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# I Could not Afford to Hang Men for Votes—Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons

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**“I COULD NOT AFFORD TO HANG MEN FOR VOTES.”<sup>1</sup>  
LINCOLN THE LAWYER, HUMANITARIAN CONCERNS,  
AND THE DAKOTA PARDONS**

Paul Finkelman<sup>†</sup>

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1. Diary of Alexander Ramsey (Nov. 23, 1864), *quoted in* DAVID A. NICHOLS, *LINCOLN AND THE INDIANS: CIVIL WAR POLICY AND POLITICS* 118 (1978) [hereinafter *LINCOLN AND THE INDIANS*].

In a six-week period in August and September 1862, Minnesota was the scene of the most violent and bloody conflict between Indians and white settlers since the colonial period.<sup>2</sup> As many as 600 or more white settlers (some contemporary estimates put it at 1000), a few hundred soldiers, and somewhere between 100 (or less) and 300 Indians—almost all members of the Dakota Nation (called Sioux at the time)—died in this conflict.<sup>3</sup> At the time political and military leaders in Minnesota asserted that at least 1000 whites died. While this number may be an exaggeration, the fact that most white leaders believed the death toll was this high raised emotions and increased demands for executions of the Dakota. Another 300 or so Indians would die in the aftermath, some through execution, but many more through harsh conditions in post-conflict confinement.

Following the restoration of peace, General Henry Hastings Sibley appointed a military commission, which tried 393 Indians for “crimes” connected to the conflict.<sup>4</sup> The trials began on September 28, and by November 5 the military commission had convicted 323 of the men who were tried. The commission sentenced 303 men to death and provided lesser punishments for twenty others, who were convicted only of looting, but were not involved in any combat or attacks on white settlers. Even before the trials were over, President Abraham Lincoln exercised his authority, and his obligation, under

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2. More Indians died in the Second Seminole War and the Red Stick Creek war, but these were essentially conflicts between the military and Indians, rather than Indian-settler conflicts.

3. David A. Nichols, *The Other Civil War: Lincoln and the Indians*, MINN. HIST. MAG., Spring 1974, at 8. Estimates of the dead vary from 400 to 800 (or more) white civilians and another 200 or so soldiers. CURTIS A. DAHLIN, *THE DAKOTA UPRISING: A PICTORIAL HISTORY 1* (2009) (“Estimates of the number of whites killed vary widely, with 600 being a conservative estimate.”). Many sources estimate Dakota deaths at 300, although this may be way too high. Carol Chomsky, citing a 1923 account of the events, puts the deaths at “77 American soldiers, 29 citizen-soldiers, approximately 358 settlers, and an estimated 29 Dakota soldiers.” Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 21–22 (1990). Chomsky also cites another source for fewer Dakota killed. *Id.* at 21 n.50. I believe that Chomsky’s figures, at least for the deaths of settlers, are far too modest.

4. There is large literature on the violence in Minnesota, but very little of it focuses on the trials, and even less on the pardons. For the best work on the legal aspects of the trials, see Chomsky, *supra* note 3, and Maeve Herbert, *Explaining the Sioux Military Commission of 1862*, 40 COLUM. HUM. RTS. L. REV. 743 (2009). On Dakota-white relations from the seventeenth century to the outbreak in 1862, see generally GARY CLAYTON ANDERSON, *KINSMEN OF ANOTHER KIND* (1984).

the Militia Act of 1862,<sup>5</sup> ordering that no executions could take place without his approval.<sup>6</sup> On November 8, Major General John Pope, Commanding General of the Department of the Northwest, forwarded the list of those sentenced to death to Lincoln.<sup>7</sup>

Much to the shock of the military and civilian leaders in Minnesota, the President did not rubber-stamp these convictions and sentences. Instead, on November 10, Lincoln asked General Pope to “[p]lease forward as soon as possible the full and complete record of their convictions.”<sup>8</sup> Lincoln further told Pope to “have a careful statement” indicating “the more guilty and influential of the culprits.”<sup>9</sup> News of Lincoln’s response led Minnesota Governor Alexander Ramsey to immediately weigh-in with his “hope” that “the execution of every Sioux Indian condemned by the military court will be at once ordered.”<sup>10</sup>

The next day General Pope assured Lincoln he would forward the record, although in fact it would not arrive until the end of the month.<sup>11</sup> Meanwhile, Pope lobbied the President to allow the executions to go forward. Even before Lincoln could see the

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5. Militia Act of 1862, Ch. CCI, § 5, 12 Stat. 597, 598 (“And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President.”).

6. On October 17, Major General John Pope told General Henry Hastings Sibley, “The President directs that no executions be made without his sanction.” Letter from John Pope to Henry Sibley (Oct. 17, 1862), in *LINCOLN AND THE INDIANS*, *supra* note 1, at 96.

7. *Message of the President of the United States in Answer to a Resolution of the Senate of the 5th Instant in Relation to the Indian Barbarities in Minnesota: Hearing on S. Exec. Res. 7 Before the S. Comm. on Indian Affairs, 37th Cong. 1 (1862)* (statement of Abraham Lincoln, President of the United States) [hereinafter *Message of the President*], available at <http://turtletalk.files.wordpress.com/2008/10/senate-executive-document-no-7-from-1862.pdf>. For copies of the original telegraph dispatch, dated November 8, 1862, see *List of 300 Sioux Sentenced to Death*, MDEWAKANTON REFERENCE SITE (Jan. 29, 2007, 5:13 PM), <http://mdenney.proboards.com/index.cgi?board=indianprisoners&action=print&thread=273>. To view the first of the twenty pages of names of those sentenced to death, see <http://i83.photobucket.com/albums/j299/mdenney100/xx/LIST%20OF%20300%20SIOUX%20SENTENCED%20TO%20DEATH/p1-1.jpg> (last visited Nov. 24, 2012).

8. Letter from Abraham Lincoln to John Pope (Nov. 10, 1862), in 13 U.S. WAR DEPT. ET AL., *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 787 (1885)* [hereinafter *OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*].

9. *Id.*

10. Letter from Alexander Ramsey to Abraham Lincoln (Nov. 10, 1862), in *OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, *supra* note 8.

11. *Message of the President*, *supra* note 7, at 1.

evidence, Pope assured him that “the only distinction between the culprits is as to which of them murdered most people or violated most young girls. All of them are guilty of these things in more or less degree.”<sup>12</sup> After reflecting on the issue, Pope then sent the President a telegram suggesting an alternative to Lincoln executing the Sioux under federal law. The general suggested that “the Criminals be turned to the State Govt to be dealt with.”<sup>13</sup> At the end of the month, Governor Ramsey made a similar offer, telling the President, “[i]f you prefer it turn them over to me & I will order their Execution.”<sup>14</sup> Both the General and the Governor were desperate to see the Indians executed by some authority. Neither understood that Lincoln’s concerns for due process and fairness—and his discomfort with needless killing—would not be eliminated by substituting a state executioner for a federal hangman. Nor did either man apparently understand that Lincoln was not the kind of leader who would shift responsibility to someone else so he would not have to make a distasteful decision.

Following Pope’s offer to hand the prisoners over the state, the General and the Governor tried to pressure Lincoln to approve the executions. They warned him that if he did not order the immediate execution of the Indians there would be “[p]rivate revenge,”<sup>15</sup> and an “indiscriminate massacre of all the Indians—old men, women, and children.”<sup>16</sup> Meanwhile, Lincoln learned from newspapers and letters that in Minnesota the general public was enthusiastic about the mass hanging. The headline in one paper, “DEATH TO THE BARBARIANS,”<sup>17</sup> summarized the feelings of most whites in the state.

Lincoln did not respond to the absurd notion that he shift the responsibility for the Dakota prisoners to Governor Ramsey and state authorities. Nor did he respond to the threats Pope and

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12. Letter from John Pope to Abraham Lincoln (Nov. 11, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 788.

13. Telegraph from John Pope to Abraham Lincoln (Nov. 11, 1862), in THE ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS, available at <http://memory.loc.gov/ammem/alhtml/malhome.html> [hereinafter THE ABRAHAM LINCOLN PAPERS].

14. Telegraph from Alexander Ramsey to Abraham Lincoln (Nov. 28, 1862), in THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

15. Letter from Alexander Ramsey to Abraham Lincoln (Nov. 10, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 787.

16. Letter from John Pope to Abraham Lincoln (Nov. 11, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 788.

17. Chomsky, *supra* note 3, at 29.

Ramsey articulated or to the pressures from Minnesota newspapers. Lincoln had seen so many newspaper attacks on him since he began his run for the presidency that he probably was unaffected by the wild harangues from the press in Minnesota. However, he surely must have wondered why the major general he had appointed to command the newly created Department of the Northwest was incapable of preventing an unruly mob of civilians from attacking the Indians who were in his custody. Lincoln might also have wondered why Governor Ramsey was unable to keep the peace among his own constituents. In the end, Lincoln would pardon<sup>18</sup> the vast majority of the convicted Dakota, despite the pressure of his generals, the political leadership of the state, and the public press.

While the hanging of the thirty-eight men was the largest mass execution in American history, the decision to reprieve 265 men—seven out of every eight who were condemned—constituted the largest mass clemency of people sentenced to death in American history. This article focuses on a narrow slice of these events: the decision by President Lincoln to pardon about eighty-seven percent of those who were condemned to die.

#### I. POLITICAL CONSIDERATIONS AND THE PARDON ISSUE

With the Civil War raging, almost all of Lincoln's attention was focused on defeating the Confederacy and preserving the Union. With mounting Union army casualties exceeding 100,000,<sup>19</sup> the fate

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18. Technically Lincoln did not “pardon” any of the Dakota prisoners, but merely refused to authorize their execution. However, at the time everyone understood that these were pardons, and contemporaries used that term in describing them. In reality, once the prisoners were reprieved, they were effectively pardoned, and eventually released from custody. For use of the term pardon, see for example, a letter in which Judge Advocate General Joseph Holt told Lincoln that if he certified some of the convicted men to be executed it was “merely an approval of the sentences, and a refusal to pardon.” Letter from Joseph Holt to Abraham Lincoln (Dec. 1, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

19. “Casualties” refer to those killed, wounded, and missing. By the end of 1862 more than 15,500 U.S. soldiers had been killed in major battles (where there were more than 500 casualties on the Union side), more than 69,000 U.S. soldiers had been wounded, and more than 52,000 were missing or captured. See FREDERICK PHISTERER, STATISTICAL RECORD OF THE ARMIES OF THE UNITED STATES 213–15 (1883). Tens of thousands of other soldiers had died or were incapacitated from disease related to the war. *Id.* With high mortality rates from wounds and disease many of those who had not died in battle would die later, as would many who were captured and sent to Confederate POW camps. *Id.* A few

of a few hundred Indians in Minnesota should not have been very significant to Lincoln. If anything, Lincoln had as much reason as the people in Minnesota to be furious at the Dakota who made war on the United States. They had been living peacefully in the state, they were reasonably well integrated into the society, and many of them knew and regularly interacted with whites.<sup>20</sup> Whatever their grievances, murderous attacks directed mostly at innocent civilians could hardly be justified.

The violence in Minnesota also threatened the larger security of the nation. The acts of the Dakota warriors forced Lincoln to devote troops, horses, arms, money, and time to pacify the frontier when he desperately needed these military assets for the ongoing war for the Union. In the end, the United States ended up diverting only a few thousand troops to Minnesota, but when the violence began, Lincoln had no idea how many troops he would have to send there, and how long they would be there. Three days after the violence in Minnesota broke out, the United States suffered a humiliating defeat at the Second Battle of Bull Run. Lincoln faced a crisis in the military—not knowing who he should choose for his new field commander, only knowing he had to get rid of the defeated General John Pope. The Indian conflict in Minnesota was an unanticipated complication for Lincoln that had the potential to divert huge resources from the war against the Confederacy. Initially, the administration feared the events in Minnesota were part of a Confederate conspiracy to open up a new front on the western frontier.<sup>21</sup> Horace Greeley, the influential but not always accurate editor of the *New York Tribune*, published an unsigned editorial asserting that the Dakota were “stimulated if not bribed to plunder and slaughter their White neighbors” by agents “sent . . . by the Secessionists.”<sup>22</sup> Similarly, the *New York Times*

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thousand more soldiers had been killed or wounded in smaller engagements, including the battles in Minnesota. *Id.*

20. Chomsky, *supra* note 3, at 91–92. Chomsky further notes that many of the Dakota had been interacting with white society and thus fully understood the gravity of their offenses. *Id.* at 92. General Sibley asserted they were not “wild and ignorant savages” who could be excused for behavior that offended American law and culture. *Id.*

21. The Secretary of the Interior made such claims in his report to Congress in December, 1862. See *Report of the Secretary of the Interior*, in 2 MESSAGE OF THE PRESIDENT OF THE UNITED STATES TO THE TWO HOUSES OF CONGRESS AT THE COMMENCEMENT OF THE THIRD SESSION OF THE THIRTY-SEVENTH CONGRESS, 37TH CONG., 8–9 (1862).

