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## Articles

# David Davis: Lawyer, Judge, and Politician in the Age of Lincoln

William D. Bader\* and Frank J. Williams\*\*

### I. INTRODUCTION

David Davis was one of the most important lawyers, judges, and politicians in the “Age of Lincoln.” He was born eight months after his father’s untimely death,<sup>1</sup> and experienced profound rejection during childhood, when he was shuttled back and forth among households. Nevertheless, he had the drive, focus, and intelligence to obtain a prestigious education by working his way through school.<sup>2</sup>

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\*\* Recently retired Chief Justice of the Rhode Island Supreme Court, founding chair of The Lincoln Forum, and Chief Judge of the Court of Military Commissions Review for tribunals to be held in Guantánamo Bay, Cuba. Chief Justice Williams has been a leader in the Lincoln community for the past thirty years and lectures nationally on Abraham Lincoln.

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1. BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES 160 (Melvin I. Urofsky, ed., C.Q. Press 2006) [hereinafter *Lives and Legal Philosophies*].

2. WILLARD L. KING, LINCOLN’S MANAGER: DAVID DAVIS 1-19 (Harvard University Press 1960).



Davis went on to play a seminal role in the early legal culture of Illinois as both a practitioner and a judge. He brilliantly managed the presidential-nomination campaign of his friend and

legal colleague, Abraham Lincoln, master-minding one of the greatest coups in the history of presidential conventions.<sup>3</sup>

Later in his career, Davis served with distinction on the United States Supreme Court and maintained principled independence from Lincoln when deciding important cases pertaining to his friend's presidential war policies. *Ex Parte Milligan* is a prime example of such a case.<sup>4</sup>

Finishing his political career in the United States Senate, Davis laid the groundwork for the structure of today's federal judiciary, among other accomplishments.<sup>5</sup>

Despite David Davis's contemporary prominence, he has become an obscure figure in legal history. Perhaps as Bader and Mersky have suggested in their book, *The First One Hundred Eight Justices*, those judges who are not thoroughly "politically correct" by today's standards are "evaluated" into oblivion; Davis opposed the Abolitionists, was not enthusiastic about the Emancipation Proclamation, and opposed strict reconstruction measures in the South.<sup>6</sup> Perhaps, also, Davis ironically is eclipsed in reputation by his very close proximity to our most highly esteemed American, Abraham Lincoln.

Nevertheless, David Davis's story is more than "mere" history and should be explored because it holds legal relevance for us today. It is important to understand how a major nineteenth-century legal figure such as Davis developed and how he approached his various roles, so we can better comprehend what our own roles should be as attorneys and judges. Davis's substantive ideas are also important because we live in a common-law culture where precedent, indeed history, always holds some relevance to the case at bar.

3. *Lives and Legal Philosophies*, *supra* note 1.

4. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

5. *In and Out of Congress: Mr. Davis's Bill to Create A New Court*, N.Y. TIMES, May 6, 1882, at 1; *David Davis's Court Bill: The Illinois Senator Greatly Vexed by the Democrats*, N.Y. TIMES, May 11, 1882, at 5; *A New Appellate Court: Senator Davis's Pet Bill Passed at Last*, N.Y. TIMES, May 13, 1882, at 1.

6. See generally WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES* (William S. Hein & Co., Inc. 2004) (Proposing that present day legal worldviews transform otherwise highly esteemed judicial careers into merely average or entirely obscure careers).

## II. CHILDHOOD

David Davis was born on March 9, 1815, after the death of his namesake and father, David Davis, M.D. The elder Davis had belonged to the fifth generation of a Welsh family that had settled in Maryland. He had studied medicine at the University of Pennsylvania and practiced his profession on the eastern shore of Maryland for several years before his untimely death.

Young David's mother, who was newly pregnant at her husband's funeral, was the former Ann Mercer. Ann was the daughter of John Mercer, who owned three plantations on Maryland's eastern shore. The daughter of wealth and privilege, Ann had been sent to boarding school at Linden Hall in Lititz, Pennsylvania prior to her marriage.<sup>7</sup>

David was born and spent his earliest years at The Rounds, his grandfather's plantation mansion. Keeping with antebellum Southern culture, which pervaded the state of Maryland, David was nursed by a slave woman and played with the African-American children from The Rounds' slave workforce.<sup>8</sup>

When David's grandfather died, the five-year-old child inherited two of his grandfather's slave boys. They were sold the next year by David's legal guardian, but nevertheless, the future judge was a slave owner at a tender age. Ultimately, David was immersed in a peculiar culture where slavery was disliked, but Abolitionists, who sometimes encouraged violent slave rebellion, were especially hated.<sup>9</sup>

In 1820, Ann Mercer Davis remarried a Baltimore bookseller, Franklin Betts, who became David's stepfather and legal guardian. Betts seemed more interested in David's \$5,000 estate and the five children he had with Ann, than with David personally. The young boy was sent to live with family friends, and then with his paternal uncle, Reverend Henry Lyon Davis of Annapolis.<sup>10</sup>

Reverend Henry Lyon Davis, an Episcopal clergyman of importance and a scholar of note, became a surrogate father to David. The Reverend's young son, Henry Winter Davis, who

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7. KING, *supra* note 2, at 1-2.

8. *Id.* at 3.

9. *Id.* at 4-5.

10. *Id.* at 5.

would reach fame in the halls of Congress, became more like a brother than a cousin. The Reverend's wife, the cultured and educated Jane Winter, and her sister, instilled fine Southern manners in the children and taught them to read.<sup>11</sup>

Reverend Henry Lyons Davis was a staunch supporter of Henry Clay, in opposition to Andrew Jackson and his Democracy. He was President of St. John's College for one year, but was relieved of his duties by the Jacksonian Board of Visitors, a situation that repeated itself during his tenure as principal of the Wilmington Academy. He later wrote: "Had I condescended to write for the Jackson Gazette, I might have prospered."<sup>12</sup>

David's uncle proved to be a seminal influence on the boy's political and legal outlook. Specifically, the Reverend implanted his strong anti-Jackson and pro-Clay positions in the boy. This support for Clay became a major theme in David's adult life, and most importantly, became the basis for his later support of Abraham Lincoln.<sup>13</sup>

After a year with his uncle, David returned to the Franklin Betts household, where his stepfather charged him board for the six months of his stay. David then was sent to Isaac Sams' famous boarding school for eighteen months. Betts regarded Mr. Sams' fee of \$128 per year for tuition as too expensive, so he arranged for Reverend Henry Lyons Davis to take young David back for only \$100 per year to board, lodge, clothe, and educate him.<sup>14</sup>

David lived and studied with his uncle over a three-year period. In April 1825, Reverend Henry Lyon Davis filed a bill in Maryland's High Court of Chancery to remove Betts as David's legal guardian. The uncle charged that Betts was "unworthy and unfit," and was diverting David's money to pay his own private debts. Nevertheless, Betts wrote the uncle that he intended to relocate with his wife to New Ark, Delaware, take David, and enroll him in New Ark Academy. In response, David's uncle filed a petition to his suit to the Chancellor to grant an injunction preventing the taking of the boy. The Chancellor denied the

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11. *Id.* at 6-7.

12. *Id.* at 6.

13. *Id.*

14. *Id.* at 7.

petition after a hearing, which ironically was the first time David was to witness court business. Betts promptly picked up David and relocated.<sup>15</sup>

In September 1826, Betts enrolled David at New Ark Academy. Betts, through the Orphan's Court of Cecil County, billed David's guardianship account to pick up David in Annapolis and to board him with the Betts household. Betts had, indeed, dissipated his ward's estate, a portion of which David would recover from Betts's sureties approximately twenty-five years later.<sup>16</sup>

Considering David Davis's turbulent childhood, particularly the rejection and the shuttling among households, one might expect an adulthood characterized by instability and failure. On the contrary, David proved to be a very resilient and focused man who went on to enjoy great success in the educational, professional, and personal spheres of his life.

### III. HIGHER EDUCATION

In the fall of 1828, David Davis headed to Kenyon College in Gambier, Ohio, despite that he had planned on attending Yale. Kenyon recently had been established by Episcopal Bishop Philander Chase, the uncle of the future Chief Justice Salmon P. Chase.<sup>17</sup> It is likely that Kenyon's \$70 a year for tuition and board appealed more to Franklin Betts, David's guardian, than Yale's \$140 a year cost.<sup>18</sup>

Kenyon's course of study was quite rigorous, however. Specifically, it was based on the largely classical requirements then in place at Columbia and Dartmouth. David was well prepared by New Ark Academy for Kenyon's entrance examination, which required students to translate Cicero, Caesar, Sallust, Virgil, and Jacob's Greek Reader.<sup>19</sup>

David's guardian never sent him any money for Kenyon and his mother was slow to send him the proper necessities, such as a suitable winter coat, enough socks, and his books. David was

15. *Id.* at 7-8.

16. *Id.* at 8-9.

17. BRIAN MCGINTY, *LINCOLN AND THE COURT* 113 (Harvard University Press 2008).

18. KING, *supra* note 2, at 11.

19. *Id.* at 13.

forced to work his way through Kenyon, and he labored on the new buildings and college farms during the term and throughout his vacations.<sup>20</sup>

Despite that he had no parental support of either a financial or emotional nature, David did well at Kenyon. When he graduated in September 1832, he was in an elite group of only 670 men who had graduated from American colleges that year.<sup>21</sup>

At the Kenyon graduation, David delivered an interesting oration entitled "Funeral and Sepulchral Honors," which explored the fact that all cultures, over time, and despite their many differences, have shown a deep respect for the dead.<sup>22</sup> It was a thoughtful analysis, and quite remarkably prescient in its social-scientific perspective. Indeed, he reached social-psychological and anthropological conclusions, which anticipated the future emergence of these two disciplines. Perhaps this was the result of an impressive intelligence forced to deal with death and loss from its very inception.

After graduation, David headed to Lenox, Massachusetts to read law with attorney Henry W. Bishop. David's duties also involved assisting Bishop in the latter's capacity as Registrar of Probate for Berkshire County, Massachusetts.<sup>23</sup>

David became particularly close with his future father-in-law, local Probate Judge William Perrin Walker. He immediately was attracted to his future wife, the educated and comely Sarah Walker. In addition, Judge Walker's presidency of the Lenox Colonization Society, which opposed both slavery and abolition, reinforced David Davis's own long-held hostility toward extreme Abolitionism.<sup>24</sup>

In late September 1834, David headed to New Haven, Connecticut and enrolled in the New Haven Law School, which then had an affiliation with Yale. Although the full course was two years, no degree was awarded at the end; students could also be admitted for shorter periods of time.<sup>25</sup>

20. *Id.* at 12.

21. *Id.* at 13.

22. *Id.* at 14.

23. *Lives and Legal Philosophies*, *supra* note 1; KING, *supra* note 2, at 15.

24. FRANCIS WILLIAMS ROCKWELL, THE ROCKWELL FAMILY IN ONE LINE OF DESCENT 147 & 152 (Pittsfield, MA, 1924); KING, *supra* note 2, at 15-19.

25. *Lives and Legal Philosophies*, *supra* note 1.

At the New Haven Law School David studied under its operators, Samuel J. Hitchcock, an eminent New Haven attorney, and David Daggett, who had served both as a United States Senator and Chief Justice of the Supreme Court of Connecticut. The core reading included Blackstone's Commentaries and Kent Commentaries; lectures and quizzes were given by Hitchcock and Daggett. David attended the New Haven Law School into the spring of 1835.<sup>26</sup>

David Davis's education was quite impressive compared to most lawyers of his day. His college education made him rather exceptional among his peers. His attendance at a formal law school after "reading law" in an attorney's office made him a true rarity in an age when most attorneys merely completed the latter. In fact, out west, where Davis ultimately practiced law, legal education was particularly informal, and many attorneys, such as Abraham Lincoln, were completely self-taught. David Davis truly exemplified the "gold standard" in mid-nineteenth century legal education.

#### IV. LAW PRACTICE

In 1835 the young Davis headed west to St. Louis with the intention of practicing law in the emerging west's greatest city. Advised that competition among lawyers was very high in St. Louis,<sup>27</sup> Davis moved on to the prairie of central Illinois. He was examined for the bar by Illinois Supreme Court Justice Theophilus W. Smith and admitted to practice thereafter.<sup>28</sup>

Davis opened his law office in Pekin, Illinois in October 1835. At that time, central Illinois was comprised of an odd combination of settlers from the South and the Northeast. Davis personified this strange mixture with his Southern upbringing and Yankee education. Predictably, the fledgling lawyer won instant popularity with both of these demographic groups. In November 1835, he was chosen by the town fathers to travel with a delegation to the capital at Vandalia to lobby the legislature for a

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26. See generally FREDERICK C. HICKS, *YALE LAW SCHOOL: THE FOUNDERS AND THE FOUNDERS' COLLECTION* (Yale University Press No. 1, 1935) (describing the founders and curriculum).

