned to Quincy at the close of the special session of Congress.

Browning intended to keep his ulterior motive for accepting the senatorship between himself and his wife, but Eliza Browning revealed her husband's secret to Lincoln in her letter of June 8. Marking her letter with the inscription sub rosa, she said that Browning did not want to be in the Senate longer than the fall session. Mrs. Browning told Lincoln that her husband would attend Congress for the one term only because he thought it was important for the administration to have a "warm adherent" on Capitol Hill. Obviously, Eliza Browning viewed the senatorship as yet another example of her husband's devotion to the President.[118] This opinion however was not shared by certain individuals who had learned of Browning's activities. William H. Bradley, the district and circuit court clerk in Chicago who supported Thomas Drummond's candidacy for the Supreme Court, informed Congressman Elihu B. Washburne that Browning "took the senatorship to aid himself in his efforts to secure the Judgeship." Aware of Browning's petition to Lincoln for the position, Bradley was concerned about the prospect of Browning's becoming Illinois' representative on the Court if Swayne were appointed to replace McLean.[119]

In the summer of 1861, Davis was more worried about the effects of the war on the nation than Browning's exploits in Washington. He told Lamon the "deplorable condition of the country has driven all politics out of my head . . . . [the] [d]esire for place and position must give way before the

dreadful prospect in the future."[120] After a lifetime of devotion to politics, such a frank statement illustrates the despair Davis must have felt. Fortunately, the affairs of the circuit court offered a respite from his deep concern for the future of the Union. One event in particular seemed to lift Davis' spirits. As his term on the Illinois Eighth Circuit drew to a close in June, lawyers from all the counties in his circuit urged him to run for re-election. Lawyers and court officers alike signed petitions praising Davis' legal qualifications, integrity and honor.[121] In appreciation of their efforts, Davis said that he did not know what he could do as well as presiding over the Eighth Circuit. The residents in each county evidently agreed with Davis' assessment; his re-election was unanimous.[122]

Browning's presence in Washington was a matter of some concern for Davis' supporters. Leonard Swett was worried that Browning would be able to consolidate the support of his fellow senators in his drive for the seat on the Court. Conscious of the efforts being made by various senators to secure appointments for their favorite sons, Swett remarked that "Lincoln was nearly swept off his feet by the current of influence."[123] Swett knew that the Davis candidacy stood at a disadvantage because few of the Judge's supporters had an opportunity to exert direct pressure on the President in Washington. The majority of Davis supporters were circuit lawyers who lived in eastern and central Illinois. Most of them showed their support for Davis by sending Lincoln

private letters or by signing petitions which pressed for his appointment to the Supreme Court. Since at times Lincoln was receiving hundreds of such letters each day, requesting one form of patronage or another, the influence of the letters sent by Davis' supporters can be questioned, particularly when these efforts are compared to Browning's ability to drop in for personal talks with the President at the White House at will throughout the summer of 1861.

The 'lobby by letter' effort was also hampered by the behavior of Ward Hill Lamon in Washington. Lamon was a vital conduit in the line of communication between Illinois and the White House. Ideally, Davis and his supporters would use Lamon as a liaison between themselves and the President. Davis and Swett would address their concerns to Lamon and ask him to bring them up with Lincoln. At times, letters would be sent to Lamon on the assumption that he would pass them on to the President. Unfortunately for Davis, Lamon did not embrace his duties as a courier for his associates from Illinois. He was "bored to death" with the whole business of patronage.[124] Davis complained of Lamon's reluctance to speak to Lincoln about his appointment to the Court.[125] Since Lamon's reliability as a messenger and lobbyist was doubtful, Davis was forced to ask his other associates in Washington to forward his letters. For example, Davis asked William Dole, Commissioner of Indian Affairs, to deliver a letter to Lincoln because correspondence that was sent to the President through his

secretaries did not reach him.[126] It was the opinion of some of Davis' supporters that the "surest way to get [letters] in the hands of the President" was to give them to Leonard Swett.[127]

Swett's fears concerning Davis' chances of securing the nomination in the face of Browning's position in Washington were confirmed in August. Swett received word in Bloomington that Lincoln had said "I do not know what I may do when the time comes, but there has never been a day when if I had to act I should not have appointed Browning."[128] Swett brought this information to Davis' attention during one of the daily meetings which were held in Swett's law office in Bloomington. At this meeting, Davis, Swett and Orme discussed the implications of this remark on Davis' candidacy. The three men decided that the words were too Lincolnian in nature not to be genuine. Believing the appointment was lost, all three sat in Swett's office in a depressed state. Finally Swett broke the silence by saying: "The appointment is gone and I am going to pack my carpet-sack for Washington."[129] Davis told him not to go, but Swett persisted, wanting to talk to Lincoln about the appointment before he had a chance to nominate Browning to the Supreme Court.

Swett reached Washington in two days and immediately called on the President at seven o'clock in the morning on August 15, 1861. Swett spent most of the morning at the White House, reminding Lincoln that it was through the work

of David Davis and other lawyers on the Eighth Illinois Circuit that he had been able to reach the presidency. When Swett asked Lincoln whether he would be sitting in the White House if not for the efforts of Davis, the President had to agree. Swett pressed on, telling Lincoln that since Davis was qualified for the position, he ought to be nominated "in justice to yourself and public expectation."[130] Swett left the White House thinking that he had had a successful discussion with Lincoln.

After reviewing his conversation with the President, he recognized that there may have been a weakness in his argument. Putting his thoughts to paper, Swett took the letter over to the White House and read it to Lincoln:

> I want to say one more word. Some friends of mine have asked some patronage for me. I have thought you might say if Davis receives this place Swett or his friends will next say he must have something. I have no such thoughts. The truth is Davis is my friend, and if you can honor him I will consider it a favor to me and you can plead what is done for him as an estoppel to me and my friends at any time you chuse and the plea will be honored . . . I wish to say I am applying for nothing to any member of your administration.[131]

There was more to this letter than a proclamation of faith on Swett's part--it was also good politics. Swett recognized the fact that Lincoln might well hesitate in appointing Davis to the Supreme Court because he might then be criticized by the "Democratic" or anti-Davis faction of the Illinois Republican party, led by Norman B. Judd and Senator Lyman Trumbull. If Lincoln were to be accused by these men of favoring the Bloomington wing of the Republican

party by appointing Davis, the President could then produce Swett's letter to show that Swett and his friends had relinquished all claim to any position in his administration. By writing this letter, Swett offered Davis' nomination some degree of protection from the intra-party rivalry over the spoils of Republican victory.

As he was reading the letter to Lincoln, Swett reported Lincoln to have said: "If you mean that among friends as it reads I will take it and make the appointment." Despite the promise made to Swett that August afternoon, the President did not give David Davis Judge McLean's seat in the summer of 1861, nor did he fill any of the three Supreme Court vacancies until the following year.[132]

NOTES FOR CHAPTER ONE

[16]Kutler, pp. 48-63. The Judiciary Act of 1863 created a Tenth Circuit for California and Oregon. This arrangement was temporary, however. The Judiciary Act of 1866 reduced the Supreme Court from ten to seven members and reorganized the federal judiciary into nine circuits. Field represented the Ninth Circuit, consisting of California, Oregon and Nevada. The Judiciary Act of 1869 restored the Court to a membership of nine.

[17]Henry J. Abraham, Justices And Presidents: A Political History of Appointments to the Supreme Court 2nd ed. (New York: Oxford Univ. Press, 1985), pp. 25-26.

[18]Ibid., p. 5 Other individuals have compiled similar lists which have included these and other qualifications.

[19]Ibid., p. 5.

[20]Ibid., p. 7.

[21]Kenneth B. Umbreit, Our Eleven Chief Justices (New York: Harper and Brothers, 1938), pp. 41-42. According to Umbreit,"as the Supreme Court consisted of the Chief Justice and five associate justices this meant that each individual on the Court had to ride through one-third of the United States twice a year, either on horseback or by stage or occasionally by boat, as well as come to the seat of government twice a year for the sittings of the Court. It was this intensive travelling that has made Washington purposely avoid appointing elderly men to the Court and that prompted Governeur Morris later to remark that he was not quite convinced that riding rapidly from one end of this country to another is the best way to study law."

[22]Daniel S. McHargue, "Appointments to the Supreme Court of the United States: The Factors That Have Affected Appointments 1789-1932" (Ph.D diss., Univ.of California, Los Angeles, 1949), p. 603.

[23]Charles Grove Haines and Foster H. Sherwood, The Role of the Supreme Court in American Government and Politics 1835-1864 (Los Angeles: Univ. of California Press, 1957), p. 446.

[24]David M. Silver, Lincoln's Supreme Court (Urbana: Univ.of Illinois Press, 1956), p. 57.

[25]Robert W. Johannsen, ed., "Mr. Lincoln's Reply-Fifth Joint Debate, Galesburg, October 7, 1858," The Lincoln-

Douglas Debates, (New York: Oxford Univ. Press, 1965), p. 230.

[26]Ibid., pp. 230-231.

[27]Ibid., p. 232.

[28]Ibid., p. 231.

[29]Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford Univ. Press, 1978), p. 454.

[30]James D. Richardson, ed., A Compilation Of The Messages And Papers Of The Presidents, 10 vols. (Washington D.C.: G.P.O., 1899), 6: pp. 9-10.

[31]William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's Court-Packing Plan," The Supreme Court Review (1966): pp. 350-354.
President Franklin Delano Roosevelt planned to use this very statement from Lincoln's First Inaugural Address in a defiant radio broadcast in January of 1935 if the Supreme Court ruled against the government's abolishment of the gold clause. In the Joint Resolution of 5 June, 1933, Congress nullified the gold clause in public and private contracts. A gold clause called for a payment of a fixed amount of gold by weight to be made to protect erosion of a debt's real value by inflation. Such a clause was impossible to honour because the Emergency Banking Act of March, 1933 had taken gold out of circulation to stop hoarding of currency and to allow for a devaluation of currency if inflation occurred. The gold clause was also nullified to prevent creditors from demanding repayment of a loan (especially a government contract) in enough of the devalued currency to equal the original gold value of the contract. If such repayments were allowed, there would be a great increase in public and private indebtedness. In such an event, it was projected that the government deficit was projected to rise to a crippling $ 70 billion.

Fortunately for the federal government (and not so fortunate for those holding such contracts, government bonds and gold certificates) the Supreme Court ruled in its favor. Chief Justice Hughes, writing the majority opinions in all three of the Gold Cases, ruled that the impairment of the obligation of public and private contracts fell within the monetary powers of the federal government.

[32]Ibid., p. 49.

[33]Haines and Sherwood, pp. 444-445.

[34]Felix Frankfurter and James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (New York: Macmillan, 1927), p. 49.

[35]Kutler, p. 14. The eight states not assigned to any circuit were: California, Florida, Iowa, Kansas, Minnesota, Oregon, Wisconsin, and Texas.

[36]Haines and Sherwood, p. 444. John McLean served on the Supreme Court from 1829 to his death in 1860. The first Jackson appointee, McLean was one of the most politically astute of all the Justices. As a perpetual aspirant for the Presidency, he was interested in the Jacksonian Democrats, Anti-Masons, Whigs, Free Soilers, Know-Nothings, and Republicans.

[37]Silver, pp. 48-49.

[38]Kutler, pp. 16-17

[39]Silver, pp. 48-56.

[40]Tribe, p. 88.

[41]Abraham, pp. 114-115.

[42]Carl B. Swisher, The Taney Period 1836-64, vol. 5 of The Oliver Wendell Holmes Devise: The History of the Supreme Court of the United States (New York: Macmillan, 1974), pp. 46-48.

[43]Ibid., pp. 742-744.

[44]Abraham, p. 112.

[45]Ibid., p. 116.

[46]Swisher, p. 745.

[47]Abraham, p. 116.

[48]Haines and Sherwood, p. 441.

[49]Harry J. Carman and Reinhart H. Luthin, Lincoln and the Patronage (1943; rpt., Gloucester, Mass.: Peter Smith, 1964), pp. 4-10.

[50]Haines and Sherwood, p. 447.

[51]The Know-Nothing Party was active as a national organization in the United States from 1854-1859. Officially called the American Party, the organization's more usual name was derived from the reply 'I know nothing about it' which members were sworn to give to inquisitive

questions. The party's popularity was due in part to the disruption of traditional party support by those who were unwilling to support the pro-slavery Democrats or the anti-slavery Republicans took refuge in the American Party. The anti-Catholic and nativistic sentiments that were strong in this period also contributed to the party's success. All who joined the party were pledged to vote only for native Americans, to demand immigration restrictions, and to fight the Catholic Church. In the elections of 1854 and 1855 the party was successful in New England, New York, Pennsylvania, Maryland and the Ohio Valley. The Know-Nothings expected to take the nation in the election of 1856.

However, the slavery issue divided the American Party when a pro-slavery resolution was pushed through a party convention by southern delegates in 1855. When the Know-Nothings entered the election of 1856, the party was so divided that its presidential candidate, Millard Fillmore, only carried the state of Maryland.

[52]Henry Winter Davis, Letter to Abraham Lincoln, 6 March 1861, Abraham Lincoln Papers, Robert Todd Lincoln Collection, Manuscript Division, Library of Congress, Series 1: March 4-18, 1861. Reel 18, Item 7818-9.
NOTE: Subsequent entries will be abbreviated as: LP, RTLC, LC.

[53]Abraham, p.116.

[54]Swisher, p. 812.

[55]E. Merton Coulter, The Civil War and Readjustment in Kentucky (1926; rpt., Chapel Hill, N.C.: Univ. of North Carolina Press, 1966), p. 53.

[56]Swisher, pp. 811-812.

[57]Ibid., p. 814.

[58]Coulter, pp. 93-97.

[59]Ibid., p. 812-814. As Judge Advocate General, Holt supported the manner in which military tribunals exercised their power during the war. This position was affirmed by his role in the case Ex parte Vallandigham, and put him at odds with his friend David Davis, who wrote the opinion of the Supreme Court in the Milligan case [Ex parte Milligan, 4 Wall. 2 (1866)].

[60]Ibid., p. 815.

[61]"Lawrence Weldon was born in Muskingum County, Ohio, in 1829, was reared and educated in that state, being admitted to the bar in 1854, and in the same year came to Illinois, engaging in practice at Clinton. He was elected

to the General Assembly in 1860 and was one of the presidential electors for Abraham Lincoln that year. President Lincoln appointed him, in 1861, United States district attorney for the Southern district. He resigned in 1866 and engaged in private practice at Bloomington. In 1883 President Arthur appointed him an associate justice of the United States Court of Claims at Washington, and he held that office until his death, on April 10, 1905. In the early days he had practiced law on the circuit with Mr. Lincoln. . . ." Edward F. Dunne, ed., Illinois: The Heart Of The Nation, 5 vols. (Chicago: Lewis Publishing, 1933), 5: p. 466.

[62]Lawrence Weldon, Letter to Ward Hill Lamon, 6 April 1861, David Davis Papers, Manuscript Division, Library of Congress, Reel 1.
NOTE: Subsequent entries will be abbreviated as: DDP, LC, R.

[63]Joseph G. E. Hopkins, ed., Concise Dictionary of American Biography 2nd ed. (New York: Charles Scribner's Sons, 1977), p. 540.
Lamon's Life of Lincoln (1872), one of the first biographies of the President, was written in conjunction with Chauncey F. Black (son of J. S. Black) and was based on papers purchased by Lamon from William H. Herndon, Lincoln's former law partner.

[64]William W. Orme, Letter to Ward Hill Lamon, 6 April 1861, DDP, LC, R 1.

[65]Carman and Luthin, Lincoln and the Patronage, pp. 21-22.

[66]Leonard Swett, Letter to Ward Hill Lamon, 7 April 1861, DDP, LC, R 1.

[67]"Leonard Swett was born near Turner, Me., Aug. 11, 1825. He attended Waterville College, but did not graduate, and studied law at Portland. Shortly after going West, he enrolled in an Indiana regiment for service in the Mexican War. He was discharged for health reasons before completing his term of enlistment. He settled in Bloomington, Ill., where in practicing law he became well acquainted with Abraham Lincoln and David Davis. In 1856 he was a delegate to the Republican state convention. He served two terms in the lower house of the general assembly (1858-1862). Swett was the Republican candidate for Congress in his district in 1862 but was defeated. He supported the Democratic candidate, Horace Greeley, for President in 1872 but later returned to the Republican party and, in 1888, was a delegate to the Republican national convention. He died June 8, 1899." From: John H. Krenkel, ed., Richard Yates: Civil War Governor (Danville, Ill.: The Interstate Printers and Publishers, 1966) p. 135 fn.

[68]Carman and Luthin, Lincoln and the Patronage, pp. 11-52.

[69]David Davis, Letter to Ward Hill Lamon, 14 April 1861, DDP, LC, R 1.

[70]H. C. Whitney, Letter to Ward Hill Lamon, 13 April 1861, DDP, LC, R 1.

[71]David Davis, Letter to Ward Hill Lamon, 14 April 1861, DDP, LC, R 1.

[72]Willard L. King, Lincoln's Manager, David Davis (Cambridge: Harvard Univ. Press, 1960), p. 191.

[73]David Davis, Letter to Ward Hill Lamon, 31 May 1861, DDP, LC, R 1.

[74]Thomas Drummond [1809-1890] graduated in 1830 from Bowdoin College in Brunswick, Maine. After studying law, he moved to Galena, Illinois in 1835 where he was elected to the state legislature. Drummond was appointed Judge of the United States District Court of Illinois in 1845. In 1854 he became a Chicago resident, serving the northern district. In 1869 he was appointed Judge of the Seventh Circuit of the United States. The Chicago Historical Society has twelve pieces of correspondence concerning Drummond that are scattered amongst various collections in the Society's library. Two of these letters, written by some of Drummond's associates, mention him as a possible candidate for the vacancy on the Supreme Court created by the death of Justice McLean. Ralph A. Pugh, Assistant Curator, Chicago Historical Society, letter to author, 19 November 1988.

[75]Swisher, p. 822.

[76]King, p. 107.

[77]Swisher, p. 822.

[78]Maurice G. Baxter, Orville H. Browning: Lincoln's Friend and Critic (Bloomington: Indiana Univ. Press, 1957), p. 8.

[79]Ibid., p. 14-50.

[80]Ruth Painter Randall, Mary Lincoln: Biography of a Marriage (Boston: Little, Brown, 1953), p. 285.
In her biography of Mary Lincoln, Ruth Randall refers to the Lincolns and the Brownings as "old friends". The depth of the friendship is illustrated by the support provided the Lincoln family by Browning and his wife on the occasion of the death of Willie Lincoln on February 20, 1862. Senator

Orville Browning and his wife Eliza stayed up all that night with the Lincolns, sitting beside the body. The Brownings stayed with the grieving parents until the funeral on the following Monday. Browning examined the vault in which Willie's body would lay pending removal to Illinois. Browning also accompanied Lincoln in the funeral procession to the cemetery in Georgetown.

[81]Baxter, pp. 84-92.

[82]Baxter, pp. 96 and 102.

[83]William Baringer, Lincoln's Rise to Power (Boston: Little, Brown, 1937), p. 320.

[84]Baxter, p. 107.

[85]Ibid, p. 111.

[86]Samuel C. Pomeroy, James H. Lane and M. F. Townay, Letter to Lincoln, 1 January 1861, LP, RTLC, LC, Series 1: January 1-10, 1861. Reel 13, Item 5894.

[87]Baxter, p. 111.

[88]O. H. Browning, Letter to Abraham Lincoln, 9 April 1861, LP, RTLC, LC, Series 1: April 1-15, 1861. Reel 20, Item 8913.

[89]Ibid., Item 8913, pp. 2-4.

[90]Henry Clay Whitney, Letter to Ward Hill Lamon, 13 April 1861, DDP, LC, R 1.