22. Gerald S. Henig, *A Neglected Cause of the Sioux Uprising*, MINN. HIST. MAG.,

reported that the “Indians are in league with the rebels.”<sup>23</sup> While this proved not to be true, when the conflict began the administration could not be certain that this was not a southern conspiracy. Even after the Dakota had been completely suppressed, some people in the administration continued to express fears that it was part of a Confederate conspiracy that might break out again. On December 1, Secretary of the Interior Caleb Smith reported to Congress that “the chief cause” of the events in Minnesota “is to be found in the insurrection of the southern States.”<sup>24</sup> Smith was certain that “southern emissaries”<sup>25</sup> had convinced the Dakota to go to war against the United States and the settlers. In retrospect, we know these fears were completely unfounded, but at the time some in the administration were fearful that the events in Minnesota were tied to the larger Civil War. Thus, the violence perpetrated by the Dakota clearly harmed not just the people in Minnesota, but the whole nation.

There was yet one more complication caused by the outbreak in Minnesota. At the time of the outbreak Lincoln had written the preliminary emancipation proclamation and was waiting for a decisive military victory to provide him with an opportunity to announce his plans for ending slavery in the Confederacy.<sup>26</sup> He would not announce emancipation until he had a major military victory in the East. Shifting troops and resources to Minnesota could potentially have forced Lincoln to move troops—badly needed in the East—to the West. The events in Minnesota were not simply a distraction for the President; they threatened to derail—or at least delay—a major policy shift. For Lincoln, this outbreak on the Minnesota plains could hardly have come at a worse time. In the end, the conflict in Minnesota did not require as many troops as Lincoln feared; the administration needed only a few thousand troops to defeat the Dakota. But, shifting troops to

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Fall 1976, at 107, 109 (quoting Editorial, N.Y. TRIB., Aug. 25, 1862, at 4).

23. *Are the Indians Allies of the Rebels?*, N.Y. TIMES, Oct. 1, 1862, at 4.

24. The Secretary of the Interior made such claims in his report to Congress in December 1862. See *Report of the Secretary of the Interior*, *supra* note 21, at 8.

25. *Id.*

26. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 361–62. For further discussion on Lincoln’s plan to announce the Emancipation Proclamation see Paul Finkelman, *Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading*, in LINCOLN’S PROCLAMATION: EMANCIPATION RECONSIDERED 13–44 (William A. Blair & Karen Fisher Younger eds., 2009); see also LOUIS P. MASUR, LINCOLN’S HUNDRED DAYS: THE EMANCIPATION PROCLAMATION AND THE WAR FOR THE UNION (2012).

the West, creating a whole new military district, and then focusing on the trials of the Dakota and their pending executions were distractions Lincoln did not need or want.

Lincoln also had strong political reasons for supporting the executions. Just as the trials of the Dakota were winding down, Lincoln and his party had been badly bruised in the 1862 midterm elections, losing twenty-two House seats, and holding control of the House of Representatives only with the help of a block of war Democrats who called themselves Unionists. The Republicans lost control of state legislatures in Illinois and Indiana and the New York governorship. This backlash was caused by war weariness and the general weakness of the Union war effort in the East. Opposition to Lincoln's plans for emancipation, announced in late September, hurt the Republicans in some places, especially in the lower Midwest and among Irish immigrants in New York City. Under these circumstances Lincoln could hardly afford to risk alienating voters in Minnesota, who at this time were overwhelmingly Republican. In Minnesota, there was enormous popular support for executing all of the convicted Indians. In the calculus of good and evil, suffering and redemption, Lincoln might have easily concluded that the lives of a few hundred Indians—all of whom appeared to have made war on settlers—was a small cost to shore up support for saving the nation and reshaping the ongoing national conflict into a war for freedom and emancipation.

Yet, despite these obvious reasons for simply allowing the executions to go forward, Lincoln did not do so. Instead, he and his staff reviewed all the convictions. In the process he concluded that many of the charges against the Dakota were exaggerated or bogus. As one historian has noted, “[e]arly accounts of the uprising seized upon the occasional instances of torture and mutilation, exaggerated them, and conjured up a picture of wholesale atrocities unparalleled in the history of Indian warfare.”<sup>27</sup> A letter from Minnesota Senator Morton S. Wilkinson and the state's two Congressmen detailed “fiendish brutality,” murders in “cold blood,” and gang rapes.<sup>28</sup> All three were Republicans and Wilkinson was an ally of Lincoln. This somewhat hysterical letter

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27. ROY W. MEYER, HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 120 (1967).

28. Letter from M. S. Wilkinson, Cyrus Aldrich, and Wm. Windom to Abraham Lincoln, in *Message of the President*, *supra* note 7, at 2–4.

was full of allegations that Lincoln politely described as “statements of fact not found in the records of the trials.”<sup>29</sup> Indeed, as the historian Roy Meyer notes, “Like Falstaff’s story of the men he battled . . . the closer these stories are scrutinized, the less foundation there seems to be for them.”<sup>30</sup> Similarly, General Pope had told Lincoln, although he knew better, that all of the men sentenced to death had murdered civilians and ravished women and girls “in more or less degree.”<sup>31</sup> After his examination of the record, Lincoln discovered that the persistent assertions throughout the conflict and its aftermath of rapes and the slaughtering of women, children, and captives were vastly overstated and mostly false. Lincoln concluded that only two of the condemned men had actually raped anyone,<sup>32</sup> although a number of other convicted men had killed civilians, including women and children. In the end, Lincoln refused to authorize the executions of 265 of the 303 men sentenced to die, effectively pardoning them.

On December 26, 1862, the army hanged thirty-eight Dakota men.<sup>33</sup> Some of those executed had in fact killed civilians needlessly, murdered captured prisoners, defiled dead bodies, and raped captured women and girls.<sup>34</sup> Under the rules of war at the time, the men who committed these acts were legitimately executed for what today we would call “war crimes.” However, the overwhelming majority of those sentenced to death, and many of those actually executed, were almost certainly innocent of such

29. *Id.* at 1.

30. MEYER, *supra* note 27, at 120.

31. Letter from John Pope to Abraham Lincoln (Nov. 11, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 788.

32. *Message of the President*, *supra* note 7, at 1. Other Dakota may have been involved in rapes and other barbarities, but they were either killed in battle or escaped north with Little Crow and were not captured and tried at this time. See DUANE SCHULTZ, *OVER THE EARTH I COME: THE GREAT SIOUX UPRISING OF 1862*, at 245, 249 (1992).

33. Letter from Henry H. Sibley to Abraham Lincoln (Dec. 27, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 880 (“I have the honor to inform you that the 38 Indians and half-breeds ordered by you for execution were hung yesterday at Mankato, at 10 a.m. Everything went off quietly, and the other prisoners are well secured.”).

34. At least one of those executed, a man named Chaskay, was clearly innocent, and in fact had saved the lives of whites. MEYER, *supra* note 27, at 130. Lincoln reprieved him at the last minute, but another man with a similar name, was reprieved instead. *Id.* This tragedy illustrates the arbitrary nature of the trials, the absurd rush to judgment by the military, the failure of the military to assess individual guilt, and the generally slipshod nature of the records of the trials.

offenses. Despite the war crimes committed by some of those executed, the whole episode is rightly condemned as a barbaric blot on the nation. It is remembered as the largest mass execution in American history.

Given racial sensibilities in the nineteenth century and cultural hostility to Indians, we should probably not be surprised by the attempt to perpetrate this needless slaughter of people who were already incarcerated. The 303 death sentences were more vengeance than justice. The military and political leaders in Minnesota, as well as a majority of whites in the state, might very well have agreed with this analysis, but would have said that this vengeance was justified. As one “humble private citizen” wrote to Lincoln, “Not only does justice require the blood of these savages, but *vengeance will have it*,” and if the Indians were not hanged, “[e]very man will become an Avenger.”<sup>35</sup> Thus, the more interesting question is not why so many men were sentenced to die, or even why so many were executed, but why so many—seven times as many—were *not* executed. While we remember this as the largest mass execution in American history, it is worth considering why this was also the largest mass pardoning of condemned prisoners in American history. What was it about President Lincoln that led him to effectively pardon eighty-seven percent of those who were sentenced to die?

## II. WHAT WE CALL THE CONFLICT, AND WHY THAT MATTERS

Any discussion of the conflict in Minnesota in August and September 1862 is complicated by language, perception, and cultural values. Indeed, even what we call the conflict is contested. When the conflict began, the politicians and military leadership in Minnesota called it a war. But when the conflict was over it became known as the Great Sioux Uprising. More recently it was called the Dakota War, taking the emphasis off the conflict as an uprising. Most scholars and public institutions now call it the U.S.-Dakota War, implying that it was a war between two sovereignties.<sup>36</sup> How

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35. Letter from Thaddeus Williams to Abraham Lincoln (Nov. 22, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13 (emphasis added). Williams was a physician in St. Paul. His hysterical letter described numerous atrocities against settlers, including the beheading of prisoners, people nailed to trees, disemboweling of people, and other horrors which in fact had not taken place.

36. For example, the exhibit at the Minnesota History Center commemorating the sesquicentennial of the conflict calls it the U.S.-Dakota War.

we categorize the conflict affects how we see the events that followed its conclusion. If it was an “uprising” then the Indian combatants were not “soldiers,” but more like hooligans or criminals, an unruly—but well-armed—mob randomly causing violence and death. An uprising is essentially a criminal act, perpetrated by malcontents who know they are acting illegally. Thus, those in an uprising might be subject to trial and punishment. On the other hand, if it was a “war” between two sovereign nations, as Carol Chomsky argues, then the captured Dakota soldiers should have been “treated as legitimate belligerents.”<sup>37</sup> Once defeated they were prisoners of war and not subject to criminal prosecution, unless they had actually committed war crimes.

None of these terms fully or adequately describe the events of that fall, however. The vast majority of the Dakota in Minnesota did not take part in the conflict. “The Sioux were at no time united, at no time committed as a nation to the purposes of the hostile minority.”<sup>38</sup> Indeed, most of the Dakota in Minnesota opposed the resort to violence on ethical grounds and for practical reasons.<sup>39</sup> The war, if that is what it was, cannot be seen as a war between two sovereignties,<sup>40</sup> because the Dakota Nation did not authorize the war and most leaders of the Dakota opposed it. Many Dakota had converted to Christianity, adopted western dress and customs, become farmers, and were therefore unwilling to return to their past lives. In addition, most Dakota understood that a war with the United States was essentially suicidal. Thus, designations such as the “Sioux Uprising,” the “Dakota War,” or the “U.S.-Dakota War” imply much greater support among the Dakota than there actually was.<sup>41</sup>

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*Commemorating the U.S.-Dakota War of 1862*, MINN. HIST. SOC'Y, <http://legacy.mnhs.org/featured-projects/commemorating-us-dakota-war-1862> (last visited Nov. 24, 2012).

37. Chomsky, *supra* note 3, at 15.

38. MEYER, *supra* note 27, at 118.

39. *See id.* Most of the fighting was done by members of the lower Sioux, but “most of the principle chiefs of both the lower and upper Sioux, such as Wabasha, Wacouta, Traveling Hail (who had won the election for speaker), Red Iron, and Standing Buffalo, were opposed to the uprising and either took no part or joined very reluctantly in a few battles, meanwhile giving all the aid they safely could to white victims.” *Id.*

40. *Contra* Chomsky, *supra* note 3, at 74–76 (arguing otherwise).

