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Explaining the Sioux Military Commission of 1862

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INTRODUCTION

From the doorway of her family's house, it looked to fourteen-year old Cecelia Campbell as though a boa constrictor was moving across the Minnesota plains.[1] The approaching form was in fact a steady column of organized forces, drawn primarily from the Mdewakanton Sioux tribe,[2] and poised to launch the first of a series of attacks on Minnesota's frontier settlements.[3] Over the next four days, from August 18 to 22, 1862, as reports of what some claimed to be the largest killing of civilians in the country's history sounded across the frontier press and Cecelia trudged to the enemy's camp

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1. Cecilia Campbell Stay's Account, *in* Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862, at 44, 45 (Gary C. Anderson & Alan R. Woolworth eds., 1988) [hereinafter Dakota Eyes] ("I went and stood at the door and saw something dark moving along the ground as far as I could see[:] it was shaped like a boa constrictor.").

2. The Mdewakanton tribe is part of what is often identified as the Sioux confederacy or Sioux Nation, a group comprised of seven major tribal divisions. *See* Gary Clayton Anderson, Little Crow: Spokesman for the Sioux 6 (1986). Where possible, this Note will refer to the specific tribal division. Otherwise, this Note will use the term "Sioux" for conformity with historical records, recognizing, however, that "Dakota" is the more accurate term and preferred among many Mdewakantons today. *Id.* For details on the reported scope of Mdewakanton involvement in the initial attacks, see *infra* notes 39 and 92.

3. *See* Roy W. Meyer, History of the Santee Sioux: United States Indian Policy on Trial 119–20 (1967).

along with other captives,[4] editorialists and government officials immediately began calling for the total extermination of the Sioux.[5] And yet, five weeks after Colonel Henry H. Sibley set out on the planned campaign of extermination, he instead announced that he and his men would be holding a military commission.[6]

In the subsequent proceedings, five officers gathered each morning over the course of six weeks, first in a tent and later in a fur-trader's kitchen,[7] to determine whether those seated opposite them had voluntarily participated in the attacks. Over the past century, these proceedings have incited an enormous amount of criticism.[8] More recently, in the wake of the establishment of military

4. *See, e.g.*, Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry W. Halleck, Major Gen., Gen.-in-Chief, Gen. Staff, U.S. Army (Sept. 23, 1862), *in* 13 War of The Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Ser. 1, at 663, 663 (1885) [hereinafter 13 OR] (estimating five hundred deaths); Letter from Thomas J. Galbraith, U.S. Agent for the Sioux Indians, to Alexander Ramsey, Governor of Minn. (Aug. 20, 1862), *in* St. Paul Daily Press, Aug. 22, 1862, at 1 (reporting one hundred known deaths and one thousand believed deaths); *The Sioux War*, St. Paul Daily Press, Aug. 22, 1862, at 1 (describing the massacre as "more horrible than has been perpetrated by the savage devils within the present century"); *The Sioux War: Lieutenant Governor Donnelly's Report*, Mankato Wkly. Rec., Sept. 6, 1862, at 1 (reporting that it would be "miraculous if one-half the population has escaped"). For Campbell's description of her "captivity," see Cecilia Campbell Stay's Account, *supra* note 1, at 135–38. Official military titles included in letter citations are compiled from information available in the source itself, the American Civil War Research Database, and military records from the Ancestry Library Database.

5. *See infra* notes 44–47 and accompanying text; *see also* Letter from Thomas J. Galbraith to Alexander Ramsey, *supra* note 4 (calling for an "exterminating campaign"); *The Sioux War*, Mankato Semi-Wkly. Rec., Aug. 23, 1862, at 1 (reporting that "[t]he facts are horrifying in the extreme, and call for the most summary measures of retaliation by the Government"); *The Sioux War*, St. Paul Daily Press, *supra* note 4 ("We hope they will be able to overtake their murderous and cowardly foe and exterminate them.").

6. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Sept. 27, 1862), *in* 13 OR, *supra* note 4, at 679, 679.

7. *See The Indian Expedition*, St. Paul Pioneer, Nov. 15, 1862, at 1.

8. *See, e.g.*, Louis Fischer, Military Tribunals and Presidential Power: American Revolution to the War on Terrorism 54 (2007) (noting that the military commission has been the subject of several critiques); William Watts Folwell, The Court Proceedings in the Trial of Dakota Indians Following the Massacre in Minnesota in August 1862, at 3 (1927) (referring to the trials as a "disgraceful

commissions at Guantánamo, scholars have cited the slim procedural safeguards afforded to the Sioux as evidence of the need for institutional reforms.[9]

Curiously, though, much of the recent scholarship on military commissions has glossed over a fundamental question: Why did the United States convene a military commission? For two centuries, European immigrants to the New World had responded to Indian attacks with virtually unrestrained retaliatory violence.[10] The real question raised by the commission is not whether it afforded due process but why the United States provided any process at all.

This Note seeks to address this inquiry, by exploring the circumstances surrounding the commission and the explicit justifications put forth by those in command. While it is certainly true, as Justice Stevens recently summarized,[11] that military commissions emerged out of military necessity, the necessity that

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story of passion, partiality, and cruelty . . . a travesty of justice"); Marouf Hasian, In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties 66–67 (2005) (criticizing the commission's failure to treat the defendants as prisoners of war); Ryan H. Beery, *Modern Use of Military Tribunals: A Legal "Can" and a Political "Should"?*, 28 Ohio. N.U. L. Rev. 789, 789 (2002) (critiquing the commission's "lax rules of evidence and a general ad hoc legal procedure that created an atmosphere of injustice"); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433, 452–54 (2002) (citing the commission as an example of the "abuses and injustice" that "pock-mark the domestic record of these tribunals"); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev. 13, 14–15 (1990) (summarizing the numerous procedural flaws of the commission); Joshua S. Clover, *"Remember, We're The Good Guys": The Classification and Trial of the Guantánamo Bay Detainees*, 45 S. Tex. L. Rev. 351, 375–76 (2004) (citing the commission as "an example of what can go wrong with military commissions when left unchecked"); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 Geo. Immig. L.J. 1, 47, 50 (2002) (referencing the commission as an example of force trumping legality); Jessica Tully, *Military Commissions are Governed by Military and International Law: Hamdan v. Rumsfeld*, 45 Duq. L. Rev. 805, 810 (2007) (referencing the commission as an example of "highly irregular trial procedures, overzealous prosecutors, and exaggerated sentencing guidelines"); Stephen R. Riggs, Letter to the Editor, *History of the Sioux War*, St. Paul Daily Press, Dec. 17, 1863, at 2 (finding that the military commission's hasty procedures were "not in accordance with Military Regulations and the spirit of Christianity").

9. *See* discussion *supra* note 8.

10. *See infra* text accompanying notes 49–57.

11. Hamdan v. Rumsfeld, 548 U.S. 557, 590–91 (2006).

animated a decision to convene a commission was not always, as scholars have implied, the need to adjudicate individual culpability in the absence of an available court of law.[12] Instead, archival records from one of the best documented and earliest examples of a military commission established in response to attacks on civilians reveal a more complex set of goals.

Specifically, the commanders who convened, participated in, and approved the Sioux military commission did so not in an attempt to satisfy the Army's truth-seeking needs or to provide defendants with due process, but rather, as a less costly, more efficient alternative to retaliatory warfare. These records reveal that officers convened the commission to deal with the grueling reality of limited military resources, a mobile and elusive enemy, and a newspaper industry that rendered public opinion an important factor in military strategy. Set in the context of this beleaguered war effort, officials did not intend for the commission to serve as a replacement for a court of law, but rather, as a proxy for the battlefield.

Part I of this Note describes current scholarship on the history of military commissions and identifies a gap in the prevailing narrative, namely, an explanation for why the military favored a legal process over collective reprisals or summary executions. Part II seeks to address this gap, by examining the circumstances in which the military convened the commission and the context in which President Abraham Lincoln approved it. Part III concludes that this historical perspective helps clarify the original role of military commissions as articulated in the Supreme Court case of *Hamdan v. Rumsfeld* and calls into question whether an institution that emerged as a substitute for force is the right vehicle for providing due process.

I. A GAP IN THE SCHOLARSHIP ON THE HISTORY OF MILITARY COMMISSIONS

Over the past seven years, the United States' decision to establish military commissions in the wake of the attacks of September 11, 2001, has given rise to a rich body of scholarly literature.[13] Given that the Sioux military commission marked one of

12. *See infra* text accompanying note 22.

13. Detlev F. Vagts, *Military Commissions: A Concise History*, 101 Am. J. Int'l L. 35, 35 (2007) (identifying an increase in scholarly interest in the history of

the first instances in which the United States invoked legal proceedings in response to an attack on civilians,[14] one might expect a rigorous analysis of the origins of this commission.

Instead, only a handful of scholars have sought to explain why the United States responded with legal proceedings at a time when the law of war, customary practices, and indeed public sentiment, sanctioned the use of military retaliation, including collective reprisals and summary executions.[15] Accounts of the general history of military commissions have, in some cases, overlooked the Sioux military commission entirely,[16] while those that

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military commissions following September 11, 2001). Since September 2001, 201 law review articles have been published with either "military commission" or "military tribunal" in the title; no such articles had been published in the seven years prior to 2001. Westlaw Search performed February 23, 2009.

14. The Sioux military commission was not the first time that the U.S. Army employed legal proceedings when responding to attacks on civilians. *See* William B. Skelton, An American Profession of Arms: The Army Officer Corps, 1784-1861, at 322 (1992). The army also employed legal proceedings during the Mexican-American War of 1845-48, when General Winfield Scott convened "councils of war" to try members of enemy forces for alleged violations of the laws of war. *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 30–39 (2005) (describing the creation of the military commission during the Mexican-American War and the establishment of councils of war); *see also* William Winthrop, Military Law and Precedents 1298–99 (1896) (explaining that only a few councils of war were convened during the Mexican-American War). For a discussion of historical precedents of the Sioux military commission, see *infra* notes 62–66 and accompanying text.

15. *See infra* text accompanying notes 49–57 (discussing collective reprisals), text accompanying notes 115–120 (discussing summary executions).

16. *See, e.g.*, Leonard Cutler, The Rule of Law and the Law of War: Military Commissions and Enemy Combatants Post 9/11, at 3–15 (2005) (summarizing the history of military commissions without reference to the Sioux military commission); Thomas H. Moreland, *Indefinite Detention of "Enemy Combatants," in* The Imperial Presidency and the Consequences of 9/11, at 91, 109–17 (James R. Silkenat & Mark R. Shulman eds., 2007) (same); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 717 n.81 (2008) (same); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 249, 250–52 (2002) (same); Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 Army Lawyer 41, 42–47 (2002) (same); Jill K. Lamson, *Hamdan v. Rumsfeld and the Government's Response: The Military Commissions Act of 2006 and Its Implications on the Separation of Powers*, 39 U. Tol. L. Rev. 497, 506–07 (2008) (same); Paul Taylor, *The Historical and Legal Norms Governing the Detention of Suspected Terrorists and the Risks Posed by Recent Efforts to Depart From Them*, 12 Tex. Rev. L. & Pol. 223, 227–28 (2008) (same).

do reference the commission have tended to focus on a normative assessment of the procedures, rather than the reasons why the United States convened the commission in the first place.[17] Likewise, accounts of the United States-Sioux war generally describe the Sioux military commission without inquiring why it was held.[18]

Those scholars who have delved further into the commission's underlying rationales have reached varying conclusions. Some historians have suggested that Colonel Sibley convened the commission as part of a larger project of punishment and vengeance.[19] Roy W. Meyer, for example, suggests that the military organized the commission as a means of satisfying "the popular demand for retribution" by punishing those enemy forces who were readily available since the "most clearly guilty among the Sioux were scattered over the prairies to the west," and thus, out of reach.[20] Carol Chomsky, in her detailed critique of the commission's procedures, suggests that Sibley chose trials over forced removal

17. *See, e.g.*, Louis Fischer, *supra* note 8, at 51–55 (2007) (describing the Sioux military commission without examining why the military did not resort to reprisal or summary executions); Peter Judson Richards, Extraordinary Justice: Military Tribunals in Historical and International Context 30–31 (2007) (same); Beery, *supra* note 8, at 789 n.54 (same); Belknap, *supra* note 8, at 452–53 (same); David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2044–45 (2003) (same); Jody Prescott, *Military Commissions, Past and Future*, Mil. Rev., Mar.–Apr. 2003, at 42, 45; Vagts, *supra* note 13, at 39 (same). Notably, Professor Glazier makes the sound point that although scholars have raised legitimate concerns about the unfairness of the procedures, "arguably, more significant was the insistence on providing trials at all, given previous views that 'savages' could be summarily executed." Glazier, *supra* note 14, at 39–40.

18. For accounts that describe the Sioux military commission without inquiring why it was held, see Kenneth Carley, The Sioux Uprising of 1862, at 62–63 (1961); William M. Osborn, The Wild Frontier 206 (2000); Robert M. Utley, Frontiersmen in Blue: The U.S. Army and the Indian 1848–1865, at 269 (1967); Robert M. Utley & Wilcomb E. Washburn, The American Heritage History of the Indian Wars 204 (First Mariner Books ed., 2002).

19. Micheal Clodfelter, The Dakota War: The United States Army Versus the Sioux, 1862–1865, at 57 (1998) (briefly describing the appointment of the military commission and stating that "the real work . . . was vengeance"); Louis H. Roddis, The Indian Wars of Minnesota 147 (1956) (briefly describing the appointment of the military commission and implying that it was established as a means to "punish the warriors"); Meyer, *supra* note 3, at 125.

20. Meyer, *supra* note 3, at 125.

because he had been trained in the law and wanted to provide the defendants with some degree of due process.[21]

These accounts are consistent with a broader theory that scholars have put forward to explain the emergence of military commissions in general, namely, that the commission emerged as a substitute for an otherwise unavailable court of law.[22] According to

21. Chomsky, *supra* note 8, at 93 ("[Sibley's] training as a lawyer, however, would suggest not that he punish the Dakota by removing them to a distant reservation, as was frequently done, but that he try them for their crimes."); *see also* William Watts Folwell, Minnesota: The North Star State 227 (1908) (describing Pope's plans to exterminate the Sioux and explaining that Sibley "was too humane and judicious to give serious regard to so insane a proposal"); Rhonda R. Gilman, Henry Hastings Sibley: Divided Heart 185 (2004) ("Drum-head justice it was, as Sibley freely admitted. Yet his ingrained sense of legal propriety demanded some color-of-law, even in the disposal of those deemed maniacs and wild beasts."). Notably, however, Sibley had elected not to pursue a career in law. As Sibley explained in his unpublished autobiography: "My father intended me to follow his profession, but after [two years of study], I frankly told him that the study was irksome to me, and I longed for a more active and stirring life." Gilman, *supra*, at 20 (quoting Sibley's autobiography).

22. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 590–91 (2006) (surveying scholarly views on military commissions and concluding that "[g]enerally . . . the need for military commissions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial"); William W. Winthrop, Digest of Opinions of the Judge Advocate General of the Army 325 (1880) ("[Military commissions are] simply criminal war-courts, resorted to for the reason that the jurisdiction of Courts Martial . . . is restricted by law, and cannot be extended to include certain classes of offenses . . . which in war would go unpunished in the absence of a provisional forum for the trial of the offenders."); Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules For Military Commissions in the War Against Terrorism*, 42 Harv. C.R.-C.L. L. Rev. 139, 140 (2007) ("Military courts were traditionally regarded as courts of necessity, only to be convened temporarily by commanders in war zones . . . where no other courts were open or had jurisdiction."); Chomsky, *supra* note 8, at 63 ("The army began to use military commissions during the Mexican Wars as a way of conducting what the commanding officers viewed as necessary trials involving individuals and offenses not specified by statute as being subject to court-martial."); Louis Fischer, *Military Commissions: Problems of Authority and Practice*, B.U. Int'l L.J. 15, 26 (2006) ("During the United States' Civil War, military commissions were established initially to address crimes and military offenses . . . not triable or punishable by courts-martial and . . . not within the jurisdiction of any existing civil court."); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantanamo Military Commissions*, 12 Lewis & Clark L. Rev. 131, 136, 140–41 (explaining that General Winfield Scott created military commissions during the Mexican-American War to "fill a critical statutory gap in the UCMJ's predecessor" and referring to the "historic commission use as a jurisdictional gap-filler"); Gabor

this theory, which Justice Stevens endorsed in *Hamdan v. Rumsfeld*, officers in the Mexican-American War and Civil War began using military commissions to try enemy defendants charged with law of war violations because no other forum was available; the tribunal that militaries had traditionally set up in the field—the court-martial—was statutorily reserved for disciplining one's own troops.[23] Although different in name, the new tribunal—the military commission—would use the same processes as the court-martial, and thus "protect against abuse and assure evenhandedness under the pressures of war."[24] As Louis Fischer explained in a brief to the Supreme Court, military commissions "have traditionally been used as an emergency measure by a commander in the field to fill a temporary gap created by the absence of civilian court or court-martial jurisdiction."[25]

While these explanations provide a helpful starting point in explaining why Sibley convened the Sioux military commission, they raise two further questions.

