“I’ll keep them in prison awhile . . .”: Abraham Lincoln and David Davis on Civil Liberties in Wartime

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The recent location of three letters written by David Davis to Abraham Lincoln during the period July 1 to July 5, 1864, provides documentation of Davis’s communications to the president about the preservation of civil liberties in times of war. The letters address the case of fifteen Coles County prisoners arrested following the Charleston, Illinois, riot of March 28, 1864. In them Davis conveys strong opposition to

1. Davis was a longtime friend and colleague of Lincoln from early court circuit days in Illinois. Davis was regarded as manager of the president’s election campaign in 1860, and he was appointed by Lincoln to the U.S. Supreme Court in 1862, a position he held until 1877. He was the executor of Lincoln’s estate following the 1865 assassination, was briefly considered a candidate for the presidency in 1872, and served as senator from Illinois from 1877 to 1883. Though a Republican, he generally had an independent stance and based his views and decisions on the merits of the issue.

2. Justice Davis’s views of infringements on civil liberties in the North were considered “well known” prior to the 1866 Supreme Court opinion. Much of it, however, was expressed verbally or conveyed secondhand to the president. Often quoted are Davis’s remarks in 1866 to Lincoln biographer William Herndon that “Mr Lincoln was advised as Presdt that the various military trials in Northern states. . . . where the courts were open and untrammeled and free were unconstitutional and wrong.” He went on to say, “I am satisfied that Lincoln was thoroughly opposed to these military commissions especially in the free states where the courts were open and free.” See chapter 20 of Willard L. King, Lincoln’s Manager: David Davis (Cambridge, Mass.: Harvard University Press, 1960). William H. Herndon and Jesse W. Weik, Herndon’s Life of Lincoln: The History and Life of Abraham Lincoln (1942; reprint, New York: Da Capo Press, 1983).

3. Davis to Lincoln, 1 July 1864; 4 July 1864; 5 July 1864. Letters Received by the Office of the Adjutant General (Main Series), 1861–1870 (M619), roll 285, 199–799, National Archives and Records Administration, Washington, D.C. (Three letters are transcribed in Exhibits 1–3). Also cited by Peter J. Barry, “The Charleston Riot and Its Aftermath: Civil, Military, and Presidential Responses,” Journal of Illinois History 7 (Summer 2004): 82–106. These Davis letters are located in the files for the Coles County prisoners at the NARA. Heretofore, the letters do not appear to have been located by researchers, family members, or others.
the suspension of civil liberties. The letters, thus, testify to Lincoln’s firsthand awareness of Davis’s views, foreshadow subsequent court proceedings, and provide an early glimpse of how Davis’s views carried through to his drafting in 1866 of the decision in the landmark U.S. Supreme Court case *Ex Parte Milligan.*

Davis’s actions in mid-1864 and his related communications to Lincoln were fueled by several violations of civil liberties arising from the Charleston Riot. The riot was the culmination of numerous incidents of conflict, violence, and personal animosities between Union soldiers home on leave and local antiwar Democrats (mostly farmers). Nine were killed (six soldiers and three citizens) and twelve wounded on the Coles County courthouse square in what was one of the bloodiest Civil War riots in the North. President Lincoln knew Coles County well. His father and stepmother resided there, he owned property in the county, he tried numerous cases in the courthouse (as did Davis), he met Stephen A. Douglas at the Coles County fairgrounds for one of their famous debates, and he was distantly related to several of the riot participants.