[91]William Orme [1832-1867] moved to Chicago from Washington D. C. in 1849 and studied law. In 1850 he moved to Bloomington and opened a law office. Soon after, he accepted a position in the office of General William McCullough, Clerk of the Circuit Court of McLean County. In 1853 he married the General's daughter and in that year formed a legal partnership with Leonard Swett. Commissioned a Colonel of a regiment of Illinois volunteers in 1862, Orme was promoted to the rank of Brigadier General by Lincoln a year later. However, poor health kept Orme out of active service and Lincoln gave him the command of Camp Douglas at Chicago. Ill health again prevented Orme from keeping a military command so Lincoln appointed him Supervising Agent of the Second Agency of the Treasury Department at Memphis, Tenn. Orme stayed at this position until November of 1865 when his poor condition again forced him to resign. He later died of consumption at the age of 35.
"Gen. William W. Orme," The History of McLean County, Illinois, (Chicago: Wm. Le Baron Jr., and Co., 1879), p. 808.

[92]William W. Orme, Letter to David Davis, 11 May 1861, DDP, LC, R 1.

[93]Glydon G. Van Deusen, Thurlow Weed: Wizard of the Lobby (New York: Da Capo Press, 1969), pp. 256, 260, 274.

[94]William W. Orme, Letter to David Davis, 11 May 1861, DDP, LC, R 1.

[95]Ibid., Reel 1.

[96]Carl Sandburg, Abraham Lincoln: The War Years, 4 vols. (New York: Harcourt, Brace, 1939), 1: pp.424-437.

[97]William W. Orme, Letter to David Davis, 11 May 1861, DDP, LC, R 1.

[98]David Davis, Letter to William W. Orme, 17 May 1861, DDP, LC, R 1.

[99]Ibid., Reel 1. At the time that this letter was written, six slave states were not part of the Confederacy. North Carolina would secede within three days on May 20, 1861. Tennessee followed suit on June 8, 1861. The four other slave states (Missouri, Kentucky, Maryland and Delaware) would remain loyal to the Union.

[100]David Davis, Letter to William W. Orme, 17 May 1861, DDP, LC, R 1.

[101]David Davis, Letter to Ward Hill Lamon, 31 May 1861, DDP, LC, R 1.

[102]Ibid., Reel 1.

[103]Ibid., Reel 1.

[104]Swisher, p. 819.

[105]Ward Hill Lamon, Letter to William W. Orme, 2? July 1861, [Second numeral of date illegible] DDP, LC, R 1.

[106]Baxter, p. 12.

[107]Mrs. O. H. Browning, Letter to Abraham Lincoln, 8 June 1861, LP, RTLC, LC, Series 1: 1861 June 7-July 9, Reel 23, Item 10215-10216.

[108]Abraham Lincoln, Letter to Mrs. O. H. Browning, 1 April 1838, in Roy Basler, ed., Abraham Lincoln: His Speeches and Writings (1946; rpt., New York: Kraus Reprint, 1969), pp. 85-89.

[109]Noah H. Swayne, Letter to Salmon P. Chase, 4 April 1861, Chase Papers, Manuscript Division, Library of Congress.

[110]William Dennison, Letter to Abraham Lincoln, 14 December 1861, LP, RTLC, LC, Reel 30 Item 13414.

[111]Swisher, p. 816.

[112]Ibid., p. 816.

[113]Ibid., p. 816. One of Swayne's competitors in Ohio was C. P. Walcott, the state's attorney general. Another rival was William T. Gholson, a judge on the Ohio Supreme Court.

[114]Baxter, pp. 121-122.

[115]Mrs. O. H. Browning, Letter to Abraham Lincoln, 8 June 1861, LP, RTLC, LC, Series 1: June 7-July 9, 1861. Reel 23, Item 10215-10216.

[116]Orville H. Browning, The Diary of Orville Hickman Browning, Theodore C. Pease and James G. Randall eds., Collections of the Illinois State Historical Library, (Springfield: Illinois State Historical Library, 1925-33), vol. 20: pp. 475-476.

[117]Ibid., 20: pp. 477-478.

[118]Mrs. O. H. Browning, Letter to Abraham Lincoln, 8 June 1861, LP, RTLC, LC, Series 1: 1861 June 7-July 9, Reel 23, Item 10215-10216.

[119]William H. Bradley, Letter to Elihu B. Washburne, 10 July 1861, Washburne Papers, Manuscript Division, Library of Congress.

[120]King, p. 192.

[121]L. P. Lacey et al, Letter to David Davis, 6 April 1861, DDP, LC, R 1.

[122]King, p. 192.

[123]Leonard Swett, Letter to William H. Herndon, 29 August 1887, in William H. Herndon and Jesse W. Weik, Herndon's Life of Lincoln (1942; rpt., New York: Da Capo Press, 1983), pp. 405-408.

[124]Leonard Swett, Letter to Ward Hill Lamon, 7 April 1861, DDP, LC, R 1.

[125]David Davis, Letter to William Orme, 23 February 1862, DDP, LC, R 1.

[126]David Davis, Letter to William P. Dole, 11 November 1861, DDP, LC, R 1.

[127]P. H. Walker, Letter to J. D. Caton, 19 February 1862, DDP, LC, R 1.

[128]Herndon and Weik, Herndon's Life of Lincoln, p. 406.

[129]Ibid., p. 406.

[130]Ibid., p. 407.

[131]Leonard Swett, Letter to Abraham Lincoln 15 August 1861, LP, RTLC, LC, Series 1: August 13-September 17, 1861. Reel 25, Item 11238.

[132]Herndon and Weik, p. 407. In the letter of 29 August 1887, Swett told Herndon that Lincoln honored his request immediately. This is not true of course.

CHAPTER TWO

THE TROUBLE WITH FREMONT

The autumn of 1861 was not a pleasant time for the Lincoln administration. The disintegration of the Union army and its mad retreat back to Washington after the Battle of Manassas or First Bull Run on July 21, 1861 quashed any hope of a quick victory over the South, and renewed criticism of Lincoln's conduct of the war. The Radicals, who had exerted great political pressure on Lincoln to initiate aggressive action of this kind in the first place, now began to question his ability to bring the war to a successful conclusion.[133] Senator Lyman Trumbull, who, with a group of other senators and congressmen had witnessed the defeat, "complained that the administration was inefficient and incompetent in organizing the war effort."[134] The newspapers joined the politicians in the search for scapegoats; Henry J. Raymond of the New York Times and James Gordon Bennett of the New York Herald blamed newspaper editor Horace Greeley for the defeat at Bull Run. His associates in New York City said that by publishing the

"Forward to Richmond" slogan in a New York Tribune editorial, Greeley had incited the administration to order the Union army to the field before it was ready.[135]

In the weeks after the battle, everyone blamed someone else for the premature attack on the rebel forces. The Republicans and the Democrats blamed each other, Radical Senators Benjamin Franklin Wade of Ohio and Zachariah Chandler of Michigan (who witnessed the battle from a carriage) blamed the stupidity of the Union officers, and the army officers blamed the volunteers.[136] It seems that all of Washington voiced an opinion regarding who was at fault, and Davis' supporters were no exception. Ward Hill Lamon blamed the abolitionists for the defeat:

> If these scheming, contemptible politicians had left Genl. Scott alone--we would not now stand disgraced in the eyes of the world, by the defeat of Bull's Run. They brought on this battle prematurely--then went on there to witness it and they and a [damn] fat abolitionist Lieutenant were the first to run, and frighten the teamsters . . . Had those abolition spectators remained at home--our troops never would have retreated in such disorder--nor do I believe they would have retreated at all.[137]

In this letter to William Orme, Lamon blames the rout of the Union soldiers on "abolition spectators"--an obvious reference to those senators and congressmen who witnessed the battle from their carriages.[138] Lamon was probably reacting to the news of the panic which ensued as Union soldiers, camp followers, congressmen and other spectators rushed back to Washington once the Confederates counter-attacked. Lamon was able to see a silver lining in the

defeat at Bull Run, however. He thought that the rush of Trumbull and the other Radicals to blame the President for the defeat would only serve to increase Lincoln's esteem for Davis, thereby improving his chances of being appointed to the Supreme Court.[139]

The defeat at Bull Run provided the abolitionists with an opportunity to press for the eradication of slavery. The Radicals saw Manassas as an illustration of the true strength of the Confederate army. Since the rebels were better organized than the Union generals had expected, it became clear that the war was not going to last a mere three months, as previously thought. The Radicals reasoned that the Union government would not be able to win the war unless the Confederacy was weakened by the emancipation of its slaves.[140] The Radicals also believed that emancipation would provoke sympathy among foreign powers for the Union cause and prevent European intervention in the war.

Two days after the battle, Massachusetts Senator Charles Sumner, a veteran of the anti-slavery cause, visited the President for the express purpose of lobbying for emancipation. When Sumner asked Lincoln if he was "going against slavery" (i.e. thinking of supporting the idea of emancipation), the President replied that he was not. Sumner pressed his case until midnight, but the President would not acquiesce. Sumner left the White House, "chafing under the undue influence of Kentucky and other border slave States over the Administration."[141] Attempts by other

Radicals to persuade Lincoln to issue an edict of emancipation met a similar fate. When Senator Chandler made the demand that the government conscript Negro soldiers, including fugitive slaves into the Union army, Lincoln refused.[142]

The question of emancipation offers a classic example of conflicting ideologies which could not be reconciled. The Radicals did not want the war to end until slavery was destroyed in every state. Emancipation was one means to achieve that end. The President saw the preservation of the Union as the primary objective of the war. If emancipation was to come to fruition, Lincoln reasoned, it would come as a result of a decision made by the Executive, not by Congress. A policy of emancipation could only be adopted if such a decision would not endanger Lincoln's border-state policy. His concern for the attitude of the border states towards the Union cause was legitimate "because to alienate the border states was to lose the war, the Union, everything."[143] As Lincoln himself said: "I would do it [issue an edict of emancipation] if I were not afraid that half the officers would fling down their arms and three more states would rise [up against the United States]."[144]

The first act of emancipation was exercised neither by the President nor Congress; it was issued by a major general in the Union Army. John Fremont, pioneer explorer and former Republican candidate for president in 1856, issued an emancipation order in Missouri on August 30, 1861. As

commander of the Department of the West stationed in St. Louis, Fremont assumed administrative powers over the state and placed it under martial law. He declared that all property of disloyal Missourians would be confiscated and their slaves set free. By placing Missouri under such a harsh edict, Fremont hoped to secure the tenuous position of his occupation force.[145] Bolstered by the episode at Bull Run, the pro-slavery elements in Missouri allied themselves with the Confederates who were pushing northward up the Mississippi Valley. Guerrilla warfare was prevalent as a myriad of spies monitored telegraph communications and followed troop movements.[146] By threatening to shoot all persons in possession of arms north of Union lines, Fremont hoped to stop Confederate sympathizers from supporting guerrilla activities in the northern and central regions of the state.[147]

The news of Fremont's proclamation was enthusiastically received by the Radicals, who saw it as an important advancement in the abolition of slavery.[148] The major Northern newspapers (Washington's National Intelligencer, Chicago's Tribune and Times, Boston's Post and four New York papers--the Tribune, Times, Herald and Evening Post) all joined to praise the act of emancipation.[149] This sentiment, however, was not shared by Lincoln, for if the proclamation was allowed to stand, the emphasis of the war might shift from a fight for the preservation of the Union to a crusade to liberate the slaves. On September 2, 1861

Lincoln wrote to Fremont using the same conciliatory tone with which he usually addressed the officers under his command. Lincoln asked Fremont to modify his proclamation, reminding him that "[t]his letter is written in a spirit of caution, and not of censure."[150] Fearing retaliation in kind by the Confederates, Lincoln ordered Fremont not to have any men shot under the proclamation until he received the President's consent. The President also told Fremont to change the paragraph regarding the confiscation of property and the liberty of slaves in order to pacify the Southern Unionists, especially the Union supporters in Kentucky.[151]

Fremont ignored Lincoln's advice, choosing to dictate a strongly worded statement to his wife instead of sending a reply directly to the President. Fremont refused to rescind the proclamation until Lincoln demanded that he do so in a public statement. The general did not want to modify the proclamation in any form because he was convinced that "it was a measure right and necessary."[152] By refusing to change the proclamation to conform to Lincoln's border-state policy, Fremont was offering a political challenge to the President's conduct of the war. Lincoln responded to Fremont's insolence by modifying the section of the proclamation dealing with the confiscation of property and the emancipation of the slaves so that it conformed with Congress' First Confiscation Act of 1861.[153]

Lincoln's order to rescind the proclamation was denounced by the abolitionists, who saw Fremont as a symbol

for their extreme political views.[154] Wade said that only "one born of poor white trash and educated in a slave state" would overrule Fremont's proclamation.[155] Referring to Lincoln as a dictator, Sumner lamented that unless there was a change in policy, the war would become "a vain masquerade of battles, a flux of blood and treasure."[156] One man turned to David Davis for assistance, hoping that he would be able to make the President recognize the error of his ways. Horace White, chief reporter for the Chicago Tribune, fired off an angry letter to Davis:

> Our President has broken his own neck if he has not destroyed his country. The public rage here, caused by his order countermanding Fremont's proclamation, is fearful, and my own indignation, I confess is too deep for words. Accursed be the day that I ever voted for such cowards and blacklegs.[157]

Davis, who was not close to White, refused to pass this message on to Lincoln. Davis did not join in the condemnation of the President's actions; but he did believe that the open hostility of the Radicals towards Lincoln would not "inspire confidence in the administration."[158]

Unlike Davis, another friend of the President did not stand in support of Lincoln on this issue. Orville Browning, the same man who once claimed that he was the one "warm adherent" on Capitol Hill who would support legislation by the administration, now criticized Lincoln for modifying the proclamation to adhere to the Confiscation Act of 1861. Ironically, this Act was a piece of legislation which Browning had helped to pass during the

special session of Congress in August.[159] Browning wrote to Lincoln from Illinois in mid-September, puzzled over the modification of an edict which he said had received "the unqualified approval of every true friend in the government."[160] Browning chided Lincoln, telling him that he was offering the protection of the Constitution to the very individuals who were making war upon it. He told the President that he was exhibiting too much tenderness to the rebels, predicting the dissolution of the government if the traitors were not struck hard, quick blows. Browning also warned Lincoln not to demote Fremont, because such an act would demoralize the Unionists in the South and the West who had put their confidence in the Major-General.

Lincoln was astonished by Browning's attitude towards the modification of the proclamation on September 11. He replied promptly to Browning's accusations in a long and detailed letter in which he described those sections of the proclamation pertaining to the confiscation of property and the liberation of slaves as being "purely political" in nature, enacted by Fremont for reasons that had nothing to do with military necessity. Lincoln said that he rejected the validity of the proclamation on principle because "it assumes that the general may do <u>anything</u> he pleases- confiscate the lands and free the slaves of loyal people, as well as of <u>disloyal</u> ones."[161] Neither a general nor the president had the right to assume the legislative powers of government under any circumstances. In an eloquent defense

of the rule of law, Lincoln told Browning that the enforcement of the proclamation would not save the government as he had asserted, but would surrender it because without adherence to the Constitution the government of the United States would not exist. Lincoln also reminded Browning that the proclamation had to be modified in order to make it conform to the administration's policy regarding the retention of the border states in the Union. Lincoln said that unless the proclamation was modified, three states--Kentucky, Maryland and Missouri-- would have turned against the federal government.

In his concluding remarks to Browning, Lincoln reassured him that he was not contemplating Fremont's removal as commander of the Department of the West because of the circumstances surrounding the emancipation proclamation of August 30. Lincoln closed his letter by saying that he hoped that no other reasons existed which might precipitate the general's dismissal.[162] Unfortunately for Fremont, these reasons soon came to light. Lincoln soon received numerous reports from a variety of sources which suggested that Fremont was not fit for command.[163] In September, Lincoln sent Postmaster General Montgomery Blair, his brother-in-law, Quartermaster-General of the Army Montgomery C. Meigs and General David Hunter to St. Louis to investigate the charges of corruption and prodigality made against Fremont and members of his staff.[164] The President charged Blair, Fremont's long-time mentor, to return to his

native Missouri to stand by the General's side and work with him in order to regain the confidence of the troops.

When the investigators arrived in St. Louis on September 12 to "give friendly advice and admonition to the commander of the Department of the West", the General was not very receptive.[165] He decided that the administration had lost confidence in his abilities to direct the affairs of the Department. This sentiment was shared by Montgomery Blair who, after talking with his brother Frank and others who were calling for Fremont's dismissal, returned to Washington with the recommendation that Fremont be removed for the good of the public welfare in Missouri.[166] Lincoln was hesitant to dismiss Fremont from his post in St. Louis; he was dismayed by the Blairs' loss of confidence in the very man they had recruited to save Missouri and the West from secession. However, when reports were made from St. Louis by Secretary of War Cameron, Adjutant-General Lorenzo Thomas, divisional commander General John Pope and Brigadier-General Samuel R. Curtis (the local commander at St. Louis) questioning Fremont's capacity for military leadership, Lincoln reluctantly removed him from command.[167]

David Davis stayed clear of the controversy over Fremont's emancipation proclamation of August 30 and the feud between the Blair family and John Fremont. By not joining in the criticism of the administration over the modification of the proclamation, Davis avoided the political blunder which Browning had committed. While

Browning antagonized Lincoln with his denunciation of the modifications, Davis supported the President. Davis' comments on the whole affair were brief and concise. He stated that he had no faith in Fremont's ability and did not care about the falling-out between the Blairs and Fremont. Davis was more concerned with all the stories he had been hearing about the corruption and mismanagement that had surfaced during Fremont's three month term as commander of the Department of the West.[168]

Davis was given the opportunity to see if the extent of corruption in the Department of the West was as bad as he had heard. After Lincoln took Fremont's command away, he appointed Davis to chair a commission which was to investigate the validity of unsettled claims made on the federal treasury by contractors who had provided supplies and services to the Department of the West at the request of Fremont and his subordinates. The Commission on War Claims at St. Louis consisted of three men: Davis as chairman, Joseph Holt, Judge Advocate General in the War Department under Edwin M. Stanton, and Hugh Campbell, a prominent St. Louis businessman. When Joseph Holt heard of his appointment to the commission he sent a letter to Lincoln, expressing his gratitude for being honored by what he called "this token of confidence."[169] Davis, on the other hand, was not as enthusiastic about his appointment. He accepted the position only because he could not think of a way to avoid his duty in St. Louis. Davis was reluctant to be the

chairman of the commission because he had as he put it a "full knowledge of the unpleasantries of the situation."[170]

The Department of the West was in a state of chaos by the time Fremont stepped down from his post in November of 1861. A great number of the general and staff officers Fremont appointed to his department were holding illegal commissions which were not recognized by the President or the Secretary of War.[171] These individuals, some of whom were responsible for the procurement of military contracts, the management of army stores and the distribution of other public property, were referred to as a group of "irresponsible, ignorant, and illegally-appointed persons" by Major-General David Hunter, Fremont's replacement.

Two days after Fremont relinquished his position on November 9, 1861, General George McClellan, commander of the Union Army, took immediate steps to end what he called "a system of reckless expenditure and fraud perhaps unheard of before in the history of the world."[172] McClellan said that the army would refuse to recognize the legality of any existing contracts now that Fremont had relinquished his command. Payment was suspended on all existing contracts until competent and trustworthy staff officers had an opportunity to examine them. Once a contract had been scrutinized, a report was to be sent to Army Headquarters in Washington D.C. to which recommendations could be made for the fair compensation for services and materials rendered.

If the validity of any contract were questioned, the said materials and services were to be refused.[173]

Davis and his colleagues now had the herculean task of deciding on the validity of thousands of disputed claims brought before the commission by manufacturers of everything from clothing to cannons.[174] The commission started its deliberations on November 6, 1861 in St. Louis. The three men heard testimony from a multitude of contractors who wanted payment for the services they had provided to a Major-General whose authority to make contracts was no longer recognized by the federal government. The commission also made an attempt to reach those contractors who had unsettled claims requiring adjudication outside the state.

During Fremont's tenure, the Department of the West encompassed Missouri, Illinois and all the other states and territories between the Mississippi and the Rockies.[175] In order to give contractors in these areas the opportunity to have their cases heard, a lawyer who would be described by today's nomenclature as a field investigator was sent outside Missouri to render decisions regarding fair compensation for services rendered.[176]

Back in St. Louis, a great deal of work went into the preparation of each claim before it was brought before the commission for adjudication. A lawyer was appointed by Davis to examine witnesses and to prepare affidavits for the testimony to be heard at each session. Since the commissioners ruled that each claim presented to the board

by a claimant had to be accompanied by an affidavit, the amount of material to be notarized was enormous. Throughout the course of the commission's inquiry, three lawyers were appointed at different times to complete this task.

