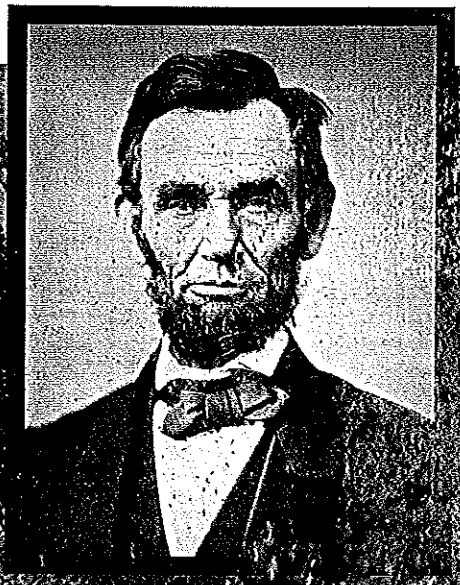
Lincoln's

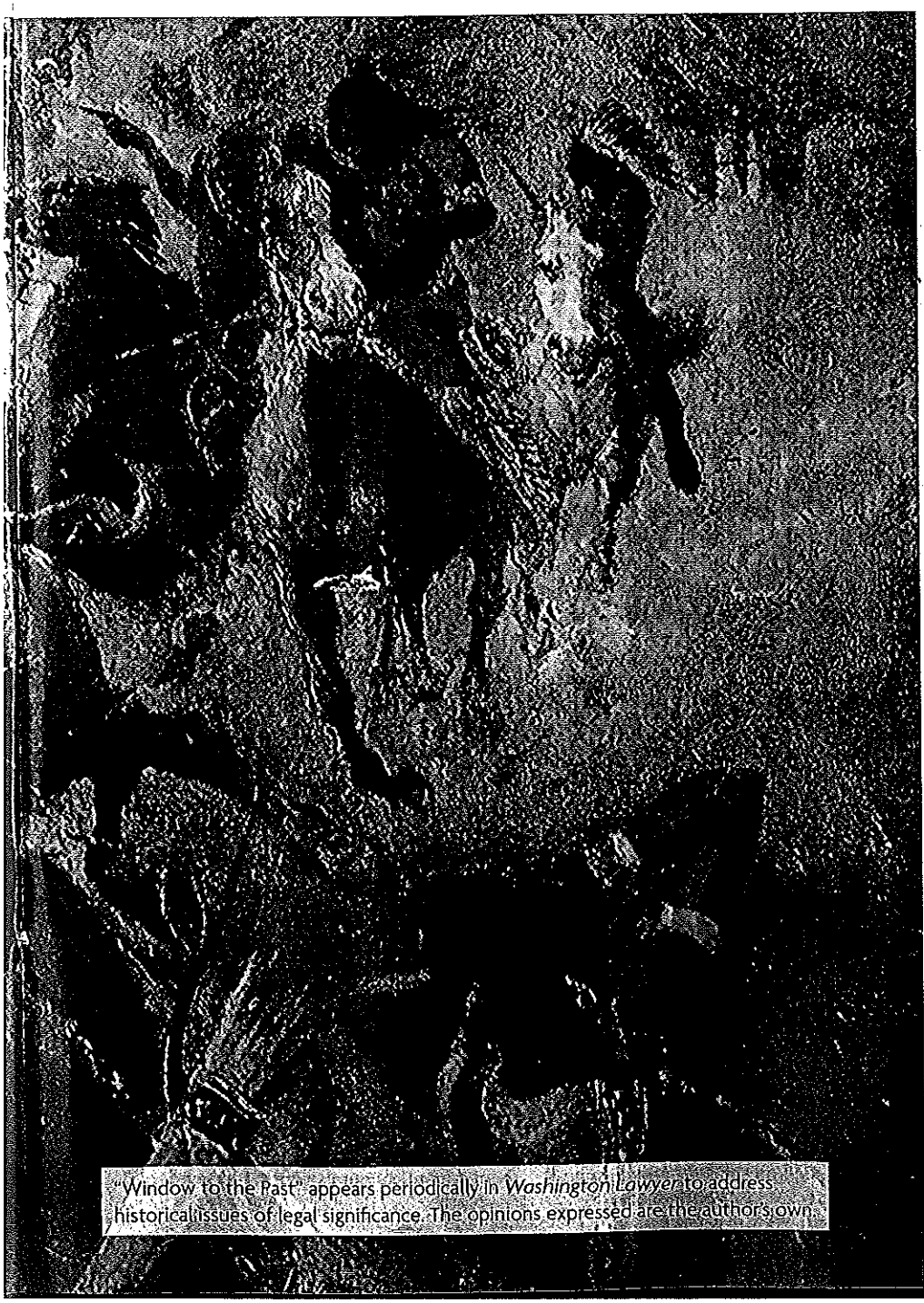


"You do not know how hard it is to have a human being die when you know that a stroke of your pen may save him."

"The Siege of New Ulm, Minnesota" by Henry August Schwabe

Dilemma

By Robert B. Norris



"Window to the Past" appears periodically in *Washington Lawyer* to address historical issues of legal significance. The opinions expressed are the author's own.

On November 7, 1862, Abraham Lincoln received a telegram from General John Pope seeking his approval for the execution of 303 Dakota Indians. Although not surprised, Lincoln was nevertheless appalled by the magnitude of the request. These Indians had been condemned to death by a Military Commission for their participation in an Indian uprising in Minnesota in August and September 1862.[1] Besides the legal issues raised by General Pope's request, Lincoln also was confronted with a difficult moral dilemma.