41. An analogous naming issue can be seen in the “Red Stick War” of 1811, between the “Red Stick” Creeks and the United States. In that war the Lower

It is also not clear whether the Dakota in Minnesota, in 1862, were a sovereign nation, at least under American law. By 1862, the Dakota had ceded almost all their land in Minnesota to the U.S. government<sup>42</sup> and lived on a tiny sliver of what had once been their vast territory. In return for this land the Dakota had accepted annual payments—annuities—from which they purchased most of their food and other necessities. As such they were almost entirely dependent on the U.S. government for their survival through the annuities. Indeed, the failure of the annuities to arrive was what caused the outbreak of violence in the first place. While Indians further west who had not signed treaties, and had not given up almost all of their economic independence, might be considered “legitimate belligerents in wartime,” to use Professor Chomsky’s phrase,<sup>43</sup> it is not entirely clear this theory would apply to the Dakota in Minnesota who had in fact ceded almost all aspects of their sovereignty to the United States. To use Chief Justice John Marshall’s terminology from *Cherokee Nation v. Georgia*,<sup>44</sup> we might argue that the Dakota in Minnesota had been reduced to something far less than even “domestic dependent nations.”<sup>45</sup> But, even if this is an incorrect analysis,<sup>46</sup> the Dakota had not made war on the United States. Only a small group of the Dakota had. After the conflict was over the military would punish all the Dakota in Minnesota, even those who had protected whites and did not join in the conflict. This is rightly condemned as punishing the group for actions of a small minority within the group.<sup>47</sup> But, the logic of this condemnation cuts in both directions. If it was wrong to punish all the Dakota because of what a small group did—and it was surely wrong on legal and moral grounds—then it is impossible

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Creeks, as well as the Choctaw and Cherokee, were allied *with* the United States, against a separatist group of Creek known as the “Red Sticks.” While earlier historians called this the “Creek War,” it is more properly called the Red Stick War or the Creek Civil War today, recognizing that the Creek were themselves deeply divided in this conflict. For more information on the Red Stick War, see ROBERT V. REMENI, *ANDREW JACKSON AND HIS INDIAN WARS* 62–77 (2001).

42. See Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743; Treaty with the Sioux—Sisseton & Wahpeton Bands, July 23, 1851, 10 Stat. 949.

43. Chomsky, *supra* note 3, at 75.

44. 30 U.S. 1 (1831).

45. *Id.* at 17.

46. As Professor Chomsky would argue in Chomsky, *supra* note 3, at 76–77.

47. Andrew Jackson had done the same thing to the entire Creek Nation, after the Red Stick War, even though a majority of the Creek had opposed the Red Stick, and many of the Creek had fought alongside Jackson against the Red Stick. See REMENI, *supra* note 41, at 75–77.

to argue that the Dakota who did fight represented a sovereign nation going to war against the United States. It may be true that the United States recognized the right of the Dakota Nation “to make war.”<sup>48</sup> But in Minnesota in 1862, the Dakota Nation did not go to war with the United States. Only a small group of Dakota did.

Thus, both the terms “uprising” and “war” seem imprecise. An uprising implies the illegitimacy of the participants. And it might imply a relatively short time frame. An uprising seems to be something like a riot, but larger and longer lasting. But the events in Minnesota lasted about six weeks, and claimed as many as 1000 lives, or more. This was surely bigger than an uprising.

But, was it a “war”? There was no declaration of war or even an agreement among the Dakota that they should commence hostilities. The army talked about it as a war, but in reality, neither Congress nor the President saw the conflict in Minnesota as a true war. The events in Minnesota stood in marked contrast from the ongoing Civil War. Neither side followed accepted rules of behavior in a war. The Dakota mostly killed civilians, and fought only a few engagements with the army. Similarly, as the conflict came to an end, the army rounded up thousands of non-combatants, including those who did not support the violence, and destroyed their crops and homes. There were three or four skirmishes between the Dakota warriors and the U.S. Army, and one decisive military engagement, the Battle of Wood Lake, on September 23, when somewhere between 700 and 1200 Dakota were forced to retreat from a force led by Colonel Henry H. Sibley.<sup>49</sup> While a few hundred soldiers may have died, most of the whites killed were civilians including a significant number of women and children. These do not seem to be the statistics or the demographics of a traditional war. After the war—if that is what it was—the army acted in violation of almost every acceptable standard of behavior for the treatment of prisoners and civilians. Indeed, leaders in Minnesota, including General John Pope, General Henry Sibley, and Governor Alexander Ramsey, spoke of exterminating the Dakota, and while not actually embarking on a campaign of genocide, they hinted that this was their ultimate goal.<sup>50</sup> Dakota civilians who had nothing to do with the conflict

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48. *Worcester v. Georgia*, 31 U.S. 515, 583 (1832) (McLean, J., concurring).

49. MEYER, *supra* note 27, at 115–23; KENNETH CARLEY, *THE SIOUX UPRISING OF 1862*, at 58–59 (1961).

50. *See infra* notes 90–108 and accompanying text.

were rounded up, their crops were burned, their housing destroyed, and they were interned in camps that would be precursors of how the British treated the Boers in South Africa a half-century later.<sup>51</sup> Much of the behavior of the army after the conflict was over can only be described as racist vengeance, perpetrated against innocent civilians who had taken no part in the conflict, and some of whom had provided shelter for fleeing white settlers. Meanwhile, in violation of the traditional rules of war, combatants were put on trial and sentenced to death, on the theory that they had not been involved in a legitimate war, but rather had participated in some illegal violent activity.

If not an “uprising” or a “war,” perhaps it should be called a revolution or a rebellion, since in a very classic sense, this was a rebellion against the rule of the United States. Alternatively, it might be more precise to call this Little Crow’s War, after the Dakota chief who led the relatively small minority of the Dakota in their brief war.<sup>52</sup> Those Dakota who followed Little Crow may have seen themselves as citizens of a sovereign nation fighting for their independence and defending their very existence against callous policies by agents of the U.S. government. They may have believed their actions were justified by desperate circumstances.

Whatever the terminology, there is yet one more way to analyze the events. The Dakota who fought against the army were involved in warfare, even if they represented only a minority of the Dakota Nation. As will be noted below,<sup>53</sup> even if the technical rules of international law and conventional declarations of war were not present, the United States should have treated the Dakota soldiers as legitimate belligerents, just as it was treating Confederate soldiers, who fought an undeclared war for a putative nation that no other country in the world recognized as legitimately a sovereign state.

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51. The British used the term “concentration camp” for the facilities used to intern Afrikaans civilians during the Boer War. The camp at Pike Island, which held about 1600 Dakota civilians, may in fact have been the world’s first concentration camp. About 300 Dakota died in this camp from disease and malnutrition. See Mark Joy, *U.S. Dakota War of 1862*, in 2 PAUL FINKELMAN & TIM ALAN GARRISON, *ENCYCLOPEDIA OF UNITED STATES INDIAN POLICY AND LAW* 804 (2009).

52. This would mirror the name of the war in Illinois in 1832–1833, known as Black Hawk’s War.

53. See *infra* Part VII.

### III. WHAT CAUSED THE CONFLICT?

The Dakota who fought believed they had no choice, because their very existence was threatened by white settlers, Indian agents in Minnesota, and the policies of the National Government. The initial cause was the delay in the annuity payments and the reality that the Dakota were facing starvation. As the Dakota leader Robert Hakewaste later recalled, “We were starving and in a desperate state of mind.”<sup>54</sup> There were many underlying causes, including the corruption of the Indian agents and the often dishonest practices of the Indian traders, who persistently appeared to cheat the Indians out of much of their annuities. Beyond these economic issues were cultural conflicts. The Dakota who fought—mostly young men of the Mdewakanton band associated with Little Crow—felt squeezed by settlers and government policies, and they saw no future for themselves or their people. Dakota Chief Big Eagle, who opposed the violence, recalled that “the whites were always trying to make the Indians give up their life and live like white men,”<sup>55</sup> and this was something many Dakota had no interest in doing. Big Eagle thought the demands for change were coming too quickly and were accompanied by enormous white arrogance and racism.<sup>56</sup> These ongoing issues, combined with the imminent starvation, delay in the annuity payments, and callousness on the part of the Indian agents and traders, led to the violence.

Under the treaties of 1851<sup>57</sup> and 1858<sup>58</sup> the Dakota had ceded most of southern Minnesota to the national government in exchange for annual “annuity payments” for fifty years. The Dakota were slowly transitioning to a farming culture and lacked

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54. Evidence for Defendants, *Sisseton & Wahpeton Bands v. United States*, 39 Ct. Cl. 172 (1904) (No. 22524), reprinted in GARY CLAYTON ANDERSON & ALAN R. WOOLWORTH, *THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862* 32 (1988). However, historian Gary Clayton Anderson argued that in mid-August the Dakota began to harvest what was the most abundant crop in memory and that by mid-August the Dakota had an abundance of food, and the serious food shortage that existed just a few weeks before no longer existed. See Gary Clayton Anderson, *Myrick’s Insult: A Fresh Look at Myth and Reality*, MINN. HIST. MAG., Spring 1983, at 198, 200, available at <http://collections.mnhs.org/MNHHistoryMagazine/articles/48/v48i05p198-206.pdf>.

55. Jerome Big Eagle, *A Sioux Story of War*, reprinted in ANDERSON & WOOLWORTH, *supra* note 54, at 23.

56. *Id.*

57. Treaty with the Sioux—Sisseton and Wahpeton Bands, July 23, 1851, 10 Stat. 949.

58. Treaty with the Yancton Sioux, Apr. 19, 1858, 11 Stat. 743.

enough land to survive by hunting and fishing.<sup>59</sup> They depended on the annuity payments for their very survival. But often they were cheated out of some of their money by corrupt Indian agents and Indian traders. In 1862, for instance, the Indian traders claimed half of the annuity for payment of goods previously given to the Dakota, even though some Dakota, such as Joseph Wabasha, had never agreed to this transfer of funds.<sup>60</sup> Even though Wabasha opposed violence, he, like many other Dakota, believed he had been cheated out of his annuity by the Indian traders. He recalled that, “the young men of the tribe . . . felt very angry” and “would not submit to having half of their annuity taken from them.”<sup>61</sup> The conflict began in August 1862 at least in part because the annual payments “were months late in arriving.”<sup>62</sup> Rumors were rife that they might never be paid because the federal government was bankrupt or because the Confederates had so disrupted the economy that there was no money to send.<sup>63</sup> There were also rumors that rather than being paid in gold, the Dakota annuities would be paid in newly printed greenbacks, which the Indian traders reportedly might not accept.<sup>64</sup> Gold coin had to be sent from Washington, but the Civil War impacted all government operations, including shipping gold west. The focus of the administration was on the ongoing War of the Rebellion. Transportation west was complicated by military requirements, and of course gold itself was more scarce than usual. Thus, the allotments were very late. But, the Dakota depended on these allotments for their very survival, and by late August they were desperately running out of food.<sup>65</sup>

The Upper Indian Agency at Yellow Medicine, fearful of violence from the Indians, and perhaps out of compassion for the Indians who faced starvation, began to distribute food in advance of the annuity payments. Officials at the Lower Agency at Redwood, however, lacked such foresight or compassion and

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59. Henig, *supra* note 22, at 107.

60. ANDERSON & WOOLWORTH, *supra* note 54, at 12–13.

61. *Papers Relating to Talks and Councils Held with the Indians in Dakota and Montana Territories in the Years 1866–1869*, at 90–91 (1910), reprinted in ANDERSON & WOOLWORTH, *supra* note 54, at 30.

62. ANDERSON & WOOLWORTH, *supra* note 54, at 13.

63. Henig, *supra* note 22, at 108.

64. MEYER, *supra* note 27, at 112–13; Chomsky, *supra* note 3, at 17.

65. Ironically, the gold for the annuities arrived in St. Paul on August 16 and at Fort Ridgley on August 18, by which time the conflict had begun and a number of white settlers were dead. See MEYER, *supra* note 27, at 113.

refused to allow the Dakota to purchase food on credit, in advance of the allotment, even though the Lower Agency had plenty of food on hand to distribute to the Indians. Some traders did not trust the Dakota to pay their debts, while others had absolutely no sympathy for the desperation of the Dakota. This attitude was famously expressed by an Indian trader named Andrew Myrick who declared: “So far as I am concerned, if they are hungry, let them eat grass.”<sup>66</sup> Little Crow’s followers responded to this callousness with violence.

Frustrated and hungry, on August 17, 1862, a few Dakota attacked a white farmstead near Acton, in Meeker County, killing Robinson Jones, his wife, his adopted daughter, and two other white men.<sup>67</sup> Within a day the Rebellion was in full force. Dakota swept through isolated farms and small towns. By mid-September large numbers of settlers—probably no fewer than 600 and perhaps as many as 800 to 1000—had been killed, much of the town of New Ulm had been destroyed, and as many as 20,000 settlers in western Minnesota had fled to St. Paul.<sup>68</sup> These farmers, who were innocent of hostile acts toward the Dakota, lost their crops, which they had to abandon in the fields, and suffered enormous hardships. More than a hundred other settlers, the majority of them women and children were also captured by the Dakota. A few were murdered after their capture, and some of the women may have been raped. The Rebellion was effectively over on September 23, when the Minnesota militia and federal troops defeated the Dakota at the Battle of Wood Lake. After the battle, hundreds of

66. DOUGLAS O. LINDER, THE DAKOTA CONFLICT TRIALS, [http://law2.umkc.edu/faculty/projects/ftrials/dakota/Dak\\_account.html](http://law2.umkc.edu/faculty/projects/ftrials/dakota/Dak_account.html) (last visited Nov. 24, 2012). Myrick would be killed on the first day of the conflict, and grass was stuffed into his mouth. Curt Brown, *In the Footsteps of Little Crow 150 Years After the U.S.-Dakota War*, STAR TRIB., Aug. 15, 2012, available at 2012 WLNR 17306280. This quotation is found in almost every account of the conflict. See ANDERSON & WOOLWORTH, *supra* note 54, at 198 (providing a history of the story of Myrick’s insult and suggesting that it may not have taken place, or that it was not one of the precipitating events leading to the violence); see also “Let Them Eat Grass” Revisited, A THRILLING NARRATIVE OF INDIAN CAPTIVITY: DISPATCHES FROM THE DAKOTA WAR OF 1862 (Aug. 17, 2012, 2:44 PM), <http://athrillingnarrative.com/2012/08/17/let-them-eat-grass-revisited/> (arguing that “Myrick is not the central character in this story; he simply got the most quotable line.”).