Following the shooting, most of the Democratic participants returned to their homes several miles north and east of Charleston, and then scattered on the run from possible arrest. The reinforced soldiers scoured the countryside over the next several days, taking about fifty prisoners and recording depositions and statements from more than one hundred citizens. Eventually, sixteen prisoners were detained at Camp Yates in Springfield, one of whom died in custody. In mid-June,

4. In the *Ex Parte Milligan* decision, the U.S. Supreme Court ruled against the use of military commissions to try civilians where civil courts were open and undisturbed. In late 1864, Lambdin Milligan and others had been tried, convicted of treasonous acts, and sentenced to be hanged by a military commission in Indiana, where the civil courts were open and no indictment by a grand jury had occurred. Upon the urgings of the attorneys and families of Milligan and his fellow prisoners, Lincoln had informally indicated their future release. One of his comments to Milligan’s chief counsel, Joseph E. McDonald, was “I’ll keep them in prison awhile to keep them from killing the government.” Davis (Herndon interview), Douglas L. Wilson and Rodney O. Davis, *Herndon’s Informants* (Urbana: University of Illinois Press, 1998), 349. After Lincoln’s death, however, President Andrew Johnson favored carrying out the prisoners’ death sentences. Johnson eventually relented, and the case, with the assistance of Davis, came before the U.S. Supreme Court. The Court decided in favor of Milligan. Justice Davis wrote the landmark opinion, which presented a profound and lasting statement about law versus oppression in a free society.

a grand jury in Coles County returned fourteen indictments for murder and riot, although only four of the fifteen prisoners were among the indicted—two for murder and two for riot. The alleged leaders of the uprising escaped capture and left the area.\(^6\)

The legal processes then followed two paths. The military, following the recommendation of Judge Advocate General Henry Burnett, appointed a commission of officers to try the prisoners in Cincinnati, Ohio, on June 21, 1864. Concurrently, the prisoners’ attorneys (Orlando B. Ficklin and Milton Hay) were mounting several initiatives to have the unindicted prisoners discharged and the indicted ones turned over to the civil authorities in Coles County. On June 22, 1864, the attorneys delivered to the Fourth Circuit Court a request for a writ of habeas corpus for the prisoners’ release. The writ was granted by the court under a ruling by Judges Samuel H. Treat and David Davis, and the prisoners were ordered to be delivered to the court. The commanding officer, Colonel James Oakes then sought and was granted a brief delay to receive instructions from his superiors.\(^7\)

Oakes was in a quandary—he had just received orders to deliver the prisoners to Cincinnati, Ohio, for trial by a military commission and was concurrently under order to deliver the prisoners to the circuit court in Springfield. The next day Oakes received word that the president had suspended habeas corpus for the prisoners and that they should be sent immediately to Fort Delaware in Delaware State. Davis was in St. Louis that afternoon while court was not in session. When Oakes informed Judge Treat of the president’s decision and that the men were no longer in his custody, Treat had no choice but to dismiss the case.\(^8\)

Davis was not pleased when he learned about the handling of the Coles County prisoners, as his brief letter (Exhibit 1) of July 1, 1864, reveals. The letter, sent by mail, could not have reached Lincoln by the next day, but the Coles County case was on the president’s mind,


\(^7\) Barry, “The Charleston Riot and Its Aftermath.” Ficklin was a well-known Charleston attorney and Democrat. He was involved in numerous court proceedings with Lincoln, was a colleague and friend, and served with Lincoln in Congress from 1847 to 1849 and later. Milton Hay was a prominent Springfield attorney and uncle of Lincoln’s secretary, John Milton Hay. At the time of the Civil War, the circuit court districts were jointly overseen by an appointed federal judge and a U.S. Supreme Court justice. Davis was assigned to the district that included Illinois, and he served jointly with Judge Treat.

\(^8\) Barry, “The Charleston Riot and Its Aftermath.”
too. By telegram on July 2, 1864, he requested that Davis and Treat “Please give me a summary of the evidence, with your impressions, on the Coles County Riot cases. I send the same request to Judge Davis (Treat).”

Judge Treat responded by telegram on July 4: “The record in the case of the Coles Co. prisoners was ordered to be certified to the President it contains the whole case in my opinion the prisoners should have been surrendered to the civil authorities under the act of March third (3) eighteen sixty three (1863) Judge Davis was of the same opinion.”

Justice Davis responded by telegram on July 5, indicating “Dispatch received and have replied by letter.”

