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# Minnesota Bounties on Dakota Men during the U.S.-Dakota War

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## MINNESOTA BOUNTIES ON DAKOTA MEN DURING THE U.S.-DAKOTA WAR

Colette Routel<sup>†</sup>

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### INTRODUCTION

The U.S.-Dakota War was one of the formative events in Minnesota history, and despite the passage of time, it still stirs up powerful emotions among descendants of the Dakota<sup>1</sup> and white

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1. This article uses the term “Dakota” to refer to the Mdewakanton,

settlers who experienced this tragedy. Hundreds of people lost their lives in just over a month of fighting in 1862.<sup>2</sup> By the time the year was over, thirty-eight Dakota men had been hanged in the largest mass execution in United States history.<sup>3</sup> Not long afterwards, the United States abrogated its treaties with the Dakota,<sup>4</sup> confiscated their reservations along the Minnesota River, and forced most of the Dakota to move westward.<sup>5</sup> Generals Henry Sibley and Alfred Sully then led expeditions into the Dakota Territory to hunt down those Dakota who had refused to surrender and accept this fate.<sup>6</sup>

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Sisseton, Wahpeton, and Wahpekute tribes. Historical documents refer to these groups as the “eastern Sioux,” but the term “Sioux” is a French abbreviation of the Algonquin word meaning “enemy,” and its continued use is discouraged by many contemporary Dakota people. See GARY CLAYTON ANDERSON, *LITTLE CROW: SPOKESMAN FOR THE SIOUX* 6 (1986) [hereinafter ANDERSON, *LITTLE CROW*].

2. Estimates of the number of dead on both sides of the war have varied over the years. Most likely, 500–600 non-Indians were killed during the fighting in August and September 1862. See MARION P. SATTERLEE, *A DETAILED ACCOUNT OF THE MASSACRE BY THE DAKOTA INDIANS OF MINNESOTA IN 1862*, at 124 (1923) (concluding, after thorough research, that 490 whites (military and civilian) were killed); Letter from Major-Gen. John Pope to Major-Gen. Henry Halleck (Sept. 23, 1862), in 13 U.S. DEP’T OF WAR, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES I* 663, 663 (1885) [hereinafter *WAR OF THE REBELLION, SER. I*] (claiming that “over 500 people” were killed in Minnesota); CURTIS A. DAHLIN, *THE DAKOTA UPRISING: A PICTORIAL HISTORY 1* (2009) [hereinafter DAHLIN, *DAKOTA UPRISING*] (asserting that a “conservative estimate” of whites killed in the 1862 War was 600). Little has been written about the number of Dakota casualties during 1862, so it is harder to provide an accurate estimate of their losses. KENNETH CARLEY, *THE DAKOTA WAR OF 1862: MINNESOTA’S OTHER CIVIL WAR* 1 n.\* (noting that “we have no clear idea of [Dakota] losses”). Compare SATTERLEE, *supra*, at 107–08 (listing thirty Dakota killed during fighting in 1862), with Report of Colonel Henry Sibley (Sept. 23, 1862), in 13 *WAR OF THE REBELLION, SER. I, supra*, at 279 (Sibley reporting that thirty Dakota were killed in the battle of Wood Lake alone), and Camp Release from Brigadier-Gen. Henry Sibley to Major-Gen. John Pope (Oct. 17, 1862), in 13 *WAR OF THE REBELLION, SER. I, supra*, at 745. Far more Dakota died as a result of General Sibley’s and General Sully’s military campaigns of 1863 and 1864. See, e.g., Letter from Major-Gen. John Pope to Major-Gen. Henry Halleck (Aug. 14, 1863), in 12 U.S. DEP’T OF WAR, *WAR OF THE REBELLION, SER. I, PART II* 451, 451 (1885) (reporting 150 Dakota dead from Sibley’s expedition); Letter from Major-Gen. John Pope to Sec’y of War Edwin Stanton (Sept. 22, 1863), in 12 *WAR OF THE REBELLION, SER. I, PART II, supra*, at 569 (reporting over one hundred Dakota dead from Sully’s expedition).

3. MARY LETHERT WINGERD, *NORTH COUNTRY: THE MAKING OF MINNESOTA* 327 (2010).

4. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652, 652–54.

5. Act of Mar. 3, 1863, ch. 199, 12 Stat. 819, 819–20.

6. MICHAEL CLODFELTER, *THE DAKOTA WAR: THE UNITED STATES ARMY VERSUS THE SIOUX, 1862–1865*, at 80–87 (1998).

Not all of the Dakota were removed from Minnesota, however. The United States allowed certain “friendly” or “loyal” Dakota, who had helped whites during the War to remain within the state.<sup>7</sup> Additionally, a small number of Dakota made their way back into the state during the spring of 1863, conducting raids on settlers while looking for horses they could take to make their permanent escape westward.<sup>8</sup> Swept away by hysterical reports of hundreds of Dakota lurking in the Big Woods just waiting to attack,<sup>9</sup> the Minnesota Adjutant General, at the direction of Minnesota Governors Alexander Ramsey and Henry Swift, issued a series of orders offering rewards for the killing of Dakota men found within the state.<sup>10</sup> The first order authorized the creation of a corps of volunteer scouts that would scour the Big Woods in search of Dakota men.<sup>11</sup> They were to be paid not only a daily wage, but an additional \$25 for each scalp they were able to provide the Adjutant General’s Office.<sup>12</sup> Subsequent orders permitted individual citizens who were not part of the volunteer corps to claim up to \$200 for proof that they had killed a Dakota.<sup>13</sup> These bounty orders remained in effect until at least 1868, when their constitutionality was finally questioned by the Minnesota Supreme Court in *State v. Gut*.<sup>14</sup>

While dozens of books and articles have been written about the U.S-Dakota War, no one has focused on the bounty system that

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7. 2 WILLIAM WATTS FOLWELL, A HISTORY OF MINNESOTA 263–64 (1961); *see also* HENRY BENJAMIN WHIPPLE, LIGHTS AND SHADOWS OF A LONG EPISCOPATE 133–34 (1912) (discussing how some of the Dakota who had rescued white captives during the war, as well as the wives and children of Dakota scouts used by General Sibley, remained living within Minnesota on land provided by Alexander Faribault); *The Friendly Indians*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), May 5, 1865 (discussing attempts to secure land for these “friendly” Indians).

8. ISAAC V. D. HEARD, HISTORY OF THE SIOUX WAR AND MASSACRES OF 1862 AND 1863, at 300 (1865); THROUGH DAKOTA EYES: NARRATIVE ACCOUNTS OF THE MINNESOTA INDIAN WAR OF 1862, at 280 (Gary Clayton Anderson & Alan R. Woolworth eds., 1988) [hereinafter THROUGH DAKOTA EYES].

9. WINGERD, *supra* note 3, at 329. The “Big Woods” was an area of deciduous forest that covered much of the middle portion of the State of Minnesota and was used by both Ojibwe and Dakota hunting parties. SCOTT W. BERG, 38 NOOSES: LINCOLN, LITTLE CROW AND THE BEGINNING OF THE FRONTIER’S END 6 (2012).

10. *See infra* Part II.A.

11. ANNUAL REPORT OF THE ADJUTANT GENERAL, *reprinted in* EXECUTIVE DOCUMENTS OF THE STATE OF MINNESOTA FOR THE YEAR 1863, at 61, 192–93 (1864) [hereinafter 1863 MINN. EXEC. DOCS.] (General Orders No. 41).

12. *Id.*

13. *Id.* at 198 (General Orders No. 60).

14. *State v. Gut*, 13 Minn. 341 (1868), *aff’d*, 76 U.S. 35 (1869).

had a profound impact on Dakota remaining in or returning to Minnesota immediately following the War.<sup>15</sup> The brief accounts that can be found in the existing literature are riddled with contradictions. Some claim that the bounty system was created by Governor Ramsey, others blame the Minnesota Legislature, and still others claim both were responsible.<sup>16</sup> Scholars also disagree about the number of payments made under the Minnesota bounty system and to whom they were made.<sup>17</sup> Finally, while much recent scholarship focuses on telling the stories of individual white settlers killed during the U.S.-Dakota War,<sup>18</sup> no one has ever attempted to uncover the circumstances surrounding the killing of the Dakota men for which State bounty payments were made.

Focusing attention on the Minnesota bounty system is necessary to provide a balanced perspective of the atrocities committed on both sides of the conflict. It is also important in a broader sense, because Minnesota was not the only state that placed a bounty on its Indian inhabitants. Around the same time, a bounty system was enacted by the territory of Arizona, and one was also implemented by private citizens and local governments within the state of California.<sup>19</sup> Like the bounty system in Minnesota, these programs were creatures of state and territorial law, but they were implicitly and explicitly approved by the federal government. In fact, they could be viewed as part of a much broader extermination program that was at the heart of federal Indian policy during this time period.<sup>20</sup> This program should not be whitewashed from the history of federal Indian policy.

This article uses primary historical sources to describe the events leading up to the enactment of a bounty system in

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15. The most thorough treatment of the Minnesota bounty system can be found in an unpublished manuscript available only at the Minnesota Historical Society. See David L. Beaulieu, *The Fate of Little Crow, 1863–1970* (1970) (unpublished manuscript) (on file with the Minnesota Historical Society).

16. See, e.g., WINGERD, *supra* note 3, at 329 (“Thanks to Governor Ramsey and the state legislature, shooting Indians soon could be a profitable as well as satisfying pastime. By summer the state was offering bounties for Dakota scalps.”).

17. For example, some scholars have erroneously claimed that either Nathan or Chauncey Lamson was paid \$75 for Taoyateduta’s (Little Crow) scalp in addition to the \$500 payment that was ultimately made by the Minnesota legislature. See *infra* note 188.

18. See, e.g., CURTIS A. DAHLIN, *DAKOTA UPRISING VICTIMS: GRAVESTONES & STORIES* (2007) [hereinafter DAHLIN, *GRAVESTONES*].

19. See *infra* Part III.

20. See *infra* Part III.

Minnesota, its creation, and subsequent on-the-ground implementation. In an attempt to avoid the pitfalls of “presentism,” the legality of this bounty system is analyzed according to the laws in effect in 1863, when it was created. This article concludes that the Minnesota bounty system was illegal from its inception, as it was contrary not only the international law of war, but also the Lieber Code, which was issued by the U.S. Secretary of War in April 1863 and used to govern the conduct of Union soldiers during the ongoing Civil War.<sup>21</sup>

### I. BACKGROUND

For the white settlers who lived in Minnesota, the U.S.-Dakota War seemed to begin without warning. For the Dakota, the war was the inevitable result of festering animosity surrounding the negotiation and implementation of treaties with the United States. In a series of treaties executed between 1837 and 1858, the Dakota ceded nearly all of their land in the State of Minnesota.<sup>22</sup> These treaties were negotiated using intimidation, trickery, and outright fraud by the United States.<sup>23</sup> By 1858, all that remained of the Dakota homeland was a small reservation 10 miles wide and 140 miles long running along the south shore of the Minnesota River in southwestern Minnesota.<sup>24</sup>

On this small strip of land the Dakota were unable to sustain themselves through their traditional means of hunting, fishing, and gathering. Some turned to farming, which was part of the assimilation program advanced by the United States.<sup>25</sup> But many resisted these and other assimilation efforts, and their lives now depended on the annuities of cash and goods promised to them in the treaties. These annuities were always late in arriving, and when they did arrive, traders took the bulk of the money claiming that it

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21. See *infra* Parts III & IV.

22. See Treaty with the Mdewakanton and Wahpekute Bands of the Sioux, Aug. 5, 1851, 10 Stat. 954; Treaty with the Sisseton and Wahpeton Bands of the Sioux, July 23, 1851, 10 Stat. 949; Treaty with the Sioux, Sept. 29, 1837, 7 Stat. 538.

23. See, e.g., 2 FOLWELL, *supra* note 7, at 216–19; GWEN WESTERMAN & BRUCE WHITE, MNI SOTA MAKOCE: THE LAND OF THE DAKOTA 148–54 (2012); see also DAVID A. NICHOLS, LINCOLN AND THE INDIANS: CIVIL WAR POLICY AND POLITICS 65–66, 76 (2012) (noting that Congress investigated Alexander Ramsey for his role in 1851 treaty negotiations that led to the mishandling of \$450,000 in Dakota money, and discussing the amount of money that passed directly to traders).

24. CARLEY, *supra* note 2, at 3–4.

25. 2 FOLWELL, *supra* note 7, at 219–21.

was owed to them for goods purchased on credit. Federal Indian agents did little to reduce these frauds, as they were often complicit in them.<sup>26</sup> Instead, the agents exacerbated the rifts growing within the Dakota community by making resources available only to those who were willing to participate in the United States' assimilation programs. Meanwhile, white settlers continued flooding the area, encroaching on what little Dakota land remained.

While the causes of the U.S.-Dakota War are numerous, scholars agree that starvation,<sup>27</sup> trader fraud, conflicts with white settlers,<sup>28</sup> corruption in Indian affairs,<sup>29</sup> and the federal government's misguided assimilation program<sup>30</sup> were all contributing factors. The events of the summer of 1862 simply provided the necessary spark.

#### A. *The U.S.-Dakota War of 1862*

The winter of 1861–62 was a harsh one, and the 1862 annuity payment that was supposed to have been paid in June did not arrive.<sup>31</sup> The Dakota received assurances that it would be paid the following month, and they began to congregate around the reservation's Yellow Medicine (Upper) Agency.<sup>32</sup> On July 14, food and other provisions arrived at the agency, but Indian Agent

26. *Id.* at 214–15.

27. Robert Hakewaste, who was an important member of Taoyateduta's band in 1862, later recalled in testimony before a U.S. commission that "[w]e were in a starving condition and desperate state of mind," yet "the [Indian] agent did not give us food as he promised." THROUGH DAKOTA EYES, *supra* note 8, at 32; *see also* WINGERD, *supra* note 3, at 301–02 (noting that the Dakota were in "an extremely destitute condition," yet the traders would not allow them to buy goods on credit (internal quotation marks omitted)).

28. GARY CLAYTON ANDERSON, KINSMEN OF ANOTHER KIND: DAKOTA-WHITE RELATIONS IN THE UPPER MISSISSIPPI VALLEY, 1650–1862, at 252–53 (1997) [hereinafter ANDERSON, KINSMEN] (noting that in the weeks preceding the war, the Dakota "held nightly discussions regarding the increasing number of white settlers, the actions of the traders, and the delay in the cash payment").

29. NICHOLS, *supra* note 23, at 65–76, 92; *see* THROUGH DAKOTA EYES, *supra* note 8, at 24, 29–30 (relaying Big Eagle's and Wabasha's accounts of the causes of the war).

30. THROUGH DAKOTA EYES, *supra* note 8, at 23–27 (providing Big Eagle's account of the causes of the war, as well as discussing the government's assimilation program and the divisions that it created within the Dakota community).

31. CARLEY, *supra* note 2, at 5; WINGERD, *supra* note 3, at 301–02; *see also* 2 FOLWELL, *supra* note 7, at 228–29 (noting that the 1861 Dakota corn crops were destroyed by cutworms).

32. ANDERSON, KINSMEN, *supra* note 28, at 249.

Thomas Galbraith<sup>33</sup> refused to distribute it, believing that he should wait until the money annuities had arrived.<sup>34</sup> By this time, thousands of hungry Dakota were gathered around the agency.<sup>35</sup>

In early August, a group of Dakota men tried to break into a Yellow Medicine Agency's warehouse holding food and other goods.<sup>36</sup> This was an act of sheer desperation, as the warehouse was surrounded by troops and artillery.<sup>37</sup> Missionary Stephen Riggs, Lieutenant Timothy Sheehan, and Captain John Marsh were ultimately able to avert a disaster by convincing Agent Galbraith to release some food under the condition that the Dakota would go home and return to the agency only when the money annuities had arrived.<sup>38</sup>

Chief Taoyateduta, also known as Little Crow, was present during these negotiations and was promised that similar accommodations would be forthcoming for his band at the Lower Agency. But this promise was not kept.<sup>39</sup> He told Agent Galbraith:

We have waited a long time. The money is ours, but we cannot get it. We have no food, but here are these stores, filled with food. We ask that you, the agent, make some arrangement by which we can get food from the stores, or else we may take our own way to keep ourselves from starving.<sup>40</sup>

Galbraith turned to the traders and asked them for their opinion. Trader Andrew Myrick said, "So far as I am concerned, if

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33. Thomas Galbraith took over the job as Indian Agent to the Dakota in May 1861. Galbraith had no experience with Indian issues, and he was arrogant, stubborn, and a drunk. *Id.* at 246; WINGERD, *supra* note 3, at 294. During the war, Chief Taoyateduta told Henry Sibley in a letter that "[f]or what reason we have commenced this war I will tell you, it is on account of Maj. Gilbrait [sic]." Letter from Little Crow to Colonel Henry Sibley (Sept. 7, 1862), in EXECUTIVE DOCUMENTS OF THE STATE OF MINNESOTA FOR THE YEAR 1862, at 444, 444 (1863) [hereinafter 1862 MINN. EXEC. DOCS.].

34. 2 FOLWELL, *supra* note 7, at 228–29; ROY W. MEYER, HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 112 (1967).

35. ANDERSON, KINSMEN, *supra* note 28, at 249 (noting Lieutenant Timothy Sheehan "counted 659 lodges, or roughly seven thousand people"); 2 FOLWELL, *supra* note 7, at 228–29; MEYER, *supra* note 34, at 112; NICHOLS, *supra* note 23, at 77.

36. CARLEY, *supra* note 2, at 5; WINGERD, *supra* note 3, at 302–03.

37. 2 FOLWELL, *supra* note 7, at 229; WINGERD, *supra* note 3, at 302–03.

38. ANDERSON, KINSMEN, *supra* note 28, at 250; CARLEY, *supra* note 2, at 5–6; 2 FOLWELL, *supra* note 7, at 229–30; MEYER, *supra* note 34, at 112–13.

39. MEYER, *supra* note 34, at 114.

40. 2 FOLWELL, *supra* note 7, at 232.

they are hungry, let them eat grass or their own dung.”<sup>41</sup> There was a moment of silence, and then the Dakota left the Lower Agency.<sup>42</sup>

Not long thereafter, on the morning of August 17, 1862, four young Dakota men went out hunting in an area known as the Big Woods, approximately thirty miles east of the Redwood Agency.<sup>43</sup> They came upon Robinson Jones’s homestead in Acton Township (near present day Grove City), and before the morning was over, they had killed Jones, his wife, his teenage daughter, and two other men.<sup>44</sup> The four Dakota men returned to their homes at the Rice Creek Village and consulted with Red Middle Voice, their headman.<sup>45</sup> Red Middle Voice was concerned that federal officials would retaliate against all Dakota for the actions of these four young men. Ultimately, a council was convened that night at Taoyateduta’s village, and the decision was made to go to war.<sup>46</sup>

The U.S.-Dakota War began the next morning, when Dakota warriors attacked the Lower Agency.<sup>47</sup> Twenty whites were killed either in the initial attack or the subsequent flight.<sup>48</sup> Among the dead was trader Andrew Myrick, whose body was found with grass stuffed in his mouth.<sup>49</sup> From there, the Dakota traveled down the Minnesota River valley, attacking settlements in their path and, in many instances, killing civilians.<sup>50</sup>

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41. MEYER, *supra* note 34, at 114; *see* Letter from Little Crow to Colonel Henry Sibley, *supra* note 33, at 444.

42. 2 FOLWELL, *supra* note 7, at 233.

43. ANDERSON, KINSMEN, *supra* note 28, at 253; THROUGH DAKOTA EYES, *supra* note 8, at 34.

44. CARLEY, *supra* note 2, at 7–9. There are various accounts of the events that precipitated these killings. According to Chief Big Eagle, the men found a hen’s nest with some eggs in it. One of the Dakota men started to take the eggs when he was stopped by another who was afraid that they would get into trouble. THROUGH DAKOTA EYES, *supra* note 8, at 35–36. This made the first man angry. *Id.* He threw the eggs to the ground and said: “You are a coward. You are afraid of the white man. You are afraid to take even an egg from him, though you are half-starved.” *Id.* The other replied that he was not a coward, and he would prove it by shooting the white man who owned the eggs. *Id.* He dared the others to join him, and they did. *Id.*

45. CARLEY, *supra* note 2, at 10; THROUGH DAKOTA EYES, *supra* note 8, at 36.

46. CARLEY, *supra* note 2, at 10–12; MEYER, *supra* note 34, at 117; THROUGH DAKOTA EYES, *supra* note 8, at 36 (Big Eagle’s account). There are conflicting accounts regarding whether a council was held, who was present at the council, and whether war was formally declared. A more complete discussion of these issues can be found in *infra* Part IV.B.

47. 2 FOLWELL, *supra* note 7, at 109.

48. CARLEY, *supra* note 2, at 14.

49. *Id.*; MEYER, *supra* note 34, at 117.

50. 2 FOLWELL, *supra* note 7, at 110–11.

Minnesota Governor Alexander Ramsey immediately turned to former governor and friend, Henry Hastings Sibley, to gather a force to respond.<sup>51</sup> After battles at Fort Ridgely, New Ulm, Birch Coulee, and other locations,<sup>52</sup> on September 23, thirty-seven days after beginning the war, the Dakota forces were defeated at the Battle of Wood Lake.<sup>53</sup> Soon thereafter, Taoyateduta and at least 150 Dakota fled to the western prairies, where they knew they could not be pursued until the spring.<sup>54</sup>

Taoyateduta's exit left a path open for those Dakota who had opposed the war from its inception. On September 26, these so-called "friendly" Indians turned over 269 whites and mixed-bloods that had been held captive.<sup>55</sup> Sibley took the remaining 1200–1800 Dakota into custody at Camp Release.<sup>56</sup> This number included some defeated warriors, women and children, and a large contingent of Dakota who had refused to join the war effort, some of whom had protected white refugees fleeing the hostilities.<sup>57</sup>

Rather than treat the Dakota as prisoners of war, on September 28, 1862, Henry Sibley decided to convene a five-person military commission to try certain Dakota for "murder and outrages."<sup>58</sup> Sibley informed General Pope that he would summarily try those who had been involved in the war and if found guilty, he planned to immediately authorize their executions, even though he

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51. Letter from Governor Alexander Ramsey to Sec'y of War Edwin Stanton (Aug. 21, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 590; Message of Governor Ramsey to the Legislature of Minnesota (Sept. 9, 1862), in 1862 MINN. EXEC. DOCS., *supra* note 33, at 3, 5.

52. See generally CARLEY, *supra* note 2 (containing accounts of the 1862 battles).

53. ANDERSON, KINSMEN, *supra* note 28, at 274; MEYER, *supra* note 34, at 123. Casualties were minimal in the Battle of Wood Lake. Sibley lost four men, and the Dakota lost between sixteen and thirty men. But much of the Dakota force refused to fight, making the end of the conflict obvious to Taoyateduta and the other leaders. ANDERSON, KINSMEN, *supra* note 28, at 274; Letter from Brigadier-Gen. Henry Sibley to Maj.-Gen. John Pope (Oct. 17, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 745; Report of Colonel Henry Sibley (Sept. 23, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 279.

54. ANDERSON, KINSMEN, *supra* note 28, at 275, 278; MEYER, *supra* note 34, at 123.

55. MEYER, *supra* note 34, at 123.

56. ANDERSON, KINSMEN, *supra* note 28, at 276.

57. *Id.*

58. Letter from Colonel Henry Sibley to Maj.-Gen. John Pope (Sept. 28, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 686–87; Letter from Brigadier-Gen. Henry Sibley to Maj.-Gen. John Pope (Oct. 3, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 707–08.

was unsure he had the legal authority to do so.<sup>59</sup> The commissioners Sibley appointed were military officers that had each fought against the Dakota just days earlier, but were now expected to dispense impartial justice.<sup>60</sup> The commission decided thirty to forty cases in a single day and some were heard in as little as five minutes.<sup>61</sup> None of the Dakota were provided attorneys, hearsay evidence was used against them, and many were prevented from testifying in their own defense.<sup>62</sup> No distinction was made between those Dakota who had fought soldiers in battle and those who had killed civilians.

By November 5, 1862, the military commission had tried 392 Indians for “crimes” connected to the war, convicted 323 men, and condemned 303 of those men to death.<sup>63</sup> Henry Sibley informed General Pope that he expected to approve the results and, with Pope’s permission, “hang the villains.” But the Militia Act of 1862 provided that no execution could take place without the President’s approval.<sup>64</sup> As a result, General Pope telegraphed the list of condemned men to President Lincoln on November 7, 1862.

After receiving the telegram listing the 303 Dakota men who had been condemned to death, President Lincoln directed General Pope to forward “the full and complete record of their convictions” by mail.<sup>65</sup> Lincoln then struggled to find a solution that would

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59. Letter from Colonel Henry Sibley to Maj.-Gen. John Pope, *supra* note 58, at 686–87.