Once the commission had determined on the preponderance of the evidence that a claimant deserved compensation from the government, a voucher was made out for the amount to be allowed. However, Secretary of War Stanton ordered the commission to examine all vouchers, both originals and duplicates for error before endorsing any claim for payment. This stipulation complicated the entire process because many of the thousands of claims brought before the commission contained a large number of accounts, each requiring separate vouchers. For example, the contracts relating to the transportation of troops by rail and steamboat consisted of as many as sixty accounts per claim. Each account could then contain hundreds of items. Thus, when a transportation contract was examined by the commission and the railroad and steamboat experts it employed, each individual item would have to be audited and a decision made regarding its true value. Vouchers could be prepared for delivery to the claimant(s) only after the eight certificate and accountant clerks on staff had scrutinized each claim in full for error.

The dual mandate of the commission to prepare lawful affidavits for testimony and to exercise precise financial accountability for each claim placed a heavy burden on every

member of the commission. The twenty-two employees of the commission worked twelve to fourteen hours a day, seven days a week in order to process the claims for renumeration. The commissioners did not fare any better. Davis, Holt and Campbell listened to testimony in sessions which lasted over ten hours a day from November 6, 1861 to March 10, 1862. During this period of time, the commission adjourned only once, for a Christmas break from December 23, 1861 to January 2, 1862. In the end, the commission rendered judgment on 6485 filed claims, the final value of which was set at over $9,525,000.00[177]

The grueling pace at which the commission worked from its first session on November 6, 1861 quickly put Davis in a depressed state. The commission was only in its second week of deliberations when he began to complain bitterly to his wife Sarah about the working conditions he was forced to endure:

> I have never got into such a job as this. The labor seems to accumulate instead of diminishing. Your dear letter made me happy. Oh, how I want to see you and my little girl. How much I love you both--how much I want to contribute to your happiness and how bad I feel away from you. I have not the words to tell you. The work is day and night. I get very restless often. I appreciate dearest, your inability to come here and stay with me. It has been work here all week... Excuse me for this hastily written note. Wednesday and Thursday were so long days I couldn't write you at all.[178]

Davis' daily schedule shows just how long his days were while the commission was in session. The commissioners would start hearing testimony at the U.S. District Courtroom in St. Louis from 9:00 a.m. to 3:30 p.m. After an hour long

break for dinner, the session would commence again until 10:00 or 11:00 p.m. At times, the Judge would have to put in additional hours because Hugh Campbell would go home at 9:00 p.m., and whatever work was left had to be finished by Davis, Holt and J. Fullerton, the commission's secretary. The only respite Davis had was the two hours which were allotted for meals each day. He spent these hours reading newspapers or going for walks. Occasionally, Davis would attend a dinner party held by Hugh Campbell or one of the merchant's relatives or friends. Although he enjoyed the company of the other commissioners, Davis spent most of his time in St. Louis fighting feelings of intense loneliness brought on by the separation from his wife and family.[179]

Davis' dissatisfaction with his job was compounded by the tedious nature of the testimony heard by the commission. Eighty percent of the claims brought before the board for consideration were for amounts under one thousand dollars. The majority of these claims were for single items purchased by army officers while in the field. These contracts were made under loose terms and proper receipts were seldom issued. Consequently, the commissioners spent hour after hour adjudicating the claims of small farmers and dealers from the interior of Missouri who sold such items as horses and wagons to the army.[180] Faced with this same routine at every session, Davis lamented:

> If I did not feel that I owe a duty to my country I would not stay here for twenty dollars a day...I would absolutely rather hold court in Dewitt

> County...than to stay here in the business that I am.[181]

The other commissioners were also sorry they undertook this laborious task. Joseph Holt told Davis that "no earthly power could make him go through the labor of another commission."[182] Davis said that he could not express his attitude toward the commission in better terms.

While Davis was not pleased with working conditions in St. Louis, he was truly incensed by the degree to which corruption had flourished there. He was shocked to learn how many people were willing to use the war to their advantage by defrauding the government during a national crisis.[183] In the course of its investigations, the commission uncovered some flagrant examples of graft in the Department of the West. A number of officers on Fremont's staff used their positions to award government contracts to a clique of favored merchants and manufacturers. Captain E. M. Davis, Assistant Quartermaster at St. Louis, bought $14,283.00 worth of blankets from his son, H. C. Davis of Philadelphia. Captain Davis testified before the commission that his son was paid $3.25 per blanket instead of the $3.25 per pair of blankets authorized for the purchase. Davis admitted that he was at fault for omitting the word "pair" from the receipt that endorsed payment. By forgetting to write the word "pair" on an order for blankets, the Assistant Quartermaster doubled the price paid by the federal government for blankets supplied by his own son.[184]

Captain Davis' superior, Quartermaster Major Justus McKinstry also made an illicit profit from the procurement of government contracts. Unlike some of the other officers on Fremont's staff, McKinstry did not receive his commission from the Major General. McKinstry had twelve years' experience as a quartermaster in the regular army. His experience, however, was no mark of integrity; it merely made McKinstry a better profiteer. One of the Quartermaster's most lucrative dealings involved his method of purchasing horses and mules for military use. When McKinstry received an initial bid of $119.00 per horse on his first purchase order, he adopted $119.00 as the government price for a cavalry horse. Refusing to place any further purchase orders up for public tender, McKinstry told a group of his friends to purchase animals at that rate.

The majority of the individuals who received this preferential treatment from McKinstry were associates of Fremont who moved to Missouri from California. Most of the members of this clique knew little or nothing about horses. When farmers and horse dealers arrived in St. Louis with horses and mules for sale, they were turned away from the quartermaster's office and referred to this group of middle men. Relying on the discretion of a band of dishonest inspectors and receiving clerks in the Department of the West, the middlemen forced horse suppliers to accept low prices for their animals. These horses were then sold to the army as "cavalry" horses at $119.00 or as "artillery"

horses at $150.00 per animal. At these inflated prices, Fremont's associates were able to reap substantial profits.[185] For example, Leonidas Haskell, a member of General Fremont's staff, made a profit of $44,000.00 on the sale of 4000 mules to the army. During McKinstry's tenure, over $2,000,000.00 worth of horses and mules were sold in this manner to the Department of the West. Unfortunately, the majority of these animals were not fit for service, being either diseased or partially blind.[186]

The monopoly which McKinstry operated was lucrative and not only to the peddlers of horse flesh. An entire group of businessmen benefited from their association with the Quartermaster of the Army at St. Louis. These middlemen would purchase all types of supplies from manufacturers and then resell the goods to the army, reaping a lucrative commission in the process. One such profiteer was Joseph Pease, who sold tents to the Department. Since Pease was a close associate of McKinstry, the companies which made tents had to work through Pease in order to gain access to the quartermaster's stores. As the middleman in this particular case, Pease cleared $10,000.00 on a resale of $200,000.00 worth of army and hospital tents.[187] McKinstry's name was mentioned again and again in instances such as this by the witnesses who appeared before the commission.

Davis and his colleagues concluded that the administration of the quartermaster's office was

> marked by personal favoritism, by a complete indifference to the public interests, and by an

> unceasing anxiety to fill at the expense of the nation the pockets of a clique of men who surrounded him.[188]

McKinstry's control of the procurement and allocation of goods and services for the Department of the West ended with Fremont's resignation on November 11, 1861. When General Hunter took over Fremont's command, he arrested McKinstry and sent a request to Washington for a staff of ordinance officers, engineers and assistant quartermasters to prevent further loss to the army stores.[189] McKinstry was imprisoned for three months, court-martialed and dismissed from service.[190]

Fremont was also involved in the gross mismanagement of public funds. Fremont awarded contracts to some friends from California outright, and competitive bids were not sought. Fremont authorized an associate from California to build thirty eight mortar boats for $8250.00 per ship. These "mortar boats" were mere log piles, covered by a deck and a small chamber intended to be the magazine. The wooden sub-structure was encased in six foot high iron sheets, which were supposed to protect the crew from musket fire.[191] Knowledgeable ship builders reported that the boats could have been built for less than $5000.00 each.

Another friend of Fremont, E. L. Beard, (who possessed no experience in military engineering) was paid $191,000.00 to build ten forts at St. Louis. The amount of money which Fremont advanced to his friend for the construction of the forts was so excessive that it even shocked Quartermaster

McKinstry. When the terms for construction were settled, McKinstry took the precaution of writing on the contract that the prices were authorized by the special order of General Fremont.[192] After this contract was made, Secretary of War Stanton determined that these forts had no military application, and an order was issued to stop their construction. The forts were built anyway, at three times the cost they should have been.[193] One of Fremont's most expensive misallocations of funds involved the construction of a pontoon bridge across the Ohio River at Paducah, Kentucky. Built at a cost of $120,000.00, the bridge's usefulness was short-lived. Soon after it was constructed it was carried down the river by the spring run off.[194]

Perhaps Fremont's most malicious act was the method of extortion which he employed to collect capital to finance the expenditures of his government. Under the pretense of martial law, Fremont and his staff secured substantial loans from banks throughout Missouri. These loans were not voluntary; the military authorities threatened to seize funds from banks which refused to extend them a line of credit. $978,000,000.00 was raised for the Department of the West in this manner, of which $732,000,000.00 was secured by Fremont himself. This practice caused the failure of at least one bank in St. Louis. This form of extortion was also used to collect funds from the fortunes of wealthy individuals. Personal loans made to the government during Fremont's command amounted to $59,000.00.

Davis and his colleagues condemned Fremont for collecting such funds for his war chest without the approval of the War Department.[195]

The commissioners were shocked by the totally irresponsible manner in which General Fremont exercised his authority as commander of the Department of the West. Davis and his colleagues were particularly critical of Fremont's willingness to commit extortion in order to finance the expenditures of his government. The seizure of funds from the banks of Missouri was especially repugnant because the money was spent in such an extravagant fashion. The one group that probably suffered the most from Fremont's excesses was the troops under his command. While Fremont spent thousands of dollars on a furnished, three storey marble mansion for his personal quarters, his soldiers lived in dilapidated barracks. In addition, the money that was sent from Washington to pay the troops and provide for their food and clothing was given to E. L. Beard instead.[196]

These incidents of graft and corruption were described in a report issued by the commission in March of 1862. Entitled a Final Report of Commission on War Claims at St. Louis, it was derived from over seven thousand pages of testimony recorded during the examination of the twelve hundred witnesses who appeared before the commission. As chairman, Davis was responsible for writing the report. However, Davis delegated the job to Joseph Holt, even though he was sick from exhaustion. Davis admitted that he should

have written the report; but he said that he did not possess a "great facility for writing."[197] His contribution to the report was that of an editor, changing the strong language which Holt used to describe Fremont and his activities. For example, Holt referred to Fremont and his friends as "The California Gang". Davis modified the report so that the conclusions of the commission were expressed in a more tactful manner.[198]

When the report was released, it was enthusiastically received in St. Louis. Two newspapers in the city published it in its entirety in their editions. Once the report was widely circulated, people bombarded Hugh Campbell with requests for copies. Campbell did not have anything to distribute because none of the 10,000 copies of the report ordered by Congress were sent to him in St. Louis. The extra copies were horded by Fremont's friends, who were trying to suppress them because the report was highly critical of his performance in Missouri.[199]

Davis was disappointed that his report did not cause the sensation in Washington that it did in St. Louis. He learned that heads of the government departments in Washington were not reading the report. The information Davis received was not entirely accurate. Although their was limited distribution of the report, the issue of military claims in the Department of the West was not being ignored in Washington. Discussions were held in Congress throughout February and March of 1862 regarding which awards

allowed by the commission would be honored by the federal government. The debate in Congress centered around the wording of a joint resolution from the Senate which authorized the payment of all sums certified by the commission. Subsequently, the language of the resolution was amended to restrict the disbursement of funds to "claims and contracts for service, labor, or materials, and for subsistence, clothing, transportation, arms, supplies, and the purchase, hire, and construction of vessels."[200] Once the amendments were agreed upon, Senate Resolution 22 was passed by both houses of Congress and signed into law by Lincoln on March 11, 1862.[201]

It is not surprising that the report did not generate an overwhelmingly positive response in the Capitol at the time of its publication, even if the actions of Fremont's "friends" are not taken into account. Fremont became a symbol to those groups in the North and the West who believed that the abolition of slavery ought to be the primary objective of the Civil War. The admiration of these individuals for Fremont was not diminished by the rumors which came out of Missouri regarding his administration of the Department of the West. The wave of indignation which assaulted Lincoln when he removed Fremont from his command was testimony to the strength of the General's popularity. The level of Fremont's political support in Washington can be measured by the impact the charges of graft made against him had on the congressmen themselves.

Corruption in war contracts was a contentious issue in the spring of 1862. On the one hand, the House Committee on Government Contracts passed a resolution which condemned the procurement of the Hall Carbine for use by the army. The defective rifle earned an infamous reputation for blowing off a soldier's thumb when it was fired. Davis and his fellow commissioners believed that the resolution substantiated their opinion of Fremont because the General had authorized the purchase of the rifle for his troops. In the Senate yet another committee supported Fremont's actions in Missouri. Radical senators who were members of the Committee on the Conduct of the War were politically sympathetic to Fremont. In April of 1863, after an intensive investigation, the committee issued a report on the Western Department. The Radicals glossed over incidents of Fremont's incompetent conduct, stating:

> that various of his measures, such as the building of gunboats, had been of the highest value; and that his administration of the Western Department 'was eminently characterized by earnestness, ability, and the most unquestionable loyalty'.[202]

Obviously, if the Radicals in the Senate believed that Fremont's conduct in Missouri was so commendable, they could not have considered Davis' report to be valid.

Since Fremont was supported by such Senators as Wade, Chandler and Sumner, it would have been dangerous for Davis to criticize the General. After all, a Supreme Court nominee would have to be confirmed by the Senate before he could assume his position on the bench. If the Radical

senators started a drive to block Davis' confirmation, once his name came before the Senate for consideration, his candidacy would be in jeopardy. Davis' campaign faced this possibility in 1862 as the debate over Fremont's competency as a military leader and as state administrator in Missouri raged on in the newspapers and the legislatures of the nation. Fremont's supporters did not forget that Davis had helped to tarnish the image of their hero.

Davis' involvement in the government's investigation of the Department of the West is an important part of the story of his appointment to the Supreme Court. In addition to illustrating the potential danger the Radicals posed to his nomination, this episode provides an interesting insight to Davis' character. The determination which he exhibited in fulfilling his duties as chairman of the Commission on War Claims shows that he was a hard worker who strove to adjudicate the cases placed before him in a impartial manner. Yet, Davis deferred the most important responsibility of the chairmanship--the writing of the Commission's report--to another committee member. He did this because he believed that he did not possess a facility for writing. It is rather ironic that a man striving for a Supreme Court Associate Justiceship would not recognize the fact that the ability to write is an essential prerequisite for such a position.

NOTES FOR CHAPTER TWO

[133]T. Harry Williams, Lincoln and the Radicals (Madison: University of Wisconsin Press, 1960), pp. 30-33.

[134]Mark M. Krug, Lyman Trumbull: Conservative Radical (New York: A. S. Barnes, 1965), p.197.

[135]Harlan Hoyt Horner, Lincoln and Greeley (N.p.: University of Illinois Press, 1953), p. 229. Greeley did not pen the phrase "Forward to Richmond". The slogan was written by Fitz-Henry Warren, Washington correspondent for the Tribune at the time. It was placed on the editorial page by managing editor Charles A. Dana.

[136]H. L. Trefousse, Benjamin Franklin Wade: Radical Republican From Ohio (New York: Twayne Publishers, 1963), p. 151.

[137]King, p. 185.

[138]Although Lamon blamed the "abolition spectators" for the rout, Senators Wade, Chandler and their radical colleagues did not run in the face of the enemy. As Trefousse states on p. 150: "The sudden disaster infuriated Wade. He loathed cowardice, and when he saw the soldiers running away from the enemy instead of standing up to the Confederates, he sprang into action. Drawing up his carriage across the pike between a fenced-in farm and an impenetrable wood one mile beyond Fairfax Court House, he jumped out, rifle in hand--"Boys, we'll stop this damned run-away, he shouted. Then, supported by his companions, he turned back the fugitives at rifle's point . . ." until the party was relieved by units of the second New York Regiment, which turned back the fleeing multitude."

[139]King, p. 185.

[140]Williams, p. 33.

[141]Edward L. Pierce, ed., Memoir and Letters of Charles Sumner, Vol. 4 of The Anti-Slavery Crusade in America (New York: Arno Press, 1969), pp. 41-42.

[142]Williams, p. 33.

[143]Stephen B. Oates, With Malice Toward None: The Life of Abraham Lincoln (New York: Harper, Row, 1977), p. 267.

[144]J. G. Randall, Springfield to Gettysburg, Vol. 2 of Lincoln the President (New York: Dodd, Mead, 1945), p. 153.

[145]Montgomery Blair, Letter to Abraham Lincoln, 17 September 1861, LP, LC, Series 1: Aug. 13-Sept. 17, 1861 Reel 25 Item 11428. Blair sent three clippings from the Evening Transcript; one of which was a copy of the proclamation.

[146]William Ernest Smith, The Francis Preston Blair Family in Politics, 2 vols. (1933; rpt., New York: Da Capo Press, 1969), 2: pp. 58-59.

[147]Allan Nevins, Fremont: Pathmarker of the West (New York: Longmans, Green, 1955), p. 501.

[148]Williams, p. 40.

[149]Nevins, p. 504.

[150]Abraham Lincoln, Letter to Major-General John C. Fremont, 2 September 1861, LP, RTLC, LC, Series 1: Aug. 13-Sept. 17, 1861 Reel 25 Item 11440.

[151]Ibid.

[152]Major-General John C. Fremont, Letter to Abraham Lincoln, 8 September 1861, LP, RTLC, LC, Series 1: Aug. 13-Sept. 17. Reel 25 Item 11561.

[153]Abraham Lincoln, Letter to Major-General John C. Fremont, 11 September 1861, LP, RTLC, LC, Series 1: Aug. 13-Sept. 17, 1861 Reel 25 Item 11590.

[154]John G. Nicolay and John Hay, Abraham Lincoln: A History, 10 vols. (New York: The Century Company, 1890), 4: p. 420.

[155]Trefousse, p. 152.

[156]Pierce, p. 42.

[157]Joseph Logsdon, Horace White: Nineteenth Century Liberal, ed. Stanley I. Kutler, Contributions in American History, no. 10 (Westport: Greenwood Publishing, 1971), p. 73.

[158]King, p. 185.

[159]Baxter, pp. 125-126. The Confiscation Act of 6 August 1861 was entitled "an act to confiscate property used for insurrectionary purposes." The statute described the provisions by which a court (whether it be a United States admiralty court, district or circuit court) was to condemn seized property as confiscated material. One section of the Act stated that a slaveholder relinquished his right to use

slave labor if said person was involved in the insurrection against the United States.

[160]Orville H. Browning, Letter to Abraham Lincoln, 17 September 1861, LP, RTLC, LC, Series 1: Aug. 13-Sept. 17, 1861 Reel 25 Items 11926-11933.

[161]Abraham Lincoln, Letter to Orville H. Browning, 22 September 1861, LP, RTLC, LC, Series 1: 1861 Aug. 13-Sept. 17. Reel 25 Item 11724.

[162]Ibid.

[163]Nicolay and Hay, p. 412.

[164]Smith, p. 75.

[165]Nicolay and Hay, p. 413.

[166]Nevins, p. 514.

[167]Nicolay and Hay, pp. 430-433.

[168]King, p. 186.

[169]Joseph Holt, Letter to Abraham Lincoln, 29 October 1861, LP, RTLC, LC, Series 1: Oct. 16-Nov.3, 1861 Reel 28 Item 12728.

[170]David Davis, Letter to Daniel [?], 4 November 1861, DDP, LC, R 1.

[171]U.S., The National Archives, Official Records Of The Union And Confederate Armies 1861-1865, National Archives Microfilm Publications, Microcopy No. 262 (Washington: NARS, 1959), Roll 3, Serial No. 3, p. 568.

[172]Ibid

[173]Ibid., pp. 568-569.

[174]Ibid., p. 568.