The day before, Davis had written a four-page letter to Lincoln. In it (Exhibit 2) he cites the statutory basis for the discharge of the unindicted prisoners, summarizes the evidence, and as Lincoln requested, provides his “impressions of the case.”

Davis wrote a third, brief letter (Exhibit 3) to Lincoln on the next day (July 5, 1864), transmitting a summary of the case received from the prisoners’ co-counsel, Milton Hay, and reiterating his opinion that the prisoners should have been turned over to civil authorities.

In those letters, Davis focused on the suspension of the writ of habeas corpus for the Coles County prisoners and their relocation to Fort Delaware. He was not immediately aware that a trial by military commission had been scheduled. His second letter roughly parallels the structure of the opinion he later wrote in Ex Parte Milligan. He considers applicable statutes, then reviews the case, and finally gives his views and impressions of the case, namely that the indicted prisoners should be delivered to Coles County for adjudication and the others discharged under conditions imposed by law. His brief mention of oppression and the spirit of the law receives extensive development in Ex Parte Milligan, where the precedent established would contribute significantly to the understanding of American liberty. Davis wrote the July 4, 1864, letter in a day (albeit Independence Day), while he composed the Ex Parte Milligan opinion over a six-month period. Nonetheless, Davis’ experience in putting his views to paper in the July 4
letter to the president helped solidify his thinking for the subsequent Supreme Court assignment.\textsuperscript{13}

Initially, Lincoln was persuaded by the advice from Davis and Treat regarding the Coles County prisoners. He wrote a release order for the prisoners on July 19, 1864. However, he suspended it later on the same day in part because of the voluminous evidence, and he requested the Judge Advocate General to prepare a report on the case. The prisoners’ supporters and attorney Ficklin in Charleston gathered and forwarded to the president numerous additional testimonies, letters, and petitions for the prisoners’ release from Fort Delaware. Finally, after a mercy visit from Dennis Hanks—Lincoln’s cousin and a Charleston resident—the president wrote the final release order on November 4, 1864, leading to the prisoners’ actual release ten days later. This time span included Lincoln’s re-election as president on November 8, 1864, perhaps indicating that political ramifications were also on his mind.\textsuperscript{14}

Lincoln, thus, let the Coles County cases ride for a while, as he had done in other situations, and in the spirit of his 1865 comment about the \textit{Milligan} case: “I’ll keep them in prison for awhile to keep them from killing the Government.” He eventually played his trump card as commander-in-chief by releasing the prisoners prior to any further military proceedings. Upon their return to Illinois, and true to the spirit of the law, two of the prisoners indicted for murder were held for trial, gained two changes in venue, and were exonerated by jury trial on December 5, 1864.\textsuperscript{15}

Did the \textit{Ex Parte Milligan} decision repudiate Lincoln’s earlier war actions regarding civil liberties? If Lincoln had survived, would he have been surprised or felt rebuked by the U.S. Supreme Court’s decision and by Davis’s opinion? At the least, he likely anticipated that such a case and issues would eventually come before the U.S. Supreme

\textsuperscript{13} Davis to Clifford, 2 July 1866, Clifford Papers, Maine Historical Society. Also cited in King, \textit{Lincoln’s Manager}, 254. In this letter Davis states that he is setting aside the summer of 1866 to draft the opinion.

\textsuperscript{14} Lincoln to Secretary of War Edwin M. Stanton, 20 July 1864, with annotations, Adjutant General letters. Edward D. Townsend of the adjutant general’s office sent Lincoln’s request for the report to the judge advocate general’s office. Townsend, 20 July 1864, ibid.

Court, and that Justice Davis would be deeply involved. At the same time, however, a goal of preserving the Union for continuation under freedom and democracy for all predominated, by whatever means possible. The consequences of success could be dealt with later. Davis had likely recognized this goal as well as the differing judicial and executive responsibilities of the two men. His reference in *Ex Parte Milligan* to “the place occupied by Washington and Lincoln” speaks to the high esteem with which he held his old friend.