67. MEYER, *supra* note 27, at 115.

68. For a description of the burning of much of New Ulm, see HANK H. COX, LINCOLN AND THE SIOUX UPRISING OF 1862 103–04 (2005). For various descriptions of the military conflict, see DAHLIN, *supra* note 3, at 1; MEYER, *supra* note 27, at 120; SCHULTZ, *supra* note 32, at 249; Nichols, *supra* note 3, at 8.

Dakota immediately surrendered and most of the rest were quickly captured, although their leader, Little Crow, managed to escape into Canada.<sup>69</sup>

#### IV. THE POLITICS OF THE CONFLICT

The conflict began on August 18. Almost immediately, Governor Alexander Ramsey appointed Henry Hastings Sibley to organize a defense of the state. Sibley had been the first governor of the state of Minnesota, and in 1862, and at the outbreak of violence, was appointed a colonel in the state militia, making him the highest ranking military officer in the state.<sup>70</sup> On August 21, Governor Ramsey telegraphed Secretary of War, Edwin M. Stanton, asking for help<sup>71</sup> while Minnesota's Secretary of State asked Assistant Secretary of War, Christopher P. Wolcott, for authorization to raise a cavalry force of 1000 men and to purchase a sufficient number of horses for them to ride into battle.<sup>72</sup> Five days later, Governor Ramsey begged Major General Henry W. Halleck, the General-in-Chief of the army, to create a military district in the Northwest as a prelude to sending sufficient troops and leadership to fully crush the Indians in the region.<sup>73</sup> Halleck bluntly told the Governor that the "War Department is not prepared at present to create a new military department in the West."<sup>74</sup>

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69. In July 1863, Little Crow would return to Minnesota with his son. While foraging for food he was shot and killed by a local farmer, Nathan Lamson, who received a \$500 bounty for killing Little Crow and turning his scalp over to the state. His son was captured and scheduled for execution, but this never happened. Ultimately he was released from custody, perhaps reflecting that even in Minnesota people lacked the stomach to execute a child for the "crimes" of his father.

70. See Kenneth Carley, *The Sioux Campaign of 1862: Sibley's Letters to His Wife*, MINN. HIST. MAG., Sept. 1962, at 99, available at <http://collections.mnhs.org/MNHHistoryMagazine/articles/38/v38i03p099-114.pdf>. By the end of September, Sibley had been promoted to Brigadier General of Volunteer within the regular army. *Id.* at 109. Sibley would later be promoted to Brevet Major General and command the Department of the Northwest. *Id.* at 114.

71. Telegram of Alexander Ramsey to E. M. Stanton (Aug. 21, 1862 at 4:00 PM), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 590.

72. Telegram of J. H. Baker to Hon. C. P. Wolcott (Aug. 21, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 590-91.

73. Telegram of Alexander Ramsey to Henry Halleck (Aug. 26, 1862 at 2:00 PM), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 597.

74. Telegram of H. W. Halleck to Alexander Ramsey (Aug. 29, 1862), in

But Halleck missed the political significance of this issue, which President Abraham Lincoln did not miss. Facing midterm elections, Lincoln doubtlessly saw creating a military department in Minnesota as both politically useful and perhaps necessary to restore peace on the northwestern frontier. Governor Alexander Ramsey asked Lincoln to order the War Department to supply horses or mounted troops for the conflict, arguing that this “is not our war, it is a National War.”<sup>75</sup> There is some evidence that Lincoln and others in the administration initially may have agreed with Ramsey, actually believing, or at least fearing, that the Indian violence was the result of Confederate machinations, and thus a stronger military presence in Minnesota might be truly necessary for the safety of the nation. In his letter to Assistant Secretary of War Wolcott, Minnesota’s Secretary of State said that the Dakota violence was a result of a “deep-laid plan.”<sup>76</sup> This was actually not true, but the Lincoln administration feared it might be true, and that Confederate agents were trying to start a wholesale Indian war in the West. Secretary of Interior, Caleb B. Smith, later claimed to have evidence that “southern emissaries” had conspired with the Dakota.<sup>77</sup> Thus, for both military and political reasons, Halleck was forced to do a quick about-face, and on September 6, Secretary of War Stanton ordered Major General John Pope to “proceed immediately” to St. Paul, where he was to assume the position of commander of the newly created Department of the Northwest and “take such prompt and vigorous measures as shall quell the hostilities and afford peace, security, and protection to the people against Indian hostilities.”<sup>78</sup>

The choice of Pope was curious, but perhaps predictable. Pope was a West Point graduate who had had some initial success in the West, defeating Sterling Price in Missouri and helping to capture a key island in the Mississippi. He was then transferred to the East where he suffered a humiliating defeat at the Second Battle of Bull Run just days after outbreak of violence in Minnesota.

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OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 605.

75. Telegram from Alexander Ramsey to Abraham Lincoln (Sept. 6, 1862), in THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

76. Telegram of J. H. Baker to Hon. C. P. Wolcott (Aug. 21, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 590–91.

77. Nichols, *supra* note 3, at 5; *see also* LINCOLN AND THE INDIANS, *supra* note 1, at 78.

78. Telegram of E. M. Stanton to John Pope (Sept. 6, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 617.

His failure at Bull Run, combined with his almost insufferable arrogance, made it impossible to put him in combat against the Confederates. At the same time, Pope did have military and logistical skills. The new department in the Northwest provided General Halleck with a place to send Pope while enhancing Lincoln's support in the West. Pope initially saw his removal to the Northwest as a demotion (which after Bull Run he should have expected), but quickly used the new post to lead an aggressive campaign against the Dakota that he doubtlessly hoped would lead to a new command in the *real* war against the Confederates.

Pope and Sibley quickly organized a defense of the state, and within a few weeks the Dakota had been defeated. The conflict was essentially over after the Battle of Wood Lake, on September 23. Hundreds of Dakota soon surrendered to the army, and those who had not participated in the conflict came forward with whites they had sheltered or rescued from other Dakota who had captured them. Sibley continued to pursue some Dakota into early October, rounding up Indians who had not been involved in the conflict.<sup>79</sup> Indeed, the Indian population of Minnesota suffered worse after peace was restored than during the conflict. On October 9, General Pope sent a dispatch to General Halleck stating that “[t]he Sioux war may be considered at an end.”<sup>80</sup>

## V. THE TRIALS

Following the restoration of peace, the army tried 393 Indians for the “crime” of going to war with the United States.<sup>81</sup> On October 3, Colonel Sibley, who by then was actually a brigadier general,<sup>82</sup> reported that a military tribunal was already at work

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79. Telegram of John Pope to H. W. Halleck (Oct. 4, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 709 (noting that Sibley was still pursuing Indians and that he wanted to disarm the Winnebagoes, which Pope and Sibley asserted (incorrectly in fact) had been “engaged in the recent outrages with the Sioux”); *see also* Telegram of Henry H. Sibley to John Pope (Oct. 5, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 711–12 (describing his attempts to capture all remaining Sioux, disarm them, and arrest “the men, except the older ones”).

80. Telegram of John Pope to H. W. Halleck (Oct. 9, 1862 at 10:45 PM), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 722.

81. *See* Chomsky, *supra* note 3; Herbert, *supra* note 4.

82. Sibley did not find out about this promotion until October 7. *See* Telegram of Henry H. Sibley to John Pope (Oct. 7, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 717. Technically he was Brevet Brigadier General until April 7, 1864, when Congress confirmed this

“engaged in the trial of between 20 and 30 of the Indians . . . suspected of participating in the murders and outrages committed on the frontier.”<sup>83</sup> Sibley admitted that ninety percent of those Indians in his custody “have not been actively engaged in the war,” but he had to ferret out those who had.<sup>84</sup> Sibley already assumed he would execute those found guilty, but would not order any executions until he could persuade all the Indians not in his custody to surrender. He understood that if they heard about death sentences “they might be deterred from returning.”<sup>85</sup> General Pope agreed with this analysis, telling General Halleck “it will be necessary to try and execute many of those engaged in the late horrible outrages, and also some of the Winnebagoes.”<sup>86</sup>

These trials were swift and summary. The Dakota were not provided with counsel, as would have been done in a true court martial, and most of the trials were shams.<sup>87</sup> Without counsel the defendants lacked any due process protections, since none of the Dakota had any experience with American legal procedure. Some of those prosecuted knew little or no English, but this did not deter the military from trying them without defense counsel. But even those who were fluent in English probably did not understand the proceedings or that they were even on trial for their lives.<sup>88</sup> None of the defendants seemed to have had any idea of the legal right against self-incrimination. Indeed, many probably believed that honest answers would lead to fair treatment. This would have comported with Native American notions of justice and with the understanding of Indian soldiers operating in a traditional honor culture. Thus, many of the defendants admitted to something, such as firing a weapon, for example, or riding with Little Crow, the leader of the rebellion. However, they were not always given the opportunity to explain what they did—in effect to testify on their own behalf and explain their circumstances.<sup>89</sup>

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promotion. Carley, *supra* note 70, at 109.

83. Telegram of Henry H. Sibley to John Pope (Oct. 3, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 707.

84. *Id.* at 708.

85. *Id.*

86. Telegram of John Pope to H. W. Halleck (Oct. 7, 1862 at 1:30 PM), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 716.

87. For discussions of the trials, see generally Chomsky, *supra* note 3 and Herbert, *supra* note 4.

88. Chomsky, *supra* note 3, at 52–53.

89. See LINCOLN AND THE INDIANS, *supra* note 1, at 100.

These admissions were used to convict many defendants. Generals Pope and Sibley both believed that *any* participation in the rebellion was enough to merit a conviction. This logic flew in the face of General Pope's own assertions to Lincoln after the trials: "[T]hat the only distinction between the culprits is as to which of them murdered most people or violated most young girls. All of them are guilty of these things in more or less degree."<sup>90</sup> In fact, Pope knew better. But it did not matter because the military tribunal essentially held that any participation in the rebellion was an offense and that there was no meaningful distinction between those who committed what might be regarded as war crimes and those who were merely soldiers or fellow travelers in Little Crow's make-shift army.

In the next six weeks the army tried 393 men, convicting 323 and sentencing 303 to death. Many of these hearings—it would be too much to call them trials—lasted no more than five or ten minutes.<sup>91</sup> On the first day alone, sixteen men were tried with ten being convicted and sentenced to death.<sup>92</sup> On November 3, forty-two men were tried,<sup>93</sup> and on November 5, the last day of the proceedings, forty men were tried.<sup>94</sup> Assuming an eight-hour day, with no pauses between hearings or recesses, this meant that each trial lasted an average of twelve minutes or less. The standard of guilt was quite simple: anyone who fired a rifle in any form of combat was considered guilty and subject to a death penalty.<sup>95</sup>

Sibley's motivations are not clear. Some scholars suggest that the trials were mostly an act of vengeance by a victorious army.<sup>96</sup> Surely there is an element of that. The soldiers under Sibley had just fought for a month, many of their comrades were dead or wounded, and revenge is a common human emotion. This level of vengeance was also present in the civilian community in Minnesota, as refugee settlers streamed into St. Paul and it became apparent that hundreds of white settlers had been killed. The civilian

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90. Letter from John Pope to Abraham Lincoln (Nov. 11, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 788.

91. LINCOLN AND THE INDIANS, *supra* note 1, at 99–101; Chomsky, *supra* note 3, at 25.

92. Chomsky, *supra* note 3, at 25.

93. *Id.* at 27.

94. MEYER, *supra* note 27, at 127.

95. See LINCOLN AND THE INDIANS, *supra* note 1, at 100–01 (describing the trials); see also Chomsky, *supra* note 3; Herbert, *supra* note 4.