60. 2 FOLWELL, *supra* note 7, at 191, 192 n.3; WINGERD, *supra* note 3, at 313.

61. Carol Chomsky, *The United States Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 27, 47 (1990); see also NICHOLS, *supra* note 23, at 95, 99–100 (noting that the average length of a trial was only ten to fifteen minutes).

62. NICHOLS, *supra* note 23, at 99–100. In one case, the only testimony taken was a lone witness who stated: “I saw the prisoner . . . and he stated to me that he was wounded at the Fort, and that he there fired one shot.” *Id.* at 100. The prisoner was not allowed to speak in his own defense, and he was immediately sentenced to death. *Id.*

63. There are small discrepancies among scholars in the final tally of those convicted and acquitted by the commission. Compare Chomsky, *supra* note 61, at 28 (noting that of the 392 men tried, the commission acquitted 69 and convicted 323, of which 303 were sentenced to death and 20 to imprisonment), with 2 FOLWELL, *supra* note 7, at 196 (claiming, after a complete review of the record, that 392 persons were tried, 70 were acquitted or not proven, 16 were sentenced to imprisonment, and 307 were sentenced to death).

64. Act of July 17, 1862, ch. 201, § 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.”).

65. Letter from President Abraham Lincoln to Major-Gen. John Pope (Nov. 10, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 787.

temper the draconian sentences Sibley and Pope wished to impose, be severe enough to discourage another war, satisfy Minnesotans' calls for revenge, and not risk losing his supporters in what was a key northern state.<sup>66</sup> Initially, Lincoln planned to execute only those found guilty of rape, but he discovered there were only two such cases.<sup>67</sup> He then added the names of those who were believed to have engaged in the killing of civilians rather than battles with soldiers.<sup>68</sup> On December 6, 1862, President Lincoln personally wrote out the names of thirty-nine Dakota men to be executed.<sup>69</sup> He ordered the remaining Dakota be held until further instructions were received.<sup>70</sup>

On December 26, 1862, before a crowd of some 4000 people, the prisoners walked to the great wooden gallows specially constructed just a few days earlier so that all thirty-eight men (one of the men on Lincoln's list received a last minute reprieve) would die simultaneously.<sup>71</sup> The prisoners wore white muslin coverings and sang a traditional Dakota song as they were led to gallows. Ropes were placed around their necks, and a single blow from an ax cut the rope that held the platform causing the prisoners to fall to their deaths. This was the largest mass execution in American history.<sup>72</sup>

In February 1863, at the urging of Governor Ramsey and the Minnesota Legislature,<sup>73</sup> Congress passed an act unilaterally abrogating all treaties between the United States and the Minnesota Dakota, confiscating their lands, and cancelling their

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66. See, e.g., Letter from Governor Alexander Ramsey to President Abraham Lincoln (Nov. 10, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 787 ("I hope the execution of every Sioux Indian condemned by the military court will at once be ordered."); NICHOLS, *supra* note 23, at 100–03, 106–11; Paul Finkelman, "I Could Not Afford to Hang Men for Votes." *Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405, 408, 412 (2013).

67. 2 FOLWELL, *supra* note 7, at 209; NICHOLS, *supra* note 23, at 112.

68. 2 FOLWELL, *supra* note 7, at 209; NICHOLS, *supra* note 23, at 100, 112.

69. 2 FOLWELL, *supra* note 7, at 209; Letter from President Abraham Lincoln to Brigadier-Gen. Henry Sibley (Dec. 6, 1862) (on file with the Minnesota Historical Society).

70. Letter from President Abraham Lincoln to Brigadier-Gen. Henry Sibley, *supra* note 69.

71. DAHLIN, DAKOTA UPRISING, *supra* note 2, at 255; see ANDERSON, KINSMEN, *supra* note 28, at 277; NICHOLS, *supra* note 23, at 117.

72. NICHOLS, *supra* note 23, at 117.

73. 2 FOLWELL, *supra* note 7, at 245; NICHOLS, *supra* note 23, at 96–97; Message of Governor Ramsey to the Legislature of Minnesota, *supra* note 51, at 11.

annuity payments.<sup>74</sup> Less than one month later, Congress passed an act removing the Dakota from Minnesota and authorizing the President to assign them a reservation “outside of the limits of any state.”<sup>75</sup> Nearly 2000 Minnesota Winnebagos who had taken no part in the Dakota War were also forced to leave.<sup>76</sup>

In April 1863, President Lincoln decided that no more executions would take place, and he ordered the convicted Dakota to serve indefinite prison terms in a camp near Davenport, Iowa.<sup>77</sup> For the rest of the Dakota, he approved their removal to the site of a new reservation on the Missouri River in what would become South Dakota.<sup>78</sup> By this time, at least 200 Dakota had died while at the Fort Snelling internment camp due to the harsh winter, lack of food, and disease.<sup>79</sup> Over the next month, as they traveled to the Crow Creek Reservation, they left a trail of makeshift graves along the riverbank, dug for passengers who had fallen ill and perished along the trip.<sup>80</sup> Three hundred more died on this trip, as a result of what Missionary Thomas Williamson likened to the slaves’ “middle passage.”<sup>81</sup>

#### B. *Dakota Raids in the Spring of 1863*

In the winter of 1863, General Pope and Henry Sibley began to plan an expedition to chase down the Dakota who had fled west with Taoyateduta following the Battle of Wood Lake. Pope instructed Sibley that when the spring came and he was preparing

74. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652, 652–54 (1863); 2 FOLWELL, *supra* note 7, at 246–48; see also Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 WM. MITCHELL L. REV. 538, 559–78 (2013) (discussing Congress’s ability to unilaterally abrogate the Dakota treaties).

75. Act of Mar. 3, 1863, ch. 112 Stat. 819, 819–20 (1863).

76. NICHOLS, *supra* note 23, at 115–16, 121–22.

77. 2 FOLWELL, *supra* note 7, at 262; NICHOLS, *supra* note 23, at 124–25. The prisoners were eventually pardoned by President Johnson in April 1866. 2 FOLWELL, *supra* note 7, at 262. More than 100 died in prison before they were released. *Id.*

78. 2 FOLWELL, *supra* note 7, at 258.

79. CORINNE L. MONJEAU-MARZ, *THE DAKOTA INDIAN INTERNMENT AT FORT SNELLING, 1862–1864*, at 61, 165 (2005). *But see* ANDERSON, KINSMEN, *supra* note 28, at 278 (claiming that nearly half of the Dakota died at the Fort Snelling internment camp).

80. 2 FOLWELL, *supra* note 7, at 259.

81. *Id.*; MEYER, *supra* note 34, at 146, 147–48. Hundreds more died shortly after being relocated to the Crow Creek Reservation because the United States failed to provide adequate food and clothing. MEYER, *supra* note 34, at 147–48.

to leave the state, it was not “necessary or desirable that you should keep up the small posts you have established for the winter along the frontier. Don’t put yourself on the defensive, but on the offensive.”<sup>82</sup>

Governor Ramsey disagreed. As if anticipating General Pope’s instructions, the governor sent Sibley a letter several days earlier, requesting that he maintain a military presence in the state.<sup>83</sup> The governor claimed there was “a deep anxiety throughout the frontier settlements” because it was believed that Dakota attacks would begin anew in the spring.<sup>84</sup> He argued that “with five regiments of infantry and one of mounted rangers at your disposal, you will be able to proceed across the plains and chastise the Sioux allies of [Taoyateduta] and at the same time guard our extended settlements from any reasonable probability of an inroad from Sioux or other Indians.”<sup>85</sup>

Sibley replied in a letter dated February 14, 1863.<sup>86</sup> He told Governor Ramsey that he had already issued an order commanding officers along the frontier to construct stockades where settlers could flee in case of attack.<sup>87</sup> Scouts would be employed so they could sound the alarm if Dakota were seen approaching the settlements. On the other hand, Sibley pointed out that he did not know the size of the force that he would have at his disposal for the expedition to the Dakota Territory; therefore, he did not commit to leaving any troops to protect settlers in Minnesota. Instead, he suggested that companies of militia be formed that could defend their hometowns, if necessary. Sibley believed that these militia groups would “prevent a panic and tend to appease the apprehensions of the people generally,” but he did not think they

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82. Letter from Major-Gen. John Pope to Brigadier-Gen. Henry Sibley (Feb. 25, 1863), in 22 U.S. DEP’T OF WAR, WAR OF THE REBELLION, SER. I, PART II 123, 123 (1888).

83. Letter from Governor Alexander Ramsey to Brigadier-Gen. Henry Sibley (Feb. 13, 1863), in 2 MINNESOTA IN THE CIVIL AND INDIAN WARS 292, 292–93 (1899).

84. *Id.* at 292.

85. Letter from Brigadier-Gen. Henry Sibley to Governor Alexander Ramsey (Feb. 14, 1863), in 2 MINNESOTA IN THE CIVIL AND INDIAN WARS, *supra* note 83, at 293.

86. *Id.*

87. *Id.* at 294; *see also* Willoughby M. Babcock, *Minnesota’s Frontier: A Neglected Sector of the Civil War*, MINN. HISTORY, June 1963, at 274, 280 (quoting a February 1863 circular instructing commanding officers “to construct a bullet proof stockade at least nine feet high which [will] serve not only for defense, but as a place of refuge to families in the neighborhood in case of attack by Indians”).

would be necessary.<sup>88</sup> “My own belief is that the hostile Indians will make no descent upon the border until they find they are not themselves to be attacked in their prairie haunts.”<sup>89</sup>

As it turns out, Sibley’s confidence was misplaced. While most of the Dakota had been expelled from the state of Minnesota,<sup>90</sup> a few returned in the spring of 1863 and continued raids on Minnesota settlers. In mid-April, a group of Dakota went on an expedition to the south branch of the Watonwan River (just west of Madelia, Minnesota) to acquire horses.<sup>91</sup> They traveled to a nearby home that was being temporarily occupied by two members of Company E, Seventh Minnesota Volunteer Regiment.<sup>92</sup> The Dakota attacked the occupants, killing a soldier, and wounding another soldier and a civilian.<sup>93</sup> The survivors fled to a nearby stockade, known as Fort Union, where the other members of Company E were located.<sup>94</sup>

Upon learning of the attack, Lieutenant Hardy sent soldiers to collect nearby settlers and bring them to the stockade where they could be more easily protected.<sup>95</sup> In that vein, two soldiers were sent to the nearby home of Swenson Roland.<sup>96</sup> But while escorting the Roland family to the stockade, the soldiers spotted a group of Dakota and left the family to pursue them.<sup>97</sup> The Rolands were attacked not long afterward. Their twelve-year-old son was killed

88. 2 MINNESOTA IN THE CIVIL AND INDIAN WARS, *supra* note 83, at 294.

89. *Id.*

90. *See supra* note 7 and accompanying text (discussing those Dakota who were permitted to remain within the state).

91. CHARLES S. BRYANT & ABEL B. MURCH, A HISTORY OF THE GREAT MASSACRE BY THE SIOUX INDIANS IN MINNESOTA 487 (1872); *The Indian Campaign Opened. Midnight Attack on an Outpost. Several Persons Killed and Wounded. Several Horses Stolen*, ST. PAUL DAILY PRESS, Apr. 19, 1863 [hereinafter *The Indian Campaign Opened*].

92. BRYANT & MURCH, *supra* note 91, at 487; *Further Particulars of the Indian Attack on Fort Cox on the Watonwan*, ST. PAUL DAILY PRESS, Apr. 21, 1863 [hereinafter *Further Particulars of the Indian Attack*].

93. BRYANT & MURCH, *supra* note 91, at 487; 2 FOLWELL, *supra* note 7, at 281; THOMAS HUGHES, HISTORY OF BLUE EARTH COUNTY AND BIOGRAPHIES OF ITS LEADING CITIZENS 140 (1909); Narrative of the Seventh Regiment, in 1 MINNESOTA IN THE CIVIL AND INDIAN WARS 347, 353 (1890); *The Indian Campaign Opened*, *supra* note 91. The soldier killed was named Ole Boxrud, but he was sometimes referred to as Ole Erickson. DAHLIN, GRAVESTONES, *supra* note 18, at 94, 128; HUGHES, *supra*; *Further Particulars of the Indian Attack*, *supra* note 92.

94. BRYANT & MURCH, *supra* note 91, at 487.

95. *Id.*; *Further Particulars of the Indian Attack*, *supra* note 92.

96. BRYANT & MURCH, *supra* note 91, at 487.

97. *Id.*

and three family members were wounded.<sup>98</sup> That same day, three civilians fishing and trapping within a few miles of Fort Union were also killed, presumably by Dakota.<sup>99</sup> Colonel Miller,<sup>100</sup> commanding at Mankato, dispatched two companies under Lieutenant Colonel William Marshall to give chase, but they were unable to overtake the Dakota party.<sup>101</sup>

Initial reports claimed that more than fifty Dakota warriors led the attacks.<sup>102</sup> Brigadier General Sibley quickly attempted to counter this misinformation by notifying the press that probably only a handful of Dakota were involved.<sup>103</sup> Sibley's supposition was later confirmed by Lieutenant Colonel Marshall, who could only identify the tracks of six individuals while in pursuit of the Dakota party.<sup>104</sup> Yet despite this, the press continued to publish the fanciful

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98. *Id.* at 486–88; *see also* BRYANT & MURCH, *supra* note 91, at 486–88 (noting that Swenson Roland's son, Christ, was killed); HUGHES, *supra* note 93, at 140 (stating that a twelve-year old boy was killed, but wrongly identifying him as Christopher Gilbrantson); MARION P. SATTERLEE, AUTHENTIC LIST OF THE VICTIMS OF THE INDIAN MASSACRE AND WAR 1862 TO 1865, at 7 (1919) (listing Christian Roland as having been killed in Watonwan County).

99. The other civilians killed were Gilbert Palmer, Ole Palmer, and Gabriel Ellingson. *See* BRYANT & MURCH, *supra* note 91, at 488; HUGHES, *supra* note 93, at 140 (listing the dead as Gilbrand Palmer, Gabriel Erlingren and Ole Palmerson); C. M. OEHLER, THE GREAT SIOUX UPRISING 228–29 (1959) (Gilbert Parker); SATTERLEE, *supra* note 98, at 7 (listing the dead as Gabriel Ellingson, Gilbert Palmer, and Ole Palmer).

100. The Colonel Miller referred to was Colonel Stephen Miller. Just a few months later, he was elected governor of Minnesota. He remained in that office until January 1866. P. J. SEBERGER & STEPHEN MILLER, STEPHEN MILLER—MOST FAMOUS OF ST. CLOUD'S EARLY PIONEERS; HIS LIFE, HIS WORK, HIS SWORD 6–7 (1933).

101. CLODFELTER, *supra* note 6, at 71 (1998); 1 MINNESOTA IN THE CIVIL AND INDIAN WARS, *supra* note 93, at 353; John Danielson, HISTORY OF COMPANY G, OF THE 7TH MINNESOTA VOLUNTEERS, WAR OF THE REBELLION, AUGUST 12, 1862 TO AUGUST 16, 1865, at 2 (undated) (on file with the Minnesota Historical Society) (combined diaries of brothers H.H. Danielson and John Danielson, members of Company G of the 7th Minnesota Volunteers states "Apr. 17 Friday. Indian raid on South Branch stations on Watonwan reported. Cos. G. and K march to Madelia Station. Lt. Col. Marshall commanding. Quit at Fort Cox").

102. *The Indian Campaign Opened*, *supra* note 91 ("[T]he attacking party were estimated at fifty in number. . ."); *The Sioux War! The Ball Opened. Soldiers Attacked by Indians Near Madelia*, MANKATO INDEP., Apr. 17, 1863 (claiming that the attack was initiated "by a force of Indians estimated at from fifty to one hundred").

103. Letter from Brigadier-Gen. Henry Sibley to St. Paul Press (Apr. 18, 1863), *reprinted in* ST. PAUL DAILY PRESS, Apr. 19, 1863.

104. Letter from Lieutenant Colonel William R. Marshall to Colonel Stephen Miller (Apr. 22, 1863), *reprinted in* ST. PAUL DAILY PRESS, Apr. 25, 1863.

claim that dozens of warriors were involved, which created hysteria among settlers in the area.<sup>105</sup>

On May 4, 1863, Lieutenant Governor Henry Swift wrote to Governor Ramsey to inform him of the Madelia attacks.<sup>106</sup> He noted that many settlers had left the area due to fear of future Indian attacks. Swift claimed that Minnesota Adjutant General Oscar Malmros was refusing to send arms to the area because Nicollet, Brown, and Renville counties had given the state “trouble in the past.” He asked that Governor Ramsey intervene and ensure that arms were distributed to settlers in these border areas.<sup>107</sup>

Governor Ramsey adopted Swift’s suggestions. He directed the Minnesota Adjutant General to place Brigadier General Munch on special duty.<sup>108</sup> Munch was to visit the counties of Nicollet, Blue Earth, Brown, and Renville to determine whether Indian raids were likely there and, if so, whether citizens in those counties were prepared to repel the attacks.<sup>109</sup> Munch was given access to the state’s cache of weapons and ammunition and instructed to distribute them to militia companies in those areas most likely to be attacked.<sup>110</sup> About two weeks later, Munch was directed to expand his activities to Sibley, McLeod, Meeker, and Stearns counties.<sup>111</sup>

Unfortunately, more deaths occurred around the same time that Munch was receiving his orders. In early May, three soldiers

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105. See, e.g., *Further Particulars of the Indian Attack*, *supra* note 92 (reprinting an April 17, 1863, report from Captain Hall of the Seventh Regiment claiming that there were “not less than fifty” Dakota involved in the attack); Letter from Captain Hall, Co. E, Seventh Minn. Volunteers, to Colonel Stephen Miller (Apr. 21, 1863) *reprinted in* ST. PAUL DAILY PRESS, Apr. 25, 1863 (reprinting another statement of Captain Hall claiming that “there must have been forty or fifty of the party of Indians”).

106. Letter from Henry Swift, Lieutenant Governor, to Alexander Ramsey, Governor (May 4, 1863), *microformed on* Ramsey Papers, roll 14, frame 223–26 (on file with the Minnesota Historical Society) (“[H]ostile Indians have made an attack on the Watonwan, have stolen property, and killed at least one settler near the mouth of the Cottonwood . . .”).

107. *Id.*

108. Letter from Minn. Adjutant-Gen. Oscar Malmros to Brigadier-Gen. Munch (May 7, 1863), *in* Emil Munch Papers (on file with the Minnesota Historical Society).

109. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 212 (Special Orders No. 15).

110. *Id.*

111. *Preparations for the Defense of the Frontier*, ST. PAUL DAILY PRESS, June 7, 1863 (describing Munch’s activities); Letter from Minn. Adjutant-Gen. Oscar Malmros to Brigadier-Gen. Munch (May 27, 1863), *in* Emil Munch Papers (on file with the Minnesota Historical Society).

and one civilian were killed on the Abercrombie trail in the vicinity of Fort Pomme de Terre.<sup>112</sup> Then, on May 19, 1863, Henry Basche<sup>113</sup> was shot and killed about two miles outside of the town of New Ulm, by a party of Dakota intent on stealing the horses Basche was using to plow his field.<sup>114</sup> Basche's six-year-old son escaped and ran to a neighbor's home.<sup>115</sup> The neighbor quickly traveled to New Ulm where a company of mounted rangers was based. The Rangers pursued but were unable to capture the Dakota responsible for the killing.<sup>116</sup>

The Sheriff of Brown County sent Governor Ramsey a hysterical letter following Basche's death, claiming that "Brown County is the most exposed part of the State being without protection!"<sup>117</sup> Even though the mounted rangers were admittedly based in New Ulm, the Sheriff complained that few soldiers were stationed in other portions of Brown County. He requested additional troops be sent to create a protective line to the west of settlers. If troops were not forthcoming, the Sheriff claimed that he would have to press militia companies into active service at the expense of the state.<sup>118</sup>

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112. The names of those who were killed are Adam Hair, Zenas Blackman, Comfort Luddington, and Silas Foot. DAHLIN, GRAVESTONES, *supra* note 18, at 78-79; *More Indian Murders. Four Persons Killed near Fort Abercrombie. Two of the Bodies Still Missing*, ST. PAUL DAILY PRESS, May 6, 1863; *The Murders near Pomme de Terre. Names of the Killed and Full Particulars. Bullets, Buck-Shot and Arrows Were Used*, ST. PAUL DAILY PRESS, May 13, 1863; see SATTERLEE, *supra* note 98, at 7, 8. These persons were likely killed by the same small group of Dakota responsible for the attacks on the Watonwan River since Lieutenant Colonel Marshall chased that group in a westward direction before giving up the pursuit. Letter from Lieutenant Colonel William R. Marshall to Colonel Stephen Miller, *supra* note 104 (indicating that Marshall followed the Dakota west towards Big Stone Lake, which is 50 miles south of Pomme de Terre).

113. His real name actually appears to have been Heinrich Bosche, but since Henry Basche is used in nearly all of the reports of the time, I have continued to do so. See DAHLIN, GRAVESTONES, *supra* note 18, at 65 (including photograph of gravestone).

114. 2 FOLWELL, *supra* note 7, at 281; *On the Way to Camp Pope. Particulars of the Recent Indian Murder Near New Ulm. Proceedings of the Indemnity Commission of St. Peter*, ST. PAUL DAILY PRESS, May 24, 1863; see Letter from George Jacobs, Sheriff of Brown County, to Alexander Ramsey, Governor (May 20, 1863), *microformed on Ramsey Papers*, roll 11A, frame 768 (on file with the Minnesota Historical Society).

115. Letter from George Jacobs, Sheriff of Brown Cnty., to Alexander Ramsey, Governor (May 20, 1863), *microformed on Ramsey Papers*, roll 11A, frame 768 (on file with the Minnesota Historical Society).

116. *See id.*

117. *Id.*

118. *Id.*

Governor Ramsey in turn wrote Henry Sibley. In a May 23, 1863, letter, the governor informed Sibley of Basche's death and noted that "this murder, with those at Madelia and those on Abercrombie trail, naturally cause alarm among the frontier settlers."<sup>119</sup> He asked Sibley for help,<sup>120</sup> but was met with a rather curt response.<sup>121</sup> Sibley had already heard about Basche's death and claimed that there was nothing more he could do:

While I deeply deplore these occasional raids, and have taken every precaution against them, it must be evident to you that along the line of frontier to be guarded it is physically impossible to protect every man on his farm by an armed force, or to prevent entirely the passage of two or three Indians at points where they may do mischief.<sup>122</sup>

Sibley believed that the ultimate solution was still the expedition he was preparing to make into the Dakota Territory to "sweep[] the country of these merciless redskins."<sup>123</sup> Until that time, he once again suggested that every settler arm himself.<sup>124</sup>

Ultimately, however, when Sibley left the state to pursue his expedition against the Dakota, he left approximately 1800 soldiers behind to defend frontier settlements in Minnesota.<sup>125</sup> Both he and Brigadier General Munch had independently come to the conclusion that a chain of infantry posts located west of the settlements and approximately ten to fifteen miles apart should be maintained at all times. Cavalry were assigned to patrol between these posts to ensure steady communication.<sup>126</sup>

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119. Letter from Governor Alexander Ramsey to Brigadier-Gen. Henry Sibley (May 23, 1863), in 2 MINNESOTA IN THE CIVIL AND INDIAN WARS, *supra* note 83, at 296.

120. *Id.* ("With some 5,000 troops in the state destined for this special purpose, I can but hope that [the necessity of ordering the militia to the western frontier] may be saved us. I should be pleased to hear from you as to what may be expected to be done, that I may communicate it to citizens on the frontier who have addressed me on the subject.").

121. *Id.* at 296-97.

122. *Id.* at 297.

123. *Id.*

124. *Id.*

125. Babcock, *supra* note 87, at 283-84; *Preparations for the Summer Campaign Against the Indians. The Disposition of the Troops Along the Frontier*, MANTORVILLE EXPRESS, June 5, 1863 (noting that 1852 troops including all of the Eighth Regiment and several companies of the Ninth Regiment would remain in Minnesota).

126. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 340-41; Babcock, *supra* note 87, at 282, 283.