27. KING, *supra* note 2, at 20.

28. JOHN J. DUFF, *A. LINCOLN: PRAIRIE LAWYER* 183 (Holt, Rinehart and Winston 1960).

railroad from Pekin to the Wabash River.<sup>29</sup>

Nevertheless, the practice of law on the prairie was economically challenging for a new lawyer. Davis advertised in the "Sangamo Journal," a Whig newspaper out of Springfield:

David Davis, Attorney and Counselor at Law, will attend to the business of his profession in the Courts of McLean, Tazewell, Fulton, Peoria and Putnam Counties; he will also practice in the Supreme Court of the State. . .<sup>30</sup>

In 1836, Davis found it necessary to supplement his income by performing schoolmaster's duty at the local log schoolhouse.<sup>31</sup>

Davis's first litigated case of importance came in probate court against John Todd Stuart, a top lawyer in Illinois, leader of the Whigs in the legislature, and Abraham Lincoln's great mentor. As Davis told it:

The bondsmen of an administrator had petitioned for his removal on serious charges. I was employed to resist the application while Mr. Stuart was engaged to prosecute it. . . . I was naturally solicitous for success, and endeavored to prepare myself for it, but soon found that I did not know how to present to the judge my side of the controversy. Mr. Stuart, instead of taking advantage of my ignorance, told me what to do . . .<sup>32</sup>

It occurred to Davis, after the aforementioned courtroom experience, that he was more comfortable in the role of an "office attorney." This included the drafting of wills, contracts, mortgages, and leases. It also included creditor representation in many foreclosure and collections cases based on default judgments. Surprisingly, Davis's first case in an appellate court was in the role of Associate Justice of the United States Supreme Court.<sup>33</sup>

Davis was favorably impressed with the bench and bar of Illinois. He was particularly surprised with the high quality of judges, such as Sangamon Circuit Judge Stephen T. Logan. He wrongly had assumed that the New England jurists defined the

29. KING, *supra* note 2, at 21.

30. *Id.* at 24.

31. *Id.*

32. DAVID DAVIS, *Memorial Address: The Life and Services of John Todd Stuart*, PROCEEDINGS OF THE ILL. B. ASS'N 48 (1886).

33. KING, *supra* note 2, at 24.

judicial gold-standard.<sup>34</sup>

In the fall of 1836, after suffering the first bout of malaria, Davis had the good fortune to receive an offer from Jesse Fell, a prominent Bloomington practitioner. Fell, whom Davis had met as a fellow lobbyist at the legislature in 1836, wanted to devote his full time to real estate and wished to sell his Bloomington law practice and office to Davis. Davis immediately accepted and relocated to Bloomington, a booming city with a new courthouse, thirty-five miles east of Pekin.<sup>35</sup>

After a year of solo practice in Pekin, Davis joined professional forces with a fellow law student from Lenox, Massachusetts, Wells Colton, to form the successful law firm of Davis & Colton. Financial success, significantly bolstered later on by the purchase of defaulted land tax titles, was a new experience for Davis, who had realized no profits from his practice in Pekin and his early days in Bloomington.<sup>36</sup>

Davis & Colton concentrated in collections law, which in those days was a very lucrative and prestigious specialty.<sup>37</sup> Their most lucrative cases were collection matters on behalf of merchants from St. Louis and Philadelphia.

The Depression that had begun with the panic of 1837 improved the collections business, although fees were often difficult to collect. A collections lawyer had to work hard to earn a good living. In addition to representing big city merchants against debtors, Davis & Colton represented the State Bank of Illinois in actions against many of its debtors. Jesse Fell, an agent of the State Bank in Bloomington, and Whig leader John J. Hardin, an assignee of the State Bank, retained David Davis to collect a significant number of bank debts.<sup>38</sup>

By 1844, Davis & Colton had become a preeminent law firm in Bloomington. They had more cases in both law and equity in their Circuit Court of McLean County than any other attorneys. They also had a significant number of cases in the courts of

34. *Id.*; THE BENCH AND BAR OF ILLINOIS 167 (John M. Palmer, ed., The Lewis Publishing Company 1899).

35. KING, *supra* note 2, at 25-26.

36. *Id.* at 26, 29-30, 51-52.

37. DUFF, *supra* note 28, at 183.

38. J.H. BURNHAM, HISTORY OF BLOOMINGTON AND NORMAL, IN MCLEAN COUNTY ILLINOIS 36, (J.H. Burnham of Bloomington 1879); KING, *supra* note 2, at 27-28, 46.

surrounding counties and in the federal district court at Springfield.<sup>39</sup>

It is of special note that David Davis and his fellow practitioner, Abraham Lincoln, who were on the opposing sides in some cases, were actually law partners in others. In the latter actions, they signed the pleadings "Davis & Lincoln." Davis even represented Lincoln, a literal indication of Davis's renown as a "lawyer's lawyer," in a suit in DeWitt County to collect a two-



DAVID DAVIS AND ABRAHAM LINCOLN IN DEWITT COUNTY, ILL.

hundred dollar note.<sup>40</sup>

Davis was persuaded to run for the Illinois legislature in 1844, and served one term from 1845 to 1847. Despite his technical status as a "back bencher," he became a leading Whig, and worked on legislation relating directly to the legal system.<sup>41</sup>

Davis was elected as a member of the Illinois Constitutional Convention, which met in June 1847. He was the leader in reforming the judicial system of the state. Believing that legislative appointment of judges led to a narrow politicization and corruption of the judicial profession, he helped establish a new system of supreme court and circuit court judges to be elected by popular sovereignty. The St. Louis Republican newspaper of July 22, 1847 praised Davis and an associate stating: "No men in the State stand fairer, either as learned lawyers or able and clear sighted statesmen."<sup>42</sup>

#### V. JUDGE DAVIS AND HIS RELATIONSHIP WITH LINCOLN ON THE ILLINOIS EIGHTH CIRCUIT

In 1848 when the opportunity presented itself to run for the newly defined Illinois Eighth Circuit judgeship, David Davis, who had dedicated himself to the law rather than politics, seized it. His potential competition at the Whig Convention was Benjamin Edwards, the brother of Mrs. Lincoln's brother-in-law. For this reason, Lincoln would not back Davis. Edwards withdrew, however, and Davis obtained the Whig endorsement.<sup>43</sup> Davis informed his father-in-law, Judge Walker, of his candidacy, in the words of a man who aspired to live greatly in the law: "I am more anxious on the subject than I have ever been, where I was personally concerned in an election. The *salary* I do not fight for. The position suits me. I like it."<sup>44</sup>

In September 1848, David Davis was selected, without opposition, to the Illinois Eighth Circuit Court, on which he would serve until his elevation to the United States Supreme Court in 1862. Twice a year, Davis traveled the circuit, which equaled the area of the state of Connecticut, to hold court in the various towns

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40. KING, *supra* note 2, at 53-54.

41. *Id.* at 53-55.

42. *Id.* at 55-56.

43. *Id.* at 59-61.

44. *Id.* at 61 (emphasis in original).

and cities. Lawyers from the Springfield area accompanied him because local litigants often had limited access to attorneys, or the local attorneys wanted an expert litigator from the city to assist them.<sup>45</sup>

The late John P. Frank, a famed practitioner and legal historian, has written of the circuit practice: "The traveling library consisted at most of a book or two, easily carried in the saddlebags, one of which was the Illinois Statutes, and the pleadings were quickly written out. . . There was not only no room for legal refinement, but also there was no possibility of it."<sup>46</sup>

Living conditions were rough on the circuit, and it took real dedication to the law, and, specifically, to judging, for Davis to pursue his calling. Davis wrote his wife, with more than a hint of humor, "This thing of traveling in Illinois, and being eaten up by bed bugs and mosquitoes (fleas you know don't trouble me much) is not what it is cracked up to be." He also wrote her that in the tavern eateries the "table [was] greasy—tablecloth greasy—floor greasy and everything else ditto," and the food was "*Horrible*."<sup>47</sup>

The lawyers who traveled the circuit, including Lincoln, were forced by constraints of space and money to share beds at the inns. David Davis, however, had the singular honor of sleeping alone. He was not given his own bed because of his judicial status, but because of his very large size.<sup>48</sup>

Davis thought it remarkable that, unlike the other attorneys, Lincoln never complained about the miserable living conditions on the circuit. In fact, Davis noted that Lincoln seemed to rise to the challenge and thrive on the adversity.<sup>49</sup>

At night, to blow off steam and entertain themselves, the traveling lawyers met in the tavern, with Judge Davis presiding and the quick-witted Lincoln conspicuously attending to hold storytelling competitions and trade jokes. Sometimes Davis held his "orgmathorial court." This was an extremely satirical mock court where lawyers were "fined" for their behavior during the

45. JOHN P. FRANK, *LINCOLN AS A LAWYER* 19 (University of Illinois Press 1961); DAVID HERBERT DONALD, *LINCOLN* 147 (Simon & Schuster 1995).

46. FRANK, *supra* note 45, at 23.

47. KING, *supra* note 2, at 77 (emphasis in original).

48. USHER F. LINDER, *REMINISCENCES OF THE EARLY BENCH AND BAR OF ILLINOIS* 183 (Chicago Legal News Co. 1879).

49. DUFF, *supra* note 28, at 199.

day. Once, in Danville Circuit Court, Lincoln, out of a sense of fairness, returned part of a fee in a case where he had represented a man seeking a conservator for his mentally challenged sister's financial affairs. That evening, before Davis's "orgmathorial court," Lincoln was teased and "fined" for such a professional heresy.<sup>50</sup>

Abraham Lincoln rode the circuit as an attorney for more than a decade with Judge Davis. They became particularly close because Lincoln, whose sole income was derived from law practice, was one of the few lawyers to ride the entire circuit with Davis.<sup>51</sup> Furthermore, they shared a Whig affiliation<sup>52</sup> and a common-sense, common law approach to cases.

Overall, David Davis grew to hold Attorney Abraham Lincoln in the highest esteem. Davis summed up Lincoln, after many years on the circuit by stating: "In all the elements that constituted a lawyer he had few equals."<sup>53</sup>

On at least 321 occasions, Judge Davis gave Lincoln the ultimate honor he could bestow by appointing him a substitute judge.<sup>54</sup> The Clerk of the Champaign Circuit Court, William H. Somers stated that "Judge Davis frequently called Mr. Lincoln to take the Bench, while he went out for exercise. A courtesy, I don't remember of seeing him extend to any other Attorney, of the twenty or more in attendance."<sup>55</sup>

Of particular interest was an 1854 lawsuit, *Henry Perry v. Jesse Alexander*, because the firm Lincoln & Herndon actually represented the plaintiff who was alleging the intentional torts of assault and battery. Lincoln, by designation of Judge Davis, presided over a contested motion hearing, while his partner, William Herndon, represented the plaintiff. The result certainly vindicated Davis's confidence in Lincoln's consummate professionalism; Lincoln ruled in favor of the defendant and

50. WARD HILL LAMON, RECOLLECTIONS OF ABRAHAM LINCOLN 1847-1865 17-19 (Dorothy Lamon, ed., A.C. McClurg 1895).

51. DONALD, *supra* note 45, at 151.

52. DUFF, *supra* note 28, at 187.

53. *Id.* at 366.

54. 4 THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES, 280 (Daniel W. Stowell, ed., University of Virginia Press 2008) [hereinafter *Legal Docs and Cases*].