96. See LINCOLN AND THE INDIANS, *supra* note 1, at 125–26.

community was also inundated with stories (mostly untrue) of “outrages” committed against settler women and girls. All of this was enough to lead to calls for vengeance and executions.

But these procedures also dovetailed with Sibley’s larger goal of removing or killing all the Dakota in Minnesota. At the very beginning of the conflict he told his wife, “My preparations are nearly completed to begin my work upon them with fire and sword, and my heart is hardened against them beyond any touch of mercy.”<sup>97</sup> He referred to them as “fiends” and “devils in human shape.”<sup>98</sup> On September 10, he vowed to “pursue” the “red devils” with “fire and sword.”<sup>99</sup> As the conflict was coming to an end, Sibley urged that he be replaced by a “strictly military commander” who “would be better fitted” to “follow up the Indians vigorously and exterminate them . . . .”<sup>100</sup> If Sibley’s goal was extermination of the Dakota, for whatever reason, the trials were a step in the right direction. Executing a large number of young men would clearly undermine and weaken the entire Dakota society.

The trials and executions also fit with the views of the highest military leader in the state, Major General John H. Pope. Shortly before the hostilities came to an end, Pope predicted that he had the fire power to “put a final stop to Indian troubles by exterminating or ruining all the Indians engaged in the late outbreak.”<sup>101</sup> After the decisive battle at Wood Lake, Pope told Sibley that “[n]o treaty must be made with the Sioux . . . .”<sup>102</sup> Instead, he was determined to “utterly . . . exterminate the Sioux if I have the power to do so and even if it requires a campaign lasting the whole of next year.”<sup>103</sup> Calling the Sioux “wild beasts,” he asserted they deserved “punishment beyond human power to inflict,” and urged Sibley to “[d]estroy everything belonging to them . . . .”<sup>104</sup> While the trials were going on, Pope wrote the Secretary of War indicating that he was “anxious to execute a

97. Carley, *supra* note 70, at 99, 101.

98. *Id.*

99. *Id.* at 106.

100. Letter from Henry H. Sibley to John Pope (Sept. 27, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 680.

101. Letter from John Pope to Henry H. Sibley (Sept. 17, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 649.

102. Letter from John Pope to Henry H. Sibley (Sept. 28, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 686.

103. *Id.*

104. *Id.*

number of them.”<sup>105</sup> Pope had destroyed the crops of not only the offending Dakota, but of other Dakota who had not been involved in the combat and also the Winnebagoes, who had nothing to do with the conflict.<sup>106</sup> Sibley, who had been one of the first white settlers in Minnesota and had served as the first governor of the state,<sup>107</sup> was even more enthusiastic, expressing the hope at the very beginning of the conflict that his forces would “overtake and kill a thousand or more of the savages . . . and drive the remainder across the Missouri or to the devil.”<sup>108</sup>

When faced with the reality of the post-conflict trials, Sibley vacillated between wanting swift punishment and mild concerns about fairness. With over 250 prisoners in his care he admitted that “[s]ome of them are probably innocent,” but believed “by far the greater part will be found guilty of murder, rape, etc.”<sup>109</sup> This was a significant change from his earlier belief that the vast majority of the captured Indians were innocent of any crime. At this point he was planning to send most of these captured men to Fort Snelling and regretted that he would “be deprived of the gratification of strangling the guilty ones.”<sup>110</sup> Two days later he told his wife that “the Indian prisoners are being tried as fast as a due regard for justice will permit. I have to review all the proceedings

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105. 1 GIDEON WELLES, DIARY OF GIDEON WELLES SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 171 (1911), available at <http://archive.org/stream/diarygideonwell09wellgoog#page/n230/mode/2up> [hereinafter WELLES DIARY].

106. *Id.*

107. In the late 1830s and early 1840s Sibley had been virtually, although not legally, married to an Indian woman, Red Blanket Woman, and fathered a child with her, Helen Hastings Sibley. Jane Lamm Carroll, *Who Was Jane Lamont?: Anglo-Dakota Daughters in Early Minnesota*, MINN. HIST. MAG., Spring 2005, at 192, available at <http://collections.mnhs.org/MNHHistoryMagazine/articles/59/v59i05p184-196.pdf>. This relationship, known as a marriage “*a la facon du pays*,” lasted two or three years, and Sibley never denied his paternity of Helen, paid for her education, helped support her, and gave her away at her wedding in 1859. *Id.* at 192–93. Sibley later married Sarah Jane Steele, the daughter of a commanding general at Fort Snelling. Sarah Sibley apparently hated that her husband maintained a relationship with his half-Dakota daughter. *Id.* at 193. It is difficult to know how this earlier relationship affected his views of Indians. It is possible that given his earlier relationship with the Dakota, Sibley felt he had to go to extra lengths to prove his bona fide hostility to the Dakota after the rebellion began.

108. Letter from Henry H. Sibley to Sarah Sibley (Aug. 24, 1862), in EXTRACTS FROM GENERAL SIBLEY’S LETTERS TO HIS WIFE, WRITTEN ON THE INDIAN CAMPAIGN (R.J. Holcombe ed., 1893), in Herbert, *supra* note 4, at 753.

109. Letter from Henry H. Sibley to Sarah Sibley (Oct. 13, 1862), in Carley, *supra* note 70, at 110.

110. *Id.*

and decide the fate of each individual.”<sup>111</sup> As a young man Sibley had read law under the tutelage of his father, Solomon Sibley, the first Chief Justice of the Michigan Territory. Henry Sibley was the first Justice of the Peace in the Minnesota Territory.<sup>112</sup> But, for all this legal background, Sibley clearly had no real sense of due process or fair trials, as he reviewed trials that lasted a few minutes and sentenced men to death for non-capital offenses on the basis of virtually no evidence. His earlier legal training and his practice experience served him poorly in 1862<sup>113</sup> and again afterwards when he tried to justify his actions.<sup>114</sup> At the beginning of the trials he did not bother to review the findings of his commission, telling General Pope that “the proceedings . . . may not be exactly in form in all the details,” but he fully expected to approve all the sentences and “hang the villains.”<sup>115</sup> Pope would have agreed. He had already told Sibley that he doubted it was possible to assess individual guilt and “discriminate between Indians who say they are and have been friendly, and those who have not.”<sup>116</sup>

Sibley admitted to his wife that the “power of life and death is an awful thing to exercise,” telling her “it makes me shudder” to “think [that] more than three hundred human beings are subject to that power.”<sup>117</sup> But, shudder or not, he was prepared to do his “duty” and make sure that “judgment [would be] visited upon the guilty.”<sup>118</sup> By the time the trials were over, Sibley had long abandoned any notion of due process. “A military commission,” he told Bishop Henry Whipple, “is not expected to enter into details of a technical character,” and was not designed to function like “ordinary criminal tribunals” or even like “regular courts-

111. Letter from Henry H. Sibley to Sarah Sibley (Oct. 17, 1862), in Carley, *supra* note 70, at 110–11.

112. See Robert J. Sheran & Timothy J. Baland, *The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal Legal History of the Years 1835 to 1865*, 2 WM. MITCHELL L. REV. 1, 6 n.33 (1976).

113. See Chomsky, *supra* note 3, at 93 (arguing that Sibley’s legal training led him to use military commissions to provide a semblance of due process).

114. See Herbert, *supra* note 4, at 794–97 (describing Sibley’s post-execution justifications and his desire to bring new hearings, and have new executions in March 1863).

115. Letter from Henry H. Sibley to John Pope (Oct. 7, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 717.

116. Letter from John Pope to Henry H. Sibley (Oct. 2, 1862), in Herbert, *supra* note 4, at 774.

117. Letter from Henry H. Sibley to Sarah Sibley (Oct. 17, 1862), in Carley, *supra* note 70, at 111.

118. *Id.*

martial.”<sup>119</sup> This was certainly how Sibley set them into motion, with Pope’s acquiescence. But this was not in fact how they were *supposed* to operate. In Missouri, the scene of the most violent guerilla warfare in the Civil War, the army declared that military commissions “should be . . . constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses that might otherwise arise.”<sup>120</sup> Congress applied this logic to the entire nation in The Militia Act of 1862<sup>121</sup> by providing for the “same post-conviction review in both military commissions and courts-martial.”<sup>122</sup>

Other scholars suggest that Sibley and Pope used the trials to “protect” the incarcerated Dakota from lynching by the local populace.<sup>123</sup> Pope and Sibley made this argument, claiming that without the summary trials mobs of civilians would have massacred many Dakota women, children, and old men in Sibley’s custody. By this time, there were more than 1000 Indians under military control. Trying and executing a sufficient number of combatants might have been enough to satisfy the blood lust of most Minnesotans, as articulated by one newspaper’s demand that the Indians should be “exterminated.”<sup>124</sup> Sibley and Pope may have believed this was what they were doing, but their arguments were surely self-serving. The Indian non-combatants were in custody only because Sibley had been so busy rounding them up and forcing them off their lands. Moreover, the military was surely powerful enough to protect the Dakota in custody if Sibley and Pope wanted this to occur. That Sibley and Pope made these arguments illustrates their own vacillation over the fate of the Dakota. Both Sibley and Pope had been calling for the extermination, annihilation, or total removal of the Dakota. Yet, when faced with the reality of the slaughter of women, children, and old men, they stepped back.

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119. Letter from Henry H. Sibley to Henry B. Whipple (Dec. 4, 1862), in Herbert, *supra* note 4, at 771.

120. Gen. Orders No. 1, Headquarters Dept. of the Missouri (Jan. 1, 1862) in 1 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 248.

121. Militia Act of 1862, Ch. CCI, sec. 5, 12 Stat. 597, 598.

122. Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT’L L.J. 15, 27 n.97 (2006).

123. See, e.g., Chomsky, *supra* note 3, at 93–94.

124. SCHULTZ, *supra* note 32, at 243. For other examples of popular demands for “extermination” of the Dakota see MEYER, *supra* note 27, at 124.

Sibley complained that the newspapers thought he was too “tender hearted” and that the trials and executions were not moving fast enough.<sup>125</sup> He insisted he would not “murder any man, even a savage, who is shown to be innocent of the ‘great transgression,’ or permit of the massacre of women and children.”<sup>126</sup> But in fact he was pushing the trials along as fast as possible and showed little concern for due process, fairness, or actual guilt. Sibley may have been annoyed at pressure from newspapers or the civilian public, and he may have formally opposed killing native women and children, but he was still planning further military expeditions to force these women and children to leave Minnesota, and he had little regard for any fair investigation of the alleged “crimes” of their husbands, fathers, sons, and brothers, who he was planning to execute as quickly as possible.

General Pope told Lincoln that vigilantes were preparing to massacre the Dakota.<sup>127</sup> Governor Ramsey similarly warned Lincoln that “[n]othing but the Speedy execution of the tried and convicted Sioux Indians will save us here from Scenes of outrage.”<sup>128</sup> Civilians did make two attempts to attack Indian prisoners in November, but the army easily prevented any significant violence, capturing some of the civilian attackers and forcing them to march with Indians to Mankato.<sup>129</sup> The fears of Pope and Ramsey were clearly exaggerated and Lincoln probably realized that they could not be taken at face value. He must have intuitively understood that both Pope and Ramsey were trying to force him to let the executions go forward. Clearly, the military had more than sufficient force to protect all Indian captives from vigilantes, and Pope, as a career officer, had the skill and backbone to make sure his soldiers did their duty.

Another reason for the trials, demands for mass executions, and the incarceration of even friendly and cooperative Indians,

125. Letter from Henry H. Sibley to Sarah Sibley (Oct. 20, 1862), *in* Carley, *supra* note 70, at 111.

126. *Id.*

127. Letter from John Pope to Abraham Lincoln (Nov. 24, 1862), *quoted in* Nichols, *supra* note 3, at 10 n.34.

128. Telegram from Alexander Ramsey to Abraham Lincoln (Nov. 28, 1862), *available at* <http://memory.loc.gov/ammem/malquery.html> (search for “November 28, 1862, Ramsey”; then follow “Alexander Ramsey to Abraham Lincoln, Friday, November 28, 1862” hyperlink).