Despite these efforts, small parties of Dakota still managed to wreak havoc on border areas. On June 7, 1863, a party believed to consist of between four and six Dakota men<sup>127</sup> apparently seized a number of horses near Silver Creek in Wright County.<sup>128</sup> When trackers confirmed that the individuals responsible were Indians, Lieutenant Nathaniel Tibbetts, who had temporary command of a detachment from the Eighth Minnesota Regiment stationed at Kingston, started in pursuit.<sup>129</sup>

The actual commanding officer for Company A was Captain John Cady. Cady had been in St. Paul to secure horses for his scouts and was on his way back to Kingston when the horse theft occurred.<sup>130</sup> While en route, he passed through Forest City and was informed of Tibbetts's pursuit of the Dakota. Cady hastily followed, and when he overtook Tibbetts, he resumed command of the soldiers.<sup>131</sup> Captain Cady and his men followed the trail until they reached Kandiyohi Lake. As soon as they saw the Dakota, Cady and his men opened fire, apparently wounding at least one man.<sup>132</sup> The Dakota returned fire, however, and Captain Cady was shot through the heart and killed instantly.<sup>133</sup>

While Captain Cady was just twenty-five years old and had only lived in Minnesota for a few years, he was well known and well respected both inside and outside the military.<sup>134</sup> He owned a large amount of real estate and was a leading businessman.<sup>135</sup> The details

127. See *The Indian War: Another Murder by the Savages*, WINONA DAILY REPUBLICAN, June 16, 1863 [hereinafter *The Indian War*].

128. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 341–42; *The Sioux Raid in Wright and Meeker Counties. Full Particulars of the Pursuit. How Captain Cady Was Killed*, ST. PAUL DAILY PRESS, June 14, 1863 [hereinafter *The Sioux Raid*].

129. *Another Indian Outrage*, MANTORVILLE EXPRESS, June 19, 1863; *The Sioux Raid*, *supra* note 128.

130. *Another Indian Murder! Captain Cady the Victim. He Was Shot Through the Head and Instantly Killed. The Indians Escaped*, ST. PAUL DAILY PRESS, June 13, 1863 [hereinafter *Another Indian Murder!*]; *Indians in Meeker County*, CHATFIELD DEMOCRAT, June 20, 1863.

131. *Another Indian Murder!*, *supra* note 130; *Indians in Meeker County*, *supra* note 130.

132. DAHLIN, GRAVESTONES, *supra* note 18, at 72; *Another Indian Outrage*, *supra* note 129; *The Indian War*, *supra* note 127.

133. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 341–42; *Indians in Meeker County*, *supra* note 130; *The Sioux Raid*, *supra* note 128.

134. LOUIS H. RODDIS, *THE INDIAN WARS OF MINNESOTA* 223 (1956); *Indians in Meeker County. Capt. Cady of the Eighth Regiment Killed*, ST. PAUL PIONEER (DAILY), June 13, 1863 [hereinafter *Capt. Cady of the Eighth Regiment Killed*].

135. Jared Benson, Letter to the Editor, *A Fuller Account Derived from an Eyewitness*, ST. PAUL DAILY PRESS, June 14, 1863; see *Capt. Cady of the Eighth Regiment*

of his death were published in every major newspaper in Minnesota<sup>136</sup> and helped to continue to fuel panic among settlers.

Reports of stolen cattle, horses, and other personal property increased in Wright County toward the latter part of June. These reports were characterized as thefts by Dakota, although there is little evidence to support this claim.<sup>137</sup> Then, the final straw occurred. On June 29, 1863, Amos Dustin, who had lived in Wright County for a number of years, was moving his family to a new piece of land in the southwestern part of the same county. He was traveling with his wife, their three children (a six-year-old girl and two sons, one four and the other two years old), and Dustin's widowed mother along a road not far from Howard Lake when his wagon was attacked by Dakota. Dustin, his mother, and his four-year-old son were killed quickly. Dustin's wife was mortally wounded in the attack, and she died several days later. The other two children managed to escape and were rescued by settlers.<sup>138</sup>

The attack was especially surprising because it occurred "in a comparatively thickly settled country" far from the frontier border and just forty miles west of the state capital.<sup>139</sup> Additionally, the victim's bodies laid exposed to the elements for two days before they were found, and the scene was especially grisly. Dustin's left hand was cut off and carried away, as were both of his mother's hands.<sup>140</sup> One newspaper asked: "Can't we get another expedition started out to hunt Indians?"<sup>141</sup>

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*Killed*, *supra* note 134; *Particulars of the Death of Captain Cady*, ST. ANTHONY FALLS, June 13, 1863.

136. See *Another Indian Murder. Captain Cady Killed*, FAIRBAULT CENT. REPUBLICAN, June 17, 1863; *Capt. Cady Killed*, ST. CLOUD DEMOCRAT, June 18, 1863; newspaper articles cited in *supra* notes 127–30, 134–35.

137. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 343.

138. *Id.* at 343–44; 2 FOLWELL, *supra* note 7, at 442–43.

139. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 344; RODDIS, *supra* note 134, at 223.

140. *The Indian War. A Horrible Scene on the Prairie. The Mutilated Bodies of the Dustin Family. Indian Camps in Hennepin County. A Party of Sioux Seen Within 6 Miles of Minneapolis. Volunteer Scouts for 60 Days Called Out. Twenty-Five Dollars Bounty for Sioux Scalps*, ST. PAUL DAILY PRESS, July 7, 1863.

141. *A Horrible Scene!*, FAIRBAULT CENT. REPUBLICAN, July 15, 1863.

## II. MINNESOTA'S BOUNTY SYSTEM

### A. *The Minnesota Adjutant General's Bounty Orders*

Governor Ramsey learned about the Dustin family murders on Friday, July 3, 1863.<sup>142</sup> While fewer than twenty civilians and military personnel were killed by Dakota raids in Minnesota during the spring and summer of 1863, the events of the previous fall were no doubt still fresh in the governor's mind. Offering a monetary reward for the killing of Dakota men appears to have been Governor Ramsey's idea. Ramsey's daily journal establishes that he summoned Minnesota Adjutant General, Oscar Malmros, and directed him to issue an order placing a bounty on Dakota men. His journal entry for July 3–4 states: "Had the Adj. Genl. [issue] an order inviting the service of 50 skilled trappers and sharp shooters & \$25 per scalp for scalps of male Sioux Inds."<sup>143</sup>

On July 4, 1863, Minnesota Adjutant General Oscar Malmros complied with Governor Ramsey's request by issuing General Orders No. 41. The order explained its purpose as follows:

The continued outrages of the Sioux Indians in the Big Woods, and in the rear of the U.S. out posts for the border defence, render it imperatively necessary that extraordinary measures should be adopted for the more complete protection of our frontier and the extirpation of the savage fiends who commit these outrages.<sup>144</sup>

The order provided for the creation of a corps of scouts that would "scour the Big Woods" for Sioux men. The corps was to remain active for sixty days and be composed of a captain and forty to sixty men, who were to be divided into squads of five or more men under the command of their own leader.<sup>145</sup> The scouts would be responsible for equipping and subsisting themselves, but they were

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142. Journal Entry of Governor Alexander Ramsey (July 3, 1863), *microformed on Ramsey Papers*, roll 39, frame 862 (on file with the Minnesota Historical Society) (noting that around midnight two messengers came to inform him that members of the Dustin family had been killed by the Dakota on June 29).

143. Journal Entry of Governor Alexander Ramsey (July 4, 1863), *microformed on Ramsey Papers*, roll 39, frame 862 (on file with the Minnesota Historical Society) (showing the journal entry on the page marked Saturday, July 4, but it is possible the entry was the remainder of the entry from July 3).

144. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 192 (General Orders No. 41).

145. *Id.*

to be paid \$1.50 per day and an additional \$25 for “each scalp of a male Sioux delivered to this office.”<sup>146</sup>

Brigadier General Munch traveled to different areas of the state to muster squads of volunteers into service and found an overwhelming response to General Orders No. 41. By July 24, 1863, the entire number of troops sought had been mustered in.<sup>147</sup> James Sturges of Wright County was appointed captain of the company of scouts. In that position, he was responsible for directing and coordinating the movements of the several squads the scouts had been divided into.<sup>148</sup>

General Orders No. 41 was reprinted and summarized in newspapers around the State of Minnesota.<sup>149</sup> For the most part, the order was lauded by local newspapers. The *St. Cloud Democrat*, for example, stated that General Orders No. 41 was “the most effective plan that has yet been taken to clear the State of the marauding devils and this corps will do more service than any monster expedition moving at its snail like pace.”<sup>150</sup> Not all of the features of the order, however, met with widespread approval. Many felt the provision requiring scalps be taken and presented to the Minnesota Adjutant General was barbaric.<sup>151</sup> Other newspapers objected to the

146. *Id.*

147. *Id.* at 214 (Special Orders No. 38); *id.* at 346; *id.* at 196–97 (notifying the public in General Orders No. 45 that the company of scouts was now filled and no more persons would be accepted for service).

148. *Id.* at 346.

149. *General Headquarters, State of Minnesota*, ST. PAUL DAILY PRESS, July 8, 1863; *General Orders No. 41*, CHATFIELD DEMOCRAT, July 18, 1863; *General Orders No. 41*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), July 10, 1863; *Scouts Wanted! \$25 for Sioux Scalps!* ST. CLOUD DEMOCRAT, July 9, 1863; *The Indian War*, WINONA DAILY REPUBLICAN, July 9, 1863; *The Indians*, MANTORVILLE EXPRESS, July 10, 1863; Untitled, ST. PAUL PIONEER (DAILY), July 7, 1863.

150. *Scouts Wanted! \$25 for Sioux Scalps!*, *supra* note 149.

151. For example, the *Winona Republican* published the following editorial in response to General Orders No. 41:

The offer of a bounty by Adjutant General Malmros of \$25 for every Sioux scalp delivered to him at his office in St. Paul, appears to us peculiarly barbarous, and unworthy of him as well as disgraceful to the State. No greater incentive to capture and slay the Sioux can possibly be given than that already before our people. It is a mockery and a shame that such an idea as this of a bounty for scalps should be even momentarily entertained, to say nothing of its being seriously adopted and acted upon. In the name of our common humanity, and for the sake of that reputation for enlightenment which our State claims, we protest against the bounty feature of Gen. Malmros' [sic] policy, and call upon the Executive to put an immediate stop to it.

*Bounty for Sioux Scalps*, ST. PAUL PIONEER (DAILY), July 16, 1863 (reprinted from the

fact that the order allowed any Dakota male to be killed, regardless of whether he was a child or whether he had protected white settlers during the Dakota War. The Chatfield Democrat stated:

Barbarism.— . . . Adjutant General Malmros, has issued an order offering a bounty of twenty five dollars for the scalp of any male Sioux. We look upon this proposition as a relic of the dark ages, barbarous, inhumane and unbecoming the enlightened age in which we live. . . . We have no objection to urge against killing the red devils who are guilty, but let the fair name of our State never be disgraced by paying a bounty to murder innocent children, even if they are Indians. God has made them what they are, and we have no right to take their lives unless forfeited by some act of their own. We hope the new Commander-in-Chief will at once revoke this disgraceful and objectionable portion of Order No. 41.<sup>152</sup>

Henry Swift, who had recently taken over the governorship due to Alexander Ramsey's election to the U.S. Senate, was apparently affected by public opinion. At his direction,<sup>153</sup> on July 20, 1863, Malmros issued General Orders No. 44, which amended the original bounty order. It limited application of the order to "hostile" Sioux warriors, rather than all Dakota men. Additionally, individuals seeking to claim the bounty were no longer required to provide a scalp. Instead, the order now stated that "satisfactory proof[s]" must be made at the Minnesota Adjutant General's office to substantiate the killing.<sup>154</sup>

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WINONA REPUBLICAN and characterized as a "copperhead" editorial).

152. *Barbarism*, CHATFIELD DEMOCRAT, July 18, 1863.

153. *News of Our Own State*, ROCHESTER REPUBLICAN, July 29, 1863 (noting that the scalp bounty "had a blood thirsty look—it merged too clearly on the barbarous—and when Gov. Swift discovered this to be the fact, he 'modified' the policy of the Adjutant-Gen. Malmros . . ."); see also *The Indian Expedition*, BURLINGTON HAWK EYE, July 25, 1863 ("The scalp bounty order . . . was issued during the interim between Gov. Ramsey's resignation and the arrival of Gov. Swift, so that we were virtually without a Governor. [Now that the order has been revoked, our] Eastern friends will therefore find their comments of barbarism unnecessary.").

154. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 195–96 (General Orders No. 44). This later provision—eliminating the requirement that scalps be provided to the Minnesota Adjutant General—was mocked by many Minnesotans. The *St. Cloud Democrat* noted that "the Adjutant General, in order to free himself of the clamor that some thin-skinned folks are making, leaves it optional with scouts whether they bring him the scalp or the entire Indian. Rather a dry joke from headquarters!" *New Features*, ST. CLOUD DEMOCRAT, July 23, 1863. It was favorably received by those out of state, however. For example, Wisconsin

General Orders No. 44 also contained a new provision. Citizens who were not mustered in as scouts (entitling them to daily pay) were now able to collect a reward of \$75 for killing any “hostile Sioux warrior.”<sup>155</sup> To collect such a reward, these “independent scouts” were required to register in advance with the Minnesota Adjutant General’s office. On the other hand, individuals actually mustered into the formal scout corps saw their pay increased to \$2 per day and they were still paid \$25 per hostile Dakota killed.<sup>156</sup> These new provisions were once again advertised statewide.<sup>157</sup>

On September 20, 1863, the service period for volunteer scouts ended.<sup>158</sup> The scouts were paid and disbanded. To ensure that there were still adequate numbers of persons willing to search for and kill hostile Dakota men, the Minnesota Adjutant General issued one final order. General Orders No. 60 increased the bounty for independent scouts from \$75 to \$200. The Winona Daily Republican claimed that “[t]his sum is more than the dead bodies of all the Indians east of the Red River are worth.”<sup>159</sup>

*B. Implementation of the Minnesota Adjutant General’s Orders and Payments Made*

Four individuals ultimately collected bounties under General Orders Nos. 41, 44, and 60 for killing Dakota men. They were paid a total of \$325 out of the State’s Military Contingency Fund, and those payments are catalogued in the State Auditor’s Warrant Register, the Annual Report of the Minnesota Adjutant General, and the Annual Report of the State Auditor. The official records, however, do not include any factual descriptions of these killings.

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newspapers emphasized that now only testimony of the killing of a Dakota male was required for payment of the bounty, not his scalp. Revoking the scalp bounty was “extraordinary evidence that there is a gleam of civilization left somewhere on the continent.” Untitled, DAILY MILWAUKEE NEWS, July 23, 1863.

155. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 196 (General Orders No. 44).

156. *Id.*

157. *General Headquarters, State of Minnesota*, ST. PAUL DAILY PRESS, July 21, 1863; *General Orders No. 44*, ST. PAUL PIONEER (DAILY), July 24, 1863; *The Indians*, CHATFIELD DEMOCRAT, Aug. 1, 1863; Untitled, ROCHESTER REPUBLICAN, Aug. 5, 1863.

158. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 217 (Special Orders No. 103).

159. *Id.* at 198 (General Orders No. 60); Untitled, WINONA DAILY REPUBLICAN, Sept. 25, 1863.

In an attempt to determine the surrounding circumstances, I began by reviewing newspaper articles during the relevant time periods and then attempted to corroborate the details contained in those articles through other sources. What follows is the first discussion of the circumstances surrounding the four bounty payments made by the Minnesota Adjutant General.

The first bounty payment was made on July 6, 1863, to an individual referred to in State records as “J. H. Bates,”<sup>160</sup> “Jas. H. Bates,”<sup>161</sup> and “G. H. Bates.”<sup>162</sup> On July 7, 1863, the *St. Paul Pioneer* notified its readers that J. W. Bates, Sheriff of McLeod County, had visited St. Paul with an Indian scalp in hand seeking the “authority to raise a company of Indian hunters.”<sup>163</sup> He only discovered the recent issuance of General Orders No. 41, which already authorized the establishment of a corps of paid scouts to kill Dakota men, upon reaching the city. But Bates happily collected the \$25 prize nonetheless.<sup>164</sup> The story that follows is the one he apparently told newspaper reporters while he was in St. Paul.

On July 4, 1863, a man named Harper was out in the woods with his son a few miles north of Hutchinson.<sup>165</sup> They came upon three Indians who were picking berries.<sup>166</sup> Harper fired his gun and hit one of the Indians in the hip.<sup>167</sup> The Indians returned fire, and there are conflicting accounts as to whether Harper was injured or not in the return fire.<sup>168</sup> Ultimately, however, the wounded Indian rose and Harper fired again, this time hitting him in the heart.<sup>169</sup> Harper succeeded in making his escape through the brush to Fort

160. Minn. Office of the State Auditor, Warrant Register (July 6, 1863) (on file with the Minnesota Historical Society, restricted archives collection) (J.H. Bates).

161. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 223 (listing “Jas. H. Bates” as having been paid \$25 on July 6, 1863, and including the description: “Bounty for Scalp”).

162. ANNUAL REPORT OF THE STATE AUDITOR, *reprinted in* 1863 MINN. EXEC. DOCS., *supra* note 11, at 405, 470 (listing July 6th as the date \$25 was paid “[t]o G. H. Bates, bounty for Sioux warrior scalp”).

163. *Indian Killed Near Hutchinson*, ST. PAUL PIONEER, July 7, 1863.

164. *The Indian War*, *supra* note 149; *An Indian Killed*, FAIRBAULT CENT. REPUBLICAN, July 15, 1863.

165. *Indian Killed Near Hutchinson*, *supra* note 163; *The Indian War*, *supra* note 149.

166. *Indian Killed Near Hutchinson*, *supra* note 163.

167. *Id.*

168. *Compare Indian Killed Near Hutchinson*, *supra* note 163 (noting that because Harper was shielded by a tree, he was not harmed), *with An Indian Killed*, *supra* note 164 (noting that the white settler made “his escape with a severe wound from their [Indian] fire”).

169. *Indian Killed Near Hutchinson*, *supra* note 163.

Hooker or Glencoe (depending on the account), where the cavalry started in pursuit of the Indians, but to no avail. They did, however, find the body of the dead Indian, and they took his scalp.<sup>170</sup>

It was fairly simple to determine that at the time, a J. W. Bates was indeed the Sheriff of McLeod County. He had only assumed that post in April 1863 due to the untimely death of the prior sheriff.<sup>171</sup> Previously, the 1860 census establishes that Joseph W. Bates resided in Glencoe (within McLeod County) with his wife and two young children and worked as a “hotel keeper.”<sup>172</sup> While the newspaper accounts and other sources help to confirm that Sheriff Joseph Bates is most likely the individual who collected the \$25 bounty payment, they incorrectly report the person who was directly responsible for shooting the Dakota man. It was not a man named Harper, but rather, Lamson. And this was not just any Dakota man; it was Taoyateduta (Little Crow) himself.

No other conclusion seems reasonable. There were no Harpers living in McLeod County at the time of the 1860 census, and no source other than these newspaper accounts refer to anyone by the name of Harper shooting a Dakota man in the summer of 1863.<sup>173</sup> Conversely, Taoyateduta’s death is well documented. It occurred at the same approximate location and date. Most importantly, the circumstances surrounding the death of Taoyateduta closely parallel the facts that Sheriff Bates provided to these newspaper reporters.

On July 3, 1863, Nathan Lamson was out hunting deer with his son, Chauncey, when they came upon two Dakota men picking raspberries a few miles north of Hutchinson in Meeker County.<sup>174</sup> Although the Lamsons did not know this at the time, the Dakota they saw were Taoyateduta and his teenage son, Wowinapa.

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170. *An Indian Killed*, *supra* note 164.

171. HISTORY OF MCLEOD COUNTY MINNESOTA 231 (Franklyn Curtiss-Wedge & Return I. Holcombe eds., 1917) (stating that “J. W. Bates, of Glencoe, was duly appointed to fill the vacancy for the remainder of the term” of sheriff, on April 5, 1863).

172. *Id.* at 107.

173. *Id.* at 81–108 (1860 census).

174. *Great Excitement in McLeod County. The Sioux Marauders in the Big Woods. A Peddler Chased by the Red Devils. Two Indians Surprised, and One Killed, by Mr. Lamson and His Son. How That Scalp Was Taken! Highly Interesting Details. Particulars of the Murder of James McGannon*, ST. PAUL DAILY PRESS, July 10, 1863 [hereinafter *Two Indians Surprised*]; Walter Trenerry, *The Shooting of Little Crow: Heroism or Murder?*, MINN. HISTORY, Sept. 1962, at 150 [hereinafter Trenerry, *The Shooting of Little Crow*].

Without warning or any attempt to determine if the men were hostile,<sup>175</sup> Nathan Lamson immediately opened fire, striking Taoyateduta in the hip.<sup>176</sup> Then, both sides fired a volley.<sup>177</sup> Nathan Lamson was shot in the left shoulder, and Taoyateduta was shot fatally in the chest, this time by Chauncey.<sup>178</sup>

Wowinapa remained with his father until he passed away.<sup>179</sup> In accordance with Dakota traditions, Wowinapa then placed new moccasins on his father's feet, covered his body in a blanket, straightened his legs, and left swiftly.<sup>180</sup> Chauncey Lamson, believing that his father had also been killed, ran to the town of Hutchinson to sound the alarm.<sup>181</sup> The next morning, a group of soldiers and civilians found Taoyateduta's body, but they did not

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175. *Two Indians Surprised*, *supra* note 174 (subtitled the article section "Indians caught napping," and discussing how Nathan Lamson crept undiscovered toward the Dakota men until he had a close and clean shot). While scholars frequently blame Taoyateduta for the attacks on Minnesota settlers and soldiers during the spring and early summer, there is no evidence that he was involved. Taoyateduta did not return to Minnesota until the middle of June 1863, which makes it impossible for him to have been involved in the deaths of Henry Basche, John Cady, and others killed in April, May, and early June. See MARK DIEDRICH, *LITTLE CROW AND THE DAKOTA WAR* 246 (2006). When he did return, he was traveling alone with his son, not with the group of six Dakota who killed the Dustin family. *Id.* The one death that Taoyateduta could have played a role in was that of James McGannon, a settler who was killed near Union Lake on the border of Wright and Meeker Counties on July 1, 1863. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 345. At his death, Taoyateduta had McGannon's jacket in his possession. *Indian News and Rumors*, ST. PETER TRIB., July 11, 1863. Wowinape later told military officials that they had returned to Minnesota only to gather horses and that the jacket was given to his father by Heyoka (also known as Hi-uka), a relative of Taoyateduta's through marriage, who had killed McGannon when they were traveling separately. *Little Crow's Death Confirmed*, CHATFIELD DEMOCRAT, Aug. 22, 1863. It is possible that Wowinape fabricated this story in an attempt to absolve himself of any responsibility for McGannon's death, but that seems unlikely given the consistent story that Wowinape told not only military officials, but other Dakota. See, e.g., *Proceedings of a Military Commission Which Convened at Fort Abercrombie* (Aug. 22, 1863), in U.S. ARMY, MILITARY COMM'N, *SIoux WAR TRIALS 1862* (1862) (testimony of Joseph Demairais) [hereinafter WOWNAPE'S TRIAL TRANSCRIPT]. But see DAHLIN, *GRAVESTONES*, *supra* note 18, at 77 ("McGannon was probably killed by Little Crow or the small party of Dakota who were with Little Crow.").

176. *How that Indian Was Killed*, ST. CLOUD DEMOCRAT, July 16, 1863.

177. *Id.*

178. RODDIS, *supra* note 134, at 226; WOWNAPE'S TRIAL TRANSCRIPT, *supra* note 175 (testimony of William Quinn and Joseph Demaraist Jr.); *Two Indians Surprised*, *supra* note 174.

179. Trenerry, *The Shooting of Little Crow*, *supra* note 174, at 150-51.

180. *Id.* at 150; DIEDRICH, *supra* note 175, at 247.

181. HISTORY OF MCLEOD COUNTY MINNESOTA, *supra* note 171, at 175.

recognize him as the famous chief.<sup>182</sup> They scalped him and brought him back to town where his corpse was mutilated and displayed for the Fourth of July festivities.<sup>183</sup> While the unique deformities on his arms and teeth made some townspersons question the man's identity,<sup>184</sup> it was not until Wowinapa was captured weeks later near what is now Devils Lake, North Dakota, that Taoyateduta's death was confirmed.<sup>185</sup>

This interpretation—that J.W. Bates was Sherriff Bates, who collected a \$25 bounty for Taoyateduta's scalp, not the scalp of some unknown Dakota—is also supported by other contemporaneous newspaper accounts. In August 1863, when it was finally confirmed that the Lamsons had killed Taoyateduta himself, several newspapers asserted that it was “poetic justice” that the first scalp upon which the bounty was claimed later turned out to be the chief himself.<sup>186</sup> It also provides an explanation for how the scalp of Taoyateduta reached the Minnesota Adjutant General's office, where it was preserved and decades later, provided to the Minnesota Historical Society.<sup>187</sup>

Conversely, many prominent scholars have asserted that Chauncey Lamson himself brought Taoyateduta's scalp to the Minnesota Adjutant General and claimed a \$75 bounty payment for doing so.<sup>188</sup> But neither the Annual Report of the Minnesota

182. Trenergy, *The Shooting of Little Crow*, *supra* note 174, at 150–51.

183. *Id.* For example, when the body of Taoyateduta arrived in Hutchinson on the Fourth of July, children filled the ears and nostrils with firecrackers. *Little Crow, The Sioux Chief: How the Famous Warrior Met His Death*. Historical Society Relics, *microformed on Minnesota Historical Society Scrapbook*, vol. 38, roll 13, frame 71. The body was buried in a shallow grave, but a cavalry officer who came to the town not long afterwards dug up the grave and cut off Taoyateduta's head. *Id.* Dr. John Benjamin took the head home with him and placed it in a large dinner-pot filled with a solution of lime. *The Body of Little Crow*, HUTCHINSON LEADER, Jan. 6, 1893. In mid-August, the head was retrieved by Captain John W. Bond at the request of Colonel Stevens, who wanted to present it to the Minnesota Historical Society. Letter from Captain Bond to Colonel Miller (Aug. 16, 1863), *reprinted in Little Crow. Exhumation of His Body. Letter from Capt. J. W. Bond*, ST. PAUL PIONEER (DAILY), Aug. 20, 1863.