First, if the purpose of the commission was to satisfy popular demand for retribution, why did the military not simply execute its plans of extermination, or alternatively, immediately execute those who had surrendered? The nineteenth-century common law of war sanctioned such forms of retaliation against enemies who failed to comply with the prevailing norms of "civilized nations."[26] Indeed, when Francis Lieber drafted the first codification of the laws of war in 1863, he deemed retaliation lawful, provided that it was used as a measure of last resort.[27] Thus, if an enemy force wantonly killed unarmed non-combatants, early American military commanders

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Rona, *Legal Issues in the "War on Terrorism"—Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger*, 9 German L.J. 711, 732 (2008) ("Historically, military commissions have been appropriately relegated to times and places where the normal machinery of the judiciary is unavailable or dysfunctional.").

23. *See* discussion *supra* note 22.

24. *Hamdan*, 548 U.S. at 617.

25. Brief for Louis Fischer as Amicus Curiae Supporting Petitioner at 2, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), 2005 WL 2178809; *see also* Gilman, *supra* note 21, at 185 (describing the Sioux military commission as an alternative to "premptory executions" when state courts were not available).

26. *See infra* text accompanying notes 49–57.

27. Francis Lieber, General Order No. 100: Instructions for the Government of Armies of the United States in the Field 9 (1863).

could, and often did, respond in kind or by summarily executing enemy prisoners.[28]

Second, if the goal was instead to create a substitute for a court-martial and provide some degree of due process, a goal that seems plausible in light of Sibley's long-standing friendship with members of the Sioux,[29] how do we reconcile this with Sibley's initial plans to "begin my work upon [the Sioux] with fire and sword,"[30] whom he referred to as "devils in human shape",[31] and his later threats to "destroy [Sioux] men, women, and children, alike"[32] and "cut them to pieces?"[33] In other words, how do we reconcile Sibley's professed initial goal of total war and announcement that his "heart is hardened against [the Sioux] beyond any touch of mercy"[34] with his chosen means of legal process?

II. REVISITING THE ORIGINS AND GOALS OF THE SIOUX MILITARY COMMISSION

A. Circumstances Prompting the Sioux Military Commission of 1862

When Colonel Sibley set out on August 20, 1862, with plans to kill the Sioux,[35] the United States faced, in the eyes of many, an

28. *See infra* text accompanying notes 49–57.

29. Clodfelter, *supra* note 19, at 50 (describing Sibley's close, twenty-year friendship with the Sioux).

30. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Aug. 24, 1862), *in* Extracts from General Sibley's Letters to his Wife, Written on the Indian Campaign (R.J. Holcombe ed., 1893), *microformed on* Henry H. Sibley Papers, Film M164, Reel 11 (Yale Univ.) [hereinafter Sibley Papers].

31. *Id.*

32. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 3, 1862), *in* 13 OR, *supra* note 4, at 707, 707–08.

33. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 5, 1862), *in* 13 OR, *supra* note 4, at 711, 711–12.

34. Letter from Henry H. Sibley to Sarah Sibley (Aug. 24, 1862), *supra* note 30.

35. Carley, *supra* note 18, at 36–37; *see* Letter from Henry H. Sibley to Sarah Sibley (Aug. 24, 1862), *supra* note 30.

unprecedented threat. Eleven years earlier, four of the seven tribes that composed the Sioux Nation—the Mdewakantons, Sissetons, Wahpetons, and Wahpekutes—had agreed to sell their ancestral homelands to the United States and move to a reservation stretching along the Minnesota River valley, in exchange for a fixed sum to be paid in annual installments.[36]

Despite the United States' assurances, conditions on the reservation had steadily deteriorated as corrupt federal agents withheld or diverted payments and inflated prices on goods intended for distribution.[37] By 1862, following an especially harsh winter, many families on the reservation were forced to the brink of starvation and instructed to "eat grass."[38] Betrayed, angry, and desperate, members of the Mdewakanton soldiers lodge—a tribal institution employed in organizing hunts and political activism—began to plan the attacks of August 1862.[39]

From the perspective of at least some state and federal officials, these attacks signaled the potential unraveling of American hegemony. By August 30, 1862, an American officer reported that "[t]here never was a time in the history of the country when so many tribes distant from and hostile to each other were exhibiting hostility

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36. For a discussion of the treaty negotiations of 1851 between the United States and the Mdewakantons, Wahpekutes, Sissetons, and Wahpetons, see Anderson, *supra* note 2, at 58–74.

37. *See* Dakota Eyes, *supra* note 1, at 19–20.

38. Robert Hakewaste's Testimony, *in* Dakota Eyes, *supra* note 1, at 31, 33 (recalling that the government agent had advised the families that they could "eat grass").

39. Anderson, *supra* note 2, at 116–17, 130–34. Although it is not within the scope of this Note to examine the origins of the conflict in detail, first-hand accounts from three Mdewakantons who were involved in the conflict, Jerome Big Eagle ("Wamditanka"), Joseph Wabasha, and Robert Hakewaste, provide a good overview of Mdewakanton perspectives on the causes of war and are reprinted in Dakota Eyes, *supra* note 1, at 21–33. *See also* Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Oscar Malmros, Adjutant Gen. of Minn. (Sept. 8, 1862), *in* St. Paul Daily Press, Sept. 11, 1862 (citing a letter from the presumed leader of the attacks as stating that the Sioux commenced the war after the United States failed to comply with its treaty obligations, leaving children to die of starvation); *Where the Responsibility Lies*, Mankato Semi-Wkly. Rec., Nov. 1, 1862, at 2 (asserting that the Indian massacre was "caused wholly by the dishonesty of the [Federal] Indian superintendent and agents").

to the whites."[40] In mid-September, Iowa's Governor received intelligence that "the whole Sioux Nation is bound for a war of extermination against the frontier."[41] As reports of the death-toll continued to climb,[42] families abandoned their homes, leaving behind predictions that it was only a matter of time before the Union would be forced to cede control of Minnesota's frontier.[43]

1. The Initial Plan of Response: A War of Extermination

After news of the attacks arrived in St. Paul, government and military officials immediately advocated a war of extermination as the preferred response. President Abraham Lincoln's secretary, who was coincidentally visiting Minnesota, reported to the Secretary of

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40. Letter from James Craig, Brigadier Gen., Commanding Dist. of Neb., Gen. Staff, U.S. Volunteers, to James G. Blunt, Brigadier Gen., Commanding Dist. of Kan., Gen. Staff, U.S. Volunteers (Aug. 30, 1862), *in* 13 OR, *supra* note 4, at 607, 607–08.

41. Letter from H. C. Nutt, Lieutenant Colonel & Aide-de-Camp, Iowa State Militia, to Samuel J. Kirkwood, Governor of Iowa (Sept. 16, 1862), *in* 13 OR, *supra* note 4, at 638, 640.

42. *See* Meyer, *supra* note 3; *see also* Carley, *supra* note 18, at 11 (stating that "in terms of the number of lives lost, the outbreak was the worst in American history."); Clodfelter, *supra* note 19, at 41 (estimating that on August 18 alone, four hundred civilians were killed throughout southwestern Minnesota); Dakota Eyes, *supra* note 1, at 1, 14 (estimating that about four hundred civilians lost their lives in the first four days of fighting); Chomsky, *supra* note 8, at 21–22 (1990) (estimating that "in thirty-seven days of fighting . . . approximately 358 settlers . . . had been killed.").

43. *See* Ignatius Donnely, Letter to the Editor, St. Paul Daily Press, Aug. 28, 1862, at 1 (describing widespread panic); Letter from John H. Pope to Henry W. Halleck (Sept. 23, 1862), *supra* note 4 (describing the threat of depopulation and emphasizing the need to restore confidence). *But see* Alexander Ramsey, Proclamation to the People of the State (1862), *in* St. Paul Daily Press, Aug. 23, 1862, at 1 (assuring Minnesotans that the "force of [Sioux] violence will fall upon the scattered habitations along the western frontier" and that the Sioux would not "invade the more thickly settled parts of the State"); *Exaggerated Rumors and Reports*, St. Paul Daily Press, Aug. 26, 1862, at 1 ("We have thousands of men in the State . . . who are more than a match for the [the Sioux] in all the arts of Indian warfare. Our citizens may rest assured that the irregular forces now in the field are ample for the present emergency . . . ."); *The Origin and Extent of Our Indian Difficulties,* St. Paul Daily Press, Aug. 28, 1862, at 1 ("Let Col. Sibley then abandon these panic bred chimeras of vast armies of Indians, and move forward at once to mete out to the rascals the just punishment of their crimes.").

War that "against the Sioux it must be a war of extermination."[44] General John H. Pope, the commander of the newly formed Minnesota Department, also advocated a campaign of vigorous warfare: "I think as we have the men and means now we had best put a final stop to Indian troubles by exterminating or ruining all the Indians engaged in the late outbreak," he advised Sibley.[45] Sibley shared this enthusiasm; five days after receiving his appointment to lead the expedition,[46] he announced his strategy: "I hope to overtake and kill a thousand or more of the savages . . . and drive the remainder across the Missouri or to the devil."[47]

Although these calls for violence were tempered by calls from at least one missionary, who warned against complete extermination,[48] the American officials who advocated this type of exterminatory response were in good historical company.[49]

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44. Letter from John Nicolay, Private Sec'y to President Abraham Lincoln, to Edwin M. Stanton, U.S. Sec'y of War (Aug. 27, 1862), *in* 13 OR, *supra* note 4, at 599, 599–600. The Governor, in turn, announced that "[t]he Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State." *Governor Ramsey's Message*, Chi. Trib., Sept. 17, 1862, at 3. A few days later, Minnesota's Lieutenant Governor reported to the Governor that, "[w]ith prompt action [the Sioux] can be exterminated or driven beyond the State line." Ignatius Donnelly, *Report of Lieutenant Governor Donnelly* (Aug. 29 1862), *in* Report of the Commissioner of Indian Affairs for the Year 1862, at 59, 68 (1863); *see also Minnesota and the Indian War*, N.Y. Evangelist, Oct. 9, 1862, at 1 (alluding to the "general wish for the utter extermination of the race").

45. Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia (Sept. 17, 1862), *in* 13 OR, *supra* note 4, at 648, 649.

46. *See* 2 William Watts Folwell, A History of Minnesota 147–48 (1961) (describing Sibley's appointment).

47. Letter from Henry H. Sibley to Sarah Sibley (Aug. 24, 1862), *supra* note 30.

48. *See* Thomas Williamson, Letter to the Editor (Aug. 29, 1862), *in* Stephen R. Riggs Papers, Minn. Historical Soc'y, St. Paul, Minn. [hereinafter Riggs Papers] ("Some say, exterminate them all; but to do this will be both foolish and wicked."); *see also* Martha T. Riggs, Letter to the Editor (Sept. 26, 1862), *in* Riggs Papers, *supra* ("And yet there are many who curse this people, and cry, 'Exterminate the fiends.' Dare we, as a nation, thus bring a curse upon ourselves and on future generations.").

49. For a description of Native American warfare and early American military responses, see generally John Grenier, The First Way of War: American War Making on the Frontier, 1607–1814, at 16–86 (2005) (detailing early American military traditions that developed in response to the varied ways that Indians waged war, including extirpative war, hanging, and scalp hunting);

Since colonial times, commanders responding to attacks on civilians had repeatedly resorted to indiscriminately killing Native Americans. Perhaps the most infamous example of a collective reprisal can be found in Captain John Mason's response to a 1637 Pequot raid on Connecticut farmers which left nine settlers dead.[50] As punishment, Mason found a Pequot village, announced "we must burn them," and lit the fort and its sleeping inhabitants on fire.[51] The fire killed hundreds of men, women, and children.[52]

Such responses were not limited to colonial warfare. In 1850, over two hundred years later and on the opposite coast, Lieutenant Nathaniel Lyon led a campaign in Northern California that "twice trapped large groups of Indians on islands, then killed scores of men, women and children," in a venue Lyon later described as a "perfect slaughter pen."[53] A year later, General Ethan Allen Hitchcock, the commander of the Department of the Pacific, dispatched troops to "punish the Coquilles" after reports surfaced that a party of Coquilles had killed five American explorers in Oregon.[54] The following month, troops traveled up the Coquille River and, after spotting an Indian

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Bernard W. Sheehan, Seeds of Extinction: Jeffersonian Philanthropy and the American Indian 205 (1973) (describing how Virginians and New Englanders followed a "policy of extermination" in retaliation for Native American attacks on colonial settlements); Armstrong Starkey, European and Native American Warfare, 1675–1815, at 6, 17–35 (1998) (describing the Native Americans' use of ambushes, guerrilla tactics, and lack of distinction between civilians and soldiers).

50. For an early account of the attack and colonists' response, see Thomas Prince, *Introduction* to John Mason, A Brief History of the Pequot War i, iii–iv (1736); *see also* Grenier, *supra* note 49, at 27–28 (describing Mason's May 1637 attack on Pequot women, children, and old men); Utley & Washburn, *supra* note 18, at 25 (describing how, in September 1675, a combined force from Maryland and Virginia murdered five Susquehannock chiefs who were suspected of recent frontier murders).

51. John Mason, A Brief History of the Pequot War 7–8 (1736) .

52. *See* Isaac V.D. Heard, History of the Sioux War and Massacres of 1862 and 1863, at 271 (1864) (estimating six hundred deaths); Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest 225 (1975) (estimating anywhere from three hundred to seven hundred Pequot deaths). In 1675, Massachusetts soldiers engaged in a similar act of collective reprisal, killing hundreds of women and children in retaliation for an attack on settlers. *See* A Farther Brief and True Narration of the Late Wars Risen in New-England 9–10 (1676) (describing the "firing" of five hundred wigwams).

53. Skelton, *supra* note 14, at 321.

54. *See* Ray H. Glassley, Pacific Northwest Indian Wars 59–60 (1953) (describing the attack and military response).

encampment, killed fifteen people within a few minutes.[55] Four years later, in 1855, Colonel William S. Harney responded to a Sioux attack on an Army detachment in Nebraska by looking for a suitably large Sioux village to punish.[56] Upon discovering a camp of teepees, he and his men pounded the village with artillery, killing eighty-five men, women, and children.[57]

Although the U.S. Army issued "few fixed guidelines" governing conduct toward native tribes, these actions reflected a broad sentiment among nineteenth-century officers that indiscriminant retaliation against Native Americans was an acceptable form of warfare.[58] As William B. Skelton documents in his study of U.S. Army officers' attitudes towards Native Americans, the military's relationship to Native Americans was characterized both by compassion and a "readiness to use force," as expressed in teachings at West Point,[59] military orders,[60] and the remarks of one officer who insisted in 1850 that "the *surest*, and, in the end, the *most humane*, preventive is *retaliation*, not only on the offenders in person, but upon the *tribes to which they belong*."[61]

These nineteenth-century campaigns of retaliatory violence were not, however, immune from censure.[62] Nor were they the only way in which officers responded to attacks on civilians. In the 1850s, it was "surprisingly common" for officers in the Pacific Northwest to resort to "hasty military trials."[63] For example, in July of 1855, Major

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55. *Id.* at 60.

56. Clodfelter, *supra* note 19, at 19.

57. *Id.* at 19–20.