129. Attacks by civilians on the Indian prisoners are described in Carley, *supra* note 70, at 112–13; *see also* LINDER, *supra* note 66.

involved land and money. Final removal of the Indians would open more land to settlers and remove any fear of future violence.<sup>130</sup> Secretary of the Navy Gideon Welles believed that the vengeance against the Dakota was part of a larger plan to remove other Indians from the state. This was especially the case when it came to the arrest of non-Dakota. He noted that “the Winnebagoes have good land which white men want and mean to have.”<sup>131</sup>

In reality there was no need for the trials. In addition, their speed and lack of any semblance of due process were obviously unnecessary. Once the Dakota had surrendered and were under military control, they certainly posed no threat to the people of Minnesota. The conflict was over, and there was no chance it could resume, given the army’s decisive victory and the overwhelming military force General Pope had in Minnesota. The threats from civilian vigilantes, while real, were certainly exaggerated. The U.S. Army could surely have protected the Indians from a mob of angry farmers, and in fact, it did so. Governor Ramsey’s fear of “[s]cenes of outrage” were either an admission of his utter incompetence as a chief executive (which seems unlikely) or an exaggeration of the threats in order to pressure Lincoln to allow the executions to take place as quickly as possible. Ramsey was surely using the threats of violence to accomplish his real goal, which was to go forward with what would have been highly popular executions. Indeed, after civilians attacked Indians under army guard, and were repulsed, Ramsey issued a public proclamation “to avert the disastrous consequences of a collision” between the people of Minnesota and the United States.<sup>132</sup> He urged all citizens to refrain from attacking U.S. troops or Indians in the custody of the troops,<sup>133</sup> and there were no more outbreaks of such vigilante violence.

The terminology for the events comes directly into play when we consider the motivations for the trials. Throughout the military campaigns against the Dakota, both Pope and Sibley referred to the “war” with the Dakota. Pope was a military man at war with the enemy. As such, he and Sibley should have known that trying

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130. MEYER, *supra* note 27, at 124–25.

131. See WELLES DIARY, *supra* note 105, at 171.

132. Alexander Ramsey, *Proclamation to the People of Minnesota* (Dec. 6, 1862), in THE ABRAHAM LINCOLN PAPERS, *supra* note 13, available at <http://memory.loc.gov/ammem/malquery.html> (search for “Alexander Ramsey to Minnesota Citizens”; then follow “Alexander Ramsey to Minnesota Citizens, Saturday, December 6, 1862” hyperlink).

133. *Id.*

prisoners—except for very specific crimes—was not acceptable behavior. It was not a “crime” to go to war against an enemy. Many Dakota were convicted of shooting at U.S. soldiers. This was surely not a crime.

While Pope and Sibley did not understand their own hypocrisy, Secretary of the Navy Gideon Welles did. As Lincoln contemplated what to do with the convicted Dakota, he had to cope with letters from Pope and Sibley, editorials, and the demands of the Minnesota congressional delegation that the sentences be swiftly carried out against *all* the convicted Indians. Secretary Welles was especially annoyed by the behavior of Senator Morton S. Wilkinson and the state’s two Congressmen. He wondered how these “Representatives of a State can deliberately besiege the Government to take the lives of these ignorant barbarians by wholesale, after they have surrendered themselves prisoners.”<sup>134</sup> He thought the aggressive and almost bloodthirsty “sentiments of the Representatives were but slightly removed from the barbarians whom they would execute.”<sup>135</sup> The point was clear to Welles if the Indians were soldiers who had surrendered, they could not then be executed for having been soldiers. It was a position President Lincoln would accept as well.

#### VI. THE ADMINISTRATION AND THE DAKOTA TRIALS

When President Lincoln received General Pope’s list of condemned men, he immediately asked for the full records of the trials. Lincoln was a war-time president, and by the end of 1862 he was no longer shocked by the human cost of warfare. But, he was also deeply troubled by unnecessary killing. Throughout his presidency, he often commuted sentences of soldiers charged with desertion or other infractions. He understood that warfare cost lives, but he was also always reluctant to be the instrument of death for people in federal custody. He reviewed about 1600 court martial cases and, much to the annoyance of his generals, issued pardons or commutations to almost all the enlisted men charged with desertion or most other military offences.<sup>136</sup> He also issued at least 331 clemency orders for civilians convicted in federal courts.<sup>137</sup>

134. See WELLES DIARY, *supra* note 105, at 186.

135. *Id.*

136. *Pardons & Clemency, MR. LINCOLN’S WHITE HOUSE*, <http://www.mrlincolnwhitehouse.org/inside.asp?ID=226&subjectID=3> (last visited Nov. 24, 2012). Lincoln did not generally commute sentences of soldiers charged with

Many of Lincoln's military and civilian pardons were clearly part of his own military strategy.<sup>138</sup> His humane attitude towards the troops certainly increased morale. For example, Lincoln never signed a warrant for the execution of a common soldier convicted of falling asleep while on guard duty.<sup>139</sup> In 1864, he issued a wholesale pardon for "all deserters, who have been condemned by Court Martial to death."<sup>140</sup> He later issued a wholesale pardon to all deserters who were not in custody if they would return to their units within two months of his proclamation.<sup>141</sup> Lincoln almost always asked himself the pertinent question whenever a military execution came up: "[W]hether this soldier can better serve the country dead than living."<sup>142</sup> While Lincoln almost never signed an execution warrant for soldiers charged with military infractions like desertion or sleeping on duty, and regularly pardoned deserters, he rarely commuted sentences for non-military crimes, such as murder or rape.<sup>143</sup> Lincoln famously issued pardons when lobbied by members of Congress, state politicians, and other "respectable" and "honorable" citizens. He was equally susceptible to the entreaties of mothers, wives, and sisters seeking to save a son, husband, or brother.<sup>144</sup> Attorney General Bates complained he was "unfit to be trusted with the pardoning power."<sup>145</sup> However, it is also clear that Lincoln signed death warrants "only after he had examined the facts of each case and determined that the sentence was appropriate."<sup>146</sup>

Given this record of issuing pardons, it is perhaps not surprising that Lincoln wanted more information from General Pope before he was willing to authorize the executions of 303 men. Lincoln was troubled by a single execution. Three hundred and

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murder, rape, or other serious non-military offenses. *Id.*

137. P. S. Ruckman, Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84, 84 (1999).

138. *Id.* at 84–85.

139. *Id.* at 85.

140. E. D. Townsend, Order Commuting Sentence of Deserters, Gen. Orders No. 76 (Feb. 26, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 208 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS OF ABRAHAM LINCOLN].

141. Abraham Lincoln, Proclamation Offering Pardon to Deserters (March 11, 1865), in COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 140, at 349–50.

142. *Pardons & Clemency*, *supra* note 136.

143. Ruckman & Kincaid, *supra* note 137, at 85.

144. *Id.* at 88–90.

145. *Id.*

146. *Id.* at 85.

three at one time must have boggled his mind. If he was worried about blood on his hands from the shooting of a teenage deserter, as he clearly was, he would surely have been concerned about the blood of over 300 men.

But, these were captured enemies, not American soldiers who failed to fully do their duty. They were accused of barbaric treatment of civilians—Lincoln’s own constituents—and of course they also killed a substantial number of American soldiers before they were finally subdued. And they were Indians, not whites. Lincoln’s relationship with Indians was complicated. His grandfather had been killed by Indians in Kentucky, and his only military experience—in which he never saw combat—was in Black Hawk’s War.<sup>147</sup> Lincoln knew blacks while he was a lawyer in Illinois, and even had them as clients, but he had had very few interactions with Indians. They were truly foreign to him.

Politically, there was little advantage to issuing pardons. The Indians were not constituents. Lincoln could not score points with voters or soldiers by issuing pardons. Indeed, he would offend voters and soldiers in Minnesota and perhaps Wisconsin. Lincoln had received political pressure from the army, the civilian leadership in Minnesota, Senator Wilkinson, and the state’s congressmen. Had Lincoln followed his own political instincts, or done what was politically expedient, he would have approved all of the executions and ordered General Pope to move swiftly to eliminate the problem of the Indian prisoners.

On the other hand, if Lincoln followed his general view of executions and military trials—which apparently he did—he would have to examine every one of the trial records. The many military pardons Lincoln had already issued had convinced him that military trials were notoriously unfair and often without any meaningful due process. As a trial lawyer, the President was particularly sensitive to the unfairness of military trials. In addition, Lincoln and members of his cabinet were skeptical of the reports of many generals. Many generals constantly wanted more troops and equipment, constantly overestimated Confederate troop strength, and then did not perform in battle. General Pope, who had just embarrassed the administration with his huge loss at the Second Battle of Bull Run, had little credibility with the administration. His reports of Indian atrocities in Minnesota did not impress

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147. Nichols, *supra* note 3, at 3.

Secretary of the Navy Gideon Welles, who believed the tales of Indian “barbarities” were “greatly exaggerated.”<sup>148</sup>

While Sibley, Pope, Ramsey, Wilkinson, and other politicians and citizens in Minnesota pressed Lincoln to let the executions go forward, Lincoln also heard from a few people on the other side of the issue. There was a memorial from a group of Quakers in Pennsylvania, but that was to be expected.<sup>149</sup> Most scholars who write about the pardon process assert that Bishop Henry B. Whipple, the head of the Episcopal Church in Minnesota, convinced Lincoln to pardon most of the convicted Dakota.<sup>150</sup>

How much influence Bishop Whipple had over Lincoln is uncertain. Scholars cite Whipple’s autobiography, in which he describes his meeting with Lincoln while he was in the East to attend the Episcopal General Convention.<sup>151</sup> At the meeting with Lincoln, Whipple discussed the corruption of the entire Indian Agency system, explaining how Indian agents, Indian traders, and others systematically cheated the Indians while lining their own pockets. Whipple claims in this book that Lincoln was “deeply moved” by their conversation, and that later Lincoln told someone that Whipple “talked to me about the rascality of the Indian business until I felt it in my boots.”<sup>152</sup> However, this meeting took place in mid-September, before the conflict in Minnesota was over, and of course, before any Dakota had been put on trial. Whipple was in Washington at about the time of the battle of Antietam, where he preached to the First Minnesota and met General George B. McClellan.<sup>153</sup>

148. WELLES DIARY, *supra* note 105, at 186.

149. See Senator Morton S. Wilkinson, Speech at the Cong. Globe, 37th Cong., 13th Sess. (1862); see also Chomsky, *supra* note 3, at 30; Herbert, *supra* note 4, at 780.

150. Nichols, *supra* note 3, at 9.

151. HENRY B. WHIPPLE, LIGHTS AND SHADOWS OF A LONG EPISCOPATE 136–37 (1899).

152. *Id.* at 137. Many historians quote this story, but there is no source for it beyond Whipple’s recollection. Whipple wrote about this in 1899, thirty-seven years after the events took place.

153. See Diary of Bishop Henry B. Whipple (1864) [hereinafter Whipple Diary], in THE WHIPPLE PAPERS, 1859–1899, box 42 (on file with Minn. Hist. Soc’y). The Abraham Lincoln papers at the Library of Congress contain an undated calling card from Secretary of the Treasury, Salmon P. Chase, to Lincoln, introducing Lincoln to Bishop Whipple. See THE ABRAHAM LINCOLN PAPERS, *supra* note 13. Chase was active in the Episcopal Church and would have been a natural contact for Whipple. The Library of Congress erroneously dates this calling card as “December 1862.” This dating is incorrect since Whipple was in Minnesota at

Because this meeting took place before the conflict was over and of course before any Indians were being tried for crimes, Whipple could not have lobbied Lincoln to pardon anyone. His conversations probably touched on the cause of the conflict in Minnesota. But they were mostly about general Indian policies and the corruption of Indian agencies. This would have comported with a long letter Whipple sent Lincoln in March 1862 about the failures of Indian policies and the dishonesty of Indian agents.<sup>154</sup> In that letter he complained that Indian agents were “often men without any fitness, sometimes a disgrace to a Christian nation; whiskey-sellers, bar-room loungers, debauchers.”<sup>155</sup> When Whipple met with Lincoln in September, with the conflict in Minnesota still raging, he probably continued to denounce the entire system of Indian agents. But, there is one oddity about this meeting with the President: Whipple made no mention of meeting the President in his personal diary,<sup>156</sup> although he did record many of the people he met, including General McClellan, noted churches he preached at, and towns he visited. It seems incomprehensible that he would have not noted this meeting in his diary. Thus, his discussion of this meeting in his memoirs, published thirty-seven years later, makes one wonder if the meeting took place. Moreover, in Whipple’s memoirs he offers no source or explanation of how he heard that Lincoln said Whipple had made Lincoln feel the “rascality” of the Indian agencies in his “boots.”<sup>157</sup> Whipple’s discussions of the corruption of the Indian agency system would probably have affected Lincoln’s views of the causes of the violence in Minnesota, but Whipple could not have been lobbying Lincoln for leniency before any trials took place.

After the trials Whipple lobbied Lincoln from a distance, but he was clearly ambivalent about what should happen to the convicted Dakota warriors. He wrote to Senator Henry M. Rice on November 12, asking him to deliver a letter to Lincoln on the

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that time. The footnote to this document also erroneously claims Whipple talked to Lincoln about the Dakota prisoners at this time, which would have been impossible, since there were none yet, because the meeting would have taken place in September, and not December.