[175]Ibid., p. 567. When Fremont relinquished his command on November 9, 1861, Assistant Adjutant-General Julius P. Garesche issued General Order No. 97 which reorganized the Departments of the West, Cumberland, and Ohio into the Departments of New Mexico, Kansas and Missouri.

[176]J.S. Fullerton, Secretary to the Commission investigating unsettled claims incurred by the Department of the West, Letter to David Davis summarizing the work of the commission, 5 May 1862, DDP, LC, R 2.

The investigations made by James K. Knight, the lawyer appointed by the commission for this purpose, did not extend throughout the entire jurisdiction of the Department of the West. Knight's investigations were limited to the settlement of claims originating from Cairo, Illinois and Keokuk, Iowa.

[177]Ibid

[178]David Davis, Letter to Sarah Walker Davis, 15 November 1861, DDP, LC, R 1.

[179]David Davis, Letter to Sarah Walker Davis, 16 November 1861, and David Davis, Letter to Sarah Walker Davis, 22 January 1862, DDP, LC, R 1.

[180]J. S. Fullerton, Letter to David Davis, op. cit.

[181]David Davis, Letter to Sarah Walker Davis, 16 November 1861, DDP, LC, R 1.

[182]David Davis, Letter to Sarah Walker Davis, 26 January 1862, DDP, LC, R 1.

[183]David Davis, Letter to Sarah Walker Davis, 16 November 1861, and David Davis, Letter to Sarah Walker Davis, 22 January 1862, DDP, LC, R 1.

[184]Sandburg, Abraham Lincoln: The War Years, 1: p. 423.

[185]In the Commission's Final Report, the prices paid by the Quartermaster's Office for horses and mules was criticized because the prices were set arbitrarily. This does not mean that these prices were necessarily excessive for horses in good condition. Horses were like any other valued commodity in the wartime economy--the price fluctuated with supply and demand. The price range for horses was from $135.00 to $150.00 per animal. Army regulations fixed the maximum price to be paid for horses and mules at $200.00 each. This is not an outrageous price when one considers that the Union army was without an adequate supply of horses. By August of 1863, the shortage was so acute that 8,000 men in the cavalry corps of the Army of the Potomac were without mounts. See P. J. Staudenraus, ed., Lincoln's Washington: Selections from the Writings of Noah Brooks, Civil War Correspondent (New York: Thomas Yoseloff, 1967), p. 225.

[186]U.S., Cong., House, Commission on War Claims at St. Louis, War Claims At St. Louis., Executive Document No. 94, 37th Cong., 2nd Sess., 10 March 1862 (Washington: GPO, 1862), vol. 7, pp. 8-9.

[187]Executive Document No. 94, pp. 5-6.

[188]Ibid., p. 87.

[189]Official Records Of The Union And Confederate Armies, p. 569.

[190]Sandburg, The War Years, 1: p. 423.

[191]Executive Document No. 94, p. 17.

[192]Ibid., p. 25.

[193]Ibid., pp. 21-22.

[194]Ibid., p. 21.

[195]Ibid., pp. 3-5.

[196]Ibid., pp. 19-20.

[197]David Davis, Letter to Sarah Walker Davis, 2 March 1862, DDP, LC, R 1.

[198]George Perrin Davis, Letter to Thomas Dent, n. d., DDP, LC, R 1.

[199]Hugh Campbell, Letter to David Davis, 5 May 1862, DDP, LC, R 1.

[200]Congressional Globe, 37th Cong., 2nd sess., 1862, vol. 67, p. 1098.

[201]Ibid., p. 1190.

[202]Nevins, p. 547.

CHAPTER THREE

THE RIGHT MAN IN THE RIGHT PLACE

Lincoln finally made his first appointment to the Supreme Court in 1862, after spending over ten months in office. The President nominated Noah Swayne, a former U.S. Attorney and active Republican, on January 21, 1862 to fill the vacancy created by the death of Justice John McLean a year earlier.

A burly figure, over six feet tall, with a pleasant disposition, Swayne was the natural choice to serve as associate justice for the Seventh Circuit. Though Swayne was born and raised in Virginia, his Quaker heritage had produced the soul of an abolitionist. After his admission to the bar at the age of nineteen in 1823, he freed his slaves and moved to Ohio.[203] The strong anti-slavery sentiment and loyalty to the Union exhibited by this transplanted Southerner probably appealed to Lincoln. We know that the President believed it was important to provide for some southern representation on the Supreme Court. He

explained that one reason for the long delay in making a nomination to the Court was his unwillingness "to throw all the appointments northward, thus disabling [himself] from doing justice to the South on the return of peace . . ."[204] By appointing Swayne to the Court, Lincoln was able to place an ardent Republican on the bench who also had ties to the South.

Ideological compatibility and geographic considerations were not the only factors to influence Lincoln's decision to place Swayne on the bench. A number of political considerations were also taken into account in Lincoln's first appointment to the Supreme Court. In naming Swayne, he paid off a political debt owed to Ohio Republicans. At the Republican National Convention in Chicago in 1860, Lincoln's nomination for president had been secured over Republican favorite William Seward by votes provided by the Ohio delegation.[205] The importance of Ohio's contribution to Lincoln's nomination was not lost on Swayne's strong contingent of boosters in Washington. Senators John Sherman and Benjamin Wade joined the entire congressional delegation from Ohio in pushing for the appointment. Swayne also received the support of prominent businessmen and members of the Ohio bar. The high level of support for Swayne in his home state was illustrated by the trip made by Governor Dennison to Washington for the very purpose of obtaining the appointment for his friend.[206] Considering Swayne's prominent legal status in Columbus,

Ohio, his strong Unionist position (that was tailor-made for the Lincoln Court), and the considerable political pressure placed on Lincoln on his behalf, one can appreciate why the President was quick to appoint Swayne once the Supreme Court was again in session. Noah Swayne's appointment was confirmed by the Senate on January 24, 1862 with only one dissenting vote: 38-1.[207]

The speed with which Lincoln appointed Swayne to the bench probably did not take the nominee by surprise, for the Ohio lawyer was confident that the position was his. On January 10, 1862 Swayne had written to Senator Benjamin Wade, assessing the strength of the competition from Browning, Chase, and to a lesser extent, John Crittenden of Kentucky. Although Swayne recognized the danger posed by these three men, he believed that Lincoln was going to appoint him to the circuit Ohio would fall into if Illinois were placed elsewhere. Swayne even went as far as to say that the reference made by Lincoln in his Annual Message to Congress to the fact that Justice McLean's former circuit was too large and ought to be reorganized was put in the speech on his behalf! Swayne also told Wade that the President had assured him that Chase "would not be in the least in [his] way."[208]

Swayne arrived in Washington on January 25, 1862 and prepared to take the oath of office in open court two days later. While Swayne was waiting in Washington, no doubt confident and in high spirits, David Davis was plunged into

a state of depression. On January 26, 1862 he wrote his wife, complaining about his lot in life. While Davis grew weary of the monotonous day-to-day routine of investigating war claims in St. Louis, he had learned that a bi-partisan recommendation for his appointment to the Supreme Court had been passed at a state convention in Springfield, Illinois. Although Davis felt grateful to the members of the convention for their support, he believed without question that the measure was a futile act. Since Swayne had already been appointed and his judgeship would be a matter of record the next day,-- Davis lamented: "I have no more expectation of being appointed than I have of being translated . . . I appreciate fully that I am not fit for Supreme Court Judge even if I could get it."[209] When this statement of diffidence is compared to Swayne's confident attitude, one might be tempted to question the sincerity of Davis' aspirations for a Supreme Court justiceship. It is altogether understandable, however, that Davis should be despondent on the eve of Swayne's ascendancy. Lincoln made Swayne his first appointee to the Court, even though he had promised Leonard Swett that Davis would get the position. In addition, Davis' periodic expressions of self-doubt were merely indicative of his ambivalent feelings towards the possibility of receiving the appointment. At times, Davis would say that he had no interest in obtaining a position on the Supreme Court, and yet, in the same breath he would ask

one of his colleagues what was being done to secure him the nomination![210]

While Davis seemed to have given up hope for a nomination from Lincoln, his supporters pushed on, undaunted by Swayne's appointment to the Supreme Court. Starting in January of 1862, a flood of letters began to reach Washington pressing for Davis' appointment to the Supreme Court. This flow of letters was precipitated by Leonard Swett, who immediately sought to enlist others in the campaign to place Davis on the bench. Swett approached John T. Stuart, Lincoln's first law partner, and persuaded him to write to the President on Davis' behalf. In his letter, Stuart said that Davis' appointment would gratify "the circle of your old personal friends."[211] Swett sent Stuart's letter to Washington himself, enclosing a rather audacious covering letter of his own which expressed his anger at Lincoln for overlooking Davis. Swett told Lincoln that as the leader of a class of friends devoted to his success, Davis had never put pressure on the President for a reward for his service to him. Swett asked Lincoln to consider what would happen if the situation were reversed and his elevation to the Court rested in the hands of Judge Davis instead. Swett postulated that Davis would not hesitate to appoint Lincoln, regardless of the pressure put on him to do otherwise. Swett asked Lincoln, somewhat sarcastically, whether Orville Browning would have decided

in his favor if the power of Lincoln's appointment rested with the Senator.[212]

Swett's sense of indignation over Lincoln's decision to pass over Davis for his first Court appointment was shared by another of the Judge's supporters. A strong four-page statement was sent to Lincoln by John M. Scott of Bloomington, the man who would eventually succeed Davis as judge for the Eighth Judicial District of Illinois. Scott said that if Lincoln intended to appoint someone from Illinois in anticipation of the creation of new judicial circuits by Congress, that person by right of his abilities and qualifications had to be David Davis. Aware of the influence that personal friendship might play in Lincoln's selection of candidates from Illinois, Scott dismissed Browning by saying that "to appoint <u>one</u> not heretofore your most steadfast friend with the hope of <u>making him such</u> is neither wise in politics or morals."[213] Scott warned Lincoln not to disappoint the people of Illinois, who expected him to give the nomination to Davis. Scott said that in discussions with individuals from all parts of Illinois he learned that they were "<u>tired</u> of being ruled by <u>Senators</u> and <u>Representatives</u> in Congress."[214] He told Lincoln to make the decision on his own, to ignore congressional pressure, and to act instead from his "own strong sense of right" (i.e. to follow his instincts and appoint his respected colleague and friend, David Davis).

A number of Davis' associates also wrote to Lincoln expressing their views on his obligations to the Judge and the state of Illinois. Clifton H. Moore, a former law partner of Davis, apologized for "badgering" Lincoln with a petition for Davis' appointment. Yet, Moore said that it was his duty to inform Lincoln that he had been present at the Chicago Convention and was witness to the "ceaseless energy, strong will [and] great persuasive powers" which Davis had used to provide Lincoln with the presidential nomination.[215] Moore said that he joined Davis' friends in pressing for the appointment, because if they were to succeed, "the right man will be in the right place."[216] Letters which combined the themes of political indebtedness and judicial compatibility were also sent by Oliver L. Davis and L. P. Lacey. Oliver Davis told Lincoln that the appointment of David Davis would remove the impression present in Illinois that the Judge's services were not appreciated by the Administration.[217] Using a similar approach, L. P. Lacey asked the President to remember the political obligation he owed his campaign manager when considering the merits of Davis for a place on the Supreme Court.[218]

While Davis' friends were sending their appeals to Lincoln, Swett was looking for further support for Davis' nomination outside of Illinois. Swett canvassed prominent members of the legal community in other states, asking them to lend support to the Davis campaign. On January 31, 1862,

Swett wrote to Samuel Treat of St. Louis, Missouri. He told Treat that in the mind of the President, the choice for the next Supreme Court appointment lay between Davis and Browning. Swett thought that the legal men of Treat's district should be "consulted" on this subject. What Swett really wanted was for Treat to secure a recommendation for Davis from the members of the St. Louis bar. Treat honored Swett's request, for twenty prominent members of the bar agreed to write to Lincoln, expressing their preference for Davis if no individual from Missouri were to be selected for the position.[219]

When Swett learned of the promise of support from the members of the St. Louis bar, he tried to secure a similar recommendation from the legal community in Iowa as well. In the first week of February, 1862, Swett wrote to an old friend of Davis', Dr. John Henry of Burlington, Iowa. Swett told him that public sentiment in Illinois was strongly in favor of Davis. Relating the news of the endorsement from the St. Louis bar, Swett asked Henry to approach prominent members of his bar and try to achieve a similar result.[220] It is not known whether Henry was successful in obtaining a recommendation from the bar in Burlington. Although it was not unusual that Swett would try to gain support where he could find it, his chances of obtaining an endorsement from Iowa for an Illinois judge were slim at best. Members of the Iowa state bar, the Iowa Supreme Court judges, and the

attorney general of Iowa all favored the appointment of Iowa lawyer Samuel Freeman Miller to the Supreme Court.

Born and raised in Kentucky, Samuel Miller, one of the great nineteenth century justices, spent the first years of his adult life in the study of medicine. After practicing for twelve years as a physician, in 1845, at the age of 29, he decided to change professions. Within two years, Miller was practicing law in the same town where he had worked as a physician. When pro-slavery delegates were elected to the state constitutional convention of 1849, Miller realized that slavery would never be abolished voluntarily in Kentucky. A strong advocate of emancipation, Miller decided to free his slaves and leave Kentucky; he moved his family to Keokuk, Iowa in 1850. Miller's law practice thrived in this town in southeastern Iowa; between 1851 and 1862 he made regular appearances before the State Supreme Court. In 1856, Miller was personally involved in over three hundred cases. His distinguished reputation was recognized by politicians in that year when Miller was made the president of the first Republican caucus in Keokuk. He was also involved in the national election of 1860, doing his part to insure that Iowa went Republican. As a member of the State Central Committee, Miller held political rallies and county fairs in Keokuk during the election campaign.[221]

The legal community in Iowa sent a great number of recommendations to Lincoln, extolling Miller's character and

professional skills. The content of most of these petitions was quite different from that sent by Davis' supporters during the same period. Letters written on Davis' behalf were usually straightforward appeals that included some reference to Lincoln's obligation to the Judge for his work during the presidential campaign of 1860. Many of the petitions sent by Miller's supporters, on the other hand, contained testimonials describing Miller's masterful practice of the law. Referring to him as one of the prominent lawyers of the North West, Iowa lawyer Caleb Baldwin said that Miller possessed a "sound, logical, [and] vigorous mind that would well qualify him for . . . a position [on the Supreme Court]."[222] This sentiment was also shared by the Iowa Supreme Court judges who had worked with Miller over the past decade. Chief Justice George C. Wright of the Iowa Supreme Court wrote Lincoln to say that he had been a witness to Miller's rise in the profession since 1854. He characterized Miller as an "able, upright and professional lawyer . . . [whose] habits are good [and whose] health [is] all that could be wished."[223]

While these men praised Miller's legal abilities, they were also cognizant of the political importance of obtaining a Supreme Court appointment for their state. Edward Johnstone, a friend and associate of Miller, wrote Lincoln a letter which included the standard fare: an affirmation of Miller's integrity of character and the obligatory statement which judged his legal abilities to be greater than those of

any other man on the Iowa state bar. Yet, the letter also included a strong political message which Lincoln was supposed to heed. Johnstone advised the President to appoint Miller because "[t]he Citizens of the Upper Mississippi Valley believe that this region of [the] Country is entitled to be represented on the Federal Bench."[224]

The view that Iowa should have a representative on the Supreme Court was also shared by J. C. Hall, former judge of the Iowa Supreme Court. In a letter which was meant for Lincoln to read, Hall told Senator James W. Grimes of Iowa that since the federal court system was about to be reorganized, "Iowa of course will expect some appointment on the Bench."[225] In his letter to the Senator, Hall described the qualifications that Miller possessed which made him an ideal choice for the nomination. It was natural for Hall to contact Grimes, because the Senator was working hard to insure that the legislation then before the Senate calling for the reorganization of the federal judiciary would place Iowa in a new trans-Mississippi circuit.

Senate bill number 89 (the new judicial legislation which proposed to reorganize the federal circuits) was reported out of the Senate Committee on the Judiciary by committee chairman Lyman Trumbull of Illinois on January 6, 1862.[226] Senator Trumbull reported to his colleagues that the bill, as introduced by Senator John Sherman of Ohio, had been amended by the Committee in order to bring a more

equitable distribution of population to the circuits. The reorganization of the circuits was as follows: the three Northern circuits (the First, Second and Third) remained the same; their composition was not changed by the bill as introduced originally, nor by the amendment proposed by the committee.[227] The other six circuits were totally rearranged, in order to equalize the population of each circuit to approximately three million each. North Carolina was added to Delaware, Maryland and Virginia to make the Fourth Circuit. Florida was brought into a judicial circuit for the first time under the composition of the Fifth Circuit, which also included Alabama, Georgia, Mississippi and South Carolina. Texas also received representation on a Supreme Court circuit for the first time when it was brought in to the Sixth circuit to join Arkansas, Louisiana and Tennessee. The Seventh Circuit now consisted of Kentucky and Ohio, while the young states of Minnesota and Wisconsin were joined with Indiana and Michigan to make up the Eighth Circuit. Kansas and Iowa were brought into the circuit system for the first time with Illinois and Missouri to form the Ninth Circuit.[228]

One amendment made to Senator Sherman's bill by the Senate Judiciary Committee created a potential problem for the Miller candidacy. The reorganization of the circuits now placed Iowa and Illinois together in the Ninth circuit. This meant that Miller would now have to compete with Orville Browning and David Davis for a seat on the Supreme

Court. Since there was a strong possibility that Lincoln would appoint one of his old circuit riding friends from Illinois to the bench, the inclusion of that state in a circuit with Iowa would presumably pose a serious threat to Miller's chances of receiving the nomination. The Iowa delegation in Congress was well aware of the consequences stemming from the new composition of the Ninth circuit. The Iowa congressmen, in association with their counterparts at the state level, waged a powerful and persistent lobbying effort to get Iowa into a different circuit.

On January 24, 1862, Senate Judiciary Committee chairman Trumbull moved that the Senate consider bill number 89. Trumbull was anxious to have the bill passed by the Senate because its consideration had already been delayed for two weeks. However, before the bill was read, Senator Grimes brought a resolution before the Senate, asking that the bill to be amended. Among his proposals was a clause which would place Illinois and Iowa into different circuits. According to Grime's plan, the Eighth Circuit would consist of Illinois, Indiana and Wisconsin. Minnesota would take the place of Illinois in the Ninth Circuit.[229]

Under this new arrangement, the Ninth Circuit would have a small population (2,156,397) in comparison to the average of three million per circuit of Trumbull's plan. Grimes told the other senators that this smaller circuit would better accommodate the growth of population which he

expected to affect the four states west of the Mississippi River. In addition, Grimes said that Kansas, Iowa, Minnesota and Missouri should be put in the same circuit because they had adopted a different "system of pleading". Grimes claimed that each of the four states had simplified their legal codes. Since the four states had developed a uniform legal system amongst themselves, Grimes thought that an amendment should be passed which would unite them in the same circuit.

Grimes' attempt to change the organization of the Ninth Circuit (so that his friend Samuel Miller would not have to compete against the two Illinois heavyweights) was not successful. The Senate rejected his amendment by a vote of 24:13. Once the vote was taken, Vice President Hannibal Hamlin called for the question on the amendment reported by the Committee on the Judiciary. Trumbull's plan for the reorganization of the judiciary was agreed to, read for a third time and passed by the Senate.[230] The rejection of Grimes' proposals by the Senate however, did not spell an end to Iowa's chances for representation on the Supreme Court. Senate bill 89 still had to be referred to the House of Representatives for consideration. In the House the Miller forces had a most powerful ally. The newly appointed member of the House Committee on the Judiciary was none other than Representative James F. Wilson of Iowa.

When Senate bill 89 reached the House of Representatives, it became bogged down in a mire of political infighting. Rivalries ensued as congressmen challenged the different configuration of states and circuits that were proposed in one amendment or another. At the center of the struggle was Representative James Wilson. This congressman from Iowa gained control of the Senate bill when it was referred to the House. Wilson kept the bill under review in the House Judiciary Committee for four months, from February to May 1862--time enough to take the bill apart, reassemble its respective parts, and construct the amendments which would create the arrangement that the Iowans needed to give Miller a fighting chance.