David Davis had clearly expressed his opposing views to Lincoln, as shown by his 1864 letters. Moreover, Lincoln took those views under serious consideration and likely charted the best course possible. He recognized, however, that civil courts might be overwhelmed by the trauma and intensity of the rebellion.\(^\text{16}\)

A 1866 letter from John Jay, grandson of Chief Justice John Jay, to Chief Justice Salmon Chase, questioned whether Lincoln’s appointees to the Supreme Court had repudiated his position by actions in *Ex Parte Milligan* that could have benefited the rebels if enacted earlier. Circumstances had changed, however. General Jacob Cox observed that a post-assassination public response against President Andrew Johnson had “the tide running strongly in favor of Congressional rather than Executive initiative in public affairs.” The Court, thus, had responded to the popular drift.\(^\text{17}\)

The *Ex Parte Milligan* decision was unanimous in opposing a military commission’s jurisdiction over Milligan, although four of the nine justices wrote a concurring opinion limiting the decision to the Milligan case rather than broadly addressing the validity of congressional powers in instituting military commissions. The minority justices criticized the majority for saying that Congress lacked the constitutional power to authorize military trials of civilians.\(^\text{18}\)

Of the five majority justices, Davis’s views were known by Lincoln. So were the concerns of Justice David Field (a Lincoln appointee), whose brother was a lead defense attorney for Milligan. The remaining three majority justices were appointed prior to Lincoln’s presidency, while his other three appointees (including Chief Justice Chase) were in the minority.\(^\text{19}\)

In the end, the case of the Coles County prisoners achieved several aims for Lincoln. The prisoners were held for seven months as a sig-

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18. Ibid., 51–52.
19. Ibid., 52. Field to Lincoln, 8 November 1862. Lincoln Papers.
nal to deter future insurrections, to prevent their further interference with the war, and to provide the president with continued flexibility in responding to other alleged acts of disloyalty in the North. The prisoners then were released and those indicted turned over to local civil authorities for adjudication according to the advice in the July 4, 1864, letter from David Davis. The prisoners, most of whom were not materially involved in the Charleston Riot, paid a high price for their confinement, but their experiences contributed importantly to defining the nation’s values for civil liberties in a free society.

*Ex Parte Milligan* has stood for nearly 140 years as a landmark court decision and as a compelling statement about law versus oppression in a free society. The goals of adhering to constitutional principles and civil liberties are unquestionable in a democracy, although the desperation of full-scale war clouds the issue. In speaking recently on the lessons of civil liberty experiences in the Civil War and World War II, the late Chief Justice William Rehnquist observed that “perhaps we can accept the proposition that laws are not silent in war-time, they speak with a muted voice.” Lincoln and Davis likely would have agreed.20

Exhibit 1. Davis to Lincoln, July 1, 1864

Bloomington, Ill
July 1, 1864
My Dear Sir,

The govt I think must have acted on wrong information.

I wrote to Mr. Hay that if I could get the necessary correct information concerning the matter of W either for bringing it to the President myself or do it in confirmation with Judge Treat, as might be deemed most advisable.

I go to Chicago on the sixth of July and shall be there through the month.

