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Cultural Amnesia and Legal Rhetoric: Remembering the 1862 United States- Dakota War and the Need for Military Commissions

MAROUF HASIAN, JR.

*Attend to the Indians. If the draft cannot proceed, of course it will not proceed.
Necessity knows no law.*

—Abraham Lincoln, wire to Minnesota Governor Alexander Ramsey

In the aftermath of the terrorist attacks of 11 September 2001, civic leaders, military experts, and lay people are deciding what to do with the Taliban warriors and Al-Qaeda prisoners who were captured in the international war on terrorism. In November 2001, President George W. Bush startled some observers when he publicly announced the promulgation of an executive order for military tribunals,¹ but a few months later the Department of Defense (DOD) made it clear that it was going to modify some of those rules in order to provide full and fair trials for defendants.² The modified rules stipulated that any accused prisoners who appeared before potential tribunals would have the right to choose their own counsel, would have copies of the charges provided to them in their native language, and would have the right to obtain witnesses and documents needed for their defense.³ While the appellate review procedures established by the DOD guidelines would stay within the executive chain of command, the policy guidelines were written to balance the needs of military secrecy with the rights of individual defendants. Bush administrators made it clear that the guidelines ensured that suspected

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“terrorists” would receive the same legal protections given to any American soldiers who might appear before parallel courts-martial proceedings.⁴

When interdisciplinary scholars and legal experts examine the annals of American history to see how other generations dealt with the legality of military tribunals, they often cite the Civil War precedent of *Ex parte Milligan*⁵ and the World War II decision *Ex parte Quirin*,⁶ both of which curbed military abuse of civil rights. They have generally neglected one of the most pertinent historical parallels to the post-September 11 era: that of the US military treating American Indians as enemies of the state.⁷

One incident in particular sheds important insight into the current political climate: On 26 December 1862, thirty-eight “Sioux” fighters were executed in the town of Mankato, Minnesota. Although many scholars consider this event the largest mass execution of individuals in United States history,⁸ they rarely mention the stories behind the incident in modern commentaries on the strengths and weaknesses of military commissions. A host of possible reasons exists for this omission—it was an older case that did not involve twentieth-century warfare, there were few discussions of habeas corpus, and few people living at the time believed that the “savages” who died that day had the same rights as Anglo-Saxons or that they sought “independence.” For example, Charles Bryant and Abel Murch, writing in 1864, claimed that the Christian ministers who sympathized with the condemned Sioux simply did not understand that those “dusky natives” had violated both “human and divine law.”⁹ If the Indians had “engaged in open war, such as the law of races of nations [*sic*],” then Bryant and Murch would have conceded that, “their advocates might have claimed for them the rights extended to prisoners of war.”¹⁰ In the frontier mythologies of the west and the military ideologies of the east, a person who did not fight openly or who did not follow recognized rules of war, deserved to be treated differently.

It is my contention that theorists and practitioners who debate the desirability of modern-day military tribunals have much to learn from historical investigations of American Indian trials, and that deeper knowledge about those trials can complicate the ways that scholars think about US power and the usages of these military commissions. Many people today, liberals, moderates, and conservatives, complain about Bush’s military order and/or the DOD modifications, and some skeptics critique rationalizations associated with these proceedings.¹¹ Yet in investigating the politics of the Mankato hangings, I have reluctantly concluded that one cannot totally dismiss all expeditious usages of executive power or military commissions. As William Lee Miller has recently written in *Lincoln’s Virtue*, the president’s intervention in the winter of 1862 may have saved the lives of more than 260 Dakota Indians.¹² As I argue below, if some military leaders, lay persons, and local politicians in Minnesota had had their way, hundreds more would have been hanged. Scholars therefore need to be wary of automatically assuming that local civil courts will be more generous in dispensing justice or fairness.

Both contemporary and modern writers have debated the desirability and the legality of the Dakota military tribunals, but they usually agree that the tribunal decisions were just the first of many debates during the ensuing

decades regarding the “Indian problem.”¹³ In theory, the legal and military actions taken in December 1862 brought an end to what some called the Dakota “war,”¹⁴ “conflict,”¹⁵ “uprising,”¹⁶ or “massacre.”¹⁷ Within a few years, some of the tens of thousands of whites who had fled the state of Minnesota returned to help rebuild the new territory. At the same time, the Santee Sioux and the other Indian communities that survived the conflict were blamed for instigating the Dakota War and were removed to other territories in the name of necessity. Thousands of friendly and hostile Dakota Indians were deported and their treaties abrogated. They lost what little land they had retained in the region.

For almost a century and a half, Civil War battles taking place during the same months have overshadowed what many considered to be the beginnings of the Plains Wars with the Indians.¹⁸ In recent years, however, an increasing number of interdisciplinary scholars have invited us to reconsider the role that the US-Dakota War played in the way that observers think about military commissions, manifest destiny, ethnic histories, and apologies for past misdeeds. For example, in 1987 then-Governor Rudy Perpich of Minnesota announced that a “Year of Reconciliation” would allow for the healing of some traumatic wounds.¹⁹ Several years later, Professor Carol Chomsky argued that:

The evidence demonstrates that the trials of the Dakota prisoners were objectionable in a number of respects. The speed of the proceedings, the nature of the evidence, and the identity of the judges all combined to preclude judicious decisionmaking and to guarantee an unjust outcome. The commander who ordered the commission trials did not have the authority under the prevailing statutes to convene the tribunal, and it is questionable whether a military commission had any lawful authority to try the Dakota.²⁰

Ellen Farrell has similarly argued for the interrogation of the uncritical supposition that the “Dakota were uniformly and without exception guilty of unprovoked atrocities.”²¹ The story is filled with a plethora of subplots—treaties used to acquire land for settlers, Dakota communities divided among themselves on how to react to the growing presence of whites, outraged citizens who wanted the governor to deport all Indians indiscriminately, and troops caught in the middle of regional controversies.

At the very center of these discursive debates over the histories and memories of the US-Dakota War is the question of the legality of the military commissions that were established by President Lincoln and his subalterns in the fall of 1862. Both General John Pope and Minnesota’s Colonel Henry Hastings Sibley (formerly Governor Sibley) defended the tribunals on the basis of necessity, but many northerners questioned the wisdom of having mass hangings in the aftermath of that tragic period, especially since the 1862 hangings did not end the conflict. In fact, the western frontier violence would only end with the final surrender of some of the Sioux at Wounded Knee, South Dakota, in 1890.²² The myriad problematics associated with the US-

Dakota War—which included the lack of governmental legal infrastructure in the territories, the use of vigilante justice in place of procedural fair trials, and the involvement of interested parties in the prosecution of the Dakota trials—were emblematic of what could happen when anxious settlers and their military defenders focused on ending the outbreaks that seemed to plague thousands of square miles of territory through violent means.²³

Even non-Indians who sympathized with the plight of the Dakotas and the other Indian tribes rarely questioned the expansionist policies of whites. Most of the commentaries on removal or the desirability of the reservation system were linked to questions involving the relative power of military and civilian communities, or the conundrums associated with the behavior of traders and treaty violators. An infinite number of biological, cultural, or environmental explanations could be used to justify the administrative oversight of the Indians. Nelson Miles, in a typical Social Darwinian commentary, had this to say about the “terrible wars of race”:

The real issue ... which is now before the American people is, whether we shall continue the vacillating and expensive policy that has marred our fair name as a nation and a Christian people, or devise some practical and judicious system by which we can govern one quarter of a million of our population, securing and maintaining their loyalty, raising them from the darkness of barbarism to the light of civilization, and put an end to these interminable and expensive Indian Wars.... Could we but perceive the true character of the Indians, and learn their dispositions, not covered by the cloak of necessity, policy, and interest, we should find that they regard us a body of false and cruel invaders of their country, while we are too apt to consider them as a treacherous and bloodthirsty race, that should be destroyed by any and all means.²⁴

Miles, unlike many of his contemporaries, was willing to look at some of the historical roots of these public perceptions. Sadly, others simply saw the US-Dakota War in Minnesota as a conflict that could only be resolved through the extermination or removal of the enemy. Charles Flandrau, one of the participants in the New Ulm battles which were fought in Minnesota between settlers and Indians, wrote in 1890 that the liberation of some of the condemned “savages” had perpetuated the western Plains wars.²⁵ He told readers that the “only proper course to have pursued with them, when it was decided not to hang them,” was to have “exiled them to some remote post—say the Dry Tortugas [*sic*]—where communication with their people would have been impossible.” This purportedly benevolent policy would have the advantage of setting “them to work on fortifications or some other public works,” and would “have allowed them to pass out by life limitation.”²⁶

In order to examine some of the rhetorical dimensions of this important controversy, this essay has been divided into five major sections. The first portion of the manuscript provides a short contextual overview of contemporary and modernist writings about the early Minnesota treaties and land disputes. The next section provides an explication of some of the material and symbol-

ic forces that contributed to the volatile political situation in the 1860s. The third part of the essay looks into the formation of what would be known as the Sibley commissions, while the fourth section examines how various publics interpreted these trials. Finally, in the conclusion, I discuss the heuristic importance of the Dakota trials for our modern-day discussions of executive authority and military commissions.