58. Skelton, *supra* note 14, at 305–06.

59. *Id.* at 319 (quoting Dennis Hart Mahan as advising his students at West Point that, in the event of hostilities, they should "strike such a blow that it shall be handed down as memorable in the traditions of the Tribe").

60. *Id.* at 321 (quoting Colonel William J. Worth, the newly appointed commander of the Florida campaign against the Seminoles, as instructing his officers in 1841 to "[f]ind the enemy, capture, or exterminate").

61. *Id.* at 316 (quoting Lieutenant William H.C. Whiting in his March 14, 1850 letter to Brevet Captain George Deas) (emphasis in original).

62. *See id.* at 315–16 (explaining that during the 1850s, "officers almost universally denounced" settlers and miners who exploited and slaughtered the Western Indians and accused civil officers and militia leaders of "conducting wars of extermination").

63. *Id.* at 322. Skelton also cites a second instance in which officers in the Pacific Northwest convened a commission to try captured Indians accused of participating in attacks on civilians. *Id.* An account of this 1856 Cascade military commission, in which nine of thirteen Cascade warriors were sentenced and

Granville O. Haller convened a "board of officers, or as Major Haller call[ed] it, a military commission" in the Oregon Territory to try four captured Wenneste warriors accused of participating in a massacre of immigrants on the Boisé river the previous August.[64] The four prisoners pled guilty to the charge of "being present, and in some degree, [having] participated in the massacre of immigrants."[65] After brief proceedings lasting less than a day, the commission found three defendants guilty; the fourth was shot and killed while attempting to escape.[66] The following day, the commanding officer ordered the defendants to be hanged at the "grave of the massacred immigrants."[67]

Although this 1855 military commission in the Oregon Territory reveals that the U.S. Army's response to attacks on civilians was more complex than one of force alone, the pattern of organized violence that preceded it makes clear that the 1862 plan to exterminate the Sioux was not without historical precedent.

2. The Dilemma: A Temporarily Impossible War of Extermination

Despite Sibley's professed eagerness to implement the extermination strategy his forebears had pursued, he quickly discovered that his options for doing so were limited. Throughout September, and particularly on the day he announced his decision to convene a military commission, Sibley expressed his inability to wage an effective offensive pursuit.

The first problem, and one that Sibley recognized almost immediately, was a severe shortage of essential supplies, including

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hung, may be found in Phillip H. Sheridan, 1 Personal Memoirs of P.H. Sheridan 80–84 (1888).

64. Letter from John E. Wool, Major Gen., Commanding Dep't of the Pacific, Gen. Staff, U.S. Army, to L. Thomas, U.S. Assistant Adjutant Gen. (Sept. 4, 1855), *in* S. Exec. Doc. No. 34-26, at 11, 11 (1856).

65. *See Proceedings of a Military Commission Convened at the Camp at Fort Boisé, O.T.*, July 17, 1855, *reprinted in* S. Exec. Doc. No. 34-26, at 12, 13–19 (1856).

66. *See* Orders No. 6 (July 18, 1855), *excerpted in* S. Exec. Doc. No. 34-26, at 19 (1856).

67. *Id.* (approving the proceedings of the military commission and ordering the executions as "an example, in hopes it will prevent other murders, and not from the instinct of revenge").

men, food, horses, guns, and bullets.[68] Other observers agreed, concluding that sending the dispatch of infantry to hunt down the Sioux was a "useless"[69] and even "ludicrous" measure.[70] As one commentator remarked, "[i]t . . . was probably about as poorly an equipped army as ever entered the field to face what I regard as the best warriors that ever fought on the North American continent."[71] Indeed, two weeks into the campaign, after Sioux forces had ambushed his command twice,[72] Sibley simply refused to advance until he received additional supplies.[73]

A shortage of supplies was not the only difficulty. Officers reported that the Sioux enjoyed a considerable strategic advantage, based on their mobility and superior knowledge of the terrain.[74] For much of the expedition, Sibley never had a clear idea of where the enemy had encamped.[75] Even when he did, concerns for the safety of

68. For letters describing the shortage of ammunition and rations, see Letter from Henry H. Sibley to Sarah Sibley (Aug. 24, 1862), *supra* note 30; Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Aug. 29, 1862), *in* Sibley Papers, *supra* note 30; Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Sept. 2, 1862), *in* Sibley Papers, *supra* note 30.

69. Letter from James H. Baker, Minn. Sec'y of State, to Christopher P. Wolcott, U.S. Assistant Sec'y of War (Aug. 21, 1862), *in* 13 OR, *supra* note 4, at 590, 591.

70. Charles Johnson, *Narrative of the Sixth Regiment*, *in* 1 Minnesota in the Civil and Indian Wars 1861–1865, at 300, 304–05 (1890) [hereinafter 1 Minnesota in the Civil and Indian Wars].

71. Charles E. Flandrau, *The Indian War of 1862–1864, and Following Campaigns in Minnesota*, *in* 1 Minnesota in the Civil and Indian Wars, *supra* note 70, at 727, 735.

72. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Sept. 7, 1862), *in* Sibley Papers, *supra* note 30 (explaining how Little Crow had killed eighteen soldiers, wounded forty, and left all but two horses standing).

73. *Id.* (explaining that he could not continue onward because he lacked essential supplies).

74. Letter from Stephen R. Riggs, Reverend, to Alexander Ramsey, Governor of Minn. (Sept. 8, 1862), *in* 2 Minnesota in the Civil and Indian Wars, 1861–1865, at 226, 227 (1893) [hereinafter 2 Minnesota in the Civil and Indian Wars] (observing that "[a]t present the Indians have all the advantages of this war. Their passing with certainty from place to place on horseback, their mode of shooting and flying, their perfect knowledge of the country, its ravines and hiding places, their bushwhacking and ambushing, all give them a decided advantage in fighting with our troops").

75. For example, on August 29, Sibley expressed his hope that the Sioux were entrenching at Little Crow's village, as it would give him "an opportunity to

the estimated 120 settlers whom the Sioux had taken captive during the attacks cautioned against waging the type of reprisal that previous commanders had deployed.[76]

Thus, even after Sibley received a delivery of much-needed supplies that allowed him to press onward with the expedition on September 19, 1862,[77] he continued to express doubts as to whether victory on the battlefield was possible. These doubts are particularly evident in his correspondence with his commanding officer, General Pope. After arriving in St. Paul to assume command in mid-September,[78] Pope wrote to Sibley and giddily described his detailed plans for "exterminating or ruining" the Sioux. [79] In Pope's view, resources were of no concern: "Let me know . . . precisely what you wish of everything and it shall be sent." In response to this enthusiastic call for total war, Sibley penned two letters to Pope in

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apply a finishing blow to them if they are so concentrated." Letter from Henry H. Sibley to Sarah Sibley (Aug. 29, 1862), *supra* note 68. The next day, however, Sibley's hopes for a "finishing blow" were dashed: Little Crow and his followers had retreated. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Aug. 30, 1862), *in* Sibley Papers, *supra* note 30; *see also* Letter from G.H. Pound, Reverend, to Alexander Ramsey, Governor of Minn. (Sept. 8, 1862), *in* St. Paul Daily Press, Sept. 11, 1862, at 1 ("The Indians will attack, only when we think them to lie thirty miles off . . . . [They] will be able to describe our position so accurately that every Indian who hears it, can approach us precisely at the point he wishes to in the dark.").

76. Letter from Henry H. Sibley to Oscar Malmros (Sept. 8, 1862), *supra* note 39, at 1 ("I am very much anxious to secure the safety of the many prisoners before attacking the camp, as they will doubtless be placed in the most exposed situations."); *see also* Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Sept. 19, 1862), *in* 13 OR, *supra* note 4, at 651, 652 (describing his anxiety about the fate of the captives); Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah Sibley (Sep. 10, 1862), *in* Sibley Papers, *supra* note 30 (worrying that if Sibley made an advance movement, "two or three hundred white women and children might be murdered in cold blood").

77. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Oscar Malmros, Adjutant Gen. of Minn. (Sept. 13, 1862), *in* 13 OR, *supra* note 4, at 631, 631 (describing recent arrival of new troops and rations); *see also* Carley, *supra* note 18, at 57 (describing the influx of new supplies).

78. *See* Clodfelter, *supra* note 19, at 45.

79. Letter from John H. Pope to Henry H. Sibley (Sept. 17, 1862), *supra* note 45, at 649.

which he tactfully suggested that Pope was in need of a reality check.[80]

The Sioux, Sibley reminded Pope, were "the most warlike and powerful of the tribes on this continent."[81] And, the United States, Sibley explained, had been in a bind: "At one time we have wanted bullets and at another bread."[82] Although Sibley was optimistic that he could "whip" the Indians, such a defeat could only occur, he explained, if the Indians opted to fight.[83] Otherwise, Little Crow (Taoyateduta), the presumed leader of the attacks, could "escape from us if he chooses to do so."[84] Moreover, Pope's "admirable" plans to send additional forces were unlikely to help the situation.[85] Collective reprisals, it seemed, were no longer an assured means of preserving control of the frontier.

3. A Back-Up Plan: Calibrating the Scale of War

After Pope received Sibley's dour assessment of the United States' prospects for defeating the Sioux on the battlefield, he turned his attention toward dredging up the resources needed to wage a war of extermination.[86] While Pope tried unsuccessfully to secure supplies from Washington,[87] Sibley had begun to follow a different strategy:

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80. Letter from Henry H. Sibley to John H. Pope (Sept. 19, 1862), *supra* note 76, at 651.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 652 (explaining that Pope's plans would "partially fail" because of the difficulty of organizing large-scale expeditions with new troops and the impending cold weather).

86. *See, e.g.*, Letter from John H. Pope to Henry W. Halleck (Sept. 23, 1862), *supra* note 4, at 664 (asserting that Pope was acting as "vigorously" as he could but that "there is positively nothing here"); Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Edwin M. Stanton, U.S. Sec'y of War (Sept. 22, 1862), *in* 13 OR, *supra* note 4, at 658, 658 (complaining that "[t]here are neither troops nor arms, and the Governor calls on me for both," and requesting additional supplies).

87. *See, e.g.*, Letter from Henry W. Halleck, Major Gen., Gen.-in-Chief, Gen. Staff, U.S. Army, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Sept. 23, 1862), *in* 13 OR, *supra* note 4, at 663, 663 (denying Pope's request for supplies); Letter from Edwin M. Stanton, U.S. Sec'y of War, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw.,

calibrating the scale of war to accommodate existing military capacity, first via negotiations, and ultimately, via military commissions.

Sibley's resort to negoitations began in early September. After an ambush left Sibley with eighteen fewer men, two less horses, and a conviction that continued advance was impossible,[88] Sibley buried his men and left a note in a cigar box, tied to a stake, for Little Crow, inviting him to respond with any "propositions."[89] Although this effort faltered,[90] Sibley soon discovered that he might have a new negotiating partner: the following week, Sibley learned that the Sioux force he was unsuccessfully pursuing had split into two parties.[91]

One faction, composed primarily of the Mdewakantons under Little Crow, continued to call for hostilities, while a second party, composed primarily of the Sissetons, Wahpetons, and at least three

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Gen. Staff, U.S. Army (Sept. 23, 1862), *in* 13 OR, *supra* note 4, at 662, 662–63 (denying Pope's request for supplies); *see also* Clodfelter, *supra* note 19, at 47 (describing Pope's failed attempts to secure supplies).

88. Letter from Henry H. Sibley to Sarah Sibley (Sept. 7, 1862), *supra* note 72.

89. Letter from Henry H. Sibley to Oscar Malmros (Sept. 8, 1862), *supra* note 39, at 1 (explaining that he had left a note to Little Crow reading, "If Little Crow has any proposition to make to me, let him send a half breed to me, and he shall be protected in and out of my camp"); *see also* Gabriel Renville's Memoir, *in* Dakota Eyes, *supra* note 1, at 186, 188 (describing the response to Sibley's note).

90. Little Crow responded with a note outlining the number of prisoners and asking Sibley how he could "make peace for my people." Letter from Little Crow (Taoyateduta), Mdewakanton Chief, to Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia (undated), *in* Mankato Semi-Wkly. Rec., Sept. 20, 1862, at 1. For Sibley, however, this was insufficient; in his reply, he cited continuing murders and imprisonment and noted that "this is not the way for you to make peace." Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Little Crow (Taoyateduta), Mdewakanton Chief (Sept. 12, 1862), *in* Mankato Semi-Wkly. Rec., Sept. 20, 1862, at 1.

91. Letter from Henry H. Sibley to Oscar Malmros (Sept. 13, 1862), *supra* note 77, at 631 (forwarding reports from the messenger delivering Little Crow's message that "the Indians are very much divided in sentiment and are quarreling among themselves" while "those who have opposed the war and taken no part in it are organizing themselves so as to make a separate camp when the time comes and claim our protection."); *see also* Thomas A. Robertson's Reminiscences, *in* Dakota Eyes, *supra* note 1, at 177, 178 ("While we were ostensibly messengers from Little Crow and the hostiles, I was, in secret, a messenger in the interests of the friendly element and the release of over 150 prisoners in the hostile camp.").

Mdewakanton leaders, had established a separate "friendly" camp and advocated for an immediate cessation of war.[92] On September 12, 1862, Joseph Wabasha, the Mdewakanton leader credited with having organized the peace party,[93] and Taopi, a Mdewakanton leader who opposed the war from the outset,[94] initiated a dialogue with Sibley, notifying him that they were prepared to retrieve the settlers currently held prisoner in the hostile camp, in exchange for assurances that their camp would not be attacked.[95] Sibley, who had only twenty-five cavalry and was still hoping for a "couple hundred or more," accepted this offer.[96] He wrote in reply:

> It is not my purpose to injure any innocent person . . . . If you and others who have not been concerned in the murders and expeditions will gather yourselves with all the prisoners, on the prairie in full sight of my troops, . . . then

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92. For a description of the division between the Mdewakantons, Sissetons, and Wahpetons, see Anderson, *supra* note 2, at 145–153 (1986). Briefly, members of the Mdewakanton soldiers lodge led the initial attack on Redwood Agency on August 18. *Id.* at 133–35. The Sissetons and Wahpetons, who lived thirty-five miles north on the Upper Sioux Reservation, were reportedly not involved. *See* Martha Riggs, Letter to the Editor (Sept. 26, 1862), *supra* note 48; *see also The Origin and Extent of Our Indian Difficulties*, *supra* note 43, at 1 (reporting that the Upper Sioux tribes were not involved in the initial attack on Redwood Agency and that several of the most influential chiefs of the Mdewakantons were not aware of the plans of the attack). Three days after the first attack, four hundred Wahpeton and Sisseton soldiers apparently joined the Mdewakanton offensive. *See* Lightning Blanket's Account, *in* Dakota Eyes, *supra* note 1, at 153, 156. This alliance, however, was short-lived: the tribal chiefs of the Upper Sioux tribes announced that they would not support the war effort on August 28. Anderson, *supra* note 2, at 152.

93. *See* Dakota Eyes, *supra* note 1, at 27.

94. *See* Taopi's Statement, *in* Dakota Eyes, *supra* note 1, at 63, 63–65.

95. Letter from Wabashaw, Mdewakanton Chief, and Taopee, Mdewakanton Chief, to Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia (Sept. 10, 1862), *in* Mankato Semi-Wkly. Rec., Sept. 20, 1862, at 1. Thomas A. Robertson, who acted as a courier between Sibley and the friendly camp, later recalled that he transcribed the letter for Good Thunder (Wakinyanwaste), a Mdewakanton leader who instructed Robertson to sign the letter from Wabashaw and Taopi. *See* Thomas Robertson's Narrative, *in* Dakota Eyes, *supra* note 1, at 177, 183; *see also* Gabriel Renville's Narrative, *in* Dakota Eyes, *supra* note 1, at 186, 191 ("A few of the Medawakantons [sic] felt inclined towards the whites, and secretly getting Thomas A. Robertson to write a letter for them, sent it by him to General Sibley. This letter was signed by Taopi, Good Thunder, and Wabashaw.").