154. Letter from Henry B. Whipple to Abraham Lincoln (Mar. 6, 1862), *in* WHIPPLE, *supra* note 151, at 510–14.

155. *Id.* at 511.

156. Whipple Diary, *supra* note 153.

157. The lack of any mention in his diary or in any other source corroborating this meeting does not prove Bishop Whipple did not meet with the President, but it does weaken the case for it.

proposed executions.<sup>158</sup> He praised Rice as “the only public man who has at all times recognized the wickedness of our Indian system.”<sup>159</sup> He told Rice: “We cannot hang men by the hundreds.”<sup>160</sup> Whipple argued that the captured Indians were “prisoners of war” and it would violate “our own premises” to hang them.<sup>161</sup> But it does not appear this letter was directly about the executions and trials. On November 20, Senator Henry M. Rice sent Lincoln a petition from eighteen Episcopal bishops and another twenty or so other leaders of the church,<sup>162</sup> asking for a comprehensive reform of American Indian policy. The petition began with a reference to the “recent Indian attack” but then immediately went to a discussion of needed reforms in Indian policies. Whatever Whipple and the other Bishops thought about the executions, they wanted the tragedy to lead to significant reforms.<sup>163</sup> Senator Rice delivered the petition to Lincoln, met with the President, and on November 27, reported back to Whipple that the President would advocate reform of the Indian agency system in his annual message to Congress.<sup>164</sup> However, Rice did not indicate that he discussed the convictions of the Dakota soldiers with the President.<sup>165</sup>

A few days later Whipple reiterated his “demand” for “a reform” of the entire Indian agency system.<sup>166</sup> But then Whipple clarified his views on the trials and executions, which Rice had apparently misunderstood from Whipple’s earlier statements, objecting to “hang[ing] men by hundreds.”<sup>167</sup> Whipple flatly declared that when it came to the convicted Dakota soldiers he did

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158. There does not appear to be an actual copy of this letter in existence, only the cover letter Whipple sent Rice. See Letter from Henry B. Whipple to Henry M. Rice (Nov. 12, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 4.

159. *Id.*

160. *Id.*

161. *Id.*

162. Letter from Henry M. Rice to Abraham Lincoln (Nov. 20, 1862), in ABRAHAM LINCOLN PAPERS, *supra* note 13.

163. Letter from Protestant Episcopal Church to Abraham Lincoln (Nov. 20, 1862), in THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

164. Letter from Henry M. Rice to Henry B. Whipple (Nov. 27, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 3.

165. *Id.*

166. Letter from Henry B. Whipple to Henry M. Rice (Nov. 29, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 3.

167. Letter from Henry B. Whipple to Henry M. Rice (Nov. 12, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 4.

not “desire to screen the guilty murderers.”<sup>168</sup> He objected to the irregularities in the commission’s work and wanted someone to “carefully scrutinize between the guilty & innocent.”<sup>169</sup> He feared for the many innocent Dakota in federal custody because of the public “cry to exterminate every one who had a red skin.”<sup>170</sup> But “as a law abiding man” he was prepared to “bow to the supremacy of all decisions lawfully conducted.”<sup>171</sup> His only concern was whether the convicted Dakota had fair trials “such as to carefully scrutinize between the guilty and the innocent.”<sup>172</sup> Thus, even the most committed friend of the Indians in Minnesota was, in the end, not troubled by executing some Dakota soldiers, even though he had initially argued that the captured Indians were “prisoners of war” and it would violate “our own premises” to hang them.<sup>173</sup>

Whipple’s concerns were mostly about the Indian system, and only tangentially about the condemned Dakota. On December 4, Whipple wrote Lincoln directly, thanking him for supporting a reform of the entire Indian system, which was “a stupendous piece of wickedness.”<sup>174</sup> Whipple enclosed a “history of the causes of the late fearful massacre,” but he did not urge Lincoln to pardon the Dakota.<sup>175</sup>

The petition from Whipple and the other Episcopal bishops surely had some impact on Lincoln’s thinking. By this time Lincoln fully understood that the Indian agents and traders in Minnesota had been outrageous in their greed and incompetence. He also fully understood that many of those sentenced to die were innocent of any “outrages.” Along this line, Lincoln received a letter from Stephen R. Riggs, a missionary and the chaplain to General Sibley’s command. He noted that “among those

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168. Letter from Henry B. Whipple to Henry M. Rice (Nov. 29, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 3.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Letter from Henry B. Whipple to Henry M. Rice (Nov. 12, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 4.

174. Letter from Henry B. Whipple to Abraham Lincoln (Dec. 4, 1862), in THE WHIPPLE PAPERS, *supra* note 153, box 40, letterbook 3. The actual letter to Lincoln is found in Record Group 48: Records of the Office of the Secretary of the Interior, Entry 649: Records of the Indian Division, 1828–1907, General Records, 1838–1907, Letters Received, 1849–1880, National Archives College Park, College Park, Maryland.

175. *Id.*

condemned there are various grades of guilt from the men who butchered women and children to the men who simply followed with a party for the purpose of taking away spoils from the homes of settlers who fled.”<sup>176</sup> But Riggs also admitted that most of the convicted men “were condemned on general principles, without any specific charges proved.”<sup>177</sup> Riggs told Lincoln “there is room for the exercise of your *clemency*.”<sup>178</sup> Riggs then suggested some specific men who should be pardoned.

The petitions of Whipple and the other bishops, Senator Rice’s conversations with Lincoln, and other communications condemning the trials doubtlessly affected Lincoln’s thoughts on the subject. He told Rice he would raise the issue of Indian reform in his annual message to Congress (the nineteenth century equivalent of the State of the Union Address), which led Bishop Whipple to profusely praise and thank Lincoln.<sup>179</sup> But communications on the other side, including lobbying by Governor Ramsey, Senator Wilkinson, General Pope, and others in the state, urging speedy execution of all the Dakota also must have weighed on Lincoln’s mind.<sup>180</sup> Bishop Whipple argued for justice and humanitarian concerns for the Dakota; Ramsey and others argued for justice for the dead settlers and for the good of the Republican Party in the state. Ultimately, however, the concerns of those in Minnesota were only part of the process that led Lincoln to pardon the overwhelming majority of the Dakota soldiers who were sentenced to death.

## VII. LIEBER, THE LAW OF WAR, AND THE DAKOTA

The Dakota trials and Lincoln’s effective pardon of the vast majority of those sentenced to death must also be seen in the context of the emerging law of war within the administration. On April 24, 1863, the administration would promulgate Francis

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176. Letter from Stephen R. Riggs to Abraham Lincoln (Nov. 17, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

177. *Id.*

178. *Id.*

179. Letter from Henry B. Whipple to Abraham Lincoln (Dec. 4, 1862), *in* THE WHIPPLE PAPERS, *supra* note 153.

180. Letter from M. S. Wilkinson, Cyrus Aldrich, and Wm. Windom to Abraham Lincoln, *in* *Message of the President*, *supra* note 7, at 2–4. Morton S. Wilkinson was the U.S. Senator from Minnesota, while Aldrich and Windom were the state’s two Congressmen. All three were Republicans.

Lieber's code of war, known as General Orders 100.<sup>181</sup> This code, or even a draft of it, was not available to Lincoln in December 1862. Lieber first suggested writing the code to Major General Henry Halleck on November 13, 1862, and it was December before the project began.<sup>182</sup> Lieber wrote quickly, but he did not have a draft of the Code until February, and therefore had nothing to give the President before the pardons were issued. However, Lieber influenced Lincoln in other ways.

After the first Battle of Bull Run, on July 21, 1861, the administration was uncertain what to do with captured Confederate prisoners. If secession was illegal, as Lincoln contended, then the Confederates were little more than brigands, or perhaps some form of land-based pirates, making war on the general populace, and might be sent to hard labor, imprisoned, or even summarily executed. But, such a solution would only lead to retaliation by the Confederacy against U.S. soldiers, and encourage barbaric behavior on both sides. But, if the captured Confederates were treated as soldiers in battle, Lincoln and Attorney General Edward Bates worried this would be a de facto recognition of the Confederacy as a legitimate nation.

On August 19, 1861, Lieber published an open letter to consider the nature of Confederate prisoners. He noted that this was an issue that called for “[c]onsiderations of law, authority, humanity, [and] wise foresight.”<sup>183</sup> The issue concerned the treatment of captured Confederates—whether they were soldiers or pirates—and also how captured U.S. soldiers might be treated. In arguing that traditional rules of war should be applied to prisoners, he asserted that this was not a formal or diplomatic recognition of the Confederacy but was merely “the recognition of reality.”<sup>184</sup> Lieber offered an analogy which set the issue out clearly: “When a highway robber asks my purse, and I, being unarmed, consider it expedient to give it, I certainly recognize the robber, it is no more than recognition of a fact.”<sup>185</sup> For humanitarian reasons it was also

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181. Gen. Orders No. 100, *reprinted in* RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45–71 (1983).

182. *See* Special Orders No. 399, War Dept., Adjutant General's Office, Washington D.C., Dec. 17, 1862, *in* 2 *OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, *supra* note 8, at 951; *see also* JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 3 (2012).

183. Francis Lieber, *The Disposal of Prisoners*, N.Y. TIMES, Aug. 19, 1861, at 5.

184. *Id.*

185. *Id.*

important that Confederate prisoners be treated as legitimate belligerents under international law.<sup>186</sup> This would not be recognition of the Confederacy and would not even prevent a subsequent prosecution for treason if that was what the government wanted to do. But it would be a practical solution to the problem, since both sides had captured each other's soldiers. Eventually Lieber's theory would lead to prisoner exchanges. In this letter Lieber noted, but dismissed, the idea of executing prisoners of war. This would in effect reduce the United States to the level of the Jacobins during the French Revolution who "guillotined . . . the prisoners they made."<sup>187</sup> Lieber's point was clear: civilized, humane nations did not execute prisoners of war.

In a subsequent essay published in 1862, Lieber set out rules for dealing with guerrilla soldiers and other irregular forces.<sup>188</sup> Here he argued that "guerrillamen, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them."<sup>189</sup> Lieber argued that this was the precedent of "the most humane belligerents in recent times."<sup>190</sup>

These two theories were available to Lincoln when he considered the cases of the Dakota warriors. Lincoln seemed to have acted on both theories. In reviewing the cases, Lincoln made a sharp distinction between Indian soldiers, who simply participated in combat, and those who raped, killed women and children, or killed prisoners. This last point would have been particularly important to a careful and logical attorney like Lincoln. If it was wrong—a war crime—for Indians to kill prisoners, then would it not have been equally wrong—equally a war crime—for the United States to execute prisoners?

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186. *Id.*

187. *Id.*

188. FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR, WRITTEN AT THE REQUEST OF MAJOR-GENERAL HENRY W. HALLECK (1862), reprinted in HARTIGAN, *supra* note 181, at 31–44.

189. *Id.* at 20.

190. *Id.*

VIII. "I COULD NOT AFFORD TO HANG MEN FOR VOTES."<sup>191</sup>

In the end, Lincoln was pulled in many directions by the Dakota Rebellion. A humane chief executive, he was unable to even consider the mass hanging of hundreds of men. The Civil War was bloody enough, and there was no end in sight. Lincoln had no stomach for what the generals and politicians in Minnesota wanted. From the moment he heard of the push for mass executions, he made it clear that he was skeptical about the idea.

The first word of mass executions reached Lincoln in mid-October. On October 9 General Pope informed General Halleck that the "Sioux war may be considered at an end," but that the bloodletting was not over.<sup>192</sup> Pope reported that he had 1500 prisoners and that many of them were being "tried by military commission . . . and will be executed."<sup>193</sup> He reported he had seized "a number of Winnebagoes" and that he had "destroyed all the fields and property of the Sioux,"<sup>194</sup> even though most of the Sioux had not participated in the violence and the Winnebagoes had not been involved at all. He told Halleck he planned to renew his attacks on the Sioux in the spring and that "[t]he Indians are greatly terrified."<sup>195</sup> However we characterize the events of the fall of 1862—insurrection, war, or rebellion—Pope was planning to escalate the violence into what can only be described as a war of genocide. For Pope the mass execution of prisoners was the beginning of this process.

Secretary of War Edwin M. Stanton presented this report to the Cabinet on October 14.<sup>196</sup> Secretary of the Navy Gideon Welles was "disgusted" with Pope's report, the "tone" of which was "discreditable."<sup>197</sup> Welles noted that the Winnebagoes had "good land which white men want and mean to have."<sup>198</sup> Welles also observed that there was nothing in the reports to indicate *why* this violence had erupted, and he suspected—correctly—that the Indians in Minnesota had some legitimate grievances.