The Dakota War of 1862 could not have erupted at a more inopportune time for Lincoln. The president was consumed by the demands of the Civil War. General George McClellan's Peninsula Campaign had recently ended in failure. In late August, a Union Army was soundly defeated in the Second Battle of Manassas. Union forces, which just a few weeks earlier had driven to the outskirts of Richmond, Virginia, were now deployed in a defensive position around Washington. In early September, a Confederate Army under General Robert E. Lee crossed the Potomac River into Maryland. War was now being waged in the North. The horrific Battle of Antietam took place on September 17. Also, during this crucial period, Lincoln was preparing a preliminary Emancipation Proclamation, which he issued on September 22 to galvanize antislavery sentiment.[2] In considering the many and disparate issues confronting Lincoln at this time, it is understandable that he regarded the Dakota War as a disturbing sideshow. The Dakota War presented Lincoln with the additional burden of resolving the legal and moral dilemmas inherent in Pope's request for permission to execute 303 Dakota Indians.

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The Dakota War had its origin in a decade of mistreatment of the Indians, commencing with the blatantly unfair treaties negotiated by the United States and the Dakota in 1851 and 1858. Under these treaties, the Dakota were compelled to cede large tracts of land in Minnesota to the United States in exchange for money and goods. The treaties also required the Dakota to live on a narrow reservation along a stretch of the Minnesota River. Under the patronage system that developed under the treaties, much of the money to be paid to the Indians supposedly for their support was systematically siphoned off by corrupt government officials. By the summer of 1862, the Dakota had become increasingly discontented over the loss of their ancestral lands, violations of treaty obligations, the nonpayment of promised annuities, food shortages, and their ongoing struggle against a corrupt system.[3]

In the 10 years preceding the Civil War, 150,000 white settlers moved into Minnesota, many of whom ignored the boundaries of the reservation.[4] They, as most Americans in the 19th century, regarded Western expansion as the "Manifest Destiny" of the United States, a policy that ignored the fact that the frontier was also the homeland of the Indians. During this period, the Dakota population of Minnesota remained constant at about 7,000.[5] Friction was inevitable.

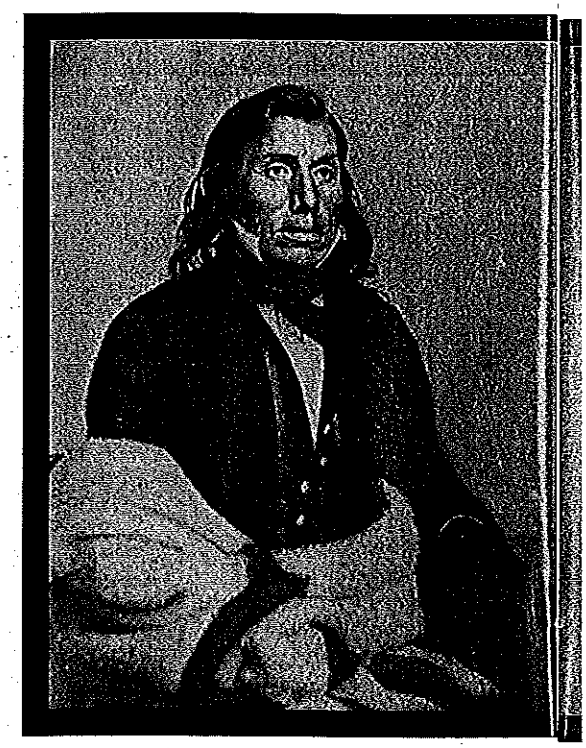
Following a crop failure in 1862, the Dakota faced famine. At a meeting on August 15, U.S. government officials and local traders rejected the Dakota's desperate pleas for food. One of the traders, Andrew Myrick, was heard to say, "As far as I am concerned, if they're hungry, let them eat grass."[6] For the Dakota, this insult was unforgivable as Myrick had an Indian wife. The disgruntled Dakota departed in anger. On Sunday, August 17, four young Dakotas, while on an unsuccessful hunting trip near Acton, Minnesota, happened upon an isolated farm and killed five white settlers. This provocative incident was unintended. In excited braggadocio, one of the braves defiantly dared another to prove his courage by killing a white man. The four of them accepted the challenge. The five white settlers were then murdered.[7]

After reporting this incident to their elders that night, a council was convened by Little Crow, a tall and imposing Dakota chief. Fifty-two years of age, Little Crow was an assimilated Indian. He dressed in white man's clothing, lived in a house, had taken up farming, and joined the Episcopal Church. He was regarded as a friend of the white man. Little Crow had participated in the negotiations of the 1851 treaty, under which the U.S. government had failed to honor its obligations. In an effort to alleviate the deteriorating conditions of the Dakota, Little Crow traveled to Washington in 1858 to confer with President James Buchanan. The trip was a failure, as Little Crow was pressured into agreeing to the demands for more land to accommodate the ever-growing number of white settlers.[8]

> "[White men] fight among themselves, but if you strike at them, they will all turn on you and devour you and your women and little children just as the locusts in their time fall on the trees and devour all the leaves in one day."—Dakota Chief Little Crow

On the Sunday of the Acton murders, Little Crow attended services at the local Episcopal Church. After the service, he shook hands with the minister and several of his fellow parishioners.[9] Less than 24 hours later, Little Crow would be leading the Dakota in a terrible war against the whites.