184. See RODDIS, *supra* note 134, at 227.

185. *Id.*

186. See, e.g., *Death of Little Crow Confirmed*, HASTINGS CONSERVER, Aug. 18, 1863; *The Indian Expeditions—Death of Little Crow Confirmed*, WINONA DAILY REPUBLICAN, Aug. 14, 1863.

187. See, e.g., ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 225 (entry for \$5 payment on August 31 to a Julius Schmidt for “[t]anning Indian scalp”).

188. See, e.g., ANDERSON, LITTLE CROW, *supra* note 1, at 8 (claiming that Taoyateduta was scalped because Nathan Lamson “wanted the trophy in order to

Adjutant General nor the Annual Report of the State Auditor show any payment being made to either Chauncey or Nathan Lamson in 1863. This widely reported mistake appears to have come from errors in early newspaper accounts. For example, on July 16, 1863, long before anyone knew that the Dakota man killed was Taoyateduta, the *St. Cloud Democrat* stated that the Lamsons had claimed the bounty from the Minnesota Adjutant General's office.<sup>189</sup> The Lamsons corrected these inaccuracies when they were interviewed by reporters following the confirmation that the man they shot was indeed the famous chief.<sup>190</sup> But that correction did not prevent the inaccuracy from proliferating.<sup>191</sup>

In actuality, neither Sheriff Bates nor the Lamsons should have received a bounty payment from the Minnesota Adjutant General. Taoyateduta was shot the day before General Orders No. 41 was issued; regardless, only mustered-in members of the volunteer scouts were to receive bounty payments under that order.<sup>192</sup> No person with the surname of Bates, Harper, or Lamson is listed on the muster rolls for scouts included in the Adjutant General's

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collect the seventy-five-dollars-a-head offered by the state for the scalps of hostile [Dakota]," even though that particular bounty order—General Orders No. 44—was not issued until several weeks after the Chief's death, and despite the fact that the Lamsons could not have even known about the first bounty order (General Orders No. 41), since it was issued the same day that Taoyateduta was killed); CARLEY, *supra* note 2, at 86 (claiming, without citation, that "[s]hortly after Wowinapa identified his father's body, Chauncey collected a bounty of seventy-five dollars from the state for the Sioux chief's scalp"); TRENERRY, *The Shooting of Little Crow*, *supra* note 174, at 151, 153 (claiming that Chauncey Lamson collected the \$75 bounty from the State); see also BERG, *supra* note 9, at 299 (claiming that the Lamsons were paid a \$25 bounty).

189. *How That Indian Was Killed*, *supra* note 176.

190. See *Untitled*, ST. PAUL DAILY PRESS, Aug. 26, 1863 (calling for the legislature to compensate the Lamsons for killing Taoyateduta, noting that "[t]he State bounty for killing hostile Sioux is a very inadequate reward for so important a service as the killing of Little Crow, and even that, we learn, Mr. Lampson [sic] has not applied for").

191. See, e.g., CONDENSED HISTORY OF MEEKER COUNTY 1855–1939 28 (Frank B. Lamson ed. 1939) (claiming that "[t]he scalp of Little Crow was delivered by Nathan Lamson to the Adjutant General of the state and he received the state bounty of \$75"); *Little Crow, The Sioux Chief: How the Famous Warrior Met His Death*, *supra* note 183 ("Chauncey Lamson, who killed the Sioux chieftain in the brush north of Hutchinson, either took or sent the scalp to the adjutant general of the state, to claim the state bounty of \$75 which was offered at that time for every dead male Indian").

192. It was not until July 20, 1863, that the Minnesota Adjutant General issued General Order 44, which permitted private citizens, not otherwise part of the volunteer scouts, to receive a \$75 bounty payment.

Annual Report for 1863<sup>193</sup> or earlier handwritten muster rolls.<sup>194</sup> Despite this, the Minnesota Adjutant General's records acknowledged receipt of "one male Sioux scalp" by Mr. Bates and asserted that he was entitled to receipt of \$25 because he was part of the "military contingent."<sup>195</sup>

The second killing occurred on July 16, 1863.<sup>196</sup> The day before, two men cutting hay near the town of Waterville in Le Sueur County spotted three Indians riding westward.<sup>197</sup> Horses had been stolen in Rice County, and it was immediately assumed that these Indians were the responsible parties.<sup>198</sup> Two squads of independent scouts were formed to pursue the Dakota.<sup>199</sup> One squad cut off their retreat southward (toward the Winnebago reservation) while the other took to the trail to follow them. The latter squad was led by John C. Davis, an experienced hunter and former Indian trader.<sup>200</sup>

The three Dakota were pursued until 11:00 a.m. on July 16 when they were overtaken in a thicket on the border of Scotch Lake, in the vicinity of Cleveland in Le Sueur County.<sup>201</sup> Davis's squad fired on the Dakota, who then returned fire as they were fleeing the area. A search discovered a badly wounded Indian lying behind a tree.<sup>202</sup> The scouts shot him an additional six times, killing him.<sup>203</sup> One author states that "[t]he wounded Indian was

193. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 228–29.

194. Indian Expedition to the Southern Frontier, Minnesota Adjutant General Files (on file with the Minnesota Historical Society) (early draft of muster rolls for bounty scouts); Muster-In Roll of Captain Sturges, Adjutant-Gen., Military Service Records (on file with the Minnesota Historical Society).

195. See Minnesota Office of the State Auditor, Warrants and Supporting Papers (July 6, 1863) (on file with the Minnesota Historical Society, restricted archives collection).

196. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 348–49.

197. *Id.*; 2 FOLWELL, *supra* note 7, at 288; see also *Indians in Dakota County*, FAIRBAULT CENT. REPUBLICAN, July 22, 1863 (containing a seemingly more fanciful version of events where three men cutting hay were surprised by two Dakota men who sprang from the grass and pushed them into the river before fleeing themselves).

198. See 2 FOLWELL, *supra* note 7, at 288.

199. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 348–49.

200. *Id.*

201. *Id.*

202. 2 FOLWELL, *supra* note 7, at 288; *Indian Chase in LeSueur County*, WINONA DAILY REPUBLICAN, July 22, 1863 (reprinted from the MANKATO RECORD, July 18, 1863).

203. 2 FOLWELL, *supra* note 7, at 288. The only information provided about the Dakota man who died in the attack was that he was between twenty-five and thirty years old and not very tall. *Late Indian News. Indians at Bloomington. They*

dispatched in cold blood being worth much more dead than alive to the pursuers.”<sup>204</sup> One other Dakota was severely wounded,<sup>205</sup> and it was believed at the time that he went into Scotch Lake to die.<sup>206</sup> Another Dakota succeeded in escaping, although he lost his horse, gun, and blanket.<sup>207</sup> The attacking party of scouts escaped without any casualties,<sup>208</sup> and three horses that had supposedly been stolen were recovered.<sup>209</sup> John C. Davis was paid \$25 for the killing on October 9, 1863.<sup>210</sup>

The next bounty payment was made to William Allen on August 7, 1863, apparently<sup>211</sup> for killing a Dakota man on July 21,

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*Endeavor to Drown a Man in the River. An Exciting Hunt in Le Seuer County. One Indian Killed and Another Mortally Wounded*, ST. CLOUD DEMOCRAT, July 23, 1863 [hereinafter *One Indian Killed*].

204. RODDIS, *supra* note 134, at 231.

205. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 348–49.

206. See *Indian Chase in LeSeuer County*, *supra* note 202; *One Indian Killed*, *supra* note 203; see also 2 FOLWELL, *supra* note 7, at 288; *Another Indian Sent Home*, FAIRBAULT CENT. REPUBLICAN, July 22, 1863.

207. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 348–49.

208. *Id.*

209. 2 FOLWELL, *supra* note 7, at 288; RODDIS, *supra* note 134, at 231.

210. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 226 (listing payment); Minn. Office of the State Auditor, Warrants and Supporting Papers (1863) (on file with the Minnesota Historical Society, restricted archives collection). At least one newspaper account claimed that Davis had shot the wounded Dakota man, and that the dead Indian had been killed by T.M. Perry, Jr. *Indians*, ST. PETER TRIB., July 22, 1863. Another claimed that the scalp was given to the owner of a horse that was killed when the Dakota were being pursued, and he claimed the state bounty. *Indian Chase in LeSeuer County*, *supra* note 202.

211. This conclusion is not without doubt. The facts that follow in the text above were drawn from one newspaper article. That article was reprinted in other papers, but those papers do not appear to have conducted any independent investigation and therefore do nothing to bolster the original article’s credibility. See, e.g., *Indian News*, MANKATO UNION, July 24, 1863 (reprint); *Another Indian Killed*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), Aug. 14, 1863 (stating only that “[a] rumor has reached Cleveland, Le Sueur county, that another Indian had been killed near Faribault two or three days ago. He was supposed to be the one who escaped from the Le Sueur settlers during the late pursuit”).

There was one other “Allen” reported in the newspapers as having been involved in the killing of a Dakota during this time period. Two Indians were reported to have been killed by Captain D.W. Allen’s company in late July. The Indians were found “taking a quiet nap” when they were fired upon by Captain Allen’s men. Both of them were killed, despite one claiming that he was a “good Indian” just prior to his death. *Handsomely Done*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), Aug. 7, 1863; see also J.F.B., Letter to the Editors, MINNEAPOLIS STATE ATLAS, Aug. 12, 1863 (containing a different version of events but still concluding that Captain Allen’s company killed two Dakota men). Captain Allen was later seen with two scalps dangling from his tent. I considered these events not to be the ones underlying the bounty payment made on August 7, 1863, because

1863.<sup>212</sup> A gentleman referred to in newspaper accounts only as Mr. Bliss was out looking for his cattle early in the morning near the city of Cleveland, Minnesota, when he discovered an Indian lying down near a log a few feet away from him. Bliss was not armed, so he returned to Cleveland and gave the alarm.<sup>213</sup> Several citizens converged on the area and the Dakota man was found in the same location, still lying prostrate. A settler shot the Dakota man in the knee. This brought him up into a sitting position. The Indian fired a shot but was killed by several shots fired by the Rev. Mr. Allen of Cleveland. Several other settlers also shot the man, so that when his body was eventually examined, it was “completely riddled with bullets.”<sup>214</sup> Directly under the shoulder blade was an old bullet wound, and this led those present to conclude that this was one of the Indians who had previously been injured in the fight at Scotch Lake.<sup>215</sup>

The Dakota man was scalped. The only newspaper account of this event noted that “the people were no more excited over the event than if a rattle-snake had been killed.”<sup>216</sup> Allen was paid \$75 for providing the scalp to the Minnesota Adjutant General’s office, presumably because he was an “independent scout” rather than a member of the volunteer corps.<sup>217</sup> By this time, General Orders No. 44 was in effect, which authorized bounty payments only for “hostile Sioux warrior[s].” No documentation appears in the

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(1) Captain Allen’s first name does not match the first name of the person who collected the bounty, and (2) a \$75 bounty payment would only have been made to an “independent scout” pursuant to General Orders No. 44, not an individual already serving in the military. Since first names were often incorrectly reported, and as the other bounty payments were not made in accordance with the actual terms of General Orders Nos. 41, 44, and 60, this assumption may be incorrect.

212. *Latest from Le Sueur*, ST. PETER TRIB., July 22, 1863.

213. *Id.*

214. *Id.*

215. *Id.*; see also ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 348–49 (noting that the Dakota man who had been shot at Scotch Lake was discovered and killed a few days later).

216. *Latest from Le Sueur*, *supra* note 212.

217. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 224; Minnesota Office of the State Auditor, Warrants and Supporting Papers (July 6, 1863) (on file with the Minnesota Historical Society, restricted archives collection). Allen was paid via two warrants, one for \$25 and the other for \$50. Both warrants were issued on the same day. State Auditor, Warrants and Supporting Papers, Minnesota Archives Collections, Minnesota Historical Society (two warrants and one receipt.). One could surmise that the initial paperwork was completed for a \$25 payment until it was realized that Allen was not part of the volunteer corps and was entitled to \$75 via General Orders No. 44. *Id.*

remaining government files that could explain how a wounded man lying on the ground was determined to be hostile.

The fourth and final killing that resulted in a bounty payment occurred on November 26, 1863. Simon and Oscar Horner were hunting and trapping in the Kandiyohi Lake region, about sixty miles west of Glencoe, when they saw a party of three Indians, but they did not pursue them.<sup>218</sup> The next day, they went out in search of the party and saw an Indian near Long Lake, about six miles northwest of the Big Kandiyohi Lake.<sup>219</sup> The Indian saw them and tried to flee, but he was shot by Oscar Horner and died. Horner scalped the dead Indian.<sup>220</sup> He presented the scalp at the Minnesota Adjutant General's office in February 1864 for payment,<sup>221</sup> but because there was insufficient money in the military contingent fund, he was not immediately paid.<sup>222</sup> He eventually received the \$200 bounty payment under General Orders No. 60 on February 15, 1865.<sup>223</sup>

Press reports indicate that the Indian killed was unlikely to have been "hostile." The *St. Paul Pioneer* noted:

It is believed by the scouts that the Indians seen by the Horners were making their way to the Fort, with the intention of surrendering themselves to the authorities. Starvation, surrender, or fighting, are believed to be the alternatives of the Sioux since the destruction of their winter supplies on the Missouri. The Kandiyohi region has always been a favorite hunting ground with them, and it is not improbable that we may hear during the winter of similar adventures in that vicinity to the one above referred to.<sup>224</sup>

In fact, there were several reports that the Indian killed was actually one of General Sibley's scouts. Sibley had given the scouts who served his expedition permission to hunt from the Yellow Medicine to certain mounds on the Coteau Prairie. A small party of Dakota

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218. *Sioux in the Kandiyohi Region*, ST. PAUL PIONEER (DAILY), Dec. 6, 1863.

219. *Id.*

220. *Id.*

221. *Scalp Bounty Paid*, DAILY MILWAUKEE NEWS, Feb. 11, 1864, at 2.

222. ANNUAL REPORT OF THE ADJUTANT GENERAL, *reprinted in* EXECUTIVE DOCUMENTS OF THE STATE OF MINNESOTA FOR THE YEAR 1865, at 8, 285 (1866) [hereinafter 1865 MINN. EXEC. DOCS.].

223. *Id.*

224. *Sioux in the Kandiyohi Region*, ST. PAUL PIONEER (DAILY), Dec. 6, 1863.

scouts was out hunting and strayed beyond this area. The man shot by Horner may have been one of these Indians.<sup>225</sup>

The four incidents described above are the only times that the state paid out a bounty under General Orders No. 41, 44, or 60 even though these orders remained on the books for several years. Perhaps this explains why white Minnesotans quickly forgot this ugly past. By 1912, newspapers were incredulous when proof of the Minnesota Adjutant General's bounty orders resurfaced.<sup>226</sup> The Dakota never forgot these orders, however, and continue to mention them to this day.

C. *The Minnesota Legislature's Involvement: A Bounty for Killing Taoyateduta*

While many scholars have placed blame on the Minnesota Legislature, in truth, that body appears to bear no responsibility for the creation of the bounty system. In 1863, the Minnesota Legislature ended its session on March 6, long before the bounty system was put into place.<sup>227</sup> In December 1863, Minnesota Adjutant General Oscar Malmros finally informed that body of the bounty orders he had issued, noting that since the Dakota "seemed to have taken possession of the timber, throughout an extensive region of the country," and "[p]erceiving that something in the matter should speedily be done . . . it was in your absence, and with a hope that the act would meet with your subsequent approval, that I issued on the 4th day of July, General Orders, No. 41."<sup>228</sup> It would have been common practice at the time to submit a bill during the

225. *One of Sibley's Scouts Killed*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), Dec. 11, 1863. *But see The Kandiyohi Indian Again*, ST. PAUL PIONEER (DAILY), Dec. 6, 1863 (claiming that the Indian killed was not one of Sibley's scouts).

226. *Nearly Wins Bet State Pays for Indian Scalps: Attorney General Finds Reward of \$25 Was Offered by Governor Not Many Years Ago*, ST. PAUL PIONEER PRESS, Feb. 3, 1912, *microformed on* Minnesota Historical Society Scrapbook, vol. 41, roll 14, frame 145; *State's Head Price \$25, Offered in Sioux Days, Scalp Hunters at \$1.50 Per Day, They to Clothe, Arm and Feed Themselves*, ST. PAUL DISPATCH, May 17, 1912, *microformed on* Minnesota Historical Society Scrapbook, vol. 66, roll 22, frame 65.

227. *See* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE FIFTH SESSION OF THE LEGISLATURE OF THE STATE OF MINNESOTA (1863) (noting that the legislative session ran from January 6 through March 6, 1863). In January 1863, a bill was introduced by Minnesota Representative John Brisbin entitled "An Act to Outlaw Indians." A copy of the bill no longer exists, and therefore, it is impossible to tell whether it was a removal bill, a precursor to the bounty system, or contained another proposal. While the bill was twice referred to House committees, it never passed that body and it was never introduced in the Senate. *Id.* at 31, 42, 47.

228. ANNUAL REPORT OF THE ADJUTANT GENERAL, *supra* note 11, at 346.

next legislative session seeking ratification of these actions. Yet no such bill was introduced in the Minnesota Legislature during the 1864 legislative session.<sup>229</sup>

While the Minnesota Legislature played no role in the creation of the bounty system, it did issue one reward of its own accord. As discussed in Part II.B above, the Lamsons had not received any monetary reward for killing Taoyateduta. Governor Swift believed this to be unjust, and in his annual message to the Minnesota Legislature in 1864, he called upon that body to rectify this situation.<sup>230</sup> On January 13, 1864, Governor Stephen Miller, in his inaugural address to the Minnesota Legislature, also made clear his belief that Nathan and Chauncey Lamson should be rewarded for their “meritorious service,” suggesting that “such provision be made for them, as may comport with the dignity of the State.”<sup>231</sup>

A bill was drafted almost immediately by Representative Henry Hill,<sup>232</sup> and it was read in the Minnesota House of Representatives for the first time on January 21, 1864.<sup>233</sup> As originally introduced, the bill would have authorized a \$1500 payment to the Lamsons for killing Taoyateduta, of which \$1000 was to go to Nathan Lamson and \$500 to Chauncey Lamson.<sup>234</sup> The House, however, reduced the proposed payments to \$500 and \$300 respectively,<sup>235</sup> and with this alteration, the bill passed that chamber by a vote of twenty-four for and fourteen against.<sup>236</sup>

When the Senate took up the bill, it proved to be slightly more contentious. After two attempts,<sup>237</sup> a bill passed that body on

229. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE SIXTH SESSION OF THE LEGISLATURE OF THE STATE OF MINNESOTA 369–85 (1864) (index listing all House and Senate bills) [hereinafter 1864 JOURNAL OF THE MINN. HOUSE].

230. Annual Message of Governor Swift (Jan. 11, 1864), in 1863 MINN. EXEC. DOCS., *supra* note 11, at 3, 21.

231. Inaugural Address of Governor Miller (Jan. 13, 1864), in 1863 MINN. EXEC. DOCS., *supra* note 11, at 10.

232. Hill was elected from House District 6, which included Meeker County, where Taoyateduta was killed by the Lamsons. Trenerry, *The Shooting of Little Crow*, *supra* note 174, at 150; see Hill, Henry, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/legdb/fulldetail.aspx?id=13338> (last visited Dec. 21, 2013).

233. See 1864 JOURNAL OF THE MINN. HOUSE, *supra* note 229, at 49; see also *id.*, at 55, 59, 62 (tracking history of the bill from the Committee on Federal Relations to the Committee of the Whole).

234. H.F. 25, 6th Leg. (Minn. 1864).

235. *Id.* (markups directly on bill).

236. 1864 JOURNAL OF THE MINN. HOUSE, *supra* note 229, at 74–75.

237. At first, there were six for and eleven against, but due to an unknown reason, a later vote that same day produced thirteen for and six against. JOURNAL

February 18, which compensated Nathan Lamson with \$500 and eliminated any payment for Chauncey<sup>238</sup> even though it was Chauncey who had fired the fatal shot. Two days later, the House voted to concur in the Senate amendments,<sup>239</sup> and on February 24, 1864, the bill was signed into law by Governor Stephen Miller. Stylized as “Act for the relief of Nathan Lamson,” it indicated that the payment was being made for killing Taoyateduta and “thereby rendering great service to the State.”<sup>240</sup>

#### D. *Blue Earth County’s Bounty Order*

The Minnesota bounty system was not only comprised of state-wide government initiatives. At least one local government—Blue Earth County—implemented its own bounty system in the years that followed. The triggering event occurred on May 2, 1865, when a small group of Dakota attacked the family of Andrew Jewett near Garden City in Blue Earth County on the former Winnebago Reservation.<sup>241</sup> Five people were killed in the attack: Andrew Jewett, his wife, both of his parents, and a hired hand. The family’s two-year-old son was injured but survived.<sup>242</sup>

This attack was in no way related to the war between the Dakota and the United States. Instead, it appears to have been a garden-variety murder perpetrated for money.<sup>243</sup> The mastermind behind the murders was a mixed-blood man named John

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OF THE SENATE OF THE SIXTH SESSION OF THE LEGISLATURE OF THE STATE OF MINNESOTA 169, 172 (1864).

238. *Id.*; H.F. No. 25.

239. 1864 JOURNAL OF THE MINN. HOUSE, *supra* note 229, at 202.

240. Act of Feb. 24, 1864, ch. 84, 1864 Minn. Laws 352.

241. Annual Message of Governor Miller, in 1865 MINN. EXEC. DOCS., *supra* note 222, at 3, 24; *Startling News!! More Indian Murders!! A Whole Family Murdered on the Winnebago Reservation*, ST. PAUL PIONEER (DAILY), May 2, 1865 [hereinafter *Startling News*]. Prior to 1864, Garden City was known as the town of Watonwan. HUGHES, *supra* note 93, at 143.

242. Annual Message of Governor Miller, *supra* note 241, at 24; *Startling News*, *supra* note 241; see also *The Indian Murders in Blue Earth County. The Particulars*, ST. PAUL PIONEER (DAILY), May 5, 1865 (providing details of the murders). The scene was disturbing. Family members were “shot and hacked to death, their bodies scattered in and around the family cabin.” Chuck Lewis, *Frontier Fears: The Clash of Dakotas and Whites in the Newspapers of Mankato, Minnesota, 1863–1865*, 5 MINN. HERITAGE 36, 49 (2012).

243. See, e.g., *Startling News*, *supra* note 241 (noting that the “Jewetts pockets, and a box or chest in the house were rifled, [indicating that] the murderers [were] probably searching for money”).

Campbell.<sup>244</sup> Campbell had served in a Civil War cavalry battalion since September 1861 and was deployed in the southern United States when the U.S.-Dakota War began the following year.<sup>245</sup> In the spring of 1863, Campbell overheard one of his fellow soldiers mention that he had sent \$500 to Andrew Jewett to purchase a Minnesota homestead for him.<sup>246</sup> Campbell deserted his post shortly thereafter, intending to get the money.<sup>247</sup>

After murdering the Jewett family, Campbell split from the rest of his group and began walking towards Mankato.<sup>248</sup> While en route, he was stopped by a local citizen and taken to the county jail for questioning.<sup>249</sup> That night, a few Mankato citizens were allowed into the jail, where they attempted to torture a confession out of Campbell without success.<sup>250</sup> They did, however, find in his possession items that were later confirmed to be the property of the Jewett family.<sup>251</sup> Later on, a roll of money was found in Campbell's jail cell that was believed to be taken from the Jewett family.<sup>252</sup>

By the morning of May 3, 1865, hundreds of people had gathered outside the jail, threatening to lynch Campbell.<sup>253</sup> As a compromise, it was suggested that he be immediately tried.<sup>254</sup> A judge, prosecutor, and jurors were quickly named from persons

244. Lewis, *supra* note 242, at 49, 51.

245. Descriptive Roll and Account Pay and Clothing of Deserters from Company G 5th Iowa Cavalry, Minnesota Adjutant General Files (on file with the Minnesota Historical Society) [hereinafter Descriptive Roll and Account Pay]; Annual Message of Governor Miller, *supra* note 241, at 24; *Startling News*, *supra* note 241.