191. Diary of Alexander Ramsey (Nov. 23, 1864), *quoted in* LINCOLN AND THE INDIANS, *supra* note 1, at 118.

192. Letter from John Pope to H. W. Halleck (Oct. 9, 1862), *in* OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 722.

193. *Id.*

194. *Id.*

195. *Id.*

196. WELLES DIARY, *supra* note 105, at 171.

197. *Id.*

198. *Id.*

We do not know what the rest of the cabinet thought about this, but Lincoln immediately informed the military authorities that there would be no hasty executions. A disappointed General Pope told General Sibley that, “[t]he President directs that no executions be made without his sanction.”<sup>199</sup> When the Dakota were sentenced, Pope dutifully sent Lincoln a list of those to be executed, and as we know, Lincoln immediately asked that all the records of the trials be forwarded to him.

Meanwhile, Lincoln received letters from people in Minnesota, mostly urging that the Dakota be executed. Governor Ramsey was apoplectic when he contemplated that some might not be executed. But he also offered Lincoln a way to avoid having blood on his hands. Ramsey suggested: “If you prefer it turn them over to me & I will order their Execution.”<sup>200</sup> Senator Wilkinson and the state’s two congressmen pushed Lincoln hard for speedy executions. Even Reverend Riggs, who urged Lincoln to “exercise your *clemency*,”<sup>201</sup> also expressed “a great necessity . . . to execute the *great majority* of those who have been condemned by the Military Commission.”<sup>202</sup>

Bishop Whipple and other clergymen reminded Lincoln of the corruption of the Indian system, the failure of the allotments to arrive, and the real threat of starvation among the Indians. Their desperate situation may not have justified killing civilians, but going to war with the United States was not totally unjustified. Lincoln also heard from William P. Dole, the Commissioner of Indian Affairs, whom he sent to Minnesota. Dole communicated to Secretary of the Interior Caleb B. Smith,<sup>203</sup> who passed the letter on to Lincoln “concurring in the humane views” of Dole.<sup>204</sup> In his letter, Dole condemned the “indiscriminate punishment of men who have laid down their arms and surrendered themselves as prisoners.”<sup>205</sup> He suggested that the trials and the planned

199. Letter from John Pope to Henry H. Sibley (Oct. 17, 1862), *quoted in* LINCOLN AND THE INDIANS, *supra* note 1, at 96.

200. Telegram from Alexander Ramsey to Abraham Lincoln (Nov. 28, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

201. Letter from Stephen R. Riggs to Abraham Lincoln (Nov. 17, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

202. *Id.*

203. Letter from William P. Dole to Caleb B. Smith (Nov. 10, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

204. Letter from Caleb B. Smith to Abraham Lincoln (Nov. 11, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

205. Letter from William P. Dole to Caleb B. Smith (Nov. 10, 1862), *in* THE

executions were merely “revenge” rather than “the infliction of deserved punishment,” and thus they were “contrary to the spirit of the age, and our character as a great, magnanimous and christian people.”<sup>206</sup> Dole urged Smith to pass his letter on to Lincoln to “prevent the consummation of an act which I cannot believe would be otherwise than a stain upon our national character, and source of future regret.”<sup>207</sup>

In pardoning the vast majority of those condemned to death, Lincoln accepted the recommendation of his own Commissioner. It dovetailed with his own persistent opposition to needless killing and his lifelong commitment to due process of law. Lincoln was doubtlessly shocked by the lack of specific evidence for many of those convicted and the apparent unwillingness of the military to even attempt to treat the prisoners individually and assess their guilt or innocence on an individual basis.<sup>208</sup> In the early stages of the trials, General Sibley had admitted that “the proceedings . . . may not be exactly in form in all the details.”<sup>209</sup> But this lack of due process clearly did not bother him. Perhaps if a handful of Dakota had been sentenced to death after such proceedings, as Confederate guerillas had been in Missouri,<sup>210</sup> Lincoln might not have been too concerned either. But Lincoln refused to approve the bloodbath that Sibley, Pope, and Governor Ramsey wanted on the basis of such shoddy and suspect proceedings.

Lincoln’s decision to review the proceedings and spare the lives of the overwhelming majority of those convicted also comported with the emerging views of the War Department on the role of law in military affairs. Lieber’s arguments about prisoners of war and guerillas probably played into this. So too did the realization that the nature of the Civil War itself was changing. On August 17, Lincoln signed two laws that allowed for the enlistment of black troops: The Second Confiscation Act<sup>211</sup> and The Militia Act of 1862.<sup>212</sup> A week later, Secretary of War Edwin M. Stanton

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ABRAHAM LINCOLN PAPERS, *supra* note 13.

206. *Id.*

207. *Id.*

208. See *supra* note 34.

209. Letter from Henry H. Sibley to John Pope (Oct. 7, 1862), in OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 717.

210. Herbert, *supra* note 4, at 791–93 (discussing drumhead prosecutions and summary executions of guerillas in Missouri).

211. Second Confiscation Act, Ch. 195, §11, 12 Stat. 589, 592 (1862).

212. Militia Act of 1862, Ch. 201, 12 Stat. 597, 598.

authorized General Rufus Saxton, who was based at Hilton Head, South Carolina, to begin to enlist black troops.<sup>213</sup> Now that the United States was enlisting and training black soldiers, Lincoln had to be even more concerned about the fate of captured prisoners. Confederates might soon be seeking to execute or enslave black soldiers they captured. This would turn the war into one of unmitigated barbarism as the United States would then have to retaliate by executing captured Confederates. These were real possibilities. Executing enemy soldiers—even Indian enemy soldiers—was not only immoral, but it would set a dangerous precedent. If Lincoln allowed the execution of Indian soldiers on the grounds that the Indian attacks on the frontier were barbaric, then the Confederates could respond that from their perspective putting free blacks and former slaves in uniform and giving them guns was also barbaric. The military and civilian authorities in Minnesota wanted to execute the Dakota because they believed such executions would prevent future frontier warfare and thus save the lives of civilians and soldiers. But Lincoln’s view from the White House was the opposite. Executing Indian prisoners of war would only serve to justify Confederate executions of black U.S. soldiers (and their white officers). Rather than saving lives, a mass execution in Minnesota could have cost lives in the larger Civil War that was most important to Lincoln.

On December 1, Lincoln asked Judge Advocate General Joseph Holt, of the U.S. Army, for advice on how to deal with the convicted men. He was clearly planning to pardon many of the Indians. He asked Holt “whether I should conclude to execute only a part of them, I must myself designate which, or could I leave the designation to some officer on the ground?”<sup>214</sup> Holt replied that day, telling the President he could not delegate his pardon power “and that the designation of the individuals, which its exercise involves, must necessarily be made by yourself.”<sup>215</sup> Holt said that he knew of no instance where any president had attempted “the delegation of this delicate and responsible trust.”<sup>216</sup>

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213. Letter from E. M. Stanton to Rufus Saxton (Aug. 25, 1862), *in* 14 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, *supra* note 8, at 377–78.

214. Letter from Abraham Lincoln to Joseph Holt (Dec. 1, 1862), *in* COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 140, at 537–38.

215. Letter from Joseph Holt to Abraham Lincoln (Dec. 1, 1862), *in* THE ABRAHAM LINCOLN PAPERS, *supra* note 13.

216. *Id.*

Holt then made the observation that was obvious to others in the administration, including Lincoln, that “[i]n view of the large amount of human life involved in these proceedings, [it would] be well—if this step has not already been taken—to submit them to the Attorney General for the purpose of more satisfactorily determining the question of their regularity.”<sup>217</sup> The point seems clear: the leaders of the army were concerned about the lack of due process, the rush to judgment, and the large amount of life at stake. In the midst of America’s bloodiest war, even the leaders of the army were concerned about executing more than 300 men after trials that on their face were, at best, parodies of the legal process.

Lincoln, following his own humanitarian instincts and his lawyerly training, and backed by members of his cabinet, his Commissioner of Indian Affairs, and the Judge Advocate General of the U.S. Army, moved to mitigate, as much as possible, the barbarism of hanging more than 300 men, especially when it was obvious many were not guilty of any crimes. Thus, the President ordered his subordinates to divide the convicted Dakota into two groups: those “who were proven to have participated in *massacres*”<sup>218</sup> which were “distinguished from participation in *battles*.”<sup>219</sup> In doing so, Lincoln was forced to accept some of the findings of the military commission, even though he knew those hearings were deeply flawed and jurisprudentially scandalous. Carol Chomsky argues that Lincoln’s “judgments” to allow any executions were “questionable” because all the trials were “flawed.”<sup>220</sup> But this argument ignores the fact that some of those executed had openly bragged about killing civilians, and that some of the evidence for what amounted to war crimes was persuasive and compelling. Moreover, in the world of 1862, with the Civil War raging, with a miniscule staff, and the issues of the real war constantly pressing him, Lincoln may have done as much as he could have done—and spent as much time as he could afford—to correct the miscarriage of justice that took place in Minnesota.

Furthermore, Lincoln tried to balance justice with military concerns, issues involving the ongoing War of the Rebellion, and fear of renewed violence in Minnesota. As he told the Senate, he

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217. *Id.*

218. *Message of the President*, *supra* note 7, at 1–2.

219. *Id.* at 2.

220. Chomsky, *supra* note 3, at 15.

was “[a]nxious to not act with so much clemency as to encourage another outbreak, on the one hand, nor with so much severity as to be real cruelty, on the other.”<sup>221</sup> In the end, he spared seven out of every eight of the convicted men. In hindsight, he should have pardoned more and required new trials—fair trials—for those going to the gallows.<sup>222</sup> Clearly, Lincoln and his advisors understood the many problems with the trials and the lack of due process. But the lack of due process for those who were executed was swallowed up by the complexities of the Civil War, the distance between Washington and St. Paul, and the myriad of other demands on Lincoln’s time and attention. In December 1862 he had other things on his mind—the ongoing campaign against the Confederacy and the implementation of the final Emancipation Proclamation on January 1, 1863. Thus, on December 6, he sent General Sibley a list of forty men who would be executed.<sup>223</sup> By the time of the executions this would be reduced to thirty-eight, as two more men were reprieved.

Lincoln expected there would be a huge political cost for this massive commutation. Lincoln may have allowed a certain amount of rough justice, and rough injustice, to settle the matter, but he fully understood that his massive commutation—which would effectively be a massive pardon—would probably not satisfy the demands for vengeance and mass executions in Minnesota. But, Lincoln was willing to accept these political costs because the alternative was to acquiesce in the executions of over 300 men, most of whom had not committed any recognizable crime.

Ultimately, the political cost turned out to be not as great as Lincoln feared. Minnesota troops would continue to fight bravely and gallantly against the Confederacy. The people of Minnesota would remain mostly loyal to the Union cause. In 1864, Lincoln would carry Minnesota by 7000 votes. This was not as large as his 10,000 vote victory in 1860, and given that the state had a larger population by 1864, the decline in his margin of victory was even greater. He had carried 63.5 percent of the popular vote in 1860

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221. *Message of the President, supra* note 7, at 1.

222. At least one Dakota scholar sees the executions as “a political decision in order to appease the angry and vengeful Minnesota citizens.” Interview by Deborah Locke with Dr. Eldon Lawrence, in New Ulm, Minn. (Apr. 12, 2011) (transcript available at <http://collections.mnhs.org/cms/web5/media.php?pdf=1&irn=10248274>).

223. Letter from Abraham Lincoln to Henry H. Sibley (Dec. 6, 1862), *in* COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 140, at 543.

but only 59.1 in 1864.<sup>224</sup> This decline was noticeable, but hardly a threat to Lincoln or his party's power in the state. After the results were in, Alexander Ramsey, who by then was a U.S. Senator, told Lincoln "that if he had hung more Indians, we should have given him his old majority."<sup>225</sup> It is difficult to know if Ramsey was attempting to make a joke,<sup>226</sup> or if he was offering serious political advice. Lincoln replied with a more sober point that reflected his own legal and moral standards: "I could not afford to hang men for votes."<sup>227</sup>

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224. Ctr. for the Study of Politics and Governance, *Minnesota Presidential Election Results, 1860–2008*, HUMPHREY SCH. PUB. AFFAIRS 8–9, [http://www.hhh.umn.edu/centers/cspg/research/election\\_data\\_archive/pdf/MN\\_Presidential\\_Election\\_Results.pdf](http://www.hhh.umn.edu/centers/cspg/research/election_data_archive/pdf/MN_Presidential_Election_Results.pdf).

225. Diary of Alexander Ramsey (Nov. 23, 1864), *quoted in* LINCOLN AND THE INDIANS, *supra* note 1, at 118.

226. *See id.*

227. *Id.*