An Administrative Trail of Tears: Indian Removal

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by Ethan Davis*

ABSTRACT

In the early nineteenth century, the federal government uprooted the so-called five "Civilized Tribes" of the South and sent them westward to modern day Oklahoma. This article rediscovers the long-forgotten administrative system that guided the removal of one of those tribes: the Choc-taws. Because judicial review was non-existent, control of the removal was concentrated in the so-called external law—the statutes passed by Congress and the treaties between the United States and the Indian tribes—and in the so-called internal law—the regulations promulgated by the War Department and the operational system developed by the administrators themselves. Drawing almost exclusively on primary sources, this article shows how the interrelationships between these layers of administrative law produced a tragic result.

INTRODUCTION

The decade of the 1830s was one of immense upheaval for the American Indians. Responding to the clamoring of whites in Mississippi, Georgia, and Florida, the federal government uprooted the so-called five "Civilized Tribes" of the South—the Choctaws, Creeks, Chickasaws, Seminoles, and Cherokees—and sent them westward to modern day Oklahoma. Under the Department of War's supervision, tens of thousands of these Indians trekked hundreds of miles. Trapped in impassable swamps in the middle of brutal winters and facing epidemics of cholera and dysentery, many perished on this "trail of tears." The tale of their suffering has been told.1

Modern scholars have not, however, adequately studied the administrative system that brought about the removal. This may be because conventional wisdom nowadays pegs the beginning of the administrative state in 1887, with the creation of the Interstate Commerce Commission. But the removal of the southern Indians in the 1830s required the assembling of a corps of federal removal agents, the purchase of hundreds of thousands of pounds of supplies and provisions, and the construction of supply depots along the road to the west. It might be said that the men who removed the Indians composed their own nineteenth century version of a self-contained administrative agency.

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1. See generally Grant Foreman, Indian Removal (2d ed. 6th prntg. 1972).
In the 1830s, no less than today, the existence of administration raised the ever-present problems of limits, controls, consistency, and accountability. Modern day administrative lawyers tend to think of the courts as the final overseers of administrators, but the courts were nowhere to be found during the removal of the Indians. Though the removal proceeded according to an Act passed by Congress and treaties negotiated with each Indian tribe, no court had the opportunity to interpret either legal text during the removal. Judicial review was nonexistent. The control of the removal was left, therefore, in the hands of the administrators themselves, and to a lesser extent, the political branches. As Jerry Mashaw has argued, the "internal law of administration" is consistently understudied, yet it is arguably of equal or greater significance than judicial or political controls. Some important questions of administrative law in the 1830s, then, were as follows: To what extent would Congress assert itself over the removal? How much power would the president enjoy to direct day to day operations? Who would prevail in conflicts between Congress and the president? How would the administrators standardize the removal process? How would administrators limit their own discretion?

This article pieces together the ad hoc layers of political and administrative controls that arose in the 1830s to impart direction and accountability to the removal. I demonstrate how four legal texts guided the operation. Part I evaluates the first legal layer: the Removal Act of 1830. That federal statute, which survived intense debate in the Senate and the House, authorized President Jackson to negotiate removal treaties with the Indian tribes. It did not, however, limit the president’s powers in any meaningful way. Jackson would be free to offer tribal leaders financial inducements and to negotiate with minority factions. Moreover, the Removal Act did not address, let alone resolve, any of the significant administrative details of the removal. Instead, most of the debate centered around whether the Indians could constitutionally exercise self-government within the borders of U.S. states. The Removal Act was part of the external law of the removal.

Part II examines the second layer of legal guidance: treaties with the five southern Indian tribes. As dissenting congressmen had predicted, Jackson’s treaty negotiators resorted to a series of false choices and tough tactics to induce the Indians to surrender their lands. Moreover, while the completed treaties spent pages addressing the distribution of the lands the Indians would leave behind, no thought was given to the technical details of removing the Indians to their new homeland. When Jackson submitted the treaties to Congress, the Senate exercised its ratification role lightly at best. The treaties formed the second half of the external law.

Part III covers the internal law of the Choctaw removal. I first recount the troubled departure of a group of Choctaws in the winter of 1831 to 1832. Due to lack of planning, oversight, and supervision, this first group of emigrating Indians faced many unnecessary hardships. In the late

spring of 1832, responding to the debacle of the previous winter, the Department of War promulgated a comprehensive set of Removal Regulations. The Regulations created a hierarchy of removal agents, allocated authority accordingly, and standardized accounting, recording, and disbursement practices. These Regulations formed the third layer of legal guidance for the agents on the ground.

Finally, Part IV addresses the fourth level of law during the Choctaw removal: the thousands of letters exchanged between Commissary General of Subsistence George Gibson in Washington and the removal agents on the ground, many of which interpreted the Regulations. Gibson transformed the Regulations into concrete policies, further specifying how to account for expenditures, how to negotiate for supplies with private contractors, and how to deal with Indians who wished to emigrate by themselves. Gibson’s correspondence formed the second half of the internal law.

I conclude by pointing out the unfortunate interrelationships between the four layers of law. Congress’s frugality, for example, meant that the treaties and the War Department’s Regulations would focus more on accounting procedures and cost-cutting ideas than on the safety and health of the emigrating Indians. The correspondence between the Commissary General and the agents on the ground, in turn, reveals an almost single-minded concentration on removing the Indians as quickly and cheaply as possible. The internal, lower levels of law were thus quite responsive to the external law of Congress. But tragically, the external law took almost no account of the internal law.

**PART 1: THE REMOVAL ACT OF 1830**

The conflict between the southern states and the Indians in the 1830s was grounded in anger over a bargain gone bad. In 1802, the federal government had promised Georgia that it would extinguish Indian title within the state’s borders by purchase “as soon as such purchase could be made upon reasonable terms.”3 In return, Georgia delivered to the national government the lands which would become the states of Alabama and Mississippi.4 Twenty-eight years later, the federal end of the bargain remained unfulfilled. The southern states’ patience ran out. Georgia argued that “before [Georgia] became a party to [the 1802 agreement], she could rightfully have possessed herself of [the Cherokee lands], either by negotiation with the Indians, or by force; and she had determined to do so; but by this contract she made it the duty of the United States to sustain the expense of obtaining for her the possession, provided it could be done upon reasonable terms and by negotiation.”5 Now that negotiations had failed, “the consequence is, that Georgia is left untrammeled, at full liberty

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3. 6 Reg. Deb. 97 (1830).
4. Id.
5. Id. at 995.
to prosecute her rights . . . , according to her own discretion, and as though no contract had been made." Georgia and other southern states therefore threatened unilaterally to extend their laws over the Indians unless the federal government acted first. In other words, the southern states had decided to force the national government’s hand.

The strategy worked. On May 28, 1830, months of acrimonious debate culminated in the passage of the Indian Removal Act. The Act granted remarkable authority and discretion to the president. Jackson would divide United States territory west of the Mississippi “into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there.” To effect the exchange, the Removal Act allowed the president “solemnly to assure the tribe or nation with which the exchange is made” that the lands west of the Mississippi would forever belong to them.

What sort of administrative machinery would be needed to remove the Indians? The Act did not provide an answer. Instead, it spoke in broad generalities. Echoing the Constitution’s Necessary and Proper Clause, the Removal Act authorized “such aid and assistance to be furnished to the emigrants as may be necessary and proper to enable them to remove . . . .” The president would also be allowed to provide for the “support and subsistence” of the Indians “for the first year after their removal.” An appropriation of $500,000 at the end of the bill granted Jackson an initial arsenal of financial firepower.

The vagueness and imprecision of the Removal Act rivals many of today’s broadest congressional delegations of power. The president would have unrestrained authority to survey and subdivide millions of acres west of the Mississippi as he saw fit. The removal and mass emigration of tens of thousands of human beings would occur when, where, and how Jackson decreed. And the financial inducements that would be required to obtain the assent of the Indian tribes and their chiefs would be negotiated and agreed upon by the executive, since the Removal Act did not provide any hard guidelines.

The Removal Act left many critical questions unanswered:

In his great rush to enact the Indian Removal Bill, Jackson and his congressional supporters seemed unconcerned about the technical aspects of any subsequent migration of thousands of eastern Indians to the trans-Mississippi West. Opponents of the bill in Congress had raises several important questions: Would emigration be purely voluntary? Would treaty commissioners negotiate only with acknowledged tribal leaders or would land be purchased from individuals? How many

6. Id. at 996.
7. An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi, ch. 148, 4 Stat. 411, § 1 (1830).
8. § 3.
9. § 5.
10. § 5.
Indians would go? What kind of preparations and resources would be necessary for them?11

Part of the reason for so broad a delegation was simple lack of foresight. The technical details of the removal were far less glamorous than high-minded constitutional debates about Indian sovereignty. Moreover, congressmen were primarily concerned about how their constituents would divide the lands the Indians left behind. Most importantly, the removal would be a military operation, changing often in response to needs on the ground. As such, it would be unfit for congressional micromanagement.

And yet, despite its grand terms, the Removal Act may not have delegated any power at all. For all the political strife triggered by the Act, its legal effect was not clear. In a strictly legal sense, the Removal Act was superfluous. The removal could occur only through the negotiation of treaties with the Indians. Nothing in the Constitution, of course, requires the president to seek congressional pre-approval before beginning treaty negotiations. Indeed, treaties with the Indians had been negotiated, signed, and ratified by the Senate for decades without congressional pre-approval. During the Senate debates, Senator Robbins made the point crisply: “If these Indian nations are competent to make treaties, then the proposed law is unnecessary, as its objects may be effected by treaty; and this law is not necessary to aid the Executive in making this treaty.”12

Recognizing that the bill was legally inoperative, one commentator has argued that the true purpose of the Removal Act was financial:

Removal would be expensive, and the Office of Indian Affairs could not pay for it from its ordinary budget. As Thomas McKenney had explained in early 1828, before Jackson was elected, the Office of Indian Affairs was already spending its entire annual appropriation on food, clothing, and medical care for Indians . . . . The most significant part of the Removal Act was thus its last section, which appropriated $500,000 for the specific purpose of removal.13

This is partly correct. However, the true costs of removal turned out to be much higher than anticipated. The financial issue thus returned to Congress time and again during the 1830s. Even the appropriation at the end of the Removal Act, then, was not immensely important.

Perhaps the Removal Act placed limits on Jackson’s authority to negotiate treaties. Indeed, the treaties with the five major southern Indian tribes all provided for the support and subsistence of the Indians for the first year after their removal—a subsistence provision that also appears in the Removal Act. This reading, though, raises serious constitutional questions. The Constitution excludes the House from the treaty ratification process. If the Removal Act were construed to require all future Indian treaties to be in accordance with the Act, it might be read to give the House of Representatives an unconstitutional hand in treaty ratification.

12. 6 REG. DEB. 374 (1830).
During debate, Senator Robbins, an opponent of the Act, pushed the argument: “[I]f these Indian nations are competent to make treaties,” the Removal Act “is unconstitutional; for it is to make a treaty by the Legislature, which can only be made by the Executive and Senate.”¹⁴ No one else appears to have taken this suggestion seriously.¹⁵ Most likely, the only legally operative part of the Removal Act was Section 1, which placed the western territories at the president’s disposal.¹⁶

In any case, no meaningful restraints on the president made their way into the final version of the Removal Act. To be sure, several congressmen tried valiantly during the debates to alert their colleagues to the dangers of granting the president unrestrained discretion. New Jersey Senator Frelinghuysen, the Act’s leading Senate opponent, had been concerned from the beginning that American treaty negotiators would bribe tribal chiefs to betray their people: “[The treaty commissioners] are directed . . . with the public purse in hand, to take the chiefs alone, to approach individually, and at home, to meet them in the way of their prejudices. I admire the ingenious clothing of a most odious proposal.”¹⁷ In the House, Congressman Ellsworth called such tactics “a stain upon our national character.”¹⁸

Senator Sprague echoed Frelinghuysen’s worries:

I confess, sir, that I cannot but indulge fears of the use which may be made by the War Department, of the half million of dollars, to be appropriated by this bill. We do know, that, in making Indian treaties, there have been instances of valuable reservations of lands, and large sums of money being secretly given to individual chiefs, by confidential arrangements, to induce them to yield to our wishes, and betray the confidence reposed in them by their nation. Is it uncharitable to apprehend that such things may happen under the directions of the present Secretary of War?¹⁹

In another passage, Sprague elaborated on the dangers of giving the president unrestrained authority to bargain with Indians unschooled in the arts of negotiation:

Not only has terror been inspired, but other means have been resorted to, to cause the women to influence their husbands; the children to beseech their parents; the warriors to urge the chiefs; until their firmness is overcome. It is related of a venerable chief, that, yielding at last to this irresistible pressure, he signed the fatal parchment in tears; declaring at the time that it was the death warrant of his nation.²⁰

There was a need, Senator Sprague insisted, for Congress to restrain the treaty commissioners: “Is it uncharitable to suppose that agents, to be

¹⁴. 6 REG. DEB. 374 (1830).
¹⁵. Ironically, supporters of the Removal Act resisted an amendment that would have limited Jackson’s power to bribe tribal chiefs, on the grounds that it was an unconstitutional interference with the president’s treaty power. See 6 REG. DEB. 382 (1830).
¹⁶. See An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi, ch. 148, 4 Stat. 411, § 1 (1830).
¹⁷. 6 REG. DEB. 311 (1830).
¹⁸. Id. at 1027.
¹⁹. Id. at 356.
²⁰. Id. at 355.
appointed under the direction of those who are now concerned in our Indian affairs, may resort to force or terror?"21

Building on these fears, Senator Frelinghuysen proposed forbidding the president, during negotiations, from expending funds on “secret presents for the chiefs or head men of the Indian nations.”22 But Jackson’s supporters successfully countered Frelinghuysen and Sprague on two grounds. First, such an amendment would unfairly malign the president’s integrity.23 Second, it would unconstitutionally interfere with the president’s treaty making power.24

The Act’s opponents tried twice more to insert controls. First, Senator Sprague spoke in strong support of a proposed amendment that would have protected the Indians’ rights, recognized and reaffirmed by many previous treaties, to refuse to remove:

This bill ... provides for the removal of the Indians to distant regions, beyond the Mississippi, and it is proposed to place no less than half a million of dollars in the hands of the Secretary of War for that purpose. The amendment, now under consideration, declares that they shall be protected, in the enjoyment of their rights, until they shall choose to remove. The necessity for such a provision is apparent. Without it, this bill will add to the pressure of the torrent that is sweeping them away.25

Then, as the Senate prepared to vote on the Act, Frelinghuysen tried one last time to curb presidential power. This second amendment would have required federal agents to explore the land west of the Mississippi to ensure its habitability before removing the Indians. Both measures were defeated.26

Most of the debate over the Removal Act revolved around high-minded questions of constitutional law. The central question was whether states could constitutionally extend their laws over the Indians (as they threatened to do) in the face of express federal treaties guaranteeing Indian sovereignty. President Jackson and congressional Democrats argued that the states retained the sovereign right to legislate upon Indians within their borders, while opponents of removal insisted that federal treaties trumped inconsistent state legislation. These debates implicated deep, unresolved issues about the scope of executive and legislative power and the role of the Senate in the treaty-making process.