246. HUGHES, *supra* note 93, at 149.

247. See *Startling News*, *supra* note 241; Descriptive Roll and Account Pay, *supra* note 245. A few sources claim that Campbell was also motivated by his desire to avenge the death of his brother, Baptiste Campbell, who was one of the thirty-eight Dakota hung at Mankato in December 1862. DANIEL BUCK, INDIAN OUTBREAKS 246 (1904); HUGHES, *supra* note 93, at 149.

248. BUCK, *supra* note 247, at 247; HUGHES, *supra* note 93, at 150.

249. HUGHES, *supra* note 93, at 151.

250. *Id.*

251. *Id.*; WALTER N. TRENERRY, MURDER IN MINNESOTA: A COLLECTION OF TRUE CASES 43 (1985) [hereinafter TRENERRY, MURDER IN MINNESOTA].

252. *Blood for Blood!! Executive Clemency to Indians Rebuked. John Campbell, the Half-Breed Murderer Hung at Mankato. He Makes a Full Confession of His Guilt. One Hundred Hostile Savages Near Mankato. Nine Hundred More on the War Path. An Indian Sympathizer Compelled to Flee the Wrath of the People. The Citizens of Mankato and St. Peter Guarding Their Homes*, ST. PAUL PIONEER (DAILY), May 5, 1865 [hereinafter *Blood for Blood*].

253. HUGHES, *supra* note 93, at 152; *The Trial and Execution of John L. Campbell*, ST. PETER TRIB., May 10, 1865.

254. HUGHES, *supra* note 93, at 152.

in the crowd.<sup>255</sup> Four hours of testimony was received about Campbell's "character as a desperado and outlaw," "his complicity [in] other frontier murders," the conflicting statements he offered to officials following the Jewett murders, and the family's objects found in his possession.<sup>256</sup> No one represented Campbell, and while he testified on his own behalf, he was unable to call any witnesses in his defense due to his incarceration and immediate trial.<sup>257</sup> Within a half-hour of the end of this "trial," the jury returned a unanimous guilty verdict but suggested that the prisoner be held over until the regular term of the district court for a fuller trial.<sup>258</sup>

Instead of heeding the jury's suggestion, the mob rushed Campbell and took him out to a tree to be hanged. After several botched attempts, they were successful in strangling him.<sup>259</sup> Press coverage noted that it was "an exciting day in Mankato"<sup>260</sup> and claimed that these "exasperated people" could not be blamed for the lynching, since there was legitimate concern that the perpetrator would escape punishment given the government's refusal to execute most of the Dakota condemned to death in 1862.<sup>261</sup>

The five other Dakota who participated in the attack encountered General Sibley's scouts as they fled west, and all but one were killed.<sup>262</sup> Nevertheless, to ensure that settlers would be protected from any potential future attacks, the Minnesota Adjutant General created a unit of "Mounted Minute Men"

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255. *Id.*; TRENERRY, MURDER IN MINNESOTA *supra* note 251, at 43–44; *Blood for Blood*, *supra* note 252.

256. *The Trial and Execution of John L. Campbell*, *supra* note 253.

257. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 43; *see also The Trial and Execution of John L. Campbell*, *supra* note 253.

258. HUGHES, *supra* note 93, at 153; *The Trial and Execution of John L. Campbell*, *supra* note 253.

259. HUGHES, *supra* note 93, at 153–54; TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 44.

260. *Blood for Blood*, *supra* note 252.

261. *The Indian News*, ST. PAUL PIONEER & DEMOCRAT (WEEKLY), May 12, 1865. In his annual message to the Minnesota legislature the following January, Governor Miller acknowledged but showed no concern for this lawless behavior. Annual Message of Governor Miller, *supra* note 241, at 24 (stating that Campbell's "guilty participation having been fully demonstrated, he was summarily hung at Mankato without reference to the ordinary forms of law").

262. Annual Message of Governor Miller, *supra* note 241, at 24–25; *Important Indian News. The Murderers of the Jewett Family Intercepted and Killed. No Other Party Known to Be on the Frontier, Letter from Fort Wadsworth*, ST. PAUL PIONEER (DAILY), May 26, 1865.

stationed in and around Mankato.<sup>263</sup> Along with the companies already in existence, there were now more than 400 soldiers stationed in southwestern Minnesota to guard against future Dakota attacks.<sup>264</sup>

The local response to the Jewett murders was also swift. On May 17, 1865, the Blue Earth County Board of Commissioners met and adopted a resolution offering a bounty of \$200 for “each and every Sioux Indian hereafter killed within the limits of the county until[] this resolution shall be rescinded.”<sup>265</sup> The money was to be paid upon production of the scalp and proof that the person claiming the payment had both killed the Indian in question and that he had done so within county limits.<sup>266</sup> No bounty payments appear to have been made pursuant to this resolution even though it was not officially repealed until March 19, 1872.<sup>267</sup>

Additionally, E. P. Evans, a friend of the murdered Andrew Jewett, organized an expedition to the southern United States to purchase “blood hounds with which to hunt Indians.”<sup>268</sup> The funds for this trip were provided by three Minnesota counties (Blue Earth, Martin, and Watonwan) and a select number of private citizens, including a \$100 personal donation from Governor Miller.<sup>269</sup> Evans ultimately purchased thirteen dogs that were distributed among these counties in August 1865.<sup>270</sup> The hounds were never used for their intended purpose, and they “escaped one after another and soon like the Indians disappeared from Blue Earth County.”<sup>271</sup>

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263. HUGHES, *supra* note 93, at 158; Annual Message of Governor Miller, *supra* note 241, at 25.

264. HUGHES, *supra* note 93, at 158.

265. BLUE EARTH CNTY. BD. OF COMM'RS, JOURNAL FOR COUNTY PURPOSES 231–32 (May 17, 1865).

266. *Id.* at 234; *see also Extermination of the Indians*, ST. PAUL PIONEER (DAILY), May 23, 1865 (reprinting the county commissioners' resolution).

267. *See* HUGHES, *supra* note 93, at 157 (noting that the county never made any bounty payments pursuant to these resolutions, but making other minor errors about the bounty order enacted, such as claiming that it was limited to killing “hostile” Dakota).

268. Lewis, *supra* note 242, at 51 (quoting MANKATO UNION, May 26, 1865); *see also Extermination of the Indians*, *supra* note 266 (noting that the county commissioners authorized \$500 to purchase blood hounds that would be used to track Dakota).

269. HUGHES, *supra* note 93, at 157.

270. *Id.* at 157–58; Lewis, *supra* note 242, at 51.

271. HUGHES, *supra* note 93, at 158.

E. *The End of Minnesota Bounties?* State v. Gut

Another garden-variety murder also played a significant role in the Minnesota bounty system a few years after the Jewett family murders. New Ulm, a predominately German settlement in Brown County, Minnesota, was in the midst of Christmas Day celebrations on December 25, 1866.<sup>272</sup> On that day, two trappers from the nearby town of Mankato—Alexander Campbell and George Liscom<sup>273</sup>—travelled to New Ulm to sell some of their furs to a local trader.<sup>274</sup> Campbell and Liscom were both white Americans in their twenties<sup>275</sup> who had served three years in the military.<sup>276</sup> On this day, however, they had just returned from trapping in the woods, and their dress included a mixture of white and Dakota elements. Campbell was wearing moccasins, a dark blue hood or blanket around his head, buckskins, and a knife at his belt.<sup>277</sup> Liscom was also wearing a knife attached to his belt.<sup>278</sup> Both men were tanned from having spent considerable time outdoors.<sup>279</sup>

After selling their furs, Campbell and Liscom entered the National Hall, a local saloon. At the saloon, they spoke in Dakota, French, and English (or at least in jargons that the mostly German-speaking New Ulm residents believed to be those languages).<sup>280</sup> They played a game of cards<sup>281</sup> and met a New Ulm man named John Spinner.<sup>282</sup> Spinner coaxed the men into pretending to be Indians. While Spinner tapped on a kettle, Campbell and Liscom danced about the room, brandishing their knives and mimicking

272. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 44.

273. In some sources, these men are referred to as Charles Campbell and George Liscome. *See, e.g.*, State v. Gut, 13 Minn. 341, 344, 354–56 (1868) (referring to one of the trappers as George Liscome, and the other as Charles Campbell or Alexander Campbell at different points in the opinion), *aff'd*, 76 U.S. 35 (1869); JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 10 (2003) (claiming that the lynching victims were named Charles Campbell and George Liscom).

274. *The New Ulm Horror*, ST. PAUL DAILY PRESS, Jan. 3, 1867 (noting that the pair sold 146 rat pelts for \$28.27).

275. *Funeral of Liscom and Campbell*, MANKATO UNION, Jan. 11, 1867.

276. *The New Ulm Butchery. Further Particulars of the Affair*, ST. PAUL PIONEER (DAILY), Dec. 29, 1866 [hereinafter *The New Ulm Butchery*].

277. *Gut*, 13 Minn. at 356; *see* BESSLER, *supra* note 273, at 11.

278. *Gut*, 13 Minn. at 356.

279. *Id.*; BESSLER, *supra* note 273, at 11.

280. *Gut*, 13 Minn. at 354–56.

281. *The New Ulm Tragedy*, MANKATO UNION, Jan. 4, 1867.

282. *Id.* Spinner is also referred to as John Spenner in many sources. *See, e.g.*, TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 45.

the motion of scalping their enemies.<sup>283</sup> Everyone in the saloon watched the performance.

At some point, a dispute arose over the liquor bill. Liscom was told that he owed seventy-five cents even though he believed he owed only fifteen cents.<sup>284</sup> He refused to pay the difference, but a man who had ridden into town with Liscom and Campbell seemed to defuse the situation by paying the bill.<sup>285</sup> It is not clear from the trial record whether it was the dispute over the liquor bill, the fact that Campbell and Liscom referred to themselves as Yankees, or some other matter that sparked the fatal fight. Regardless, Spinner turned on Liscom; he forced Liscom outside and struck him in the head with an ax or a club, most likely fracturing Liscom's skull.<sup>286</sup> Campbell came to his friend's defense, slashing at Spinner with a knife. While he may have only intended to intimidate Spinner into backing off, Campbell severed an artery in Spinner's leg and sent blood everywhere.<sup>287</sup>

At this point, the Brown County Sheriff arrived and took Campbell and Liscom into custody. Even though Liscom had life threatening injuries, the sheriff did not provide him with medical assistance. Instead, he forced the men to strip, handcuffed them, and placed them in jail cells.<sup>288</sup> When Spinner died from blood loss later that evening, news of his death spread rapidly through the town. Just after the arrest was made, a report began circulating around town that "two half-breeds" had murdered John Spinner.<sup>289</sup>

Only thirty minutes after the arrests, a crowd of over one hundred men assembled at the jail. The crowd repeatedly chanted: "Bring out the half-breeds! Hang the half-breeds! Out with the Indians!"<sup>290</sup> George Schneider, who later became a witness for the

283. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 45; *The New Ulm Tragedy*, *supra* note 281.

284. *The New Ulm Horror*, *supra* note 274.

285. *Id.*

286. *Report of Atty. Gen. Colville*, MANKATO UNION, Feb. 8, 1867.

287. *The New Ulm Butchery*, *supra* note 276; *The New Ulm Tragedy*, *supra* note 281; *Report of Atty. Gen. Colville*, *supra* note 286.

288. *The New Ulm Murders*, ST. PAUL PIONEER (DAILY), Dec. 30, 1866.

289. *State v. Gut*, 13 Minn. 341, 355 (1868), *aff'd*, 76 U.S. 35 (1869).

290. *Id.*; see also *Result of the Preliminary Examination at New Ulm*, MANKATO UNION, Feb. 8, 1867; *Report of Atty. Gen. Colville*, *supra* note 286 ("[M]ost of the mob were infuriated by the false statement which had been industriously circulated by the parties concerned in the original affray at the saloon—for what purpose may be surmised—that Spenner [sic] had been stabbed without provocation by two half-breeds.").

State, testified that the crowd began calling out that Alexander Campbell was the brother of John Campbell, the mixed-blood Dakota who had been executed for killing the Jewett family just one year earlier.<sup>291</sup> In actuality, neither Alexander Campbell nor George Liscom had any Dakota ancestry, and Alexander Campbell was not related to John Campbell.<sup>292</sup> The crowd eventually stormed the jail and dragged out Campbell and Liscom, who were still in handcuffs.<sup>293</sup> Liscom was killed first. He was struck in the head and then hanged from a ladder leaning against the jail.<sup>294</sup> Campbell was next.

John Gut, a soldier with Company H of Minnesota's Tenth Regiment, arrived around the same time that the crowd broke open the jail.<sup>295</sup> Gut pushed to the front of the mob and stabbed Campbell.<sup>296</sup> When he was criticized by a witness for stabbing the prisoner, he replied: "These two half-breeds killed my best friend, John Spinner, and I will kill them; let me alone or I will stab you!"<sup>297</sup> The crowd parted, and Gut continued to stab, kick, and beat Campbell (as did others in the crowd) until Campbell was hanged from the jail window gratings.<sup>298</sup>

After the lynching, Gut returned to the Pennsylvania House, the hotel he was staying at.<sup>299</sup> Even though he was covered in blood and wearing a military uniform, which made him easy to identify, Gut seemed unconcerned. In fact, he struck up a conversation with a stranger and confessed that he had just killed two Indians in retaliation for their having killed a German.<sup>300</sup> Gut's confidence was understandable because lynching was not unheard of during this time period. Between 1857 and 1865, at least six persons (four of whom were Indians) were lynched in Minnesota, and none of the

291. *Gut*, 13 Minn. at 355; BESSLER, *supra* note 273, at 8–11.

292. TRENNERY, MURDER IN MINNESOTA, *supra* note 251, at 44–45.

293. *The New Ulm Tragedy*, *supra* note 281.

294. *Id.*; BESSLER, *supra* note 273, at 11.

295. *Gut*, 13 Minn. at 355. In his own correspondence, John Gut spelled his last name "Gutt." See *infra* note 340.

296. TRENNERY, MURDER IN MINNESOTA, *supra* note 251, at 46–47; *The New Ulm Tragedy*, *supra* note 281.

297. *Gut*, 13 Minn. at 355.

298. BESSLER, *supra* note 273, at 11; *Result of the Preliminary Examination at New Ulm*, *supra* note 290.

299. *Important Arrest*, MANKATO UNION, Jan. 11, 1867.

300. *Report of Atty. Gen. Colville*, *supra* note 286; *The New Ulm Horror*, *supra* note 274; *The New Ulm Tragedy*, *supra* note 281. Later, however, Gut realized the gravity of his situation and fled, only to be arrested and brought to Mankato. *Important Arrest*, *supra* note 299; *Our Prisoner*, MANKATO UNION, Jan. 18, 1867.

persons who participated in their murders were ultimately brought to justice.<sup>301</sup>

Governor William Marshall was concerned that New Ulm would not punish the citizens responsible for lynching Campbell and Liscom.<sup>302</sup> These concerns led Marshall to dispatch Minnesota Attorney General William Colvill to New Ulm on January 5, 1867. Colvill was to determine whether a fair trial was possible in New Ulm.<sup>303</sup> At first, he believed it would be,<sup>304</sup> but he quickly changed his mind.<sup>305</sup> In a formal report to the governor, Colvill noted that New Ulm had not attempted to identify the offenders or bring them to justice before his arrival.<sup>306</sup> Furthermore, while almost half of the town's citizens had been in "full view of the whole scene,

301. BESSLER, *supra* note 273, at 5–10.

302. In addition to Minnesota's poor track record for trying and convicting persons involved in lynching, the governor had ample reason for concern that the perpetrators in this particular case would not be brought to justice. Several prominent New Ulm citizens were present at the lynching. *The New Ulm Horror*, *supra* note 274. Others, such as Minnesota Legislator Daniel Shillock, began spinning the incident almost immediately after it occurred. Shillock wrote letters to the *St. Paul Daily Press*, claiming that Campbell and Liscom were unprovoked in their attack on Spinner, only two men had participated in attacking the prisoners, and the majority of the onlookers in the crowd were not even from New Ulm. *The New Ulm Tragedy*, *supra* note 281; see, e.g., *The Other Side of the Story*, ST. PAUL DAILY PRESS, Dec. 30, 1866; *Vindication of New Ulm. A Series of Slanders Refuted*, ST. PAUL DAILY PRESS, Jan. 12, 1867; see also *The New Ulm Tragedy. The Other Side of the Affair*, ST. PAUL PIONEER (DAILY), Jan. 9, 1867 (reprinting an article from the *New Ulm Post* claiming that the victims deserved to be hanged because they portrayed themselves as Indians, thereby frightening the townspeople); *The Other Side. Statement of Hon. Francis Baasen of New Ulm*, ST. PAUL PIONEER (DAILY), Dec. 30, 1866 (claiming that Liscom and Campbell were drunk, and that Spinner was stabbed before he struck Liscom with a hatchet). While the New Ulm Press printed these letters, it also refuted their contents and expressed concern that the town was not willing to try the persons responsible for the murders. See, e.g., *New Ulm's Vindication*, ST. PAUL DAILY PRESS, Jan. 12, 1867.

303. *Attorney Gen. at New Ulm*, MANKATO UNION, Jan. 11, 1867; *The New Ulm Tragedy*, ST. PAUL PIONEER (DAILY), Jan. 4, 1867. Colvill's name is often spelled "Colville." See *Report of Atty. Gen. Colville*, *supra* note 286.

304. Letter from William Colvill, Minn. Att'y Gen., to William Marshall, Governor (Jan. 8, 1867) (on file with the Minnesota Historical Society).

305. *Report of Atty. Gen. Colville*, *supra* note 286.

306. *Id.* New Ulm did not issue any arrest warrants until January 18, 1867. A preliminary examination into Alexander Campbell's murder was held a few days later. Of the seventeen persons arrested, five were unconditionally discharged. Twelve persons were charged with either murder in the first degree or manslaughter in the second degree. All were released after posting bail except for John Gut, who could not afford to do so. *Preliminary Examination at New Ulm*, MANKATO UNION, Feb. 1, 1867; *Result of the Preliminary Examination at New Ulm*, *supra* note 290. No one believed, however, that the community would ultimately issue indictments. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 48–49.

they could not remember a single person engaged in it.”<sup>307</sup> Colvill also believed that the Sheriff of Brown County may have acted in concert with the mob, and at a minimum, the Sheriff consented to the removal of Campbell and Liscom’s bodies.<sup>308</sup> For these reasons, the attorney general informed the governor that he was convinced a fair trial could not be had in New Ulm.

In his report, Colvill also provided some details about the lynching, gathered through dozens of interviews. He believed that the mob became infuriated by the false rumor that the two men were “half-breeds” who had stabbed Spinner without provocation.<sup>309</sup> Anticipating an argument that would later become part of Gut’s defense, Colvill wrote:

If half-breeds have no rights, and it is lawful to hang them without judge or jury, the fact that these men were mistaken for them by a portion of the mob might go in mitigation of the offense, so far as that portion is concerned; but until that principle is established by our courts, this offense having been clearly premeditated as above stated, is murder in the first degree.<sup>310</sup>

Colvill’s report was forwarded to the legislature with the request that legislation be enacted that would ensure a change of venue.

The legislature took action in March 1867, and under a newly enacted law, the case against John Gut and his fellow lynchers was moved to Redwood Falls and began with the calling of a grand jury. The first grand jury failed to return an indictment, however, and District Court Judge Horace Austin lectured the jurors for more than thirty minutes, stating that he would continue to convene new grand juries “until the accused are tried, and if guilty, properly punished.”<sup>311</sup> The second grand jury convened in September 1867 and indicted John Gut and twelve others on first degree murder charges.<sup>312</sup> Each case was to be tried separately. Gut then filed his own change of venue motion, which was approved, and this time the case was transferred to neighboring Nicollet County.<sup>313</sup> Gut

307. *Report of Atty. Gen. Colville, supra* note 286.

308. *Id.*

309. *Id.*

310. *Id.*

311. *The New Ulm Trials. No Indictment Found—Court Adjourned Until September 10, 1867*, MANKATO UNION, July 5, 1867.

312. *State v. Gut*, 13 Minn. 341, 351 (1868), *aff’d*, 76 U.S. 35 (1869); *see also New Ulm Murder Trials*, MANKATO UNION, Oct. 4, 1867.

313. *Gut*, 13 Minn. at 347; *see also New Ulm Murder Trials, supra* note 312 (noting that the change of venue request, which was not opposed by the State,

“interposed the plea of insanity, with the plea of not guilty.”<sup>314</sup> After several continuances, the trial began on January 23, 1868.<sup>315</sup>

The trial included several well-known Minnesotans. Horace Austin remained the district court judge. He had helped defend New Ulm against the Dakota in 1862 and had later served as captain of a mounted ranger company before being elected district court judge in the fall of 1864.<sup>316</sup> The State was represented by its Attorney General, Francis Cornell. John Gut was represented by various attorneys, including Charles Flandrau. Flandrau was a former Nicollet County prosecutor and an associate justice on the Minnesota Supreme Court.<sup>317</sup> He was also knowledgeable in Indian affairs, having served as the U.S. Indian agent for the Dakota reservations in 1856–57.<sup>318</sup> His view of the Dakota, however, was substantially altered by the U.S.-Dakota War, during which he successfully led the defense of New Ulm against a vigorous Dakota attack.<sup>319</sup> Afterwards he wrote General Sibley a letter advocating for the killing of all Dakota, including women and children.<sup>320</sup> These personal views no doubt colored Flandrau’s defense of Gut.

Attorney General Cornell had no problem proving that John Gut killed Campbell. Several witnesses testified that he had stabbed Campbell repeatedly, both before and after he was hanged. Charles Flandrau represented John Gut at trial and set forth various defenses. He argued that Gut was drunk and insane and should not

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claimed that the citizens of Redwood County “were entirely American,” and therefore, the defendants, who were all German, could not have a fair and impartial trial there). On appeal to the Minnesota Supreme Court, Gut later claimed that the change of venue he requested and obtained was improper. That claim was rejected. *Gut*, 13 Minn. at 352.

314. *Gut*, 13 Minn. at 356; see also *New Ulm Trials, John Gut Convicted of Murder*, MANKATO UNION, Feb. 7, 1868 (describing the charge to the jury on the insanity charges and noting that Gut was, in the newspaper’s opinion, “unquestionably, a sane man, yet he is of a very low order of intellect”).

315. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 50.

316. *Id.*; HUGHES, *supra* note 93, at 148.

317. Russell W. Fridley, *Charles E. Flandrau, Attorney at War*, MINN. HISTORY, Sept. 1962, 116, 117–18, 120.

318. *Id.* at 122.

319. *Id.* at 116–17.

320. Stephen Riggs, a long-time missionary to the Dakota, wrote to his wife about a letter written by Flandrau to Brigadier General Henry Sibley. That letter advocated for the killing of all men, women, and children. According to Riggs, Flandrau was convinced that all Dakota had “been engaged in these massacres except the young children, and they will only grow up like their fathers.” Letter from Stephen Riggs to wife Mary Riggs (Oct. 25, 1862) (on file with the Minnesota Historical Society).

be held legally responsible for his acts.<sup>321</sup> Flandrau also argued that the 1867 Act, which allowed the location of the trial to be moved from Brown County, was unconstitutional. Finally, he claimed that the Minnesota Adjutant General's 1863 bounty orders should provide a defense for Gut in these proceedings.

In fact, Flandrau opened the defense's case with an offer of proof. He told the court that he wished to call two witnesses who would establish the following:

1st. That at the time of the killing of Alexander Campbell . . . there existed a state of war between the United States and the Sioux tribe of Indians, which tribe or Nation is composed of Indians and Half-breeds. The actual theatre of which war was the State of Minnesota, and particularly the western frontier of said State. . . .

2nd. That the State of Minnesota through its legal authorities offered rewards for the killing by any person of any male of said tribe, which offer was then in full force. That the said Campbell and one Liscome, came into the Town of New Ulm on the day said Campbell was killed from the western frontier of this State. That said Campbell and Liscome . . . were then and there draped in the garb of Half breeds of said tribe of Indians, spoke the language of said tribe, and danced the war dance and other dances of said tribe, and then and there killed John Spenner, a citizen of the United States, and resident of the Town of New Ulm, Brown County, Minnesota.