While Senate bill 89 was under review by the House Judiciary Committee, prominent Iowa politicians pressed Lincoln on the Miller appointment. On Miller's request, John A. Kasson (whom Lincoln had appointed first assistant postmaster general) went to ask the President why a second appointment to the Court had not been made. When Kasson mentioned Miller's name, Lincoln asked him if he was the same man who used to represent southern Iowa in the Thirty-First Congress. Lincoln was confusing Samuel F. Miller with another lawyer from Keokuk--former Iowa Congressman Daniel F. Miller. Distinguished lawyer though he was, Miller was apparently not well known outside his own state. Kasson cleared up that misunderstanding, and told the

President about Samuel Miller's qualifications for the judgeship.[231]

Miller's name was also brought to the President's attention by Iowa Senator James Harlan, Governor Samuel J. Kirkwood and other representatives from that state. When this delegation met with Lincoln, he asked them which office they wanted filled and by whom. Senator Harlan said that they wanted Miller appointed to the Supreme Court. Lincoln replied: "Well, well, that is a very important position, and I will have to give it serious consideration. I had supposed you wanted me to make some one a Brigadier General for you."[232] The President was teasing Governor Kirkwood with this remark, for he had been pressing Lincoln to appoint more brigadier generals from Iowa. Even though the delegation from Iowa had this audience with Lincoln, he did not make any promises.[233]

Concern over the effect of circuit reorganization on the trans-Mississippi states was not shared by the Davis' coterie. In fact, the threat posed by the Miller candidacy was not even a topic of discussion in the correspondence that flowed between Davis and his friends in Washington D.C. and Illinois in the spring of 1862. This is understandable, considering that Miller was not well known outside of Iowa. In addition, there was a general perception held by Davis' supporters that Browning was their principle competitor for the two vacancies remaining on the Court.

This belief was not ill-founded; it received confirmation from inside the White House itself. Ward Hill Lamon, Lincoln's bodyguard in residence in the White House, verified Swett's suspicions that Lincoln was thinking of appointing Browning to the Supreme Court. In a letter to William Orme in the middle of February, Lamon states: "It is thought here that Browning will be appointed to the [Supreme] Bench. I have said all I dared without injury in the direction of my first allegiance."[234] Even though Lamon was cautious in dispensing information he picked up in the company of the President, he did give Orme some additional information. Lamon said that there was "talk in secret quarters" in Washington to the effect that once Browning was appointed, the third vacancy would be awarded to Caleb Smith. If he received the nomination, David Davis would be tendered Smith's current post, the office of the Secretary of the Interior.

When Davis learned of this, he thought that it would be strange for Lincoln to remove Smith from his Cabinet and place him on the Supreme Court. Davis was not too concerned over the prospect of Smith's becoming Lincoln's second appointee to the Court, once the Judiciary Act was finally passed by Congress. He knew that Lincoln was distressed by the fact that three of his close associates (Browning, Davis and Smith) all wanted to be chosen to fill one of the positions still open on the Court. Davis was confident that Lincoln would hesitate in making another appointment.

However, just to be safe, Davis wrote to Swett on February 16, 1862 and asked him to go to Washington in the company of Lawrence Weldon if the bill should pass Congress. As an added piece of insurance, Davis sent Swett a petition on his behalf from Samuel T. Glover, a distinguished lawyer from St. Louis who had worked hard with Davis on the war claims commission. If Swett and Weldon were dispatched to Washington to lobby for him once the bill reorganizing the judicial system became law, Davis believed that Glover's letter would aid them in their efforts because Lincoln held the St. Louis lawyer in high regard.[235]

Davis' indifference to Smith's aspirations for an appointment to the Supreme Court ended when he discovered that he might end up as Secretary of the Interior instead of an Associate Justice of the Supreme Court. Davis received the news from Hawkins Taylor, who said that the gossip in Washington was that the Judge would be appointed Secretary of the Interior once the bill reorganizing the judiciary was passed. Taylor also told Davis that the opinion in Washington was that it was unlikely that Smith would receive confirmation from the Senate even if he were appointed. This admission was of little consolation to Davis, who thought that Smith was now working with Browning to get them both on the Supreme Court at his expense.[236] When Davis received Taylor's letter from Washington, he immediately wrote to William Orme and Leonard Swett, complaining about Smith's lack of gratitude. Davis' anger at Smith over this

episode is quite understandable because he had been initially responsible for securing Smith a position in Lincoln's Cabinet.[237]

Davis' suspicion of collusion between Smith and Browning may have been well founded, for Smith did attempt to persuade Davis to drop out of contention and accept the fact that Browning was going to receive the nomination. Smith used John P. Usher to try to convince Davis to end his campaign and instead accept one of the two new positions on the Court of Claims which had recently been created by an Act of Congress. Usher was an old friend of Davis from his circuit riding days and was now Smith's assistant in the Department of the Interior. On May 1, 1862, Usher wrote Davis a long and persuasive letter which outlined the many reasons why Davis should seek a position on the Court of Claims. Usher opened his letter by saying that he had refused to sign a petition recommending Judge Jesse O. Norton of Illinois for the judgeship because he thought Davis would want it. Usher believed that the position would appeal to Davis because it would take up only half the time of his state judgeship, since there was no circuit to travel. Usher told Davis that his chance of receiving the position of Chief Justice of the Court of Claims was much better than becoming an Associate Justice of the Supreme Court, on account of the great uncertainty of the whole affair in Washington. He also reminded Davis that, as Lincoln's favorite, Browning was bound to be appointed to

the bench. When this happened, Usher warned, the President would be obliged to fill the remaining vacancy with a candidate from the South. In closing, Usher reminded Davis that multitudes of office seekers were harassing Lincoln for an appointment. He asked Davis not to allow his friends to interfere with the President on his behalf any longer, for the probability of success was small.[238]

Davis probably did not give serious consideration to the arguments presented in Usher's condescending letter. Unbeknownst to Usher, Davis had received a letter from Jesse Norton the previous week declaring his wish for a judgeship on the Court of Claims. Norton told Davis that he had written a letter to Lincoln recommending him for the Supreme Court. Norton asked Davis to return the favor by writing to the President in support of his bid for a seat on the Court of Claims.[239] "Davis, aware that his reply [to Norton] would probably be shown to Lincoln, phrased it with care."[240] Davis wrote:

> So far as I am personally concerned, I do not wish to be considered by my friends as an applicant for any position and the mention of my name in connection with this position should not effect your selection.[241]

Davis told Norton that he could not write to Lincoln as he wished because he had already promised his support to Judge W. E. Terry of Vermillion County, Illinois a year earlier. Since Davis was bent on recommending Terry for the Court of Claims, Usher's appeal probably did more to strengthen,

rather than weaken his resolve to obtain a seat on the Supreme Court.

Davis' belief of a possible collaboration between Smith and Browning was also shared by Justice Swayne. In March of 1861, Swayne had a long discussion with Attorney General Edward Bates over the filling of the vacancies on the Court. Swayne told Bates that the bill which was pending before Congress would gerrymander the reorganization of the judiciary in Smith's favor. If passed, the bill would put Indiana and Illinois in different circuits; Smith and Browning would then not have to compete for the same seat. Swayne believed that a great effort was being made to secure Smith his own circuit--and he thought it was on the verge of success.[242]

Fortunately for Davis, Swayne's prediction did not come true. Whatever support Smith had in Congress was not sufficient to place Indiana in a different circuit from Illinois. In fact, when the legislation reorganizing the judiciary was debated in the Senate, Indiana's senators made no effort to get Smith the separate circuit that he desired. The debate centered around the amendments made to Senate bill 89 by the House Judiciary Committee. Representative Wilson reported the amendments to the House on June 4; the bill reached the Senate two weeks later. Senator Joseph A. Wright of Indiana was not pleased by the changes Wilson had made to the bill because Indiana was now in the Eighth

Circuit with Illinois and Wisconsin. Speaking for the senators from Indiana, Michigan and Ohio, Wright said that these three states deserved to be placed together in the same circuit for a number of reasons. For example, he said that the three states had developed similar legal procedures, during the period in which the region had undergone population growth.[243] For the most part, Senator Wright's argument revolved around his desire to put Indiana in the same circuit as Ohio in order to gain the representation of Justice Swayne for his state:

> I have before me a petition signed by almost all the leading members of the bar of Indiana who practice in the Federal Courts, requesting that Indiana and Ohio shall be retained in the same circuit, in order that they may have the judicial services of that pure, able, and learned jurist, Judge Swayne.[244]

Even though the battle over the reorganization of the circuits would reverberate back and forth between the House and the Senate until the middle of July, Senator Wright was finally able to get Ohio and Indiana as the two states which made up the Seventh Circuit.

The preference exhibited by Senator Wright and members of the Indiana state bar for the services of Justice Swayne shows that Smith's desire for a seat on the Supreme Court was nothing more than an empty ambition. Even if Smith were able to gather some support for his candidacy, there is no evidence to suggest that Lincoln ever seriously considered Smith as a viable aspirant for the Supreme Court. In fact,

Smith was a political liability for the President. He was nothing more than a political hack from Indiana who used his connections with David Davis, Simon Cameron, and Thurlow Weed to get himself into the Cabinet. Once there, he did not have the aptitude or the interest to effectively manage a portfolio as large and demanding as the Department of the Interior.[245] He had other problems as well; he was denounced in Washington for an "alleged abuse of patronage."[246] Finally, another important factor which would have excluded Smith from contention was his poor health. If Smith's physical condition put his continued participation in the Cabinet in jeopardy, it would have been impossible for him to endure the arduous work load required of a Supreme Court Justice.

When all these factors are taken into account, one can understand why Lincoln was trying to find a way to get Smith out of the Cabinet. The President had been thinking of removing Smith from his post for some time. Finally, Smith himself decided to accept an appointment to a Federal District Court. A vacancy on the United States District Court of Indiana was created upon the death of Judge Elisha M. Huntington in October of 1862. Lincoln appointed Smith to the District judgeship and elevated Assistant Secretary of the Interior John Usher to replace him. However, Caleb Smith did not enjoy a long and distinguished career as a federal judge; he died in 1864.[247]

Smith's failed candidacy and Miller's successful one illustrates the affect that a particular arrangement of states in a judicial circuit can have on an aspirant's drive for a seat on the Supreme Court. Davis appreciated the connection between circuit reorganization and the probability of the selection of one candidate over another. He believed that Lincoln would not make another appointment to the Supreme Court until the arrangement of the judicial circuits was finalized.[248] If Lincoln's procrastination in filling the remaining vacancies on the Court was linked to the passage of Senate bill number 89, the conflict between the House and the Senate over the provisions of the act threatened to delay the appointment of a second justice until the fall.

When the bill finally emerged from the House Judiciary Committee on June 4, Senator Trumbull waited for another two weeks before he reported the bill to the Senate. Trumbull recommended that the Senate reject the amendments made to the bill by the House because they disrupted his plan to equalize the population of the circuits. After Senator Wright's demands for a circuit consisting of Ohio, Michigan and Indiana were accepted, the Senate sent the bill to the House for passage. However, Representative Wilson did not appreciate the changes to the bill which were made by the Senate. Wilson pushed a resolution through the House which requested a conference to be held in the Senate to discuss the series of amendments made by both Houses of Congress.

The conference committee consisted of Senators John C. Ten Eyck of New Jersey, Jacob Collamer of Vermont, Joseph A. Wright of Indiana, Representatives John A. Bingham of Ohio, Robert Mallory of Kentucky and James F. Wilson of Iowa. The House readily accepted the changes in circuit organization which were made by the committee; the Senate did not. When Senator Wright brought the recommendations of the conference committee before the Senate for consideration, Senator Jacob M. Howard of Michigan, angered by the placement of his state in a different circuit, accused the committee of writing an entirely new bill. Howard did not want Michigan and Ohio to be separated from one another, citing the similarity of legal and business practices between the two states. He was supported by Senators Zachariah Chandler of Michigan and committee member Ten Eyck; they suggested that the passage of the bill should be delayed so that it could receive further consideration. Senator Henry M. Rice of Minnesota wanted consideration of the bill to be put aside until the following December. Senator Wright was against any delay; he feared that if the report of the conference committee were to be rejected, the bill would not survive another series of congressional debates. The Senate, weary of the months of debate over the reorganization of the circuits, rejected Senator Rice's motion to delay consideration of the bill until Congress reconvened in December. The conference report was approved by the Senate and the bill reorganizing

the judiciary was passed. Senate bill 89 was signed into law by President Lincoln on July 15, 1862.

According to the Judiciary Act of 1862, the newly structured circuits were now composed of the following states: The First Circuit consisted of Maine, Massachusetts, New Hampshire and Rhode Island. The Second Circuit contained Connecticut, New York and Vermont. New Jersey and Pennsylvania made up the Third Circuit. The Fourth Circuit included Delaware, Maryland, North Carolina and Virginia, while Alabama, Florida, Georgia, Mississippi and South Carolina were placed together in the Fifth Circuit. Arkansas joined Kentucky, Louisiana, Tennessee and Texas in the Sixth Circuit. The Seventh Circuit contained Indiana and Ohio. Illinois was put in the Eighth Circuit with Michigan and Wisconsin. Iowa was placed in the Ninth Circuit with Kansas, Minnesota and Missouri.[249] California and Oregon were left out of the Judiciary Act of 1862. These two states could not be brought into this system without the addition of another justice to the Supreme Court. Besides, if California and Oregon were made into a separate circuit, they would have a very small population in comparison to the other circuits. Exclusion from the Judiciary Act of 1862 did not leave these two western states without representation in the federal judiciary: in 1862, these states had a circuit system of their own, with a circuit judge. California and Oregon received representation on the Supreme Court in the following year

when the Judiciary Act of 1863 created a Tenth Circuit. These states were represented by Lincoln's fourth appointment to the Supreme Court, Justice Stephen J. Field of California.[250]

The passage of the Judiciary Act of 1862 marked a double victory for Representative Wilson, Senators Grimes and Harlan, and the rest of Miller's supporters in the Capitol and in Iowa. The persistent efforts of these men resulted in the placement of Iowa and Illinois into different circuits, thereby insulating Miller from a contest with Browning and Davis for a seat on the Supreme Court. This lobby was successful, for Lincoln appointed a man to the Court whose name he did had not even recognized only a few weeks before.

The President appointed Samuel Miller to the justiceship of the Ninth Circuit of the Supreme Court on the night of July 16, 1862. Lincoln sent the nomination to the Senate that night and it was confirmed ". . . in half an hour without reference to committee, a courtesy usually reserved for persons who have been members of that body."[251] Ironically, Senators Grimes, Harlan and Representative Wilson were still gathering support for Miller at the time Lincoln was in the process of making his nomination. Senator Grimes had drawn up a petition asking for Miller's appointment to one of the two remaining vacancies on the Court. Senators Grimes and Harlan got 28 of the 32 senators

left in Congress (after the secession of the Confederate members) to sign the recommendation. Representative Wilson submitted a similar petition to the House of Representatives, receiving 120 signatures (approximately 75 percent of the members of the House signed the document). The two written requests were presented to Lincoln after the Judiciary Act was passed by the Senate.[252]

When Miller's appointment was confirmed by the Senate, the eastern newspapers were confused about the identity of the nation's new justice. In Washington, the Daily Globe and the Evening Star did not mention Miller by name; they only stated that a new appointment had been made to the Supreme Court. When the telegraph dispatches reached the New York Tribune, Samuel Miller's name was changed to Daniel F. Miller. The Tribune's editorial staff had assumed that the former Whig congressman from Iowa had been appointed by Lincoln instead. This case of mistaken identity was perpetuated for months after Samuel Miller's appointment, because such newspapers as the New York Post and the Washington Morning Chronicle continued to refer to Samuel Freeman Miller as Daniel F. Miller. Of course, some newspapers did publish accurate reports; the Chicago Tribune identified the new justice as Samuel Miller, a prominent Republican from Iowa.[253] Naturally, the one publication which did not have a problem with Miller's name or occupation was the Weekly Gate City of Keokuk, his hometown

in Iowa. In the issue of July 23, 1862 Miller was described as the

> model, the beau ideal of a Western Lawyer and a Western Judge [whose appointment would] . . . create a sensation even in that fossilized circle of venerable antiquities which constitutes the Bench of the Supreme Court.[254]

This editorial was prophetic; for Samuel Miller was a "sensation" on the Lincoln Court. In the words of Chief Justice Salmon P. Chase, Miller was "beyond question, the dominant personality [then] upon the bench, whose mental force and individuality [were] felt by the Court more than any other."[255]

When newspaper reporters were not referring to "Daniel F. Miller" as a new member of the Supreme Court, they speculated on who would be nominated to fill the third vacancy on the bench. A story in the New York Tribune on July 18, 1862 said that while David Davis was the leading candidate, Republican Senator James R. Doolittle of Wisconsin or Michigan lawyer William A. Howard were two possible choices for the seat. The Tribune concluded that Lincoln's decision to leave the Eighth Circuit without representation signaled the "defeat of Senator Browning's aspirations to a seat on the bench."[256] In a subsequent report, the Chicago Tribune postulated that Doolittle and Browning were ineligible for a position on the Court under the Constitution because the circuit was created while they were members of the Senate.[257] Whether the Tribune's interpretation of the Constitution was correct or not was of

little consequence; Doolittle probably abandoned any hope for a seat on the Court once the Judiciary Act of 1862 became law:

> [He] . . . voted against the reorganization bill because of personal and state considerations. He was anxious for judicial office himself and was bitterly disappointed when Wisconsin and Illinois were joined in the same circuit.[258]

While the New York Tribune was forecasting the demise of Browning's campaign for a seat on the Court, Davis' supporters continued to lobby the President to choose their candidate over Browning. Republican Joseph Medill, editor of the Chicago Tribune, was adamant in his opposition to Browning's appointment. Medill wrote to Senator Trumbull saying:

> You may safely tell your senatorial associate Browning that he represents only the secesh [secessionists] of Illinois--Republicans detest and despise him. . . . His elevation to the Supreme Bench will be the most unpopular act of Mr. Lincoln's life and he ought to be informed of it, before he does the deed.[259]

Medill's denunciation of Browning was prompted by the Senator's opposition to the passage of another confiscation bill by Congress--a piece of legislation which Medill supported. Introduced by Senator Trumbull in December of 1861, it was a harsh bill; one that was far more inclusive in its scope than the First Confiscation Act of the previous August. Rebel property was to be confiscated in the South by the military; in the North, the seizure of Confederate assets would be carried out through the courts. "Trumbull argued that his bill conformed to the Constitution by

providing that any person in reach of the federal courts convicted of treason would have his personal property confiscated forever, but his real property forfeited only for life."[260] Naturally, slaves were considered to be subject to confiscation as rebel property under this bill. Among its provisions was a clause which declared free the slaves of all individuals in rebellion against the Union government and of any person who assisted the rebellion.[261]

Trumbull's confiscation bill created an uproar in the Senate as three different political factions debated the merits of his plan (or lack thereof) for months:

> First, there were the Radical Republicans, passionately in favor of the hard-knuckled Trumbull measure. Although some of them desired a stronger bill than Trumbull proposed, they closed ranks behind it. Second, there were the moderate Republicans who desired the mildest possible bill. Lastly, there were the Democrats and Conservatives who adamantly opposed any such legislation.[262]

One Conservative Senator who opposed Trumbull's bill was Orville Browning. When the legislation was put on the floor of the Senate for consideration, Browning denounced the measure as being too oppressive on the South.[263]

The question of which branch of government had the authority to exercise certain war powers was at the heart of this dispute. If Trumbull's bill became law, the Radicals would have emancipation in the manner they wanted, i.e. by congressional enactment rather than by presidential edict. Thus, Congress would effectively assume what Lincoln considered to be a disputed war power and at the same time, "establish a precedent for legislative supremacy over the

whole prosecution of the war."[264] Browning was aware that Trumbull's confiscation bill was a threat to Lincoln's authority, because it would assert Congressional control over the government's policy towards slavery and emancipation. Browning warned the President of the pitfall of this matter, saying that "his course upon this bill was to determine whether he was to control the abolitionists and radicals, or whether they were to control him."[265] Lincoln understood the danger that Trumbull's bill posed to his authority over slavery policy. When it appeared that the Radicals would succeed in pushing the confiscation bill through Congress in July, Lincoln finally entered the debate by letting it be known that he would veto the act. This revelation infuriated the Radicals; since Congress was ready to adjourn, there would be no time to pass Trumbull's bill over a veto. However, Lincoln said that even though he did not like the bill, he would sign it if submitted in a modified form. The President wanted a clause that would allow the slave property of a person to be confiscated if he had committed treason before the passage of the act to be removed. He also wanted Trumbull's provision which confiscated real property of a traitor beyond his life to be dropped as well. Reluctantly, the two offending clauses were removed and Lincoln signed the Confiscation Act into law on July 17, 1862.[266]