CONFLICTING REMEMBRANCES OF THINGS PAST IN THE YEARS BEFORE THE DAKOTA WAR, 1850–1860

In the majority of contemporary and historical accounts of Indian life before 1850, the Dakota communities in Iowa, Dakota, and Minnesota were portrayed as nomadic owners of vast tracts of underdeveloped and underutilized land. Those leaders of Indian tribes who were not willing to go to war to stop white expansion were viewed as realists who voluntarily gave up their land rights in fair commercial exchanges. For example, with the signing of the 1851 treaties, some 24 million acres of land were supposedly ceded by the Sioux to the United States government and the whites who wanted to occupy the region.²⁷ That agreement meant the Dakota tribes were relinquishing their rights to much of the land in Iowa, Dakota, and Minnesota, “except for a tract along the Upper Minnesota, which they reserved for their future occupancy and home.”²⁸

In effect, the 1851 agreements meant that the Dakota gave up most of southern Minnesota in return for two twenty-mile by seventy-mile reservations. In theory, the members of those tribes would become temporary dependents, paid an annual annuity of some \$1.4 million per year for fifty years. One seemingly innocuous provision of these treaties, later approved by the Senate, authorized the president of the United States to select the location of the reservation lands.²⁹

Seven years later, some of the Dakota tribes ceded another half of the reservation land they had been given in 1851. Gerald Henig notes that they were left with a “ten-mile-wide reservation on the side of the Minnesota River from west of New Ulm to Big Stone Lake,” and the lack of hunting grounds meant that the “nomadic and proud” Sioux “found themselves largely dependent for food and money on the form of annuities provided by the government under the terms of the various treaties.”³⁰ Many whites now hoped that the “farmer” Indians, with their “plows, hoes, scythes, cradles, ox-gearing, harness, carts, wagons,” coats, pants, “shirts, coffee, tea,” and so on, would become productive neighbors and adapt to the new frontier life.³¹ Protestant and Catholic missionaries were busy converting their new wards, and Indian agents sent their superiors monthly records of the needs and requirements of the communities living on the reservation.

Most contemporary accounts of the pre-US-Dakota War years give the impression that the Indians had eagerly ceded their land and that the majority of the Dakota tribes profited from the existence of white settlements and agencies in a pastoral and idyllic world populated by separate and mutually appreciative communities. Isaac Heard, one of the first chroniclers of what he called “the Sioux War,” explained that just before the outbreak, agents could

congratulate themselves “on the thriving appearance of affairs.”³² If Little Crow and the other leaders were displeased with the recent turn of events, they had not given the whites any notice of their disaffection. Heard was convinced that before the war, the Indians and the “half-breeds” had learned the lessons of the universe and the order of things:

Over the soil which Indians had sold[,] civilization had made rapid strides. From Ireland, Germany, Norway, and Sweden, and many another country of the Old World, and from every part of the New, had come a quarter of a million people, and made the land their home.... Almost within stone’s-throw of the reservation was the prosperous town of New Ulm, and emigrants even crowded upon the land invacated [sic] by the treaty of 1858. Every where appeared those works by which the great Caucasian mind asserts itself supreme.³³

In this eulogistic tale of benign and benevolent progress, nothing could prevent the “certainty of” the “not very distant extinction” of the Dakotas. Neither their memories of their rivers, lakes, and hills, nor the “weird religion of the savage,” could stand in the way of the development of cities and states.³⁴ When the Dakota Sioux refused to die on the reservations, their survival and their apparent violation of nature’s laws contributed to an atmosphere of mutual deception, distrust, and misunderstanding.

THE CATALYTIC, SYMBOLIC, AND MATERIAL EVENTS THAT CONTRIBUTED TO THE SIOUX-DAKOTA UPRISING, 1861–1862

Scholars now believe that a number of symbolic and material causes contributed to the advent of the US-Dakota War of 1862. Life on the reservation bore little resemblance to life in New Ulm, and many Dakota Indians had to deal with contradictory white positions on such issues as the payment of annuities, the placement of the camps, the degree of assimilation that was expected, and the uncertainty that accompanied the abandonment of the nomadic way of life. The Dakota, who depended on the annuities that came from the 1850s treaties, learned that Indian agents could often withhold payments if outlaw bands of Dakotas caused any trouble in the region.³⁵

At the same time, there were interpretative disputes about the letter and the spirit of both tribal and treaty agreements. Many of the Dakota believed that they had retained some rights to occupy, fish, and trap on the very lands that the settlers now considered to be theirs. The schisms that existed both within and between the M’dewakanton, Wahpekuta, Wahpeton, and Sisseton tribes simply exacerbated an already volatile situation.

The massive changes in the lives of these Northwesterners could be explained by competing narratives about the causes of the troubles and the apportionment of blame. Many white residents did not see the ordinary citizens who lived in the towns, the settlers who flocked to these lands, or the politicians who were trying to turn the territory into a respectable state as part of the “Indian problem.” Heard, whose ideas were relatively moderate, was

convinced that the authors of future Indian laws needed to take into account the biological realities of the situation:

This inborn feeling [of hostility] was increased by the enormous prices charged by the trader for goods, by their debauchery of their women, and the sale of liquors, which were attended by drunken brawls that often resulted fatally to the participants. Death to the whites would have followed years ago had not commercial dealings with them, as before stated, become of necessity.³⁶

The issue in these narratives was the abuse, not the use, of the treaties.

One major question was how Minnesota whites and their Dakota neighbors were going to address the necessitous conditions. Many of the narratives related how individual settlers, traders, or military leaders sometimes violated the treaties or other rules of law, but rarely were observers willing to contemplate the possible social or political equality of the “barbarians” or “savages.” Here, of course, we have little examination of the long-term costs of the treaties, the racism on both sides of the ethnic divide, or the inevitability of manifest destiny.

By 1862 the payment of annuities to the Dakotas had become a cumbersome process. The “annuity Indians” had to wait until Congress approved the coinage that was being used, and then hundreds of small steps had to be taken before the money actually reached Minnesota. One commentator noted that even the depth of a river could influence just when starving Indians got their money.³⁷ Many traders took advantage of the situation by giving the Dakotas credit in anticipation of the federal payments, which in turn meant that the government had to get involved in policing the funds. By that time, there were perhaps one thousand regular troops stationed in the region, who were supposed to protect the “white Minnesota population of 175,000.”³⁸ Sometimes the Indians arrived at an agency at an appointed time, expecting to be paid a certain sum. Blegen once argued that the combination of the “pauperizing effects of the annuities,” the “political appointment of the Indian Agents,” the compression “of the natives into narrow reservations,” and the dissipation of traditional hunting grounds helped to create situations in which conflicts between the whites and the Sioux seemed to be inevitable.³⁹ Things got so bad that when some of the M’dewakanton Sioux sought more credit from one Indian agent and trader, Andrew Myrick, he dismissed their complaints by telling them “they could eat grass.”⁴⁰ Legend has it that during the US-Dakota conflict, Myrick was one of the first casualties. When his body was found, it was said that his mouth was stuffed with grass.⁴¹

Scholars who have studied the origins of the Minnesota-Dakota Wars contend that the event that constituted the “lighted match ... flung on a trail of powder” came when four “young devil-may-care Wahpetons” stopped at an Acton farm on 17 August 1862.⁴² On that day, Killing Ghost, Breaking Up, Runs Against Something When Crawling, and Brown Wing got into a heated exchange with Robinson Jones, and a game of target practice ended with the murder of five whites. When the four Wahpeton youths reported back to Red

Middle Voice, there was a great deal of discussion about how the whites would react to the murders and whether their actions would lead to an end of the annuity payments. Little Crow warned his followers about the power of the whites, but he nevertheless agreed to lead into battle those Indians who favored war. The next day, hundreds of Sioux warriors launched a surprise raid on the Lower Agency, where both the traders and the “short hairs” (assimilated Indians) became the targets.⁴³

In many of the stories told about the “Dakota Conflicts” or the “Sioux Wars,” the focus is on the settler-Indian conflict, when in fact many of the Dakota tribes were divided on the question of engagement in war because of their grievances. The majority of the two Northern Dakota tribes, the Sissetons and the Wahpetons, were opposed to war for a variety of reasons, including intermarriage, conversion to Christianity, and the recognition that they would be fighting overwhelming odds. Unlike some of the other Dakota communities, their subsistence farming allowed them to survive in a hostile environment. Their neighbors to the south, the M’dewakantons and the Wahpekutes, supplied most of the warriors who would fight in the US-Dakota conflicts.