Your friend,
D. Davis

Exhibit 2. Davis to Lincoln, July 4, 1864

To the President of the United States July 4th, 1864
Dear Sir

Your dispatch concerning the Coles County rioters is just received. By the Second Section of the act related to Habeas Corpus & Judicial proceedings approved March 3, 1863 it is provided that the Secretary of State & War shall furnish to the judges of the United States Courts, a list of prisoners who are held in custody otherwise than as prisoners of war. And if a Grand Jury shall adjourn without finding an indictment or presentment, the prisoners so held are entitled to their discharge by 12 Statute at large. Page 755. The Grand Jury adjourned without finding anything against the Coles County men. The men were in the custody of Colonel Oakes I think at Camp Butler—very soon after the riot at Charleston, he arrested them & brought them to Spr & kept control of them—They were never in the custody of the Marshall—I doubt whether the District Attorney or Marshall were ever communicated with, in relation to these men—After the adjournment of the Grand Jury Mr. Ficklin & Mr. Hay in behalf of these men filed a petition for their discharge—The court issued the Writ of Habeas Corpus requiring Colonel Oakes to bring the men before us to be dealt with according to law. Colonel Oakes requested time to consult with his superior General Heintzelman, which was granted. At this stage of the case (Judge Treat & myself being fully agreed what should be done whichever aspect

a. In this letter, Davis focuses on the writ of habeas corpus. He was likely not aware that a military commission had been appointed to try the prisoners.
of the matter assumed) I left for St. Louis. Judge Treat writes me that Col Oakes showed him an order under which he acted. It was from Genl Halleck. Stating in substance that the President suspended the Writ of Habeas Corpus in the case of these prisoners & directs them to be sent immediately to Fort Delaware.

After this, of course the case was dismissed. It was made a part of the final order that a copy of the proceedings be certified to the President—a transcript I understand has accordingly been made, and taken by the prisoner's counsel to be used at Washington.

You ask me to give you a summary of the evidence in the case of these men. The Court did not advance far enough to hear any evidence. The prisoners were never brought before us & we predicated the Writ of Habeas Corpus on the strength of the petition & the Law of Congress heretofore referred to. I will very cheerfully give you my impression of the case. The Govt. ought not to have taken these men out of the hands of the law. Besides the disregard of the law as I think, it will irritate the public mind and cannot possibly do any good. A Grand Jury of Coles Co. (and as I am credibly informed, a reputable one) has patiently investigated the outrage at Charleston and found several indictments for murder and riot.

No offense after the fullest investigation could be fastened on several of the persons who were in the custody of Col. Oakes. The affair at Charleston as I understand it was a big riot to be punished by State authority. It was undoubtedly brought about [by] bad men who were inimical to the Govt & who especially wished to wreak their vengeance against those serving in the Army. Unhappily many persons were killed. The guilty should be punished. Both certainty and severity of punishment are demanded, where can it be measured out if I understand the case a right only in a state court. These prisoners violated no law of the United States and resisted no authority of the Govt. No draft was being enforced and the country was not in the process of enrollment. There was no attempt to arrest a deserter. The soldiers (furloughed I believe) were at home & in town & a fight was brought on purposely by bad men who were not in the military service to kill & murder. How can they be tried by military law. They violated no military law.

They committed the gravest offenses against the state and my judgment is that if tried by the state authorities a most salutary effect will be produced. The determination to enforce law & order is manifest in Coles Co. and the feeling I trust has permeated other counties.

But even if they had violated a law of the United States, it was the duty of the govt. after they were arrested to have had them prosecuted
at the first term of the court. Court adjourned and no proceeding was had against them & as far as the United States were concerned, they were entitled to their discharge. The Secretary of War furnished no list of the prisoners to the judges which should have been done, and the Grand Jury adjourned. The letter as well as the spirit of the law of Congress required that these men should be discharged after the adjournment of the Grand Jury. Unless held as prisoners of war, to keep them longer would be oppression and would not harmonize with the obvious purpose and intention of the act of Congress. It was the intention of the court (if the prisoners have been brought before us) to have delivered over those who were indicted by the Grand Jury of Coles Co. to the sheriff of that county and to have discharged the others under the conditions imposed by law.

Respectfully submitted
Your friend
D. Davis

Exhibit 3. Davis to Lincoln, July 5, 1864

This abstract of the Coles County case has been sent to me by Mr. Hay & I enclose it to the President.

It is I think correct. It was received since my letter to the President on the subject.

I have nothing to add to my letter of this date except that I am strengthened in the opinion that the prisoners should have been turned over to the state authorities.

David Davis
July 5, 1864