55. DUFF, *supra* note 28, at 297-98.

ordered Perry to provide security for costs.<sup>56</sup>

Over seventy percent of Lincoln's judicial decisions were made when he was appointed by Davis to take care of the judicial "meat and potatoes": a motions calendar. In 1856, for example, there is docketed evidence of Lincoln disposing of forty motions, some uncontested, on one day of covering for Davis's motion calendar in the Sangamon County Circuit Court.<sup>57</sup>

There is also evidence that Davis appointed Lincoln to act as State's Attorney Pro Tempore in one very serious felony case, *People v. Delny*, in May of 1853. The State's Attorney had left the Tazewell County Circuit Court to prepare for the next Court on the Eighth Circuit in DeWitt County, when the *Delny* case unexpectedly came before Judge Davis as he was finishing his docket at Tazewell County.<sup>58</sup>

Lincoln, upon Davis's appointment, prepared the indictment charging Thomas Delny with the forcible rape of a seven-year-old, Jane Ann Rupert. Lincoln then tried the case before Judge Davis and examined the alleged victim, as well as the victim's neighbor, her uncle, Paul W. Rupert, and two examining physicians, among others. The jury returned a guilty verdict and recommended an eighteen-year prison sentence for Delny, which Judge Davis proceeded to institute.<sup>59</sup>

Judge Davis also appointed Lincoln to serve on several writ-of-inquiry juries. Although practicing attorneys could not serve on grand or petit juries in Illinois, they were permitted to sit on the writ-of-inquiry jury, and the more prominent members of the Illinois Bar frequently constituted this body.<sup>60</sup> When the plaintiff in an action for trespass or assumpsit, for example, was issued a default judgment in his favor, but the amount of damages was uncertain, the judge issued a writ-of-inquiry, mandating a writ-of-inquiry jury to hear evidence on damages, and reach a recommendation regarding the aforementioned.<sup>61</sup>

56. Abraham Lincoln, Judges' Docket No. 168 (Nov. 1854) (unpublished document, on file with the Abraham Lincoln Presidential Library).

57. KING, *supra* note 2, at 95; *Legal Docs and Cases*, *supra* note 54, at 280.

58. *Legal Docs and Cases*, *supra* note 54, at 275.

59. *Id.* at 275-77.

60. *Id.* at 272-73.

61. *Id.*



Judge David Davis appointed Lincoln to a writ-of-inquiry jury in August 1852 in the case of *H.W. Derby & Company v. Cary*, where Lincoln had the distinction of being jury foreman. Once again, Davis evidenced his trust in Lincoln's high professionalism, because the defaulting defendant in this Sangamon County Circuit Court case was represented by Lincoln's law partner,

Herndon.<sup>62</sup>

The defendant, Thomas DeWitt Cary, had failed to pay a promissory note when it became due to H.W. Derby & Company, a law book publisher. When plaintiff H.W. Derby & Company brought an assumpsit suit against Cary, and Cary failed to enter a plea, Judge Davis entered a default judgment against him and ordered the writ-of-inquiry jury to determine damages. Led by Lincoln, they assessed the plaintiff's damages at \$716.48. Judge Davis then entered judgment against Cary in this amount plus costs. Defendant Cary proceeded to convey 160 acres in Pike County to defendant Derby in satisfaction of the judgment.<sup>63</sup>

Judge Davis was ahead of his time in promoting arbitration, as opposed to lawsuits, in the settlement of disputes. On occasion he was chosen to be the sole arbitrator. At other times he was joined by the most highly respected attorneys on his circuit to form an arbitration panel. In one case, Davis, Abraham Lincoln, and Lincoln's mentor, John T. Stuart, made up a panel that successfully settled a land trade dispute in Logan County.<sup>64</sup>

The professional esteem in which Judge Davis held Lincoln is also impressively illustrated by the former's use of the latter as his personal attorney. For example, Judge Davis retained Lincoln to represent him as a defendant in federal court in a case regarding the ownership of some real estate.<sup>65</sup>

Davis and Lincoln also grew personally close during those years. The measure of Davis's personal relationship with Lincoln, as well as the continued cementing of this relationship, is revealed by a tragically poignant episode that took place in the late summer of 1850. Shortly after Davis had commenced his circuit, he was called home because his infant daughter, Lucy, was gravely ill. Before Davis arrived in Bloomington, Lucy had died. Davis decided to resume his circuit, but felt duty-bound to bring along his wife, Sarah, and his eight-year-old son, George Perrin Davis. During the ensuing two months, Sarah rode circuit in her husband's buggy, while little George was entrusted to Lincoln and

62. *Id.* at 273.

63. *Id.* at 273-74.

64. KING, *supra* note 2, at 94.

65. Letter from David Davis to Abraham Lincoln (August 27, 1859) in *The Abraham Lincoln Papers at the Library of Congress available at* [http://lcweb2.loc.gov/cgi-bin/query/P?mal:18:/temp/~ammem\\_w2QL::](http://lcweb2.loc.gov/cgi-bin/query/P?mal:18:/temp/~ammem_w2QL::)

rode along in the attorney's buggy.<sup>66</sup>

## VI. LINCOLN'S CAMPAIGN MANAGER

David Davis, despite his long career in the law, seems to be best remembered as Lincoln's political manager. This is probably the case because political phenomena are more easily understood and evaluated by the public than legal ones. In addition, Lincoln, who is widely reputed to be our greatest president, seems to have eclipsed all those around him.<sup>67</sup>

In Lincoln's milieu, the profession of attorney was intermixed with political activity. David Davis wrote of life on the Illinois Eighth Circuit: "Politics rage hereabouts. . . The first day of every court is occupied with political speaking, usually by an elector on each side of politics, each person generally taking some three or four hours. . . Lincoln is the best stump speaker in the State."<sup>68</sup>

In late 1854, Lincoln, then a Whig, realized that a combination of old Whigs, Abolitionist Republicans, and anti-Nebraska Democrats constituted a majority of the legislature. He just had been elected to the legislature and believed that these groups might unite behind him for United States Senator. Lincoln promptly resigned from the legislature and announced his candidacy for the United States Senate.<sup>69</sup>

Judge David Davis became Lincoln's de facto campaign manager. He, or his legal colleague, attorney Leonard Swett, tried to contact as many sympathetic legislators as possible extract pledges for Lincoln. In January 1855, Judge Davis was at the opening of the legislature, with Swett and other legal allies he had recruited from the Eighth Circuit, to lobby hard for Lincoln.<sup>70</sup>

Although at times Lincoln had forty-six of the fifty votes needed for election, he lost the Senate seat, after many ballots, to Lyman Trumbull. Davis wrote to his brother-in-law, the Massachusetts jurist and politician Julius Rockwell:

Mr. Lincoln ought to have been elected. . . The Republicans and Whigs were all for Lincoln, and but 5 men [who were anti-

66. KING, *supra* note 2, at 69.

67. See generally BADER & MERSKY, *supra* note 6.

68. DANIEL MARK EPSTEIN, *THE LINCOLNS: PORTRAIT OF A MARRIAGE* 84 (Ballantine Books 2008).

69. KING, *supra* note 2, at 104.

70. *Id.* at 104-105.

Nebraska Democrats] wanted Trumbull. The 5 would not yield and the Whigs and Republicans, rather than let the election pass over or a Nebraska man be elected, voted for Trumbull. The members would not do it until Lincoln urged them to do so. I had spent a good deal of time at Springfield getting things arranged for Lincoln. . . I was necessarily absent on the day of the election . . . But if I had been there, there were ten members of the Legislature who would have fully appreciated the fact that 46 men should not yield their preference to 5.<sup>71</sup>

Lincoln did not give up his interest in a Senate seat. Instead he worked hard, but quietly, to lay the groundwork for a challenge to incumbent, Senator Stephen A. Douglas, in 1858. He appointed campaign managers in various sections of Illinois to organize an effort to unite old Whigs, Republicans, and anti-Nebraska Democrats around a moderate Republican platform, which could propel a Republican majority in the legislative elections. Because the legislature chose the U.S. Senator, Lincoln then could have an excellent chance of electoral success.<sup>72</sup>

In the Bloomington area Lincoln appointed Judge Davis and Leonard Swett to run his campaign.<sup>73</sup> Davis worked effectively, and often secretly, to discourage abolitionist candidates who would offend more conservative members, such as the old Whigs, in the new, but fragile, Republican coalition in Illinois.<sup>74</sup> In the end, however, Douglas Democrats won a small majority in the legislature over the Lincoln Republicans. On January 5, 1859, Douglas was re-elected United States Senator by a vote of 54 to 46.<sup>75</sup>

Davis who, as a judge, necessarily had kept a low profile in his political maneuvering, wrote Lincoln a moving letter:

The result in Illinois, has both astonished and mortified me beyond measure. . . . You have made a noble canvas (which if unavailing in this State) has earned you a national reputation. . . . I doubt whether among your friends in Illinois, any one feels your defeat more deeply than I do. I have regretted for the past month that I had not early in the summer resigned my judgeship [and]

71. *Id.* at 108.

72. DONALD, *supra* note 45, at 196, 202-03.

73. *Id.* at 203.

74. KING, *supra* note 2, at 117.

75. DONALD, *supra* note 45, at 228.

entered into the fight for you.<sup>76</sup>

William Lee Miller has listed six reasons “distinctive to Lincoln” as to why Abraham Lincoln won the presidential nomination in 1860. First and foremost, Miller lists: “Lincoln had shrewd, energetic managers and operatives, led by David Davis.”<sup>77</sup> Indeed, it is doubtful whether there would have ever been a President Lincoln if it had not been for Judge David Davis.

Lincoln was the ultimate long-shot at the Republican national convention. Although he had spent one term in the United States House of Representatives, he had no other national experience, no state-wide office experience, and no executive experience whatsoever. His credentials were incredibly meager compared to the impressive frontrunners for the nomination, such as William Seward, Edward Bates, and Salmon Chase.<sup>78</sup>

David Davis arrived early at the National Convention in Chicago (Lincoln remained in Springfield), and with his singularly brilliant organizing skills set up a headquarters and a sophisticated strategy for victory. To help carry out his plan he brought along many attorneys from the Eighth Circuit who supported Lincoln out of personal loyalty to the former and the latter. He also made certain to bring Lincoln’s political friends with him.<sup>79</sup>

Davis carefully assigned these men to lobby the important state delegations where they each might have special contacts and influence. For example, Leonard Swett was assigned to work with the delegation from his native Maine. Similarly, Ward Hill Lamon was sent to lobby the delegates from Virginia, where he had been raised.<sup>80</sup>

Davis tirelessly coordinated all their efforts from his Chicago headquarters, and rearranged strategic details in an astute and pragmatic manner. When it was necessary, he personally would

76. Letter from David Davis to Abraham Lincoln (November 7, 1858) in *The Abraham Lincoln Papers at the Library of Congress, available at [http://lcweb2.loc.gov/cgi-bin/query/P?mal:25:/temp/~ammem\\_N8of:](http://lcweb2.loc.gov/cgi-bin/query/P?mal:25:/temp/~ammem_N8of:)*

77. WILLIAM LEE MILLER, *LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY* 396 (Alfred A. Knopf 2002).

78. *Id.* at 391.

79. GARY ECELBARGER, *THE GREAT COMEBACK: HOW ABRAHAM LINCOLN BEAT THE ODDS TO WIN THE 1860 REPUBLICAN NOMINATION* 189-190 (Thomas Dunne Books 2008).