Although some chroniclers of these events give the impression that all of the Minnesotans or northerners were united in their struggle against the alleged barbarism of the Indians, many whites in various regions disagreed about the exact causes of the US-Dakota conflicts. One of the most popular narratives that circulated during the early 1860s argued that the Indian troubles were just one small part of the much larger Civil War being fought to end the southern rebellion. Many newspaper editors in the North believed that the Dakota conflicts had been encouraged by “rebel emissaries” in search of allies and traitors. For example, in August 1862 an editor at the *New York Daily Tribune* wrote about some of the causal similarities that brought on the Dakota and Civil wars:

The Southern Rebels and their Indian allies are alike slaveholders—a ‘brotherhood of thieves.’ The White traitors are fighting for Slavery; and the Indians are impelled by a common interest, a common crime, to go in with them. The new outbreak in the North-West has manifestly a like origin, without a like excuse. The Sioux have doubtlessly been stimulated if not bribed to plunder and slaughter their White neighbors by White and Red villains sent among them for this purpose by the Secessionists. These perfectly understood that the Indians will be speedily crushed and probably destroyed as tribes; but what care their seducers for that? They will have effected a temporary diversion in favor of the Confederacy, and that is all their concern. But a day of reckoning for all these inequities is at hand.⁴⁴

In the early stages of the Dakota conflict, it appeared that local militias and volunteers would be asked to handle that reckoning, but the scope of the uprising meant the Union armies had to play a more active role in ending the Indian wars. After several weeks of conflict, Governor Ramsey sent a message

to Abraham Lincoln, asking for federal assistance.⁴⁵ The president responded by appointing Major General Pope to be commander of the newly created Department of the Northwest.⁴⁶ Pope, who had been embarrassed by the Confederate victory at the Second Battle of Bull Run, was now in charge of a department that “encompassed the states of Minnesota, Iowa and Wisconsin and the territories of Dakota and Nebraska.”⁴⁷ Harry Williams once sarcastically remarked that if “Pope had possessed a coat of arms, it would have been bombast rampant upon an expansive field of incompetence.”⁴⁸

The new leader of the Department of the Northwest let it be known that the American Civil War was not the only conflict that would involve total warfare. Pope informed Sibley that he wanted to put “a final stop to Indian troubles by exterminating or ruining all the Indians engaged in the late outbreak.”⁴⁹ For several months, newspapers in the region carried daily stories of how the Sioux were raping, scalping, disemboweling, and beheading their victims. In the white imagination, it was the Indian who “was merciless, brutal, [and] treacherous.”⁵⁰

After six weeks of bloody fighting in the fall of 1862, some five hundred whites and an “unknown but substantial number of Indians” had lost their lives.⁵¹ During the initial engagements the Dakota warriors staged some successful ambushes, managing to destroy entire towns, but the Fort Ridgely and New Ulm defeats created schisms within the ranks of the Indian forces.⁵² Many of the Sisseton and Wahpeton camp members wanted to end the conflict and return to the reservation.⁵³ After the battle of Wood Lake, most of the remaining combatants, led by Taoyateduta, Shakopee (Little Six), and Wakanozan (Medicine Bottle), fled to Canada.⁵⁴ Some of the chiefs who advocated peace (including Waccuta and Wabasha) convinced Little Crow to let them save some of the hundreds of captives.⁵⁵

Before surrendering, Dakota tribal leaders wanted assurances from Colonel Henry Sibley that they would receive fair treatment. He responded by telling them that he was interested only in punishing those who had committed “murder and outrages upon the white settlers.”⁵⁶ Sibley then received word from the Dakotas that his military companies could safely march into what were called “peace” camps.

Those who surrendered may have believed that the Indians who continued to fight and those who had given up were going to receive differential treatment, but many of the whites who fought in the conflict or who had suffered through the burning of towns had other ideas.⁵⁷ Sibley sent word to General Pope that he was planning to appoint a three-member military board of inquiry that would look into the matter of Indian culpability. Many of the Dakotas naively believed that they would be treated as prisoners of war in a conflict among warring nations, and not as common criminals.

THE END OF THE DAKOTA CONFLICT AND THE WORK OF SIBLEY'S MILITARY COMMISSIONS

By the end of September 1862, it became evident to everyone except firebrands that the Dakota Indians (or Santee Sioux) were not going to regain

their lands. When Sibley marched into the Dakota camps, some “107 white” and “162 half-breed” captives rejoiced as they witnessed the arrival of their liberators.⁵⁸ White flags were hanging from tipis, wagons, and trees, and Sibley decided that the new bivouac site should be christened “Camp Release.” Within a matter of days about 2,000 Sioux Indians had formally surrendered to the victors.⁵⁹

The losers of the US-Dakota war were to be tried by the victors, and a rhetorical analysis of the contemporary military correspondence provides us with evidence of the mind-set of those who were in charge of the proceedings. In a letter sent from Pope to Sibley (28 September 1862), the leading military authority in the Northwest gave his subordinate some very clear directions:

The horrible massacres of women and children and the outrageous abuse of female prisoners, still alive, call for punishment beyond human power to inflict. 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 and even if it requires a campaign lasting the whole of the next year. Destroy everything belonging to them and force them out to the plains[,] unless, as I suggest, you can capture them. They are to be treated as maniacs or wild beasts, and by no means as people with whom treaties or compromises can be made.⁶⁰

Sibley had the unenviable task of carrying out these orders, for which he expanded his three-person court of inquiry and turned it into a five-man commission. His Order 55 charged his own subordinates with the responsibility of finding those who had committed murder and other outrages “during the present State of hostilities.”⁶¹ The panel of military leaders that had to try the more than 390 prisoners included Colonel William Crook, Colonel William Marshall, George Bailey, Captain Hiram P. Grant, and Captain Hiram S. Bailey. Interestingly enough, it was twenty-two-year-old Lieutenant Rollin C. Olin who was given the task of serving as judge advocate; he was assisted by Lieutenant Isaac Heard.⁶²

Sibley’s commission now had to make some key decisions regarding the substantive and due process rights of these defendants. Were the members of the Dakota tribe going to be treated as legally culpable, or would some selected individuals be blamed for the abuse of the settlers? Could a military tribunal place blame on an entire community at the outset, or did the prosecution have to make a separate case against each individual? In making these determinations, was the five-member commission going to follow the civilian or military evidentiary traditions? What would happen if hundreds of the Dakota were found guilty of “murders and other outrages?” How many of the other participants in these proceedings would agree with this commentary in the St. Paul *Pioneer and Democrat* from December 1862: “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, demand that these prisoners should die”?⁶³

What made the situation even more complicated was that simultaneously many of Lincoln's officers were formulating and codifying some of the rules and regulations that would govern modern warfare.⁶⁴ Karin Thiem argues that one "may assume that martial law, declared or undeclared, ruled the Minnesota frontier," because of the absence of civil law in late 1862.⁶⁵ The Dakota defendants were certainly not going to be treated as US citizens, which meant that they had to be treated as members of "foreign nations under presidential treaty making powers."⁶⁶ Yet that did not mean that Indians were going to be treated as traditional prisoners of war. William Winthrop, one of the leading authorities on American martial law, who later reviewed the opinions of the judge advocates written between September 1862 and July 1867, commented that:

Active hostilities with Indians do not constitute a state foreign war.... Warfare inaugurated by Indians is thus a species of domestic rebellion, but it is so far assimilated to foreign war that during its pendency and on its theatre the laws and usages which govern and apply to persons during the existence of a foreign war are to be recognized as in general prevailing and operative.⁶⁷

Sibley's military tribunals could therefore be categorized as specific types of military proceedings that still needed to follow unwritten customs and usages, military precedents and traditions, statutory codes of the Articles of War, specific army regulations, and special orders.⁶⁸ Those conditions enabled the members of the commission to act as judge and jury, and to make decisions about the competency of witnesses, the admissibility and sufficiency of evidence, and legal burdens of proof. Since the Dakota Indians did not have any adversarial representation, the judge advocate served as their counsel and their protector. Hearsay evidence was not supposed to be admissible, but some prisoners were allowed to become witnesses who could testify against other defendants. The lines were blurred when the Sibley commission established the guilt of prisoners through the use of "hearsay confession of crimes committed against non-combatants in time of war."⁶⁹

Many of the military leaders involved with those cases understood the magnitude of their decisions. Flandrau later remarked that the "eyes of the world were upon us."⁷⁰ Colonel Sibley, General Pope, General-in-Chief Henry Halleck, and President Lincoln deliberated about the nature and scope of their authority in that situation.⁷¹ Sibley thought that he could judiciously separate the guilty from the innocent, but he also left fragmentary writings that show that he thought most of the defendants were "deeply implicated in the late outrages."⁷²

In spite of Sibley's confidence, we need to recognize that he at least was conscious of some of the complexities of his position. Sibley must have sensed that he was in uncharted waters, as indicated in remarks he made in a letter to Charles Flandrau: "If found guilty, they will be forthwith executed, although perhaps it will be a stretch of my authority. If so, necessity must be my justification."⁷³ Given the history of successful usages of the term, it was not a bad argument to have in reserve.