Such constitutional concerns did not bear directly on the question of Indian removal itself, since it was legitimate for the president to obtain land cessions from the Indian tribes through future treaties. But as discussed later, the question of the constitutionality of Indian self-government within the borders of states had a powerful, coercive impact upon treaty negotiations that would occur over the following years. The Indians

21. Id.
22. Id. at 380.
23. Id.
24. Id. at 382.
25. Id. at 355.
26. Id. at 381, 383.
undoubtedly knew they had many supporters in high levels of the federal government. But the passage of the Removal Act over Whig objections and President Jackson’s declarations of his inability to protect the Indians from state law suggested to the southern tribes that they faced the impossible choice of abandoning their ancestral lands or submitting to the states. To be sure, the Supreme Court rejected Jackson’s legal position in an 1832 decision. But by then the Choctaws had already been coerced into a removal treaty. Moreover, the states and President Jackson treated the Supreme Court’s decision with contempt, suggesting to the remaining tribes that their situation remained precarious. The debate over the United States’ constitutional and statutory obligations to the Indian tribes thus had enormous practical impact. As one congressman mused:

[So long as the tribes of Indians within any State of the Union were exempted from the operations of state laws, they never would consent to remove from the territory they occupy: until our legislation can in some form or other be brought to act on these people, or those resident among them, they will never consent to abandon their lands. So soon as our laws can reach those abandoned citizens, who settle among them, and become as savage as the Indians themselves, a powerful motive for their continuance will be removed.]

President Jackson and congressional Democrats argued that Congress’s constitutional power under the Indian Commerce Clause was limited to regulating intrastate commerce with the Indians. Indian affairs that were purely intrastate, on the other hand, were committed to the governance of the states. Senator Forsyth declared that “Congress w[as] not intended to have any special authority over Indians within a State, subjected to state laws.” Relying on the principle that “[t]he States ought not to be divested of any part of their antecedent jurisdiction by implication or doubtful construction,” Jackson contended that the Indian Commerce Clause did not alter the states’ historic powers over the Indians. Instead, the Constitution gave “the General Government complete control over the

28. It may be that the Supreme Court’s Worcester decision partially explains why the Cherokees resisted U.S. coercion until 1835.
29. 6 Reg. Deb. 12 (1830). Another lawmaker said: “I know that there is nothing on the face of these [state] laws which proposes to exert any direct force for the removal of the Indians. But, under the existing condition of things there, the moral effect of these measures will as effectually accomplish this end as your army could do it.” Id.
30. U.S. Const. art. 1, § 8 (“The Congress shall have power . . . To regulate commerce . . . with the Indian tribes.”).
31. In 1830, decades before the Court began construing Congress’s Commerce power more broadly, this argument carried some force. Article I, Section 8 of the United States Constitution grants Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. Const. art. I, § 8. If Congress could not regulate quintessentially intrastate commerce, then why should it have the authority to regulate intrastate Indian affairs?
32. 6 Reg. Deb. 336 (1830).
33. Andrew Jackson, Special Msg. to Cong. (Feb. 22, 1830).
trade and intercourse of those Indians only who were not within the limits of any State."\textsuperscript{34} Jackson declared that “[f]or the justice of the laws passed by the States within the scope of their reserved powers they are not responsible to this Government. As individuals we may entertain and express our opinion of their acts, but as a government we have as little right to control them as we have to prescribe laws for other nations.”\textsuperscript{35} Therefore, the federal government did not have the constitutional authority to grant political sovereignty to Indian tribes that existed within state boundaries. The Jacksonians also pointed out that Article IV, Section 3 of the Constitution forbids the erection of new states “within the jurisdiction of any other state.”\textsuperscript{36}

Such states’ rights arguments led almost inexorably to the conclusion that the federal treaties guaranteeing Indian sovereignty were unconstitutional intrusions upon state sovereignty. Removal advocates did not expressly contend, however, that these many treaties were flatly unconstitutional. Rather, they seemed to invoke a crude constitutional avoidance doctrine. The treaties, Jackson contended in a special message to Congress, were born of necessity. The United States “had just emerged from a protracted war for the achievement of their independence.”\textsuperscript{37} Many southern tribes, “powerful as they were ferocious in their mode of warfare, remained in arms, desolating our frontier settlements.”\textsuperscript{38} The first treaties with the Cherokees, therefore, “were evidently sanctioned as measures of necessity adapted to the character of the Indians and indispensable to the peace and security of the western frontier.”\textsuperscript{39} Thus those treaties “can not be understood as changing the political relations of the Indians to the States or to the Federal Government.”\textsuperscript{40} Jackson then implied that a contrary interpretation might violate the Constitution: to alter the states’ powers over the Indians “would have required the operation of quite a different principle and the intervention of a tribunal higher than that of the treaty-making power.”\textsuperscript{41} The treaties should not be understood, the Jacksonians contended, as granting the Indians’ right to self-government.

Jackson and the Democrats believed that past practice bolstered their arguments about the scope of the Indian Commerce Clause and the interpretation of the Indian treaties. “Until recently,” Jackson contended, “it has never been maintained that the right of jurisdiction by a State over Indians within its territory was subordinate to the power of the Federal

\textsuperscript{34} Id.
\textsuperscript{35} Andrew Jackson, 2d. Ann. Msg. (Dec. 6, 1830).
\textsuperscript{36} See U.S. Const. Art. IV, § 3; 6 REG. DEB. 96 (1830). This argument was vulnerable to the rejoinder that Indian nations were not “states.” They enjoyed no congressional representation and residents were not taxed. See 6 REG. DEB. 1010 (1830).
\textsuperscript{37} Andrew Jackson, Special Msg. to Cong., Feb. 22, 1831.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
If the treaties really did guarantee Indian sovereignty, Jackson continued, "much error has arisen in the intercourse of the Government with them." He pointed out that the Indians had "been called upon to assist in our wars without the privilege of exercising their own discretion . . . ." If the Indians really were independent, sovereign nations, such forced conscription would represent "too lofty a tone" on the part of the national government. Moreover, the frequent hostilities with the tribes had never been preceded by a congressional declaration of war: "was the prosecution of such hostilities an usurpation in each case by the Executive which conducted them of the constitutional power of Congress?"

Removal, the Jacksonians concluded, was the only way to protect the Indians from the states. It would "enable [the Indians] to pursue happiness in their own way and under their own rude institutions" and "retard the progress of decay, which is lessening their numbers." Framing removal as the lesser of two evils offered political benefits as well, allowing Jackson somewhat misleadingly to announce that "[t]oward the aborigines of the country no one can indulge a more friendly feeling than myself . . . ." Congressional Democrats said the Removal Act was "a measure of life and death. Pass the bill on your table, and you save [the Indians]. Reject it, and you leave them to perish."

Opponents of removal rejected the Jacksonians’ contentions at each step. First, they argued that the Indian Commerce Clause granted the federal government exclusive and plenary control over Indian relations. "[T]he expression [of the Indian Commerce Clause]," Congressman Huntington pointed out, "is general: it is made to extend to all Indian tribes, and must include those within as well as those without the territorial limits of a State." Referring to Supreme Court precedent, Huntington urged a broad interpretation of "commerce": "commerce undoubtedly is traffic, but it is something more; it is intercourse." Like the Commerce Clause, this grant of authority was exclusive, "amount[ing] to a prohibition to the States to exercise it." Senator Sprague agreed: "By the Constitution, the fundamental compact, Georgia has given to the United States the right to legislate, in certain cases, over her citizens, for their benefit . . . ."
Whigs also seized on the Jacksonians’ reluctance to declare the treaties unconstitutional. One lawmaker sought to deny Jackson the middle ground. Either the treaties were legally binding upon the states, or they were unconstitutional. If the treaties were legally binding “no act of one of the States could discharge our obligations.”\textsuperscript{54} Therefore, “the principle which lurks under this disguise, really goes to the total annihilation of the treaties from the beginning, and assumes that they were never binding on the United States at all.”\textsuperscript{55} If Jackson could unilaterally allow the states to extend their laws over the Indians in violation of federal treaties, the result would be “the total prostration of the treaties, and the unqualified power in the Executive to mould and fashion them, and to annihilate these, or any other treaties, at his own will and pleasure.”\textsuperscript{56} The practice of the government over the past fifty years would be “treated as a deliberate system of jugglery and imposture.”\textsuperscript{57} Removal opponents knew that the Jacksonians would not endorse such an extreme result.

Even assuming the Indian treaties were unconstitutional, Whig congressmen questioned whether Jackson could constitutionally decline to enforce them. Congressmen insisted that Jackson did not have the authority to refuse to enforce a treaty that he believed unconstitutional. Representative Huntington declared: “[t]he Executive has no constitutional right to say he will not execute a law, because he considers it void for want of authority to enact it.”\textsuperscript{58} To allow the president such an authority would render “[t]he legislative and judicial departments . . . powerless, and the Government . . . a rope of sand.”\textsuperscript{59} Another lawmaker declared that if the president “had the power under the constitution to do what he has done, it is a mere mockery, and an insult to the Cherokees and to common sense, to talk about the treaty of Holston as a thing which has any existence.”\textsuperscript{60} Furthermore, lawmakers contended, if the executive could ignore a duly ratified treaty, the Senate would lose its constitutional role in the formation of treaties.\textsuperscript{61} Jackson’s move was therefore a “bold step . . . of executive prerogative.”\textsuperscript{62}

More convincingly, opponents of removal demonstrated that the states’ claims were incompatible with federal statutory law. An 1802 statute, the Trade and Intercourse Act, forbade United States citizens from traveling into Indian territory without a passport.\textsuperscript{63} Would that statute

\textsuperscript{54} Id. at 999.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 1000.
\textsuperscript{57} Id. at 1002.
\textsuperscript{58} Id. at 6.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 999.
\textsuperscript{61} Id. at 1000.
\textsuperscript{62} Id. at 1001.
\textsuperscript{63} An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier, ch. 13, § 5 (1802).
apply to a Georgia law enforcement official seeking to arrest a Cherokee? The same Act disallowed any “purchase, grant, lease, or other conveyance of lands . . . from any Indian, or nation, or tribe of Indians, . . . unless the same be made by treaty or convention, entered into pursuant to the Constitution.”

Even if a state did not directly seize the Indians’ land, would the statute prevent a state citizen from purchasing land from an Indian now within the state’s jurisdiction? If yes, what would it mean to say that the Indians had been brought within the orbit of state law? Finally, the Trade and Intercourse Act granted the “courts of the United States . . . full power and authority to hear and determine all crimes, offences and misdemeanors against this act.” Since the Act criminalized a wide array of behavior, not much room would be left for state court jurisdiction.

Finally, opponents of removal persuasively disputed Jackson’s account of past practice. Congressman Huntington pointed out that “all the acts of the Continental Congress were predicated on the assumed basis that the Indian tribes had a just and legal right to the occupancy of their lands, indefinitely, and that the only subsisting right of the Government to them was . . . the exclusive right of purchase, and ultimate, contingent right in fee.” Huntington also wondered why the states had never before “claimed or exercised” the right to extend their laws over the Indians. Moreover, acts of Congress contemplated the Indian territories as separate from the states: dating back to the eighteenth century, Congress had provided for the “punishment of citizens or inhabitants of the United States who commit crimes in the Indian territories, in the same manner as if the offence had been committed within the jurisdiction of the State of which [the wrongdoers] were inhabitants or citizens.” Congressman Ellsworth wondered: “Can we need other evidence that our relation to the Indians has been national, exclusively, from the first?”

Another lawmaker declared:

We have dealt with [the Indians] by commissioners appointed under all the forms of the constitution. We have asserted our compacts to be definitive treaties with them as nations. We have ratified them like other treaties. They are promulgated in the statute book as the law of the land . . . . We have taken their lands as cessions—terms totally senseless if they are citizens or individuals. We have stipulated for the right of passage through their country, and for the use of their harbors, for the restoration of prisoners, for the surrender of fugitives from justice, servants, and slaves.

Against such a persuasive demonstration of past practice, the Democrats’ position seemed disingenuous at best.

64. Id. § 12.
65. Id. § 15.
66. 6 REG. DEB. 9 (1830).
67. Id. at 13.
68. Id.
69. Id. at 1029.
70. 6 REG. DEB. 1010 (1830).
Another, more modern argument was available to the Whigs, although they do not seem to have articulated it explicitly. The Whigs might have distinguished between two heads of federal authority: the Indian Commerce Clause and the treaty power, which grants the president the power "to make Treaties, provided two thirds of the Senators present concur."71 Even if the federal government could not regulate intrastate Indian affairs under the Indian Commerce Clause, therefore, it might still have such authority under the treaty power. The critical question, then, was whether the federal government could accomplish through treaties what it could not through general legislation. That question would be answered in the affirmative nearly a century later, in the groundbreaking case of Missouri v. Holland.72 In that case, the Supreme Court held that a federal statute implementing a treaty regarding migratory birds was constitutional, even though a federal law on the same subject in the absence of a treaty would have exceeded Congress’s Commerce Clause power.73 But in the 1830s the scope of the treaty power was still an unanswered question. Removal opponents did not raise this point.

Two years after the passage of the Removal Act, the Supreme Court rejected the Jacksonians’ position, resolving the question of Indian independence decisively in the Indians’ favor in the landmark case of Worcester v. State of Georgia.74 In the late 1820s and early 1830s Georgia extended its laws over the Cherokees and forbade any white missionaries from entering the Indian country without a state license. Samuel Worcester, one such missionary, disobeyed Georgia’s law and was seized by the state militia. After losing in the Georgia state courts, Worcester challenged Georgia’s extension of state law over the Cherokees in the United States Supreme Court. Georgia’s laws, Worcester’s attorneys argued, usurped Congress’s constitutional power to regulate commerce with the Indian tribes (a “dormant Indian Commerce Clause” contention), violated provisions of numerous treaties guaranteeing Indian sovereignty, and infringed the 1802 Trade and Intercourse Act.75

Chief Justice Marshall delivered a ringing victory for the Cherokees. Marshall first concluded that the Supreme Court had appellate jurisdiction under the Judiciary Act of 1789, since the case drew into question “the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question.”76 He

72. 252 U.S. 416 (1920).
73. Id. at 432-33.
74. 31 U.S. 515 (1832).
75. 31 U.S. at 539-40.
76. Id. at 541. A related issue, unresolved in the early 1830s, was whether the Supreme Court’s appellate jurisdiction extended to review of state criminal cases. The Judiciary Act referred to “any final judgment or decree in any suit.” Id. at 566. Although Chief Justice Marshall did not expressly address the point, Justice McLean’s concurrence in Worcester concluded that the word “suit” did not imply a distinction between civil and criminal cases. Id.
then disputed Jackson’s account of past practice; Great Britain, Marshall pointed out, “considered [the Indian nations] capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.” 77 During the Revolutionary War, the United States concluded a treaty with the Delaware tribe that guaranteed “all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties.” 78 Another treaty “solemnly guarant[eed] to the Cherokee nation all their lands not hereby ceded.” 79 Finally, past treaties “treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States.” 80

But the Indians were not entirely independent. Marshall argued instead for exclusive federal control of Indian relations: “[t]his relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.” 81 He wrote: “The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.” 82 The U.S. Constitution, Marshall added, endorsed this model, similarly contemplating exclusive federal control over relations with the Indian tribes. 83 The treaties were therefore constitutional. Marshall concluded, “the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.” 84

In his concurring opinion, Justice McLean stated the critical point plainly: “So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government, within the limits of a state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.” 85 The Court accordingly reversed Worcester’s conviction.