Browning's strong vocal opposition to the Confiscation Act was somewhat of a mixed blessing for his campaign for a

seat on the Supreme Court. On the one hand, newspapers throughout Illinois supported Browning for his stand against the Radical abolitionists and their Confiscation Act. For example, Springfield's Illinois State Register ran a series of editorials and articles from newspapers from across the country which praised Browning for "his able and manly defense of the constitution."[267] An editorial in the Chicago Times even predicted that Browning's "fair representation" of Lincoln's views in the Senate on the Confiscation Act would quickly earn him an appointment to the Supreme Court.[268] However, the same newspaper editorials that approved of Browning's course on the confiscation question also reported that his actions were not without a political cost. In a number of newspaper articles, Browning was referred to as the Republican "Jonah" of the Confiscation Act, meaning that Illinois members of Congress and others who were alienated by Browning's opposition to the bill were "now trying to throw him overboard" by signing a petition for the appointment of Thomas Drummond to a seat on the Supreme Court for which Browning was a candidate.[269]

As a result of his attack on the Confiscation Act, opposition to Browning's appointment to the Supreme Court now came in other forms besides the favored tactic of signing petitions that espoused rival candidates. A number of individuals wrote strong letters to Senator Trumbull, saying that they were puzzled by Browning's actions in the

Senate, especially since "[n]early every Republican senator decided to vote for the bill, although some were unenthusiastic about it."[270] These men saw him as a Southern sympathizer; a man whose disloyal vote against the Confiscation Act had made him the most unpopular man in Illinois. One correspondent of Trumbull's was a Mr. J. Buck from Aurora, Illinois, who stated:

> Mr. Browning . . . is universally condemned and despised by the great [majority] of the Republicans and a large portion of the Democrats in this end of the State. . . I hope Mr. Lincoln will not outrage his friends in this State by giving him a Judicial Appointment.[271]

In a letter of a similar tone, Charles Dyers, an associate of Thomas Drummond in Chicago, told Trumbull that Drummond was the most probable candidate for the Court. Dyers reported that his contacts in Michigan, Wisconsin, and Illinois were "anxious" that Browning should not be appointed to the Supreme Court. Dyers asked Trumbull, presumably in his capacity as Chairman of the Senate Judiciary Committee, to "put right in for Judge D. [Drummond]--and give us a clearance from Browning."[272]

It is not known whether or not these letters, the incensed attitude of the Radicals, and their press comment, in general adverse towards Browning's view on the Confiscation Act, or his attack against Trumbull and his bill on the floor of the Senate set the Chairman of the Judiciary Committee against Browning's candidacy. However, the fact remains that a strong attempt was made in July of 1862 to block Browning's nomination to the Court because he

staunchly opposed the passage of the Confiscation Act. This episode illustrates two important points: first, like the Davis campaign, the Browning candidacy had its own problems; secondly, as in the case of Davis and the Department of the West, Browning's campaign was endangered by the Radicals. Certain Radical Republicans sought to block his nomination because Browning criticized one of their own.

Even though the speculation over whom Lincoln would select as his third nominee continued throughout July, no one expected another appointment to the Supreme Court for at least a few more months. Congress adjourned on July 17, and the interested parties anticipated that Lincoln would wait for Congress to convene again before making another nomination. However, at least one of Davis' colleagues did not have to wait for very long. During a visit with the President at the end of the month, Leonard Swett learned that Lincoln had decided to appoint Davis to the Supreme Court. Elated by the news, Swett scribbled a quick note to his wife from the Executive Mansion on July 31, 1862, urging her not to "tell any human soul of it [because] . . . [n]o one else knows anything about it."[273]

Swett had a good reason for keeping the news of Lincoln's decision a secret from Davis and the rest of his close associates. Swett had received similar assurances about Davis from Lincoln in the past, only to see the President give Justice McLean's place on the Supreme Court to Noah Swayne. Swett probably did not want to repeat the

unpleasant experience of returning to Davis in Illinois with another empty promise--especially since Miller's recent appointment had left only one more vacancy on the Court to be filled. Perhaps Swett had this thought in mind when he called upon Mary Todd Lincoln before he left Washington for New York. Swett related the details of the interview in another letter to his wife:

> She told me she had been fighting Davis' battles, that Browning had gone home and she was glad of it--that he [had] become distressingly loving just before he left. She told me to tell Judge Davis that his matters were all right. . . . She seemed very glad and very positive about it [about the prospect of Davis' appointment]. When I left she told me again at the door to tell Judge Davis his matter was all right.[274]

The enthusiastic reassurance made by Mrs. Lincoln was just the thing that Swett needed to hear.

Mary Todd Lincoln's enthusiastic support for the Judge proved to be an invaluable asset to the Davis campaign. His wife exercised considerable influence over her husband's public activities. Unlike the majority of the women of her era, Mrs. Lincoln had shown a keen interest in politics since her youth. Her passion for politics intensified with her marriage to Abraham Lincoln, whose career as a legislator was regarded by her as a mutual responsibility. The high level of participation in her husband's subsequent career illustrates this belief.

For instance, when Congressman Lincoln left Springfield for his first term in 1847, she travelled the 1,626 miles to Washington (with four-year-old Robert and the infant Eddie)

to be by her husband's side. In 1849, she wrote letters to influential Whigs across the Midwest asking them to lobby President Taylor, requesting Lincoln's appointment as Commissioner of the General Land Office. She signed his name to the letters. When his checkered rise to public office suffered one of its many setbacks, Mary consoled Lincoln, raised his spirits, offered advice--and he listened.[275] Mary Lincoln always had an unrivalled opportunity to provide such advice, since her husband "to an extraordinary degree confided to her his plans, his positions, his opinions of others."[276] Thus, by setting the advancement of Lincoln's political career as her primary concern, Mary Lincoln had made herself "her husband's chief advisor on patronage and appointments."[277]

The range of her interests in patronage and appointments was limitless. She wanted to be involved at every level of the selection process; from the determination of the composition of the Cabinet to the filling of minor offices and clerkships. In January of 1861, Mrs. Lincoln wrote to David Davis, knowing that her husband's campaign manager had considerable influence when it came to the assignment of Cabinet posts. She told Davis about the efforts being made to secure Norman Judd a position in the Cabinet, and warned him that such an appointment would cause "trouble and dissatisfaction".[278]

Judd was not the only aspirant for the Cabinet to whom Mary was opposed. When conservative Republicans tried to

get the President to appoint General Nathaniel Banks as Secretary of War in the fall of 1864, Mary asked many friends (including Senator Charles Sumner) to write to Lincoln expressing their opposition.[279] Even though Mrs. Lincoln was pleased with her efforts to exclude these men from the Cabinet, her involvement with this body did not end with the selection of its members. Within weeks of moving into the White House, Mrs. Lincoln was urging Secretaries William Seward, Caleb Smith, Gideon Welles, and Simon Cameron to provide positions for her friends and associates.

Mary Lincoln was successful in procuring appointments for some of her relatives. Her brother-in-law, Dr. William Wallace, was provided with a paymastership for volunteers in Illinois. Mrs. Lincoln's cousin, Captain John Todd, a West Pointer, received a commission as brigadier general of volunteers from the President.[280] Some of the examples of patronage which Mrs. Lincoln secured from her husband stretched the bounds of propriety, even in an age when the practices of nepotism and influence peddling were commonplace. For example, Mary Lincoln received a gift of diamonds from Isaac Henderson before Lincoln's inauguration. Henderson's gift, which was intended to secure a customs' post in Boston, caused a fight between the President and his wife over the appointment. Mary Lincoln urged her husband to grant Henderson at the very least a naval post, and he consented.[281]

Mrs. Lincoln understood the value that the mention of a name, a short memorandum, or even a temper tantrum could have in influencing her husband's selections. It was the latter tactic which helped her earn the nickname of "Hell Cat". In her fits of rage, Mrs. Lincoln threw books at her husband in order to get his attention; in one instance she threw a log at him.[282]

The extremes to which the First Lady would go in order to secure an appointment could be described as serio-comical. For example, on February 11, 1861, the day that the presidential delegation was to leave Springfield for the U. S. Capitol, Lincoln failed to show up at the railway station for a farewell reception. When one of Norman Judd's aides was sent to the Lincolns' suite to investigate, he found the President-elect sitting in a chair looking at the contorted form of his wife lying on the floor. Lincoln quietly explained: "she will not let me go until I promise her an office for one of her friends."[283]

These emotional outbursts distinguish Mary Lincoln's particularistic attitude towards politics. She viewed politics from a personal perspective: friendships were judged in partisan terms and political rivals were seen as enemies. More concerned with personalities than issues, Mary Lincoln judged individuals according to her personal impressions of them. She saw herself as a "full-fledged, home-based counselor available for insightful judgments about the human motivations that were the core of

politics".[284] Mary Lincoln believed she could best serve her husband by using the sixth sense with which females are supposed to be endowed (especially in her case) to guide his political decisions.[285]

Since the decisions she made as Lincoln's chief advisor on appointments and patronage were based on personal impressions and intuition, her opinion of Browning and Davis in the weeks following Samuel Miller's appointment may have influenced his attitude as to which man was right for the position. Even though both Browning and Davis were considered to be close friends of the family, Mary Lincoln was annoyed with Browning's presence in Washington. Her reference to his becoming "distressingly loving just before he left" concerns a faux pas that the Senator committed while riding in a carriage with the First Lady.[286] This social indiscretion was a political blunder, one which may well have had a negative impact on Browning's campaign. Considering Mary Lincoln's intemperate disposition, such an offense, whatever it was, may have only served to strengthen her resolve to press for Davis' selection as the third nominee for the bench. After all, Mrs. Lincoln was by then very positive about Davis' chances of being appointed to the Supreme Court; she was also demonstrably glad that Browning had left the Lincolns' company to return to Illinois.

The private discussions she had with her husband on the appointment of David Davis to the Supreme Court must have been persuasive. The President's decision to nominate Davis

was made a few weeks after Leonard Swett's visit to the White House. Lincoln wrote to Davis on August 27, 1862, saying: "My mind is made up to appoint you Supreme Judge."[287] However, Lincoln made the nomination dependent upon one condition. The President wanted Davis to promise that he would not dismiss William Bradley from his position as district and court clerk in Chicago. Lincoln included this stipulation in order to appease Bradley and the rest of Thomas Drummond's supporters. While this gesture was only a small concession for the President to make, it was a magnanimous act on his part. Drummond did not deserve a consolation prize from the President; he was not the runner-up in the contest for the third vacancy. The Chicago judge had been dismissed as a possible choice for a seat on the Supreme Court as early as February of 1862.[288]

Davis received Lincoln's letter in Bloomington, Illinois on September 1, 1862. He immediately sent the following reply to Washington:

> I cannot in words sufficiently express my thankfulness and . . . gratitude for this distinguished mark of your confidence and favor. While I shall assume the responsibilities of this office, with great distrust in my abilities[,] . . .I hope by labor and application, to discharge its duties satisfactorily. I should not in any event think of displacing Mr. Bradley . . . I shall take great pleasure in retaining him.[289]

When Lincoln received this letter of acceptance, he did not draw up Davis' official nomination to the Supreme Court right away. Since the Senate had adjourned, the announcement of the appointment would have to be postponed

until Congress reconvened in December. However, Lincoln refused to wait until the end of the year and asked Attorney General Bates to advise if a vacancy on the Court had ever been filled during a recess of Congress. Bates told him that the Constitution (Article II, Section 2) gave the President the right to fill all vacancies that occur during a Senate recess by granting commissions that expire at the end of the next session.[290] When Lincoln received this information, he asked the Attorney General to draw up a commission for Davis as Associate Justice of the Supreme Court.

The commission, signed by Lincoln on October 17, 1862, provided Davis with the right "to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him . . . ."[291] While Davis was authorized to "execute and fulfil the duties" of an Associate Justice of the Supreme Court, the commission was only temporary. Lincoln, mindful of the fact that he had appointed Davis during a recess of Congress, and knowing that the nomination would still have to be confirmed by the Senate, restricted the tenure of Davis' commission to the length of the next session of Congress.[292] Temporary commission or not, Davis was excited by the news of his appointment to the Supreme Court. Expressing his thanks for the commission, he admitted to surprise at the timing of the nomination. Expecting the appointment in December, Davis told Lincoln that he had planned to leave for Washington in

November. However, Lincoln's invitation to come to Washington spurred Davis to hasten his departure.[293]

He arrived in Washington during the week of November 12, 1862. For a man who was about to receive the highest honor of his profession, Davis was not a very happy man. The atmosphere in Washington drained away whatever feeling of elation Davis may have felt on learning of his nomination. The Capitol was in a state of near chaos in the fall of 1862. The Union Army had suffered another major defeat in the Second Battle of Bull Run (i.e. Second Manassas) on August 30. The army of General John Pope had retreated to Washington in disarray. Fearing that the Confederates would take advantage of the Army's demoralized state, Lincoln prepared for an invasion of the Capitol by placing Major-General George McClellan in command of the Army of the Potomac. Unfortunately, McClellan's cautious approach to battle failed to produce a decisive victory. The President relieved McClellan of command on November 5, only a week before Davis was to arrive in Washington. McClellan's dismissal brought the Army to the point of mutiny and frightened a city awaiting invasion. This is the situation that Davis found in November of 1862.[294]

The melancholy atmosphere in the District contributed to Davis' depression; once again he seriously questioned his ability to fulfill the duties of a Supreme Court Justice. In a letter to William Orme, he admitted: "Writing opinions will come hard to me. I don't write with facility. I'd

give $10,000.00 if I could write as easily as you do."[295] In a letter to his wife, Davis talked about how his mood had changed after leaving Illinois:

> If I had felt in Illinois, as I have this week, I never [would] have come to Washington. . .What strikes everybody as the highest good fortune, has been to me like ashes. . . I will try the judgeship and if it don't [sic] suit me, or if I don't suit it, I will resign.[296]

The speed with which Davis was confirmed supports the observation that his nomination was seen by others as a good appointment. Lincoln sent a message to the Senate on December 1, 1862, announcing Davis' nomination as an Associate Justice of the Supreme Court. The matter was referred to the Senate Judiciary Committee two days later. On December 5, the Committee reported it favorably to the Senate. On December 8, 1862 the Senate confirmed Davis' nomination. There was no recorded vote.[297]

A strange development regarding Davis' appointment occurred after his confirmation to the Supreme Court. Apparently, opposition to the appointment was being organized in Congress weeks <u>after</u> he became an Associate Justice. In a letter to William Orme on December 28, Leonard Swett reported that the "Fremont--McKinstry influence" was causing trouble with Davis' confirmation. Yet, Swett was not concerned with the actions of the supporters of Major-General Fremont and the late Quartermaster McKinstry in Congress; he thought "it would amount to nothing."[298] Opposition to Davis' nomination may have been weak in Congress because the report the Judge

presented on corruption in the Department of the West did not destroy Fremont's military career. Lincoln gave Fremont a new (albeit minor) command in the Appalachians before the Commission's report was even published. While Davis was angry that Lincoln succumbed to political pressures exerted by the abolitionists, such a move redounded to the Judge's benefit in the long run. If the report by the Commission on War Claims in St. Louis had contributed to Fremont's dismissal from the Army, Davis might have been caught in the political backlash. Fremont's new command probably placated his supporters in Congress enough to make them forget about seeking revenge for Davis' "past sins".

Davis' denunciation of Fremont's command of the Department of the West was not the only reason why the abolitionists in Congress would be inclined to oppose his nomination to the Supreme Court. Like many other border state whites, David Davis was no friend of the abolition movement. Before the war, he saw the abolitionists as extremists, whose policies would bring about the dissolution of the Union.[299] In the 1850's, Davis fought to keep the Whigs and the new Republican Party from becoming 'abolitionized'. Davis' campaign against Illinois abolitionist Owen Lovejoy is a case in point.[300] When Leonard Swett lost the Republican nomination for the Third Congressional District to Lovejoy in 1856, Davis again tried to prevent Lovejoy's nomination in 1858. Davis hated

Lovejoy, and did not want this abolitionist to represent Illinois in the House of Representatives.

Davis was fighting a losing battle. Lovejoy was very popular in the counties of central Illinois which comprised his district. It was crucial for the Republican Party in Illinois to retain control of these counties in the center of the state. Illinois was split along ideological lines into two sections: the northern part of the state was solidly Republican, and the southern part was Democratic.[301] In the middle was Lovejoy's Third Congressional District. When Lincoln's followers proposed to run an independent Republican against Lovejoy for the congressional nomination, Lincoln quashed the plan. He did not want the Republican Party to be embarrassed by a split in the ranks at its own nomination meeting. Lincoln also feared that Lovejoy's supporters would blame him for the plan to defeat the Congressman. Since Lincoln needed the legislators representing the counties in Lovejoy's district to support his bid for the Senate over Stephen A. Douglas, he was careful not to be seen as opposing Lovejoy's re-nomination.[302]

Considering the fact that Davis despised Lovejoy and had campaigned against him in two congressional contests, one would expect that this abolitionist would try to block the Judge's nomination. In fact, Lovejoy did just the opposite. As early as April of 1861, "the abolitionist was urging the appointment of Davis to the United States Supreme

Court."[303] At times, circumstances make strange bedfellows. During the Civil War, it was not uncommon for divergent political factions to unite for the sake of the Union. In Lovejoy's case, "the congressman arrived at a modus vivendi with David Davis and his supporters in and around Bloomington."[304] Owen Lovejoy made his peace with the conservative Republicans in Illinois in the spring of 1861 in order to facilitate the winning of the war.[305] Davis was fortunate that the need to suppress the rebellion took precedence over lesser issues, including old political rivalries which existed within the Republican Party of Illinois.

NOTES FOR CHAPTER THREE

[203]Abraham, p. 116.

[204]Abraham Lincoln, "Annual Message To Congress", 3 December, 1861, ed. Richardson, 6: p. 49.

[205]Baringer, pp. 179, 200-3, 286-7.
Lincoln admitted before the convention that he was not the first choice for president in Ohio or in any other state besides Illinois. However, Ohio was not as solidly behind Chase as one might expect. Some delegates were for McLean, some for Lincoln, and others supported Benjamin Wade. On the crucial third ballot at the convention, Ohio provided Lincoln with 29 votes, a gain of 15 votes in the race against Seward for the nomination. When the roll call was completed, Lincoln had a total of 231.5 votes, only 1.5 votes short of the nomination. Lincoln won the nomination when the Ohio delegation provided him with four additional votes. These votes were gained by Lincoln campaigner Joseph Medill, who promised Ohio delegate David Cartter that "Chase could have anything he wants" if the Ohio delegation supported Lincoln.

[206]William Gillette, "Noah H. Swayne", The Justices Of The United States Supreme Court 1789-1969: Their Lives and Major Opinions, eds., Leon Friedman and Fred L. Israel (New York: Chelsea House, 1969), Vol. 2 pp. 990-1.
As mentioned in the first chapter, Swayne received the support of influential businessmen in Ohio, including B. Ogden and Samuel J. Tilden, future Democratic candidate for president.

[207]Tribe, p. 145.

[208]Silver, p. 60.

[209]David Davis, Letter to Sarah Davis, 26 January 1862, DDP, LC, R 1. The word "translated" was a nineteenth century slang expression which meant to be in a state of drunkenness. The word also had a theological definition for being conveyed to heaven without death. Whatever definition Davis meant shows that he did not believe his chances of being appointed were very good.