Sibley's five-man military commission first convened at Camp Release in late September, and on the first day of the proceedings the commission tried sixteen men, convicting ten and acquitting six.⁷⁴ A rhetorical analysis of the structural trajectory of the trial transcripts shows that after the first few cases, the commissioners found it unnecessary for the same witnesses to repeat their entire testimony in order to gain the conviction of a particular defendant. In theory, each of the suspects was questioned about his participation in the war, after which witnesses were called who could testify about the facts in each case. In some situations, shooting at the soldiers or militia members was considered to be a lesser offense than firing on civilians. Isaac Heard remarked that the brevity of these cases did not matter that much because "ninety-nine hundreds of these devils are guilty."⁷⁵

When the trials actually got underway, the former captives and "friendly" Indians took center stage. Many of the first prisoners who were tried were convicted on the basis of the testimony of Joseph Godfrey (Otake), a "mulatto ... born of a Black mother and a French-Canadian father."⁷⁶ Godfrey, the first prisoner to be tried, was sentenced to be "hung by the neck" until he was dead. After he turned state's evidence, however, the commission decided to commute his sentence to ten years in prison. His name appears in the records of dozens of other defendants, and many of the stories told about the proceedings treated him as a major villain in a morality play.

After Godfrey's first trial, the order of the trials was apparently organized according to the alleged severity of the crimes committed during the revolt.⁷⁷ For example, during the second trial of Te-he-hdo-ne-cha (One Who Forbids His House), the trial recorder noted that he was a Sioux Indian who went on a "war party against the white citizens of the United States,"⁷⁸ and the specifications alleged that he had "forcibly" ravished Margaret Cardinal and killed several others in August and September 1862. The prisoner replied to this charge by stating that he did not "remember" killing "any white persons, or committing any depredations."⁷⁹ Yet he also admitted that he had "slept with this woman once," and that "another Indian may have slept with her."⁸⁰ Te-he-hdo-ne-cha would later be convicted; he was one of the thirty-eight prisoners who were executed in late December 1862.⁸¹ That type of case helped create the template used in framing the trajectory of many other trials.

After the first half-dozen trials, the trial records get shorter and shorter, and do not indicate the voicing of any evidentiary objections by the judge advocate. Heard later asserted that the trials "were elaborately conducted until the commission became acquainted with the details of the different outrages and battles, and then, the only point being the connection of the prisoner with them, five minutes would dispose of a case."⁸² Such a position reflected a very truncated view of the contemporary rules and regulations of American martial law, even in times of emergency.

What Heard and many of the other defenders of the trials conveniently forgot was that in many of the cases, "no witness testimony was recorded" and "presumptive evidence was sufficient proof for the military commission."⁸³ Nancy McClure [Faribault Huggan] was one of the few witnesses who later admitted "she couldn't recognize any of the prisoners as those I saw taking

part in the murders of whites.”⁸⁴ Several of the friendly Sioux, including Wakinyan Washtay (Good Thunder), were allowed to testify against the defendants, and during one trial (no. 281), Washtay claimed that he “heard other indians say that he went down to the Fort with the others.”⁸⁵ Testifying against other defendants could bring exoneration, clemency, or lighter sentencing.

Some witnesses, like David Faribault, were allowed to testify in more than sixty trials, and most of the recorded material that we have on these proceedings indicates that many testimonials focused on the identification of particular individuals or specific acts of violence against civilians. For example, in the trial of Amdacha (trial no. 69), Faribault claimed that the “Deft. took us prisoners” and “shot two at my house,” and on the basis of this testimony the defendant was convicted and hanged.⁸⁶ Defense protests that contradicted such claims could easily be dismissed as self-serving and untruthful commentaries on these “massacres.”

When some of the Dakota defendants tried to explain their positions on the origins of the conflict or rules of engagement, their commentaries could be characterized as “confessions” that obviated the need for further inquiry. Their confessions could have been overheard by other witnesses, and that end-run around the hearsay rule helped speed up the process. As soon as the military court “got the knack of it,” argues Ralph Andrist, they began grinding out “convictions at a fast clip.”⁸⁷ This knack could help or hurt the cause of the Dakotas who suffered through the trial, depending on the preconceptions of the participants in the makeshift courtroom. If some of the commissioners or witnesses had evidence of an accused Indian’s character and affability prior to the “massacre,” then he had a better chance of being cataloged as a “friendly” rather than “savage” Indian.

Even though none of the whites in the region had to suffer through the trials, many of the local settlers were convinced that Sibley’s commission was too lenient in handling the Dakotas. Some argued that too many Indians had escaped justice, and that having the trials was a waste of time and energy. Others were pleased that the military officers were affording the victims—the white and “half-breed” captives—the opportunity to witness and confront their captors. For example, Nancy McClure Faribault Huggan remembered the cannons booming at the battle of Wood Lake, and she recalled the relief she felt when she realized she was being rescued by General Sibley, Colonel Marshall, and Colonel McPhail. She was called as “a witness before the military commission that tried the Indians,” where she admitted that she “was sorry that the guilty wretches [she] had seen were not brought up.”⁸⁸

Many of the missionaries and settlers who lived in the region were invited to become active participants in the legal procedures of Sibley’s commissions, and they were given an incredible amount of discretion. For example, several of the local residents considered to be familiar with the Dakota language and Indian habits, were supposed to help pick those who would stand trial for the “murder or other outrages on whites.”⁸⁹ Some of the written testimony about the military proceedings comes to us from the interpretive work of Antoine D. Frenière and Reverend Riggs. Riggs appears to have been the individual given the primary responsibility for identifying and arraigning

the prisoners, and this awesome discretion meant that the Riggs “served in a sense as a grand jury of one.”⁹⁰

By mid-October 1862 more than one hundred trials had taken place, and the newly promoted Brigadier-General Sibley moved the proceedings to Fort Snelling, near the camp at the Lower Agency. A log house served as the courtroom, where the commission decided to try hundreds of cases in less than two weeks. Even if we assume that the first cases discussed above were handled in a careful manner, there is little question that the second series of trials were rushed affairs. Reverend Riggs was quoted in the St. Paul *Pioneer and Democrat* as follows:

Many of those that are tried and condemned are doubtless guilty of participating in the murders and outrages committed on the Minnesota frontier—some of them guilty as Satan himself, and richly deserving the punishment of death. Others were guilty only to the extent of taking property. 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 everyone.⁹¹

By the end of the proceedings, it became clear that most of the defendants were charged with murder, and that the specifications often included few details about the alleged activities of the particular defendant. Unfortunately, “the general statement of participating in the fighting was the only specification to the charge.”⁹²

By 5 November 1862, Sibley’s commission had tried 392 prisoners, more than 300 of whom had been sentenced to death.⁹³ Pope sent the names to Lincoln, and the general also sent the president the full records of all of the trials.⁹⁴ Governor Ramsey urged the president to approve the execution of *all* of those who had been convicted by the tribunal, and one Mankato newspaper warned that if Lincoln hesitated, the Indians would be executed by “the will of the people, who make Presidents.”⁹⁵ Many other editorials, letters to the editor, and press commentaries shared those sentiments.⁹⁶ If any of the easterners tried to modify the findings of the commission or any other tribunal that found the Indians to be culpable, it would have been considered a violation of Minnesota’s state sovereignty and a rationale for vigilante justice.

As noted above, many of the Sioux expected to be tried as prisoners of war, and they felt they had been betrayed by the leaders who had talked them into surrendering. When they realized they were going to be put on trial for murder or other atrocities, they tried mightily to adapt to that unfamiliar legal culture. Some denied that they had participated in battles, and many claimed that they went out of their way to save the captives. Others claimed that they had been forced at gunpoint to fight, and that they were actually “friendly” baptized Indians. After watching the first few convictions, the accused Dakota fighters quickly realized that if any of the witnesses could identify any defendant as a participant in the battles at New Ulm or Birch Coulee, than that particular defendant would in all likelihood receive a death sentence. At that point in the proceedings some of the prisoners began testifying about their

poor aim or their sore eyes. Some even tried to talk about how they had suffered from bellyaches that prevented them from participating in the warfare. A few were so desperate that they argued they were cowards who refused to join the fray.⁹⁷

Many chroniclers of the activities of the Sibley commissions were not overly sympathetic to the plight of the Dakotas. Isaac Heard, for example, in the opening chapter of his *History of the Sioux War* (1865), was direct in his own rendition of these events:

The Indians were predisposed to hostility toward the whites. They regard them with that repugnance which God has planted as an instinct in different races for the preservation of their national integrity, and to prevent the subjection of the inferior and industry and intelligence to the superior.⁹⁸

Not all of President Lincoln's advisers, officers, administrators, and agents shared Heard's views on the biological limitations that stood in the way of Indian and white cohabitation. Episcopal Bishop Whipple, who sent the president a letter on the subject in the spring of 1862, was convinced that the chief executive needed to concentrate on finding honest Indian agents, treaty reformation, workable plans for representation of the legal positions of the Sioux, control of the supply of liquor, and a "paternal relationship under which the Indians would be fairly treated as wards." As far as Whipple was concerned, it had been the corrupt Indian trading that had created a "nursery of fraud," which in turn meant that much of the blame for the troubles "lies at the Nation's doors."⁹⁹ William Dole, the president's commissioner of Indian Affairs, wrote in November 1862 that many of the Indians' problems stemmed from their environmental and cultural challenges:

The Indians, small and insignificant as they are when compared with the broad domain of which they were once the undisputed masters, are the objects of the cupidity of their white neighbors; they are regarded as intruders, and are subject to wrongs, insults, and petty annoyances.... They find themselves in the pathway of a race they are wholly unable to stay, and whose sense of justice they can along rely for a redress of their real or imaginary grievances. Surrounded by this race, compelled by inevitable necessity to abandon all their former modes of gaining a livelihood ... they are brought in active competition with their superiors in intelligence and those acquirements which we consider so essential to success.... If a white man does them an injury, redress is often beyond their reach.... If one of their number commits a crime, punishment is sure and swift, and oftentimes is visited upon the whole tribe.¹⁰⁰

Many Minnesota settlers and newspaper editors dismissed such commentaries as the rants of sentimentalists who had little understanding of life on the frontier.