96. Letter from Henry H. Sibley to Oscar Malmros (Sept. 13, 1862), *supra* note 77, at 631.

> you can come forward and place yourself under my protection.[97]

Two weeks later, after Little Crow's forces launched an unsuccessful ambush and began to retreat, Sibley received reports that the peace party had rescued the prisoners, who were now safely in the friendly camp, awaiting his arrival.[98] Happily, Sibley reiterated his promise of limited warfare, explaining that he would soon retrieve the prisoners as he was only there to make "war against the guilty."[99] Accordingly, on the afternoon of September 26, while Little Crow and his followers fled north, Sibley and a small group of his staff and infantry "paid a formal visit" to the friendly camp.[100] After shaking hands with the chiefs and giving a series of speeches, Sibley assembled the women and children prisoners and escorted them promptly back to camp.[101]

In Sibley's view, the meeting was a success. As he wrote to Pope the following day, he had accomplished two of the key objectives of the campaign: retrieving the prisoners and checking the threat of attacks.[102] As Sibley remarked, all that remained was the task of extermination. There was "nothing left to do but to follow up the

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97. *Id.* Sibley sent a similar letter addressed to all "Sioux Indians who had not been concerned in the murder and outrages upon the white settlers," repeating the promise of limited warfare. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia (Sept. 13, 1862), *in* 13 OR, *supra* note 4, at 632, 632.

98. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Ma-za-ka-tame, Toopee, and Wake-nan-nan-te (Sept. 24, 1862), *in* 13 OR, *supra* note 4, at 666, 667. For details of Little Crow's failed ambush, see Carly, supra note 18, at 58–59.

99. *Id.* ("I have not come here to make war upon those who are innocent, but upon those who are guilty."). Later that day, Sibley again announced a plan of limited warfare, warning the Sissetons that his command would be arriving at the friendly camp "very soon" and that he had "not come up to make war upon any bands who have not been concerned in the horrible murders upon the white people") Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to "Ta-Tanka-Narin, Chief of the Siseton-wana and Tah-ton ka-na-ken-yan, soldiers of Wa-na-tams Band" (Sept. 24, 1862), *in* 13 OR, *supra* note 4, at 667, 667.

100. Letter from Henry H. Sibley to John H. Pope (Sept. 27, 1862), *supra* note 6, at 679.

101. *Id.*

102. *Id.*

Indians [of Little Crow's faction] vigorously and exterminate them."[103]

The problem, however, was that at precisely the time that Sibley was expected to carry on the offensive pursuit of the Mdewakantons,[104] he was once again unable to do so. On September 27, he reported that his men were on the "verge of starvation,"[105] while the onset of winter meant that forage would be in short supply on the plains, rendering an offensive pursuit unwise.[106] Despite Pope's promise that more rations were on the way,[107] he too concluded that continued pursuit would be difficult. As he reported on October 2, "[i]t is next to impossible to supply [Sibley] with food; there are no means in my possession or which I can get."[108]

Abandoning the expedition, however, was also not an option. Although the immediate threat of frontier attacks appeared to have passed,[109] and although Sibley would have liked to return for

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103. *Id.* at 680.

104. Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia (Sept. 28, 1862), *in* 13 OR, *supra* note 4, at 685, 686; Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry W. Halleck, Major Gen., Gen.-in-Chief, Gen. Staff, U.S. Army (Oct. 4, 1862), *in* 13 OR, *supra* note 4, at 709, 709 (urging the need for a strong force to be kept during the winter).

105. Letter from Henry H. Sibley to John H. Pope (Sept. 27, 1862), *supra* note 6, at 680.

106. *See The Sioux War: What Shall We Do With It?; The Sioux Indians: What Shall We Do With Them?*, St. Paul Daily Press, Oct. 21, 1862, at 1 (reporting that "the season is too far advanced for the effective pursuit of Little Crow" and suggesting that "[i]f the months of November, December and January are too severe for field operations, they can be made none the less available to organize a spring campaign").

107. Letter from John H. Pope to Henry H. Sibley (Sept. 28, 1862), *supra* note 104, at 686.

108. Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry W. Halleck, Major. Gen., Gen.-in-Chief, Gen. Staff, U.S. Army (Oct. 2, 1862), *in* 13 OR, *supra* note 4, at 705, 706 (explaining that pursuit was temporarily impossible).

109. *See* Carley, *supra* note 18, at 59 (describing the decisiveness of Wood Lake and return of the captives); Roddis, *supra* note 19, at 139 (asserting that the victory at Wood Lake marked the end of the uprising); Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Sarah

personal reasons,[110] Pope was adamant that extermination was still necessary and worried that the "whole of the annuity Indians are restless."[111] As he instructed Sibley on September 28, "There will be no peace in this region by virtue of treaties and Indian faith. It is my purpose utterly to exterminate the Sioux, if I have the power to do so."[112] Indeed, even after Pope admitted that Sibley's men did not have any food, he reported to Washington that he would "push him forward at all hazards."[113]

Unable to advance, and unable to return, Sibley turned his attention to the Sioux men, women, and children, who had refused to follow Little Crow and now remained in the nearby camp.[114]

4. A Usual But Impracticable Means: Summary Executions

In the past, military commanders, and territorial governors seeking to avenge civilian deaths relied on summary executions.[115]

Sibley (Sept. 23, 1862), *in* Sibley Papers, *supra* note 30 (stating that the Sioux received "so severe a blow that they will not dare to make another stand").

110. Letter from Henry H. Sibley to John H. Pope (Sept. 27, 1862), *supra* note 6, at 680 (asking to be relieved of command because a "strictly military commander would be better fitted for the task than myself" and because "my private affairs are left in utter confusion and require my presence."); *see also* Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Charles E. Flandrau, Colonel, Commanding Military Expedition, Minn. State Militia (Sept. 28, 1862), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 258, 258 (explaining that he wanted to return home as "[m]y business is going to destruction and I have stood so much wear and tear that I need some rest").

111. Letter from John H. Pope to Henry W. Halleck (Oct. 2, 1862), *supra* note 108, at 706.

112. Letter from John H. Pope to Henry H. Sibley (Sept. 28, 1862), *supra* note 104, at 685; *see also* Letter from John H. Pope to Henry W. Halleck (Oct. 4, 1862), *supra* note 104, at 709 (urging the need for a strong force to be kept during the winter).

113. Letter from John H. Pope to Henry W. Halleck (Oct. 2, 1862), *supra* note 108, at 706.

114. Letter from Henry H. Sibley to John H. Pope (Sept. 27, 1862), *supra* note 6, at 679.

115. The use of summary executions as a deterrence mechanism was not limited to Indian warfare. In 1862, General John McNeil executed, without trial, ten Confederate prisoners, believed to be guerrillas, in retaliation for the killing of an old man. *See Horrible Federal Outrage—Ten Confederates Murdered—The Full Particulars of the Scene*, Palmyra (Mo.) Courier, undated, *reprinted in* 22

Five years prior to the Minnesota attacks, for example, Oregon's Territorial Governor, George Abernathy, learned that a group of Cayuse had attacked a missionary settlement and allegedly killed fourteen settlers.[116] The legislature wanted to respond with military force, but lacked the finances to support a general war.[117] Faced with the need to take some form of action, the Governor instructed officials in February of 1848 to persuade the Cayuse leadership to hand over the perpetrators (or simply to hand over an equivalent number of those who participated in the attacks) so that they could be executed.[118]

In 1858, following a separate series of reported killings, an officer in Oregon summarily executed two Pelouze chiefs in hopes of deterring attacks.[119] The officer explained that such methods were

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War Of The Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Ser. 1, Pt. 1, at 816, 817 (1888) [hereinafter 22 OR, Ser. 1, Pt. 1]; *see also* William R. Strachan, Letter to the Editor, N.Y. Times, Dec. 10, 1862, *reprinted in* 22 OR, Ser. 1, Pt. 1, *supra,* at 861, 866 (1888) (justifying the summary executions on the grounds that it would "teach traitors that the life of an unarmed non-combatant Union man . . . was a sacred thing that murderers should not take with impunity").

116. *See* Frances Fuller Victor, The Early Indian Wars of Oregon 99–102 (1894) (describing the attack).

117. *See* Glassley, *supra* note 54, at 13 (describing how Oregon was "willing to organize a punitive expedition but wholly without funds to finance it"); *see also* Robert Newell, Memorial of the Legislative Assembly of Oregon, *reprinted in* S. Exec. Doc. No. 47, at 46 (1848) ("We feel sensibly our weakness and inability to enter into a war with powerful tribes of Indians."). Indeed, at the time, the Territory had less than $44.00 in the treasury. Clarence B. Bagley, *Our First Indian War*, 1 Pacific N.W. Q. 34, 43 (1907).

118. Letter from George Abernethy, Governor of Or. Territory, to "the Peace Commissioners Appointed to Treat with the Nez Perces and other Tribes" (Feb. 3, 1848), *in* Robert Newell, Robert Newell's Memoranda 127, 128 (Dorothy O. Johansen ed., 1959) (instructing the peace commissioners that "all the murderers and those that forced the young women, must be delivered up, or an *equivalent given* . . ." and stating that "the principal actors should be executed in the presence of all the tribes") (emphasis added). Ultimately, Abernethy's planned summary executions never took place. Instead, in 1850, after a newly appointed Governor, Joseph Lane, negotiated with Cayuse leadership for the surrender of Cayuse tribal members in exchange for peace, the five men who surrendered were prosecuted in territorial court. *See* John A. Brown & Robert H. Ruby, The Cayuse Indians: Imperial Tribesman of Old Oregon 153–60 (1972). The five defendants were later executed, after a jury returned guilty verdicts. *Id.* at 162–71 (describing the proceedings and executions).

119. Lawrence Kip, Indian War in the Pacific Northwest 106 (Clifford E. Trafzer ed., 1999); *see also* Letter from N.S. Clarke, Brigadier Gen., Commanding

necessary given the nature of Indian warfare: "The Indians belong to small bands. It is impossible . . . to bring them to a fight, but they will have to be hunted down like bandits."[120]

Indeed, on the afternoon that Sibley and his small party advanced towards the friendly camp, several soldiers reportedly "insisted that Colonel Sibley would be justifiable in making any treaty he could to obtain the captives, and when that was done, kill all the Indians, men, women, and children."[121] One soldier who weighed in on the discussion apparently quoted the "great Indian fighter Harney"—the same Harney who had earlier killed eighty-five Sioux in one day[122]—to persuade Sibley that a mass execution was appropriate as "nits make lice."[123]

Despite this enthusiasm for the reprisals of the past, on the day Sibley arrived in the camp and convened a military commission, this option was not available for a number of reasons.

First, although Sibley did not explicitly say so, the same reasons that rendered an offensive pursuit impossible—lack of food and cavalry[124]—would have strongly cautioned against rounding up and killing a handful of Sioux, or simply shooting the Sioux as he

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Dep't of Cal., Gen. Staff, U.S. Army, to L. Thomas, Assistant Adjutant Gen., U.S. Army (Oct. 10, 1858), *in* S. Exec. Doc. No. 35-1, pt. 2, at 406, 406 ("[T]he Pelouses submitted to the demands of Colonel White, and gave hostages for their good behavior. Some of these people, known to have been murderers and robbers, were then executed."). This execution was not an outlier in the Indian wars of the Pacific Northwest. *See, e.g.*, General George Crook: His Autobiography 59-64 (Martin F. Schmitt ed., 1946) (describing how during the Rogue River War of 1855-1856, Crook's command, charged with both punishing Indian forces who had defeated the U.S. Army in May of 1858 and killing a band of Indians who had murdered prospectors, captured and executed four Indians).

120. Kip, *supra* note 119, at 102.

121. Heard, *supra* note 52, at 187.

122. *See supra* note 56 and accompanying text.

123. Heard, *supra* note 52, at 187. The term "nits" refers to a type of louse egg.

124. *See* Letter from Henry H. Sibley to John H. Pope (Sept. 27, 1862), *supra* note 6, at 679 (explaining that without food, the expedition would be forced to return); Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Sept. 30, 1862), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 259, 259 (explaining that unless 500 mounted men arrived with additional provisions and forage, the campaign "may be considered closed").

approached (as one Senator later claimed Sibley should have done).[125] Such a move would have been likely to convert the friendly camp into a hostile camp, particularly given Sibley's previous assurances. Likewise, a seemingly random spate of executions could prompt a retaliation from the Mdewakanton forces who remained on the plains, and indeed, could have led to an alliance between the tribes.

Equally problematic, a spate of summary executions would have deterred other Mdewakantons from surrendering.[126] Sibley, who repeatedly emphasized that he could not carry out a continuing expedition without additional cavalry and rations, hoped that continued dissension among the Mdewakantons and the onset of winter would drive others to surrender. Postponing an execution, Sibley explained, would make it more likely that he could secure prisoners without the use of force.[127]

Sibley may also have had personal reasons to avoid immediate executions. Sibley was unsure if he had authority to execute the Sioux in any capacity, let alone without some form of process.[128] And as others have pointed out, Sibley had enjoyed a long-

125. Cong. Globe, 37th Cong., 3d Sess. 13 (1862) (statement of Sen. Wilkinson) ("Governor Sibley . . . ought to have killed every one of the Indians as he came to them; but he did not; he established a court, and they were tried.").

126. *See* Letter from Henry H. Sibley to John H. Pope (Oct. 3, 1862), *supra* note 32, at 708 ("It is probable that I shall not order any execution of the guilty until I can get those understood to be coming down to surrender themselves in my power, as otherwise they might be deterred from returning."); Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 7, 1862), *in* 13 OR, *supra* note 4, at 717 ("It would not do to precipitate matters now, for fear of alarming those who are coming forward to take their chances."); Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Sarah Sibley (Oct. 5, 1862), *in* Sibley Papers, *supra* note 30 (explaining his plan to postpone execution until everyone had surrendered); *see also The Indian Expedition*, St. Paul Daily Press, Oct. 8, 1862, at 1 (reporting that "[l]arge bodies of Indians are laying down their arms and seeking the protection of Colonel Sibley"); Gilmon, supra note 21, at 185 (explaining that Sibley did not immediately execute the Sioux who the commission had found guilty because of his concern that it would deter other surrenders and his doubt of his authority to do so).

127. Letter from Henry H. Sibley to John H. Pope (Oct. 3, 1862), *supra* note 32, at 708.

128. Letter from Henry H. Sibley to Charles E. Flandrau (Sept. 28, 1862), *supra* note 110, at 688 (explaining that executing the Sioux might constitute a "stretch" of Sibley's authority).

held friendship with the Sioux.[129] Although this friendship does not appear to have prevented Sibley from planning a war of extermination, it seems likely that this could have made it difficult to order random executions. It was in this context, wherein continued pursuit and summary executions were deemed impractical, that Sibley appointed five officers to pick a convenient place in camp and begin the military commission.[130]

B. The Role of the Military Commission

Throughout October and into November, as the prairie grasses dried and the command's few horses grew lean, the military commission that Sibley appointed tried 392 Sioux defendants.[131] The majority of those who came before the commissioners arrived at Sibley's encampment in early October, after Sibley—who remained unable to advance[132]—dispatched messengers to warn the Sioux that anyone who did not surrender would be treated as an enemy.[133]

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129. *See supra* note 29 and accompanying text.

130. Special Order No. 55 (Sept. 28, 1862), *reprinted in* Nathaniel West, The Ancestry, Life, and Times of Hon. Henry Hastings Sibley 279 (1889).