At the August 17 council, Little Crow was reluctant to recommend hostilities. He contended that the white man would ultimately prevail because of overwhelming numbers, arguing that "the white men are like the locusts when they fly so thick that the whole sky is a snowstorm. Kill one—two—ten and ten times ten will come to kill you. Count your fingers all day long and the white men with guns in their hands will come faster than you can count."[10] In a reference to the Civil War, Little Crow understood that the white men "fight among themselves, but if you strike at them, they will all turn on you and devour you and your women and little children just as the locusts in their time fall on the trees and devour all the leaves in one day."[11] The arguments for war also were convincing. Because of the murder of the five settlers, including two women, the Dakota could expect retaliation against all Indians. It was generally accepted that the surrender of the four Acton killers to white authority would not quell the demand for revenge. Also, the time was right to drive the white man away because of the Civil War raging in other parts of the country. With many Minnesotans away fighting for the Union, the timing for war was propitious. However, the unifying reason for war was the ever-growing resentment of the mistreatment of the Dakota. Those favoring hostilities prevailed; the council declared war. With the declaration of war, Little Crow agreed to lead the Dakota, asserting that while war was foolhardy, he was "not a coward" and he would "die with you."[12]



Dakota Chief Little Crow

Early on the morning of August 18, the day after the Acton murders, the Dakota War began. Warriors attacked white settlements. Among the first to die was Myrick, whose corpse was later found with grass stuffed in his mouth.[13] Throughout the day, Dakota war parties swept the Minnesota River Valley and near vicinities, killing numerous settlers. On that first day, violence was rampant. Countless numbers of settlers and sol-

diers were killed and more than 200 whites taken prisoner by the Dakota.

Minnesota's Republican Governor Alexander Ramsey learned of the outbreak on August 19. When the Dakota War broke out, Ramsey recognized that his old political rival, Henry Hastings Sibley, was the ideal person to put down the uprising. Although he had no military experience, Sibley knew the Dakota and their customs and language. He also knew

General John Pope

the terrain.[14] Sibley had developed close ties with the Dakota as a fur trader in the 1830s, and he had fathered a daughter with an Indian woman. The Dakota referred to Sibley as "Long Trader" because he had profited unfairly from his dealings with the Indians.[15]

On August 20, the newly minted Colonel Sibley departed from St. Paul for the frontier with a contingent of Minnesota militia. Meanwhile, Governor Ramsey flooded the War Department in Washington with requests for help. He contacted Lincoln directly, informing him that Minnesota could not meet its draft quota of troops for the Union. Ramsey's plea received an unexpected boost from John G. Nicolay, Lincoln's trusted personal secretary and confidant, who was in Minnesota investigating Indian troubles. Nicolay joined other Minnesota officials in a telegram to Lincoln from St. Paul: "We are in the midst of a most terrible and exciting Indian war. Thus far the massacre of innocent white settlers has been fearful. All are rushing to the frontier to defend settlers."[16] Lincoln replied to Ramsey: "Attend to the Indians. If the draft cannot proceed of course it will not proceed. Necessity knows no law."[17]

The Dakota, eager for what they believed would be easy plunder, attacked New Ulm, Minnesota, a village of about 900 whites. Because of an unexpected thunderstorm and the absence of a competent leader, the disorganized Dakota broke off the attack. The next day, August 20, Little Crow, in war paint and Indian dress, arrived on the battlefield. He had shed his white man's clothing, which he would refuse to wear for the rest of his life. No longer an assimilated Indian, Little Crow had returned to his Dakota roots. Under his leadership, the Dakota mounted an assault on Fort Ridgely, a military garrison established to maintain control over the Indians and to protect the settlers moving into the region. This time, the Indians encountered artillery for the first time. Cannon fire discouraged them and the attack fizzled. Two days later, the Dakota launched a second attack on the fort. Once again, accurately placed artillery proved too much for the attackers. Having failed to subdue Fort Ridgely, the Dakota turned their attention to New Ulm. On the morning of August 23, the Dakota launched a raid on New Ulm. The attackers were met by unexpected stiff resistance. Discouraged, the Dakota withdrew.[18]

These four engagements demonstrated a significant combat weakness in the Dakota. Although they would plan an attack, the "plan" was little more than a decision to attack. While most Indians were brave warriors, they tended to fight as individuals rather than as a coordinated unit. Minnesota historian Kenneth Carley opined that "the successful defense of Fort Ridgely and New Ulm saved towns farther down river from attack, and may have settled the outcome of the [Dakota War], though it was by no means over."[19]

Sibley, with 1,400 soldiers, finally reached Fort Ridgely. He was advised that the bodies of settlers killed in the initial action lay unburied. Sibley dispatched a burial party, which labored for more than two days. On the evening of September 1, the soldiers pitched camp near Birch Coulee, on the edge of a ravine, unmindful of the fact that the Dakota could advance on them undetected. As the soldiers slept, a large number of Dakota encircled the camp. At dawn, on September 2, the Dakota attacked the camp, inflicting many casualties and the loss of all but a few horses. Hearing of this fierce encounter, Sibley promptly sent a relief party with a section of light artillery, and scattered the Dakota. In the Battle of Birch Coulee, the military sustained its heaviest casualties of the Dakota War. The loss of troops was painful to Sibley, but the loss of the horses precluded immediate pursuit of the Indians.[20]

Ramsey pressed Washington for help. In a telegram to Lincoln, Ramsey stated: "Those Indian outrages continue . . . This is not our war; it is a national war . . . More than 500 whites have been murdered by the Indians."[21] Lincoln responded on September 5 by sending General Pope to Minnesota to command the newly established Military Department of the Northwest.[22] Unhappy, Pope correctly perceived this assignment as a demotion for the defeat of the Union forces under his command at the Second Battle of Manassas. To placate Pope, Lincoln directed Secretary of War Edwin Stanton to tell him that the "Indian hostilities . . . require the attention of some military officer of high rank, in whose ability and vigor the Government has confidence."[23] Upon his arrival in St. Paul on September 16, Pope instructed Sibley to push on, declaring that it "is *my* purpose utterly to exterminate the Sioux."[24] Sibley was in agreement. The slaughter of hundreds of white settlers had a profound effect on him. Once a close friend of the Dakota, Sibley was now their implacable foe.