In the aftermath of the Mankato trials, the US Congress passed legislation that voided all of the treaties that had been signed by the Dakota tribes. They no longer had any reservation land in Minnesota, and the federal government no longer had to pay any annuities to the survivors of the Dakota conflict. The Sioux and other Indian tribes (like the Winnebagos) were forced to move to the Dakota and Nebraska territories. Millions of acres of land that had belonged to the Minnesota Dakota tribes were sold to emigrating whites.¹⁰¹ Throughout the 1860s, white Minnesotans would constantly ask the federal government for more troops. After all, the settlers still needed some protection.

CONTEMPORARY AND MODERN ASSESSMENTS OF THE PERFORMATIVE NATURE OF SIBLEY'S MILITARY COMMISSIONS

Before the 1960s, few national or international scholars paid much attention to the activities of the military commission formed by Sibley in the aftermath of the Dakota Indians' surrender, but some local commentaries on these incidents are extant.¹⁰² It should come as no surprise that many of the accounts upheld both the legitimacy of the proceedings and the rights of the Minnesota settlers. For example, when some New Englanders showed sympathy for the "savage captives," Bryant and Murch wrote in 1864 that the interlopers had forgotten about the "revenge" carried out during King Philip's War.¹⁰³ Those authors told their readers that the "descendants of the primitive stock" seemed to have abandoned the "Puritan ideas" of the earlier pioneers.¹⁰⁴

Thirty years later, American authors interested in the commissions were still defending the actions of Sibley, Pope, or Lincoln, while criticisms of the proceedings were contextualized as regional squabbles or misunderstandings. J. Fletcher Williams, secretary of the Minnesota Historical Association, wrote an essay in 1894 that vilified the "pseudo humanitarians in the East" who had encouraged President Lincoln's intervention in the trial of those "condemned for murder and massacre."¹⁰⁵ General Sibley was praised in the winter of 1863 for establishing a cordon of posts and garrisons and for "securing protection to the people in the western part of the state," at a time when hundreds of Dakotas were dying of sickness and disease in unhealthy stockades and pens.¹⁰⁶

Some of the early researchers investigating the incidents tried to document how Dakota tribal members want these contested histories to be remembered. Stephen Riggs, Samuel Bond, and Thomas Williamson preserved certain arguments from the narratives supplied by Big Eagle, Robert Hakewaste, Little Crow, and White Spider.¹⁰⁷ George Quinn, for example, recalled that at the time of the uprising he had been a nineteen-year-old who had fought with his "people against the whites," because he had "never learned to speak English" and had been "raised among the Indians." Although he admitted fighting the white soldiers, he did not wage war against "the unarmed white settlers."¹⁰⁸

An analysis of these extant records illustrates how some Dakota tribal members, especially the assimilated or "half-breed" Indians, may have shared

the dominant culture's views about the fairness and legitimacy of the military commissions. For example, Snana, a captive Indian woman who came to Fort Release, recalled the problems she faced when she was threatened by "bad Indians." She remembered that Sibley had rescued her and her two children, and that she appreciated the kindness of the troops who gave them food.¹⁰⁹ Samuel Brown, seventeen years of age in 1862, later commended members of Sibley's tribunal for judging that Charles Crawford (Brown's uncle) was not guilty of the charges brought against him. One member of the commission, Lieutenant Colonel Marshall, had apparently known that Crawford was one of the "friendlies."¹¹⁰ During Crawford's trial, a soldier by the name of John Magner accused Crawford of having participated in the battle of Wood Lake, but it appears that Magner confused the two sides of the battlefield.¹¹¹

Modern-day collectors of these narratives have encouraged circumspection in the weight given to some of these tales. Anderson and Woolworth, writing in 1988, contend that:

In 1897, the year [Brown's] narrative was published, strong prejudice against people of color openly existed in America. It was the era when Herbert Spencer's doctrine of Social Darwinism and the survival of the fittest reigned supreme and when newspaper editors wrote of the 'White Man's Burden.' Brown's condemning prose fit into the context of the times, when all nonwhites who resisted the so-called benefits of western cultures, whatever their justification, were quickly marked as uncivilized savages.¹¹²

I argue that this does not mean that scholars and lay persons need to dismiss those accounts completely, but rather to remember the inherent rhetoricity of all documents and historical records.

After the deportation of thousands of Dakota Indians, few white settlers were interested in reading the accounts of the Indian participants, but a wave of nostalgic feelings, the need for archival records for court claims, and the belief that Minnesota needed to remember the deeds of the "good" Indians helped preserve some of the fragments. Mary Crook, for example, is remembered as one of the Dakota who protected two white captives, Urania White and her baby, and a monument was erected by the Minnesota Valley Historical Society to "commemorate the brave, faithful, and humane conduct of the loyal Indians."¹¹³

For many decades, American military experts and politicians assiduously avoided writing or talking about the Sibley commission's activities. When researchers wrote about the formation of martial regulations or military commissions, they focused on the east and on Lincoln's generals in the east during the American Civil War.¹¹⁴ Military theorists and other researchers averted their gazes, and only a few individuals looked at the trial transcripts that were preserved in some dusty and unused archives.¹¹⁵

In the 1960s, 1970s, and 1980s, a number of interdisciplinary researchers reassessed the role that the Sibley military commissions played in the traditional histories and memories of the 1862 US-Dakota conflict. Had the five-

member commission, which sentenced 303 Sioux Indians to death, been the type of judicial body that provided military justice? How many of those who were hanged were really innocent, and why was the swiftness of the punishment considered a military necessity? Kenneth Carley claimed that reading “the records today buttresses the impression that the trials were a travesty of justice.”¹¹⁶ Micheal Clodfelter, writing in 1998, was convinced that:

The real work at Camp Release was vengeance. With Pope’s blessing, Sibley set up a five-man kangaroo court to judge the Santees. The accused were provided with no legal representation and hardly given a chance to defend themselves. Simply placing an accused miscreant at the scene of the crime was sufficient to condemn him. Because so many Indian names in their vernacular were similar and because the white man had trouble pronouncing those names, the wrong man was often accused because of mistaken identity.¹¹⁷

Just how many individuals lost their procedural and substantive due-process rights when they appeared before the military commissions has been, and will continue to be, a contentious issue. For example, some researchers remind us that Sarah Wakefield, one of the former prisoners of the Dakotas, wrote in 1864 that a man by the name of “Chaska” (no. 20)¹¹⁸ had saved and protected her from death or harm during her captivity.¹¹⁹ Wakefield was allowed to plead for his life in front of Sibley’s military commission, but several days later she found his name on the list of those who had been executed. Many now believe that the tribunal confused Chaska’s name with that of “Chaskadon,” a man who had been accused of killing a pregnant woman.¹²⁰

We now know that many whites considered the mass executions of Dakota Indians at Mankato to be necessary deterrents that would help bring peace to the Minnesota communities. Given local prejudices, Lincoln’s intervention could be viewed as having saved some lives, but there still had to be hangings, some symbolic public spectacles that would show that justice had been served. The military tribunals that meted out these sentences were therefore “social dramas ... used to manage emotional responses to troubled situations.”¹²¹ The guilty were punished, and the federal officials who dispensed the punishment could say that President Lincoln cared about the lives of the American citizens who lived in the Northwest. At the same time, the public hangings were viewed by many Minnesotans as an essential step in the process of taking back the American states and territories. Retribution and revenge, and not reconciliation, were some of the motivating ideas were being discussed in the Minnesota newspapers.