131. Chomsky, *supra* note 8, at 27.

132. Sibley continued to express his inability to pursue the tribes throughout October. On October 17, for example, Sibley informed Pope that if he had an additional "few hundred mounted men," he would be "able to whip" the remaining 2,200 Sioux warriors but cautioned that "they are well provided for the most part with good horses" and could "easily elude the pursuit of footmen." Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 17, 1862), *in* 13 OR, *supra* note 4, at 744, 746. Sibley also warned that "unless provided with abundant forage, the horses will fail in less than ten days." *Id.*

133. On October 3, Sibley sent a message to the Mdewakantons and Wahpetons, encouraging anyone who had separated from Little Crow to "return and surrender themselves." Unaddressed Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 3, 1862), *in* 13 OR, *supra* note 4, at 709, 709 (warning "Unless these people arrive very soon, I will go in search of them with my troops and treat them as enemies"). Over the next week, several hundred Indians surrendered. *See* Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 4, 1862), *in* 13 OR, *supra* note 4, at 710, 710 (reporting that 120 lodges are coming down slowly and that it might be "necessary yet to attack them unless they surrender at discretion"); Letter from Henry H. Sibley to John H. Pope (Oct. 5, 1862), *supra* note 33, at 711 (reporting that more than 86 lodges were surrendering, of whom

Although the threat was an empty one, the desolate plains proved an inhospitable terrain.[134] By mid-October, over one hundred lodges had returned and surrendered, increasing the population at Sibley's camp to almost two thousand men, women, and children.[135] When Sibley finally received rations and mounted cavalry, the small commands that he sent out to secure any "straggling" lodges encountered no resistance and returned with the last of the prisoners to be tried.[136]

Although the procedural flaws of this commission are thoroughly catalogued in depth elsewhere,[137] this section will analyze the correspondence and orders of those who participated in the commission in order to identify how the military context at the time, as outlined in Part A, informed the goals of the commission. These records suggest that the officers who convened, participated in, and approved the commission viewed its primary role as that of securing U.S. interests at a time when military force was unavailable.

"the greater part of the men are deeply implicated in the late outrages"). After the lodges arrived, Sibley surrounded the camp, disarmed the men, and took the men to be tried by a military commission. *Id.* at 712.

134. Anderson, *supra* note 2, at 162–65 (describing how Little Crow's retreat into the "forbidding northern plains came at the most difficult time of the year" for the eastern Sioux, who normally "sought shelter in more wooded terrain," and noting that many Mdewakantons "believed that they would eventually starve on the Dakota plains" and surrendered on the assumption that Sibley would treat them as prisoners of war).

135. *See* Samuel J. Brown's Recollections, *in* Dakota Eyes, *supra* note 1, at 222, 225 (estimating the population of Indians at Sibley's camp to be 1,918).

136. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to William R. Marshall, Lieutenant Colonel, Commanding Seventh Regiment, Minn. Volunteers (Oct. 13, 1862), *in* 13 OR, *supra* note 4, at 735, 735 (instructing Marshall to lead a command to capture any "straggling" Indians or their families); Letter from Henry H. Sibley to John H. Pope (Oct. 17, 1862), *supra* note 132, at 745 (reporting that a command had successfully captured twenty-two men, twenty-two women, and twenty-three children "without even a show of resistance"); Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 21, 1862), *in* 13 OR, *supra* note 4, at 756, 757 (reporting that Marshall's command had returned with "all the Indians to be found" in the county he visited).

137. *See* Chomsky, *supra* note 8, at 14–15; *see generally supra* note 17 (citing literature providing a normative assessment of the commission's procedures).

1. The View from Sibley's Headquarters in September 1862

On September 28, 1862, the officers who served on the military commission received a slim set of instructions from Sibley: they were to try "summarily" the Indians and "mixed-bloods" and pass judgment on those found guilty of "murder and other outrages."[138] "The degree of guilt," Sibley later wrote, "was not one of the objects to be attained."[139]

These instructions, coupled with Sibley's handling of the proceedings and the correspondence of those involved in the commission, reveal that the military did not, as some scholars have implied, convene the commission to provide a forum where defendants would be afforded the procedural safeguards of a criminal tribunal or court-martial used to try one's own troops.[140] Instead, these records suggest that the project was to facilitate the hanging of a sufficient number of Indians, in an execution that would demonstrate American military strength and placate demands for retribution at a time when the military could not achieve these objectives on the battlefield. As Sibley later explained, the project was not to emulate a court of record: "A military commission cannot, and is not expected to enter into details of a technical character, which are judged necessary in ordinary criminal tribunals, and even in regular courts-martial."[141]

Sibley's understanding of the military commission's role is evident in his handling of the procedures. On the day Sibley

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138. Special Order No. 55 (Sept. 28, 1862), *supra* note 130.

139. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John P. Usher, U.S. Assistant Sec'y of the Interior (Dec. 19, 1862), *in* Records of U.S. Army Continental Commands (National Archives Record Group [NARG] 393), Letters and Telegrams Sent, Entry 343, *typed copy available in* Records of the Adjutant General's Office (NARG 94), *microformed on* Letters Received by the Office of the Adjutant General 1861–1870, M 619, Roll 483 (1866, H 747-I5) (Nat'l Archives and Records Admin.) [hereinafter Letters Received by the Office of the Adjutant Gen.].

140. *See supra* text accompanying notes 22–25 (summarizing prevailing theory that the military commission emerged as a substitute for otherwise unavailable court-martial or criminal tribunal).

141. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Henry B. Whipple, Bishop of Minn. (Dec. 4, 1862) *in* Henry B. Whipple Papers, Minnesota Historical Society, St. Paul, Minnesota [hereinafter Whipple Papers].

convened the commission, he neither offered formal instructions as to how the commissioners ought to adjudicate guilt, save for a broad reference to "military laws and usages," nor defined the offenses charged against the defendants, referring only to the capacious category of "murder and other outrages."[142] The commissioners, he later explained, had no obligation to determine whether a defendant had personally killed settlers, provided that the commissioners were satisfied that the defendant had voluntarily participated in the attacks.[143]

Likewise, once the commission was underway, Sibley did not review the record of the proceedings during the first two weeks[144] and was not particularly troubled by aberrations in the procedures: Although "the proceedings . . . may not be exactly in form in all the details," he wrote to Pope, "I shall probably approve them, and hang the villains as soon as I get hold of the others."[145]

Despite this lack of concern for procedure, Sibley was explicit as to the appropriate sentence. Anyone found guilty, he told Pope on the day he convened the commission, will "be immediately executed" because "an example is . . . imperatively necessary."[146] Although Sibley did not explain why "examples" were needed, his later writings suggest that he considered an execution necessary both to placate public demands for extermination and to deter future attacks.

For example, even before the commission had ended, Sibley predicted that the number of defendants to be executed "will be

142. Special Orders No. 55 (Sept. 28, 1862), *supra* note 130.

143. Letter from Henry H. Sibley to John P. Usher (Dec. 19, 1862), *supra* note 139 (asserting that "[i]n the matter of the Indian prisoners and the alleged paucity of evidence against them on the record, it should be borne in mind that the Military Commission appointed by me were instructed only to satisfy themselves of the voluntary participation of the individual on trial in the murders or massacres committed, either by his voluntary confession or by other evidence and then to proceed no further").

144. Letter from Henry H. Sibley to John H. Pope (Oct. 7, 1862), *supra* note 126, at 717. Sibley previously had written to Pope to explain that he had not yet reviewed the proceedings. Letter from Henry H. Sibley to John H. Pope (Oct. 4, 1862), *supra* note 133, at 710.

145. *Id.*

146. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Sept. 28, 1862), *in* 13 OR, *supra* note 4, at 686, 687.

sufficiently great to satisfy the longings of the most blood thirsty."[147] In making this prediction, Sibley may have been responding to news reports that had surfaced as early as August calling for "the most summary measures of retaliation by the Government."[148] Indeed, as the *Saint Paul Press* proclaimed in mid-November, "[t]he people of Minnesota . . . are not in temper for a delicate balancing of evidence, or a judicial discrimination of the degrees of guilt."[149] Instead, as *The Saint Paul Daily Press* urged in late October, a mass execution was deemed necessary: the war "ought" not to end "[u]ntil Little Crow and every one of his assassin horde are delivered up and hung as high as Haman" so as to teach the Sioux, "by a comprehensive example of prompt and terrible retribution, that the life of a single citizen of the United States is worth more than their whole nation . . . ."[150]

In using the commission as a means to ensure exemplary punishment, Sibley may also have been responding to concerns about future attacks. For example, after the commission ended, Sibley reasoned that all defendants who had been sentenced to death "should . . . be hung as a great example which would strike terror into all the Indians on the continent and save hundreds and perhaps thousands of valuable lives."[151]

Pope, meanwhile, who remained in St. Paul and continued to plan for a campaign of extermination,[152] seems to have had no qualms about using the commission as a means to stage a public execution without individual adjudication. At no time did Pope provide guidance to Sibley as to how the commission should assess

147. Letter from Henry H. Sibley to Sarah Sibley (Oct. 20, 1862), *in* Sibley Papers, *supra* note 30; *see also The Sioux War*, Mankato Semi-Wkly. Rec., Oct. 18, 1862, at 1 (quoting Sibley as saying "that when he was done with the Indians, there would not be enough Sioux left to hurt any more white people").

148. *See supra* note 5.

149. *The Sioux Prisoners: An Emphatic Protest Against Pardoning Them*, St. Paul Press, Nov. 11, 1862, *excerpted in* Chi. Trib., Nov. 14, 1862, at 2.

150. *Is the Sioux War Ended*, St. Paul Daily Press, Oct. 22, 1862, at 1.

151. Letter from Henry H. Sibley to John P. Usher (Dec. 19, 1862), *supra* note 139.

152. *See, e.g.*, Letter from John H. Pope to Henry H. Sibley (Sept. 28, 1862), *supra* note 104, at 686 ("There will be no peace in this region by virtue of treaties and Indian faith. It is my purpose utterly to exterminate the Sioux if I have the power to do so . . . ."); Letter from John H. Pope to Henry W. Halleck (Oct. 4, 1862), *supra* note 104, at 709 (urging the need for a strong force to be kept during the winter).

guilt, and Pope even expressed skepticism that such a determination could be made: "I don't know how you can discriminate between Indians who say they are and have been friendly, and those who have not."[153] Editorialists agreed that such determinations were impossible. As the *Mankato Weekly Record* pointed out after the commission had ended, "[t]he massacre was premeditated and simultaneous by the whole Sioux tribe; and it must indeed be a nice discrimination that can distinguish the 'ringleaders' from the followers. All are alike murderers, and no punishment short of hanging will satisfy the citizens of Minnesota."[154]

Perhaps not surprisingly, instead of advising the commission as to how to make such individual determinations of guilt, Pope repeatedly emphasized the need not just for an execution, but for a *public* execution, one that would frighten the Sioux into submission and satisfy demands for retribution.[155]

Those involved in the proceedings appear to have understood their role was not to carry out the type of individual adjudication afforded to defendants in civilian courts or to American soldiers in courts-martial. Isaac D.V. Heard, for example, a Minnesotan who served as the recorder of the court, later sought to justify the

153. Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 2, 1862), *microformed on* Letters Received by the Office of the Adjutant Gen., *supra* note 139.

154. *The Sioux War: the Ringleaders to Be Hung*, Mankato Semi-Wkly. Rec., Nov. 15, 1862, at 1; *see also Is the Sioux War Ended*, *supra* note 150, at 1 ("It will not do to tell us these Indians are friendly, and those are well disposed, and others, are penitent.").

155. *See, e.g.*, Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 10, 1862), *microformed on* Letters Received by the Office of the Adjutant Gen., *supra* note 139 (giving no instructions for adjudication but detailed instructions for execution); *see also* Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 17, 1862), *microformed on* Letters Received by the Office of the Adjutant Gen., *supra* note 139 (again providing no instructions for adjudication procedures but re-emphasizing the need for a public execution).

commission on dual grounds: first, that the procedures were sound,[156] and second, on a principle of collective guilt.[157] This latter principle was based on the idea that the Sioux's wartime conduct was sufficiently beyond the scope of "ordinary battles" and "rendered the acts of one the acts of all."[158] As he implied in an editorial published shortly after the commission had ended, individual guilt was secondary to the goal of retaliation: "The law of retaliatory war is the common law, and the law of the savage, which takes life for life, *whether it be that of the offender or his relatives*, and which would require a thousand more victims, [and] demand that these prisoners should die."[159]

Reverend Stephen R. Riggs, who was appointed as an interpreter for the commission,[160] later described a similarly circumvented role for the commission: "A military commission, where the cases of forty men are passed upon in six, or seven hours, is not the place for the . . . clear bringing out of evidence and securing a fair trial to every one."[161]

Unlike Heard, Riggs expressed disgust for such summary proceedings. In an editorial published after the commission had ended, Riggs explained that he had "no particular liking to the [commission's] *manner* of convicting Indians" and that that he had "learned to work from a sense of duty and not pleasure."[162] But while Riggs remarked that he would not be surprised if the meagerness and defectiveness of the testimony led to new trials, and later called

156. Letter to the Editor, *The Indian Trials: The Military Commission and its Mode of Procedure: The Nature of the Evidence Against the Condemned*, St. Paul Pioneer, Dec. 11, 1862 (defending the commission on the grounds that the commissioners were unbiased, "respectable and humane citizens," and that the defendants were tried on written charges and convicted on the grounds of positive testimony). As Chomsky points out, the author of this letter is presumably Isaac Heard; the author, "H," identified himself as one who was present at the proceedings and gave similar details to that which Heard later provided. Chomsky, *supra* note 8, at 56 n.268.

157. Letter to the Editor, *supra* note 156.

158. Heard, *supra* note 52, at 255–56 (describing how Sioux attacks on civilian settlements violated the law of war and justified American retaliation).

159. Letter to the Editor, *supra* note 156 (emphasis added).

160. *See* Letter from Stephen R. Riggs, Reverend, to Martha Riggs (Sept. 27, 1862), *in* Riggs Papers, *supra* note 48.

161. Stephen R. Riggs, Letter to the Editor, *The Dakota Rebellion*, St. Paul Daily Press, Nov. 29, 1862, at 1.

162. *Id.*

for such trials in some instances,[163] he nevertheless grudgingly accepted the commission's role as a means of facilitating a mass execution, concluding that:

> But all this aside, I take the grounds that *simple, stern, and merciful justice* has demands to be satisfied that cannot be ignored. I take it that a terrible necessity—the demand of public justice—requires that the great majority of those who are condemned should be executed. This is necessary as an atonement. It is necessary to satisfy the feeling of justice in the community generally, and it is necessary as a lesson to the red men for all time to come. And lastly, it is necessary for securing the protection and proper treatment of the women and children and innocent men who remain.[164]

This emphasis on ensuring a mass execution, evident in the writings of Sibley, Pope, and the participants in the commission, can be explained by the fact that Sibley convened the commission only after the traditional means of military reprisals were found to be unavailable. In Sibley's view, had he simply had more cavalry when the Sioux attacked him in late September,[165] he could have lawfully killed two-thirds of the hostile Indians without any process whatsoever.[166] As he explained shortly after the commission began hearing cases:

> I would be glad to pursue, and wipe out Little Crow, and the wretches who have escaped with him, which cannot be done without a mounted force . . . . If I had had a few hundred of this description of force after we walloped the

163. Stephen R. Riggs, Letter to the Editor, *The Indian Question*, St. Paul Pioneer, Dec. 14, 1862.

164. Stephen R. Riggs, Letter to the Editor, *supra* note 161, at 1; *see also* Stephen R. Riggs, Letter to the Editor, *What is Duty—What is Right*, St. Paul Daily Press, Jan. 15, 1863, at 2 ("[T]he same principle of justice that requires of us the painful duty of punishing the guilty, requires of us equally that we should punish *only in accordance with desert*, as far as possible, and that we should be solicitous to be clear and protect the innocent.") (emphasis in original).

165. Letter from Henry H. Sibley, Colonel, Commanding Military Expedition, Minn. State Militia, to Alexander Ramsey, Governor of Minn. (Sept. 23, 1862), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 242 (estimating that if Sibley had been equipped with more cavalry, he could have killed the "greater portion" of the Indians).

166. Letter from Henry H. Sibley to Charles E. Flandrau (Sept. 28, 1862), *supra* note 110, at 258 (estimating that if Sibley had had more cavalry, he could have "destroyed two-thirds of the hostile Indians").

> savages, the greater part of them would have been destroyed.[167]

By deploying a military commission, Sibley estimated that he could kill roughly the same number of Sioux.[168] And, indeed, by November 5, 1862, a little over a month after he determined that continued pursuit was impossible, the commission accomplished a feat that would have been impossible on the battlefield: it had sentenced 303 prisoners to death.[169]

Despite the emphasis on facilitating this mass execution of over three hundred of the enemy force, the commission did engage in some degree of individual adjudication.[170] This is perhaps best illustrated in the acquittal rate. Rather than sentencing all those who came before it to death, the commission acquitted sixty-nine prisoners, roughly eighteen percent of those tried, whom the commission determined had not voluntarily participated in the outrages.[171] Likewise, the commission also discriminated in sentencing: those whom the commission determined to have only engaged in plunder were sentenced to terms of imprisonment rather than capital punishment.[172]

These outcomes suggest that although the military's stated goal was not to determine the degree of guilt, the commission nevertheless distinguished between defendants deemed more culpable than others.