Worcester and the other missionaries, however, remained in jail, since Georgia, which had neglected even to appear before the Court, refused to comply with the Court’s ruling. The federal executive was of no help either; President Jackson reportedly said: “John Marshall has made his decision; now let him enforce it.” But it is not clear whether Jackson intended openly to defy the Court’s ruling or whether legal technicalities

77. Id. at 548-49.
78. Id. at 550.
79. Id. at 556.
80. Id. at 554.
81. Id. at 555.
82. Id. at 557.
83. Id. at 559.
84. Id. at 561.
85. Id. at 593.
prevented the executive branch from enforcing the decision. Ronald Satz says that “President Jackson did not have legal authority to use military force to execute the Supreme Court’s order.”86 The Georgia state court had “declined to acknowledge in writing its refusal to obey the order,”87 and no provision in then-existing federal law provided a mechanism to seek a writ of error challenging such a refusal. Furthermore, Worcester could not launch a collateral challenge against his confinement since the federal habeas corpus statute at the time applied only to prisoners in federal custody. It is difficult to believe, however, that the federal government would have no legal way to counteract such a blatant refusal by a state to comply with a binding Supreme Court decision on questions of federal constitutional law. In any event, Georgia’s Governor pardoned Worcester, averting a potential showdown.

Despite his inflammatory rhetoric, President Jackson quietly backed away from his legal arguments against Indian self-government in the wake of Worcester. Instead, Jackson focused on the practical effects on the Indians of living in communities surrounded by hostile whites. “Established in the midst of another and a superior race, and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.”88 That fate could be avoided only “by a general removal beyond our boundary and by the reorganization of their political system upon principles adapted to the new relations in which they will be placed.”89 Such a result would end “many difficult and embarrassing questions arising out of [the Indians’] anomalous political condition.”90 In the end, the President’s legally dubious insistence that the federal government had no power to prevent the extension of state law over the Indians is best viewed as an attempt to repay his election debts to the southern states.91

The reverberations from the constitutional showdown over the Removal Act echoed for years afterwards. Three years after Worcester, as the removal was proceeding apace, Henry Clay would deliver an eloquent speech on the floor of the House making the argument for honoring the Indian treaties. Clay began with the premise that “[t]he rights of the Indians . . . were to be ascertained, in the first place, by the solemn stipulations of numerous treaties made with them by the United States.”92 Clay then surveyed the dozens of treaties the United States had concluded with the various Indian tribes since 1791, pointing out each instance when the Indians had been solemnly guaranteed their lands and their laws.93 Clay

86. RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 49 (1975).
87. Id.
89. Id.
90. Id.
91. See SATZ, supra note 86, at 11, 47-50.
92. 11 REG. DEB. 289 (1835).
93. See id. at 290-94.
pointed out the many ways Georgia had violated the treaties: by abolishing the Cherokee government, dividing and surveying the Cherokee lands, distributing the land by lottery to Georgia citizens, and forbidding Indians from testifying in the “courts of the white man.”94 Clay even revealed how Georgia had insulated its practices from federal judicial review:

[T]he judges of the courts of Georgia are restrained from granting injunctions, so that the only form in which the Indian can come before them is in the form of an appeal; and in this, the very first step is an absolute renunciation of the rights he holds by treaty, and the unqualified admission of the rights of his antagonist as conferred by the laws of Georgia: and the court is expressly prohibited from putting any thing else upon the record. Why? Do we not all know the reason? If the poor Indian was allowed to put in a plea stating his rights, and the court should then decide against him, the cause would go up on appeal to the Supreme Court; the decision could be re-examined, could be annulled, and the authority of the treaties vindicated. But, to prevent this, to make it impossible, he is compelled, on entering the court, to renounce his Indian rights, and the court is forbidden to put any thing on record which can bring up a decision upon them.95

If the federal government had really lacked the authority to make these treaties, Clay concluded it should have, “before the Indians were reduced by our assurances to rely upon our engagement. . . . explained to them its want of authority to make the contract.”96 If the nation did have the authority to conclude treaties with the Indians, however, those treaties were part of federal law, not to be nullified by the laws of the states.

The press contributed to the Removal Act debate as well. In a piece in the Western Recorder, an anti-removal advocate writing under the name of William Penn articulated compelling arguments against removal. How could the United States solemnly guarantee to the Indians, by treaty, that the lands west of the Mississippi would forever belong to them, at “the very moment that treaties with the Indians are declared not to be binding . . . ?”97 Penn presciently predicted that the Indians would possess their western lands only temporarily: “Who can pledge himself, that it will not be contended, ten years hence, that President Jackson, and the Senate of 1830, had no constitutional power to set apart territory for the permanent residence of the Indians?”98 Penn argued: “If the Indians are removed, let it be said in an open and manly tone, that they are removed because we have the power to remove them, and there is a political reason for doing it; and that they will be removed again, whenever the whites demand their removal, in a style sufficiently clamorous and imperious to make trouble for the government.”99 On March 9, 1830, the Western Recorder printed another lengthy argument against removal signed by William B. Calhoun, Leverett Sultonstall, Rufus Choate, Samuel Hoar, Samuel Worcester, Charles

94. Id. at 294.
95. Id. at 297.
96. Id. at 298.
97. William Penn, Present Crisis in the Condition of the American Indians, Western Recorder, Feb. 9, 1830.
98. Id.
99. Id.
Loring, Edward Reynolds, and Jeremiah Everts. These eight “distinguished counsellors at law” urged towns and counties to write “memorials” against removal, and send them to Congress.

These arguments proved to no avail, and Congress passed the Removal Act on May 28. And so this vast administrative operation of removal was set in motion with little initial direction from the legislative branch. As this article will demonstrate, the implementation of Indian removal immediately triggered serious administrative problems and questions. What if the Indians refused to treat? What if only a faction of Indians agreed to emigrate? Would the dissidents also be obliged to leave? Who would guide the Indians to their new homeland? Who would supply the emigrants on their westward trek? What if the cost of removal proved much more than expected? The Removal Act’s terse provisions supplied no answers.

And yet the Removal Act was only the first opportunity for Congress to assert control over the implementation of the removal. All of Jackson’s treaties with the Indians would eventually need to be ratified. The Senate, at least, would have the opportunity to monitor the removal tribe by tribe. The House would not be powerless, either. As the cost of removal quickly exceeded initial estimates, the president’s requests for additional appropriations multiplied.

PART 2: TREATIES WITH THE INDIANS

Choctaws

Jackson wasted no time negotiating treaties with the southern Indian tribes. The Choctaws, a nation that had inhabited the lower Mississippi Valley for generations, were the first tribe to sign a removal treaty. The Choctaw experience was a “crucial test case for the administration’s Indian policy,” and the treaty negotiations bore out many of Senators Frelinghuysen and Sprague’s fears.

Even before the negotiations began, the Choctaws were torn by internal dissension. On one side was the full-blood chief Mushulatubbe; on the other, the shrewd mixed-blood Greenwood LeFlore. The full bloods opposed surrendering any more of their southern lands. LeFlore, on the other hand, saw removal as a way to advance his personal fortunes. Immediately after the passage of the Removal Act, LeFlore convinced a council of Choctaws to draft a preemptive removal treaty. President Jackson, excited by LeFlore’s gesture, took the unusual step of transmitting the draft treaty directly to the Senate, asking for its advice on potential additions and modifications. Jackson acknowledged that he had departed

100. William B. Calhoun et. al, Circular Letter, Western Recorder, Mar. 9, 1830, at 38.
101. Id.
102. SATZ, supra note 86, at 67.
103. Id. at 69.
“from a long and for many years an unbroken usage” by not submitting to the Senate a final treaty signed by both sides.104 But he thought involving the Senate earlier was justified, since “[t]he Choctaw is one of the most numerous and powerful tribes within our borders, and as the conclusion of a treaty with them may have a controlling effect upon other tribes.”105 Moreover, “[t]o be possessed of the views of the Senate on this important and delicate branch of our future negotiations would enable the President to act much more effectively in the exercise of his particular functions.”106 That a prominent Choctaw faction had not been involved in the drafting of the treaty was not mentioned.

LeFlore slanted his removal treaty too heavily in favor of the Choctaws to meet the Senate’s approbation, and it was not ratified. Many Choctaws, however, including Mushulatubbe, were angered that LeFlore had submitted the treaty without canvassing the entire tribe. The result was to exacerbate the long-standing feud between Mushulatubbe and LeFlore that continued throughout the treaty negotiations and the removal.107

Internal strife amongst the Choctaws created strategic opportunities for the American treaty commissioners. On September 15, 1830, Secretary of War John H. Eaton and Jackson’s friend John Coffee arrived at Dancing Rabbit Creek in Mississippi. Five to six thousand Choctaws were there to greet them. Soon after arriving, the treaty commissioners established the pattern of false choices and tough tactics that would characterize the later negotiations with the Creeks, Chickasaws, Seminoles, and Cherokees as well.108 Indeed, the circumstances of the negotiations made one congressman’s comments during the Removal Act appear prophetic. That lawmaker had warned that “[the Indians] are now sinking under the terror of the calamities which they believe await them when this bill shall have passed. They believe that the laws of the States are now to be extended over them for good.”109

First, to establish goodwill, Eaton and Coffee supplied the Choctaws with rations of beef, corn, and salt.110 Then, in a series of curt letters, the commissioners excluded all missionaries from the parley, fearing that they would sabotage the negotiations.111 Eaton and Coffee warned the Indians not to listen to the advice of the missionaries on political matters:

Fail not to attend on, and regard their admonitions while they seek to instruct the minds of your children, and to point you to the paths of moral duty and religion; but the moment they attempt an interference with your general government rela-

104. Andrew Jackson, Special Msg. to Cong., May 6, 1830.
105. Id.
106. Id.
107. See Foreman, supra note 1, at 22-30.
108. Satz, supra note 86, at 68-70.
109. 6 Reg. Deb. 1014 (1830).
111. Id. at 252-54.
tions, reject their counsels. These are subjects with which they have no right to meddle, and, indeed, should not interfere.112

With the missionaries out of the way, the commissioners alternated between expressions of goodwill and veiled threats. In their initial address, Eaton and Coffee assured the Indians that “[i]t is not your lands, but your happiness that we seek to obtain.”113 The United States had no desire to “interfere in any of your home affairs, but rather to persuade you to be at peace with one another; and to live as brothers should, that your nation may be tranquil and your people happy.”114

Then came the threats. President Jackson, the “Great White Father,” could not prevent Mississippi from extending its laws over the Choctaws, the commissioners warned repeatedly, so the Indians must choose between surrendering tribal sovereignty and removing to the west.115 If the Indians wisely chose to emigrate west of the Mississippi, “liberal provisions will be made to carry you to a country where you can be happy, and where already your fathers and brothers have gone in peace to reside.”116 If the Choctaws decided to remain in Mississippi, however, they would be subject to suit in state courts, “there to be tried and punished for any offence you may commit[,] . . . to be subjected to taxes, to work upon roads and attend in musters . . . .”117 The Choctaws faced a frightening quandary.

The treaty negotiators also played a game of divide and conquer. As Senators Frelinghuysen and Sprague had predicted, the commissioners appealed to the avarice and ambition of the Choctaw leaders, especially Greenwood LeFlore. “For a number of years the Choctaw mixed-blood leader Greenwood LeFlore had listened attentively to offers from the War Department to shower him with special favors if he encouraged his tribe to leave Mississippi.”118 LeFlore was anxious to be the “Joshua[...] of [his] nation.”119 The bribes were considerable. LeFlore and two other chiefs were offered large allotments. Other, influential Choctaws were offered land reservations as well. “Medals and gratuities were passed about,” and one chief convinced the negotiators to help finance his sons’ education at a private school in Georgia.120 The parley in Mississippi continued in this vein of bribery, featuring more intense negotiations regarding land reservations and annuities for tribal leaders.121

112. Id. at 256.
113. Id. at 256.
114. Id. at 255-56.
115. Id., at 257 (“[N]either [Jackson] nor Congress possess authority to prevent the States from extending their jurisdiction over you, and throughout their limits.”).
116. Id. at 257.
117. Id. at 257.
118. Id. at 67.
119. Id.
120. FOREMAN, supra note 1, at 27-28.
Notably there was little mention of the administration of the removal. The commissioners and Choctaws agreed that the United States would bear the expense of removal, and that the Indians would remove "within two, or two and a half years from the ratification of the treaty." But other than that, the record is bereft of detail. In their zeal to conclude the agreement, the commissioners and the Choctaw leaders left many questions unanswered. Who would supply the Indians with food and water on their westward trek? How would they be transported? How would disputes along the way be adjudicated? And so forth.

Nevertheless, the Treaty of Dancing Rabbit Creek was signed on September 27-28, 1830. The treaty mandated a massive emigration of some twenty thousand Indians hundreds of miles, but its text was pitifully bare of details. Article III called for the "Government, to extend to [the Choctaws] the facilities and comforts which it is desirable should be extended in conveying them to their new homes." Article XVI dealt directly with the administration of the removal, but was sparsely worded:

In wagons; and with steam boats as may be found necessary—the U.S. agree to remove the Indians to their new homes at their expense and under the care of discreet and careful persons, who will be kind and brotherly to them. They agree to furnish them with ample corn and beef, or pork for themselves and families for twelve months after reaching their new homes.

As in the negotiations, many questions were left unaddressed. Who would those "discreet and careful persons" be? How would the United States ensure that they would be "kind and brotherly?" The treaty was instead transparently concerned with recouping the costs of removal through selling the Indians' lands.

On December 9, 1830, President Jackson submitted the treaty to the Senate. The Senate Executive Journal records the straightforward, bare-bones ratification proceedings. Five days later after receiving the treaty, the Senate requested information from Jackson concerning, among other matters, "whether any reluctance has been manifested by [the Choctaws], or any part of them, to emigrate according to the stipulations of the treaty." Jackson supplied the requested information on December 20. It likely put the Senate on notice of the negotiators' tactics, but does not appear to have sparked any debate.