80. *Id.*

venture out to reinforce the lobbying efforts. Illinois State Auditor and Lincoln supporter Jesse Dubois wrote to Lincoln: "Judge Davis is furious, never saw him work so hard and so quiet in all my life."<sup>81</sup>

Davis's grand strategy was to turn Lincoln's dark horse status from a weakness into a strength. He realized that party leaders such as Seward had strong first ballot appeal, but they did not have quite enough votes for the nomination on the first ballot. Furthermore, Davis knew that from the delegates' perspective, a party leader such as Seward was in a stronger position to resist their clamorings for patronage should he win, as compared to an indebted dark horse like Lincoln. Thus, Davis was determined to procure pledges from the various delegations to support Lincoln as their second choice.<sup>82</sup>

Even though Lincoln had wired his Chicago headquarters: "Make no contracts that will bind me," Davis regarded promises of patronage as integral for securing his dark horse's nomination. In the heat of battle, Davis sternly told his troops, "Lincoln ain't here, and don't know what we have to meet." Thus, when it was essential Davis did "bind" Lincoln. Perhaps most importantly, he personally promised Simon Cameron a cabinet post in return for delivering the Pennsylvania delegation's votes to Lincoln on the second and third ballots.<sup>83</sup>

On Friday, May 18, 1860, David Davis was able to put everything together and pull off the most astounding coup in American political history. On the third ballot, the Republican national convention nominated Abraham Lincoln as the presidential candidate. David Davis, the political manager *par excellence*, was moved to tears.<sup>84</sup>

## VI. APPOINTMENT TO THE COURT

During his tenure as President of the United States, Abraham Lincoln had the opportunity to appoint five justices to the United States Supreme Court. Shortly after taking office, Lincoln was

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81. Letter from Jesse K. Dubois to Abraham Lincoln (May 13, 1860) in *The Abraham Lincoln Papers at the Library of Congress, available at* [http://lcweb2.loc.gov/cgi-bin/query/P?mal:8:/temp/~ammem\\_AjsS::](http://lcweb2.loc.gov/cgi-bin/query/P?mal:8:/temp/~ammem_AjsS::)

82. ECELBARGER, *supra* note 79, at 212-213.

83. EPSTEIN, *supra* note 68, at 251.

84. ECELBARGER, *supra* note 79, at 230-31.

given the chance to significantly change the composition of the Supreme Court by nominating three new justices. Lincoln's predecessor, James Buchanan, had failed to fill the vacancy left by Justice Peter V. Daniel, who had died while serving on the Court.<sup>85</sup> One month into Lincoln's presidency the Court experienced two additional vacancies: one due to the death of Justice John McLean and another resulting from the resignation of Justice John A. Campbell.<sup>86</sup> Despite being faced with three Supreme Court openings, Lincoln did not make appointments to the bench hastily. Instead, he first concentrated on preparing for the war that had started with the firing on Fort Sumter on April 12, 1861.<sup>87</sup>

The country waited anxiously for the new president, who had openly attacked the Supreme Court in his first inaugural address, to fill these seats. Even with his priorities set on leading the Union through a civil war, Lincoln made his view of the judicial branch well known. During his first inaugural address Lincoln proclaimed, "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court. . . ."<sup>88</sup> He was undoubtedly referring to the *Dred Scott* decision, with the plurality authored by sitting Chief Justice Roger B. Taney.<sup>89</sup> Lincoln criticized the Court and its powers by remarking that

[T]he 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

85. DAVID M. SILVER, *LINCOLN'S SUPREME COURT* 2-3 (1956) (Illinois reissue, 1998).

86. *Id.* at 9.

87. *Id.* 13.

88. Abraham Lincoln, First Inaugural Address (March 4, 1861), reprinted in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 268 (Roy P. Basler ed., Rutgers Univ. Press 1953) [hereinafter *Coll. Works*].

89. See *Scott v. Sanford*, 60 U.S. 393 (1857) (ruling that people of African descent held as slaves, or their descendants, could not be United States citizens).

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.<sup>90</sup>

With Lincoln's views of the Supreme Court widely known, there was much speculation about the damage the newly formed Republican Party could inflict upon the judicial branch once Lincoln began filling the Court's vacancies.<sup>91</sup> The Supreme Court resumed activity and commenced its regular term in December 1861, but it was not until January 1862, almost a year after taking office, and after the problems of the war first were addressed, that Lincoln turned his attention to the Supreme Court.<sup>92</sup>

It should be noted that Lincoln was not entirely at liberty to choose anyone to fill the vacant Supreme Court seats. Rather, he was restricted by a rule in place at the time requiring every associate Supreme Court justice to represent one of the nine judicial circuits.<sup>93</sup> Thus, Lincoln had to replace the three former justices with a judge from the seventh, eighth, and ninth circuits respectively.<sup>94</sup> David Davis was from Illinois, which was part of the eighth circuit and therefore could be considered by Lincoln for this great honor.<sup>95</sup>

Despite the fact that Lincoln and David Davis were close on both a personal and professional level, Lincoln hesitated in appointing Davis to the Court. When Chief Justice Taney and Associate Justice John Catron fell ill, Lincoln realized that the Supreme Court could no longer maintain the requisite quorum of five justices—he had to begin filling the vacancies.<sup>96</sup> On January 21, 1862, Lincoln nominated Noah H. Swayne, a man with no judicial experience, but who was opposed to slavery and who supported the war.<sup>97</sup> The media took a liking to Swayne, believing him to be well suited for the position and able to satisfy

90. *Coll. Works*, *supra* note 88.

91. SILVER, *supra* note 85, at 25.

92. *Id.* at 37-38.

93. *Id.* at 49, 57-58.

94. *See id.* at 9 (indicating that the first three Lincoln appointments were Noah H. Swayne of the Seventh Circuit, David Davis of the Eighth Circuit, and Samuel F. Miller of the Ninth Circuit).

95. *Id.*

96. *Id.* at 58.

97. *Id.* at 58-59.

the people's expectations.<sup>98</sup> Swayne was sworn in on January 27, 1862.<sup>99</sup>

Lincoln's second Supreme Court nomination was Samuel Freeman Miller, a man who had never before held public office but who was opposed to slavery albeit in favor of gradual emancipation.<sup>100</sup> Lincoln nominated Miller on July 16, 1862; he was considered and confirmed by the Senate in one day.<sup>101</sup> Because Miller was not well known, the press was confused about whether it had been Daniel F. Miller or Samuel F. Miller who had been appointed.<sup>102</sup> This uncertainty eventually was resolved, leaving the Supreme Court with only one remaining vacancy.

Although many expected Lincoln to fill the third vacancy at around the same time he had nominated Miller, Lincoln delayed his decision.<sup>103</sup> It was not until October 17, 1862 that Lincoln officially nominated David Davis, but this decision was not made easily by Lincoln.<sup>104</sup> In addition to Davis, there were three primary candidates for the final Supreme Court seat: Caleb B. Smith, the Secretary of the Interior; Orville H. Browning, a Senator from Illinois and a regular correspondent to Lincoln; and Thomas Drummond, a United States District Court judge.<sup>105</sup>

For Lincoln, the nomination came down to a decision between Browning and Davis. Smith's candidacy did not appear to be considered seriously by Lincoln, and Drummond did not make very many efforts in contacting Lincoln about the position, believing that such decisions should be made without solicitations by the candidates.<sup>106</sup> Browning, on the other hand, was aggressive in seeking an appointment to the Supreme Court. He contacted Lincoln almost immediately after the new president took office, beseeching Lincoln to consider him as a candidate for one of the three open seats.<sup>107</sup> Browning asked for Lincoln's

98. *Id.* at 61.

99. *Id.* at 9.

100. *Id.* at 64, 68.

101. *Id.* at 67.

102. *Id.*

103. *Id.* at 77.

104. *Id.* at 74.

105. *Id.* at 70.

106. *Id.* at 73.

107. Letter from Orville H. Browning to Abraham Lincoln (Apr. 9, 1861) in *The Abraham Lincoln Papers at the Library of Congress, available at*

discretion in these letters, requesting that he keep the solicitations private.<sup>108</sup> He wrote, “I am willing *you* shall know that I do desire the office—I am *not* willing that the world shall.”<sup>109</sup> Browning’s wife, Eliza, also wrote to Lincoln on his behalf, imploring the President to consider her husband for a Supreme Court nomination.<sup>110</sup>

In contrast to Browning’s eagerness, Davis was reluctant in considering a seat on the nation’s highest court, due mostly to the demands required of a Supreme Court justice. During this time, a Supreme Court justice was responsible not only for the cases he heard in Washington, D.C., but also for matters coming before his own particular geographic circuit.<sup>111</sup> Davis also doubted his ability to fill the seat suitably, because all his judicial experience was at the trial level.<sup>112</sup> He wrote to a friend, “I often doubt whether I could sustain myself on the Supreme Bench. It may be that I am not self confident enough. I certainly could not without hard study. I have but little legal learning, and whether study would suit me now may be very doubtful.”<sup>113</sup> Davis biographer Willard L. King wrote:

Davis’s misgivings were understandable: His experience had been confined to a trial court—he had never even argued a case in the Supreme Court of Illinois—and he doubted his ability to fill a place in a higher tribunal. It is fair to assume that Lincoln shared his doubts. He himself had handled more cases before the Illinois Supreme Court than almost any lawyer in the state and he knew that an excellent trial judge might not necessarily make the best Supreme Court Justice.<sup>114</sup>

In time, however, the energy and enthusiasm of Davis’s friends grew contagious, finally sparking his interest in a position on the Supreme Court bench; the excitement soon overshadowed

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[http://lcweb2.loc.gov/cgi-bin/query/P?mal:34:./temp/~ammem\\_WbYo::](http://lcweb2.loc.gov/cgi-bin/query/P?mal:34:./temp/~ammem_WbYo::)

108. *Id.*

109. *Id.*

110. Letter from Eliza H. Browning to Abraham Lincoln (June 8, 1862) in *The Abraham Lincoln Papers at the Library of Congress, available at* [http://lcweb2.loc.gov/cgi-bin/query/P?mal:40:./temp/~ammem\\_HjOI::](http://lcweb2.loc.gov/cgi-bin/query/P?mal:40:./temp/~ammem_HjOI::)

111. SILVER, *supra* note 85, at 76.

112. MCGINTY, *supra* note 17, at 114.

113. *Id.*

114. KING, *supra* note 2, at 191.

the laborious duties that inevitably would ensue.<sup>115</sup> When Davis ultimately decided to pursue this position he found Browning to be his greatest threat.<sup>116</sup> Davis expressed his interest in the Court to Lincoln; unlike Browning, he did not urge Lincoln to keep such discussions private.<sup>117</sup> Lincoln was not convinced immediately that Davis would be the right person for the third vacant seat: his decision was thus between two competent candidates, with each of whom he shared a personal connection.

But the support for Davis was immense. Lincoln received letters from lawyers and political figures, including John R. Shepley,<sup>118</sup> Samuel T. Glover,<sup>119</sup> Leonard Swett,<sup>120</sup> John M. Scott,<sup>121</sup> and A. Todd,<sup>122</sup> all urging Lincoln to nominate David Davis. Lincoln also received petitions from various bar associations on Davis's behalf.<sup>123</sup> Several letters were written on Browning's behalf as well,<sup>124</sup> but the letters about Davis

115. SILVER, *supra* note 85, at 76.

116. *Id.* at 71.

117. *Id.* at 72.

118. Letter from John R. Shepley to Abraham Lincoln (Feb. 25, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

119. Letter from Samuel T. Glover to Abraham Lincoln (Feb. 14, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

120. Letter from Leonard Swett to Abraham Lincoln (Jan. 25, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

121. Letter from John M. Scott to Abraham Lincoln (Feb. 11, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

122. Letter from A. Todd to Abraham Lincoln (Feb. 24, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

123. See, e.g., Letter from Champaign County Illinois Bar Association to Abraham Lincoln (Jan. 30, 1862); Letter from Burlington Iowa Bar Association to Abraham Lincoln (Feb. 10, 1862); Letter from Missouri Bar Members to Abraham Lincoln (1862); Letter from Whiteside Illinois Bar Members to Abraham Lincoln (1862); Letter from Macon County Illinois Members of the Bar to Abraham Lincoln (1862); Letter from La Salle County Illinois Members of the Bar to Abraham Lincoln (1862), all in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alsr1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alsr1_dates.html).