[210]Examples of Davis' vacillations in this regard are illustrated throughout his correspondence in 1861-2. In Davis' letter of 31 May, 1861 to Ward Hill Lamon, the Judge states that he "never had any expectation of getting on to the Supreme Bench . . . ." Yet, on the following page of the letter, Davis says that he would really appreciate it if Lamon would talk to Lincoln and find out what the

President's feelings were on the subject. Davis also wanted Lamon to relay his desire for a judicial appointment of some kind to Lincoln. In a letter to William Orme on 16 February 1862, Davis states that he has "always been diffident in the matter. . . ." However, in the following sentence Davis says confidently that "[p]ressure at Washington will overcome Lincoln."

[211]Ibid., p. 77.

[212]Leonard Swett, Letter to Abraham Lincoln, 25 January 1862, LP, RTLC, LC, Series 1: Jan. 21-Feb. 16, 1862. Reel 32 Items 14159-60.

[213]John M. Scott, Letter to Abraham Lincoln, 11 February 1862, LP, RTLC, LC, Series 1: Jan.-Feb. 16, 1862. Reel 32 Items 14479-80.

[214]Ibid

[215]Clifton H. Moore, Letter to Abraham Lincoln, 29 January 1862, DDP, LC, R 1.

[216]Ibid

[217]O.L. Davis, Letter to Abraham Lincoln, 3 February 1862, LP, RTLC, LC, Series 1: Jan.-Feb. 16, 1862. Reel 32 Item 14345.

[218]L. P. Lacey, Letter to Abraham Lincoln, 30 January 1862, LP, RTLC, LC, Series 1: Jan-Feb. 16, 1862. Reel 32 Item 14234.

[219]Leonard Swett, Letter to Samuel Treat, 31 January 1862, DDP, LC, R 1.

[220]Leonard Swett, Letter to John T. Henry, 6 February 1862, DDP, LC, R 1.

[221]Charles Fairman, Mr. Justice Miller And The Supreme Court 1862-1890 (Cambridge: Harvard Univ. Press, 1939), pp. 5, 16, 17, 22, 32-34.

[222]Caleb Baldwin, Letter to Abraham Lincoln, 16 December 1861, LP, RTLC, LC, Reel 30 Item 13434.

[223]George C. Wright, Letter to Abraham Lincoln, 16 December 1861, LP, RTLC, LC, Reel 30 Item 13454.

[224]Edward Johnstone, Letter to Abraham Lincoln, 20 December 1861, LP, RTLC, LC, Reel 30 Item 13503. In the letter, Johnstone went on to say that he supported Miller's bid for the Supreme Court even though they held opposing political views.

[225]J. C. Hall, Letter to James W. Grimes, 16 December 1861, LP, RTLC, LC, Reel 30 Item 13445.

[226]The full title of Senate bill 89 was "a bill to amend the act of the 3d of March, 1837, entitled 'An act supplementary to the act entitled 'An act to amend the judicial system of the United States.'

[227]The First Circuit consisted of Maine, Massachusetts, and New Hampshire. The Second Circuit consisted of Connecticut, New York and Vermont. The Third Circuit consisted of New Jersey and Pennsylvania.

[228]Congressional Globe, 37th Cong., 2nd Session., 6 January 1862 p. 187.

[229]Congressional Globe, 37th Cong., 2nd session., 24 January 1862 p. 469. Under Grimes' proposal, the Sixth Circuit would consist of Louisiana, Texas, Arkansas, Kentucky, and Tennessee. The Seventh Circuit would hold Ohio and Michigan. Illinois, Indiana and Wisconsin would constitute the Eighth Circuit. The Ninth Circuit would contain Missouri, Kansas, Minnesota and Iowa. Grimes' said that the Sixth Circuit was organized in this manner to accommodate Justice Catron, for Kentucky was "the only state in which he is probably able now to hold court." Grimes said that he only placed Ohio and Michigan in the Seventh Circuit because Ohio's courts processed almost twice the amount of business as the other northwestern states. Grimes probably organized the Seventh Circuit in this way to gain the support of Ohio's senators for his amendment. The results were mixed; Senator Wade voted for the amendment, while Senator Sherman voted against it. Sherman probably voted against the amendment because it was his bill which Grimes was trying to change.

[230]Ibid. A record of the vote does not appear on this page. The Globe merely reports that the bill was passed by the Senate.

[231]Fairman, p. 49.

[232]Ibid., p. 48.

[233]Ibid., p. 48. fn.,

[234]Ward Hill Lamon, Letter to William Orme, 1? [second numeral illegible] February 1862, DDP, LC, R 1.

[235]David Davis, Letter to Leonard Swett, 16 February 1862, DDP, LC, R 1. Davis received this information from John Wilson Shaffer, a friend of Leonard Swett who returned to Illinois from a trip to Washington D.C. Shaffer also

told Davis that Thomas Drummond was no longer being considered for the Supreme Court.

[236]David Davis, Letter to Leonard Swett, 23 February 1862, DDP, LC, R 1.

[237]David Davis, Letter to William Orme, 23 February 1862, DDP, LC, R 1.

[238]John P. Usher, Letter to David Davis, 1 May 1862, DDP, LC, R 1. Davis convinced Lincoln that it was necessary for him to honor the patronage appointments promised by himself and the other campaign workers at the Republican convention. Davis had promised Smith a place in the Cabinet if the Indiana delegation supported Lincoln's bid for leadership of the Republican Party.

[239]Jesse O. Norton, Letter to David Davis, 1 May 1862, DDP, LC, R 1.

[240]King, p. 195.

[241]David Davis, Letter to Jesse O. Norton, 13 May 1861, DDP, LC, R 1.

[242]Howard K. Beale, ed., The Diary of Edward Bates 1859-1866 (Washington: Government Printing Office, 1933), p. 244. Bate's concludes his entry for 26 March, 1862 by saying: "nobody...[I] think objects to Browning--He is a proper man."

[243]Congressional Globe, 37th Cong., 2nd Sess., 3 July, 1862 p. 3090.

[244]Congressional Globe, 37th Cong., 2nd Sess., 11 June, 1862 p. 2665.

[245]Carman and Luthin, Lincoln and the Patronage, p. 137.

[246]Beale, p. 228. (The entry in Bate's diary is 2 February, 1862.)

[247]Carman and Luthin, Lincoln and the Patronage, pp. 137-138.

[248]David Davis, Letter to Leonard Swett, 16 February 1862, DDP, LC, R 1.

[249]Congressional Globe, 37th Cong., 2nd Sess., June and July, 1862 pp. 3089, 3090, 3255, 3277 and 3298.

[250]Ibid., 6 January 1862 p. 187. Congress created a separate circuit for California in 1855 and a separate

circuit for Oregon when it became a state in 1859. When the size of the Supreme Court was reduced to seven members under the Judiciary Act of 1866, California, Oregon and Nevada were placed in the last circuit, the Ninth.

[251]Fairman, p. 50.

[252]Ibid., p. 50.

[253]Silver, p. 67.

[254]William Gillette, "Samuel Miller," The Justices Of The United States Supreme Court 1789-1969: Their Lives And Major Opinions, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House, 1969), p. 1014.

[255]Fairman, p. 3.

[256]New York Tribune, 18 July 1862, p. 4. The names of William D. Howard and Senator Doolittle were also mentioned in connection with the vacant judgeship, as were Browning and Davis in Springfield's Illinois Daily State Journal, 24 July 1862, p. 2.

[257]William Orme, Letter to Leonard Swett, 30 July 1862, DDP, LC, R 2. Orme cited a story in the Chicago Tribune issue of 29 July, 1862.

[258]Kutler, pp. 17-18 fn. Doolittle's disappointment at the arrangement of the circuits in the reorganization bill and his views on the judgeship can be found in correspondence to his wife, letters dated 24 January 1862 and 17 March 1862. Papers of James R. Doolittle, State Historical Society of Wisconsin.

[259]Joseph Medill, Letter to Lyman Trumbull, 4 July 1862, Trumbull Papers, Library of Congress, Reel 13.

[260]Ralph J. Roske, His Own Counsel: The Life and Times of Lyman Trumbull, No. 14 of Nevada Studies in History and Political Science (Reno: Univ. of Nevada Press, 1979), p. 83.

[261]Williams, Lincoln And The Radicals, p. 163.

[262]Roske, p. 83.

[263]Congressional Globe, 37 Cong., 2 sess., 1862, pt. 2: pp. 1136-1140.

[264]Williams, p. 163.

[265] Browning, Diary, 1: p. 558.

[266]Roske, pp. 88-90., and Williams, pp. 165-166.

[267]Quincy Herald, as reported in the Illinois State Register, 9 July 1862, p. 2.

[268]Chicago Times, as reported in the Illinois State Register, 19 July 1862, p. 2.

[269]New York Tribune, 14 July 1862, p. 5.

[270]Baxter, p. 139.

[271]J. Buck, Letter to Lyman Trumbull, 8 July 1862, Trumbull Papers, Manuscript Division, Library of Congress, Reel 13.

[272]Charles Dyers, Letter to Lyman Trumbull, 28 July 1862, Trumbull Papers, Manuscript Division, Library of Congress, Reel 13.

[273]Leonard Swett, Letter to his wife, 31 July 1862, DDP, LC, R 2.

[274]Leonard Swett, Letter to his wife, 10 August 1862 DDP, LC, Reel 2.

[275]Baker, pp. 136, 143, 144, and 150.

[276]Justin G. Turner and Linda Levitt Turner, Mary Todd Lincoln: Her Life And Letters (New York: Alfred A. Knopf, 1972), p. 70.

[277]Ibid., p. 134.

[278]Turner and Turner, pp. 71-72. Mary Todd Lincoln, Letter to David Davis, 17 January 1861. Unbeknownst to Mary Lincoln, David Davis did not want Judd in the Cabinet.

[279]Mary Lincoln, Letter to Charles Sumner, 20 November 1864, Turner and Turner, pp. 191-192. Major General Nathaniel P. Banks, was a commander of the Department of Annapolis and a former congressman and governor of Massachusetts. When Mary Lincoln discovered that whatever slim chance Banks had of being appointed were quashed, she was pleased to announce the news in a letter to Murat Halstead of the Cincinnati Commercial on 24 November 1864. See Carl Sandburg and Paul M. Angle, Mary Lincoln: Wife And Widow (New York: Harcourt, Brace, 1932) p. 221.

[280]Carman and Luthin, Lincoln and the Patronage, p. 116.

[281]Baker, pp. 200-201.

[282]Ibid., p. 134.

[283]Jay Monaghan, Diplomat in Carpet Slippers: Abraham Lincoln Deals With Foreign Affairs (New York: Bobbs-Merrill, 1945), p. 28.

[284]Baker, pp. 135-136.

[285]Ibid., p. 134.

[286]Baker, p. 205. The author does not mention what the faux pas was that Browning committed.

[287]Abraham Lincoln, Letter to David Davis, 27 August 1862, DDP, LC, R 2.

[288]David Davis, Letter to Leonard Swett, 16 February 1862, DDP, LC, R 1.

[289]David Davis, Letter to Abraham Lincoln, 1 September 1862, DDP, LC, R 2.

[290]Edward Bates, Letter to Abraham Lincoln, 15 October 1862, LP, RTLC, LC, Series 1: Sept. 24-Oct. 18, 1862. Reel 42 Item 19015.

[291]Commission of David Davis to the Supreme Court, 17 October 1862, Commissions of Judges vol. 3, (4 February 1856 to 21 January 1879) p. 111, Papers of the Attorney General, General Records of the Department of State, National Archives Record Group 59.

[292]Ibid.

[293]David Davis, Letter to Abraham Lincoln, 30 October 1862, LP, RTLC, LC, Series 1: Oct. 18-Nov. 13, 1862. Reel 43 Item 19270.

[294]J. G. Randall and David Herbert Donald, The Civil War And Reconstruction (Toronto: D.C. Health, 1969) pp. 217-224.

[295]King, p. 201.

[296]Ibid.

[297]Abraham Lincoln, Letter to The Senate of the United States, 1 December 1862, Commissions of Judges op. cit., no page number. This letter is accompanied by a cover letter which lists the dates cited. There is no record of a vote tally in the Congressional Globe on Davis' confirmation by the Senate. This was not unusual; at times "confirmation

was by voice or otherwise unrecorded vote." See Tribe, p. 151.
Since Senate confirmation hearings for Supreme Court nominees were not held in this period, there is no official record of the views of the members of the Senate Judiciary Committee towards the Lincoln appointees. Of the manuscript collections belonging to the members of the Senate Judiciary Committee, only the Trumbull Papers carry any mention of Supreme Court appointments. However, in this regard, the collection mostly contains correspondence sent to Senator Trumbull from supporters of a particular aspirant--as mentioned in this essay.

[298]Leonard Swett, Letter to William Orme, 28 December 1862, DDP, LC, R 2.

[299]Davis' contempt for the abolitionists is evident in much of his correspondence. In fact, Davis became so frustrated with their efforts to impose their anti-slavery views on the Republican Party and the President that he said: "This abolition cry in Congress distresses me. It seems as if the everlasting negro was to ruin this country completely. [?] said that the President is conservative. I fear that he has not the force to resist." David Davis, Letter to Sarah Davis, 15 December 1861, DDP, LC, R 1.

[300]Hopkins, p. 586. "Lovejoy, Owen. (b. Albion, Maine, 1811; d. 1864), Congregational clergyman, Abolitionist, Illinois legislator. Brother of Elijah P. Lovejoy [Abolitionist martyr]. Urged Abaham Lincoln as early as 1854 to assume leadership of the new political movement which became the Republican Party; remained Lincoln's loyal supporter and friend until his death. He served as congressman, Republican, from Illinois, 1857-64."

[301]James P. Jones, "Black Jack:" John A. Logan and Southern Illinois in the Civil War Era, Florida State University Studies, no. 51 (Tallahassee: Florida State University, 1967), p. xv. "The southern Illinois triangle, called "Egypt", was a land of divided loyalties in the Civil War era. Almost surrounded by slave states, with economic and social ties in the slave states, Egypt became a Northern center of pro-Southern sentiment. The Civil War is well known as a 'Brother's War' in Kentucky, Virginia, and Missouri, but in the war's first year it was almost equally so in southern Illlinois."

[302]Edward Magdol, Owen Lovejoy: Abolitionist in Congress (New Brunswick, New Jersey: Rutgers Univ. Press, 1967), pp. 154-157 and 192-199.

[303]Ibid., p. 278.

[304]Ibid.

[305]*Ibid*.

CHAPTER FOUR

THE RELUCTANT JUSTICE

There are, as has been shown, a variety of complex factors that contributed to Lincoln's decision to select David Davis for the associate justiceship of the Eighth Circuit. The strenuous lobbying effort headed by Leonard Swett deserves some of the credit. Davis' friendship and long-standing professional association with Lincoln and his wife Mary Todd, as circuit lawyer, judge and campaign manager obviously come to mind. Yet, the appointment of Davis to the Supreme Court was also based on political considerations. Since he was a respected and well known figure in Illinois, Lincoln almost certainly made the appointment to appease the voters of that state. Considering the political climate in the summer of 1862, Lincoln needed to use any means at his disposal to secure Illinois for the Republican Party in the congressional elections in November.

The Republican Party in Illinois was in a very precarious position in the fall of 1862. The public at large was not satisfied with the progress of the Union's war effort. A decisive military victory was desperately needed to boost the political fortunes of the governing party and the morale of the nation as a whole. Yet, this goal continued to elude the North; the smaller Confederate forces were able to use General McClellan's cautious approach to giving battle to their advantage by avoiding one great set piece engagement. When the two sides did meet in a series of battles in the last week of June, (known as the "Seven Days" June 25 to July 1, 1862), McClellan failed to breech the defenses of Richmond, organized by Confederate Generals Jackson and Lee. This week of fighting was followed by the defeat at Second Bull Run and the bloodiest confrontation the world had seen up to that time--the battle of Antietam on September 17, 1862. It was there in Maryland that the Union lost 12,500 men in a series of attacks against the Confederate lines. This battle proved to be a hollow victory for the North because McClellan failed to pursue Lee's army, thereby allowing the Confederates to retreat to Virginia.[306] The American people were angered by the enormity of these bloody encounters; the battles resulted in high casualty figures without producing clear victories.

In Illinois, public dissatisfaction with the course of the war was so intense that the Republican Party was in danger of losing the state in the upcoming congressional

elections. Just prior to these elections, Lincoln was warned by Horace White, Secretary of the State Committee of the Republican Party in Illinois, that if the Republicans lost the state, it would be because Generals McClellan and Buell "won't fight".[307] Clearly, McClellan's inability to produce a victory in Virginia during the Peninsula Campaign lessened the Republicans' chances of retaining control of Congress for another term. Lincoln's own actions before the election also contributed to the Party's tenuous status. For on September 22, 1862, Lincoln issued his preliminary Emancipation Proclamation. The Proclamation stated that if the Confederate states had not returned to the Union by January 1, 1863, the President would declare their slaves to be "forever free". Lincoln endeavored to weaken the Confederacy by using his war powers as President to free the slaves by confiscating them as property of rebellious states.[308]

Lincoln believed that his Emancipation Proclamation would bring the divergent factions of the Republican Party together and serve as a basis for cooperation in the future.[309] The President's expectations were not realized; the Proclamation had just the reverse effect on the different elements of his party. Abolitionists did not think the Proclamation went far enough: slavery was allowed to exist in the loyal border states and the Fugitive Slave Law was still in force elsewhere.[310] Conservative Republicans criticized the initiative because they thought

that it was an extreme application of the President's war powers.[311] While the Radicals toned down their ultraist views in the face of the Proclamation, the Democrats did just the opposite. The Democrats used the Proclamation to stir up feelings of racism in the free states. Negrophobia was particularly strong in the Mid-Western states, where the prospect of a migration of slaves to the North started a "Black scare".[312] Davis, who opposed the issuance of the Proclamation, warned Lincoln that the movement of any Negroes into the central portion of Illinois would cause the Republican Party great harm in the election.[313]

Lack of military progress and the issuance of the Emancipation Proclamation were just two of the issues which beleaguered the Republican Party. Lincoln's authorization of a militia draft caused conscription riots. "Violent opposition to the draft flared in Maryland, Pennsylvania, Ohio, Indiana, Illinois and especially Wisconsin."[314] There was also bitter opposition to Lincoln's suspension of the writ of habeas corpus. All of these issues combined to hand the Republicans a loss of seats in the House and Senate. Illinois, Indiana, New Jersey, New York, Ohio and Pennsylvania went Democratic. Yet, the Republican Party received enough support in New England, the border states and in the West to control Congress.[315]

The difficulties the Republicans faced in the congressional elections of 1862 were formidable. It may have seemed that the appointment of Davis to the Supreme

Court would do little to humour those individuals who were disenchanted with the Republican Party, and the President, in particular. However, Lincoln was bound to do whatever he could to deliver more votes to the Republican column.