On January 4, the Committee on Indian Affairs reported the treaty to the full Senate, and it was finally debated on February 19. For unrecorded reasons, the senators agreed to strike out the treaty's preamble, which had declared the president unable to "protect the Choctaw people from the

122. Id. at 261.
124. Id. at art. XVI.
125. 21 Sen. Exec. J. 126 (1830).
126. Id. at 128.
127. Id. at 134.
128. Id. at 159-62.
operation of [state] laws." The treaty was then ratified without further discussion by a vote of thirty-three to twelve. At no point did the Senate express concern about the commissioners’ tactics or about the details of the removal. Congress had let pass one of its final chances to establish guidelines for the removal. The administration of the Choctaw removal would now be worked out by agents on the ground.

The press reacted negatively to the ratification of the Choctaw treaty. William Penn accused the government of treating the Indians like animals: “while we boast of our attachment to liberty, and set ourselves up as patrons of the rights of man, we treat the weak and dependent—even our old and long tried allies, if weak and dependent, not as men, but as animals. Fellow citizens, is this horrible iniquity to be perpetrated by us?” Since the “Indian bill leaves almost every thing to the discretion of the President,” Penn addressed Jackson personally: “Caution and delay cannot injure the United States, or the rightful claims of any state; but haste may destroy the Indians, and inflict tremendous evils upon ourselves.” The Connecticut Courant argued that the Choctaws “have been compelled to [relinquish their lands] by the cruel law of the state of Mississippi, which denationalizes them and deprives them of their dearest rights and privileges.” Not all writers were virulently anti-removal; some counseled capitulation. The Reverend Cyrus Kingsbury, for example, wrote: “Whatever the consequences may be to [the Choctaws], they must now submit.”

**Chickasaws**

The 1832 treaty with the Chickasaws followed in the mold of the Choctaw treaty of 1830. Article after article of the Chickasaw treaty dealt in detail with surveying and dispensing the land the Indians would leave behind. One Article spelled out the benefits the Chickasaw chiefs would receive. Like the Choctaw treaty two years earlier, the Chickasaw treaty

129. Treaty of Dancing Rabbit Creek, supra note 123, preamble. That the Senate focused on the treaty’s preamble suggests it was aware of the treaty commissioners’ hardball tactics. Why then did the Senate nonetheless vote to ratify? Unfortunately, the debate over the striking of the preamble was not recorded. Given the need for a two thirds vote, it seems possible that anti-removal senators struck a deal with Democrats. The Jacksonians needed two thirds and the Whigs did not want explicitly to endorse Jackson’s state sovereignty argument.

130. 21 SEN. EXEC. J. 162 (1831).

131. William Penn, *What Are the People of the United States Bound To Do In Regard To The Indians?*, WESTERN RECORDER, Dec. 21, 1830, at 0_1.

132. *Id*.

133. Decision of the Choctaws To Abandon Their Country, CONN. COURANT, May 4, 1830, at 2. This editorial was written before the formal signing of the treaty, but after the Choctaw national council had agreed to negotiate.


136. *Id*. at art. XII.
of 1832 said little about administration. Article X was the only one to deal directly with the removal:

Whenever the Chickasaw nation shall determine to remove from, and leave their present country they will give the President of the United States timely notice of such intention, and the President will furnish them, the necessary funds, and means for their transportation and journey and for one years provisions, after they reach their new homes, in such quantity as the nation may require, and the full amount of such funds, transportation and provisions, is to be paid for, out of the proceeds of the sales of the ceded lands.137

In other words, the Chickasaws would pay for their own removal.

The Senate did not clarify the details of the removal. Jackson transmitted the treaty to the Senate on December 12, 1832.138 On December 28, the Senate asked for a copy of Jackson’s instructions to the treaty commissioners.139 Before Jackson’s reply, the Committee on Indian Affairs reported the treaty to the full Senate without amendment.140 Jackson complied with the request for information on January 8, 1833.141 On February 28, the Senate resolved disputes concerning the distribution of the Chickasaw lands after removal, but the discussion did not touch upon the removal itself.142 The treaty was ratified by a resounding vote of twenty-three to four.143 Congress again left the administrative issues to be resolved by the removal agents themselves.

Creeks

The treaty negotiators were unable to convince the Creeks to sign a straightforward removal treaty. The tribe did, however, agree to convert its tribal land to private allotments.144 “[N]inety principal Chiefs of the Creek tribe,” as well as “every other head of a Creek family,” would divide the allotments.145 The treaty merely encouraged the Creeks to remove west of the Mississippi.146 The Jackson administration promised to protect the Creeks who chose to stay behind from intruders.147

Since removal was not technically mandated, the Creek treaty of 1832 spelled out even fewer details than the Choctaw and Chickasaw

137. Id. at art X.
139. Id. at 290-91.
140. 22 Sen. Exec. J. not numbered (1832).
141. Id. at 294-95.
142. 22 Sen. Exec. J. 317-21 (1833). To protect the Indians, Senator Moore proposed setting aside one hundred of the 2500 land reservations provided by the treaty for “Indians or persons of mixed Indian blood alone.” His amendment to the treaty was rejected by a vote of twenty-five to two.
145. Id. art. II.
146. Id. art. XII.
147. Id. art. V.
treaties. Like the Chickasaw treaty, the Creek treaty focused almost exclusively on administering the lands the Creeks would leave behind.\textsuperscript{148} In terms of the removal, Article XII stated simply:

The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey . . . \textsuperscript{149}

The treaty promised “each emigrating warrior a rifle, mounds, wiper and ammunition and to each family one blanket.” To induce a collective will to emigrate, the treaty guaranteed the Creeks a blacksmith as soon as half of the tribe removed, and “another [blacksmith] when two-thirds emigrate, together with one ton of iron and two hundred weight of steel annually for each blacksmith.”\textsuperscript{150}

This half-way approach to removal was a recipe for an uncoordinated, piecemeal emigration. At least in the text of the treaty, no consideration was given to who, if anyone, would assist the Creeks who chose to remove. What time of year would they depart? How would they be supplied upon the way? Was the United States really willing, at its expense, to supply many different parties of emigrating Creeks whenever they chose to remove? In a familiar pattern, the treaty provided no answers.

The Senate speedily ratified the Creek treaty, perhaps thinking a more concrete version would be negotiated later. On March 26, 1832, only two days after it was signed, President Jackson submitted the treaty to the Senate.\textsuperscript{151} Two days later, the Committee on Indian Affairs reported it without amendment.\textsuperscript{152} The next day, Senator Frelinghuysen questioned whether the treaty had been negotiated with authorized Creek representatives, but his motion to request information to that effect from President Jackson was easily defeated.\textsuperscript{153} On April 2, forty-three Senators voted to ratify the treaty, including removal opponents Sprague and Robbins.\textsuperscript{154} The Senate had missed a chance to mitigate some of the worst consequences of a troubled removal.

\section*{Seminoles}

The treaty negotiations with the Seminole Indians in Florida began on a bad note. Treaty commissioner James Gadsden arrived in Polatka, Florida, on March 16, 1832, after braving “most unfavorable weather for traveling.” The Seminole chiefs, however, “were on their annual hunt, and

\begin{thebibliography}{9}
\bibitem{148} Id. art. I-VII.
\bibitem{149} Id. at art. XII.
\bibitem{150} Id. at art. XII.
\bibitem{151} 22 \textsc{Sen. Exec. J.} 232 (1832).
\bibitem{152} Id. at 233.
\bibitem{153} Id.
\bibitem{154} Id. at 234-35.
\end{thebibliography}
that as their supply of provisions had long since been exhausted, it was more than probable that the hunting season for this, would be protracted beyond the period of any previous year."155 The agreement finally reached on May 9 mandated only that a party of Seminoles be sent to survey the land west of the Mississippi.156 Should the Seminoles be satisfied that the land was fit for habitation, removal would commence. The treaty devoted plenty of attention to the timing of the conditional removal, but not much to the mechanics:

The Seminole Indians will remove within three (3) years after the ratification of this agreement, and the expenses of their removal shall be defrayed by the United States, and such subsistence shall also be furnished them for a term not exceeding twelve (12) months, after their arrival at their new residence; as in the opinion of the President, their numbers and circumstances may require, the emigration to commence as early as practicable in the year eighteen hundred and thirty-three (1833), and with those Indians at present occupying the Big Swamp, and other parts of the country beyond the limits as defined in the second article of the treaty concluded at Camp Moultrie creek, so that the whole of the proportion of the Seminoles may be removed within the year aforesaid, and the remainder of the tribe, in about equal proportions, during the subsequent years of eighteen hundred and thirty-four and five, (1834 and 1835).157

On the return trip, Major Phagan, the United States agent accompanying the Seminoles, convinced the Indians to sign a removal treaty. Phagan even managed to insert a provision in the treaty requesting that he be appointed the superintendent of the removal.158 Once again, the new treaty did not add much to the mechanics of the removal. The relevant sentence read only: "[The Seminoles] shall commence the removal to their new home, as soon as the Government will make arrangements for their emigration, satisfactory to the Seminole nation."159 The details of the removal would again be left to agents on the ground.

Once again, the Senate did not exercise vigorous oversight. Jackson transmitted the treaty to the Senate on December 24, 1833.160 For more than three months the Senate did not act. The Committee on Indian Affairs reported the treaty to the full Senate without amendment on April 7, 1834, and it was ratified without discussion the following day.161 Even Senator Frelinghuysen voted to ratify.

Cherokees

The Cherokee removal was perhaps the most infamous of the five. Much has been written about the treaty negotiations and the subsequent

156. Treaty with the Seminole, U.S-Seminole, May 9, 1832, preamble, 7 Stat. 368.
157. Id. art. VII.
158. SATZ, supra note 86, at 101-02.
159. Treaty with the Seminole, supra note 156.
160. 23 SEN. EXEC. J. 338 (1833).
161. Id. at 385-86 (1833).
Trail of Tears to Oklahoma.¹⁶² For years, Cherokee leaders steadfastly resisted pressure to sign a removal treaty. After the state of Georgia increased pressure on the Cherokees by formally extending state law over them in 1828, a dissident tribal faction favoring treaty negotiations emerged. President Jackson decided to deal only with this "Treaty Party," and the Treaty of New Echota was signed on December 29, 1835.¹⁶³ This lengthy treaty more fully spelled out the details of removal, but still left many questions unanswered. Article 8 read:

The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.¹⁶⁴

The actual circumstances of the Cherokee removal made a mockery of Article 8's ostensibly kind intentions.

The Senate narrowly ratified the Treaty of New Echota. To be sure, the ratification proceedings in the Senate came closer to vigorous oversight than any other treaty ratification proceedings in the 1830s. The Committee on Indian Affairs reported the treaty to the full Senate on April 19, 1836.¹⁶⁵ On May 18 Henry Clay argued that the treaty "was not made and concluded by authority on the part of the Cherokee tribe competent to bind it." Clay suggested instructing the president to reopen negotiations with authorized Cherokee leaders. But the Senate rejected Clay's motion to reject the treaty by a vote of twenty-nine to fifteen.¹⁶⁶ Clay’s concerns had evidently rattled the Senate, however, and the treaty was ratified by a one vote margin.¹⁶⁷

**Paying the Cost**

The treaty ratification processes, however, were not Congress’s last chances to assert control over the 1831-1833 removals. As the costs of removal quickly exceeded initial estimates, Jackson was forced to return

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¹⁶³. This is all amply documented in SATZ, supra note 86, at 97-100.


¹⁶⁶. Id. at 545.

¹⁶⁷. Id. at 546.
to Congress again and again for additional appropriations.\textsuperscript{168} Then as now, Congress resisted funding requests and demanded explanations. On March 31, 1832, right after some of the costs of the previous winter’s removal had been reported to Congress, House members showed the first signs of discomfort by attempting to strike out appropriations for houses for Indian agents.\textsuperscript{169} Congress’s concerns with the removal, however, had more to do with thrift than with the Indians’ welfare. No congressman expressed alarm over the suffering that plagued the first groups of emigrants.\textsuperscript{170}

Congressman Sevier of Arkansas responded to charges of extravagance by defending the parsimony of the removal agents:

\textquote{[M]uch has also been said about the five hundred thousand dollars appropriation. Gentlemen ask, with apparent surprise, what has become of that money? Sir, I have the honor to know the whole of these disbursing agents, with two or three exceptions—they are all my constituents. In conducting the emigrating Indians from the east to the west side of the Mississippi river, no doubt much of that money has been expended. I take this occasion to assure gentlemen that it is my sincere belief that, whenever this matter may be investigated, the most fastidious will be satisfied that every dollar of that appropriation which has been expended has been spent honestly, faithfully, and, I may add, judiciously.\textsuperscript{171}}

In a March 12, 1832 report to Congress, the War Department defended the large expenditures.\textsuperscript{172} Pointing out “the great distance at which” the removal was conducted, the Department contended “that large advances of money were absolutely indispensable to effect the object of the Government.”\textsuperscript{173} It would make little sense to require removal agents hundreds of miles away to settle their accounts on a quarterly basis: “In making these advances, little regard could be had to the usage of the department in ordinary cases, to wit: the exaction of a settlement of one quarter’s expenditures before the means of meeting those of another were remitted.”\textsuperscript{174} Therefore, the War Department assured Congress, much of the missing funds had not yet been expended: “Thus, large balances appear against individuals who have expended a part of such apparent balances, and have hardly received the remainder . . . .”\textsuperscript{175} Moreover, “[t]he active and constant employment of the agents; the flooding of the country from the almost unprecedented fall of rain; and the infrequency of mail communication between some of the more distant points; render the delay in the reception of accounts unavoidable.”\textsuperscript{176} The Department promised Congress that the agents would “speedily” balance their books: “there can be no doubt, from

\textsuperscript{168.} It appears that agent salaries were paid out of appropriations to the Indian Department, while all other costs of removal were specially appropriated.
\textsuperscript{169.} 6 Reg. Deb. 2326-27 (1832).
\textsuperscript{170.} The problems that plagued the Choctaw emigration are detailed \textit{infra} at Parts III-IV.
\textsuperscript{172.} H. Doc. No. 02-171, at 2 (1832).
\textsuperscript{173.} \textit{Id}.
\textsuperscript{174.} \textit{Id}.
\textsuperscript{175.} \textit{Id}.
\textsuperscript{176.} \textit{Id}.
the high standing of the superintendents and agents, and the faithful execution of other and important trusts which have before been confided to them, that their pecuniary responsibilities will be speedily and satisfactorily adjusted.”

For the time being, the House accepted the War Department’s explanation and Congressman Sevier’s assurances. On May 14, 1832, for example, Congress appropriated an additional $157,694 “to defray the expenses of transporting and subsisting such portions of the various tribes of Indians as have heretofore emigrated west of the Mississippi, or as may emigrate during the present year, in conformity with the provisions of various treaties entered into with them.” Eight months later, as the costs of the Choctaw removal skyrocketed, Congress appropriated another $368,760 “[f]or expense of removal and subsistence of the Choctaw Indians.” Congress might have attached conditions to these appropriations. But although it appears that amendments to the latter bill were proposed and adopted, no debate is evident from the House or Senate Journals.