124. Letter from Samuel C. Pomeroy to Abraham Lincoln (Jan. 7, 1861); Letter from Bradley F. Granger to Abraham Lincoln (Aug. 13, 1862); Letter from Missouri Delegates in Congress to Abraham Lincoln (Mar. 18, 1862), all in *The Abraham Lincoln Papers at the Library of Congress*, available at

contained something that was otherwise lacking in Browning's recommendations. Although the Davis recommendations spoke of his talent and merit, perhaps the most convincing to Lincoln were those that appealed to Lincoln's sense of justice. John M. Scott, the judge who was to succeed Davis in the Eighth Judicial Circuit of Illinois, wrote: "Of his abilities and qualifications, I need not speak to you."<sup>125</sup> Rather than focus his letter on Davis's accomplishments as a jurist, Scott explained that the public knew of the close relationship between Lincoln and Davis and that they "expected his appointment from you as a matter of justice and right."<sup>126</sup> Scott informed Lincoln that if he did not appoint Davis, "the public will be disappointed in that sense of justice and magnanimity that has ever been considered the most prominent trait in your character."<sup>127</sup>

A letter of recommendation from Leonard Swett, a friend of Lincoln's as well as a fellow attorney from Illinois, reminded Lincoln of the prominent role Davis had played in his presidential campaign, explaining, in so many words, that if it were not for Davis, Lincoln may not have been elected to the presidency.<sup>128</sup> And in another letter written by him, Swett told Lincoln, "Let me also respectfully remind you that since your public career began no man has been more warmly or efficiently your friend. [Davis's] ambition has not been for himself but for you, and where ever he could aid you, he has shrunk from no labor or sacrifice."<sup>129</sup>

Judge John D. Caton, Chief Justice of the Illinois Supreme Court, and Stephen T. Logan, an Illinois attorney (and Lincoln's second law partner), also wrote on Davis's behalf, effectively communicating that Davis, rather than Browning, was the best man for the Supreme Court bench. Judge Caton wrote, "he

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[http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

125. Letter from John M. Scott to Abraham Lincoln (Feb. 11, 1862), in *The Abraham Lincoln Papers at the Library of Congress, available at* [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

126. *Id.*

127. *Id.*

128. Letter from Leonard Swett to Abraham Lincoln (Jan. 25, 1862), in *The Abraham Lincoln Papers at the Library of Congress, available at* [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

129. Letter from Leonard Swett to Abraham Lincoln (Jan. 28, 1862), in *The Abraham Lincoln Papers at the Library of Congress, available at* [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

possesses [qualities] to an extent unsurpassed by any gentleman in our state.”<sup>130</sup> Logan echoed Caton’s sentiment: “I say without hesitation that I prefer the appointment of Hon [sic] David Davis to any other which could be made from Illinois.”<sup>131</sup>

Convinced that Davis was the appropriate choice, Lincoln offered the position to Davis in the summer of 1862, while Congress was out of session. This offer, made privately on August 27, 1862,<sup>132</sup> was not official because the confirmation could occur only after Congress reconvened in December 1862.<sup>133</sup> Lincoln wrote, “My mind is made up to appoint you Supreme Judge; but I am so anxious that Mr. Bradley, present clerk at Chicago shall be retained, that I think it no dishonor for me to ask, and for you to tell me, that you will not remove him. Please answer.”<sup>134</sup>

Davis was honored nevertheless; he wrote to Lincoln, “I cannot in words, sufficiently express, my thankfulness and gratitude for this distinguished mark of your confidence [and] favor.”<sup>135</sup> Davis mentioned his “great distrust in [his] abilities” but promised Lincoln that he would work hard to fulfill his duties as the ninth Supreme Court justice.<sup>136</sup>

Anxious to have the appointment made official, Lincoln asked United States Attorney General Edward Bates for an opinion as to whether the Supreme Court vacancy could be filled while Congress was not in session. On October 15, 1862, Bates responded affirmatively, citing both the continued practice of Lincoln’s predecessors in appointing Supreme Court justices while Congress was in recess and the “unbroken acquiescence of the Senate” to such practice.<sup>137</sup> Two days later Lincoln wrote to

130. Letter from John D. Caton to Abraham Lincoln (Feb. 4, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

131. Letter from Stephen T. Logan to Abraham Lincoln (Feb. 13, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

132. MCGINTY, *supra* note 17, at 115-16.

133. SILVER, *supra* note 85, at 78.

134. KING, *supra* note 2 at 196 (quoting Lincoln to Wait Talcott, Aug. 27, 1862, CWAL, V, 397; Lincoln to Davis, Aug. 27, 1862, Davis papers).

135. Letter from David Davis to Abraham Lincoln (Sept. 1, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

136. *Id.*

137. Letter from Edward Bates to Abraham Lincoln (Oct. 15, 1862) in *The*

Bates, asking him to “make out and send [Lincoln] a commission for David Davis—of Illinois, as an Associate Justice of the Supreme Court of the United States, for the eighth judicial circuit.”<sup>138</sup> Davis’s appointment was received favorably by the public and both Lincoln and Davis were praised by the press.<sup>139</sup>

This change of pace hastened Davis’s arrival in Washington.<sup>140</sup> Almost immediately thereafter, Lincoln assigned Davis to a circuit, even before he was confirmed by the Senate and before the Supreme Court began its term in December.<sup>141</sup>

When Congress reconvened, Davis was confirmed by the Senate on December 8, 1862 and took his seat on the Supreme Court bench for the first time two days later.<sup>142</sup>

#### VII. AUTHOR OF MAJORITY OPINION IN *EX PARTE MILLIGAN* AND OTHER SUPREME COURT CASES

Despite the personal doubts in his ability to judge successfully on the Supreme Court, Judge David Davis proved to be a thoughtful and insightful member of the bench. Davis served on the Court both during and after the Civil War; hence, the subjects of his opinions largely concerned the legal battles resulting directly from the unique situations created by the war. By illustration, this Article will survey some cases heard by Davis, taking care to highlight the particularly pervasive issues handled by the Supreme Court at this time.

In 1862, two years after the commencement of the Civil War, the Court was called upon to make the most important wartime decision in a series of consolidated matters that became best known as the *Prize Cases*.<sup>143</sup> The *Prize Cases* comprised four distinct matters: *The Amy Warwick*, *The Hiawatha*, *The*

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Abraham Lincoln Papers at the Library of Congress, available at [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

138. Letter from Abraham Lincoln to Edward Bates (Oct. 17, 1862) (as reprinted in 5 COLL. WORKS 465-66), available at <http://www.thelincolnlog.org/view/1862/10>.

139. SILVER, *supra* note 85, at 79.

140. Letter from David Davis to Abraham Lincoln (Oct. 30, 1862), in *The Abraham Lincoln Papers at the Library of Congress*, available at [http://lcweb2.loc.gov/ammem/alhtml/alser1\\_dates.html](http://lcweb2.loc.gov/ammem/alhtml/alser1_dates.html).

141. SILVER, *supra* note 85, at 79.

142. MCGINTY, *supra* note 17, at 117.

143. *The Amy Warwick*, 67 U.S. (2 Black) 635 (1862).

*Crenshaw*, and *The Brilliante*.<sup>144</sup> The same central issue was the focus of each case—the constitutionality of President Lincoln's order to blockade the Southern ports during the Civil War.<sup>145</sup> A favorable outcome in the *Prize Cases* was crucial to the government's attempt to keep the nation united. A decision against the administration would impact not only the blockade, but it would implicate all prior acts taken by Lincoln before convening Congress.<sup>146</sup> Indeed, it ultimately would curtail the President's wartime powers.<sup>147</sup> Although Judge Davis was not the author of this significant Civil War opinion, he participated in its decision and voted with the majority.<sup>148</sup> Its import requires a discussion.

By way of background, Lincoln chose not to ask Congress to declare war on the Confederate States of America, believing that such a declaration would be the equivalent of recognizing the Confederacy as a separate nation.<sup>149</sup> This recognition could have had serious international consequences and inevitably would have encouraged foreign assistance to the South and significantly aided the southern cause.<sup>150</sup> In an effort to maintain that the conflict was an insurrection rather than a war, Lincoln ordered a blockade of the Southern ports, which severely interfered with the Southern states' abilities to conduct business at sea.<sup>151</sup> According to Lincoln's proclamation issuing the blockade, if a vessel was found entering or leaving a blockaded port, it could be captured.<sup>152</sup> The proceeds from the sale of captured property, or prizes, could be shared by the crew of the capturing vessel.<sup>153</sup>

The owners of four seized vessels brought suit to gain a return of their captured property, challenging the President's authority to institute a blockade and Congress's power to authorize the

144. *Id.*

145. MCGINTY, *supra* note 17, at 134-35.

146. SILVER, *supra* note 85, at 105-06.

147. *Id.* at 106.

148. Justice Robert Cooper Grier wrote the majority opinion in the *Prize Cases*.

149. SILVER, *supra* note 85, at 104.

150. *Id.*

151. *Id.*

152. ROBERT BRUCE MURRAY, LEGAL CASES OF THE CIVIL WAR 2 (Stackpole Books) (2003).

153. *Id.*

ports' closure without a formal declaration of war.<sup>154</sup> They argued that, to legitimize the capture, a war must exist. The following dilemma resulted. If there was no war, Lincoln lacked the authority to institute a blockade, and the President's powers during wartime would be significantly restrained. If there was a war, then the South could be recognized as a separate sovereign, able to receive foreign aid, which would bolster the South's strength against the North.

In the Court's majority opinion, Justice Grier explained that in the typical case, a war exists between two independent nations.<sup>155</sup> He determined, however, that it was not necessary for both countries to be separate sovereigns.<sup>156</sup> Rather, he declared, a war exists as long as one of the entities claims sovereign rights against the other.<sup>157</sup> Grier acknowledged that although a war was never formally proclaimed, the Court was bound to take judicial notice of its existence.<sup>158</sup> He wrote: "[a] civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."<sup>159</sup> The Court determined that the President had the authority to suppress a rebellion and that the President alone was the judge of whether the hostility necessitated categorizing the hostile parties as belligerents.<sup>160</sup> Because of the inherently political nature of this decision, the Court deferred to the President's decision on this matter.<sup>161</sup> The President instituted the blockade and Congress ratified his actions; thus the Court interpreted this as the ultimate indication that a war existed.<sup>162</sup> The Court upheld the legality of the blockade, determining that the President had the right to institute a blockade of the ports of the states in rebellion.<sup>163</sup> The Court then determined the rightful owners of the captured property under international prize law.<sup>164</sup>

154. *The Amy Warwick*, 67 U.S. at 637, 659.

155. *Id.* at 666.

156. *Id.*

157. *Id.*

158. *Id.* at 667.

159. *Id.* at 666.

160. *Id.* at 668.

161. *Id.* at 670.

162. *Id.*

163. *Id.* at 671.

164. *Id.* at 671-72.

This decision, with a 5-to-4 majority, not only affirmed Lincoln's actions, but ensured the existence of broad presidential powers during wartime.<sup>165</sup>

In the years following the *Prize Cases*, Davis authored several opinions, the subjects of which were largely dictated by the Civil War.

Supplying the Northern troops with arms was of incredible importance during the Civil War. In one instance, the soldiers in a Pennsylvania troop reported to their supervisors that their arms did not function properly.<sup>166</sup> Philip S. Justice, a gun supplier, had contracted with the United States Ordnance Department in 1861, to supply the troop with muskets.<sup>167</sup> Justice had supplied the troops with samples of the muskets, representing that the muskets would be the same as the sample, yet, some of the muskets that Justice ultimately provided proved inoperable or dangerous to the user.<sup>168</sup> Because of the defects, the chief of the Ordnance Department refused to pay for the muskets.<sup>169</sup> The dispute came before the Audit Commission, which reduced the amount owed to Justice based on the inadequate arms.<sup>170</sup> Despite accepting this lessened amount, Justice filed a claim for the balance nearly five years later.<sup>171</sup> The Court of Claims determined that although the muskets were unserviceable, Justice was entitled to the balance of his contract because the government had accepted the arms after inspection.<sup>172</sup>

The government appealed its case to the United States Supreme Court, which heard oral arguments on November 8, 1872.<sup>173</sup> Justice David Davis authored the opinion in *United States v. Justice*.<sup>174</sup> After reviewing the facts and hearing the parties' oral arguments, Davis agreed with the government.<sup>175</sup> He

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165. See *id.* at 668-71, 699 (Chief Justice Roger B. Taney joined the dissenting opinion).

166. MURRAY, *supra* note 151, at 186.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 186-87.

172. *Id.* at 187.

173. *Id.*

174. *Id.* at 188; 81 U.S. (14 Wall.) 753 (1872).

175. MURRAY, *supra* note 151, at 189.

reasoned that requiring the government to pay for nonfunctioning arms for its military would set a poor precedent, as would withholding a payment to contractors who had fulfilled their contractual obligations.<sup>176</sup> To settle these disputes in a timely manner, Davis concluded that a commission of impartial factfinders could make findings and the parties could choose to either accept or reject those findings.<sup>177</sup> If the parties chose to accept the commission's findings, the decision would become binding.<sup>178</sup> In this instance, the commission concluded that because Justice had represented that the muskets would be the same as the serviceable sample he had provided initially, and because the muskets were dangerous and thus unlike the sample, the United States did not owe Justice the full amount of the contract.<sup>179</sup> Justice had deferred to this finding and, according to Davis, was bound to the commission's decision.<sup>180</sup> Certainly Justice's decision to file a claim with the Court of Claims was only an afterthought.<sup>181</sup>

Throughout the Civil War, an often-encountered problem for the military involved providing supplies for its western posts, which had little or no local sources.<sup>182</sup> The government and its suppliers accessed the West by trails and attacks by Indians and the Southern militia on the supply trains grew increasingly common.<sup>183</sup> One dispute occurred after the Secretary of War granted two men, T.W. Tailafero and W.S. Grant, the license to provide all of the requisite supplies to the Arizona posts for two years.<sup>184</sup> The contract between Grant and the government stipulated that inspection of the goods would take place in New York, the place of shipment, rather than the point of destination.<sup>185</sup> After one shipment of Grant's goods was inspected in New York, Grant attempted to move his supplies from New

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176. *Id.* at 188.