When David Davis took his place on the Supreme Court for the first time on December 10, 1862, he was not comfortable. Apparently, the black gown he was supposed to wear on the day he received his commission had yet to be made. Davis was sworn into office by Chief Justice Taney wearing one of Justice Clifford's gowns. He told his wife Sarah that he "felt funny in it."[316]

This incident in microcosm symbolizes Davis' tenure on the Court: even though he sat on the bench, travelled his circuit and wrote opinions for fourteen years, he never did settle comfortably into his role as an Associate Justice of the Supreme Court. In fact, it has been said that he grew so tired of "the confining and monotonous work of the Court [that he] . . . would gladly have withdrawn any day. . . ."[317] The actual time at which Davis decided to resign from the Supreme Court varies from one account to the other. James Harvey, a Washington journalist who supported Davis' bid for President in 1872, said that the Justice "desired and intended to resign his seat on the Supreme Court" in 1875.[318] His son, George Perrin Davis also said that his father wanted to leave the bench years before he actually resigned:

> We wanted my father to resign as Justice of the Supreme Court of the United States several years

> before he was elected senator from Illinois, which election served as a good excuse for resigning as Justice. If he had never served on the Supreme Court at all he would have lived ten years longer.[319]

The observation made by his son about his father's health is a testament to the arduous nature of the work undertaken by Supreme Court Justices of that day. The ever increasing number of cases on the Court's docket and illnesses among the brethren were two major characteristics of Court life during Davis' tenure. The Justices of the Lincoln Court were charged with the additional burden of circuit duty. From the passage of the Judiciary Act in 1789 to the establishment of the Circuit Court of Appeals in 1891, the Justices were required by law to ride the circuit. During Davis' time on the Court, each of the nine federal circuit courts was administered by the Supreme Court Justice assigned to his circuit and the district court judge of that particular district. The Justice and the district judge could preside over a case together or individually. Since the term of the Supreme Court ran only from January until March, the Justices spent most of their time in their particular circuits, hearing appeals from trial courts, when not in Washington.[320]

The organization of the federal judiciary itself was responsible for putting the Justices in the unenviable position of having to adjudicate cases the year round. Since the three tiers of the federal court system (district, circuit and Supreme Court) were dependent upon the

attendance of two types of judges (district and Supreme Court Justices) "the whole system pivoted on circuit riding by the Justices."[321] The situation grew worse after the Civil War, as the sphere of federal power increased, and litigation mushroomed. Congress responded by expanding the jurisdiction of the federal courts. As a result, the number of cases requiring disposition by the Justices continued to increase year after year.[322] By the 1880's, it became impossible for the nine Supreme Court Justices to hold court in the 65 districts which constituted the federal system. In 1890, "the statutory duty of the Justices to attend circuit was practically a dead letter."[323] Circuit duty was officially abandoned on January 1, 1912, when the circuit courts were combined with the district courts to form the Circuit Court of Appeals.[324]

Over the course of his fourteen-year tenure on the high Court, Davis had a love-hate relationship with his responsibilities as a Justice. He often complained about the laborious nature of the work. Davis' task was made even more difficult by the complete lack of support staff for himself and the other Justices during his time on the Court. The only other employees that the Court had were servants for each of the Justices. These servants, usually black, were first acquired by the Justices in the 1860's. The Court did not receive any administrative assistance until the 1880's, when a secretary or law clerk was first employed. The day to day operations of the Court, the

collection of fees, the answering of correspondence, the management of the docket and even the purchase of firewood was all the responsibility of a single Clerk of the Court. Even the Marshal of the Court had other responsibilities; he also worked for other courts in the District of Columbia. Since the courtroom was located in the old Senate chamber on the ground floor of the Capitol, the Justices did not have individual offices. They also had to share the law library located in the Capitol building.[325]

Since the term of the Supreme Court was relatively short--only seventeen weeks in the 1860's--Davis spent most of his time in his circuit, instead of listening to hours of oral argument in the old Senate chamber. Yet, as demanding as it was, circuit duty provided Davis with the opportunity to do some trial work during the summer months. He had always enjoyed riding the circuit; it allowed him to go back to his home state, where he could visit family and his old legal associates. Cognizant of the fact that the reorganization of the states in his circuit would bring him closer to home, Davis tried to swap states with the other Justices. In 1862, Davis planned to exchange Michigan from his circuit for Indiana in Justice Swayne's Seventh Circuit. He also wanted to switch Wisconsin for Missouri from Justice Miller's Ninth Circuit. Once Davis had made these arrangements, he would only have been a day's ride from St. Louis, Chicago or Indianapolis. This would have allowed his wife to accompany him on the circuit or he could travel to

Bloomington every two weeks and stay at home for two days at a time.[326] It appears as if Davis was successful in changing the configuration of his circuit route. Because he enjoyed his circuit work in Chicago, Springfield, and Indianapolis to such a degree, he threatened to resign from the Supreme Court if the circuit duties of the Justices were eliminated by congressional enactment.[327]

Such devotion to the practice of circuit riding was unique; for most of the Justices, the weeks of hard travel and separation from family and friends imposed by circuit duty was something to be endured, not enjoyed. For Davis, the establishment of a rail system in Illinois in the mid-1850's eliminated the need for lawyers and judges to travel by horse and buggy for the most part.[328] Yet, circuit riding, whether by rail or otherwise, was something which Justices had to tolerate throughout the nineteenth century. Circuit riding had other detrimental effects on the Court, besides the physical strain which it inflicted on the Justices:

> [I]t also diminished the Court's prestige, for a decision by a justice on circuit could afterward be reversed by the whole Court. . . . The development of institutional identity and esprit de corps within the Court was necessarily difficult because the justices resided primarily in their circuits rather than in Washington, and often felt a greater allegiance to their circuits than to the Court. Justices not only faced the problem of divided loyalties but also had opportunites for teaching, practicing law, and consulting in their circuits, thereby supplementing (if not surpassing) their judicial salaries. Accordingly, the important distinction between official status and personal interests was far from clearly drawn, and, perhaps inevitably,

> some justices felt little or no institutional allegiance.[329]

When Davis' circuit duties were completed for the year, he did not look forward to serving another Supreme Court term in Washington. No wonder. Washington in the 1860's was not the city of cherry blossoms and reflecting pools that it is today. It was still spotted with odoriferous swamps that were fed by sewage, the carcasses of dead animals and the night soil of the city. When Washington's population grew from 60,000 to over 200,000 during the war, its sewage and water systems could not handle the increase. The excess effluent turned the Potomac into a winding cesspool.[330] The influx of soldiers, profiteers, and freed slaves into the city also caused a housing shortage. Whereas three or four dollars a week would suffice for "genteel board" in Boston or New York, rentals in Washington were three times higher. Civil War correspondent Noah Brooks described life in the Capitol in December of 1862:

> Washington is plethoric with strangers. They overrun every boarding house, hotel, and restaurant. . .The inflation of paper currency, added to the great demand, has stimulated the price of everything here to an enormous degree. The prices of living are exorbitant . . .$75 per month will barely suffice for the necessaries of life. Everything costs money here. . . .[331]

Davis himself had trouble obtaining suitable living quarters when he arrived in Washington. Being unfamiliar with the kind of accommodations that were available in the city, he made his choice on the advice of Justice Wayne. The Justice from Illinois rented rooms with a parlor, in the

hope that Mrs. Davis would come to live in Washington.[332] Davis was not happy with his selection; his bed was hard, there were no man servants available and he did not like the class of people with whom he was forced to dine. More importantly, Davis knew that the rooms, spacious as they were, would never suit his wife. Sarah Davis advised her husband to move elsewhere, even though he stood to lose his down payment of $500.00 once the lease was broken and the rooms were relinquished.[333] Davis was persuaded by Justices Nelson and Swayne to move to Morrison's, a three storey resident hotel in downtown Washington where four other judges were boarding.[334]

Davis was satisfied with the change that he had made, for Morrison's provided a comfortable atmosphere for the Justices who resided there. Since a law library and conference room were located in it, Davis had a convenient place to study. In addition, the Justices had their meals served at a separate table, a small luxury that Davis enjoyed.[335] Morrison's provided Davis with some privacy, for he was relatively free from visitors. Those individuals who arrived occasionally at his door were not welcomed with open arms, for Davis was "very much bored" by the politicians and office-seekers who called upon him.[336] However, he enjoyed the company of the other Justices. In a letter to his wife, he remarked: "I get along pleasantly with these judges, old men as they are."[337] The only negative thing which Davis mentioned about being in constant

contact with these men was that it was not to his taste to "eat day after day without seeing any ladies."[338]

The amicable rapport that existed between Davis and his fellow judges during his first weeks in Washington grew into true friendships as his time on the bench passed. He received support from the other judges, veterans and newcomers alike. For example, Justice Wayne took Davis under his wing when he first moved to Washington.[339] When Davis began writing opinions for the Court, Justice Catron told him that the other judges really liked the style of his writing. Catron went on to say he thought that Davis "expressed himself better than anyone on the bench."[340] Even though Davis thought this praise was undeserved, he was gratified by Catron's remarks.[341] Undeserved or not, this was precisely the kind of encouragement he needed. Even after he started to write opinions, Davis continued to question his own ability to produce written work that was comparable to the opinions delivered by the other members of the Supreme Court.

Even though David Davis had doubts about his ability to fulfill his responsibilities as a Supreme Court Justice, his supporters were pleased with his appointment to the bench. They saw Davis' nomination as Associate Justice as a hard fought victory for themselves. In one sense it was just that--a successful conclusion to an intense competition between aspirants who were equally qualified for the position. The three most probable candidates for the Eighth

Circuit--Senator Orville Browning, Judge David Davis and Judge Thomas Drummond all possessed the qualifications necessary for selection by President Lincoln. However, Davis prevailed because his political supporters were very persistent, influential and closer to Lincoln than the individuals working for the other aspirants.

The most persistent and influential member of Davis' campaign was also closer to the President than anyone else. Mary Lincoln's participation in the nomination process underscores the fact that Davis' appointment to the Supreme Court was based on considerations other than professional merit. Since Mary Lincoln viewed politics from a personal perspective, one that was founded on personalities instead of issues, it is highly unlikely that her decision to support Davis was made by comparing his qualifications as a jurist to those of Browning or Drummond. This does not mean that her course of action in this matter was unorthodox; nepotism has rarely been separated from the realm of public service. Besides, the choice Mary Lincoln made to support Davis instead of Browning was very beneficial to the former candidate, even if the assessment was made on the basis of personal, instead of professional reasons.

Fortunately for Davis, the problems that faced the Browning campaign were created in part by the Senator's own actions. While Browning described himself as Lincoln's "warm adherent" on Capitol Hill (i.e. a friend and ally in Congress who would support Lincoln's prosecution of the war

effort), he was, at times, in conflict with the President and other members of his own party over war issues.

For example, Lincoln was incensed by Browning's criticism of him for rescinding General Fremont's emancipation proclamation. Browning also angered Republicans with his strong vocal opposition to the Second Confiscation Act. Although Browning believed he was supporting the President by trying to protect Lincoln's control over slavery policy from Congressional interference, certain members of the Republican Party (mostly Radicals) saw his actions as treasonable.

Thus, precisely at the time when Browning's campaign needed congressional support--as the contest for the justiceship of the Eighth Circuit clearly became an intra-Illinois affair--a number of congressmen pledged their allegiance to Thomas Drummond in retaliation to Browning's position on the Second Confiscation Act. In essence, Browning's campaign for a seat on the Supreme Court fell victim to the intra-party rivalry between the radical and conservative wings of the Republican Party.

Browning's worst error was committed at a crucial time in the race for the third vacancy on the Court. As the contest narrowed down to Davis and Browning, the Senator alienated Lincoln's closest and most trusted advisor on political appointments, his wife, by committing a social indiscretion during a carriage ride. Considering Mary Lincoln's disposition and her tendency to judge political

relationships in personal terms, this incident probably reinforced her decision to support Davis' candidacy at a time when the President was trying to decide which of his close friends would represent the Eighth Circuit.

Naturally, Davis' supporters took advantage of Browning's blunders and they tried to convince Lincoln that the Senator's actions proved that he was not as loyal as Davis. The one member of Davis' campaign who persistently reminded Lincoln of Davis' loyality to him was Leonard Swett. Cognizant of the fact that Browning had a distinct advantage over his competitors in Illinois by living in Washington, Swett made frequent trips to the Capitol in order to lobby the President in person about a seat on the Supreme Court for Davis. Swett's perseverance in this regard, especially when it seemed that Lincoln was set on appointing Browning to the Court, demonstrates that his lobbying effort was largely responsible for Davis' nomination. In fact, Swett was the driving force behind the "lobby by letter" campaign that was organized in Illinois on Davis' behalf. He urged a number of Lincoln's associates, including John Stuart and Ward Hill Lamon to recommend Davis for a justiceship. And when Lamon refused to continue to act as a conduit between Davis' supporters and the President, Swett took on the responsibility of delivering their letters to the President himself.

Even though Swett drummed up support for Davis' campaign for a seat on the Supreme Court, he was more of a

booster than a co-ordinator of an organized lobbying effort. Swett asked various individuals to write to Lincoln, and many of Davis' supporters also wrote letters or organized petitions calling for Davis' appointment on their own initiative. For example, one of the first letters to cross Lincoln's desk asking for Davis' appointment was not sent on Swett's request. Henry Winter Davis, David Davis' cousin and Congressman from Maryland was probably the first person to suggest to Lincoln the strategic importance of appointing a jurist from a border state to the Supreme Court. Yet, most of the letters sent to Lincoln had one common characteristic, whether written at Swett's request or not: they each made some reference to Davis' political support for Lincoln during his rise to the presidency. Davis' advocates believed that Lincoln should give him a seat on the Supreme Court in reward for his work as campaign manager during the Republican presidential convention in 1860.

The strong connection between patronage and judicial appointment was not deemed to be undesirable during the Civil War era. Patronage was more than just a reward system or a custom of sponsorship that was used to grant favors to the politically faithful. Patronage was a means by which competent persons were selected for government service. The patronage network employed by the Republican Party allowed its members throughout the nation to provide viable candidates to the President for consideration. In the case of the Lincoln appointees to the Supreme Court, the

patronage network worked quite well. Prominent members of the legal community, politicians, and influential businessmen from many states provided Lincoln with the names of some of the best legal minds in the nation for the federal judiciary. In the case of Samuel Miller, the pre-eminent lawyer in Iowa, the President did not know who he was. Yet, by taking advantage of the Republican members of that state, Lincoln appointed one of the greatest Justices of the nineteenth century to the Supreme Court.

Lincoln was very conscientious about the five appointments he made to the Supreme Court during his presidency. He was preoccupied with the membership of the Court because he understood the important role the high tribunal would play in the preservation of the nation. Fortunately, the selections which Lincoln made to the Court were successful. The Lincoln appointees believed strongly in the restoration of the Union. This belief is reflected in the decisions the Court made on constitutional questions which dealt with Lincoln's wartime policies. The Supreme Court supported the President's agenda and assisted in bringing the Civil War to a triumphant conclusion.

NOTES FOR CHAPTER FOUR

[306]Randall and Donald, pp. 215-227.

[307]Horace White, Letter to Abraham Lincoln, 22 October 1862, LP, RTLC, LC, Series 1: Oct. 18-Nov. 13, 1862. Reel 43 Item 19151.

[308]Richardson, 6: pp. 96-98.

[309]William S. Myers, The Republican Party: A History (1928; rpt., New York: Johnson Reprint Corp., 1968), pp. 135-136.

[310]Merton L. Dillon, The Abolitionists: The Growth of A Dissenting Minority (De Kalb: Northern Illinois Press, 1974) p. 256.

[311]Myers, p. 136.

[312]James A. Rawley, The Politics of Union, Berkshire Studies in History, (Hinsdale, Ill.: The Dryden Press, 1974,) pp. 92 and 95.

[313]David Davis, Letter to Abraham Lincoln, 14 October 1862, LP, RTLC, LC, Series 1: Sept. 24-Oct. 18, 1862. Reel 42 Item 19010.

[314]Rawley, p. 94.

[315]Herbert Agar, The Price of Union (Boston: Houghton, Mifflin, 1950,) p. 426. "Ohio and Indiana and Pennsylvania held Congressional elections in October. The Democrats won heavily in the first two states, and in the last they elected half the new Congressmen. In November, therefore, troops were sent home from the field to vote Republican in the critical states; but still the Democrats won Illinois and Wisconsin. They might have won control of Congress. . . had not the border states, soothed by Lincoln and patrolled by troops, and diligently combed of anti-war voters under Lincoln's suspension of the Habeas Corpus Act, returned enough Republicans to ensure a small majority."

[316]David Davis, Letter to Sarah Walker Davis, 14 December 1862, DDP, LC, R 2.

[317]James E. Harvey, Excerpt from a statement made on David Davis' resignation from the Supreme Court, 17 March 1887, David Davis Family Papers, University of Illinois, Reel 7.

[318]Ibid.

[319]George Perrin Davis, Letter to Addin D. Green, 18 June 1913, David Davis Family Papers, University of Illinois, Reel 7.

[320]Frankfurter and Landis, pp. 87 and 101. In the 1860's, the session of the Supreme Court would last about 17 weeks in duration. See David M. O'Brien, Storm Center: The Supreme Court in American Politics (New York: Norton, 1986), p. 103 and 105.

[321]Frankfurter and Landis, p. 14.

[322]C. Peter Magrath, Morrison R. Waite: The Triumph of Character. (New York: Macmillan, 1963), p. 266.

[323]Frankfurter and Landis, p. 87.

[324]Ibid., p. 134.

[325]David O'Brien lists these inconveniences on page 107 of Storm Center. However, this information, including the phrase on the collection of firewood has been pieced together from personal research.

[326]David Davis, Letter to Sarah Davis, 28 December 1862, DDP, LC, Reel not numbered.

[327]Kutler, p. 55. In July of 1866, a congressional act known as the "reduction bill" reduced the Supreme Court from ten to seven members. When this legislation was proposed and then debated in Congress, Davis was worried that circuit duty would be abandoned. This did not happen; enmity between President Johnson and Congress postponed effective judicial reorganization. Even though another judicial act was passed by Congress in April of 1869, little was done to lighten the workload of the Supreme Court until the implementation of the Circuit Court of Appeals Act in 1891.

[328]David Davis, Letter to George Perrin Davis, 6 May, 1855, DDP, LC, Reel not numbered.

[329]O'Brien, pp. 104-105.

[330]Baker, pp. 208-209.

[331]Staundenraus, pp. 23-24.

[332]David Davis, Letter to Sarah Davis, 14 December 1862, DDP, LC, Reel not numbered.

[333]David Davis, Letter to Sarah Davis, 7 December 1862 and David Davis, Letter to Julius Rockwell, 22 December 1862, DDP, LC, Reel not numbered.

[334]Justices Catron, Clifford, Grier, Miller and Swayne also lived at Morrison's at one time or another. Eventually, Davis moved to the National Hotel where Clifford, Nelson, Miller and Swayne also stayed. This list was made from references made by Davis throughout his correspondence and checked with a similar compilation in Silver, p. 97 fn.

[335]David Davis, Letter to Sarah Davis, 21 December 1862, and David Davis, Letter to Julius Rockwell, 22 December 1862, DDP, LC, Reel not numbered.

[336]David Davis, Letter to Sarah Davis, 21 December 1862, DDP, LC, Reel not numbered.

[337]Ibid.

[338]Ibid.

[339]King, p. 202.

[340]David Davis, Letter to Sarah Davis, 25 December 1862, DDP, LC, Reel 1.

[341]Ibid.

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Papers of Elihu B. Washburne. Manuscript Division, Library of Congress.

Remarks:

Willard L. King, the biographer of David Davis, spent ten years collecting letters and papers by and about Davis from family members, an earlier biographer, and various depositories. He put together a collection of copies of 10,000 pieces of Davis material upon which he based his own work, and which he allowed other scholars to use. King has now placed the transcripts of these materials in the Chicago Historical Society, Illinois (9 shelf feet of transcripts, 1815-1921), and the microfilm of the papers in the Illinois State Normal University (10 reels of microfilm). The Manuscript Division of the Library of Congress has a copy of this collection, on four reels of microfilm. [This description was taken from Wigdor, The Personal Papers of Supreme Court Justices: A Descriptive Guide, p. 92).]

Comment: Approximately 200 letters have been extracted from this collection for use as primary source material. The bulk of these letters consist of correspondence between Davis and his wife, Leonard Swett, William Orme, Ward Hill Lamon, Lawrence Weldon, Clifton Moore, and others.

David Davis Family Papers 1816-1843.

The Papers were deposited in the Illinois State Historical Library Springfield, in 1959 by David Davis IV and other Davis family members. The collection consists primarily of the correspondence and records of David Davis. There are

also papers of Davis' wife, son, daughter and other family members. Microfilm of the papers is available from the Milner Library, the State University of Illinois at Normal. Of the nine reels that consist of the collection, reels 2, 4, and 5 are missing.

Comment: Approximately, 75 letters have been used from this collection as primary source material. The David Davis Papers have been divided into ten categories: general correspondence, 1831-1886 (3,683 items), special correspondence (795 items), correspondence concerning the estate of Abraham Lincoln, 1860-72 (123 items), business correspondence, 1836-1886 (1,440 items), financial papers (_____), legal papers, 1838-1884, (_____), speeches and addresses, 1832-1886, (22 items), newspaper clippings, 1855-1886, (225 items), miscellaneous papers, 1832-1886, (400 items), and bound volumes (13 volumes--notebooks).

On page ninety-four, A. Wigdor states: "[t]here is a large body of legal papers related to Davis' private practice and his personal affairs." In my examination of the family papers, only a small fraction of these letters could be found. In fact, any papers that commented on Davis' attitude or performance on the Supreme Court were scattered throughout the other nine categories. I can only assume that the three missing reels of microfilm contained a portion of this large body of legal papers.

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