With a force of more than 1,600 men, Sibley sought to locate and engage the Indians. On September 23, Sibley's troops bivouacked near Wood Lake. Carelessly stationed pickets enabled about 1,000 braves to slip within a short distance of Sibley's camp. The Dakota planned to ambush Sibley's troops at daybreak, but they were detected. A firefight erupted. The troops maintained discipline, and, once again, the Indians were raked with canister fire from artillery. After two hours of heavy fighting, the Dakota withdrew. The Battle of Wood Lake ostensibly ended the Dakota War.[25] It's estimated that between 450 and 800 settlers and soldiers died in the 38-day Dakota War, thus making it "the largest massacre of whites by Indians in American history."[26]

Yet, few contemporary American citizens outside of Minnesota have heard of this bloody conflict. On the other hand, it would be difficult to find anyone who has not heard of Custer's Last Stand, where Lieutenant Colonel George Custer and 267 officers and troopers perished at the hands of

the Indians in June 1876.[27] While the exact death toll of whites killed in the Dakota War is unknown, the figure far exceeds the number slain at Custer's Battle of the Little Bighorn. The plausible explanation for the American public's relative ignorance of the Dakota War is that it occurred during the Civil War, a momentous period in American history during which more than 600,000 soldiers perished.

In writing about Lincoln and the Civil War, eminent historians have relegated the Dakota War to not much more than an historic footnote. In his highly acclaimed 1954 biography of Lincoln, Benjamin P. Thomas notes that after the Second Battle of Manassas, General Pope was sent to Minnesota "to guard the Indian frontier," with no mention of the Dakota War.[28] James M. McPherson, the renowned Civil War and Lincoln scholar, also considered the Dakota War an incidental diversion from the larger conflict. In his Pulitzer Prize-winning *Battle Cry of Freedom*, McPherson's only reference to these Indian hostilities is that Pope was sent "to Minnesota to pacify Indians."[29]

After the defeat at Wood Lake, Little Crow encouraged his followers to "run away and scatter out over the plains like buffalo and wolves."[30] Less than a year later, while picking raspberries with his son near Hutchinson, Minnesota, Little Crow was shot and killed by a settler who claimed the $25 bounty offered by the State of Minnesota for Sioux scalps.[31]

After his success at Wood Lake, Sibley turned his attention to the liberation of the captives, mostly women and children. This was a delicate operation. There was concern that the defeated Indians might seek retaliation against the hostages. Fortunately, friendly Indians controlled the captives, who were quickly released and repatriated. Sibley then rounded up about 2,000 Indians remaining in the area, of which about 600 male Dakota of fighting age were singled out for potential prosecution as participants in the Dakota War.[32]

On September 28, Sibley appointed a Military Commission consisting of five officers to try the Dakota accused of participation in the conflict. In convening the Military Commission, Sibley was either unaware of Article 65 of the Articles of War (enacted by the U.S. Congress in 1806) or chose to ignore the tacit instruction that the convening officer of a court-martial could not also be the "accuser or prosecutor." It was later determined that the trials of the Dakota violated Article 65 "in spirit."[33] Both Sibley and Pope also ignored the fact that the Dakota were not soldiers and thus, technically, not subject to military law.[34] The trials got underway immediately, resulting in several convictions. Sibley intended to execute without delay those Indians found guilty and sentenced to death. Pope approved. Neither was aware that under the Articles of War, the president's approval was required before a death sentence could be carried out.[35] When Lincoln heard of Sibley's intention, he sent word to Pope that there would be "no executions" without his approval.[36] Meanwhile, the prosecutions continued unabated.

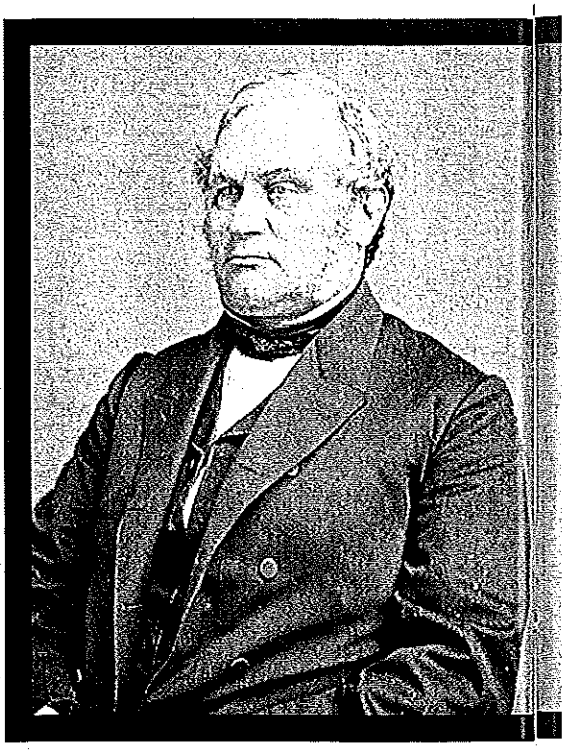
The trials before the Military Commission finally came to an end on November 5. On that day alone, in a rush to finish, the commission heard 40 cases. Between September 28 and November 5, the Military Commission tried 392 Dakota Indians, convicting 323. Of those convicted, 303 were sentenced to death.[37]

Although Sibley and Pope favored immediate executions, the issue was referred to Lincoln as mandated by law. On November 7, Pope, seeking authority to execute the 303 Indians condemned by the Military Commission, sent Lincoln "a long telegraphic dispatch . . . simply announcing the names of persons sentenced to be hanged" without any facts in support of the sentences.[38] The cost to the government of this lengthy telegram was $400, a tidy sum in 1862, an expense for which Pope was criticized. The *New York Times* even suggested that this expense be deducted from Pope's salary.[39]

Reinforcing the public cry for revenge, Ramsey also sent a telegram to Lincoln urging the immediate execution of "every Sioux Indian condemned by the military court."[40] Ramsey understood the political advantage in seeking harsh punishment in revenge for the white victims of the conflict, and he also recognized that the Dakota uprising provided an opportunity to banish all Indians from Minnesota to secure additional land for white settlers.