Not until February 1834 was there significant debate about the costs of removal. As in 1832, Congress emphasized the alleged lack of economy and frugality. On February 26, while debating the 1834 appropriation for the Indian Department, Congressman Vinton declared that he “had always opposed this Indian Department, and its operations; because, while they were carried on at remote points, removed from all observation and scrutiny, where there is the greatest opportunity afforded for fraud, abuse, and extravagance, there is less of system and accountability in the expenditure of money than in any other department of Government.” The passage of the Removal Act in 1830 had only worsened these accountability problems by “introduc[ing] into that department new and great operations, necessarily involving very heavy expenditures of money.” Vinton complained that “four years have now gone by [since the Removal Act of 1830]; something like six millions of dollars have been expended since that time; it has been, as was foretold, a perfect waste-gate into the treasury.” Vinton was afraid that “[a]t the rate which the administration has gone on thus far, the treasury will be absolutely bankrupt before the end of this year.”

In May 1836 the Senate briefly debated the progress of the removals. Senator White “spoke of the delays in the emigration of the Indians; he did

177. Id.
178. See A Bill to Carry into Effect Certain Indian Treaties, 22d Cong., 1st Sess. (May 14, 1832).
181. Id. at 2808.
182. Id. at 2809.
183. Id. at 2810.
184. Id. at 2811.
not censure the Secretary of War, who had done every thing in his power to hasten the emigration; but there was blame somewhere, and it must be in the incompetence or unfaithfulness of some of the agents that had been employed." Senator Calhoun agreed: "All these evils, he said, had been the result of mismanagement. The persons appointed had been generally incapable or unfaithful. The Government ought to have appointed men of intelligence, of firmness, and of honor, who would have faithfully fulfilled their obligations to the United States and to the Indians. Instead of that, men were sent out to make fortunes for themselves, and to oppress the Indians." As later Parts of this article demonstrate, Senators White and Calhoun had laid the blame for the botched removals at precisely the wrong doors.

The most contentious time for Congress in the 1830s, besides the debate over the Removal Act in 1830, was perhaps June 27, 1836, when the time came to appropriate money for the fraudulent Cherokee Treaty of New Echota. Upon receiving a memorial signed by a majority of the tribe, protesting the treaty, Congressman Adams moved to strike out the appropriation. Congressman Wise agreed, saying that it "was the duty of the House to look to the money of the nation; above all, to the honor of the nation; and in their action to see that they did not debase the character of the nation by the infliction of frauds upon the ignorant, and violence upon the helpless." Wise declared that if "there was a charge that the treaty had been obtained by fraud, he would never vote a dollar to carry it into effect till that charge was removed. He would not aid in carrying into effect a fraudulent treaty against an ignorant and savage people." Congresswoman Love proclaimed that "he would never vote a dollar to carry into effect a pretended treaty, in all its circumstances blacker than hell." Pro-removal advocates responded that it was the duty of the Senate to judge the propriety of treaties, not the House: "It was a treaty which the President was competent to make, which the Senate had ratified; and if it violated no part of the constitution, if it proposed no dismemberment of the Union, if it deprived the people of this country of no right, then ... the House was bound to make the appropriation necessary to carry it into effect." Moreover, supporters of removal contended that "the wrongs set forth in the memorial were only imaginary wrongs; and that the treaty had been negotiated in an open, fair, and honorable manner." After bitter debate the money was appropriated.

187. See Parts III-IV, infra.
188. 12 Reg. Deb. 4502 (1836).
189. 12 Reg. Deb. 4503 (1836).
190. 12 Reg. Deb. 4502 (1836).
The executive branch was left with almost sole control over the removal. As the president’s deputies negotiated removal treaties with various tribes, the Senate did not interfere. With the possible exception of the Cherokee Treaty of 1835, the Senate accepted every treaty, usually without amendment, and in most cases after little serious debate. As the decade progressed, the House and Senate occasionally locked horns with the War Department over the costs of removal, but never attempted to mitigate the Indians’ suffering. Although Congress demanded information from the Secretary of War about expenditures and employees throughout the 1830s, Jackson essentially enjoyed untrammeled authority over the removal. The external law from Congress was weak on issues related to the safety and health of the Indians, but strong in ensuring economy and thrift.

PART 3: THE REGULATIONS

A Chaotic Start

Federal management of Indian affairs dated to the Articles of Confederation. An Indian Department had existed at least since 1786. In 1789, the management of Indian Affairs was confided in the Department of War. In 1806, Congress established a superintendent of Indian trade, who would oversee a series of trading houses. The regulation of Indian affairs further coalesced in 1824. In March of that year, Secretary of War John C. Calhoun responded to considerable administrative disorganization and confusion in the federal government’s dealings with the Indians by creating a Bureau of Indian Affairs, with Thomas L. McKenney at its head as Superintendent. Despite its broad mandate, the Indian Office began its tenure with a mere two professional clerks and one messenger.

The Superintendent’s desk was instantly swamped with paperwork. McKenney and his two clerks were “in charge of appropriations for annuities, approving all vouchers for expenditures, administering the funds appropriated to ‘civilize’ the Indians, deciding on claims arising between Indians and whites under the trade and intercourse acts, and handling correspondence dealing with Indian affairs.” The tasks were immense. McKenney dealt constantly with legislative demands for information, requests from the Secretary of War for voluminous weekly reports, and correspondence from Indians and field officials. The backlog of work

196. 2 Stat. 402 (1806).
197. This, and more, is recounted in Satz, supra note 86, at 151-53.
was so enormous that McKenney and his clerks were almost immediately months behind. McKenney appealed to the Secretary of War for more clerks to no avail.200

McKenney inherited a widely dispersed Indian field service dating back to the Articles of Confederation. The service consisted of superinten-
dents, agents, subagents, interpreters, and other employees. Superintendents,
in charge of large swaths of territory, formed the first rung of authority beneath McKenney. Territorial governors, enjoying executive powers, some-
times doubled as superintendents. “Their broad executive powers enabled them to quell local disturbances quickly and effectively. Their proximity to the agents they supervised enabled them to give instructions and answer inquiries quickly.”201

Agents were next, each residing with a tribe of Indians. Most agents reported to their respective superintendent, but some were responsible directly to the Indian Office. Agents formed the front lines of the federal government’s Indian policies. They “arranged and negotiated treaties, filed claims, paid annuities, distributed presents, noted violations of the statutes pertaining to Indian relations, brought delegations of Indians to Washing-
ton, and reported rumors of impending hostilities.”202 Because agents were so widely distributed across the frontier, communication with Washington was difficult. McKenney thus found it necessary to allow agents broad discretion: “Indian agents had few guidelines to direct them in carrying out their duties. No code of regulations for the Indian service existed.”203 Beneath the agents were subagents and interpreters, who were appointed by superintendents and agents with the consent of the Indian Office.204

For years the Indian Office suffered from a lack of direction from the Secretary of War and from Congress, a deficiency of internal rules and regulations, and a shortage of funding. Requests for increased appropri-
tions were repeatedly trimmed down, and Congress failed to act when McKenney submitted a set of proposed regulations to guide the Indian Office. McKenney’s office carpet “quickly disintegrated into a welter of patches and holes,”205 and by 1830 the Indian Office was severely in arrears.206 Not until 1831 did Congress pass a special appropriation to settle the Indian Office’s debts.207 The Bureau was not well positioned to set in motion the massive administrative operation contemplated by the Removal Act of 1830.

And so the Secretary of War relegated the Office of Indian Affairs to the sidelines. As the first contingent of Choctaws prepared to emigrate in

200. Id. at 95-96.
201. Id. at 99.
202. Id. at 101.
203. Id. at 102.
204. Id. at 103.
205. Id. at 95.
206. Id. at 106.
207. Id. at 110.
the fall of 1831, the Secretary of War assigned the Army’s Commissary General of Subsistence, George Gibson, the task of coordinating the removal.208 The Commissary General would draw upon a corps of army officers. Gibson “had capably provided the army with rations since 1818,”209 but the removal of the Indians was another matter altogether. The challenges were moral and administrative. Thousands of Choctaws, including elderly and infirm Indians, would be transported hundreds of miles through swamps and forests. At the same time, “Gibson was under strict orders to economize as much as possible in order to disprove charges that removal would financially overburden the government.”210

The well organized, professional Army rather than the Indian field service was the logical choice to conduct the emigration. The “Thirty Years’ Peace” between the end of the War of 1812 and the Mexican War saw the professionalization of the Army. “Most of the incompetents . . . [were] weeded out.”211 The Military Academy at West Point was considerably strengthened: “facilities and staff of the Academy were expanded, the curriculum was broadened, regulations for admission were tightened, and provision was made for a Board of Visitors.”212 In the 1820s Secretary of War John C. Calhoun and Major General Winfield Scott accomplished “further innovations . . . recruiting depots were opened in major cities . . . General Scott prepared a new manual of infantry tactics . . . [and] Calhoun appointed the first commissioned Surgeon General.”213 The Army was thus better suited than any other branch of the early American administrative establishment for the task of Indian removal.

As he constructed a blueprint for the removal in the winter of 1830-1831, General Gibson drew upon the Army and the Indian field service. In December, he asked Secretary of War Eaton for the services of Lieutenant J. R. Stephenson of the 7th Infantry “for special duty in the Choctaw country.”214 Without waiting for a reply, Gibson ordered Lieutenant Stephenson

208. The Office of Indian Affairs participated in the removal to some degree, but it seems that Gibson had primary authority. As the Commissary General put it in a letter to Congress:

Much of what is connected with the preliminary steps in 1830 and 1831, will, it is presumed, appear in that part of the correspondence furnished by the office of Indian affairs, where will also appear much of what strictly appertains to Indian removal since that period. It has been somewhat difficult to separate the action of the two offices in regard to this matter; and the letters to the Department of War and the office of Indian affairs, were frequently filled with subjects of various character; some relative to Indian removal, and others to the multifarious operations of our Indian relations. But the great mass of the correspondence, relating to the policy and practical operations of the Government, in regard to the removal of the Indians west of the Mississippi, as based upon the act of Congress of May 28, 1830, has been furnished by me.


209. SATZ, supra note 86, at 70.

210. Id.


212. Id. at 151.

213. Id. at 155.

to compile a "registry of the emigrants," and authorized him to "employ as your assistants such confidential whites and Indians as you may consider essential . . . ."215 Two months later, Gibson requested the services of Captain John B. Clark of the 3rd Infantry, who became the superintendent of the removal, stationed at Little Rock, Arkansas.216 The Commissary General added Lieutenant S.V.R. Ryan to the ranks in June,217 and a man named William S. Colquhoun as well.218 Gibson assigned Captain Clark the task of overseeing the entire operation.

To prevent problems in communication, Gibson ordered all the Army officers to correspond frequently with his office and with each other: "It is very desirable that you write, as frequently as your other avocations will permit, to this office, and also to Captain Clark, who has the general superintendence of the removal and subsistence of the Indians, and give full details of the duty in which you are engaged."219 Anticipating the problems that would arise from a far-flung operation, Gibson desired "a perfect understanding and co-operation . . . among all the gentlemen engaged in the duty upon which you are about to be placed."220

At first, Gibson used the established Indian field service for informational purposes. On June 30, 1831, Gibson wrote to William Ward, the Choctaw agent, requesting a wide array of advice. Gibson wanted to know:

The number of persons who will emigrate; the time when, and places where they will assemble; the routes they will take to the Mississippi river; the time they will probably reach that river, and the places at which they will cross it; whether any road will be cut in approaching the river; if any, to what extent; and what are the means, and how much the expense of accomplishing it; what provisions will be required between the place of starting and the Mississippi, and at what points they ought to be placed; or whether they should not be transported along with the emigrants; if provisions can be obtained in the nation, or its neighborhood, and their probable cost; or, if they cannot there, where can they be procured, &c.221

Then, as the preparations progressed, Gibson and the War Department responded to needs on the ground by transferring agents in the field service to the removal. In July, the War Department appointed Colonel Wharton Rector, a "sub-agent" to the Quapaws, as a "special agent of the War Department."222 Colonel Rector would be under the command of

218. Gibson to Ward, June 30, 1831, in S. Doc. No. 23-512, pt. 1, at 20. Colquhoun's appointment was due to political patronage. In April he explained to Gibson that he had been visited by misfortune, for the "freshet has swept off my mill-dam." Colquhoun begged for an appointment: "Accumulated misfortunes have nearly crushed me, and the only hope left is, on those of my friends who have it in their power to aid me." Colquhoun to Gibson, Apr. 6, 1831, in S. Doc. No. 23-512, pt. 1, at 547.
222. Rector owed his appointment to Congressman Sevier from Arkansas, who wrote to Gibson on his behalf. See Sevier to Gibson, Aug. 21, 1831, in S. Doc. No. 23-512, pt. 1, at
Captain Clark, but Gibson’s instructions were no more specific than that. Gibson wrote to Clark: “You will assign [Rector] to such station, or employ him in whatever manner may be deemed most conducive to the good of the service.”

Despite Gibson’s efforts at harmony, the confusion began almost immediately. Discord began at the top. Not until July of 1831 did Gibson and Secretary of War Eaton realize that they were operating under completely different assumptions. For months, Gibson had thought that his duties were “confined to the west side of the Mississippi river: the Indians having been previously collected and transported or marched to the river by agents under the immediate orders of the War Department.” Learning instead that “the whole matter was confined to the Subsistence Department,” Gibson scrambled to recover. In a passage brimming with frustration, the acting Commissary General wrote:

The time has now arrived when it is of the utmost necessity that an entire understanding should exist as to this important service, and that the most active exertions should be made by those engaged in it. I therefore request to be apprised if any arrangements have been made for collecting the Indians together, and of the names of the persons who may be thus employed, with any other information relating to the removal of the Choctaw Indians . . .

The War Department did not bother to respond. Gibson preemptively ordered Colquhoun to the eastern side of the Mississippi. He then put Captain Clark in charge of removal operations west of the Mississippi River.

After confirming that he would be responsible for removal of the Indians on both sides of the Mississippi river, Gibson began working frantically. He asked the War Department to appoint George S. Gaines, a merchant possessed of “the entire confidence of the Indians,” as the removal agent east of the Mississippi river. Gibson’s instructions to Gaines were vague: he would be required to “correspond frequently with Captain Clark on all matters relating to your several duties.” The duties themselves were undefined: “[T]he precise modes of removal, the routes to be taken, 855. After Rector received his appointment, he complained to Sevier about the pay and the benefits. Sevier relayed Rector’s complaints to Gibson: “Can’t you allow Colonel Rector transportation when travelling? Or can’t his expenses be paid by Government, as are the expenses of the assistants of General Gaines? And, lastly, will not the Government furnish him for his use, when in service, a horse?” Sevier to Gibson, Dec. 10, 1831, in S. Doc. No. 23-512, pt. 1, at 858.