177. *Id.* at 188-89.

178. *Id.* at 189.

179. *Id.* at 188-89.

180. *Id.* at 189.

181. *Id.*

182. *Id.* at 264.

183. *Id.*

184. *Id.* (Grant eventually purchased Tailafero's ownership interest in their business).

185. *Id.*

York to Arizona, by way of Texas, when one of his wagon trains was captured by the Texas armed forces.<sup>186</sup> Just two months prior, Texas had seceded, the Union troops in Texas had surrendered, and no military protection was provided to Grant, making this capture rather uncomplicated.<sup>187</sup> Grant argued that, despite the failed delivery, he was still owed payment for the goods because inspection was made in New York.<sup>188</sup> The government, however, refused to pay, maintaining that delivery of the goods to their ultimate destination was a prerequisite to payment, and the goods were intercepted before reaching Arizona.<sup>189</sup>

This case came before the Supreme Court on February 18, 1869; less than one month later, Justice David Davis authored the Court's opinion in *Grant v. United States*.<sup>190</sup> Finding in favor of the government, Davis explained that inspection was not included in the contract and that inspection could have occurred in Arizona upon delivery, but was done in New York simply out of convenience to Grant.<sup>191</sup> Therefore, Davis concluded that payment was not due to Grant until the goods were actually delivered in Arizona.<sup>192</sup>

Davis also heard disputes concerning captured property as a prize of war, property captured by the military, and funds expended in defense of the Union.<sup>193</sup>

186. *Id.* at 264-65.

187. *Id.* at 265.

188. *Id.*

189. *Id.*

190. MURRAY, *supra* note 151, at 265, 267; 74 U.S. (7 Wall.) 194 (1872).

191. *Id.* at 267.

192. *Id.*

193. *See, e.g.*, *The Nassau*, 71 U.S. (4 Wall.) 634, 640-41 (1866) (concluding that an alleged prize of war was held in trust by the government until the lower court determined the rightful owner; neither private party could attach the property while it was held by the government); *Commonwealth v. Boutwell*, 80 U.S. (13 Wall.) 526, 529-31 (1871) (denying Kentucky's claim for reimbursement of funds expended in defense of the Union); *McKee v. United States*, 75 U.S. (8 Wall.) 163, 165-68 (1870) (determining that although McKee's cotton, which he had purchased from a resident in the Confederacy, was captured, the District Court had properly dismissed his claim for payment because McKee had traded with the enemy); *United States v. Lane*, 75 U.S. (8 Wall.) 185, 190-91, 194-95, 200-01 (1869) (declaring that Lane was not entitled to reimbursement for purchased cotton that had been seized by the Navy because Lane had purchased the cotton in the Confederacy and, therefore, was trading with the enemy).

Davis's most famous opinion was *Ex Parte Milligan*, decided in 1866.<sup>194</sup> At the close of the Civil War, Justice Davis, along with Chief Justice Salmon P. Chase and Associate Justices Wayne, Nelson, Grier, Clifford, Swayne, Miller, and Field, were called upon to determine the legality of Lincoln's suspension of the writ of *habeas corpus* and his use of military commissions.<sup>195</sup> The nine justices heard, for six and one half consecutive days,<sup>196</sup> arguments concerning whether a civilian could be tried by a military commission.<sup>197</sup> This civilian was Lambdin P. Milligan, an Indiana citizen who had been arrested in his home for an alleged plot to overthrow the United States government.<sup>198</sup>

Milligan was arrested on October 5, 1864<sup>199</sup> and charged with conspiracy, aiding rebel forces, inciting insurrection, disloyal practices, and violations of the laws of war.<sup>200</sup> He was brought before and found guilty by a military commission; thereafter, he was sentenced to execution by hanging.<sup>201</sup> Milligan contended that the military commission lacked jurisdiction to try him because, as a citizen of Indiana, the Constitution guaranteed him the right to a trial by jury in a civilian court.<sup>202</sup> On May 10, 1865, only ten days before he was to be executed, Milligan filed a petition in the United States Circuit Court in Indianapolis, requesting a writ of *habeas corpus* pursuant to the Habeas Corpus Act of 1863.<sup>203</sup> Milligan asked simply that he be afforded his right not to be detained or punished without receiving a fair hearing in an Article III civilian court so that he could defend himself.

194. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866).

195. *See id.* David Davis apparently believed, from the outset of Lincoln's proclamation that persons disloyal to the Northern cause were to be tried by military commission, that Lincoln did not have the power to try civilians by military commission. *See KING, supra* note 2, at 198.

196. MCGINTY, *supra* note 17, at 254.

197. *Milligan*, 71 U.S. at 107.

198. THE MILLIGAN CASE 63-64, 67-68 (Samuel Klaus, ed., Guant, Inc. 1997).

199. *Milligan*, 71 U.S. at 107.

200. MCGINTY, *supra* note 17, at 248.

201. *Id.*

202. *Milligan*, 71 U.S. at 108.

203. *Id.* at 107; SILVER, *supra* note 85, at 228. President Abraham Lincoln suspended the writ of *habeas corpus* during the Civil War. The Habeas Corpus Act of 1863 legitimized Lincoln's suspensions of the writ and approved future suspensions of the writ.

Two judges, Justice David McDonald and Circuit Justice David Davis, could not agree on whether Milligan was entitled to a writ of *habeas corpus*: McDonald would not grant the writ, whereas Davis favored granting it.<sup>204</sup> Because of this division, the following three questions were certified to the United States Supreme Court, where Justice Davis sat: (1) "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued"; (2) ". . . [O]ught the said Lambdin P. Milligan to be discharged from custody as in said petition prayed"; and (3) "Whether . . . the military commission . . . had jurisdiction to legally try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"<sup>205</sup>

Milligan's attorneys argued that he never should have been tried by a military tribunal because the Constitution as well as the laws of the United States guarantee a trial by a civilian court, complete with all of the inherent procedural safeguards.<sup>206</sup> His attorneys maintained that he should have been charged under criminal statutes, thereby invoking the rules of criminal procedure as well as the constitutional guarantees for criminal defendants.<sup>207</sup> The government, on the other hand, argued that although the constitutional requirements may have applied to Milligan's circumstances in peacetime, the country was at war and the rules had changed.<sup>208</sup>

The final day of arguments before the Supreme Court was March 13, 1866;<sup>209</sup> nearly three weeks later, on the last day of the term, the Court declared that the military commission lacked jurisdiction over Milligan and ordered the issuance of the writ of *habeas corpus*.<sup>210</sup> The full opinion would not be read until the commencement of the next term, in December.<sup>211</sup>

On December 17, 1866, the Court delivered its opinion.<sup>212</sup> At the outset of the opinion, Davis acknowledged that "the importance of the main question presented by this record cannot

204. SILVER, *supra* note 85, at 228.

205. *Milligan*, 71 U.S. at 108-09.

206. MCGINTY, *supra* note 17, at 253.

207. *Id.*

208. *Id.* at 254.

209. *Id.*

210. *Id.* at 256.

211. *Id.* at 257.

212. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.”<sup>213</sup>

Justice Davis, writing for a majority of the Court, concluded that the Constitution prohibited the trial of civilians by a military commission when there were civil courts open and available.<sup>214</sup> Noting the importance of this decision, Davis wrote: “No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.”<sup>215</sup>

Davis succinctly expressed the Court’s limited role in deciding the question presented. “If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.”<sup>216</sup> He explained that the precedents, although interesting, served only to illuminate “the struggle to preserve liberty and to relieve those in civil life from military trials.”<sup>217</sup> The Court’s decision had to be based, quite simply, on what the Constitution required.<sup>218</sup>

In looking to the Constitution, Davis cited the Fourth, Fifth, and Sixth Amendments for the protections provided to those accused of a crime.<sup>219</sup> These constitutional guarantees applied to all United States citizens, in war and peace.<sup>220</sup>

The Constitution of the United States is a law for rulers and people, equally in war and in peace and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of a man than that

213. *Id.* at 109.

214. Three justices joined in Chief Justice Salmon P. Chase’s concurring opinion. Although agreeing that Milligan was entitled to a grand jury hearing by an Article III civilian court, the concurrence disagreed on the interpretation of the Habeas Corpus Act of 1863. Chase took issue with the majority’s proposition that Congress could not authorize trials by military commission, contending that Congress had not, through the Habeas Corpus Act, authorized such trials. *Id.* at 131.

215. *Id.* at 118-19.

216. *Id.* at 119.

217. *Id.*

218. *Id.*

219. *Id.* at 119-20.

220. *Id.* at 120.

any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchism or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>221</sup>

The issue, therefore, was whether any of Milligan's constitutional rights had been violated, *despite* the country's engagement in a great civil war.

Pursuant to the Habeas Corpus Act of 1863, the federal circuit court, and not a military commission, had jurisdiction over Milligan's case. Because the civil courts were not closed at the time of Milligan's trial, the use of a military commission could not be sanctioned. Davis provided the facts the Court considered most relevant to this question.<sup>222</sup> He explained that Milligan was a United States citizen, an Indiana resident for twenty years, and not a resident of a rebellious state. Milligan was not a prisoner of war, nor was he or had he ever been a member of the military or navy.<sup>223</sup>

Roughly translated, the latin phrase *inter arma silent leges* means "during war, the laws are silent."<sup>224</sup> Keeping this common Civil War phrase in mind, Davis acknowledged the relevance of the country's hostile state at the time of Milligan's trial by military commission. Significantly, he explained that the Court could not have reached its decision if the country was still at war.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully

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221. *Id.* at 120-21.

222. *See id.* at 118.

223. *Id.*

224. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 202 (Alfred A. Knopf, Inc. 1998).

sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.<sup>225</sup>

Yet by the time the case was decided, the war had ended, allowing the Court to confidently render a decision in conformity with the liberties guaranteed in the Constitution without worrying about potential consequences on the war effort.

*Ex Parte Quirin*, decided three-quarters of a century later, severely limited *Ex Parte Milligan* to its facts.<sup>226</sup> The United States Supreme Court determined that the defendants in *Ex Parte Quirin* were properly before a military tribunal because they were belligerents<sup>227</sup> who had violated the laws of war.<sup>228</sup> The Court held that “[u]nlawful combatants are. . .subject to capture and detention, [and] are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>229</sup> *Ex Parte Quirin* did not render *Ex Parte Milligan* obsolete. Rather, by substantially limiting *Ex Parte Milligan* to its facts, the *Quirin* Court announced a new rule: enemy combatants who violate the laws of war can be tried by military tribunal.

During his time on the bench, Davis continued to provide Lincoln with political advice.<sup>230</sup> Indeed, Davis went so far as to advise Lincoln against issuing the Emancipation Proclamation, believing it would only increase Southern rebellion and border state hostility.<sup>231</sup> This political involvement with Lincoln’s administration was due largely to the fact that Davis had been so intimately involved in Lincoln’s campaigns. Thus, all the while, Davis’s first love was politics. After almost fifteen years on the bench,<sup>232</sup> he retired to resume the political life he had lived during Lincoln’s pre-presidential career.<sup>233</sup> In the words of historian David M. Silver, “To have forced judicial seclusion upon Davis would have been a penalty too severe to be countenanced.”<sup>234</sup>

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225. *Milligan*, 71 U.S. at 109.

226. *Ex parte Quirin*, 317 U.S. 1 (1942).

227. *See id.* at 43-44.

228. *See id.* at 29.

229. *Id.* at 31.

230. SILVER, *supra* note 85, at 81-82.

231. KING, *supra* note 2, at 207-08.

232. SILVER, *supra* note 85, at 9.

233. *Id.* at 82.

234. *Id.*

## VIII. U.S. SENATOR

David Davis's election to the United States Senate in 1877 took place amidst a political storm surrounding the previous year's presidential election.<sup>235</sup> Davis, though politically ambitious, did not expect to be elected to the Senate.<sup>236</sup> In 1876, Rutherford B. Hayes, the republican governor of Ohio, ran for President against Samuel J. Tilden, the Democratic governor of New York.<sup>237</sup> The voting process around the country was fraught with irregularities that year, resulting in a highly disputed single vote majority for Hayes in the Electoral College.<sup>238</sup> To avoid an outright constitutional crisis, Congress created the fifteen-member Electoral Commission to resolve the volatile dispute.<sup>239</sup> The Commission consisted of five members from each house of Congress and five members from the Supreme Court.<sup>240</sup> As it happened, Davis was to be appointed as the only independent member of the Commission, which would have given him the deciding vote.<sup>241</sup> For the first time in United States history, a single individual, David Davis, was afforded the opportunity to choose the president.<sup>242</sup>

Davis narrowly avoided making that decision. On January 17, 1877, the Illinois Legislature met in a joint session to fill the state's open Senate seat.<sup>243</sup> Initially, Davis was removed from contention and the legislature ended the day in deadlock.<sup>244</sup> But the next day, in a move clearly designed to sway the Electoral Commission, Davis was elected to the Senate with every single Democratic legislator's vote, and not a single Republican's.<sup>245</sup> This tactic, intended to curry Davis's favor with the Democrats,

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235. See ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, 271-18 (Simon & Schuster 2004).