Had Lincoln subscribed to the adage that the only good Indian was a dead Indian, the granting of Pope's request would have been a formality. Lincoln must have had to suppress some painful family history as he read Pope's request. His paternal grandfather, also named Abraham, was killed by Indians, "not in battle, but by stealth." This untimely death left Lincoln's father, Thomas, who was then a boy of six, impoverished.[41]

Lincoln's family tragedy did not embitter him against Indians. In the Black Hawk War of 1832, Lincoln volunteered, and, as a 23-year-old, he was elected captain of his company by his comrades. Although the company never engaged in any actual Indian fighting, an old Indian happened to stumble into their camp. This Indian had an official safe-conduct pass, but Lincoln's men still accused him of being a spy and threatened to kill him.



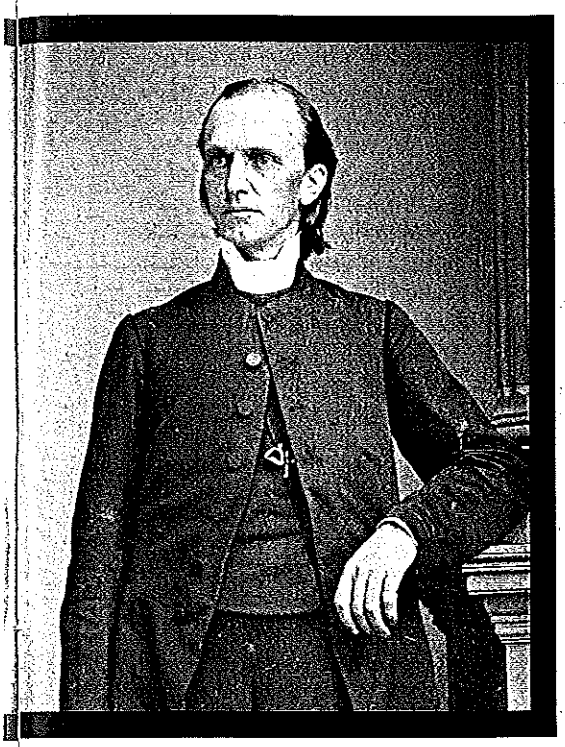
Governor Alexander Ramsey

To the consternation of his men, Lincoln defended the Indian and his life was spared. Many years later, Lincoln recalled that his election as militia captain was "a success which gave more pleasure than any I have had since."[42] Far more illuminating, however, was Lincoln's innate humanity in his defense of the old Indian.

In response to Pope's telegram, Lincoln refused to be stampeded. If Pope, Sibley, and Ramsey expected Lincoln to promptly sign off on the death sentences, they did not understand the president. Instead, on November 10, Lincoln requested Pope to provide him, "as soon as possible, the full and complete record of these convictions. And if the record does not fully indicate the more guilty and influential, of the culprits, please have a careful statement made on these points, and forwarded to me." Obviously, Lincoln was annoyed by the arrogant and cavalier tone of Pope's "long telegraphic dispatch" of November 7 as well as its expense to the government. Lin-

coln added, "Send all by mail."[43]

Pope acknowledged that he would comply with Lincoln's request, adding that all of the condemned Indians were "guilty in more or less degree," and "if the guilty are not executed, I think it nearly impossible to prevent the indiscriminate massacre of all the Indians." Succeeding telegrams from Pope and Ramsey continued to press for immediate execution.[44] Because Lincoln did not immediately approve these



Bishop Henry Benjamin Whipple

demands, it was rumored that he might pardon a large number of the Indians. The pressure on Lincoln was intense. One of the senators and two of the representatives from Minnesota sent him a long letter protesting the possibility of a pardon for the Indians. In a separate letter, the citizens of St. Paul also objected to a pardon.[45] On November 12, Pope attempted another ploy. He proposed that Lincoln release the condemned prisoners to state authorities whereby the condemned would "be dealt with" forthwith. Later in the month, Ramsey offered Lincoln another escape: "If you prefer it, turn them over to me & I will order their execution."[46] Lincoln raised the issue with the Judge Advocate General, Joseph Holt. In referring to this matter as a "delicate and responsible trust," Holt emphatically rejected the idea: "[T]he power cannot be delegated."[47]

In the clamor for the prompt dispatch of the condemned Indians, there was one voice in Minnesota urging compassion and mercy. Shortly after his appointment in 1859 as the Episcopal Bishop of Minnesota, Henry Benjamin Whipple wrote Lincoln's predecessor in the White House, Buchanan, about the fraud and corruption in the U.S. government's handling of Indian affairs.[48] He even forecast the probability of a Dakota uprising if the system was not reformed: "A nation which sowed robbery would reap a harvest of blood."[49] As the bishop had predicted, the corrupt Indian system "commences in discontent and ends in blood."[50]

In September, while the Dakota War was still raging, Bishop Whipple visited Lincoln at the White House. Lincoln knew very little about Indian affairs. The bishop explained in graphic detail the skullduggery of government agents and traders; the failure of the government to protect the Indians; and, finally, why this corruption and mistreatment of the Indians had led to the Dakota War. Lincoln was moved by the Bishop's eloquence and passion. After this meeting, Lincoln recounted to a friend that the Minnesota bishop "came here the other day and talked with me about the rascality of this Indian business until I felt it down to my boots."[51] For his efforts on behalf of the Indians in Minnesota, the Dakota called Bishop Whipple "Straight Tongue."[52] Although Lincoln regarded the presence of Indians on the frontier as a "barrier to progress," he also believed that the unjust treatment of the Indians should be remedied. [53] Based primarily on Bishop Whipple's representation, Lincoln recommended to Congress that "our Indian system [should] be remodeled. Many wise and good men have impressed me with the belief that this can be profitably done."[54] Lincoln concluded, "if we get through this war," prophetically adding, "*and I live*, this Indian system shall be reformed."[55]