2. The View from the White House in December 1862

Sibley and Pope were not the only ones to view the commission primarily as a means of advancing U.S. strategic objectives, rather than providing due process. By the time the list of the condemned Sioux reached President Abraham Lincoln's desk for

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167. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Sarah Sibley (Oct. 1, 1862), *in* Sibley Papers, *supra* note 30.

168. Letter from Henry H. Sibley to John H. Pope (Oct. 7, 1862), *supra* note 126, at 717 (estimating that he would be able to execute two-thirds of those involved in the attacks).

169. Chomsky, *supra* note 8, at 28.

170. Sibley also appears to have harbored misgivings about the use of the commission for summary justice. *See infra* text accompanying notes 253–267.

171. Chomsky, *supra* note 8, at 28.

172. *Id.*

his review and approval, the commander-in-chief of the beleaguered Union found himself, as Sibley had several months earlier, with limited options.[173]

Although Lincoln's involvement in the Sioux military commission has been extensively analyzed elsewhere,[174] it is worthwhile to briefly observe here that his handling of the review process suggests that he, like the commanders in the field, did not view the commission as an adjudicatory forum intended to replicate a court-martial or a criminal tribunal.

Lincoln's involvement in the commission began in mid-October 1862, when he informed Pope that no executions could proceed without his authorization.[175] Accordingly, on November 8, Pope sent Lincoln a list of the defendants whom the commission had sentenced to death.[176] Two days later, Lincoln instructed Pope to forward the "full and complete record of these convictions" for his review.[177]

At the time of this review, Lincoln faced considerable political and military challenges. Administrative advisors and concerned constituencies warned that allowing the executions to go forward would mar the legitimacy of the Union and potentially jeopardize Union prisoners of war.[178] As Colonel Charles Flandrau later remarked:

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173. *See* S. Exec. Doc. No. 37-7, at 1 (1862) (describing the difficulty of responding to the list of condemned Sioux in a way that would prevent further outbreaks, but stopped short of cruelty).

174. For a detailed account of Lincoln's involvement in the military commission, see David A. Nichols, Lincoln and the Indians 94–118 (1978); *see also* David Herbert Donald, Lincoln 393–95 (1995) (chronicling Lincoln's reactions to the Sioux uprising).

175. Letter from John H. Pope to Henry H. Sibley (Oct. 17, 1862), *supra* note 155 ("[T]he President directs that no executions be made without his sanction.").

176. *Id.*

177. Letter from Abraham Lincoln, President of the U.S., to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Nov. 10, 1862), *in* 6 The Collected Works of Abraham Lincoln 493 (Roy P. Basler ed., 1890).

178. For example, in early December, Gideon Welles, Lincoln's Secretary of the Navy, suggested that if the United States were to execute three hundred surrendered prisoners, it would render the United States no different from the "barbarians" to be executed. *See* 1 Diary of Gideon Welles 186 (Howard K. Beale ed., 1960) (noting that the sentiments of the Minnesotan congressmen who urged

> [T]he eyes of the world were upon us. Had these hundred men been executed, the charge would undoubtedly have been made by the South that the North was murdering prisoners of war, and the authorities at Washington knew full well that the other nations of the earth were not capable of making the proper discrimination, and deemed it safer not to incure the odium which might follow from such an accusation.[179]

In early November, the Commissioner of Indian Affairs warned that although retaliatory and vindictive measures were warranted, the execution of three hundred Indians would be "a stain upon our national character and a source of future regret."[180]

Lincoln to approve the executions "were but slightly removed from the barbarians whom they would execute").

179. Flandrau, *supra* note 71, at 748. In mid-November, Minnesota's state Bishop, Henry B. Whipple, raised additional concerns in a letter to Minnesota Senator Henry B. Rice, in which he urged a reform of federal Indian policy and noted that the planned execution could trigger a prolonged war and God's anger:

> [W]e cannot hang men by 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.

Letter from Henry B. Whipple, Bishop of Minn., to Henry M. Rice, Minn. Senator (Nov. 12, 1862), *in* Whipple Papers, *supra* note 141. Rice, in reply, rejected the suggestion that the Sioux were prisoners of war and insisted that those found guilty should be executed, as the Sioux had violated the laws of war by engaging in a number of offenses, including killing unoffending men, women, and children; nailing infants to trees; and "gratifi[ying]" their "beastly passions" with young girls: "[I]n my opinion they are murderers of the deepest degree. The laws of war cannot be so far distorted as to reach this case in any respect . . . ." Letter from Henry M. Rice, Minn. Senator, to Henry B. Whipple, Bishop of Minn. (Nov. 19, 1862), *in* Whipple Papers, *supra* note 141. Whipple later clarified that he had not meant to imply that he personally believed the Sioux to be an independent nation with the right to engage in war. Letter from Henry B. Whipple, Bishop of Minn., to Henry M. Rice, Minn. Sen. (Nov. 29, 1862), *in* Whipple Papers, *supra* note 141.

180. As the Commissioner explained:

> [I]t seems to me that an indiscriminate punishment of men who have laid down their arms and surrendered themselves as prisoners partakes more of the character of revenge than the infliction of deserved punishment, that it is contrary to the spirit of the age and our character as a great, magnanimous and Christian people; nor would it, in my opinion, be attended with beneficial results.

Allowing the executions to go forward could also undermine support for the Union in the north.[181] In the months leading up to the execution, religious and reform groups in New York and Philadelphia criticized the United States' treatment of Native Americans in general and petitioned for a complete overhaul of federal Indian policy.[182] These advocates argued that an execution would be fundamentally unjust, given that it was America's breach of its own treaty obligations that gave rise to the attacks of August 1862.[183]

Letter from William P. Dole, U.S. Commissioner of Indian Affairs, to Caleb B. Smith, U.S. Sec'y of the Interior (Nov. 9, 1862), *in* Mankato Wkly. Rec., Dec. 13, 1862, at 1. The *New York Times* echoed this concern the following month, noting that "the simultaneous execution of 300 persons, no matter what may have been their crimes . . . cannot fail to effect largely and seriously the character of the nation in the eyes of the world and on the pages of permanent history." *The Hanging of 300 Indians*, N.Y. Times, Dec. 8, 1862, at 4.

181. *See, e.g.*, Charles S. Bryant, A History of the Great Massacre by the Sioux Indians in Minnesota 39 (1864) (describing criticism of the sentence in Eastern papers, which "in numerous instances, gave countenance to the Indian sympathizers"); Heard, *supra* note 52, at 270 (stating that "[s]ome have criticized the action of the court because of the great number of the condemned"); Alonzo P. Connolly, A Thrilling Narrative of the Minnesota Massacre and the Sioux War of 1862-63, at 164 (1896) (describing how "protests were sent in to the President from all sorts of humanitarians, imploring him to stay the sentence that condemned to death so many human beings").

182. For example, in December, a group of advocates planned a meeting in New York to discuss how to correct the "want of common humanity" that had characterized the government's treatment of the Sioux and triggered the outbreak. *Other 2—No Title*, 17 Christian Inquirer 3 (1862). *See also* Letter to the Editor, Philadelphia Press, *reprinted in* St. Paul Pioneer, Dec. 2, 1862, at 1 (describing gatherings in Philadelphia to prevent the executions); Letter from Henry B. Whipple to Henry M. Rice (Nov. 12, 1862), *supra* note 179 (requesting that the Senator present Whipple's letter to Lincoln and noting that "it is our culpable mismanagement, robbery, & sin which has brought this harvest of blood").

183. *See An Appeal for the Indians: A Letter to President Lincoln from Father Beeson*, N.Y. Times, Nov. 29, 1862, at 1 (quoting a letter by Father John Beeson to Lincoln, in which Beeson protested the imposition of capital punishment on the grounds, among others, that the United States had violated its treaty obligations to the Sioux); *see also, Black, White, and Red*, 40 The Albion 569, 569 (1862) (referring to "grave doubts" as to "whether justice really requires the death by hanging of the three hundred Indians"). *But see* Letter from William R. Marshall, Lieutenant Colonel, Commanding Seventh Regiment Minn. Volunteers, to Henry B. Whipple, Bishop of Minn. (Dec. 19, 1862), *in* Whipple Papers, *supra* note 141 (noting that had the United States treated the Indians fairly, the August attacks could have been avoided, but observing that the fact of this ill treatment did not "mitigate the decreed punishment of the guilty").

Capitulating to these demands for a general pardon, however, presented a number of risks. By late 1862, the war effort was flailing in the South and "Confederate successes had filled the nation with gloom."[184] Minnesota representatives warned that if the slated executions of the Sioux did not occur, Lincoln could expect a second war on the western front.[185] Reports had surfaced that the Confederacy was urging the Indians to "combine in a common cause against the United States."[186] Absent an execution, settlers warned, the Sioux would continue to launch attacks on civilians, such that "there can be no safety for us or for our families."[187]

In December, the *New York Evening Post* identified yet another risk of inaction: vigilante justice. If Lincoln did not provide "proper and exemplary punishment for the murderers," the *Post* warned, the feverish people of Minnesota were "likely to take the law

184. West, *supra* note 130, at 282.

185. *See* Letter from Morton Smith Wilkinson, Minn. Sen., et al., to Abraham Lincoln, President of the U.S. (undated), *in* S. Exec. Doc. No. 37-7, *supra* note 173, at 4 ("If the [pardon] is done, the Indians will become more insolent and cruel than they ever were before, believing, as they certainly will believe, that their great father at Washington either justified their acts or is afraid to punish them for their crimes.").

186. West, *supra* note 130, at 282 (quoting H.M. Rice's letter to Washington, dated September 21, 1862, that "the Western tribes are going to join the South," and that "the Sioux raids are induced by rebels and traitors").

187. Memorial to the President of the United States, *in* S. Exec. Doc. No. 37-7, *supra* note 173, at 4–5; *see also* Chomsky, *supra* note 8, at 61 ("Public outcry in Minnesota resulted in enormous pressure on the President to punish the Dakota for the war. No matter how the President might otherwise have reacted to the record laid before him, he apparently felt compelled to compromise by permitting a limited number of executions despite the unsatisfactory nature of the proceedings."); Memorial to the President of the United States from the Citizens of St. Paul, *in* St. Paul Pioneer, Nov. 27, 1862 (asking that the Sioux "receive the punishment due those crimes" as a "matter of vengeance" and "much more a matter of future security for our border settlers"); Resolutions Adopted at a Meeting of the Citizens of Mankato and Vicinity, Blue Earth County (Dec. 3, 1862), *in* St. Paul Pioneer, Dec. 10, 1862, at 1 (justifying the speedy execution of the Sioux "as a sure safe guard to the frontier settlers against the possible recurrence of like outrages"); Resolutions Adopted at New Ulm (Nov. 23, 1862), *in* St. Paul Daily Press, Nov. 29, 1862 (warning that "the exercise of clemency . . . toward the Sioux Indians, for their late atrocities, will be considered by the Indians an invitation coming from our Government to renew all the horrors of their warfare upon the women, children, and defenseless frontier settlers").

into their own hands."[188] As one contributor to the *Saint Paul Daily Press* threatened in mid-November:

> If the Government wants wholesale hanging by the acre; if they want the western plains turned into a wide Golgotha of dead Indians; if they want them hunted down like wild beasts from the face of the Continent, they had better refuse to perform the act of justice which the people of this State demand, and turn the unshrived criminals over to their victims.[189]

This prospect of "wholesale hanging by the acre"—even if exaggerated[190]—would have cautioned against granting a general pardon.

Faced with these weighty considerations, Lincoln, like Sibley before him, treated the commission not as a device designed to ensure accurate individual adjudication, but rather, as a device that could be deployed to protect the country's best interests. If Lincoln had viewed the commission as a substitute for a courtroom, one in which defendants would receive due process before a fair tribunal, he presumably could have nullified the proceedings and ordered new trials.[191] Instead, Lincoln accepted the existing records and, in doing so, recognized the legality of the commission.[192]

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188. *The Mutinous Indians in Minnesota*, N.Y. Evening Post, *excerpted in* St. Paul Pioneer, Dec. 12, 1862.

189. *A Word of Advice to the Government of the United States*, St. Paul Daily Press, Nov. 9, 1862, at 1.

190. *See The Minnesotians Ferocious*, St. Paul Pioneer, Dec. 7, 1862, at 1 (denying reports that Minnesota had called for vengeance upon "all Indians in the State" and insisting that "we have not heard of a single instance" of "wreaking private vengeance upon" the Indians "for months"); *see also Versus the Clergymen*, St. Paul Daily Press, Dec. 6, 1862, at 1 (referring to a "mistaken" belief held by prominent Minnesota clergymen that the "spirit of indiscriminate extermination" prevails generally among the people of Minnesota); *Winnebagos Discharged*, Mankato Semi-Wkly. Rec., Nov. 29, 1862, at 1 (asserting that Minnesotans would not attack Indians acquitted at a military commission as "ours is a law abiding community").

191. Chomsky argues that the commission's sentences could have been overturned under a broad reading of Article of War 65, a provision that expressly applied only to courts-martial. This provision prohibited officers from acting as both the accuser and prosecutor. Therefore, the provision could have been used to invalidate the military commission. *See* Chomsky, *supra* note 8, at 56–59.

192. *See* Letter to the Editor, *The Query*, St. Paul Pioneer, Dec. 10, 1862, at 1 ("[F]rom every indication it would seem that it was the intention of the President to recognize the legality of the court that tried these Indians by the approving of their sentence as to a few, and pardoning the greater number.").

As he later explained to Congress, "[a]nxious to not act with so much clemency as to encourage another outbreak, on the one hand, nor with so much severity as to be real cruelty, on the other," Lincoln instructed his staff to examine the commission records and identify all the defendants whom had been found guilty of rape: only those convicted of this offense would be executed.[193] When the list of prisoners to be executed came back as including only two defendants, a number that was unlikely to satisfy Minnesotans calling for a mass execution, Lincoln altered the eligibility for the death penalty: he asked his staff to list all those defendants who were convicted of rape *and* murder.[194] This time, the number of defendants to be executed was thirty-nine, and Lincoln approved the sentences.[195]

Thus, after one defendant was pardoned, Sibley's first expedition, launched with the goal of killing a thousand Sioux, came to an end two weeks later on the main street of the town of Mankato, Minnesota, where thirty-eight Sioux were executed.[196]

C. A Similar Pattern in Subsequent Sioux Military Commissions

Over the next three years, as Sibley led two further campaigns against the hostile Sioux, he convened two additional military commissions. Sibley deployed and structured these commissions with a similar goal in mind: to supplement military force as a means of defeating the hostile Sioux.

The circumstances surrounding the first of these commissions, which Sibley convened on August 22, 1863,[197] were similar to those present when Sibley convened the 1862 military commission. As before, Sibley faced a perceived threat to the frontier's security: a coalition force of 2,200 to 2,500 Indians—a force

193. S. Exec. Doc. No. 37-7, *supra* note 173, at 1.

194. *Id.* at 1–2.

195. *Id.* at 2.

196. For a description of the execution, see *The Indian Executions*, N.Y. Times, Jan. 11, 1863, at 3; *see also Execution of 39 Sioux*, Mankato Wkly. Rec. (Supplement), Dec. 26, 1862, at 1 (describing the execution). For an account of the fate of the prisoners who were not executed, see Chomsky, *supra* note 8, at 38–40.