236. KING, *supra* note 2, at 292 ("Davis's election as a senator surprised him . . .").

237. LLOYD ROBINSON, *THE STOLEN ELECTION* 14 (Macmillan 2001).

238. *Id.* at 203.

239. *Id.* at 165-68.

240. *Id.* at 168.

241. *Id.* at 169.

242. *Id.* at 158-59.

243. KING, *supra* note 2, at 291.

244. *Id.*

245. *Id.*

backfired when Davis refused his selection to the Commission.<sup>246</sup> Instead, Justice Joseph Bradley became the fifteenth member of the Electoral Commission, and he gave the election to the Hayes.<sup>247</sup>

On March 5, 1877, the day that President Hayes was inaugurated, Davis resigned his seat on the Supreme Court and took the oath as a United States Senator.<sup>248</sup> To this day, Davis remains the only justice to have resigned from the United States Supreme Court to take a seat in the Senate. Many democrats never forgave Davis for his failure to sit on the Electoral Commission, blaming him for what they believed was a stolen election.<sup>249</sup> For his part, Davis took to his new duties as a Senator with great alacrity.

Judge Davis, as he preferred to be called even after he became a senator, was well respected during his single term in the Senate.<sup>250</sup> His main focus during that period was two-fold. First, he was opposed to the harshest reconstruction policies in the South, preferring to move away from military rule as quickly as possible.<sup>251</sup> Second, he was deeply interested in federal judicial reform. He left his mark in each area.

Davis's most lasting impact as a United States Senator was in the area of judicial reform. One issue in particular dominated his time in the Senate—the creation of the Federal Circuit Courts of Appeal.<sup>252</sup> In Davis's day, each Supreme Court justice was assigned to a Federal Circuit Court.<sup>253</sup> Circuit Courts had both original and appellate jurisdiction for the circuit in which they sat, and most panels consisted of two judges, a District Court judge and either a Supreme Court justice or a Circuit Court judge.<sup>254</sup>

By the late nineteenth century federal caseloads were

246. *Id.* at 292.

247. ROBINSON, *supra* note 236, at 166-68.

248. KING, *supra* note 2, at 294.

249. *Id.* at 293.

250. *Id.* at 296-303.

251. *Id.* at 296.

252. *A New Appellate Court; Senator Davis's Pet Bill Passed At Last*, N.Y. TIMES, May 13, 1882.

253. The Federal Judicial Center, Courts of the Federal Judiciary: U.S. Circuit Courts: U.S. Circuit Courts and the Federal Judiciary, <<http://www.fjc.gov/history/home.nsf>>.

254. *Id.*

increasing significantly.<sup>255</sup> The caseloads in the Circuit Courts were rising exponentially and the Circuit Court system was inadequate to handle the load.<sup>256</sup> To solve that problem, Davis urged Congress to construct an intermediate court of appeals.<sup>257</sup> Davis wanted to create courts that were devoted to hearing appeals only, which would relieve the Supreme Court of some of its heavy burden.<sup>258</sup>

Davis devoted himself completely to the cause. He forcefully shepherded the "Davis Bill" through the Senate. Descriptions of the bill in the *New York Times* almost always referred to the bill as "Mr. Davis's Bill to Create A New Court" or "David Davis's Court Bill" and tended to mention Davis spending much of the time "sitting in his old seat in the centre of the chamber" overseeing the debate.<sup>259</sup> Davis's efforts were successful in the Senate and the bill passed on May 12, 1882.<sup>260</sup> Unfortunately, there was no similar advocate in the House of Representatives, and Davis's bill died for lack of attention.<sup>261</sup>

Although Davis's plan for judicial reform did not pass as the "Davis Bill," similar reforms finally did pass in 1891 as the "Evarts Act."<sup>262</sup> Because the pressing business of Reconstruction took center stage, and because the Evarts Act did not pass until after Davis's death, his role in this important stage of judicial reform is little remembered.<sup>263</sup> The fact remains, however, that

255. FELIX FRANKFURTER, JAMES M. LANDIS & RICHARD G. STEVENS, *THE BUSINESS OF THE SUPREME COURT* 86 (Transaction Publishers 2006) (Macmillan 1928).

256. *Id.*

257. *In and Out of Congress: Mr. Davis's Bill To Create A New Court*, N.Y. TIMES, May 6, 1882; *David Davis's Court Bill: The Illinois Senator Greatly Vexed By The Democrats*, N.Y. TIMES, May 11, 1882.

258. *In and Out of Congress: Mr. Davis's Bill To Create A New Court*, N.Y. TIMES, May 6, 1882; *David Davis's Court Bill: The Illinois Senator Greatly Vexed By The Democrats*, N.Y. TIMES, May 11, 1882.

259. *In and Out of Congress: Mr. Davis's Bill To Create A New Court*, N.Y. TIMES, May 6, 1882; *David Davis's Court Bill: The Illinois Senator Greatly Vexed By The Democrats*, N.Y. TIMES, May 11, 1882. During Davis's time on the United States Supreme Court, the Supreme Court, which has now been restored, was located in the lower levels of the capitol building, where both the United States House of Representatives and Senate are located.

260. *A New Appellate Court*, *supra* note 251.

261. FRANKFURTER, LANDIS & STEVENS, *supra* note 254, at 83-85.

262. *Id.* at 98, 99, fn. 124.

263. KING, *supra* note 2, at 303 (commenting on Davis's time in the Senate: "his career there was not significant in American history").

Davis pushed vigorously for judicial reform during his tenure in the Senate, and there can be little doubt that his influence helped to usher in the reform that ultimately took place after his death.

On July 2, 1881, President James Garfield was shot and mortally wounded by a disgruntled office-seeker, Charles J. Guiteau.<sup>264</sup> President Garfield fought death for a couple of months, finally passing in September 1881.<sup>265</sup> Vice President Chester A. Arthur ascended to the presidency, leaving the Senate president's seat vacant.<sup>266</sup> In a twist of irony, Judge Davis, who had been elected to the Senate by a unanimous Democratic vote, was elected president *pro tempore* by a unanimous Republican vote.<sup>267</sup> He was well liked as presiding officer in the Senate. Ever the independent, Davis maintained his neutrality between the two parties.<sup>268</sup> His role as a popular leader of the Senate during his single term brought him to national prominence during a period of conflict and strife in the wake of the Civil War.

In his role as president *pro tempore*, Davis sought to moderate harsh Reconstruction policies in the South and to reunite the nation.<sup>269</sup> Upon his election, Davis made his intentions clear, "My only ambition, while here, is to be instrumental in bringing about perfect peace between North and South. . . . When the rude voices of faction which for fifteen years. . . have disturbed the National fellowship. . . shall be silenced, this country will bound forward in a career of grandeur and glory that will astound mankind."<sup>270</sup> Davis achieved this goal more through his ameliorative presence in the Senate than by any particular legislative stance.

At the close of his term, Davis did not seek reelection, and in March of 1883 he retired from the Senate. Although he did not attach his name to any great pieces of legislation or make great waves as a legislator, Davis's quiet presence in the Senate, as both member and presiding officer, should be remembered as a significant contribution to the post-war Congress and the existence of the federal court system today.

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264. *Id.* at 300.

265. *Id.* at 301.

266. *Id.*

267. *Id.*

268. *Id.* at 301-02.

269. *Id.*

270. *Id.*

## IX. DAVIS'S CONTINUING ROLE WITH THE LINCOLN FAMILY

On April 14, 1865, President Abraham Lincoln was shot and killed by an assassin's bullet at Ford's Theatre.<sup>271</sup> He was survived by his wife, Mary Todd Lincoln, and two sons, Robert and Tad.<sup>272</sup> Lincoln, the lawyer-president, died intestate,<sup>273</sup> and his family sought out a trusted friend to administer Lincoln's estate and handle both the legal and financial matters associated with the President's death. Robert Todd Lincoln, the older of the two boys, turned to his father's close friend and confidante, David Davis.<sup>274</sup> Robert and his mother (Tad was only fourteen years old at the time)<sup>275</sup> asked the judge of the Sangamon County Court, in Springfield, Illinois, to appoint Davis as administrator of Lincoln's estate; the court complied and Davis officially became the administrator on June 16, 1865.<sup>276</sup> Davis was, of course, still a sitting justice on the United States Supreme Court at this time.<sup>277</sup>

Robert and Mary gave Davis permission to use his discretion in settling the estate.<sup>278</sup> This proved to be a wise decision. At the time of his death, Lincoln's estate was valued at \$83,343.70; the amount ultimately distributed by Davis was \$110,974.62.<sup>279</sup> The amount distributed to each of the three heirs, in 1867,<sup>280</sup> was \$36,991.54.<sup>281</sup> Davis significantly increased the amount of Lincoln's estate by "retaining Lincoln's war bonds and buying additional government bonds at a price below par."<sup>282</sup> Davis also sought out and succeeded in the collection of several small debts owed to Lincoln at the time of his death.<sup>283</sup> Furthermore, Davis waived any fees associated with administering the estate (he could have collected up to \$6,000) and declined reimbursement for the

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271. TIMOTHY SEAN GOOD, *WE SAW LINCOLN SHOT: ONE HUNDRED EYEWITNESS ACCOUNTS* 3 (University Press of Mississippi 1995).

272. KING, *supra* note 2, at 242.

273. JOHN S. GOFF, *ROBERT TODD LINCOLN: A MAN IN HIS OWN RIGHT* 79 (University of Oklahoma Press 1969).

274. *Id.* at 72.

275. KING, *supra* note 2, at 243.

276. GOFF, *supra* note 272, at 79-80.

277. *See* section VII, *supra*.

278. GOFF, *supra* note 272, at 80.

279. *Id.*

280. KING, *supra* note 2, at 242.

281. GOFF, *supra* note 272, at 80.

282. KING, *supra* note 2, at 243.

283. *Id.* at 241.

expenses he incurred in connection with administering the estate.<sup>284</sup> Robert assisted Davis with the administration of his father's estate, with Davis handling large matters and those of great importance and Robert dealing with the minor details.<sup>285</sup>

After the estate was closed, Robert and Davis maintained a close relationship.<sup>286</sup> As for Tad, Davis became his legal guardian.<sup>287</sup> Although Davis originally had suggested that Robert be his brother's guardian, Robert declined, deferring to Davis due to his wisdom and experience.<sup>288</sup>

Davis also became the safekeeper of Lincoln's papers, letters, and manuscripts.<sup>289</sup> He brought these documents from Washington, D.C. and stored them at his home in Bloomington, Illinois, where he took custody of the papers and kept them under seal.<sup>290</sup> Davis and Robert shared the decision-making concerning the Lincoln papers. Together they refused access to the papers to many prospective Lincoln biographers, such as William Henry Herndon, Isaac N. Arnold, and Ward Hill Lamon.<sup>291</sup> They did, however, allow John Nicolay and John Hay to use Lincoln's original writings and documents.<sup>292</sup>

As for Mary Todd Lincoln, Davis assisted her greatly. After her husband's death, Mary was left only with her inheritance.<sup>293</sup> She implored Davis to use his political influence to obtain a pension for her.<sup>294</sup> Davis succeeded and Congress voted to provide Mrs. Lincoln with a yearly pension of \$3,000.<sup>295</sup> While Davis was a senator, the United States Senate voted to increase her pension to \$5,000 and included a \$15,000 cash payment.<sup>296</sup> Six months after this increase, Mary died at her sister's Springfield, Illinois home.<sup>297</sup>

284. *Id.* at 243.

285. GOFF, *supra* note 272, at 87.

286. KING, *supra* note 2, at 244.

287. GOFF, *supra* note 272, at 82.

288. *Id.*

289. *Id.* at 85-86.

290. *Id.*

291. GOFF, *supra* note 272, at 86; KING, *supra* note 2, at 242.

292. KING, *supra* note 2, at 242.

293. *Id.* at 243.