> "A nation which sowed robbery would reap a harvest of blood. [The corrupt Indian system] commences in discontent and ends in blood."
>
> —Henry Benjamin Whipple, Episcopal Bishop of Minnesota

An indication of how Lincoln intended to handle the death penalty request could be gleaned from his approach to pardon applications. John Hay, Lincoln's personal secretary, noted that Lincoln would grasp "any fact which would justify him in saving the life of a condemned soldier."[56] Lincoln was often criticized by his generals for his reluctance to approve the execution of deserters.[57] Judge Advocate General Holt observed that Lincoln "shrank with evident pain from even the idea of shedding human blood . . . in every case he always leaned to the side of mercy. His constant desire was to save life."[58] In his typically folksy manner, Lincoln once remarked that "a man can't help being a coward any more than he can help being a humpback."[59] Even when he felt he had no choice but to approve an execution, Lincoln lamented: "You do not know how hard it is to have a human being die when you know that a stroke of your pen may save him."[60] In another case, Holt recommended the execution of a soldier who had run away during a battle. Lincoln decided to file it "with my leg cases." Somewhat puzzled, Holt asked, "Leg cases?" Lincoln answered that "if God gave a man a pair of cowardly legs, how can he help it if these legs ran away with him?"[61]

For Lincoln, all life was sacred. His stepsister, Mathilda Johnston Moore, reflected that "Abe preached against cruelty to animals," remarking that Lincoln once said that "an ant's life was to it, as sweet as ours to us."[62] He believed that sparing a man from execution not only promoted morale in the army, but was also good for his own morale. "It rests me, after a hard day's work, that I can find some excuse for saving some poor fellow's life, and I shall go to bed happy tonight."[63] On the last afternoon of his life, April 14, 1865, Lincoln pardoned a deserter, commenting, "Well, I think the boy can do us more good above ground than underground." At the same time, he also revoked the death sentence of a Confederate spy.[64] In the Dakota War, Lincoln applied his humane instincts to the condemned Indians.

On December 1, Lincoln delivered his Annual Message to Congress, in which he acknowledged that "not less than eight hundred persons were killed by Indians" in the recent conflict in Minnesota.[65] Such a

death toll seemed to demand harsh punishment. Finally, on December 6, Lincoln rendered his decision. He approved the death penalty for 39 Dakota.[66]

In explaining his decision, the president stated in a December 11 response to a Senate resolution requesting "all information" pertaining to the recent "Indian barbarities in Minnesota" that he was "anxious 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."[67] He further refined the basis for his decision by differentiating between those "who were proven to have participated in *massacres*, as distinguished from participation in *battles*." (The italics are Lincoln's.)[68] In short, unlike the Military Commission, Lincoln distinguished between "individual acts and group warfare."[69] This was an important distinction to Lincoln. He "did not propose to give the Confederates reason to declare to the world that he had agreed to the execution of three hundred prisoners of war."[70]

This remark suggests that Lincoln regarded "the Dakota as a sovereign nation at war with the United States, and the men who fought the war were entitled to be treated as legitimate belligerents," a contention advanced by Minnesota law school professor Carol Chomsky in the *Stanford Law Review*.[71] This was also the view of Bishop Whipple who urged Lincoln to treat the Dakota as "an independent nation & as such they are prisoners of war."[72] In support of this position, Professor Chomsky argues that "the historical and legal precedence consistently reflect that the Dakota were entitled to be treated as a sovereign nation fighting a war," but "the officials who controlled the events in 1862 did not treat them as such."[73] While this may have been "the historical and legal views prevailing in 1862," it is not clear if Lincoln gave much thought to this argument.[74] If he did, he didn't state it as a reason for his ultimate decision. In any event, to the Dakota, "who never doubted their own sovereignty, the trials were incomprehensible and an affront to their dignity."[75]

Lincoln's decision was partly to satisfy the thirst for revenge in Minnesota and partly because there was enough evidence that at least some of the Dakota were involved in the willful and wanton murder of innocent civilians. In effect, while not specifically recognizing the sovereignty of the Dakota, Lincoln's ruling was consistent with the laws of war prevailing at that time. Those who participated in battles should be treated as legitimate belligerents, while those who killed innocent civilians had violated the rules of warfare for which they were liable for the consequences.[76]

Lincoln's decision was met in Minnesota with not only disbelief but with anger. Minnesotans felt betrayed. After the Republicans lost strength in the 1864 elections, Ramsey, the former governor and now a U.S. Senator, told Lincoln that had he hanged more Indians, the Republicans would have done better in the elections. Lincoln replied, "I could not afford to hang men for votes."[77]

Some historians maintain that Lincoln personally reviewed the trial records of the 303 condemned Indians.[78] Because of the wartime demands on Lincoln, this claim seems unlikely. As a lawyer who wrote with precision, Lincoln would have said that he personally reviewed the trial records. Instead, in his message to the Senate on December 11, Lincoln stated, "I caused a careful examination of the records of trials to be made."[79] Two lawyers, George C. Whiting and Francis H. Ruggles, were directed by the president to examine all the trial records of the convicted Indians.[80] Based on their examination of the records, the number of Indians proven to have committed massacres (rape and murder) as distinguished from participation in battles was reduced from 303 to 39. The two lawyers prepared an analysis of the evidence introduced against the 39 Indians at their trials. Lincoln used this "abstract of evidence" to buttress his final decision.[81] At the last minute, one of the condemned prisoners received a reprieve, bringing the total condemned men to 38.[82]

Lincoln's distinction between those who committed massacres and those who participated in battles resulted in the commutation of the death sentences of 265 Dakota, an act of clemency unparalleled in our nation's history. His resolution of this dilemma demonstrated Lincoln's acute political pragmatism without the loss of strong moral principles. Professor Chomsky has suggested that "President Lincoln's commutation of all but thirty-eight death sentences may have been an effort to correct the trial verdicts to reflect the proper standard of responsibility."[83] Yet that still leaves in serious doubt the validity of the trials and death sentences of those Dakota who ultimately paid the supreme penalty.