3rd. That the mode of warfare of said tribe of Indians and Half breeds was and is by small bands or parties of said Indians and Half breeds making incursions into the frontier settlements, and killing single persons or families.

4th. That the parties who killed said Campbell including this defendant were then and are now citizens of the United States, and then and there believed said Campbell to be an Indian or half breed of said tribe of Sioux Indians so at war with the United States as aforesaid, and then and there engaged in such war in the killing of said Spenner, and that the killing of said Campbell was from no other motive whatsoever.<sup>322</sup>

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321. *New Ulm Trials. John Gut Convicted of Murder*, *supra* note 314.

322. Offer of Proof, *State v. Gut*, No. 595 (Nicollet Dist. Ct.) (on file with the Minnesota Historical Society).

In addition to this offer of proof, Flandrau provided authenticated copies of Minnesota Adjutant General Orders Nos. 41 and 44. Francis Cornell, counsel for the State, objected to this offer and the court took the matter under consideration. The next day, however, Judge Austin ruled that the testimony would not be admitted. Flandrau lodged his objection in the record and continued to press the matter by requesting jury instructions on this defense.<sup>323</sup> Judge Austin, however, did not alter his decision.

On January 31, 1868, after three hours of deliberation, the jury found John Gut guilty of murder in the first degree for the killing of Alexander Campbell.<sup>324</sup> The jury recommended that the defendant be granted mercy rather than be executed for the crime.<sup>325</sup> Despite this, Judge Austin ordered that Gut be taken to the county jail and kept in solitary confinement until Friday, April 3, 1868, when he was to be hanged.<sup>326</sup>

Flandrau appealed Gut's case to the Minnesota Supreme Court, and while the case was pending, Judge Austin granted a stay of execution.<sup>327</sup> On appeal, Flandrau raised several legal challenges, but all were rejected by the court. With respect to Flandrau's argument that the Minnesota Adjutant General's bounty orders provided a justification or excuse for Gut's actions, the court noted that while it is legal to kill an enemy soldier in the heat of war, "to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder."<sup>328</sup> Therefore, the court concluded that any evidence regarding whether a state of war continued to exist between the Dakota and the United States was immaterial.<sup>329</sup>

Despite this, the court went on to question the legality of the bounty orders themselves. It noted that the bounty orders were not laws passed by the Minnesota Legislature and that a "proclamation

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323. Charges Asked by Defendant, State v. Gut, No. 595 (Nicollet Dist. Ct. Jan. 31, 1868) (on file with the Minnesota Historical Society).

324. State v. Gut, 13 Minn. 341, 344, 347 (1868), *aff'd*, 76 U.S. 35 (1869); *New Ulm Trials. John Gut Convicted of Murder*, *supra* note 314.

325. *New Ulm Trials. John Gut Convicted of Murder*, *supra* note 314.

326. Judgment Roll, State v. Gut, No. 595 (Nicollet Dist. Ct.) (on file with the Minnesota Historical Society).

327. Dist. Ct. Stay of Execution, State v. Gut, No. 595 (Nicollet Dist. Ct. Feb. 4, 1868) (on file with the Minnesota Historical Society); Letter from Charles Flandrau to William Marshall, Governor (Mar. 12, 1868) (on file with the Minnesota Historical Society) (enclosing a copy of the Stay of Execution).

328. *Gut*, 13 Minn. at 357.

329. *Id.*

or order of any officer of the state could not make that right which is wrong, or legal which is illegal.”<sup>330</sup> The court refused to even admit that the Minnesota Adjutant General had issued these orders, noting only that “if” such orders were made and they led an ignorant person to commit a crime, then the only recourse would be an appeal to the governor for executive clemency.<sup>331</sup>

Upon hearing of the Minnesota Supreme Court’s decision, on February 27, 1869, Charles Flandrau immediately wrote Governor Marshall. In his letter, Flandrau stated that the court’s decision left it to the Governor to fix the time of Gut’s execution, but that he wished to seek executive clemency in the case and he believed the Attorney General would “cheerfully join” him in that request.<sup>332</sup> Flandrau claimed that Gut was insane at the time the offense was committed, but he was unable to prove this at trial because he was a stranger to the town and only there temporarily with his military company.<sup>333</sup>

Months later, no action had been taken in Gut’s case. Although Flandrau had appealed to the U.S. Supreme Court, which was reviewing the matter, no stay of execution had been issued. District Court Judge Horace Austin wrote to Governor Marshall to determine what was to be done with Gut, who had been languishing in the county jail—a facility not fit to confine a person for long periods of time—since September 1867.<sup>334</sup> Judge Austin recommended that the sentence be commuted to imprisonment for life or a term of years because “i[f] any one is to be executed for those New Ulm murders, he is not the most fit man for the example.”<sup>335</sup> He also requested that Gut be sent to the state penitentiary.<sup>336</sup>

On February 15, 1870, the U.S. Supreme Court affirmed the decision of the Minnesota Supreme Court. The next day, Charles Flandrau once again wrote to the governor seeking to save his client’s life. This time, however, he was writing to Horace Austin. The former trial judge in the case had been elected governor of

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330. *Id.* at 358.

331. *Id.*

332. Letter from Charles Flandrau to William Marshall, Governor (Feb. 27, 1869) (on file with the Minnesota Historical Society).

333. *Id.*

334. Letter from Horace Austin, Judge, to William Marshall, Governor (June 7, 1869) (on file with the Minnesota Historical Society).

335. *Id.*

336. *Id.*

Minnesota and took the oath of office in January 1870.<sup>337</sup> Flandrau's letter informed Governor Austin of the U.S. Supreme Court's decision and requested that the governor "see the matter in a light that will induce you to save his [John Gut's] life."<sup>338</sup>

Flandrau's plea claimed that Gut's actions were somehow diminished because he believed the victim was a Dakota:

The act was done in hotblood, and in any opinion under a mistake as to the person who was killed. I have always had full faith in the statement which was made on the trial that they supposed the murdered parties were half breeds, and had they known they were white men they would not have killed them. If you can possibly change the sentence to imprisonment, compatibly with your sense of duty, I hope you will do so.<sup>339</sup>

It is not known for certain whether Flandrau's words had any effect, but a few days later, Governor Austin did commute Gut's sentence from execution to life imprisonment.<sup>340</sup> And three years later, after additional brief correspondence with John Gut himself,<sup>341</sup> Austin reduced Gut's sentence from life imprisonment to ten years, just as his term as governor was about to expire. In commuting Gut's sentence, Governor Austin noted that the other men who had been indicted had fled the country and were, therefore, never punished.<sup>342</sup>

It took the mistaken murders of two white men to end the bounty system. While the Minnesota Adjutant General's bounty orders were never formally repealed, they were never used again following the Minnesota Supreme Court's decision in *State v. Gut*, and they disappeared into the recesses of white Minnesotans' memories.

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337. 1 HISTORY OF NICOLLET & LESUEUR COUNTIES MINNESOTA: THEIR PEOPLE, INDUSTRIES AND INSTITUTIONS 147, 500 (William G. Gresham ed., 1916).

338. Letter from Charles Flandrau to Horace Austin, Governor (Feb. 16, 1870) (on file with the Minnesota Historical Society).

339. *Id.*

340. Letter from Charles Flandrau to Horace Austin, Governor (Mar. 4, 1870) (on file with the Minnesota Historical Society).

341. Letter from John Gutt to Horace Austin, Governor (Nov. 9, 1873) (on file with the Minnesota Historical Society); Letter from John Gutt to Horace Austin, Governor (Dec. 28, 1873) (on file with the Minnesota Historical Society).

342. TRENERRY, MURDER IN MINNESOTA, *supra* note 251, at 52.

### III. BOUNTIES AND THE LAWS AND CUSTOMS OF WAR

The bounty system described in Section II above was created by state officials. Its inspiration, however, may have come from the federal government. Just following the end of hostilities in 1862, General John Pope, the commander of the U.S. Military's Department of the Northwest, directed Henry Sibley to offer a \$500 reward for Taoyateduta "dead or alive" and a \$50 reward "for each principal Chief of his band."<sup>343</sup> Pope immediately informed General Halleck that he had authorized the bounty, noting that he intended to make Little Crow "an outlaw among Indians."<sup>344</sup>

In the summer of 1863, General Sully and General Sibley were placed in charge of the expedition to annihilate the remaining Dakota who had fled west following the Battle of Wood Lake. At that time, General Sully requested permission to expand on Pope's efforts by placing bounties on other Dakota.<sup>345</sup> In a June 1, 1863 letter, U.S. Assistant Adjutant General Selfridge granted him that permission.<sup>346</sup> There is no indication that any monies were paid out in response to these federal bounties. Indeed, when Taoyateduta was ultimately killed, it was the Minnesota Legislature, not the federal government, who provided Nathan Lamson with a \$500 reward (although it is curious that the sum paid was the same amount originally offered by the federal government). Nevertheless, bounties were authorized by federal officials.

There is at least one significant difference between these federal bounties and the Minnesota bounties previously discussed. The State initially authorized a bounty on *all* Dakota men. Later, it altered this order and restricted the bounty to "hostile" Dakota men, but this hostility requirement was never enforced in practice. None of the Dakota killed under this bounty system instigated the conflict that ultimately led to their death; these men were shot simply because they were Dakota. The federal bounties, on the

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343. Letter from John Pope, Major-Gen., to Henry Sibley, Brigadier-Gen. (Oct. 6, 1862) (on file with the Minnesota Historical Society).

344. Letter from Major-Gen. John Pope to Major-Gen. Henry Halleck (Oct. 7, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 716.

345. Unfortunately, a copy of this letter was not included in WAR OF THE REBELLION, and this author has been unable to locate it in the collections of the Minnesota Historical Society or the National Archives. It is therefore unclear which specific Dakota General Sully was requesting federal bounties be placed on.

346. Letter from Major & Assistant Adjutant-Gen. R. O. Selfridge to Brigadier-Gen. Alfred Sully (June 1, 1863), in 22 WAR OF THE REBELLION, SER. I, PART II, *supra* note 82, at 306.

other hand, were tied to specific named persons who were believed to have played a key role in the war during the fall of 1862.

While there is no indication that the federal government knew about the Minnesota bounty system, it was aware of similar systems in other states. For example, around the same time that the Minnesota Adjutant General was placing a bounty on Dakota heads, the Arizona Legislature was placing a bounty on Apache people,<sup>347</sup> and local governments in California were attempting to eradicate all Indian people through their own public and private bounties.<sup>348</sup> The federal government not only knew about these

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347. In 1864, John Goodwin, the federally appointed Territorial Governor of Arizona, successfully pushed the Arizona Legislature to pass a resolution endorsing the extermination of Apaches. KATHLEEN P. CHAMBERLAIN, VICTORIO: APACHE WARRIOR AND CHIEF 107 (2007). The legislature ultimately offered a “reward for every Apache brought in, dead or alive,” and the system was described as “the same sort of bounty that was used to be offered for wolf scalps.” *Id.*

Prior to 1864, bounties were placed on Apache by local governmental units within the Arizona territory or, in the alternative, by private groups who raised money to pay their own bounty for Apache scalps. Karl Jacoby, “*The Broad Platform of Extermination: Nature and Violence in the Nineteenth Century North American Borderlands*,” 10 J. GENOCIDE RES. 249, 253 (2008). Connecticut-born judge Joseph Pratt Allyn, for example, noted upon his arrival in Arizona in 1863 that “a war of extermination has in fact already begun” and that Apache “Indians are shot wherever seen.” *Id.* The judge witnessed several organizational meetings for civilian campaigns, at which settlers not only volunteered their own services as “Indian hunters,” but also contributed towards a bounty for Indian scalps. *Id.* The judge noted that these expeditions “enjoyed a degree of official support” and were widespread. *Id.* An article published in the *New York Times* in 1885 shows that these Apache bounties were used until the late 1800s, with rewards ranging from \$250 to \$500 for Apache scalps in Cochise, Pima, and Yavapai Counties. *Money for Indian Scalps*, N.Y. TIMES, Oct. 12, 1885 (“From time immemorial all border countries have offered rewards for bear and wolf scalps and other animals that destroyed the pioneer’s stock or molested his family. Why, therefore, asks the Arizona settler, should not the authorities place a reward upon the head of the terrible Apache, who murders the white man’s family and steals his stock like the wolves?”).

348. Municipal governments in California offered bounties for Indian heads or scalps. JAMES J. RAWLS, INDIANS OF CALIFORNIA: THE CHANGING IMAGE 185 (1984). Shasta City, for example, offered \$5 for every Indian head presented at city headquarters. *Id.* In 1859, a community near Marysville paid bounties that were collected by public subscription “for every scalp or some other satisfactory evidence” that an Indian had been killed. *Id.* Funds were raised in Tehama County in 1861 “to be disbursed in payment of Indian scalps.” *Id.* And two years later, the citizens of Honey Lake paid twenty-five cents for each Indian scalp. *Id.*

In addition to these local governmental programs, men joined various volunteer militia groups to exterminate California Indians, and they were permitted to submit claims to the state for their expenses. *Id.* In 1851 and 1852, the California legislature authorized payment of claims totaling over \$1 million. *Id.* The federal government later reimbursed the state for these expenses. *Id.* at 186; see also WALTON BEAN & JAMES J. RAWLS, CALIFORNIA: AN INTERPRETIVE

programs, but it reimbursed some of the expenses associated with them.

In fact, during this time period, federal officials frequently called for the extermination of all Indians. Indeed, extermination could be said to be the official policy of the federal government until President Grant unveiled his “Peace Policy” in 1870, and state bounties were one means of achieving this goal. But were these bounties legal? More specifically, was the Minnesota bounty system legal when enacted? What about the federal bounty on Dakota leaders?

If the Dakota were citizens of a sovereign state at war with the United States, the legality of the orders is measured against the laws and customs of war. As discussed in Part III.A below, those laws establish that offering a monetary reward for the killing of enemy troops is an assassination, and even in 1863, assassinations were clearly prohibited both by the European laws of war, and by U.S. domestic law. Consequently, offering money for Dakota scalps was illegal if the Dakota could be considered a sovereign state at war with the United States, regardless of whether the bounty was placed on Dakota leaders or Dakota men in general.<sup>349</sup>

On the other hand, if the Dakota were not considered a sovereign state engaged in war with the United States, those persons involved in attacks or assaults on U.S. citizens might instead be considered outlaws or guerrillas. In that case, the Dakota who killed military and civilian forces would be considered to have violated the laws of war and could be lawfully punished. The laws of war suggested that punishment be meted out by a military commission or court martial, but in the heat of war, it was not uncommon for blame to be assigned and punishment carried out by summary execution. Still, even in these cases, the individuals

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HISTORY 130–31 (1988).

349. The laws of war also prohibited the killing of disabled enemy soldiers, and such acts were punishable by death. Disabled enemy soldiers were to be taken as prisoners of war and were entitled to certain minimum conditions while being held as such. If the Dakota were considered a sovereign state at war with the United States in 1863, then the prohibition on killing disabled enemy soldiers should have applied to U.S. and Minnesota forces engaged in fighting them. At least one of the bounty payments made violated these principles. John C. Davis was mustered in as a member of the Minnesota military under General Orders 41, yet he accepted payment for the killing of a wounded Dakota soldier. *See supra* notes 196–210 and accompanying text. He should have been subjected to trial by courts-martial or military commission, and if found guilty, been executed. This, of course, did not happen.

subject to punishment bore individual culpability. Thus, if the fighting Dakota were not lawful belligerents under the laws of war, they might be legally executed for their crimes, but only for their individual acts. The federal bounty on Taoyateduta might therefore have been legal, but the initial Minnesota bounty, which authorized the killing of all Dakota men, was clearly not. Likewise, the amended Minnesota bounty orders could provide no defense to persons who murdered Dakota men in the summer of 1863 without any proof of their “hostility.”

A. *Laws and Customs of War in 1863*

In 1863, the United States was in the middle of the Civil War. The international laws and customs of land warfare did not technically apply to that conflict, since those laws pertain only to wars between sovereign nations or belligerents, not internal strife.<sup>350</sup> At first, the Union adopted this hardline position, claiming that full belligerent rights would not be granted to the Confederate armies, and persons taking up arms against the United States would be liable for treason. But as the hostilities increased in intensity during 1861, the Lincoln administration began applying more of the laws and customs of land warfare to the conflict.<sup>351</sup> By 1862, the Union had accorded the Confederate States full belligerent rights on humanitarian grounds, even though it still did not recognize the Confederacy as a separate sovereign.<sup>352</sup> The conduct of the Civil War is thus a rich resource for the laws and customs of war prevailing at the time the Minnesota Adjutant General authorized a bounty system on Dakota men.

Proclamations, orders, and correspondence issued by Union officers during the first two years of the Civil War establish the basic contours of the laws and customs of land warfare. For example, on January 1, 1862, Major General Halleck<sup>353</sup> issued General Orders

350. Mark Grimsley, “Rebels” and “Redskins”: *U.S. Military Conduct Toward White Southerners and Native Americans in Comparative Perspective*, in *CIVILIANS IN THE PATH OF WAR* 139 (Mark Grimsley & Clifford J. Rogers eds., 2002).

351. BURRUS M. CARNAHAN, *LINCOLN ON TRIAL: SOUTHERN CIVILIANS AND THE LAW OF WAR* 9–10 (2010); RICHARD SHELLY HARTIGAN, *MILITARY RULES, REGULATIONS & THE CODE OF WAR: FRANCIS LIEBER AND THE CERTIFICATION OF CONFLICT* 8 (Transaction Publishers 2011) (1983).

352. HARTIGAN, *supra* note 351, at 9.

353. As a graduate of West Point and an army officer of more than twenty years, Halleck was well acquainted with the international laws and customs of war. He was also an attorney and an author, having written several books on military

No. 1, which established the rules of engagement for troops in the Department of the Missouri, where he was the commanding officer.<sup>354</sup> That order noted that a soldier in the enemy's service was not individually responsible for killing a human being in battle, and he could not be punished for doing so. Enemy soldiers were only subject to punishment if they violated the laws of war by, for example, committing common crimes (e.g., robbery, theft, arson),<sup>355</sup> killing an enemy who had already been disabled, crossing enemy lines in civilian clothing and failing to report to the nearest post,<sup>356</sup> using poisoned weapons, or committing an assassination.<sup>357</sup> In such cases, they were to be tried and punished by courts-martial or military commissions.<sup>358</sup>

If captured Confederate soldiers had not violated the laws and customs of war, they were to be accorded all of the rights of prisoners of war.<sup>359</sup> Military correspondence indicated that prisoners of war were "entitled to proper accommodations, to courteous and respectful treatment, to one ration a day and to consideration according to rank."<sup>360</sup> It was impractical to house

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subjects. CARNAHAN, *supra* note 351, at 28. One of those books was a treatise on international law published just prior to the start of the Civil War, which included a detailed discussion of the laws of war. *See generally* H.W. HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1st ed. 1861).

354. General Orders No. 1, Hdqrs. Dep't of the Mo. (Jan. 1, 1862), in 1 U.S. DEP'T OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II 247, 247-49 (1894) [hereinafter WAR OF THE REBELLION, SER. II].

355. *Id.* at 249; *see also* Proclamation of J.C. Fremont (Aug. 30, 1861), in 1 WAR OF THE REBELLION, SER. II, *supra* note 354, at 221 (stating that all persons who destroy railroad tracks, bridges, or telegraph wires "shall suffer the extreme penalty of the law" and that all persons not in military uniform but "with arms in their hands within [Union] lines shall be tried by court-martial and if found guilty will be shot").

356. Letter from Major-Gen. Henry Halleck to Confederate Maj.-Gen. Sterling Price (Jan. 27, 1862), in 1 WAR OF THE REBELLION, SER. II, *supra* note 354, at 161 (discussing the capture of a Confederate soldier in civilian dress with a flag of truce in his pocket who had not reported to the first military post upon crossing Union lines, and noting that this was a violation of "the laws and usages of war" and should it happen again, the soldiers would be "regarded as spies and tried and condemned as such").

357. HALLECK, *supra* note 353, at 399-400.

358. General Orders No. 1, *supra* note 354, at 248-49.

359. *Id.*

360. Letter from Quartermaster-Gen. M.C. Meigs to Sec'y of War Simon Cameron (July 12, 1861), in 3 U.S. DEP'T OF WAR, WAR OF THE REBELLION, SER. II 8, 8 (1898).

large numbers of prisoners of war, so prisoners were often exchanged during the Civil War. Prisoners of war were also released after offering an oath of allegiance or signing a general parole agreeing not to take up arms against the United States again.<sup>361</sup>

Despite the clarity of these basic principles, there was considerable confusion about how to handle particular situations that arose in the field.<sup>362</sup> Orders issued by military commanders were not always available on the front lines, and regardless, they were not meant to be comprehensive. Military officers were expected to have a base of knowledge about the international laws and customs of war through their military training. Unfortunately, they did not. When the Civil War started in 1861, there were only 16,000 men in the entire U.S. army. More than 2 million men would serve in the Union army alone by the end of the war.<sup>363</sup> Consequently, nearly all of the troops and officers were civilians with no knowledge of the laws of war.<sup>364</sup>

This problem was exacerbated by the lack of readily available resources on the laws and customs of war. While international law theorists had written numerous treatises on how states should treat each other's armies and civilian populations during wartime, these treatises were hardly practical sources for military officers in the middle of a war. No government had ever codified these practices into domestic law.<sup>365</sup> As a result, there was no source for new officers to quickly learn the international laws and customs of land warfare.

In the summer of 1862, Halleck had an opportunity to correct this deficiency when he was promoted to General-in-Chief of the

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361. See, e.g., General Orders No. 44, War Dep't, Adjutant-Gen.'s Office (July 13, 1861), in 3 WAR OF THE REBELLION, SER. II, *supra* note 360, at 9; Letter from Winfield Scott to Major-Gen. McClellan (July 14, 1861), in 3 WAR OF THE REBELLION, SER. II, *supra* note 360, at 9–10; Letter from Assistant Adjutant-Gen. E.D. Townsend to Major-Gen. Nathaniel Banks (July 15, 1861), in 3 WAR OF THE REBELLION, SER. II, *supra* note 360, at 10.

362. Quincy Wright, *The American Civil War (1861–65)*, in THE INTERNATIONAL LAW OF CIVIL WAR 54 (Richard A. Falk ed., 1971).

363. CARNAHAN, *supra* note 351, at 28.

364. HARTIGAN, *supra* note 351, at 7; see also Letter from Major-Gen. Henry Halleck to Brigadier-Gen. George Thomas (Jan. 28, 1862), in 1 WAR OF THE REBELLION, SER. II, *supra* note 354, at 162 (stating that Halleck had “not been able to get the names of many of the prisoners taken in Northern Missouri as the officers there pay very little attention to orders or regulations respecting returns”).

365. HARTIGAN, *supra* note 351, at 1–2.

Union army. The previous year, he had become acquainted with Dr. Francis Lieber, a German immigrant and law professor at Columbia College in New York. Lieber had delivered a series of lectures at Columbia College entitled *Twenty-Seven Definitions and Elementary Positions Concerning the Laws and Usages of War*. Some of these lectures appeared in the *New York Times* and were noticed by Halleck.<sup>366</sup> After reviewing Lieber's work and corresponding with him, the two men became friendly.

Halleck appointed Lieber to a special War Department Board tasked with developing a "code of regulations for the government of Armies in the field as authorized by the laws and usages of War."<sup>367</sup> Lieber was the only civilian on the board, which also included four military officers. Despite this, Lieber did all of the drafting.<sup>368</sup> After revisions and additions, some of which were made by Halleck himself, the final draft was approved by President Lincoln on April 24, 1863, as General Orders No. 100: Instructions for the Government of Armies of the United States in the Field.<sup>369</sup> Today, the document is more commonly referred to as the Lieber Code, named after its drafter.

Enacted more than two months before the Minnesota Adjutant General issued the first bounty order on July 4, 1863, the Lieber Code contains several provisions that indicate the illegality of these bounty orders if the Dakota were considered lawful belligerents in a war with the United States. The Code notes that in modern wars, the object is not to kill the enemy. Killing is only a means to obtain the object that lies beyond the war.<sup>370</sup> As a result, placing a bounty on the heads of enemy soldiers is not permitted. This is stated clearly by paragraph 148 of the Lieber Code:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers

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366. *Id.* at 13.

367. *Id.* at 14.