The public nature of the executions meant that both immediate and distant audiences could vicariously participate in the social dramas. Tens of thousands of settlers had lost their homes, and they were in no mood for cultural sentimentality or racial tolerance.¹²² For example, William Duley, the executioner of the thirty-eight condemned Sioux, had lost three of his children in the raids around Lake Shetek, and after three drum taps he was the one who had the honor of springing the trap doors. At first the bodies of the dead

Dakota warriors were buried in a mass grave, but later local physicians were allowed to use their skeletons for purposes of research and medical education.¹²³

What will we do with these conflicting accounts of an incident that is now a part of what Donald Bloxham calls our judicial memory?¹²⁴ Are there any didactic lessons that we can learn from visiting these earlier military situations?

CONCLUSION

This analysis of the US-Dakota Minnesota war and the Sibley commissions may leave some critics with very ambivalent feelings about the uses of the military commissions in this particular situation. It would be easy to take the categorical stance that all military tribunals are inherently unfair, and that they are problematic in all situations. One could argue that Lincoln and his generals were given too much power, that wars have a way of eroding the civilianization trends in American history, and that tribunals during this period did not have any of the protections that would later appear in the Uniform Code of Military Justice.¹²⁵

Yet scholars who have looked into the rhetoric of the times also grudgingly admit that President Lincoln's intervention may have saved the lives of hundreds of other Dakota Indians. Given the politics of the times and his worries about the Northwest, his intervention has to be acknowledged as a politically astute and courageous move. The US commander-in-chief was acting against the wishes of Minnesota's governor and the majority of the whites who lived in that state and wanted to hang hundreds of Indians.

Perhaps one of the key lessons that we should take away from the study of the US-Dakota war and Sibley's commission is that all judicial proceedings, military or civilian, are rhetorical forums that involve a host of legal and political negotiations. The Minnesota authorities who fought against the Dakota tribes sometimes described it as a "war," and yet they refused to treat their enemies as prisoners of war entitled to at least a modicum of legal protection. Even those who viewed it as a "rebellion" refused to talk about the possibility of restitution or reconciliation. The liminal status of the defendants encouraged their characterization as "murderers" who could not claim non-citizen combatant status.

As modern researchers and lay persons grapple with the complexities of modified forums, rhetorics of necessity, and the war on terrorism, they may want to remember some of the historical arguments that were used in earlier struggles, where the "other" was also treated as an implacable, uncivilized foe. Peter Maguire, one of the few writers in the fall of 2001 who remembered the US-Dakota wars and the Sibley commission precedent, said this about the president's military order:

President George W. Bush's executive order establishing military tribunals came as a shock to many human rights advocates who had hoped to see Osama bin Laden wearing headphones in a United

Nations courtroom. This move is a direct challenge to those who believe individual rights take precedence over national sovereignty[,] and that is a part of Bush's broader attempt to roll back the human-rights advances of Bill Clinton's administration.... Although military commissions have been used throughout American history, given their uncertain historical legacy the President's decision raises as many questions as it answers.... Many of these trials were primitive forms of political justice such as the 1862 Dakota War trials.... Primitive political justice had no presumption of impartiality, over a very public spectacle of vengeance usually followed by an amnesty of wartime acts.¹²⁶

Are nationalist forums the best options that we have in wartime situations? Can military tribunals provide that precarious balancing of civil liberties and state necessities? Only time will tell as modern societies deal with new characterizations of defendants who have to face different enraged citizenries.

ACKNOWLEDGMENTS

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NOTES

1. President George W. Bush, Military Order of 13 November 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 F. R. 57833 (16 November 2001).

2. Department of Defense, *Fact Sheet, Department of Defense Order on Military Commissions*, 21 March 2002.

3. Bruce Zagaris, "U.S. Defense Department Issues Orders on Military Commissions," *International Law Enforcement Law Reporter* 18 (May 2002) [17 paragraphs]: paragraphs 5–6.

4. "Review and Outlook: Due Process for Terrorists," *Wall Street Journal*, 22 March 2002, A14.

5. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). This post-Civil War decision is remembered for having established the principle that military courts are not necessary when the civil courts have remained open for the trial of defendants.

6. *Ex parte Quirin* (317 U.S. 1, 63 S. Ct. 1, 87 L. Ed. 7, 1942) is better known as the World War II German saboteurs' case, in which eight unwelcome visitors landed on the east coast and were caught by J. Edgar Hoover's FBI investigators. *Ex parte Quirin* stands for the principle that the enemy combatants could be tried by US military tribunals. For interesting scholarly discussions of *Ex parte Quirin*, see Joan Miller, "Nazi Invasion!" *American History Illustrated* 21 (November 1986): 42–49; Bennett Boskey, "A Justice's

Papers: Chief Justice Stone's Biography and the Saboteurs' Case," *Supreme Court Society Quarterly* 14 (1993): 10–20; David J. Danelski, "The Saboteurs' Case," *Journal of Supreme Court History* 1 (1996): 61–82; Boris Bittker, "The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction," *Constitutional Commentary* 14 (Winter 1997): 431–451.

7. For a rhetorical analysis of some of these other tensions and amnesias, see Richard Morris and Philip Wander, "Native American Rhetoric: Dancing in the Shadows of the Ghost Dance," *Quarterly Journal of Speech* 76 (1990): 164–191. A more general discussion of the rhetorical power of "cultural amnesia" can be found in Nathan Stormer, "In Living Memory: Abortion as Cultural Amnesia," *Quarterly Journal of Speech* 88 (2002): 265–283.

8. Ellen Farrell, "'The Most Terrible Stories': The 1862 Dakota Conflict in White Imagination," *Journal of the Indian Wars* 1 (2000): 33.

9. Charles S. Bryant and Abel S. Murch, *A History of the Great Massacre of the Sioux Indians in Minnesota, Including the Personal Narratives of Many Who Escaped* (Cincinnati: Rickey & Carroll, 1864), 458.

10. Bryant and Murch, *History of the Great Massacre*, 458.

11. See, for example, "The Moussaoui Problem," *Washington Post*, 27 April 2002, A20.

12. William Lee Miller, *Lincoln's Virtues: An Ethical Biography* (New York: Alfred A. Knopf, 2002).

13. See, for example, Nelson A. Miles, "The Indian Problem," *North American Review* 128 (March 1879): 304–314.

14. Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," *Stanford Law Review* 43 (November 1990): 13–98; Micheal Clodfelter, *The Dakota War: The United States Army Versus the Sioux, 1862–1865* (Jefferson, NC: McFarland, 1998); Isaac V. D. Heard, *History of the Sioux War and Massacres of 1862 and 1863* (1864; reprint, Millwood: Kraus Reprint Company, 1975); Kenneth Carley, *The Sioux Uprising of 1862* (St. Paul: Minnesota Historical Society, 1976); Paul N. Beck, "'Firm But Fair': The Minnesota Volunteers and the Coming of the Dakota War of 1862," *Journal of the Indian Wars* 1 (2000): 1–19. I appreciate the symbolic importance of Chomsky's usage of the term *Dakota War*, which provides some deference in discussing tribal self-identification and alternative historiographies. Yet as a communication scholar I am also aware of how the very naming of these communities and these conflicts is a part of the politics of these rhetorical histories. I therefore occasionally use the terms that became part of the dominant discourse surrounding the contemporaneous and historiographical reconstruction of these events.

Angie Debo has argued that the Dakota War was the "most disastrous Indian uprising white Americans had experienced since the attacks of Opechancanough and Philip on the Virginia and Massachusetts frontiers two centuries before." Angie Debo, *A History of the Indians of the United States* (1970; reprint, Norman: University of Oklahoma Press, 1974), 189.

15. Farrell, "'Most Terrible Stories,'" 21–37.

16. C. M. Oehler, *The Great Sioux Uprising* (New York: Oxford University Press, 1959); Carley, *Sioux Uprising*.

17. Heard, *History of the Sioux*; Marion P. Satterlee, *A Detailed Account of the Massacre by the Dakota Indians of Minnesota in 1862* (Minneapolis: Marion P. Satterlee, 1923);

Ralph K. Andrist, "Massacre!," *American Heritage* 13 (April 1962): 8–11, 108–111. Some commentators, like Meyer, Carley, and Chomsky, are convinced that the stories of the Dakota atrocities told in the Minnesota newspapers at the time exaggerated the number of mutilations and purposeful abuse of white bodies. Chomsky, for example, admits that there may have been abuses of "special enemies," but suggests that the "wild rumors far exceeded the realities" (20). See also Roy W. Meyer, *History of the Santee Sioux: United States Indian Policy on Trial* (Lincoln: University of Nebraska Press, 1967).

18. For example, Union General-in-Chief Henry Halleck's army suffered more than 45,000 casualties in Civil War battles at Antietam and Second Bull Run. Clodfelter, *Dakota War*, 45.