It is inconceivable that Lincoln, an accomplished and careful attorney, was unaware of the serious legal defects in the proceedings of the Military Commission. Lincoln couldn't ignore the fundamental unfairness in the hastily convened trials without benefit of counsel. The Sixth Amendment mandates that an accused is entitled to a speedy trial with the assistance of counsel. The corollary of this right is that an accused should have ample time within which to mount a defense with the aid of counsel. In many of the Dakota cases, the verdict was based on hearsay evidence. Witnesses were permitted to testify what others had told them of incriminating information about the person on trial. In several cases, the prosecution failed to prove the guilt of the accused beyond a reasonable doubt, the standard of proof in criminal cases. The trial records disclose that the condemned Dakota were denied these protections as well as trial by an impartial tribunal. The Military Commission appointed by Sibley consisted of five army officers who, only a few days earlier, had fought against the Dakota who were on trial for their lives. Unquestionably, the commission was unduly influenced by their commanding general's purpose "to exterminate the Sioux."[84] Indeed, it would be blinking reality not to recognize the extreme prejudice inherent in these trials.

The absence of counsel also led directly to the denial of the Indians' rights under the Fifth Amendment. Most of the Dakota could not speak or understand English. Without counsel, they may not have understood the nature of the proceedings, or even that they were on trial for their lives. These Indians could not have understood their constitutional right against self-incrimination. They were not informed that anything they might say at their trial could be used against them. Indeed, that is precisely what happened in many cases. When asked at the trial, the Indians invariably "confessed"—some even boasted as proud warriors—that they were present at a particular battle. A trial of less than five minutes was usually sufficient to establish the Dakota's presence and participation in battles and result in a death sentence.

In his order of December 6, Lincoln carefully wrote out the names of the Dakota to be hanged.[85] Dakota names, unless translated into English, are difficult and frequently misspelled and mispronounced. To avoid confusion, Lincoln admonished the telegraph operator to be careful with the spelling of the names of the doomed Dakota as a mistake might result in the execution

of the wrong man. While not Lincoln's fault, this is exactly what happened. Prison authorities hanged an innocent man named "Chaska" by mistake in place of "Chas-kay-don," who had been found guilty of killing a pregnant woman and cutting the fetus out of her body.[86]

Sibley directed that the executions take place in the main public square in Mankato, Minnesota, and ordered the construction of an elaborate scaffold. It was 24-feet square with 40 nooses, 10 on each side of the square, hanging from the scaffolding. Beneath the ropes, a platform could be dropped by cutting a single control rope so that all the condemned prisoners could drop simultaneously to their death.

Early on the morning of December 26, the condemned Indians began chanting their death songs. After their arms were bound, a white cap, which could be rolled down over their face before the execution, was placed on their heads. At precisely 10 a.m., the doomed Dakota were marched from the prison to the scaffold, which was surrounded by 1,400 soldiers in military formation. After the adjustment of the nooses around the neck of each Indian, the caps were drawn over their faces. A slow, measured drumbeat commenced. On the third roll, the control rope was severed, sending the 38 Dakota to their deaths in the largest mass execution in U.S. history.[87]

After the Indians were pronounced dead, their bodies were cut down and buried *en masse* in a single grave in the soft bank of the Minnesota River. However, because of a shortage of cadavers for anatomical study, several doctors requested the bodies. In a final indignity, the grave was reopened and the bodies distributed among local doctors, one of whom was Dr. William Worrall Mayo, the father of the two Mayo brothers, cofounders of the world-renowned Mayo Clinic in Rochester, Minnesota.[88]

On December 27, Sibley telegraphed Lincoln: "I have the honor to inform you that the 38 Indians . . . ordered by you for execution, were hung yesterday at Mankato, at 10 a.m. Everything went off quietly."[89] With the executions and subsequent forced removal of the remaining Indians, life for the Dakota as a community in Minnesota came to an end.[90]

For Abraham Lincoln, having tempered justice with compassion, the legal and moral dilemmas with which he was confronted by the Dakota War was resolved.