226. Id.
227. Id. at 22.
and the places of crossing the Mississippi swamps and river, cannot be fixed at this distance from the place of action. They will therefore be, in a great measure, left to the discretion of the superintendent.”  

Dividing the removal responsibilities between agents positioned on opposite sides of the Mississippi River was a recipe for mass confusion. In a long missive to Gibson, Captain Brown elaborated on the difficulties.

Suppose . . . the superintendent west of the Mississippi is informed by the superintendent east of the river that, by the first of October next, five thousand . . . of emigrants will be at the Mississippi, and will cross that river at four different places, (and here let it be understood that the superintendent east of the Mississippi selects the crossing places, the superintendent west has no voice nor control until the emigrants are landed on the west bank of the Mississippi . . .). The superintendent west . . . proceeds and makes arrangements . . . and, as matter of course, calculates on receiving the emigrants at the crossings named. He sends his agents to these points with the means and supplies necessary to subsist and convey them . . . to their new homes. The routes are pointed out, and depots of supplies are established, to be availed at the times specified and of need. October arrives; the means . . . are concentrated, and are in readiness to meet the objects for which they were engaged; every thing is under pay and expense, and each day involves large sums; but, by some cause or other, the emigrants do not arrive: a month or so rolls round. In the interim rumor is afloat; every thing is kept up; the highest expectancy prevails. When, very unexpectedly, information is received that the emigrants are landing from steamboats at some place, up some of the tributaries interior, and perhaps a hundred or two miles distant from the crossings of the Mississippi first named; and, instead of being in detachments, the whole are embodies and are at the same place, and remote from all expectancy: consequently, no preparation has been made to receive them.  

“Under such circumstances,” Brown argued, “it is quite obvious that thousands of dollars are at once wasted, which would not have been the case were the business conducted by one person.” Conflicts among the agents positioned on either side of the river also contributed to the difficulties. Which agents had authority over emigrating Indians when they were crossing the Mississippi? Colquhoun posed that question to Gibson, noting that “Captain Brown has manifested much displeasure at the mere suggestion of aid from this side of the river . . .” Brown called the division of responsibilities the “greatest source of evil.”

Three years later, when Gibson transmitted his correspondence with the Indian agents to Congress, he noted with regret his hastiness and the immense discretion he was forced to confide in the agents on the ground:

Every effort of the Subsistence Department had, in fine, been entirely devoted to the objects above stated [superintending the removal west of the Mississippi], leaving for the Department of War the more important and difficult task of starting the emigration on the east of the Mississippi. But it was afterwards deemed proper to confide the whole operation to the Commissary General. The determination to do this will appear by the correspondence to be late, and action, in conse-

232. *Id.*


234. *Id.* at 451.


quence, hasty. Much discretion is given in the foregoing instructions that, although well confided to the individual appointed, was very properly afterwards restricted.\footnote{237}

The agents’ broad discretion extended to the appointment of subordinate agents. Gibson instructed Captain Clark to “select the points of issue for rations and to appoint persons to these posts.” Furthermore, Clark would be “strictly responsible” for these civilian disbursement agents. The combination of military and civilian personnel was bound to create friction, and it did. The civilians would not be under the immediate control of the army officers, and would be directly entrusted with thousands of dollars in government funds. When making the appointments, Clark would not be familiar with the “integrity or qualifications” of the applicants. What if an agent failed to perform his duties, or worse, made off with government funds? Clark was not pleased with Gibson’s orders. He wrote to the Commissary General: “I hope the instructions are not intended to mean all that they seem to convey, viz, that I will select agents from persons with whose integrity or qualifications I am entirely unacquainted, to be placed on duty beyond my immediate control, and to be responsible to the United States for the faithful performance of their duty.” When Gibson failed to assure Clark that he would not be held responsible for “faithless” agents, Clark resigned his post.\footnote{238}

Another idea, generated by the Indian chiefs, created more administrative complications. Greenwood LeFlore, the Choctaw chief who had orchestrated the removal treaty, suggested to Gibson and the Secretary of War that the Indians be allowed to remove themselves in exchange for a “commutation fee” of ten dollars per head. Article XVI of the Treaty of Dancing Rabbit Creek had made no mention of commutation, and indeed had promised that the United States would “remove the Indians to their new homes at their expense and under the care of discreet and careful persons.”\footnote{239} Nevertheless, LeFlore, Gibson and Secretary Eaton concluded that the commutation plan would result in “[n]o inconsiderable saving . . . to the Government.”\footnote{240} President Jackson, motivated by concerns for economy, gave the plan his immediate personal approval. Henceforth, Indians would be allowed to choose whether to emigrate by themselves or with the United States Army. The commutation idea was codified the following year in the War Department’s 1832 “Regulations Concerning

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238. This paragraph draws from Satz, supra note 86, at 75-76. Clark’s resignation was also prompted by another miscommunication, this one involving transportation by wagons. Clark had been under the impression that the removal would proceed via steamboat. When Gibson informed him that at least some Indians would emigrate via land, Clark protested his lack of experience: “No one can form a proper estimate of the difficulties that will attend the removal by land, and subsistence on the route, who has not been in this country, and made himself acquainted with them. I am free to confess that I do not feel competent to the task.” Clark to Gibson, July 30, 1831, in S. Doc. No. 23-512, pt. 1, at 562.

239. Treaty of Dancing Rabbit Creek, supra note 123, art. XVI.

the Removal of the Indians” and in subsequent Indian treaties. This plan would have tragic consequences. The removal agents “soon learned that [the commutation] plan was promoted by mixed-bloods who planned to subsist the Indians on the way by hunting, and then collect from the government the allowance of ten dollars for each Indian.” The result was “to aggravate the rancor and bitterness already existing between individuals and partizans of Indians.”241

The administrative apparatus that arose in the summer of 1831 was haphazard, inexperienced, assembled on an ad hoc basis, and insufficiently instructed. At every level, confusion reigned supreme. Due to political pressure to prove that a removal could be successfully, rapidly, and cheaply accomplished, officials did not standardize the process, instead leaving almost every important decision to agents on the ground. This technique had its benefits, as it “allowed removal agents to feed hungry emigrants and provide clothing or medicine in emergency situations without waiting for authorization from Washington.”242

But the lack of better instructions, the obsession with thrift and economy, and an exceptionally harsh winter caused massive administrative difficulties and much human suffering. The Indians missed their fall departure date, instead leaving in the depths of winter. Deluges of rain damaged roads, delaying the Choctaws at Memphis. A lower than expected Arkansas river forced one steamboat to unload a party of emigrants ninety miles away from Fort Smith, where they camped for almost a month, enduring “one of the coldest periods ever known in the country.”243 Lack of communication and coordination caused massive numbers of emigrants to converge simultaneously at Arkansas Post, “completely swamp[ing] the facilities provided for them.” The Mississippi River was clogged with ice, hampering steamboats from transporting emigrants from bank to bank. When the steamboats did manage to depart, the “disgusting sight of a vessel loaded with human beings under no control or regularity, leaving their evacuations in every direction through the whole range of the cabins and decks, would create in the mind of any one an additional allowance for the transportation.”244

241. FOREMAN, supra note 1, at 49.

242. SATZ, supra note 86, at 78. On November 30, 1831, Captain Brown informed Lieutenant Ryan that he could issue an additional pint of corn to each emigrating Choctaw without waiting for permission: “In the mean time [while waiting for formal authorization] you will make occasional issues of an additional pint of corn for each of the emigrants . . . you will be governed by your own discretion and the necessity of the case.” Brown to Ryan, Nov. 30, 1831, in S. Doc. No. 23-512, pt. 1, at 424.

243. On December 15, Brown wrote to Gibson: “[T]he mercury has been down to Zero, and for ten days past has averaged about twelve freezing degrees . . . So much, and so severe cold weather, has never before been experienced in this section of the country, and if it is with you, in proportion to your northern location, you must have a Siberian winter of it.” Brown to Gibson, Dec. 15, 1831, in S. Doc. No. 23-512, pt. 1, at 427. Making matters worse, the Indians were “generally very naked, and few moccasins are seen among them.” Colquhoun to Gibson, Dec. 10, 1831, in S. Doc. No. 23-512, pt. 1, at 593.

The Indians who chose to emigrate by themselves fared even worse. Fearing steamboats, they traveled by land, and one party, numbering in the hundreds, found itself trapped in a swamp. Many died from hunger and the cold before United States army officers came to the rescue.245 The officer who rescued the suffering Choctaws recounted:

[O]n the 22nd Inst that they were then in the Mississippi swamps suffering beyond description, both for provisions for themselves and forage for their stock. I immediately repaired to the Post of Washita, and went into the swamp myself and brought out the poor fellows with their few horses and cattle, many Horses having died and great numbers of the Indians much frosted.246

Making matters worse, the arrival of funds was delayed. One removal agent, carrying $50,000 intended for Captain Brown and Lieutenant Stephenson, was halted for a month by the vicious weather. Brown wrote to Gibson in desperation: “Four of my agents are now in charge of emigrants, and all are begging for funds. They tell me it will be impossible to sustain themselves and parties much longer. Drafts are coming in from all quarters; the holders are disappointed, they are clamorous; some have come two hundred and fifty miles, and have had to return without their money.”247

The removal resulted in indescribable human suffering. Gibson, with characteristic understatement, referred to the fall and winter of 1831 as “unparalleledly severe.”248 An article in the Religious Intelligencer described “the suffering among the emigrants from the extreme severity of the weather, they being as usual but thinly clad; and before they reached their destination they probably suffered from scarcity of provisions.”249 Angie Debo is the most accurate:

The sufferings of the emigrants were almost beyond belief. It was a difficult journey at best—350 miles through a wild unsettled country of vast swamps, dense forests, impenetrable canebrakes, and swollen rivers. Added to this was a great deal of blundering and inefficiency on the part of the War Department. Additional suffering and loss of life was caused by one of the worst blizzards in the history of that region, which broke upon the emigrants who were removed during the Winter of 1831-1832 . . . . The population of the tribe was permanently decreased by the losses sustained during this terrible experience.250

An Infusion of “System”: The War Department’s Regulations

Political pressure to remove the Indians quickly and cheaply had led to a poorly planned and executed operation in the winter of 1831-1832. Not that the War Department would admit it. A War Department report to

245. See Foreman, supra note 1, at 56-62.
246. Cross to Brown, Dec. 28, 1831, Correspondence of the Office of Indian Affairs.
249. The Emigrating Choctaws, Religious Intelligencer, Mar. 3, 1832, at 634.
250. Angie Debo, The Rise and Fall of the Choctaw Republic 56 (1934).
Congress in February of 1832 hinted only obliquely at the suffering that plagued the winter of 1831-32, and blamed it on the Indians’ savagery: “To collect savage men together, who are ignorant of the very first rudiments of civilization, who have, in fact, neither government, law, religion, property, arts, nor manufactures; who are actuated by impulse, and not by reflection: by whom the past and the future are almost equally disregarded, and to teach them abstract principles, is a process which seems, on calm reflection, to promise as little as it has performed.”251 Moreover, “[t]he scene of action is remote; the people to be affected, ignorant, barbarous, and vindictive; and the principal topics of inquiry, without the sphere of ordinary observation.”252

Still, the War Department insisted that it had matters in hand. “Improvements in the system have been recently made, and the operations are now conducted upon more rational principles, and with a better prospect of partial success.”253 That being so, the Department cautioned against undue congressional interference: “With respect to [the Indians’] removal and temporary subsistence, no further legislation is at present required.”254 Congress should confine itself to making, “from time to time,” the “necessary appropriations.”255 “[T]he mode of effecting the object, is a matter of executive regulation; and, as experience is acquired, the system itself, and the plan of administration, will be gradually improved.”256 The agents’ experience from the winter of 1831-32 was already paying dividends:

[The agents] have effected a delicate task in a manner highly creditable to themselves, and, in performing it, whether from the great extent of country necessarily traversed, the want of roads, the almost impassable nature of the swamps, or the extreme and heretofore inexperienced cold in that climate, have encountered obstacles, and overcome difficulties, of the most formidable kind. They have thus acquired an experience which will prove highly valuable, and laid a good foundation for future operations of a more extensive character.257

The War Department did suggest that Congress provide for the appointment of commissioners to “examine the business of emigration, look into the conduct of all persons employed, scrutinize the expenditures, and suggest such alterations as may occur to them.”258

Congress generally respected the War Department’s request that it stay on the sidelines, although a bill introduced in the House in 1835 would have codified some of the technical details of the removal.259 And only two months later the Department of War followed through with its

252. Id. at 17.
253. Id. at 11.
254. Id. at 10 (1832).
255. Id.
256. Id.
258. Id. at 17.
259. See H.R. 747, §§ 4-6. (Feb 19, 1835). Section 6 of the House Bill would have codified the practice of commutation discussed supra.
promises, imparting standardization to the removal process. In April of 1832, Secretary of War Lewis Cass responded to Captain Clark’s earlier concerns by putting the military fully in charge of the removal. All civilians who had participated in the 1831-1832 removal were discharged, including George Gaines. Cass thus resolved the military/civilian dilemma. A month later, Cass, explicitly responding to the need for “a more systematic plan of operations,” drafted and released a set of “Regulations Concerning the Removal of the Indians.” These regulations became the blueprint for all future removals. Much of General Gibson’s correspondence thenceforth focused on the proper interpretation and application of the Regulations.

The Regulations of 1832 was the third legal document bearing on the removal. Until they were promulgated, Gibson had drawn upon the vaguely worded Treaty of Dancing Rabbit Creek (and, to a lesser extent, the Removal Act of 1830) to answer questions concerning the removal. Now, a more specific text was available. The Regulations shifted administrative control of the removal from an inefficient scheme of individual letters to a more systematic, consistent system of rules.

The Regulations, however, were not designed to ensure the Indians’ health and safety. Quite the opposite. The Regulations instead responded to Congress’s concerns for economy by limiting access to the government purse, codifying LeFlore’s commutation idea, limiting baggage, establishing firm pay scales, providing guidelines for purchasing supplies, and the like.

Though many of the problems with the removal were due to nature’s inherent unpredictability—weather and disease—better regulations designed to mitigate human suffering would have improved matters considerably. The War Department might have required physicians to accompany each group of emigrants, for example. The Regulations might also have disallowed the commutation practice rather than endorse it.

Rather, this third layer of law was designed to implement the obvious goals of the Removal Act and the removal treaties: the relocation of thousands of Indians hundreds of miles at the lowest possible cost. In this sense, the Regulations were more tightly connected with the external law from Congress than with the conflicting, far more important realities on the ground.