368. CARNAHAN, *supra* note 351, at 30.

369. General Orders No. 100, ¶ 68, *in* HARTIGAN, *supra* note 351, at 58.

370. *Id.*

of rewards for the assassination of enemies as relapses into barbarism.<sup>371</sup>

Additionally, as applied, the bounty order violated other clear provisions of the Lieber Code. As described in II.B above, at least two of the bounties paid out by the Minnesota Adjutant General involved the killing of Dakota men who had already been wounded and were no longer a threat. The Lieber Code establishes that enemy soldiers that are already disabled must be taken as prisoners of war. Intentional acts that inflict additional wounds or result in the death of a disabled enemy soldier are violations of the law of war. If these acts can be proven, the soldier and anyone who encouraged or ordered the action can be sentenced to death.<sup>372</sup>

The Lieber Code applied directly only to the “Armies of the United States in the Field.” It was not, therefore, directly applicable to the scouts employed by the State of Minnesota under the bounty orders. But the Lieber Code was, for the most part, merely a convenient codification of the international laws and customs of war. These laws and customs had long prohibited assassination of enemy troops for bounties, as well as the killing of disabled soldiers. In the 1855 decision of *Jecker v. Montgomery*, the U.S. Supreme Court stated that the laws of war form a portion of “the municipal jurisprudence of every country” without any congressional action.<sup>373</sup> As a result, if the Dakota were a sovereign state engaged in a war with the United States, the bounty order as written and applied, constituted a violation of domestic and international law.

#### B. *Laws Relating to Guerrilla Warfare*

If the Dakota were not considered a sovereign state engaged in a war with the United States, then those persons involved in attacks or assaults on U.S. citizens could be considered part of a guerrilla force. Once again, the Union’s conduct during the Civil War is a resource to determine the contemporaneous definition and treatment of guerrilla parties. The western frontier of the Civil War was replete with armed groups that had only a tenuous connection to the Confederate government. Missouri, for example, had descended to “near anarchy,” as persons in plain clothes snuck

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371. *Id.* ¶ 148, at 69.

372. *Id.* ¶ 49, 61, 71, at 55, 57–58.

373. *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855).

across Union lines to destroy infrastructure (e.g., roads, bridges, railroads) and kill both soldiers and civilians.<sup>374</sup>

Halleck believed that these acts were violations of the laws of war and punishable by death, but Confederate officers argued otherwise.<sup>375</sup> Convinced of his position, on March 13, 1862, Halleck issued General Orders No. 2, which warned citizens that if they “join any guerrilla band they will not, if captured, be treated as ordinary prisoners of war, but will be hung as robbers and murderers.”<sup>376</sup> The real issue, however, was determining who should and should not be classified as a guerrilla group.

In July and August 1862, Halleck wrote to Dr. Lieber and requested his assistance in determining how the laws of war defined guerrilla warfare.<sup>377</sup> Lieber responded quickly to Halleck’s request by providing him with a lengthy essay entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, which contained a compendium of historical examples.<sup>378</sup> In that document, Lieber defined a guerrilla party as “an irregular band of armed men, carrying on an irregular war.”<sup>379</sup> The “irregularity” of the guerrilla band stemmed from the fact that it was both self-constituted and separate in pay, provisions, and movements from the government’s army. Members of the band wore plain clothes and moved back and forth from civilian life to participation in armed raids.<sup>380</sup> Guerrilla parties were especially dangerous because they could not be saddled with prisoners of war, prompting them to kill any captured soldiers.<sup>381</sup>

According to Lieber, guerrilla members were not entitled to the protections of prisoners of war. In fact, Lieber indicated that at least in some circumstances it would be proper to execute a

374. See CARNAHAN, *supra* note 351, at 28–29.

375. See, e.g., Letter from Confederate Major-Gen. Sterling Price to Major-Gen. Henry Halleck (Jan. 12, 1862), in 1 WAR OF THE REBELLION, SER. II, *supra* note 354, at 255–56; Letter from Major-Gen. Henry Halleck to Confederate Major-Gen. Sterling Price (Jan. 22, 1862), in 1 WAR OF THE REBELLION, SER. II, *supra* note 354, at 258–59.

376. MICHAEL FELLMAN, *INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR* 87–88 (1989).

377. Letter from Major-Gen. Henry Halleck to Francis Lieber (July 30, 1862) & Letter from Major-Gen. Henry Halleck to Francis Lieber (Aug. 6, 1862), in HARTIGAN, *supra* note 351, at 75–76, 78.

378. HARTIGAN, *supra* note 351, at 2, 31.

379. *Id.* at 33.

380. *Id.* at 33, 41.

381. *Id.* at 32–33.

guerrilla on the spot,<sup>382</sup> without proceeding to a court-martial or military commission. Relaxation or mitigation of these rules was possible, however, and the most humane belligerents in recent times would provide that guerrillas captured in a fair fight be treated as a prisoner of war until it was proven that they were guilty of murder, destruction of property, or some other crime.<sup>383</sup> Still, Lieber concluded that it was up to the executive and legislative branches to determine what mitigation, if any, would have a beneficial effect on the conduct of the war.<sup>384</sup> Halleck agreed with the essay and ordered 5000 copies to be distributed to military personnel.<sup>385</sup>

The Union army followed Halleck's and Lieber's approaches. If caught, guerrilla members were not entitled to prisoner-of-war status. The official policy was to speedily try suspected guerrillas and civilians who harbored or supported them by courts-martial or military commissions. In private and public communications, however, certain Union officers suggested that the proper approach was to shoot guerrillas on the spot rather than capture them. This was true even if they were unarmed.<sup>386</sup>

For example, on April 21, 1862, Brigadier General James Totten, commanding officer for the District of Central Missouri, issued Special Orders No. 47, complaining that "jayhawkers, guerrillas, marauders, murderers and every species of outlaw are infesting to an alarming extent all the southwestern portion of Jackson County."<sup>387</sup> These guerrillas were frequently being harbored by civilians living there. The Special Order referred specifically to William Quantrill, noting that he was the "desperate leader of these outlaws."<sup>388</sup> It stated that "[a]ll those found in arms and open opposition to the laws and legitimate authorities who are known familiarly as guerrillas, jayhawkers, murderers, marauders, and horse-thieves, will be shot down by the military upon the spot."<sup>389</sup> Civilians who "knowingly harbored . . . these outlaws . . .

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382. *Id.* at 33, 40.

383. *Id.* at 42, 44.

384. *Id.* at 44.

385. Letter from Major-Gen. Henry Halleck to Francis Lieber (Aug. 20, 1862), in HARTIGAN, *supra* note 351, at 78.

386. FELLMAN, *supra* note 376, at 86–87, 91–92, 120–121, 123.

387. WILLIAM ELSEY CONNELLEY, QUANTRILL AND THE BORDER WARS 236 n.1 (1956) (reproducing Special Order 47, dated April 21, 1862, in its entirety).

388. *Id.*

389. *Id.*

[would] be arrested and tried by a military commission for their offenses.”<sup>390</sup>

Even though the treatment of guerrillas was harsh during the Civil War, the Union does not appear to have authorized bounties for killing them. On certain occasions, Union officers did offer rewards for the *capture* of specific persons,<sup>391</sup> but there is no indication that such rewards would be paid if the person were killed. Instead, “dead or alive” bounties were reserved only for notorious criminals operating outside of war times. Thus, if the Dakota were considered guerillas, they could have been legally executed (even on the spot) for their crimes. But this was only true for those specific Dakota who were actually engaged in hostilities against the United States, and it does not explain the bounty system put in place by either the federal or state governments.

#### IV. TESTING THE LEGALITY OF MINNESOTA’S BOUNTY SYSTEM

##### A. *The Dakota as Sovereigns Capable of Declaring War*

As the above discussion indicates, one of the crucial questions that must be answered in determining the legality of the Minnesota Adjutant General’s bounties orders is whether the Dakota should have been treated as lawful belligerents or merely guerrillas. Answering this question requires resort to contemporaneous decisions of the U.S. Supreme Court and statements made by executive branch officials about the status of Indian tribes generally, as well as more specific interactions with and statements about the Minnesota Dakota communities.

By 1863, the U.S. Supreme Court had a long history of treating Indian tribes as sovereign states. In its 1831 decision in *Cherokee Nation v. Georgia*, the Court refused to exercise original jurisdiction over a lawsuit brought by the Cherokee Nation because it

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390. *Id.*

391. For example, in April 1865, the United States authorized a \$2000 reward for the capture of John Mosby when he refused to surrender with the rest of his men. Letter from Major-Gen. Winfield Hancock to Sec’y of War Edwin Stanton (Apr. 22, 1865), in 46 U.S. DEP’T OF WAR, WAR OF THE REBELLION, SER. I, Part III 897, 897 (1894) (“Some of Mosby’s own men are in pursuit of him for a reward of \$2,000 . . .”). That reward was later increased to \$5000 at the request of Grant and Halleck. Letter from Gen. Ulysses Grant to Major-Gen. Henry Halleck (May 4, 1865), in 46 WAR OF THE REBELLION, SER. I, Part III, *supra*, at 1082; Letter from Major-Gen. Henry Halleck to commanding officer at Charlottesville, Va. (May 18, 1865), in 46 WAR OF THE REBELLION, SER. I, Part III, *supra*, at 1173.

concluded that Indian tribes were not *foreign* states within the meaning of Article III of the U.S. Constitution.<sup>392</sup> Still, a majority of the Court did agree with Cherokee contention that it was a “state” in the sense of being “a distinct political society, separated from others, capable of managing its own affairs and governing itself.”<sup>393</sup> Chief Justice John Marshall described Indian tribes as “domestic dependent nations”<sup>394</sup> and said that the United States had recognized them “as a people capable of maintaining the relations of peace and war.”<sup>395</sup>

Chief Justice Marshall’s vision of the federal-tribal relationship was confirmed by a majority of the Court just one year later in *Worcester v. Georgia*.<sup>396</sup> In *Worcester*, the Court overturned the criminal convictions of two missionaries who had failed to obtain a license mandated by the state of Georgia for all persons residing in Cherokee Territory.<sup>397</sup> Speaking for the Court, Marshall held the Georgia statute unlawful under the Supremacy Clause.<sup>398</sup> Marshall concluded that Indian tribes “had always been considered as distinct, independent political communities retaining their original natural rights.”<sup>399</sup> Therefore, the Cherokee Nation was “a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.”<sup>400</sup> In a

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392. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Nation was seeking to enjoin enforcement of Georgia statutes that purported to annul the Nation’s laws, confiscate Cherokee lands, and extend state laws over all persons residing on those lands. *Id.* at 15. In holding that the Court could not exercise jurisdiction over the lawsuit, Chief Justice Marshall pointed to Article I, section 8, clause 3, which is the only place where Indian tribes are mentioned in the U.S. Constitution. That clause empowers Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” In determining that Indian tribes were not foreign nations, Marshall emphasized the fact that Indian tribes were contradistinguished from foreign nations by name in this clause. *Id.* at 18–19.

393. *Id.* at 16. Chief Justice Marshall wrote the opinion and was joined only by Justice McLean. Justices Johnson and Baldwin concurred in the result, but believed that tribes possessed no sovereignty. Justices Thompson and Story dissented, arguing that the Cherokee Nation was a foreign state. As a result, a majority of the Justices held that the Cherokee Nation was a state (Marshall, McLean, Thompson, and Story), but not a *foreign* state (Marshall, McLean, Johnson, and Baldwin). *Id.*

394. *Id.* at 17.

395. *Id.* at 16.

396. 31 U.S. 515 (1832).

397. *Id.* at 538–39.

398. *Id.* at 561–62.

399. *Id.* at 559.

400. *Id.* at 561.

concurring opinion, Justice McLean discussed the ability of Indian tribes to declare war against the United States:

We have recognised in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors.<sup>401</sup>

Read together, *Cherokee Nation* and *Worcester* recognized that Indian tribes were “states” as that term is used in international law, possessed territorial sovereignty, and had the right to declare war against the United States.

In the decades that followed *Cherokee Nation* and *Worcester*, some doubt as to the status of Indian tribes crept into federal court decisions. In the 1846 decision in *United States v. Rogers*, the Supreme Court addressed whether a white settler adopted into the Cherokee Nation should be considered an Indian for purposes of federal criminal statutes.<sup>402</sup> If both the defendant and victim were Indians, then the federal government could not prosecute any crimes between them. If the defendant and/or victim were non-Indian, then the federal government could initiate a federal prosecution pursuant to a provision in the Trade & Intercourse Acts.<sup>403</sup> Chief Justice Taney wrote the unanimous opinion for the

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401. *Id.* at 583.

402. 45 U.S. 567, 571 (1846). The leading scholarly work on *Rogers* is Bethany R. Berger, “Power Over This Unfortunate Race”: Race, Politics and Indian Law in *United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004).

403. Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729 (“[M]uch of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.”). Today, this provision, as amended, is referred to as the Indian Country Crimes Act, the General Crimes Act, or the Interracial Crimes Act. It is codified at 18 U.S.C. § 1152 (2012).

In *Rogers*, both the defendant and victim were white men who had been adopted into the Cherokee Nation by virtue of their marriages to Cherokee women. *Rogers*, 45 U.S. at 568. Thus, if the defendant was not considered Cherokee, his victim must have been considered non-Indian as well. Decades later, the Supreme Court held that if both the defendant and victim are non-Indian, the federal government lacks jurisdiction to prosecute crimes committed in Indian country within an existing state, despite the explicit language of the Indian Country Crimes Act. Instead, those crimes fall to the state to prosecute. *See, e.g.*, *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 622 (1881). These decisions are not necessarily inconsistent with *Rogers*, however,

Court, which claimed—without reference to *Cherokee Nation* or *Worcester*—that Indian tribes “have never been acknowledged or treated as independent nations by the European governments.”<sup>404</sup> Instead, the Court argued that they were subject to the authority of the federal government because they had been incorporated within the territory of the United States through the doctrine of discovery.<sup>405</sup>

Confusion can also be found in *United States v. Coxe*, decided in 1855.<sup>406</sup> Writing on behalf of a unanimous court, Justice McLean began by seemingly reaffirming the *Cherokee Nation* and *Worcester* decisions (although once again, without reference to either). McLean stated that the Cherokee Nation could not be considered a foreign state, but the Cherokee people were still governed by their own laws, and the federal government “guarantee[d] their independence” from the states.<sup>407</sup> The Court went on, however, and reasoned that Indian tribes were under the U.S. Constitution, and that the Cherokee Nation should be considered “a domestic territory—a territory which originated under our constitution and laws.”<sup>408</sup> If Indian tribes were domestic territories under “our constitution and laws,” could they declare a lawful war against the United States? While this was not at issue in *Coxe*, it would appear that Justice McLean’s formulation of Cherokee sovereignty could lead to the conclusion that Indian tribes engaged in hostilities against the United States were part of a rebellion or uprising and; therefore, not entitled to the protections of the international law of war.

Despite the language in *Rogers* and *Coxe*, several other Supreme Court decisions continued to recognize both that tribal sovereignty was independent of U.S. sovereignty and that Indian tribes could

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because the latter involved a crime committed outside of any state in the Indian Territory. *Rogers*, 45 U.S. at 571–72 (“The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within in [sic] the limits of any particular State.”).

404. *Rogers*, 45 U.S. at 572. The opinion actually did not cite *any* legal authorities other than the 1834 Trade & Intercourse Act and the Cherokee Treaty of New Echota. *Id.* at 572–73.

405. *Id.* The doctrine of discovery gave European nations and their successors in interest title to the lands they had “discovered,” but that title was subject to the Indians’ aboriginal occupancy rights. *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823).

406. 59 U.S. 100 (1855).

407. *Id.* at 103.

408. *Id.* at 103–04.

wage lawful wars against the United States. For example, in an 1850 case entitled *Parks v. Ross*, the Court was asked to hold the Cherokee Nation's principal chief, John Ross, personally liable for damages under a contract executed with an individual who had provided wagons and horses to assist Nation members in their forced relocation to the Indian Territory.<sup>409</sup> It refused to do so. The Court noted that it was settled law that public officers acting for their government were not personally liable for contracts made in their official capacity.<sup>410</sup> The unanimous opinion written by Justice Grier held that this precedent applied to John Ross, who was acting as a public officer of the Cherokee Nation at the time he signed the contract in question. In doing so, the Court noted that "[t]he Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves."<sup>411</sup>

Dicta in the U.S. Supreme Court's 1856 decision in *Dred Scott v. Sandford*<sup>412</sup> also supports the notion that Indian tribes should have been considered lawful belligerents if they declared war against the United States. In that decision, authored by Chief Justice Taney—the same Justice who had authored the *Rogers* decision ten years earlier—the Court stated:

These Indian Governments were regarded and treated as foreign Governments . . . and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.<sup>413</sup>

Consequently, at the time of the U.S.-Dakota War in Minnesota, while the question was not free from doubt, the *Rogers* and *Coxe* decisions appear to have been outliers. Elements of these decisions would later gain sway in the Supreme Court during the assimilation era of Federal Indian policy,<sup>414</sup> but prior to 1863, these

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409. 52 U.S. 362, 373–74 (1850).

410. *Id.* at 374.

411. *Id.*

412. 60 U.S. 393 (1856).

413. *Id.* at 404.

414. *See, e.g.,* United States v. Kagama, 118 U.S. 375, 381–82 (1886) (referring to tribes as “local dependent communities,” rather than “domestic dependent

were the only times in twenty-eight Indian-law related decisions that the Supreme Court failed to acknowledge tribal sovereignty as inherent and distinct from the United States.<sup>415</sup> The language in *Cherokee Nation*, *Worcester*, *Parks*, and *Dred Scott* supports the notion that Indian tribes were sovereigns capable of declaring war against the United States or serving as an ally to the United States during war.

The actions of the executive branch also support the interpretation that Indian tribes generally, and the Dakota specifically, were sovereigns capable of declaring war against the United States. For example, in 1828, Attorney General William Wirt was asked to opine as to whether the Creek Nation could be held liable for certain property destruction that occurred in Georgia prior to 1802, when the Creek were at war with the United States.<sup>416</sup> In a lengthy opinion, Wirt concluded that “[l]ike all other independent nations, [the Creek] have the absolute power of war and peace,” and unless their treaties with the United States provided otherwise, they were not liable for such damages.<sup>417</sup>

Another example can be found in an opinion issued by the U.S. Attorney General in 1873.<sup>418</sup> Between 1872 and 1873, the United States was engaged in an armed conflict with a band of the Modoc tribe, led by Kintpuash, better known as Captain Jack.<sup>419</sup> In January 1873, the Secretary of the Interior appointed a peace commission to negotiate with Captain Jack in an effort to end the war.<sup>420</sup> At a negotiation session in April 1873, the Modoc killed two

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nations,” and noting that they had a semi-independent position “not as states, not as nations, not as possessed of the full attributes of sovereignty, but as separate people, with the power of regulating their internal and social relations”).

415. See, e.g., Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437 (1998) (collecting cases). In fact, the closest the Court came to questioning tribal sovereignty after *Rogers* was in *Fellows v. Blacksmith* in 1856. 60 U.S. 366 (1856). In that case, the Court still referred to the Seneca Nation “as a quasi nation, possessing some of the attributes of an independent people.” *Id.* at 371.

416. *Georgia and the Treaty of Indian Spring*, 2 Op. Att’y Gen. 110 (1828).

417. *Id.* at 133.

418. While this opinion was issued after the U.S.-Dakota War had ended, there is no indication that it was based on a change in governmental policy.

419. ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* 250 (2002); JEROME A. GREENE, *INDIAN WAR VETERANS: MEMORIES OF ARMY LIFE AND CAMPAIGNS IN THE WEST, 1864–1898*, at 306–07 (2012) (account of Oliver Applegate, a captain in the Oregon Militia).

420. ARTHUR QUINN, *HELL WITH THE FIRE OUT: A HISTORY OF THE MODOC WAR* 85–86 (1997).

members of the U.S. Peace Party, General Canby and Reverend Thomas, during negotiations.<sup>421</sup> When the war ended a month later, Colonel Jefferson Davis (no relation to the former Confederate President) decided to execute between eight and ten Modocs. He believed the Modoc were “a band of outlaws, robbers and murderers,” and as the field commander, he had the authority and “no doubt of the propriety and the necessity of executing them on the spot, at once.”<sup>422</sup> Others were not as sure. President Grant asked for an opinion from the U.S. Attorney General, George Williams.

Williams concluded that the international laws of war should apply to the conflict with the Modoc, who were lawful belligerents:

That these hostile Indians were and are a distinct people and therefore capable of legal and legitimate war with the United States seems to me to be open to no doubt. They are in no sense citizens of the United States, and owe it no allegiance; they are governed by their own laws and owe no obedience, and pay none, to the laws of the country in which they live. . . . They are dealt with only by the General Government through the instrumentality of treaties, which treaties are an evidence and acknowledgment of their independent position as distinct peoples.<sup>423</sup>

Williams noted that the Lieber Code and the laws of war required that “a regular unoffending soldier of the opposing party to the war” should be treated with “courtesy and kindness” as a prisoner of war.<sup>424</sup> Soldiers who had violated the laws of war, such as by acting as a spy, breaking their parole, or operating as a “bushwhacker, a jayhawker, a bandit, a war-rebel, [or] an assassin,” should be tried by a military commission if there was no statutory grant of authority enabling them to be subject to a courts-martial.<sup>425</sup>

Williams concluded that the laws of war acknowledged that a flag of truce, dispatched in good faith, was sacred. The assassination of the bearer of a flag of truce was the “great[est] act of perfidy and treachery,” and should result in the trial of Captain Jack and the other Modoc responsible.<sup>426</sup>

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421. GREENE, *supra* note 419, at 308.

422. QUINN, *supra* note 420, at 175.

423. *Id.*

424. The Modoc Indian Prisoners, 14 Op. Att’y. Gen. 249, 251–52 (1873).

425. *Id.* at 250–52.

426. *Id.* at 250.

The Attorney General's opinion was followed. Six Modoc were tried (without the benefit of a lawyer or interpreter), convicted, and sentenced to death by a military commission for killing U.S. officials under a flag of truce.<sup>427</sup> President Grant approved the death sentence for Captain Jack and three other Modoc while commuting the sentence of the remaining two to life imprisonment.<sup>428</sup> The remainder of the Modoc who participated in the 1872 war—approximately 160 men, women, and children—were treated as prisoners of war and sent east to the Indian Territory.<sup>429</sup> These actions clearly demonstrate that the United States treated the Modoc as lawful belligerents, which requires that the conduct of war be governed by the international laws of war and the Lieber Code.

There is no reason that the Dakota should have been treated differently.<sup>430</sup> By 1862, the Dakota had already entered into treaties with the United States in 1805, 1825, 1837, 1851, and 1858.<sup>431</sup> Each one of these treaties is necessarily an acknowledgment of Dakota sovereignty, and lawful belligerent status flows from this sovereignty. In a January 1863 address to the Minnesota legislature, Minnesota Governor Ramsey acknowledged that the Dakota were, like other Indian tribes, “independent nations, competent to declare war, to make laws for their own guidance, and to hold and dispose of property,” even while he urged that this status should be

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427. UTLEY & WASHBURN, *supra* note 419, at 253.

428. *See id.*

429. *Id.* at 254.

430. Professor Finkelman claims that the Dakota should not be viewed as sovereigns in 1862 because the Dakota had ceded most of their land in Minnesota and were almost entirely dependent on treaty annuities for their survival. Finkelman, *supra* note 66, at 416. As an initial matter, treaty annuities are legal obligations, not gratuities from the United States; they were promised as payment for lands ceded, and therefore, it is unclear how “dependence” on such annuities could result in a loss of sovereignty. Likewise, a small land base does not necessarily result in a loss of sovereign status. The country of Monaco is currently less than one square mile, and thus, far smaller than the Dakota reservation in 1862. In *Worcester*, Justice McLean hypothesized that “[i]f a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them.” *Worcester v. Georgia*, 31 U.S. 515, 593 (1832). But McLean’s theory was never adopted by the majority of the Court, the Dakota still had thousands of tribal members in 1862, and the 1858 treaty is conclusive evidence that the federal government, not the state of Minnesota, maintained a government-to-government relationship with the Tribe.

431. *See* sources cited *supra* note 22 and sources cited *infra* notes 437–38.

changed.<sup>432</sup> The fact that Governor Ramsey—who was certainly no friend to the Dakota—held this view shows just how settled it was at the commencement of the U.S.-Dakota War in 1862.

*B. The Dakota Decision to Go to War*

A few legal scholars and historians claim that even though the Dakota were sovereigns, the individuals who fought the United States in the fall of 1862 should not receive lawful belligerent status because the tribe as a whole never declared war against the United States. In support of this assertion, some have emphasized that many of the principal chiefs of both the Lower Dakota and Upper Dakota, including Wabasha, Wacouta, Traveling Hail, Red Iron, and Standing Buffalo, were opposed to the War.<sup>433</sup> Others have focused on the fact that many Dakota, particularly those who had converted to Christianity and become farmers, were opposed to the War from its inception.<sup>434</sup> Therefore, according to this viewpoint, the War was simply the work of a hostile minority.<sup>435</sup> If this is true, then the actions of the Dakota in 1862 and 1863 could be analogized to guerrilla warfare and might be punished as mere criminal behavior, rather than the protected actions of a lawful belligerent under the international law of war.