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Notes

1 Collected Works of Abraham Lincoln (Basler, ed., Rutgers University Press, 1953), Vol. V, p. 493, hereinafter CW V __. Some of the condemned prisoners were of mixed blood, a distinction irrelevant for purposes of this article. *See* message of Dec. 27, 1862, to Lincoln from Henry H. Sibley, CW VI, p. 7. Also, the events discussed in this article occurred in 1862. Therefore, to avoid confusion and promote uniformity, the author has eschewed the currently approved names, "Native Americans" or "Native peoples."
2 CW V, p. 433.
3 For a discussion of the causes for the Dakota War, *see* Nichols, David A., Lincoln and the Indians (Univ. of Missouri Press. Columbia and London, 1978), pp. 66–75, hereinafter Nichols __. *See also*, Carley, Kenneth, The Dakota War of 1862 (Minnesota Historical Society, St. Paul, 2001 ed.), pp. 1–6, hereinafter Carley __. This book was first published in 1976 under the title The Sioux Uprising of 1862. In deference to Dakota sensitivities, the title of the 2001 edition was changed to The Dakota War of 1862. According to Carley, these Native Americans have always preferred "Dakota," meaning "friends" or "allies." "Sioux" is a contraction of Nadouessioux, meaning "snake" or "snakelike," a name given them by their ancient enemies, the Chippewa. Carley, note, p. 1.
4 Brown, Dee, Bury My Heart at Wounded Knee (Holt, Rinehart & Winston, NY, 1970), p. 38, hereinafter Brown __.
5 They Chose Minnesota: A Survey of the State's Ethnic Groups (Minnesota Historical Society, St. Paul, 1981), p. 22, hereinafter They Chose Minnesota __.
6 Nichols, p. 77; Brown, p. 40; Carley, p. 6.
7 Carley, p. 7.
8 Berg, Scott W., 38 Nooses, Lincoln, Little Crow, and the Beginning of the Frontier's End (Pantheon Books, NY, 2012), pp. 11–12, hereinafter, Berg __. For a description of the terms of the Treaties, see Carley, pp. 2–4.
9 Carley, p. 6.
10 Anderson, Gary Clayton and Woolworth, Alan R., Through Dakota Eyes (Minnesota Historical Society, St. Paul, 1988) p. 40, hereinafter Anderson __.
11 Anderson, pp. 41–42.
12 Anderson, p. 42.
13 Carley, p. 14.
14 Carley, p. 31.
15 Berg, p. 108; Brown, p. 50.
16 CW V, p. 399.
17 CW V, p. 396.
18 For a discussion on the attacks on New Ulm and Fort Ridgeley, see Carley, pp. 28–30, 35–38.
19 Carley, p. 39.
20 Carley, pp. 43–44.
21 Carley, pp. 59–60.
22 Nichols, p. 84.
23 Nichols, p. 85.
24 Nichols, p. 87 (italics added).
25 Carley, pp. 62–63.
26 Donald, David Herbert, Lincoln (Simon & Schuster, NY, 1995), p. 392, hereinafter Donald __.
27 Philbrick, Nathaniel, The Last Stand: Custer, Sitting Bull, and the Battle of the Little Bighorn (Viking, NY, 2010), p. 286.
28 Thomas, Benjamin P., Abraham Lincoln (Knopf, NY, 1952), p. 365, hereinafter Thomas __.
29 McPherson, James M., Battle Cry of Freedom (Oxford University Press, NY, 1988), p. 533. Paradoxically, McPherson was raised in St. Peter, Minnesota, a scant 10 miles from Mankato, and graduated from the local high school and Gustavus Adolphus College, also located in St. Peter.
30 Brown, p. 58.
31 Carley, pp. 84, 86.
32 Brown, p. 58.
33 Chomsky, Carol, "The United States-Dakota War Trials: A Study in Military Injustice," 43 Stanford Law Review (1990-91), pp. 42-43, notes 179-85, hereinafter Chomsky__.
34 "Lincoln and the Sioux Outbreak" by David Miller in Lincoln: A Contemporary Portrait, (Doubleday, NY, 1962), p. 122, hereinafter David Miller__.
35 Chomsky, pp. 26, 29, notes 77 and 88.
36 Nichols, p. 96.
37 Carley, p. 69; Nichols, p. 98.
38 Message of the President to the Senate, 37th Congress, 3d Session, Ex. Doc. No. 7 (Dec. 11, 1862), p. 1, hereinafter Ex. Doc. no. 7__.
39 David Miller, p. 123.
40 Nichols, p. 99.
41 Miller, William Lee, Lincoln's Virtues (Knopf, NY, 2003), pp. 36, 61, hereinafter William Miller __.
42 Donald, p. 44.
43 CW V, p. 493.
44 *Ibid.*
45 Ex. Doc. no. 7, Exhibit "C"
46 Nichols, pp. 101, 107.
47 CW V, pp. 537–538.
48 Miller, William Lee, President Lincoln: The Duty of a Statesman (Knopf, NY, 2008), p. 322, hereinafter William Miller, President Lincoln __.
49 *Ibid.*
50 Nichols, p. 75.
51 Nichols, pp. 140–141.
52 Carley, p. 72.
53 Donald, p. 393.
54 CW V, p. 526; Nichols, p. 144.
55 Nichols, p. 141.
56 Burlingame, Michael, The Inner World of Abraham Lincoln (Univ. of Illinois Press, 1994), p. 145, hereinafter Burlingame __.
57 Perret, Geoffrey, Lincoln's War (Random House, NY, 2004), p. 15, hereinafter Perret __.
58 Burlingame, p. 136.
59 Davis, William C., Lincoln's Men (Free Press, NY, 1999), p. 174, hereinafter Davis __.
60 Burlingame, p. 23.
61 Perret, p. 352; *see also*, Davis, pp. 173–174; Current, Richard N., The Lincoln Nobody Knows (McGraw Hill, 1958), pp. 165–166.
62 Wilson, Douglas L., Honor's Voice (Knopf, NY, 1998), p. 305.
63 Perret, p. 354.
64 Thomas, p. 544.
65 CW V, p. 525.
66 CW V, pp. 542–543.
67 Ex. Doc. no. 7, p. 1.
68 *Ibid*, pp. 1–2.
69 Chomsky, p. 81.
70 David Miller, p. 124.
71 Chomsky, p. 15.
72 Nichols, p. 104.
73 Chomsky, p. 84.
74 Chomsky, p. 15.
75 Chomsky, p. 94.
76 Chomsky, pp. 86–90.
77 Donald, p. 395; Nichols, p. 118.
78 Burton, Orville Vernon, *The Age of Lincoln* (Hill and Wang, NY, 2007), p. 230; Donald, p. 394; William Miller, p. 36
79 Ex. Doc. no. 7, p. 1.
80 Berg, pp. 206, 220.
81 Ex. Doc. no. 7, p. 2.
82 Nichols, p. 117.
83 Chomsky, p. 15.
84 Nichols, p. 87.
85 CW V, pp. 542–543.
86 Berg, pp. 227–228.
87 Carley, pp. 73–75.
88 Carley, p. 75.
89 CW VI, p. 7.
90 By 1866, the Dakota population in Minnesota had shrunk from around 7,000 to less than 400. They Chose Minnesota, p. 22.