197. Special Order No. 300 (Aug. 22, 1863), *copied in* Proceedings of a Military Commission which Convened at Fort Abercrombie, D.T., By Order of the Following Special Order [hereinafter Commission Proceedings in the Trial of Wowe-na-pa], *in* Court Martial Cases (NARG 153), Case No. NN-3132 [hereinafter Court Martial Cases].

that Sibley estimated to be the largest concentration in the history of the country—had encamped across the Missouri.[198] Although Sibley had triumphantly prevailed against this united alliance in battle, inflicting a "severe" punishment in early August, he predicted that, absent "further chastisement," a significant force would be needed "against these powerful bands should they attempt, in large numbers, to molest the settlements in retaliation for the losses they have sustained during the late engagements."[199]

Also as before, the spate of killings triggered widespread panic, prompted many settlers to flee, and renewed calls for extermination of the Sioux.[200] For example, in early July, Colonel Stephen Miller of the state volunteer regiments informed Sibley that he had sent cavalry into the "big woods with directions to hunt down the Sioux like wolves, and to remain until not one of the fiends shall have an existence in the State."[201] And once again, Sibley found himself seeking additional supplies. Six days before convening the commission, Sibley was obliged to temporarily abandon—for the

198. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to J.F. Meline, Assistant Adjutant Gen., Dep't of the Nw., U.S. Volunteers (Aug. 7, 1863), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 297, 301.

199. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to J.F. Meline, Assistant Adjutant Gen., Dep't of the Nw., U.S. Volunteers (Aug. 16, 1863), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 304–05; *see also* Letter from Stephen Miller, Colonel, Minn. St. Militia, to Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (July 9, 1863), *in* Sibley Papers, *supra* note 30 (expressing hope that the conflict would end soon, but worrying that "they may come down upon us in numbers").

200. *See* Folwell, *supra* note 21, at 237–38 (describing the fear that animated frontier life during the "raiding season" of 1863 and explaining how, despite the vigilant patrols of Sibley's commands, "parties of savages broke through at various points" and killed settlers); Letter from Stephen Miller to Henry H. Sibley (July 9, 1863), *supra* note 199 ("Hundreds of citizens are flying from the frontier as usual, and every town and settlement demands the protections of a company."); Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to J.F. Meline, Assistant Adjutant Gen., Dep't of the Nw., U.S. Volunteers (Aug. 23, 1863), *in* 22 OR, Ser.1, Pt. 1, *supra* note 115, at 908, 909 (describing the need to reassure the settlers); *see also* Clodfelter, *supra* note 19, at 72–73 (describing a panic equivalent to that of 1862).

201. Letter from Stephen Miller to Henry H. Sibley (July 9, 1863), *supra* note 199.

second time in a month—his offensive pursuit, owing to the "debilitated condition" of his men and the suffering of the animals.[202]

It was in this context that Sibley appointed a military commission on August 22, 1863 to try four prisoners.[203] The first defendant tried was Wo-we-na-pa, the son of Little Crow, whom a scouting expedition of Sibley's command had captured in late July while "scour[ing] the country."[204] Sibley charged Wo-we-na-pa with "participation in the murders and massacres" and "attempt at murder and horse stealing."[205] Over the course of several days in August and September, prosecution witnesses testified as to the defendant's participation in the second battle of New Ulm and an attack on the town of Hutchinson; witnesses also offered somewhat conflicting descriptions of the circumstances of his capture.[206]

Although it does not appear that any witnesses testified that they had seen Wo-we-na-pa engage in any particular act of killing or horse-stealing,[207] the transcript reveals some attempt at procedural safeguards: Wo-we-na-pa was offered counsel and an opportunity to cross-examine, both of which he declined.[208] On September 29, 1863,

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202. Letter from Henry H. Sibley to J.F. Meline (Aug. 7, 1863), *supra* note 198, at 302 (describing Sibley's retreat in late July owing to debilitated infantry); Letter from Henry H. Sibley to J.F. Meline (Aug. 16, 1863), *supra* note 199, at 305 (referring again to debilitated state of his men).

203. Special Order No. 300 (Aug. 22, 1863), *supra* note 197.

204. Letter from Henry H. Sibley to J.F. Meline (Aug. 23, 1863), *supra* note 200, at 909.

205. Commission Proceedings in the Trial of Wo-we-na-pa, *supra* note 197, at 3–4.

206. *See generally id.* at 4–8 (documenting David Faribault's testimony that the defendant "went into the battle with the Indians" during the attack on New Ulm); *id.* at 20 (describing A.J. Campbell's testimony that the defendant was part of a party that engaged in a battle near Hutchinson and later "attacked the town of Hutchinson"). *Compare id.* at 8 (documenting one of Sibley's scout's testimony that when the defendant was captured, "[h]e was armed with a double-barreled shot gun"), *with id.* at 12 (documenting one of Sibley's scout's testimony that when the defendant was captured, he had a gun, "but as I rode up to him he threw it down, the gun was not loaded and he had no ammunition"). For a more detailed account of the proceedings, see Chomsky, *supra* note 8, at 40–43.

207. *See* Commission Proceedings in the Trial of Wo-we-na-pa, *supra* note 197, at 6–7 (documenting Faribault's testimony that "[t]here were so many Indians in the battle that I did not notice particular acts of the accused" in the battle of Fort Ridgley and that "I did not see [the defendant] use [his gun], for the reason that I was so far behind him").

208. *See id.* at 3 ("The accused was asked if he desired counsel, and he replied in the negative."); *id.* at 6 ("Rev. S.R. Riggs was sworn to truly and

the commission found Wo-we-na-pa guilty of both counts,[209] and Sibley, as before, approved the death sentence.[210]

Before the execution could take place, however, the review process took an unusual turn: in late October, Pope refused to approve the proceedings because of what he called a "technical difficulty."[211] He pointed out, and the Judge Advocate agreed,[212] that because Sibley had both ordered the commission and issued the charges, he had violated a procedural rule that governed the courts the military convened to try its own soldiers, i.e., the courts-martial.[213]

Pope's letter offers perhaps the strongest support for the conventional wisdom that the military commission emerged to serve as a substitute for a court of record. However, the events that followed the issuance of this letter suggest that Pope's concern gave way to a consensus that a military commission was different from a court-martial, and thus, did not have to comply with all court-martial regulations.

For example, shortly after learning of Pope's disapproval, Sibley wrote to the Judge Advocate and argued that the regulation at issue, requiring separation of prosecutorial and adjudicatory roles,

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correctly interpret the Commission, the prisoner, and the witnesses."); *id.* at 8, 11, 13, 16, 23 (stating that the defendant declined to cross-examine the prosecution's witness).

209. *Id.* at 24–25.

210. *See* Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 1, 1863), *in* Commission Proceedings in the Trial of Wo-we-na-pa, *supra* note 197.

211. Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army, to Joseph Holt, U.S. Judge Advocate Gen. (Oct. 29, 1863), *in* Court Martial Cases, *supra* note 197.

212. Letter from Joseph Holt, U.S. Judge Advocate Gen., to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Nov. 3, 1863), *in* Court Martial Cases, *supra* note 197 (agreeing with Pope that "sufficient ground is established to justify a disapproval of the proceedings" and stating that "[a]lthough the Articles of war only provide expressly against the trials of officers by a tribunal created by the prosecutor who acts upon or inflicts the punishment yet the reasons for the bar are no more apparent and forcible in such cases than in those when enlisted men or civilians are accused").

213. Letter from John H. Pope to Joseph Holt (Oct. 29, 1863), *supra* note 211.

did not apply to military commissions.[214] Sibley reminded the Judge Advocate that this was not Sibley's view alone: both Pope and the President had approved the first Sioux military commission, even though it did not comply with court-martial regulations.[215] The commission, Sibley implied, was fundamentally different from a court-martial. First, there was no need to worry about bias and second, expediency was essential. As Sibley explained: "Nor did I believe that the regulation referred to, was intended to control the summary proceedings of a military commission, when prompt action was required, and when, from the very nature of the case, no other than the General Commanding could be in possession of the information . . . ."[216]

Sibley's view that the military commission operated in a separate sphere from the court-martial appears to have prevailed. Although Pope expressed disapproval of the proceedings, he ordered the defendant to be kept in confinement, under close guard, until the President had decided on appropriate action.[217] Moreover, when Sibley convened the last of the Sioux military commissions the following year, in 1864, neither Pope nor the Judge Advocate expressed any qualms in approving two death sentences, even though the 1864 commission suffered from precisely the same technical difficulty.[218]

This last Sioux military commission arose under circumstances similar to the first two. In autumn of 1863, Sibley dispatched a command to the Northern outpost of Pembina to protect

214. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Joseph Holt, U.S. Judge Advocate Gen. (Dec. 7, 1863), *in* Court Martial Cases, *supra* note 197.

215. *Id.*

216. *Id.*

217. Unaddressed Letter from John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Nov. 13, 1863), *in* Court Martial Cases, *supra* note 197.

218. Letter from Joseph Holt, U.S. Judge Advocate Gen., to Edwin M. Stanton, U.S. Sec'y of War (Nov. 17, 1865), *in* Court Martial Cases, *supra* note 197 (recommending that Shakopee's and Medicine Bottle's sentences be confirmed); *see also* Letter from Joseph Holt, U.S. Judge Advocate Gen., to Andrew Johnson, President of the U.S. (March 25, 1865), *in* Court Martial Cases, *supra* note 197 (stating that Pope and Sibley had approved the proceedings and sentence).

against attacks by fugitive Sioux fighters who had fled to Canada.[219] Once again, the United States was constrained in its ability to use force: the military could not pursue the Sioux into Canada, as Canada constituted British soil.[220] But when two Canadian residents kidnapped two Sioux chiefs and delivered them to Pembina,[221] Sibley responded by convening a military commission.[222]

The subsequent proceedings, which were delayed until November 1864 owing to a lack of available officers to serve on the commission,[223] shared certain similarities to the prior proceedings: they violated the court-martial's prohibition against combining prosecutorial and adjudicatory roles; were conducted with similar

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219. C.W. Nash, *Narrative of Hatch's Independent Battalion of Cavalry, in* 1 Minnesota in the Civil and Indian Wars, *supra* note 70, at 594, 595; *see also* Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (Oct. 10, 1864), *in* 2 Minnesota in the Civil and Indian Wars, *supra* note 74, at 522, 523 (explaining that a force had been dispatched to Pembina on October 10, 1863, "to hold in check the hostile Sioux who had retreated for safety into her Majesty's coterminous possessions"). Earlier in 1862, the Saint Paul Pioneer had reported that "one thousand Sioux Indians are encamped" near Pembina and that "a determination is expressed to open the war against the frontier settlers again in the spring." *The Sioux War Just Begun*, St. Paul Pioneer, Nov. 27, 1862, at 1.

220. Letter from Henry H. Sibley to John H. Pope (Oct. 10, 1864), *supra* note 219, at 523 (describing stringent orders from Halleck that U.S. forces were "in no case to cross the boundary line").

221. Nash, *supra* note 219, at 599 (describing the kidnapping of Little Six and Medicine Bottle). The Chicago Tribune published an account of the kidnapping, writing:

> Little Six and Medicine Bottle were taken on British soil. Drugged liquor was given them, and, after they were well asleep, chloroform added to their insensibility. While in this condition they were bound upon sleds and run into Major Hatch's camp. The act was performed by residents of the British settlement, and, as they themselves claim, without instigation on the part of our officers.

The Indian War, Chi. Trib., Feb. 3, 1864, at 1.

222. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to John H. Pope, Major Gen., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Dep't of the Nw., Gen. Staff, U.S. Army (May 30, 1864), *in* 34 War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Ser. 1, Pt. 4, at 135, 135 (1888) (announcing Sibley's plan to hold a military commission).

223. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Joseph Holt, U.S. Judge Advocate Gen. (Dec. 14, 1864), *in* Court Martial Cases, *supra* note 197.

expediency;[224] involved minimal fact-finding;[225] and resulted in two death sentences, both of which Sibley, Pope, and the Judge Advocate approved.[226]

The executive review process was also similar to that of the 1862 proceedings. In attempting to persuade the President to approve the executions, Sibley relied not on the reliability of the procedures, but rather, on conventional wisdom: "Apart from the evidence given on the trials," the defendants' role in the massacre was "a matter of notoriety."[227] Sibley said he was convinced of the "deep criminality" of the defendants based on facts "gathered from various sources during my command of this district for nearly two years and a half."[228] Sibley's petition was successful, and on November 11, 1865, the two defendants were executed.[229]

III. IMPLICATIONS FOR TODAY

A. Clarifying the Record

In 2006, the Supreme Court was asked to determine the legality of the military commissions that the United States convened following the terrorist attacks on September 11, 2001. The Court turned to the past, seeking to understand how and why such

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224. *See* Chomsky, *supra* note 8, at 44–46 (describing the procedures).

225. The Saint Paul Pioneer wrote:

> [T]here is no witness who saw either Shakopee or Medicine Bottle kill a single person or fire at the whites in battle or otherwise. There is no evidence that Shakopee ever went to battle, or carried away in plunder. Four witnesses swear that Shakopee stated that he had killed white people on the first day of the outbreak . . . . On such admissions, unsupported by other testimony, a conviction cannot be legally held in the civil courts.

The Condemned Indians, St. Paul Pioneer, Oct. 14, 1865.

226. Endorsement to Transcript of the Commission Proceeding in the Trial of Shakopee, *in* Court Martial Cases, *supra* note 197; *see also* Letter from Joseph Holt to Andrew Johnson (Mar. 25, 1865), *supra* note 218 (concluding "that the findings of the Commission are fully warranted by the evidence in the case, and the execution of the prisoner is strongly recommended").

227. Letter from Henry H. Sibley to Joseph Holt (Dec. 14, 1864), *supra* note 223.

228. *Id.*

229. For a summary of the review process, *see* Chomsky, *supra* note 8, at 46.

commissions first began to emerge on America's battlefields in the nineteenth century.[230] After surveying the historical record, a record that did not include an account of the origins of the Sioux military commission,[231] Justice Stevens reached two conclusions.

First, Justice Stevens concluded that, in general, the military commissions emerged out of military necessity—the necessity for a courtroom that was not otherwise available: "Generally . . . the need for military commissions during this period—as during the Mexican War—was driven largely by the then-limited jurisdiction of courts-martial."[232]

Second, Justice Stevens concluded that the goal in convening such a commission was to provide the same procedural protections afforded to one's own troops in a court-martial. As he explained, "[t]he military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter."[233]

Had the Court had access to the records lodged in the archives of Washington, D.C. and Minnesota, it might have reached a different conclusion as to the origins of military commissions. As discussed above, the records from the Sioux military commission reveal that those who convened and approved this commission did not desire to replicate the procedural protections of the court-martial or to ensure individual adjudication. On at least three occasions, Sibley reiterated that the military commission was fundamentally different from a court-martial and was not intended to abide by the same practices as did ordinary criminal tribunals.[234] Instead, Sibley compared the military commission to a drum-head court-martial—a device Union officers deployed to execute Confederate guerrillas,

230. Hamdan v. Rumsfeld, 548 U.S. 557, 590–91 (2006).

231. *Id.* (citing William Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920); George Davis, A Treatise on the Military Law of the United States 308 (2d ed. 1909)). Winthrop refers to the Sioux military commission only once, in a footnote to support the proposition that Indians could be tried before a law-of-war military commission. Winthrop, *supra,* at 838 n.98. Davis does not include any reference to the Sioux military commission.

232. *Hamdan,* 548 U.S. at 590–91.

233. *Id.* at 624.

234. *See supra* text accompanying notes 139, 141, 216.

whereby soldiers brought a prisoner before an officer in the field and typically executed the prisoner within a day.[235]

This decision to reject the procedural protections afforded one's own troops makes sense when one examines the context in which Sibley and his men sat down to conduct the military commission, a context in which retaliation was an accepted legal norm, states routinely paid citizens and soldiers for male Sioux scalps,[236] newspapers published poems celebrating the hanging of three hundred Sioux,[237] and military commanders authorized civilians to shoot every Indian found off of the reservation.[238]

As one editorialist who supported the forced removal of the Sioux proclaimed in protest: "This was not the way our forefathers treated the Pequods. Daniel Boone instituted no trial by jury when he caught a savage."[239] Rather than serving as a substitute for the court designed for American soldiers, the commission was set up as a substitute for the retaliation traditionally waged against Native Americans.[240]

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235. *See, e.g.*, Letter from Frank J. White, Major, Second Battalion, Mo. Cavalry, Mo. State Militia, to F. L. Crawford, Colonel, Commanding Sub-District of Cole Co., Mo. State Militia (Sept. 22, 1862), *in* 13 OR, *supra* note 4, at 281, 282 (describing the execution, within a day, of a prisoner who pled guilty to charges of guerrilla warfare and was tried before a drum-head court-martial).