19. Chomsky, "United States-Dakota War Trials," 14.

20. Ibid.

21. Farrell, "Most Terrible Stories," 21.

22. For a general overview of the legal and military issues involved in the Wounded Knee controversies, see Roxanne Dunbar Ortiz, "Wounded Knee 1890 to Wounded Knee 1973: A Study in United States Colonialism," *Journal of Ethnic Studies* 8, 2 (1980): 1–15; Peter R. DeMontravel, "General Nelson A. Miles and the Wounded Knee Controversy," *Arizona and the West* 28, 1 (1986): 23–44. For an overview of how the military policies of the early Sioux War influenced the debates in the intervening decades between the US-Dakota War and Wounded Knee, see John Keegan, "Warfare on the Plains," *Yale Review* 84 (1996): 1–48; Jeffrey Ostler, "Conquest and the State: Why the United States Employed Massive Military Force to Suppress the Lakota Ghost Dance," *Pacific Historical Review* 65, 2 (1996): 217–248; Stephen D. Youngin, "Prelude to Wounded Knee: The Military Point of View," *South Dakota History* 4 (1974): 333–351.

23. See Robert H. Jones, "The Northwestern Frontier and the Impact of the Sioux War," *Mid-America* 41, 3 (1959): 131–153.

24. Miles, "Indian Problem," 305.

25. Charles Flandrau, "The Indian War of 1862–1864, and Following Campaigns in Minnesota," in *Minnesota in the Civil and Indian Wars, 1861–1865*, Board of Commissioners (St. Paul: Pioneer Press, 1890), 748–748.

26. "Flandrau, "The Indian War," 749.

27. Thomas C. Blegen, *Minnesota: A History of the State* (St. Paul: University of Minnesota Press, 1975), 167.

28. Heard, *History of the Sioux War*, 18.

29. Ibid.

30. Gerald S. Henig, "A Neglected Cause of the Sioux Uprising," *Minnesota History* 45 (Fall 1976): 107.

31. Heard, *History of the Sioux War*, 25.

32. Ibid. Flandrau would later describe Heard as "an experienced lawyer of St. Paul, who had been for many years the prosecuting attorney of Ramsey county and was thoroughly versed in criminal law." He had been on the "staff of Col. Sibley," and Sibley had appointed him to be the recorder of the court during these Dakota trials. Flandrau, "The Indian War," 747.

33. Heard, *History of the Sioux War*, 26–27.

34. Ibid., 27.

35. Chomsky, "United States-Dakota War Trials," 16–17.

36. Heard, *History of the Sioux War*, 31.
37. By the summer of 1862, some seven thousand members of four Dakota tribes were living on a reservation that bordered the Minnesota River.
38. Clodfelter, *Dakota War*, 40; Minnesota Board of Commissioners, *Minnesota in the Civil and Indian Wars, 1861–1865: Official Reports and Correspondence* (St. Paul: Pioneer Press, 1899). Many of the American soldiers asked to fight in the US-Dakota War were members of Minnesota volunteer regiments that had been “mustered into federal service as part of the Civil War effort.” Chomsky, “United States-Dakota War Trials,” 19.
39. Blegen, *Minnesota*, 262.
40. For a skeptical look at the Myrick tale, see Gary Clayton Anderson, “Myrick’s Insult: A Fresh Look at Myth and Reality,” *Minnesota History* 48, 5 (1983): 198–206. Anderson argues that the upper Dakota tribes were not the aggrieved parties, and that they had had a relatively mild winter in comparison with other Indian communities.
41. Chomsky, “United States-Dakota War Trials,” 17; Meyer, *History*, 116; “Big Eagle’s Account,” in *Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862*, ed. Gary Clayton Anderson and Alan R. Woolworth (St. Paul: Minnesota Historical Society, 1988), 55–56.
42. Blegen, *Minnesota*, 260.
43. *Ibid.*, 260–261.
44. Editorial, “Indian Murders,” *The New York Daily Tribune*, 25 August 1862, 4. For more on the “influence of white men at the bottom of the Indian massacres,” see Anon, “Indian Troubles in Minnesota,” *The New York Daily Tribune*, 28 August 1862, 5.
45. Blegen, *Minnesota*, 274.
46. The Minnesota conflict was often considered to be an event that threatened to spill over into Kansas and the Dakotas. This provided one of the justifications for asking the frontier to be militarized under the federal command of Major General John Pope. See Robert H. Jones, “The Northwestern Frontier and the Impact of the Sioux War,” *Mid-America* 41 (1959): 131–153.
47. Clodfelter, *Dakota War*, 48.
48. Harry T. Williams, *Lincoln and the Radicals* (Madison: University of Wisconsin Press, 1941).
49. Major General John Pope, quoted in Blegen, *Minnesota*, 274.
50. Blegen, *Minnesota*, 278.
51. Gary Clayton Anderson and Alan R. Woolworth, “Introduction,” in *Through Dakota Eyes*, ed. Anderson and Woolworth, 1. Some legal commentators were convinced that the Indians had incurred very few losses in the war, and that people back east did not have an accurate count of who died in what battles. For example, Heard, writing in 1863, read many newspaper accounts and claimed to have interviewed many of the Indian participants in these conflicts. He came up with this tally of Dakota losses (Heard, *History of the Sioux War*, 248):
Admitted loss of the enemy in 1862: At the battle of Red-Wood Ferry, 1; at new Ulm (including half-breeds), 5; at Fort Ridgely, 2; at Birth Coolie, 2; Big Woods, at or near Forest City, 1; at battle of Act with Strout, 1; at Hutchinson, 1; at Spirit Lake, 1; at Lake Shetek, by Duly, 1; near Omahaw, where several went to steal horses, not knowing of the outbreak, 1; at Abercrombie, 4; between Fort Ridgely and New Ulm, half-breed, 1; at Wood Lake, 22. Total, 42.

52. For an overview of the town reactions to the Dakota uprising, see Don Heinrich Tolzmann and Louis Albert Fritsche, *Memories of the Battle of New Ulm: Personal Accounts of the Sioux Uprising* (Bowie, MD: Heritage Books, 2001).

53. Clodfelter, *Dakota War*, 52–53.

54. Chomsky, “United States-Dakota War Trials,” 21.

55. For illuminating summaries of some of the schisms that existed within the Sioux camps, see Priscilla Ann Russo, “The Time to Speak is Over: The Onset of the Sioux Uprising,” *Minnesota History* 45 (1976): 97–106.

56. Henry Sibley, “Letter from Col. Henry Sibley to Those of the Half-Breeds and Sioux Indians Who Have Not Been Concerned in the Murder and Outrages Upon the White settlers,” 13 September 1862, reprinted in United States Department of War, *The War of the Rebellion: A Compilation of The Official Records of the Union and Confederate Armies*, Series I (1885): 13, 632; Chomsky, “United States-Dakota War Trials,” 22.

57. See “The Minnesotians Ferocious,” *The St. Paul Pioneer and Democrat*, 12 December 1862, 2.

58. Blegen, *Minnesota*, 275.

59. Clodfelter, *Dakota War*, 57.

60. John Pope, “Letter from Major General John Pope to Colonel Henry Sibley, 28 September 1862,” reprinted in United States Department of War, *The War of the Rebellion: A Compilation of The Official Records of the Union and Confederate Armies*, Series I (1885): 13, 685–686, quoted in Chomsky, “United States-Dakota War Trials,” 23.

61. Chomsky, “United States-Dakota War Trials,” 23.

62. Carley, *Sioux Uprising*, 68. Heard served as recorder, and he left one of the first histories of the uprising and these trials. See Heard, *History of the Sioux War*. One of Sibley’s contemporaries, J. Fletcher Williams, claimed that the “Hon. I. V. D. Heard” served as “Judge Advocate” during these proceedings. J. Fletcher Williams, “Henry Hastings Sibley: A Memoir,” *Collections of the Minnesota Historical Society* 6 (1894): 290. If this was true, then Heard played at least three roles in the affair—judge advocate, trial recorder, and historian.

63. Heard, quoted in Karin Thiem, “The Minnesota Sioux War Trials,” thesis; Mankato State University, 1979, 95.

64. See James Garfield Randall, *Constitutional Problems Under Lincoln* (Urbana: University of Illinois Press, 1951), 174–187.

65. Thiem, “The Minnesota Sioux,” 39.

66. Ibid. Also see John Marshall’s commentary in *Worcester v. The State of Georgia*, 315 U.S. 515 (1832).

67. William W. Winthrop, *A Digest of Opinions of the Judge Advocates General of the Army Between September 1862 and July 1867* (Washington, DC: Government Printing Office, 1901), 411; Thiem, “The Minnesota Sioux,” 40.

68. Thiem, “The Minnesota Sioux,” 41. See also William W. Winthrop, *Military Law and Precedents* (Washington, DC: Government Printing Office, 1887).

69. Thiem, “The Minnesota Sioux,” 48.

70. Flandrau, “The Indian War,” 748.

71. See Chomsky’s discussion of the correspondence between Pope and Halleck, “United States-Dakota War Trials,” 26.

72. Chomsky, “United States-Dakota War Trials,” 26.

73. Henry Sibley, “Letter from Colonel Henry Sibley to Colonel Charles Flandrau,” 28 September 1862, quoted in Chomsky, “United States-Dakota War Trials,” 23.