Section I, obviously drafted to clear up confusion about the allocation of authority east and west of the Mississippi, made unambiguously clear that “[a]ll the subjects connected with the removal of the Indians, whether they relate to subsistence, transportation, payments, or any other matter, will be committed to the Commissary General of Subsistence, who will take the necessary measures to carry into effect the object of the laws


and treaties relating to this business, and the instructions of the Government.”

Section II systematized and limited the selection of subordinate agents. During the first removal of the Choctaws, agents had been appointed *ad hoc*, as needs arose. From 1832 onwards, one “special agent” would “be appointed to superintend the removal of each tribe.” The Regulations did not specify how the special agent (a military officer) would be appointed, but custom dictated that the War Department would have that authority. The Regulations conferred plenary authority upon the special agents: “To the special agent will be committed the general operations: comprehending the duties and conduct of the various persons employed, the preparatory arrangements, the collection of the Indians, the route, the mode of travelling, their movement and subsistence, and, generally, every thing connected with this object.” Further, special agents would be allowed to “employ assistants,” but in a departure from prior practice “[n]o persons will be employed, except temporarily and from necessity, without the previous sanction of the department.”

Each special agent would have supervisory authority over all his subordinates, including the power to suspend employment “for causes appearing to him to be just.” Any suspensions, however, would have to “be immediately forwarded to the War Department for its consideration and decision.” Finally, special agents would be required to make “weekly reports of their progress and operations,” including detailed accounts of expenditures and persons employed.

Section III dealt with disbursements. Only officers in the army, specially entrusted with disbursement funds, would be allowed access to the government purse. The War Department clearly hoped that entrusting funds only to specially designated army officers would improve accounting and lower costs. These army officers were directed to “carry into effect the instructions of the special agents,” but only “so far as the same are in conformity with the general authority given by these regulations.” Section III thus seemed to contemplate situations in which disbursing officers could justifiably ignore the orders of their superiors (the principal disbursing officer and even the Commissary General himself), invoking the War Department’s regulations in their defense. The rest of Section III dealt with the keeping of duplicate vouchers and the transmitting of quarterly accounts.

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264. Removal Regulations, *supra* note 261, § II, art. 2. This allocation of authority created confusion in the relationships between the principal disbursing agent (Captain Brown) and the disbursing agents scattered in the field. Would the disbursing agents report to the principal disbursing agent or to the special agent? Were principal disbursing agents junior to special agents? In a frustrated letter to Gibson, Brown demanded that they report directly to him. See Brown to Gibson, Feb. 7, 1833, *in S. Doc. No. 23-512, pt. 1, at 496.


266. Removal Regulations, *supra* note 261, § II, art. 3.


268. Removal Regulations, *supra* note 261, § III.
Section IV was intended to systematize the transportation of the emigrants, and it reflected the War Department’s contradictory desires simultaneously to cut expenditures and to improve the removal process. Article I seemed to envision a broad grant of discretionary authority to the special agents: “The route and mode of transportation will be determined by the special agent, having a just regard to economy and the health and comfort of the Indians.”269 But what Article I granted, the rest of Section IV took away. Article II codified the practice of commutation that had arisen during the first Choctaw removal. Article IV, concerned with cutting costs, forbade all but the “young” and “infirm” from traveling “in wagons or upon horses.” In the same vein, Article V limited the baggage the Indians were allowed to carry: “The amount of baggage will not exceed 1,500 weight for every fifty persons; nor will any wooden furniture or heavy utensils be carried.” The baggage wagons would be limited to one per fifty emigrants.270

Article 7 of Section IV addressed transportation by water. It, as well, reflected concerns about economy. If possible, the special agent should make a contract “for the transportation of each individual from the place of departure to the place of destination.” If no contract could be made, the special agent should “charter a boat for the voyage at a fixed rate.” Finally, if both options failed or were “found unreasonable or impractical, then a contract may be made for the hire of a boat by the day.” Transportation by land, dealt with in Article 9, was similarly subject to cost-cutting measures. The rest of Section IV required muster rolls to be kept on prescribed forms.271

Sections V and VI established elaborate regulations for supplying and provisioning the emigrants. Both Sections emphasized the War Department’s preference for negotiating contracts in advance with private parties rather than purchasing supplies on the open market: “It is desirable that all the important supplies should be procured by contracts upon previous public notice inviting proposals; and this rule will be adhered to where there are not strong reasons to the contrary.”272 The War Department’s preference for contracts reflected two well founded fears. First, sudden, large demand for food could spark a rise in prices. Second, the small communities along the Indians’ westward path might not have adequate supplies available. The Regulations further specified that contracts “exceeding fifty dollars in value” had to be in writing, and those exceeding three hundred dollars required the contractor to post “adequate security.” The Regulations explained the provisions to be afforded the Indians in detail: “The ration will consist of one and a quarter pound of fresh beef or fresh pork, or of three-quarters of a pound of salt pork, and of three-fourths of a quart of corn or of corn meal, or of one pound of wheat flour, to each

269. Removal Regulations, supra note 261, § IV, art. 1.
270. Removal Regulations, supra note 261, § IV, art. 2, 4-5.
271. Removal Regulations, supra note 261, § IV.
272. Removal Regulations, supra note 261, § IV.
person, and of four quarts of salt for every one hundred persons.”273 The Regulations specified that “it will be proper to have depots of provisions at reasonable distances . . . .”274

The Regulations also sought to standardize the accounting and recording of the removal. Section VIII required the “conducting officer of each detachment” to keep a “daily memorandum” detailing “impediments . . . the time of marching and of encampment . . . and, generally, of such occurrences as may best enable the Government to form a judgment of the mode in which the business has been done.”275 The final pages of the Regulations contained standard forms for disbursing officers and other agents to use when reporting expenditures to the Commissary General.

Finally, in an attempt to control the most easily manageable costs, the Regulations established pay scales. Special agents would receive an annual salary of $2,000. All others would be paid by the day. Assistant agents, enrolling agents, and conductors would receive four dollars per day.276 Appraisers and assistant conductors would be paid three dollars per day. Interpreters would collect two dollars and fifty cents per day. All other “[p]ersons employed in collecting Indians, taking charge of teams, and other duties of a similar nature, will not be allowed more than two dollars and fifty cents per day, to include their expenses; and laborers will be employed agreeably to the custom of the place where their services are wanted.”277

The 1832 Regulations were the War Department’s first serious attempt to provide direction. They established a clear hierarchy of removal officers, abandoning the old system of ad hoc appointments. The Regulations put meat on the bones of the Removal Act of 1830 and the subsequent Indian treaties, giving removal agents some idea of the bounds of their discretion. They made clear that special agents would have power to suspend their assistants, subject to appeal to the War Department. They established a rigid pay scale. Most importantly, the Regulations were the first document to limit meaningfully the discretion of the Commissary General.

But more specificity was not necessarily a positive development. As the next Part will demonstrate, by insisting on meticulous accounting and thriftiness, the War Department drew Gibson’s attention away from the Indians’ welfare. As army officers involved in the removal hunted for financial corners to cut, they overlooked other problems—such as the unavailability of medical treatment for the emigrating Indians.

273. Removal Regulations, supra note 261, § IV. As it turned out, the discretion to choose between beef and pork was useful. Captain Brown reported that “the great mass of the Choctaws” preferred beef to pork. Brown to Gibson, July 3, 1832, in S. Doc. No. 23-512, pt. 1, at 458.

274. Removal Regulations, supra note 261, § VI.

275. Removal Regulations, supra note 261, § VIII.

276. Conductors (civilians) would be paid only “where an officer of the army is not present.” See Removal Regulations, supra note 261, § IX.

277. See Removal Regulations, supra note 261, § IX.
PART 4: THE REGULATIONS IN PRACTICE

By the summer of 1832 removal agents had three legal texts to guide them: the Removal Act of 1830, the Indian treaties, and the War Department’s new Regulations. The Regulations were by far the most specific, making them more influential during the removal than the Removal Act or the treaties. In practice, though, the War Department’s Regulations did not and could not anticipate every eventuality that the removal agents would encounter.278 They also sometimes caused problems of their own. Thus another layer of instructions was necessary to guide the agents’ discretion. That set of regulations emanated from Commissary General Gibson, who spent much of the rest of 1832 and 1833 explaining to agents how the War Department’s Regulations should be applied. Through Gibson’s voluminous correspondence with field agents, the Regulations of 1832 were transformed into concrete policies. Secretary Cass and President Jackson added their own interpretations and ideas on an ad hoc basis.

Gibson’s instructions to field agents came in several broad categories. By far the most common were pleas and entreaties to maintain proper accounting standards, to keep costs down, and to file regular reports. The amount of energy, time, and paper spent ensuring economy cannot be overstated. These instructions were Gibson’s most specific. The Commissary General insisted on “scrupulous exactness in the agent’s accounts of every description.”279 Writing to John Page, a newly appointed disbursing agent, the acting Commissary General even appealed for carefully folded papers: “It is desirable that your papers should be folded to correspond, to wit: of the size of a half sheet of letter-paper folded three times.”280 Gibson scrutinized his agents’ lists of expenditures as they arrived in his office, frequently disallowing certain costs. In a letter to James Gardiner, the superintendent of the removal of the Ohio Indians, Gibson complained about Gardiner’s request for eight additional wagons: “In the first estimate you confine your demands in that respect to three light wagons, and in one of your letters you state that no conveyance at all of that kind will be required. It is not known to the department that any thing has occurred to make these wagons requisite if they were not so before.”281 Gibson also repeatedly reminded his agents to maintain muster rolls of emigrating Indians.

Gibson’s instructions regarding proper accounting sometimes were absurd. To an agent who was struggling to discover which Indians were entitled to government assistance, Gibson wrote:

278. See Montgomery to Gibson, Jan. 5, 1833, in S. Doc. No. 23-512, pt. 1, at 772 (“One serious disadvantage realized this year has been the great dissimilarity of opinion had by the different agents in relation to the true meaning and proper construction of the existing regulations . . . .”).
In order that what you have been directed to do may be perfectly intelligible, I would suggest to you this method: take your muster-roll, and add to its width as much paper as may be requisite to place opposite to each name the facts above required to be stated. For instance, draw on this addition perpendicular columns—one set for those who have been paid by drafts, another for those to whom provisions have been issued by Captain Vashon, and the third for the negroes, white children &c. . . . You will also send your monthly abstracts with regularity. The greatest care will be necessary not to feed Indians who are not entitled.282

This passage simultaneously reflects the government’s ardent desire to cut costs as well as its need for precise accounts.

The government’s cost-cutting mentality also influenced, and sometimes contaminated, Gibson’s interpretation of the Regulations. The Commissary General, for example, vigorously enforced Section IV’s prohibition on travel by horse: “No allowance can be made, under the new regulations, to Indians for their horses, no matter under what circumstances they may go west. Those persons who emigrate the present season will receive an ample supply of provisions, and the regular transportation, or a sum of money in lieu thereof. (See section 4.)”283 Later, Gibson softened this absolute prohibition, albeit only in cases of extreme necessity: “if [horses] are indispensable, you can get them, but in as limited a number as will by any possibility answer your purposes.”284 This letter demonstrates Gibson’s willingness, in certain situations, to respond flexibly to needs on the ground.

Gibson flatly disregarded the Regulations’ instructions regarding the timing of commutation fees. Section IV, Article 3 provided: “The amount necessary to be advanced to such persons [Indians choosing to emigrate on their own] previous to their departure, will be determined by the Commissary General, and will be paid when they are upon the point of commencing their journey.”285 The Commissary General, however, instructed his agents that: “No part of this sum will be advanced, but promptly paid, as was the case after the last removal, when the Indians reach the new country.”286

Leaving the emigrating Indians penniless, in violation of the War Department’s Regulations, allowed shrewd mixed-bloods to prey upon them during the trek westward. The Indian mixed-blood leaders would conduct their fellow tribesmen to the west, subsist them through hunting along the way, and then collect their commutation fees at the end. To his credit, Gibson discovered this unfortunate practice early, and cleverly interpreted the Regulations to allow removal agents to bar vulnerable Indians from emigrating on their own. The Commissary General noted that Section IV, Article 2 of the Regulations allowed only Indians “considered capable of” emigrating by themselves to take advantage of the commutation scheme. “The agents may therefore refuse to give tickets to any

285. Removal Regulations, supra note 261, § IV, art. 3 (emphasis added).
whom they may deem fit subjects for speculation on account of their poverty.”

The commutation practice also produced recordkeeping problems. For payment purposes, the government needed to distinguish Indians who had emigrated on their own from those who traveled with the removal agents. Moreover, private citizens sometimes helped groups of Indians in distress, but later found that the special agents lacked the authority to reimburse them. In the case of the Choctaw removal, the difficulties were substantial enough that “agents, finding it would interfere very much with the arrangements then making to take them on, thought best to discourage that mode of emigration.” Nevertheless, thousands of Choctaws chose the commutation option, and Gibson ordered investigations to ensure that only entitled Indians would be paid. To cut further costs, commutation allowances would be reduced for Indians who “caused the expenditure of money uselessly” by deciding only at the last minute to emigrate alone.

The Regulations’ preference for negotiating contracts for supplies created more administrative difficulties that Gibson was forced to resolve. Naturally enough, the official government policy was to award contracts to the lowest bidders. The Commissary General was particularly concerned, however, that contractors would collude to force prices up. The removal agents were worried as well. Clark expressed his concern to Gibson that the “price of beef cattle has already advanced, from a belief that the United States will be compelled to purchase at any price. This unfortunately is too true, and I fear that every advantage will be taken.” Rains said that “there has scarcely been one contract of any description whatever published in this section of country, that there has not been some combination or evident attempt of fraud upon Government among the bidders.” In one case, a contractor “who owned the salt works near the Choctaw line, hired the ‘proprietor of another saltwork to let his work lie idle’ in order to prevent competition in the sale of salt for the Indians.”