This approach, however, seems to gloss over both the governmental structure of the Dakota in 1862, and the means that the Dakota used to reach decisions. Each Dakota band was a separate political unit with the ability to make decisions that affected their own citizens. Thus, the Dakota were more properly thought of as a confederacy: individual bands that may be united in pursuit of a common goal, but need not be.<sup>436</sup> This is evident in the

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432. Annual Message of Governor Ramsey to the Legislature of Minnesota (Jan. 7, 1863), in 1862 MINN. EXEC. DOCS., *supra* note 33, at 3, 27.

433. MEYER, *supra* note 34, at 118.

434. Finkelman, *supra* note 66, at 415.

435. *See, e.g., id.* (“The war, if that is what it was, cannot be seen as a war between two sovereignties, because the Dakota Nation did not authorize the war and most leaders of the Dakota opposed it.”); MEYER, *supra* note 34, at 118 (referring to the events of 1862 as a “war” and “uprising” interchangeably, yet concluding that “[t]he Sioux were at no time united, at no time committed as a nation to the purposes of the hostile minority”).

436. CHARLES ALEXANDER EASTMAN (OHIYESA), *THE SOUL OF THE INDIAN* 10 (2003) (“The family was not only the social unit, but also the unit of government. The clan is nothing more than a larger family, with its patriarchal chief as the natural head, and the union of several clans by intermarriage and voluntary connection constitutes the tribe.”); 4 LEWIS H. MORGAN, *HOUSES AND HOUSE-LIFE*

very name of the tribe—Dakota—which means “Allied People.”<sup>437</sup> For this reason, the decisions and actions of individual bands should be considered, not simply those of the entire Dakota tribe. At a minimum, the United States recognized the independent sovereignty of the Mdewakanton, Wahpekute, Sisseton, and Wahpeton bands. The clearest example of this can be found in the treaties between the United States and the Dakota. Those treaties sometimes included only the Mdewakanton bands,<sup>438</sup> only the Lower Dakota bands (Mdewakanton and Wahpekute), or only the Upper Dakota bands (Sisseton and Wahpeton).<sup>439</sup>

Additionally, focusing on the individual beliefs of Dakota chiefs<sup>440</sup> is improper, since they could neither make laws nor execute them. Decisions were made democratically, by consensus or at least majority vote, in large councils.<sup>441</sup> If the decision would affect the entire nation, multiple bands would usually be represented at the council.<sup>442</sup> Chiefs played an important role in council, gathering support for their views through oratory.<sup>443</sup> But they did not have authoritarian power.<sup>444</sup>

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OF THE AMERICAN ABORIGINES 23 (1881) (referring to the Dakota League of the Seven Council Fires as a confederacy).

437. EASTMAN, *supra* note 436, at 10.

438. The 1805 and 1837 treaties were negotiated and executed only by the Mdewakanton bands. 1837 Treaty with the Sioux, Sept. 29, 1837, 7 Stat. 538; WINGERD, *supra* note 3, at 77, 134; *see also* WESTERMAN & WHITE, *supra* note 23, at 157 (noting that Dakota leaders from Wahpekute, Sisseton, and Wahpeton bands were present at the 1837 Treaty negotiations, although they were not signatories to that treaty).

439. Two sets of 1851 treaties were executed. First, the United States negotiated the Treaty of Traverse des Sioux with the Sisseton and Wahpeton bands. 1851 Treaty of Traverse des Sioux, July 23, 1851, 10 Stat. 949; WESTERMAN & WHITE, *supra* note 23, at 167. Then, it negotiated the Treaty of Mendota with the Mdewakanton and Wahpekute bands. 1851 Treaty of Mendota, Aug. 5, 1851, 10 Stat. 954; WESTERMAN & WHITE, *supra* note 23, at 182. The same pattern was followed in 1858, although the negotiations for both of those treaties occurred in Washington, D.C. WESTERMAN & WHITE, *supra* note 23, at 192.

440. The office of chief was usually hereditary, although chiefs were also chosen because they were well respected as warriors, had demonstrated spiritual powers, or had the power to persuade others. ANDERSON, LITTLE CROW, *supra* note 1, at 4–5; SAMUEL W. POND, THE DAKOTA OR SIOUX IN MINNESOTA AS THEY WERE IN 1834, at 67–68 (1986).

441. POND, *supra* note 440, at 66, 68; Chomsky, *supra* note 61, at 82; *see also* ELLA CARA DELORIA, THE DAKOTA WAY OF LIFE 12 (2007) (discussing how the council tipi was selected).

442. Chomsky, *supra* note 61, at 82.

443. ANDERSON, KINSMEN, *supra* note 28, at 12.

444. ANDERSON, LITTLE CROW, *supra* note 1, at 4; *see also* WESTERMAN & WHITE, *supra* note 23, at 169 (“For the Dakota, chiefs acted only with the consent of their

Finally, it is important to recognize that the traditional Dakota governmental system had been placed under considerable strain since the 1830s and was beginning to break down. Chiefs had become more susceptible to the machinations of white traders, and their influence among the Dakota had diminished.<sup>445</sup> The United States' assimilation programs had created deep divides between those "farmer Indians" who had adopted western attire, Christianity, and farming, and the traditionalists or "blanket Indians" who had refused to do so. At first, this made consensus more difficult to obtain; later, it became nearly impossible.<sup>446</sup> As white traders and farmer Indians began to assert more control over council proceedings, an old organization—the soldiers' lodge—began to take on a new role. Traditionally, the soldiers' lodge served many functions, including operating as a police force to carry out the will of the council, organizing and controlling hunts, and protecting the village from outside threats.<sup>447</sup> Now, the soldiers' lodge began to operate more as a decision-making body, and it precluded mixed-bloods and farmer Indians from participating.<sup>448</sup>

This background discussion is necessary to demonstrate that in determining whether the Dakota declared war on the United States in 1862, the focus should not be on the views of individual chiefs, but rather, on whether (1) councils were held, and if so, which bands participated in those councils; or (2) the soldiers' lodge convened, and if so, whether that lodge had expanded its powers by 1862 to enable it to declare war and not simply execute one already authorized by the council. Some scholars have argued that the council system was used and a decision was made to go to war. For example, Carol Chomsky, the leading scholar on the military trials held in the fall of 1862, has acknowledged that there was dissension among the Dakota and the decision to go to war was made with great haste, but she still concluded that the Dakota must be considered legitimate belligerents because "[c]ouncils *were* held and group decisions *were* made, both to begin and to continue the fighting."<sup>449</sup> Alternatively, Gary Clayton Anderson, a noted authority on the Dakota during this time period, claimed that the decision to

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people. It was important for their bands to be well represented, so as to develop a consensus.").

445. ANDERSON, KINSMEN, *supra* note 28, at 111, 174–75, 236–37.

446. *Id.* at 174–75, 238–40.

447. *Id.* at 12; ANDERSON, LITTLE CROW, *supra* note 1, at 13–14, 41.

448. ANDERSON, LITTLE CROW, *supra* note 1, at 81–82, 116–119.

449. Chomsky, *supra* note 61, at 83.

go to war was made by “a minority of warriors from the Mdewakanton soldiers’ lodges: a tribal or band council never even met to consider the prospect of war.”<sup>450</sup> A closer look at the events of August 17, 1862, is therefore necessary.<sup>451</sup>

On that August night, the Dakota men responsible for the killings at Acton returned to their homes at the Rice Creek Village.<sup>452</sup> There, they consulted with their headman, Red Middle Voice, and convened a council of the soldiers’ lodge.<sup>453</sup> There was concern that the whites would seek widespread retaliation for these murders, and that the annuity payment would now either be permanently withheld or at the very least, withheld until the responsible persons had been surrendered.<sup>454</sup> Middle Voice decided to seek the opinion of Chief Shakopee, whose village was nearby,<sup>455</sup> and Shakopee decided that a council of chiefs should be convened that night at Taoyateduta’s village.<sup>456</sup> Runners were sent to the heads of the Mdewakanton and Wahpekute bands.<sup>457</sup>

At the council, it was apparent that the young traditionalists who led the soldiers’ lodge were in favor of a war, while the older leaders of the Mdewakanton and Wahpekute bands were

450. ANDERSON, KINSMEN, *supra* note 28, at 255.

451. The possibility of war appears to have been discussed long before August 17, 1862. In 1894, Big Eagle gave an account of the war to Return Holcombe, a newspaper reporter. Big Eagle noted that in 1862, “[i]t began to be whispered about that now would be a good time to go to war with the whites and get back the lands” because the U.S. was distracted by the Civil War. THROUGH DAKOTA EYES, *supra* note 8, at 26. When the Union formed a company of mixed-blood Dakotas (the Renville Rangers) in Minnesota to assist in the Civil War, many Dakota saw this as a sign of weakness. *Id.* at 26–27. While talk of war died down, it started up again when the United States failed to deliver the treaty annuities due to the Dakota on time. *Id.* at 27. But none of these earlier discussions led to a decision to go to war.

452. The Rice Creek Village was of fairly recent vintage and consisted largely of young warriors who, dissatisfied with life on the Reservation, had deliberately moved north of the mouth of the Redwood River into an area that had been ceded to the United States in the 1858 treaty. At the time of the U.S.-Dakota War, the Village included approximately fifty people, many of whom were formerly part of Chief Shakopee’s band. 3 LUCIUS F. HUBBARD & RETURN I. HOLCOMBE, MINNESOTA IN THREE CENTURIES 274, 302 (1908).

453. ANDERSON, LITTLE CROW, *supra* note 1, at 130–31; ANDERSON, KINSMEN, *supra* note 28, at 253–54.

454. ANDERSON, KINSMEN, *supra* note 28, at 253.

455. 3 HUBBARD & HOLCOMBE, *supra* note 452, at 274, 311.

456. MEYER, *supra* note 34, at 117.

457. 2 FOLWELL, *supra* note 7, at 240; 3 HUBBARD & HOLCOMBE, *supra* note 452, at 312.

opposed.<sup>458</sup> Taoyateduta and other leaders had been to Washington, DC, to negotiate the 1858 Treaty. Their trip to the country's capital had shown them the strength of the United States and the futility of a war. Taoyateduta tried to communicate this futility to the young Dakota warriors, but they insisted on a war, and the band leaders—who did not have coercive power in the Dakota governmental system—could not convince them otherwise.<sup>459</sup> The young men called Taoyateduta a coward, and eventually, seeing that there was no way to convince those men that a war would be unsuccessful, Taoyateduta agreed to lead them into battle.<sup>460</sup>

Sources indicate that leaders from many of the Mdewakanton and Wahpekute bands were present on the evening of August 17, 1862, along with at least one hundred members of the soldiers' lodge.<sup>461</sup> Big Eagle was present, and in his account he stated that Wabasha, the head Mdewakanton chief, and Wacouta (also spelled Wakute), another Mdewakanton chief, were also there.<sup>462</sup> Modern authors have claimed that other Mdewakanton chiefs, including Traveling Hail, the recently elected speaker of the Dakota, and Chief Mankato, were present on this night for deliberations.<sup>463</sup> Big Eagle's account seems to settle this scholarly debate by stating that "[a] council was held and war was declared."<sup>464</sup>

If these accounts are accurate, a majority of the Mdewakanton chiefs—Wabasha, Wacouta, Taoyateduta, Shakopee, Red Middle Voice, Traveling Hail, and Mankato—would have been present on August 17, 1862, lending greater credibility to the conclusion that

458. ANDERSON, KINSMEN, *supra* note 28, at 254.

459. *Id.*

460. Being called a coward struck a nerve with Taoyateduta. He had recently lost an election to remain speaker for the Dakota; the much younger Traveling Hail had taken his place. DOANE ROBINSON, A HISTORY OF THE DAKOTA OR SIOUX INDIANS 264 (1967). Taoyateduta famously responded: "You will die like the rabbits when hungry wolves hunt them in the Hard Moon (January). Taoyateduta is not a coward; he will die with you." *Taoyateduta Is Not a Coward*, MINN. HISTORY, Sept. 1962, at 115.

461. ANDERSON, LITTLE CROW, *supra* note 1, at 130–31 (noting that the soldiers' lodge consisted of no more than one hundred men).

462. THROUGH DAKOTA EYES, *supra* note 8, at 36.

463. CARLEY, *supra* note 2, at 11, 12 (claiming, without citation, that "riders were sent to summon such leaders as Mankato, Wabasha, Traveling Hail, and Big Eagle to the war council at Little Crow's house" and that Wabasha advocated against the War during the council); DAHLIN, DAKOTA UPRISING, *supra* note 2, at 71 (claiming, without citation, that Mankato was present at Taoyateduta's house for deliberations on the early morning of August 18, 1862).

464. THROUGH DAKOTA EYES, *supra* note 8, at 36.

this was a traditional council, at least for the Mdewakanton bands. But there are reasons to doubt the presence of some of these chiefs. Wabasha claimed that he only found out about the war when the attack was occurring on August 18 and that he immediately sent word to chiefs Wacouta and Red Legs, “who had not yet heard of the outbreak.”<sup>465</sup> Additionally, it seems unlikely that Traveling Hail would have been summoned to this meeting, since he was supportive of the “farmer Indians,” rather than the soldiers’ lodge.<sup>466</sup>

Regardless of who was present on that night, most of the Mdewakanton and Wahpekute chiefs led their warriors into battle during the course of the fall of 1862, thereby seemingly ratifying the decision that had been made at that first council.<sup>467</sup> Furthermore, throughout the hostilities, numerous additional council meetings were held where representatives of nearly all of the bands were present.<sup>468</sup> Faced with these facts, it is hard to conclude that a formal war was not commenced by the Lower Dakota bands.

The Upper Dakota bands (i.e., Sisseton and Wahpeton), however, are a different matter. Neither their young men nor their leaders were involved in the initial decision to go to war. They found out about the war the next day, after the attack on the Lower Agency. A council of Sisseton and Wahpeton chiefs was

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465. *Id.* at 30–31. At least one historian has called Big Eagle’s claim that Wabasha and Wacouta were present on the evening of August 17, 1862, “improbable” because of the distance of their villages from Taoyateduta’s. 2 FOLWELL, *supra* note 7, at 241 n.34.

466. GREGORY F. MICHNO, *DAKOTA DAWN: THE DECISIVE FIRST WEEK OF THE SIOUX UPRISING, AUGUST 17–24, 1862*, at 53. Furthermore, accounts of Taoyateduta’s speech at this council establish that he attempted to shrug off the representatives of the soldiers’ lodge by telling them they should consult with Traveling Hail, the newly elected speaker, instead. *Id.* This would make little sense if Traveling Hail were already present for these discussions.

467. Big Eagle fought in the second battle of Fort Ridgley, the battle of New Ulm, and the battle of Birch Coulee, the latter with about thirty warriors from his band. He was also present at the battle of Wood Lake, observing it with Taoyateduta and some other chiefs from a hill on the west side. DAHLIN, *DAKOTA UPRISING*, *supra* note 2, at 40. Chief Mankato participated in the battles of Fort Ridgley, New Ulm, Birch Coulee, and Wood Lake. He was killed during the latter battle. *Id.* at 71. Wabasha was present at the battles of Fort Ridgley, Birch Coulee, and New Ulm. *Id.* at 98. Wacouta fought at the battle of Fort Ridgely. *Id.* at 224. Red Legs was a Wahpekute chief and one of the leaders at the battle of Birch Coulee. *Id.* at 226.

468. BERG, *supra* note 9, at 104–07, 114–15, 151, 157.

immediately convened.<sup>469</sup> John Other Day, head of one of the Wahpeton bands of “farmer Indians,” argued against the war, stating: “We are a different tribe. Their actions are nothing to us. I do not want to see a white man killed.”<sup>470</sup> Walking Iron (also known as Iron Walker or Mazomani), another Wahpeton chief, replied that the Mdewakantons were their relatives and it was “too late for us to keep aloof from this trouble” since the whites would hold them all responsible irrespective of their actual participation in the war.<sup>471</sup> Ultimately, the Wahpetons advocated for emptying the traders’ stores but not killing anyone.<sup>472</sup> White Lodge and most of the Sisseton chiefs who were present were in favor of joining the war, especially upon hearing that Captain Marsh’s company had been eliminated at Red Wood Agency.<sup>473</sup> The chiefs broke the council with no consensus being reached.<sup>474</sup>

Throughout the fall of 1862, many of these Upper Dakota bands continued to refuse to participate in the hostilities, and instead, they rendered aid to fleeing white settlers while refusing to do the same for the Lower Dakota bands.<sup>475</sup> The Upper Dakota then could reasonably be seen as not having declared war against the United States. That should not, however, have precluded individual band members from changing their allegiance, joining the Lower Dakota’s war efforts, and achieving the protections of lawful belligerents in the conflict.<sup>476</sup>

### C. *Federal Acknowledgement of the War*

The conclusion that a formal war was declared against the United States, at least by the Lower Dakota bands, is also supported by contemporaneous statements and actions of federal and state officials. Throughout the fighting in August and September 1862,

469. THROUGH DAKOTA EYES, *supra* note 8, at 120 (interview with John Other Day).

470. WHIPPLE, *supra* note 7, at 119.

471. *Id.*

472. THROUGH DAKOTA EYES, *supra* note 8, at 120 (interview with John Other Day).

473. *Id.* at 123.

474. Other Day remained opposed to all hostile actions and left in the middle of the council to warn his white friends. He ultimately led more than sixty individuals to safety. *Id.* at 121–22.

475. BERG, *supra* note 9, at 104–06, 114–15, 152; 2 FOLWELL, *supra* note 7, at 117–19.

476. See 2 FOLWELL, *supra* note 7, at 131 (noting that many of the younger Upper Dakota warriors joined in the fighting).

those officials described the conflict between the Dakota and the United States as a “war.” Minnesota Governor Alexander Ramsey gave status reports to President Lincoln and Secretary of War Stanton about “the Indian war” in the state,<sup>477</sup> and when action seemed to lag at the federal level, he implored Lincoln to provide them with resources, noting “[t]his is not our war; it is a national war.”<sup>478</sup> Official correspondence sent by Brigadier General Henry Hastings Sibley,<sup>479</sup> Commissioner of Indian Affairs William Dole,<sup>480</sup> Minnesota Adjutant General Oscar Malmros,<sup>481</sup> General John Pope,<sup>482</sup> and General Halleck<sup>483</sup> all referred to the fighting between the Dakota and the United States as a “war.”

During the fighting, General Sibley also took specific actions demonstrating that he believed the conflict to be a war between lawful belligerents. For example, on several occasions Sibley communicated with Dakota forces under a flag of truce and he informed his superiors, including General Pope, of this fact.<sup>484</sup> This

477. Letter from Governor Alexander Ramsey to Sec’y of War Edwin Stanton (Aug. 25, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 596; Letter from Governor Alexander Ramsey to Sec’y of War Edwin Stanton (Aug. 27, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 599. Ramsey, however, also referred to the conflict as the “Indian outbreak” on several occasions. *See, e.g.*, Letter from Governor Alexander Ramsey to Sec’y of War Edwin Stanton (Aug. 26, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 597; Letter from Governor Alexander Ramsey to President Abraham Lincoln (Aug. 26, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 597.

478. Letter from Governor Alexander Ramsey to President Abraham Lincoln (Sept. 6, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 617; *see also* Annual Message of Governor Ramsey to the Legislature of Minnesota, *supra* note 432, at 30 (noting that in 1862, “the State [of Minnesota] found herself engaged in a defensive war” with the Dakota).

479. Letter from Colonel Sibley to Minn. Adjutant-Gen. Malmros (Sept. 13, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 631; Letter from Colonel Sibley to Major-Gen. John Pope (Sept. 19, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 650–51.

480. Letter from W.P. Dole et al. to the President of the United States (Aug. 27, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 599.

481. Dispatch from Minn. Adjutant-Gen. Malmros to Wis. Governor Salomon (Sept. 6, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 616–17.

482. Letter from Major-Gen. John Pope to Major-Gen. Halleck (Oct. 10, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 724.

483. Letter from Major-Gen. Henry Halleck to Quartermaster-Gen. Meigs (Oct. 14, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 738.

484. Report of Colonel Henry Sibley to Governor Alexander Ramsey (Sept. 23, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 278–80; Letter from Colonel Henry to Minn. Adjutant-Gen. Malmros (Sept. 13, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 631; Letter from Colonel Henry Sibley to Dakota (Sept. 13, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 632;

is important because flags of truce could only be exchanged with enemy belligerents in a war, not with guerrillas or common criminals.<sup>485</sup> Despite being informed of this practice on numerous occasions throughout the fighting, General Pope only objected in October 1862, after the fighting had ended for the year. He then told Sibley, “I only regret that you even permitted a flag of truce to be used with them.”<sup>486</sup> The inference that can be drawn from this statement is that General Pope was well aware that the use of a flag of truce was acknowledgement of the lawful status of the opposing force.

Even those outside of the military were aware of the impact of a flag of truce. On November 12, Bishop Whipple wrote Senator Rice and asked him to deliver a letter to President Lincoln. In his letter to Rice he stated:

We cannot hang men by the hundreds. Upon our own premises we have no right to do so. We claim that they are an independent nation & as such they are prisoners of war. The leaders must be punished but we cannot afford by any wanton cruelty to purchase a long Indian war—nor by injustice in other matters purchase the anger of God.<sup>487</sup>

Whipple later confronted Sibley in correspondence: “The civilized world cannot justify the trial by a military commission of men who voluntarily came in under a flag of truce.”<sup>488</sup>

The tougher question, however, is whether a state of war could be said to still exist in 1863, when the Minnesota Adjutant General issued his order. Most of the fighting concluded in September

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Letter from Colonel Henry Sibley to Colonel Flandreau (Sept. 13, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 637–38; Letter from Colonel Henry Sibley to Major-Gen. John Pope (Sept. 19, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 650–51; Letter from Colonel Henry Sibley to Ma-za-ka-Tame et al. (Sept. 24, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 666–67; Letter from Colonel Henry to Major-Gen. John Pope (Sept. 27, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 679; Letter from Colonel Henry Sibley to Major-Gen. Pope (Oct. 5, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 711; Letter from Brigadier-Gen. Henry Sibley to Major-Gen. John Pope (Oct. 7, 1862), in 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 717.

485. CARNAHAN, *supra* note 351, at 18–19.

486. Letter from Major-Gen. John Pope to Brigadier-Gen. Henry Sibley (Oct. 6, 1862) (on file with the Minnesota Historical Society).

487. Letter from Bishop Henry Whipple to Sen. Henry Rice (Nov. 12, 1862), Whipple Papers, box 40, letterbook 4 (on file with the Minnesota Historical Society).

488. NICHOLS, *supra* note 23, at 124 (citing Letter from Bishop Henry Whipple to Brigadier-Gen. Henry Sibley (Mar. 7, 1863), Whipple Papers, box 3, letterbook 3 (on file with the Minnesota Historical Society)).

1862, and by the beginning of October, General Pope had announced that “[t]he Sioux war may be considered at an end.”<sup>489</sup> But Taoyateduta had not been captured, and he fled westward along with at least 150 persons. It appears that General Halleck had it right when he wrote that “[t]he Indian war in [Minnesota] is deemed to be ended *for the season*.”<sup>490</sup>

#### CONCLUSION

Federal, state, and local governments all had a hand in creating the bounty system that provided monetary rewards for the killing of Dakota men beginning in 1863. This system was illegal from its inception because the Dakota were engaged in a war with the United States and were entitled to the status of lawful belligerents under both the international laws of war and the domestically created Lieber Code. Yet despite this, the bounty system remained in Minnesota for years, and similar systems existed in other states such as California and Arizona. While many scholars today refer to this time period as the “Reservation Era,” it could also be viewed as the “Extermination Era,” an ugly bit of our collective history where elected officials advocated for the mass murder of Indian people. The story of the U.S.-Dakota War is incomplete without this history.

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489. Letter from Major-Gen. John Pope to Major-Gen. Halleck (Oct. 9, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 722; Letter from Major-Gen. John Pope to Major-Gen. Halleck (Oct. 10, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 724; Letter from Major-Gen. John Pope to Major-Gen. Halleck (Oct. 21, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 755.

490. Letter from Major-Gen. Henry Halleck to Quartermaster-Gen. Meigs (Oct. 14, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 738 (emphasis added); *see also* Letter from WM. Crooks et al. to Brigadier-Gen. Sibley (Oct. 7, 1862), *in* 13 WAR OF THE REBELLION, SER. I, *supra* note 2, at 720 (requesting, long after the last battle of 1862 had concluded, that Sibley “remain in command [of the expedition] till the end of the war,” necessarily implying that the war had not ended).