236. Letter from Stephen Miller to Henry H. Sibley (July 9, 1863), *supra* note 199 ("The state administration has . . . offer[ed] $25 each for male Sioux scalps, and that to both soldiers and citizens.").

237. *See The Sioux War: Charge of the Hemp Brigade*, St. Paul Union, *reprinted in* Mankato Wkly. Rec., Dec. 13, 1862, at 1 ("Hemp on the throat of them, / Hemp round the neck of them, / Hemp under ears of them / Twisting and Choking; / Stormed at with shout and yell, / Grandly they'll hang and well, / Until the jaws of Death, / Until the mouth of Hell / Takes the three hundred.").

238. *See* Letter from John H. Pope to Henry H. Sibley (Oct. 10, 1862), *supra* note 155 (instructing Sibley to warn all "annuity Indians" that soldiers and citizens were authorized to shoot any Indian found off of a reservation); *see also The Sioux War: Misplaced Philanthropy*, Mankato Wkly. Rec., Dec. 6, 1862 ("Pass stringent laws on the subject, and legalize the shooting of every Indian found roaming outside of his reservation limits. Measures of this character are necessary for the safety of our citizens . . . .").

239. *What Shall be Done with the Indians?*, St. Paul Daily Press, Oct. 10, 1862, at 1.

240. *See* Alexander Ramsey, Proclamation to the People of Minnesota (Dec. 6, 1862), *in* St. Paul Pioneer, Dec. 7, 1862, at 1 ("The captured Sioux, instead of being indiscriminately slaughtered in the heat of passion, as might have been expected, were conceded an impartial trial by a military tribunal.").

Although it is not within the scope of this Note to examine all military commissions, there is reason to believe the Sioux military commission was not an outlier. In the early years of the Civil War, other leading Union officers used commissions for their strategic value rather than to recreate the protections afforded in courts-martial or civilian courts. For example, after capturing a prominent Confederate guerrilla in September 1861, General Lewis Merrill convened a military commission, explaining that "I had intended to have him shot on Friday, but if you think the sentence will be executed, he had better be tried."[241] General John McNeil, in his campaign across Missouri to quash the guerrillas, also convened commissions as a means of exemplary punishment: "Time and experience proved to him," a provost-marshal observed, "that in order to save bloodshed it was necessary to show some examples of severe punishment."[242]

But perhaps most strikingly, General Henry W. Halleck, the officer who penned the guidelines for military commissions that were in force when Sibley convened his commission,[243] does not appear to have intended for military commissions to replicate courts-martial. Although Halleck instructed his troops to use a process *similar* to that of the court-martial when trying enemies, he notably did not simply adopt the court-martial procedures, as he might easily have done.[244] Instead, in passages of General Orders No. 1 that have received less attention in the scholarly literature,[245] Halleck

241. *See* Letters exchanged between John Schofield, Commanding Dist. Mo., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Mo. State Militia, and Lewis Merrill, Brigadier Gen., Mo. State Militia; Colonel, Second Cavalry, Mo. Volunteers, & Captain, Second Calvary, U.S. Army (Sept. 9, 1862), *in* 13 OR, *supra* note 4, at 621, 621.

242. Strachan, *supra* note 115, at 864 (describing the commission and same-day execution of fifteen guerrillas).

243. Gen. Orders No. 1 (Jan. 1, 1862), *in* 8 War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Ser. 1, 476, 476 (1883) [hereinafter 8 OR].

244. *Id.* ("Military commissions . . . should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.").

245. *See, e.g.*, Brief of Military Law Historians, Scholars, and Practitioners (Military Commissions and the Articles of War) at 23–24, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) (analyzing General Orders Number 1 but focusing on aspects other than Article 3's qualification "as may be applicable" and Article 4's reference to civil tribunals); Glazier, *supra* note 14, at 41–42 (same);

instructed officers in Article Three of the orders that not *all* of the rules governing court-martial proceedings applied to military commissions, but only those that "may be applicable."[246] He ultimately declined to specify which of the statutory rules governing courts-martial[247] qualified as applicable, apparently leaving it to the discretion of the convening officer.[248] Furthermore, in Article Four, Halleck instructed officers that military commissions could be convened "even in places where civil tribunals exist,"[249] suggesting that the commission was not solely an emergency jurisdictional gap-filler.

In fact, on the day that Halleck issued these instructions for military commissions, he appears to have been seeking a substitute not for a court of law, but rather for military force: insurgent rebels were blowing up railroads and bridges[250] and Halleck's efforts to defeat them had failed,[251] leading him to conclude that a traditional army was simply no match for guerrilla warfare. As Sibley would do in the months to come, when faced with a formidable enemy, Halleck opted for severe punishment via military commission.[252]

While more comparative work remains to be done, these examples suggest that the Sioux military commission was not an

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Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 Am. U. Int'l L. Rev. 231, 261–62 (2008) (citing General Orders Number 1 as support for the proposition that "military commission proceedings have always been governed by the rules pertaining to courts-martial" but focusing on aspects other than Article 3's qualification as may be applicable).

246. Gen. Orders No. 1, *supra* note 243, at 477.

247. *See* An Act for Establishing Rules and Articles for the Government of the Army of the United States, arts. 64–93, 2 Stat. 359, 367–70 (1806).

248. Gen. Orders No. 1, *supra* note 243, at 477–78 (offering no further instructions as to which court-martial rules were applicable to military commissions).

249. *Id.* at 477.

250. Letter from Henry W. Halleck, Major Gen., Commanding Dep't of Mo., Gen. Staff, U.S. Army, to John M. Schofield, Commanding Dist. Mo., Gen. Staff, U.S. Volunteers & Brigadier Gen., Commanding Mo. State Militia (Dec. 25, 1861), *in* 8 OR, *supra* note 243, at 462, 462.

251. Letter from Henry W. Halleck, Major Gen., Commanding Dep't of Mo., Gen. Staff, U.S. Army, to Thomas Ewing, Chief Justice, Kan. Supreme Court (Jan. 1, 1862), *in* 8 OR, *supra* note 243, at 475, 476.

252. *See id.* at 475-76 ("I am satisfied that nothing but the severest punishment can prevent the burning of railroad bridges and the great destruction of human life . . . . I have determined to put down these insurgents and bridge-burners with a strong hand. It must be done; there is no other remedy . . . .").

outlier. The military commission, it seems, may not have enjoyed the illustrious beginnings the Supreme Court described.

B. Broadening the Debate

The wrinkle in the historical narrative posed by the origins of the Sioux military commission is of more than academic interest. It invites us to broaden the debate from the question of whether military commissions are legal and constitutional, and if so what additional safeguards should be added, to the more fundamental question of whether, if the goal is to achieve accurate, reliable fact-finding and individual due process, we ought to be relying at all on an instrument whose architects did not set out to achieve those goals.

In carrying out this debate, it may be useful to consult the normative views of the architect himself. For although Sibley was adamant that the commission was not intended to emulate a court-martial or a criminal trial, his personal writings and petitions for pardons following the commission reveal that he was at times conflicted over whether this was the way the world *ought* to respond to perceived violations of the law of war. For example, on October 17, 1862, he confided to his wife, Sarah:

> The military commission is still at work and the Indian prisoners are being tried so fast as a due regard for justice will permit. I have to review all the proceedings, and decide the fate of each individual. This power of life, and death, is an awful thing to exercise, and when I think of more than three hundred human beings are subject to that power, lodged in my hands, it makes me shudder. Still, duty must be performed, and judgment visited upon the guilty.[253]

Three days later, Sibley wrote to Sarah again, to say that he did not "propose to murder any man, even a savage, who is shown to be innocent of the 'great transgression'" or "permit [] the massacres of women and children."[254] And one week later, after another one hundred prisoners were tried, Sibley once again invoked the notion of

253. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Sarah Sibley (Oct. 17, 1862), *in* Sibley Papers, *supra* note 30.

254. Letter from Henry H. Sibley to Sarah Sibley (Oct. 20, 1862), *supra* note 147.

fair play: "[W]e are trying the prisoners as rapidly as fair play, and a due regard to justice will admit."[255]

These writings suggest that although Sibley did not intend for the commission to function as an ordinary court-martial or criminal tribunal, he increasingly sought to assure some form of fair play. As he wrote to Lincoln two months after the commission had ended, at a time when it had come under intense criticism, he did not take the responsibility lightly:

> I myself have revised and carefully scrutinized those proceedings and approved of the findings in each particular case, only after being fully convinced of their propriety and justice. I endeavored to guide myself in this grave and important matter by all the light and information I could obtain and under a deep sense of my responsibility as an officer and a Christian man.[256]

In March of 1863, Sibley offered a similar defense of the commission to Minnesota's Bishop, Henry B. Whipple.[257] Upon learning that Sibley had recommended an additional fifty executions, the Bishop had written Sibley to warn that "[T]he verdict of the civilized world will condemn such action as unjust."[258] Resorting to legal argumentation, Whipple argued that because the Sioux had surrendered under white flags, "the punishment of these men . . . cannot be justified by any laws human or divine."[259]

Sibley's response to this charge of injustice offers further support that, in the wake of the commission, Sibley sought to defend

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255. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Oct. 13, 1862), *in* Sibley Papers, *supra* note 30; Letter from Henry H. Sibley to Sarah Sibley (Oct. 17, 1862), *supra* note 253 ("The Indian prisoners are being tried so fast as a due reg. to justice will permit."); Letter from Henry H. Sibley to Sarah Sibley (Oct. 30, 1862), *in* Sibley Papers, *supra* note 30 ("We are trying the prisoners as rapidly as fair play, and a due regard for justice will admit.").

256. Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Abraham Lincoln, President of the U.S. (Feb. 16, 1863), *in* Records of U.S. Army Continental Commanders (NARG 393), Letters and Telegrams Sent, Entry 343.

257. *See* Letter from Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers, to Henry B. Whipple, Bishop of Minn. (Mar. 11, 1863), *in* Whipple Papers, *supra* note 141.

258. Letter from Henry B. Whipple, Bishop of Minn., to Henry H. Sibley, Brigadier Gen., Commanding Dist. of Minn., Gen. Staff, U.S. Volunteers (Mar. 7, 1863), *in* Whipple Papers, *supra* note 141.

259. *Id.*

the procedures not simply on grounds of military necessity, but also on grounds of procedural fairness. For example, Sibley began by defending his role in the commission not on the premise that summary proceedings were necessary, but rather, by asserting that "no one was better qualified to judge of all the facts . . . involving the guilt or innocence of the prisoners."[260] Likewise, Sibley characterized his review of the records as a "long, laborious, and dispassionate examination."[261] Sibley also expressed confidence in the sentences, reiterating that he would have executed all the Indians convicted, "excepting only those of whose criminality there was a reasonable doubt."[262] He concluded, "I am as anxious as you are, that the innocent among these people shall be shielded from harm and unjust reproach."[263]

But while Sibley sought to present the proceedings as fair and discerning, he also continued to defend the commission as a strategic device: he noted that his hoped-for execution would have helped "spare" thousands of innocent lives in the future.[264] Taken together, however, Sibley's defenses of procedural fairness suggest that Sibley may have doubted whether military necessity alone justified summary proceedings.

Equally telling is the fact that, in the months after the commission, Sibley submitted the first of what was to be several petitions for pardons of those whom the commission had sentenced to death, on the grounds that the defendant had acted under duress.[265] Two years later, Sibley joined in requesting an additional four pardons, citing reasonable doubt of guilt that had come to light since the commission ended.[266] Finally, in March of 1866, President

260. Letter from Henry H. Sibley to Henry B. Whipple (Mar. 11, 1863), *supra* note 257.

261. *Id.* at 2. Sibley also rebutted Whipple's charge that he had misled the Sioux into surrendering, explaining that "no such [white] flags, strictly speaking, were used." *Id.* at 1. Although white emblems were displayed to designate messengers and the friendly camp, Sibley explained that he had never implied that the guilty would avoid punishment. *Id.*

262. *Id.* at 2.

263. *Id.* at 3.

264. *Id.*

265. Chomsky, *supra* note 8, at 38–40.

266. *Id.*

Johnson issued a general pardon of the Sioux and ordered the release of all remaining prisoners.[267]

During this time, Sibley's contemporaries also debated whether an ordinary criminal trial might have been more appropriate. One editorialist in the *Saint Paul Daily Press* suggested that if the government failed to carry out the executions "by military process," the state should resort to a civil judicial process by which a grand jury would issue a formal indictment, and those indicted would stand trial in Minnesota state courts.[268] And indeed, there is evidence to suggest that seventeenth-century American colonists had relied on criminal trials to adjudicate cases in which Native Americans were charged with killing civilians during war.[269]

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267. Order for Pardon of Sioux Indians, Apr. 30, 1864, *in* 7 Collected Works of Abraham Lincoln 325–26 (R. Basler ed. 1954).

268. *See, e.g.*, *Let The Laws Be Executed*, St. Paul Daily Press, Nov. 12, 1862, at 1 ("If, therefore, the Federal authorities will not hang them by military process, the civil authorities will be justified in issuing warrants for the immediate arrest of the murderers, and turning them over to our courts."); *see also* Ramsey, Proclamation to the People of Minnesota, *supra* note 240, at 1 ("If the President shall decline to punish [the Sioux], the case will then clearly come within the jurisdiction of our civil court."); Letter from Henry B. Whipple to Henry M. Rice (Nov. 29, 1862), *supra* note 179 (noting that although he personally had "no means of knowing how carefully [the commission] was conducted," his "only wish is that the trial of all shall be such as to carefully scrutinize between the guilty and the innocent").

269. *See, e.g.*, James D. Drake, King Phillip's War: Civil War in New England 1675–1676, at 158 (1999) (recounting how the Plymouth Court tried and condemned to death a group of three Indians for killing a white woman during King Phillip's War, reasoning that "the said engagement was to be understood with exception against such as by murder . . . and not against such as killed his enimie in the field in a souldier like way"). Drake describes how Indians accused of committing a crime against humanity were tried in a civilian court:

> These Indians, not operating within the bounds of military conduct as traditionally defined, were thus held accountable in a civil court for having committed a crime against humanity. Having demonstrated no restraint and no mercy, they deserved none. The immunities reserved for prisoners of war did not apply to these three, who were scrupulously distinguished from the others who had surrendered.

Id. at 159; *see also* Glassley, *supra* note 54, at 47–48 (describing how, in 1850, after the Territorial Governor of Oregon secured the surrender of five Cayuses who were accused of killing civilians in the "Whitman Massacre" of 1847, the Territory prosecuted the defendants in Oregon City and "every care was taken to assure a fair trial").

These examples suggest that the military commission was neither an inevitable nor universally accepted response to attacks on civilians. As the editors of the *New York Times* advised the President in 1862, the challenge may be to find a solution that will "best serve the ends of justice, promote the safety and welfare of the Western people, and consult the honor and permanent credit of the country."[270]

CONCLUSION

Nearly one hundred and forty years ago, as the 1862 Sioux military commission was drawing to a close, an observer remarked that "[a] military commission . . . is not the place for the clear bringing out of evidence and securing a fair trial to everyone."[271]

This Note has argued that, at least in the case of the Sioux military commission, the commission was not such a place because those who convened it never envisioned that it would be. Rather than serving as a substitute for the courtroom in which American soldiers or civilians would be tried, the military commission of 1862 was deployed by both the commander-in-chief and his army as a strategic tool in a war against an enemy that could not easily be defeated on the battlefield. The roots of this commission and the doubts harbored by those involved call into question what it is that the United States hoped to achieve when it established military commissions at Guantánamo Bay. For if the goal is to provide the procedural safeguards of an otherwise unavailable courtroom, the story of the Sioux military commission suggests it may well be time to find another means.

270. Editorial, *The Hanging of the Indians*, N.Y. Times, Dec. 8, 1862, at 4.
271. Stephen R. Riggs, Letter to the Editor, *supra* note 161.