294. *Id.*

295. *Id.*

296. *Id.* at 244.

297. *Id.*

Throughout Davis's life, he remained closely involved not only with Abraham Lincoln, but with the Lincoln family. He and Robert shared a particularly close bond, so much so that Robert remarked: "I cannot remember when I did not know Judge Davis, first as the Circuit Judge of whom I heard as a boy everything good from my father and who was very kind to me. Upon my father's death I went to the Judge as a second father, and this he was to me until his death."<sup>298</sup> David Davis passed away on June 26, 1886, in Bloomington, Illinois, surrounded by family and friends.<sup>299</sup>

#### X. DAVIS'S RELEVANCE TODAY

At first glance it may seem that David Davis was but a footnote in history; however, it is quite apparent that Davis's legacy has significantly impacted today's society.

Davis, author of the majority opinion in *Ex Parte Milligan*, discussed at length above, concluded that trial and execution pursuant to a military tribunal (including necessarily a suspension of the writ of *habeas corpus*) was impermissible when civilian courts were operating. Davis's opinion explained that although the writ of *habeas corpus* could be suspended, it could not be suspended in Milligan's case, nor could Milligan be tried by military tribunal, because he had been captured off the battlefield during a time when civilian courts were still operating.

*Ex Parte Milligan* has been described as "the famous case in which the United States Supreme Court affirmed that the civil liberties guaranteed by the Constitution are to be safeguarded not less in the fever of civil war than in time of peace."<sup>300</sup> Yet, quite tellingly, the Supreme Court decided this case during peacetime, so as not to fetter the administration during the war. It was indeed significant that, in seeking to restore the rule of law, the Court held that Milligan had to be tried in a civilian, not military, court. Had the Civil War still been underway, it is doubtful that the Court would have issued a similar ruling.

The Court's majority, fearful that the country could experience less principled leaders in the future, sought to protect

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298. *Id.*

299. *Id.* at 306.

300. THE MILLIGAN CASE, *supra* note 198, *Forward*.

its citizens' civil liberties. Davis wrote, "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."<sup>301</sup>

Reading between the lines, *Ex Parte Milligan* stands for the proposition that, in the throes of war, the nation is faced with an unusually delicate balance between national security and civil liberties. Indeed, since the nation's founding, we have treated certain civil liberties as flexible or yielding to more paramount concerns. As the nation feels safer, our citizens are afforded more latitude with respect to civil liberties. But when national security is threatened, we are more inclined to take away certain individual freedoms, linked to civil liberties, in order to protect our country from harm. In the words of United States Supreme Court Justice Robert Jackson, the Constitution is not a "suicide pact."<sup>302</sup> If the benefits of greater security outweigh curtailing civil liberties, then it is clear that even legality must be sacrificed for some greater cause—namely, our country.<sup>303</sup>

*Ex Parte Milligan* has fallen in and out of prominence over the years. Historian Mark E. Neely, Jr. followed the case and its import in his 1991 book, *The Fate of Liberty*.<sup>304</sup> Devoting an entire chapter to the so-called "Irrelevance of the *Milligan* Decision," Neely explained that at the close of the eighteenth century the case barely was mentioned and its holding largely was ignored in an important political science article that justified the use of military commissions.<sup>305</sup> The decision experienced a resurgence in the early 1900s, and it remains a landmark case regarding constitutional liberty. Yet, the Court's holding appears,

301. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

302. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

303. Some argue that Lincoln never veered outside the scope of his constitutional powers and thus Lincoln never had to invoke the doctrine of necessity. Indeed, lawyer and historian Brian McGinty argues that the Constitution provided Lincoln with the power, as president and commander-in-chief to meet military challenges and that Lincoln did not overstep the constitutional limits that guided him. See MCGINTY, *supra* note 17, at 81-83.

304. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

305. *Id.* at 179 (citing John J. Lalor, ed., *Cyclopedia of Political Science*, 837-38).

in Neely's words, irrelevant: "The decision itself had little effect on history."<sup>306</sup>

The *Ex Parte Milligan* majority opinion provided that "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."<sup>307</sup> Yet, today's invasions differ significantly from the invasions of the Civil War. Davis's words, requiring a "real" invasion, are seemingly outdated. The use of modern technology, such as aircrafts and computers, as well as the use of progressive weapons, including biochemical weapons, change the battlefield significantly. In our present-day environment, due to the inherent imminence of a so-called threatened invasion, such threats may be enough to permit trials by military tribunal.

After September 11, 2001, the issue of military tribunals has once again made its way to the forefront of today's judicial decisions, and the import of *Ex Parte Milligan* has been the subject of some discussion. In the wake of the 9/11 terrorist attacks, President George W. Bush declared a national emergency.<sup>308</sup> On September 18, 2001, Congress enacted the Authorization for Use of Military Force (AUMF), which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."<sup>309</sup> The President then issued an order effectuating the establishment of military tribunals to detain and prosecute suspected terrorists.<sup>310</sup> A debate ensued, concerning whether the detained enemy combatants still were entitled to *habeas corpus* relief. These detainees, held by the United States in Guantánamo Bay, Cuba, sought writs of *habeas corpus* from the federal district courts.

*Ex Parte Milligan* did not play a particularly prominent role

306. *Id.* at 184.

307. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (emphasis added).

308. George W. Bush, Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010914-4.html>

309. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (enacted).

310. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

in the first trilogy of cases decided by the United States Supreme Court on this issue. In *Rasul v. Bush*, the Court was asked to decide “whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”<sup>311</sup> Answering in the affirmative, the Court held that because the petitioners were being held at an American Naval Base, over which the United States exercises “complete jurisdiction and control,”<sup>312</sup> “[a]liens held at the base. . .are entitled to invoke the federal courts’ authority,”<sup>313</sup> by filing writs of *habeas corpus*.<sup>314</sup> The Court’s majority referred to *Ex Parte Milligan* only once, for the proposition that the Court has, in the past, entertained *habeas* petitions.<sup>315</sup>

The Court then decided *Rumsfeld v. Padilla*.<sup>316</sup> Although faced with the question of whether the President had authority over a United States citizen accused of terrorism,<sup>317</sup> the Court declined to reach the merits.<sup>318</sup> Instead, the Court held that the petitioner had filed his petition in the wrong jurisdiction.<sup>319</sup> *Ex Parte Milligan* remained unmentioned.

In the final case of this trilogy, *Hamdi v. Rumsfeld*, the issue before the Court was whether the president “has the authority to detain citizens who qualify as ‘enemy combatants.’”<sup>320</sup> The plurality held that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>321</sup> Rather than give great deference to presidential decisions regarding national security, the Court concluded that the president did not afford the appropriate balance between national security and individual civil liberties.<sup>322</sup> The Court cited affirmatively to *Ex Parte Milligan*, recalling that the Founding

311. *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

312. *Id.* at 480.

313. *Id.* at 481.

314. *Id.* at 484.

315. *Id.* at 474-75.

316. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

317. *Id.* at 430.

318. *Id.* at 455.

319. *Id.*

320. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

321. *Id.* at 536.

322. *Id.* at 532-33.

Fathers, when framing the Constitution, knew the nation would experience both war and peace, and thus limited the powers of the executive accordingly.<sup>323</sup>

Two years later, in 2006, the Supreme Court decided *Hamdan v. Rumsfeld*.<sup>324</sup> This five-to-three decision held that the structure of the military commissions violated the Uniform Code of Military Justice<sup>325</sup> (UCMJ) and the Geneva Convention.<sup>326</sup> Although the Court did not determine that military commissions were violative of the UCMJ *per se*, they took issue with the procedural means used to convene the commissions.<sup>327</sup> In a concurring opinion, authored by Justice Stephen Breyer and joined by three other justices, he stated that “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”<sup>328</sup> *Ex Parte Milligan* was mentioned only briefly in the Court’s decision, simply to reinforce the proposition that military commissions have been employed when martial law has been declared, but only when civilian courts are not open.<sup>329</sup>

Prompted by the Court’s opinion in *Hamdan v. Rumsfeld*, the Bush administration, with Congress’s authorization, signed into law the Military Commissions Act of 2006 (MCA), which established the jurisdiction of military tribunals.<sup>330</sup> The MCA rescinded federal court jurisdiction over petitions for writs of *habeas corpus* filed by or on behalf of alien unlawful enemy combatants.<sup>331</sup>

After the MCA’s enactment, a Guantánamo Bay detainee challenged not only his detention, but the constitutionality of the

323. See *id.* at 530-31 (quoting *Ex Parte Milligan*, 71 U.S. at 125) (“[The Founders] knew the history of the world told them the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free men.”).

324. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

325. *Id.* at 622.

326. *Id.* at 625.

327. See *id.* at 620-625.

328. *Id.* at 636.

329. *Id.* at 595-96, 596 n.25.

330. George W. Bush, Speech, President Bush Signs Military Commission Act of 2006, (Oct. 17, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1>.

331. United States Military Commissions Act of 2006, 10 U.S.C. §§ 948a-950w.

MCA.<sup>332</sup> In *Boumediene v. Bush*, the Supreme Court held, in a five-to-four decision, that the MCA was an unconstitutional suspension of the writ of *habeas corpus*.<sup>333</sup> The Court referenced *Ex Parte Milligan* indirectly, holding that although the right to *habeas corpus* must be adhered to, leeway may be given for exigent circumstances both in the United States and abroad.<sup>334</sup>

#### XI. CONCLUSION

The post-September 11th events and corresponding jurisprudence demonstrate that although *Ex Parte Milligan* forever will be remembered as a milestone case for individual civil liberties, its relevance in regard to presidential powers in wartime has become increasingly insignificant. What is apparent, however, is that the Supreme Court is as cautious in curtailing the President's powers during wartime today as it was during Judge Davis's time.

Besides his authorship of *Ex Parte Milligan*, Davis also had a global impact on the state of the nation's judiciary. He pioneered a movement toward implementing an intermediate court of appeals in the federal court system. As explained *supra*, during Davis's time, the federal system was two-tiered; there were the trial-level circuit courts and the Supreme Court. Oftentimes, Supreme Court justices sat and heard cases in their respective circuits and, quite frequently, heard the appeal of a case upon which they had ruled at the lower level. This precise situation occurred in *Ex Parte Milligan*, where Davis had heard the initial arguments at the lower level and then heard the parties' appeal. As a result, Davis authored a Supreme Court decision in response to an appeal of his own earlier ruling. Even though Davis did not live to see his circuit reorganization plan come to fruition, his advocacy for an intermediate court of appeals and his actions as a United States Senator to further this program helped shape the structure of today's federal judiciary.

Finally, this review of David Davis would not be complete without mentioning that Davis embodied the unmistakable qualities that comprise a good judge. He was careful and

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332. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

333. *Id.* at 2274.

334. *Id.* at 2275.

thorough in his thinking and analysis, he had good judicial temperament, his writing was precise and accurate, he was systematically organized, and he was collegiate with his fellow members of the bench and bar. Davis also respected the law despite his personal affiliations, exemplifying the high principle of judicial independence in the face of party loyalties. Davis and Abraham Lincoln were close friends and colleagues. Lincoln often argued before Davis in the Eighth Judicial Circuit of Illinois, sometimes filling in for Davis on the bench when Davis was called away from town.<sup>335</sup> Later in his career, Davis served as Lincoln's campaign manager, playing an enormous role in projecting Lincoln into the presidency. After being elected president, Lincoln nominated Davis for a United States Supreme Court judgeship, an honor of the highest caliber. Yet despite this closeness and the sense of allegiance that Davis certainly felt toward Lincoln, Davis was strongly independent. He authored *Ex Parte Milligan*, an opinion declaring, in so many words, that some of Lincoln's wartime actions were violative of the Constitution: namely the suspension of the writ of *habeas corpus* and civilians trials in military tribunals. In the words of Abraham Lincoln,

[The generation of the Revolution] *were* the pillars of the temple of liberty; and now, that they have crumbled away, that temple must fall, unless we, their descendants, supply their places with other pillars, hewn from the solid quarry of sober reason. Passion has helped us; but can do so no more. It will in the future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence. Let those materials be moulded into *general intelligence, sound morality*, and in particular, *a reverence for the constitution and the laws*. . .<sup>336</sup>

Today's judges would be wise to follow in the footsteps laid down by Judge David Davis.

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335. DUFF, *supra* note 28, at 167.

336. Address to the Young Men's Lyceum of Springfield, Illinois," in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 36 (Don E. Fehrenbacher ed., 1989).