To counteract such combinations, Gibson gave the disbursing officers authority to negotiate contracts privately if necessary: “You will be partic-

294. Foreman, supra note 1, at 69.
ularly guarded against combinations among bidders; and, although you advertise for proposals, and state, as usual, that the lowest bidder giving good security shall have the contract, let this be accompanied by the proviso that the principal disbursing agent believe it compatible with the interest of Government [sic] . . . . When . . . you may think it proper to withhold contracts from the lowest bidders, you are at liberty to make them privately.”295 Additionally, removal agents Brown and Armstrong decided not to advertise the Indians’ route in advance, in order to reduce the time available for contractors to coordinate amongst themselves.296

The contract system also raised the possibility of deficient goods. To outbid each other, the contractors sometimes priced too low, and made up the difference by reducing quality. Joseph Kerr wrote to Lewis Cass: “[the contractors’] object is to make money without the least feeling for the suffering of this unfortunate people.”297 Captain Page reported to Gibson that the Indians constantly complained about the “weight and measure” of the rations. He also reported that the Choctaws “frequently could not get their rations when they were due.”298 To prevent these problems, Gibson instructed his agents to specify clearly the required quality, and provided for inspections. To fulfill part of the Treaty of Dancing Rabbit Creek, for example, Gibson instructed a Choctaw agent to contract for 400 looms and 1,000 spinning wheels. Gibson demanded only high quality goods: “The looms to be of the best seasoned materials, with hand-shuttles, cast iron rag wheels, and wrought iron wrists. And in all respects of the strongest and most durable character.” The spinning wheels as well were to be “of the best quality; the wood well seasoned. In fine, both of these articles to be what would be called first rate country looms and wheels.” Gibson further ordered the Choctaw agent to make “a specimen loom and wheel, and deposite them at Nashville, where they may be seen by those disposed to contract.” In case the contractors still produced goods of deficient quality, Gibson ordered a system of inspections: “The Choctaw agent west will inspect them; but, should any difference of opinion arise between him and the contractor, on account of rejections or deficiencies, an umpire may be

295. Hook to Brown, Aug. 21, 1832, in S. Doc. No. 23-512, pt. 1, at 144. Brown, responding to Hook’s letter a month later, reassured the Commissary General that “[i]n relation to combinations among bidders, such cannot have effect with me. The course adopted, and which I have pursued for fifteen years, that of reserving the privilege of rejecting bids deemed high, cuts up all combinations.” Brown to Gibson, Sept. 20, 1832, in S. Doc. No. 23-512, pt. 1, at 478. A year later, Brown categorically rejected any suggestion that contractors had successfully bilked the government: “I deny that any [combination] in the remotest degree has succeeded with me. The abstract of bids, and the contracts designated as taken thereon, will show conclusively that no combinations have succeeded.” Brown to Gibson, Oct. 16, 1833, in S. Doc. No. 23-512, pt. 1, at 535.

296. DEROSIER, supra note 260, at 152. At one point, a removal agent suspected that a key bridge had been destroyed in order to detain the Indians, thus prolonging the demand for food. See Brown to Gibson, June 28, 1832, in S. Doc. No. 23-512, pt. 1, at 454-55.


selected in such manner as they may choose." No explanation of how the umpire would be chosen appears from Gibson's correspondence.

Even while regulating many aspects of the removal, the Commissary General left other important details to the absolute discretion of the agents. One such matter was the route of removal. From the beginning, the officials in Washington had left that particular detail to agents on the ground, and the Regulations of 1832 did not provide further guidance. The Commissary General even refused to allow roads to be built, since "it would be hazardous to devote the public funds to works which, on an account of the uncertainty of the course the emigration would take, might be totally useless." At one point, however, for unknown reasons, President Jackson himself decreed that the second set of Choctaw emigrants would travel to the west via Memphis.

Jackson also took a special interest in the mode of removal. The War Department's Regulations had specified that removal would be either by steamboat or by wagons, but Jackson made known his decided preference for steamboats. Jackson's stubbornness created problems for removal agents. The Indians disliked steamboats. At least two agents argued early in the removal that wagon transportation would be cheaper. Moreover, many of the Indians had horses, which would be difficult to transport via water. The removal agents' initial pleas to Jackson on the Indians' behalf repeatedly went unheeded: "On the subject of removal by land, as again adverted to in your letter to me, I will remark that the determination of the President remains unaltered." Gibson suggested that the agents calm the Indians with a combination of reassurances and warnings:

If they, in reality, entertain the fears to which you allude, you will endeavor to correct their impressions. Tell them of the rapidity and certainty with which they will travel; of the distress to which the Senecas who removed last year were subjected to in their land route; and use any other arguments which may occur to your mind; but, above all, say that the plan of removal by steamboat is unalterable.

As for the horses, Gibson stated simply that "[t]hese will be taken through by land under the care of a competent number of young men." The Treaty of Dancing Rabbit Creek had provided for three groups of emigrants to depart between 1831 and 1833. The second removal of

303. Gardiner to Cass, June 2, 1832, in S. Doc. No. 23-512, pt. 1, at 687-88 ("[T]he Indians] become very uneasy on the subject . . . [t]hey were fearful some of their children might be drowned, and that all, young and old, would be in danger of being scalded to death, 'like the white man cleans his hog.'").
306. Id.
307. Treaty of Dancing Rabbit Creek, supra note 123, art. III ("[A]s many as possible of [the Choctaws] not exceeding one half of the whole number, shall depart during the falls of 1831 and 1832; the residue to follow during the succeeding fall of 1833 . . . .").
the Choctaws took place in the fall and winter of 1832-1833, and began only slightly more smoothly than the first. Determined to avoid the winter, "the Indians prepared to start earlier."308 "It was planned to assemble the Indians at convenient points in the nation, to enroll and vaccinate them. Instead of concentrating them at Arkansas Post or Little Rock as was done the year before, it was designed to have them all pass Rock Roe, a point on the White river east of Little Rock."309 Almost immediately, the agents had difficulty assembling the Indians for departure. By the spring of 1832 Mississippi had drawn the Choctaws into its jurisdiction, and state sheriffs and constables were harassing the Indians and delaying their departure.310 Whites feared that the Indians would depart without paying their debts. Colquhoun described the scene: "drunkenness prevails to an extent beyond any thing ever before experienced."311 Whites were "squatting on the lands in all directions . . . every purchaser of cultivation reservations have made small advances to the Indians, with a promise to pay the balance when the Indians make a good title; which can hardly ever be effected, owing to the remote residence of the Indians when they remove to the west."312

The major difficulties surfaced, however, when the Indians reached Memphis. At Memphis, removal agent William Armstrong received word that cholera was descending from the north. Armstrong informed Gibson that he was "making every effort to cross the Mississippi as early as possible" to avoid the cholera.313 He did not succeed. "Torrents of rain" fell, causing delays,314 "On all the steamboats coming down the Mississippi river deaths occurred from the disease."315 As they continued to slog through almost impassable swamps, Indians died of cholera in substantial numbers.316 By November 20, 1832, "thirteen wagons were filled with the sick Indians and baggage."317 Incredibly, neither Gibson nor the Secretary of War had thought to provide a physician, or even medicine. Armstrong wrote: "I have as yet employed no physician: to-day an Indian broke his leg, and we will of course have to leave him. We have no medicine but what belongs to private individuals: it is now too late to hear from the department, but I consider it very necessary that we should have medical aid: where there are two thousand Indians, with the wagoners, and those

308. FOREMAN, supra note 1, at 75.
309. Id.
310. See Armstrong to Gibson, Oct 13, 1832, in S. Doc. No. 23-512, pt. 1, at 386; FOREMAN, supra note 1, at 73-74.
311. Colquhoun to Gibson, June 20, 1832, in S. Doc. No. 23-512, pt. 1, at 617.
315. FOREMAN, supra note 1, at 76.
316. Id. at 77-79.
317. Id. at 82.
attached to the emigration, at least a physician could have been employed.318 Without the time to wait for a reply, the removal agents hired a doctor at the rate of six dollars a day, "resting assured that the appointment will meet the approbation of the department."319 In the midst of the death and suffering, Armstrong wrote to Gibson:

No man but one who was present can form any idea of the difficulties that we have encountered owing to the cholera, and the influence occasioned by its dreadful effects. It is true, we have been obliged to keep every thing to ourselves, and to browbeat the idea of disease, although death was hourly among us and the road lined with the sick. The extra wagons hired to haul the sick are about five to the 1,000; fortunately they are a people that will walk to the last, or I do not know how we could get on.320

In 1833 the press received reports of the suffering of the Choctaws, and there was an outpouring of sympathy. On January 26, 1833, the New York Observer & Chronicle printed a letter from the Reverend Loring S. Williams, who had witnessed the cholera amongst the Choctaws firsthand. "But oh, the pestilence: the CHOLERA," Williams wrote. "What this 'scourge of nations' will do with and for the poor Indian tribes, God only knows. It will doubtless sweep multitudes into the grave . . . . The sword of the destroying angel is doing execution among the new emigrants . . . ."321 The Boston Recorder printed another, similar, letter from the Reverend Williams.322

A third group of Choctaws numbering around 600 left in the fall of 1833,323 and the Choctaw removal concluded in November of that year. The Treaty of Dancing Rabbit Creek, signed in late September, 1830, had specified three years for the removal, and the Secretary of War enforced those terms almost to the hilt, decreeing that the government would not pay for any more Choctaw emigrants.324 Indeed, the cost of the Choctaw removal had embarrassed President Jackson. Including the salaries of the removal agents, "[t]he total expenditure incurred by the United States government under the Treaty of Dancing Rabbit Creek came to $5,097,367.50, or about two million dollars more than the amount the Jackson administration had assured Congress would be needed to remove all eastern tribes to lands west of the Mississippi river."325 And there was not much, other

324. FOREMAN, supra note 1, at 102.
325. SATZ, supra note 86, at 87. The sale of the Choctaw lands in Mississippi, however, netted the government $8,095,614.89. Almost sixty years later the Choctaws received a check for the difference. See SATZ, supra note 86, at 96.
than pain and anguish, to show for it. Thousands of Choctaws remained in Mississippi, subjected to state laws.326

CONCLUSION

The tragic story of the administration of Indian removal in the 1830s is one of the failure of multiple levels of guidance and control. Broad, external guidance came from Congress in the form of the Removal Act of 1830 and constant pressure to economize, and from the executive in the form of the removal treaties. Internal, technical management came from the War Department in the form of the Regulations of 1832, which implemented Congress’s political agenda. Most importantly, day to day operations proceeded according to Commissary General Gibson’s hundreds of letters to removal agents in the field.

At one level, the case of Indian removal in the 1830s highlighted the oft-forgotten importance of this internal, lower layer of law. The four legal texts bearing on the removal were not created equal. When the time came to hammer out the technical details of the removal and to ensure the integrity of the treaty making process, Congress faded into the background. Judicial review was nowhere to be seen. The text of the treaties themselves provided no guidance. It was left to Commissary General Gibson, with moderate guidance from the War Department, to implement almost all of the details of the removal.

And yet the other layers of law were far from irrelevant. Though the Removal Act of 1830 was a legal dead letter, the political branches had an enormous impact on the removal. That the Removal Act passed despite the long debates regarding the constitutionality of Indian self-government probably helped convince the Indians that the federal government would not protect them from the states. When combined with President Jackson’s insistence that the states had the constitutional right to legislate on all persons within their borders, the debate over the Removal Act created an atmosphere of coercion that contaminated the treaty negotiations.

Nor were the four layers of law independent of one another. Congress’s concern with thrift, speed, and raising revenue, for example, influenced the other layers. Treaty negotiators, after tricking and bribing Indian leaders into signing removal treaties, focused on effectively subdividing, disbursing, and selling the lands the emigrating Indians would leave behind rather than on the technical details of the removal. The Treaty of Dancing Rabbit Creek, for example, paid scant attention to the removal, promising only “to extend to [the Choctaws] the facilities and comforts which it is desir-

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326. Correspondence between Gibson and the field agents reveals increasing desperation in the fall of 1833, as the remaining Choctaws obstinately refused to leave. See, e.g., Armstrong to Gibson, Oct. 11, 1833, in S. Doc. No. 23-512, pt. 1, at 415 (“Such was the opposition to their emigrating, that I was fearful at one time that we should not have one good party.”); Lane to Gibson, Sept. 24, 1833, in S. Doc. No. 23-512, pt. 1, at 745 (“All means have been tried save force. They have violated the treaty with a full knowledge of all the possible consequences.”).
able should be extended in conveying them to their new homes.”

Congress’s focus on economy, as well as treaties concerned with frugality, impacted the War Department’s 1832 Regulations, which were primarily concerned with curbing fraud and waste and standardizing accounting rather than ensuring the Indians’ health and safety on the westward trek. Rather than mandate the employment of doctors, the Regulations set out elaborate guidelines for the purchase of supplies from independent contractors. Instead of ensuring that the Indians did not depart in the dead of winter, the Regulations prevented all but the sickest Indians from traveling in wagons. Page after page of the Regulations dealt with pay scales, limiting employment, restricting access to the government purse, preventing the Indians from obtaining horses, requiring the keeping of daily memoranda, and other cost-cutting measures.

Congress’s frugality, the text of the treaties, and the War Department’s Regulations tied Gibson’s hands. The Commissary General’s letters overwhelmingly focused on accounting procedures and breaking combinations amongst the contractors rather than determining the safest removal route or protecting the Indians from disease. Gibson’s absurd appeals for carefully folded papers, in the midst of the massive migration, is perhaps the clearest example of the unfortunate parsimony and senseless attention to the wrong details that characterized the removal operation. To be sure, Gibson did mitigate the Indians’ suffering to some degree. By interpreting the Regulations to bar some of the Indians from traveling by themselves, he likely prevented further tragedy. And Gibson tried scrupulously to insist on high quality supplies. But the mine run of Gibson’s correspondence dealt with accurate accounting at the expense of the Indians’ welfare.

The internal law, then, was quite responsive to the external law. Just as revealing, the external law was not responsive to the internal law. Then, as now, Congress sketched the broad outlines of the operation it envisioned, leaving the details to be filled in by agents on the ground. As the removals progressed, Congress’s goals remained static, unaltered and seemingly unaffected by the increasingly tragic events occurring in the south. When Congress did turn its attention to the removal, it spoke of financial costs rather than human costs. President Jackson as well seemed unaffected by the human suffering. Only the 1832 Regulations made some attempt to contend with reality. By centralizing authority over the removal in George Gibson, for example, they responded to widespread concerns about dividing removal responsibilities between agents positioned east and west of the Mississippi.

At least equally responsible for the human suffering that plagued Indian removal, however, were the inherent difficulties of moving thousands of human beings hundreds of miles westward. Nineteenth century America was ill-equipped to conduct such a massive migration. Swamps

327. Treaty of Dancing Rabbit Creek, supra note 123, art. III.
328. See supra Part II.
and dense forests blocked the Indians’ route. Terrible snowstorms, freezing temperatures, and cholera epidemics created misery that no amount of human regulation could prevent. It is telling that even the Army, America’s most professional administrative organization in the early nineteenth century, could not overcome these immense practical difficulties. Though better guidance from the political branches and more funding from Congress would have helped significantly, much of the suffering became inevitable once the political branches determined to proceed with removal.

At its core, Indian removal is a story of how administrative law can fail. Dramatically fail. In the 1830s as well as today, “[a]administrators operate[d] within three overlapping systems of accountability: Political accountability to elected executives and legislatures; administrative accountability to hierarchical superiors in the administration; and legal accountability to courts.”329 But as Gibson and the War Department’s responsiveness to the political branches demonstrates, accountability is not an end in itself. Congress’s focus on thrift was sharpened and magnified as it worked its way through the treaty negotiations, the War Department’s Regulations, and Gibson’s instructions to subordinates. Had the external law been sensitive to the internal law rather than vice versa, much suffering might have been averted. Instead, the overlapping layers of law that governed the removal combined to produce a tragic result.