74. Chomsky, "United States-Dakota War Trials," 25. The six acquittals were case numbers 7, 16, 17, 20, 21, 27.

75. "H. [Heard]," "The Indian Expedition," *The St. Paul Pioneer and Democrat*, 15 November 1862, 2. For more detailed discussion of these newspaper commentaries, see Thiem, "The Minnesota Sioux," 47–48.

76. See *Records of the Military Commission that Tried Sioux-Dakota Indians for Barbarities Committed in Minnesota, 1862* (Washington, DC: National Archives and Record Administration, 1988), case no. 1; Carley, *Sioux Uprising*, 68.

77. The term "revolt" was used in a 5 November 1862 letter from the commission that was written on behalf of Godfrey. See *Records*, Case no. 1.

78. See *Records*, Case no. 2, 1.

79. *Ibid.*, 3.

80. *Ibid.*, 4.

81. Thiem, "The Minnesota Sioux," 57–58.

82. Heard, *History of the Sioux War*, 254–255; Chomsky, "United States-Dakota War Trials," 46.

83. Thiem, "The Minnesota Sioux," 52.

84. Nancy McClure, "The Story of Nancy McClure, Captivity Among the Sioux," *Minnesota Historical Society Collections* 6 (1894): 456. See also the note on the transcript for trial no. 15, which indicated that "several of the women alluded to in the above testimony were called in but could not identify the prisoner." Thiem, "The Minnesota Sioux," 59.

85. Thiem, "The Minnesota Sioux," 49–50.

86. *Ibid.*, 47–48.

87. Andrist, "Massacre," 111. Interestingly enough, Andrist believed that "most" of the Indians "deserved their fate," even though "at least one or two of those executed were the wrong men."

88. "Nancy McClure Faribault Huggan's Account," in *Through Dakota Eyes*, ed. Anderson and Woolworth, 244–249, quote on 246.

89. Peter Maguire, "Questions Hang Over Military Tribunals," *Newsday*, 21 November 2001, A37.

90. See Isaac Heard, "The Indian Trials," *St. Paul Pioneer and Democrat*, 11 December 1862, 1; Blegen, *Minnesota*, 279.

91. Reverend S. R. Riggs, quoted in "Trial of the Indian Prisoners," *St. Paul Pioneer and Democrat*, 12 December 1862, 4.

92. Chomsky, "United States-Dakota War Trials," 27.

93. Carley, *Sioux Uprising*, 69.

94. See *Records of the Military Commission that Tried Sioux-Dakota Indians for Barbarities Committed in Minnesota, 1862* (1862; reprint, Washington, DC: National Archives and Records Administration, 1988).

95. Blegen, *Minnesota*, 279.

96. See, for example, "The Execution of the Condemned Indians," *St. Paul Pioneer and Democrat*, 5 December 1862, 2; "What Shall Be Done With the Indians," *The St. Paul Pioneer and Democrat*, 12 December 1862, 2.

97. Carley, *Sioux Uprising*, 70.

98. Heard, *History of the Sioux War*, 31; Farrell, "Most Terrible Stories," 35.

99. Blegen, *Minnesota*, 262–263.

100. William P. Dole, "Indian Commissioner Dole on Reservation Policy," 26 November 1862, reprinted in Francis Paul Prucha, *Documents of United States Indian Policy* (1975; reprint, Lincoln: University of Nebraska Press, 1990), 96–97.

101. Clodfelter, *Dakota War*, 60.

102. For more general investigations of the historical, political, and legal causes of some of the Indian conflicts, see U.S. Senate, Judiciary Committee, *Wounded Knee Massacre: Hearings Before the Senate Judiciary Committee on S. 1147 and S. 2900* (Washington, DC: Government Printing Office, 1976)

103. Bryant and Murch, *History of the Great Massacre*, 470–471. Almost thirty years later, Flandrau was still complaining that "while this court martial was in session, the news of its proceedings reached the Eastern cities, and a great outcry was raised that Minnesota was contemplating a dreadful massacre of Indians. Many influential bodies of well-intentioned but ill-informed people besieged President Lincoln to put a stop to the proposed executions." Flandrau, "Indian War," 747.

104. Bryant and Murch, *History of the Great Massacre*, 471.

105. Williams, "Memoirs of Henry," 290–291.

106. *Ibid.*, 291.

107. Anderson and Woolworth, "Introduction," in *Through Dakota Eyes*, 3–5.

108. "Account of George Quinn," ed. Kenneth Carley, *Minnesota History* 38 (September 1962): 147–149; reprinted in *Through Dakota Eyes*, eds. Anderson and Woolworth, 93–95, quote on 94.

109. "Snana's Story," in *Through Dakota Eyes*, eds. Anderson and Woolworth, 257–258.

110. "Samuel J. Brown's Recollections," in *Through Dakota Eyes*, eds. Anderson and Woolworth, 222–229, quote on 228.

111. "Charles R. Crawford's Testimony," in *Through Dakota Eyes*, eds. Anderson and Woolworth, 259–260.

112. Anderson and Woolworth, "Introduction," in *Through Dakota Eyes*, 5. These authors note that some of those who translated this material into the "rhetoric" of the times may have taken editorial license and changed the tenor of the recollections. This is, of course, pure speculation. Note, for example, how Bryant and Murch (*History of the Great Massacre*, 47–49) talked about the white and Indian races in 1864:

The white race, for some two hundred years since, had entered upon the material conquest of the American continent, armed with all the appliances for its complete subjugation.... In the case before us, the Indian races were in the wrongful possession of a continent required by the superior right of the white man. This right, founded in the wisdom of God ... will continue to assert its dominion, with varying success, contingent on the use of means employed, until all opposition is hushed in the perfect reign of the superior aggressive principle.

113. Urania White, "Captivity among the Sioux," *Minnesota Collections* 9 (1901): 395–426; quoted in *Through Dakota Eyes*, ed. Anderson and Woolworth, 267, n.23.

114. See, for example, Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991).

115. Note, for example, the several cursory paragraphs on the Sibley commission that are discussed in Solon J. Buck, "Lincoln and Minnesota," *Minnesota History* 6 (December 1925): 359.

116. Carley, *Sioux Uprising*, 69.
117. Clodfelter, *Dakota War*, 58. Linguistic confusion and mistranslation of Sioux names may also be factors that influenced the ways that the five-member commission tried to keep track of the defendants by using case numbers for each individual.
118. Chaska, whose Dakota name was We-chan-hpe-was-tay-do-pee [letter from Reverend S. R. Riggs to Sarah Wakefield], was listed as no. 20 and characterized as the savior of Wakefield and her children in a St. Paul newspaper, "Mrs. Wakefield and Her Children," St. Paul *Daily Press*, 28 December 1862, cited in Sarah F. Wakefield, *Six Weeks in the Sioux Tepees: A Narrative of Indian Captivity*, ed. June Namias (1864; reprint, Norman: University of Oklahoma Press, 1997), 152. To give readers a sense of the difficulties the commission had in listing the Dakota defendants, Namias notes there were "several Chaska name look-alikes"—Chaskay-Don or Chaskay-Eteh, no. 121; Chayton-Hoon-Ka, no. 342, and Chan-Ka-Hda, no. 369, Wakefield and Namias, *Six Weeks*, 152.
119. See Wakefield, *Six Weeks* (reprint), 3–42.
120. Sarah F. Wakefield, *Six Weeks in the Sioux Tepees (Little Crow's Camp): A Narrative of Indian Captivity* (Shakopee, MN: Job Printing Office, 1864), 53–59; Clodfelter, *Dakota War*, 58.
121. Robert Hariman, "Performing the Laws: Popular Trials and Social Knowledge," in *Popular Trials: Rhetoric, Mass Media and the Law*, ed. Robert Hariman (Tuscaloosa: University of Alabama Press, 1990), 5.
122. For intriguing accounts of various local, contemporaneous discussions of the Dakota conflict, see Larry Lundblad, "The Impact of Minnesota's Dakota Conflict of 1862 on the Swedish Settlers," *Swedish-American Historical Quarterly* 51, 3 (2000): 209–221.
123. Bryant and Murch, *History of the Great Massacre*, 475; Clodfelter, *Dakota War*, 58–59.
124. Donald Bloxham, *Genocide on Trial* (New York: Oxford University Press, 2001), 2.
125. The Uniform Code of Military Justice (UCMJ), which was passed by Congress in the spring of 1950, was intended to provide a codified set of regulations that would provide some rights to individuals who appeared in military courts. These changes were considered to be progressive because they supplied military personnel with some of the protections that had been a part of America's civil jurisprudence. For example, the UCMJ tried to restrict the discretion of commanders, provided the accused with legal counsel, and mandated some types of appellate review. See William T. Generous, Jr., *Swords and Scales: The Development of the Uniform Code of Military Justice* (Port Washington, NY: Kennikat, 1973).
126. Maguire, "Questions Hang," A37.