

PRESIDENTIAL RESPONSES TO PROTEST: LESSONS JEFFERSON DAVIS NEVER LEARNED

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I. INTRODUCTION

In 1865, the Confederacy fell.¹ This is not a secret. In April 1865, in the Virginia village of Appomattox Court House, Confederate General, Robert E. Lee, signed the terms of surrender, thus triggering the beginning of the end of the American Civil War.² As writer and historian Fletcher Pratt describes the scene, after signing the terms of surrender, Lee “clasped hands with [Union General, Ulysses S. Grant], stepped to the door and rode out of history.”³ But neither Lee nor the Civil War has ridden out of history. Indeed, a deep fascination with the American Civil War persists.⁴ Well over 150 years since the first shots of the war rang out, much can be learned from America’s bloodiest historical moment.⁵

To that end, this Article looks back to history and isolates but one aspect of the Civil War as instructive for the modern political climate—the troubled leadership of the Confederacy’s president, Jefferson Davis. Indeed, Davis’s leadership was so troubled and problematic that some historians have argued that “[i]f the Union and Confederacy had exchanged presidents with one another, the Confederacy might have won its independence.”⁶

This Article argues that a significant issue with Davis’s leadership was his inability to respond adequately to the protest and political pushback⁷ (meaning protest, criticism, and unrest that challenges laws or policies and engenders debate on any number of issues) that he faced. Indeed, Davis often

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¹ See TIMOTHY S. HUEBNER, *LIBERTY & UNION: THE CIVIL WAR ERA AND AMERICAN CONSTITUTIONALISM* 337–38 (2016).

² FLETCHER PRATT, *A SHORT HISTORY OF THE CIVIL WAR: ORDEAL BY FIRE* 386 (1948). Jefferson Davis, the Confederacy’s president, was not captured until May 1865. David K. Watson, *The Trial of Jefferson Davis*, 24 *YALE L.J.* 669, 669–70 (1915). Moreover, Davis was not quite ready to surrender after Appomattox, hoping to “continue the rebellion from the west.” See Dwight J. Davis, *The Legal Travails of Jefferson Davis: A Review and Lessons Learned*, 23 *J. S. LEGAL HIST.* 27, 37 (2015).

³ PRATT, *supra* note 2, at 386.

⁴ See, e.g., TONY HORWITZ, *CONFEDERATES IN THE ATTIC: DISPATCHES FROM THE UNFINISHED CIVIL WAR* 387–90 (1998).

⁵ When it comes to the Civil War, there is much truth in William Faulkner’s frequently quoted quip that “[t]he past is never dead. It’s not even past.” WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

⁶ JAMES M. MCPHERSON, *EMBATTLED REBEL: JEFFERSON DAVIS AS COMMANDER IN CHIEF* 4 (2014). This point only serves to highlight the problems with Davis’s leadership.

⁷ This Article switches between use of the terms protest and pushback as appropriate. In some sense, protest is a specific form of pushback.

ignored much of the political pushback he received or quelled the protest through significant exercises of executive power.⁸ Why is this relevant in the modern era and, specifically, in 2019? To begin, 2019 is similarly rife with pushback and protest directed towards the president. Like Davis, President Donald Trump faces pushback and protest from all corners of American democracy—the people, some state and local governments, and other branches of the federal government.⁹ Additionally, President Trump, like Davis, has responded at times by adopting a more expansive version of executive power to disrupt or quell pushback and protest. Perhaps, the most obvious example is President Trump’s decision to declare a national emergency and build a wall at the border with Mexico.¹⁰ Although the Supreme Court recently overturned a stay on construction of the wall, the litigation surrounding the border wall continues.¹¹

Of course, President Trump is not the first president to exercise robust executive power in the face of political pushback from Congress or the American people. Even George Washington exercised this type of robust executive power when grain farmers on the Western Frontier engaged in significant protest of the “whiskey tax.”¹² Indeed, Washington’s response to this protest included riding at the head of an army sent to suppress the now infamous Whiskey Rebellion.¹³ Years later, in the face of the dramatic political pushback that culminated in the Civil War, Abraham Lincoln suspended the writ of habeas corpus and declared

⁸ See *infra* Part III.

⁹ See, e.g., Peter Baker, *A Growing Chorus of Republican Critics for Trump’s Foreign Policy*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/politics/trump-foreign-policy.html>; Stephen Collinson, *Trump’s Immigration Reversal Creates Its Own Chaos*, CNN POL. (June 22, 2018, 12:10 PM), <https://www.cnn.com/2018/06/21/politics/trump-family-separation-executive-order-chaos/index.html>.

¹⁰ Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>.

¹¹ Linda Greenhouse, *On the Border Wall, the Supreme Court Caves to Trump*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/trump-supreme-court-border-wall.html>. The Supreme Court has upheld President Trump’s use of military funds to build part of the border wall. See *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (July 26, 2019). Although the Supreme Court has allowed construction of the border wall to proceed, litigation continues over President Trump’s declaration of a national emergency to build the border wall. See *id.*; see also Jessica Taylor, *Supreme Court Lets Trump Border Wall Move Forward, But Legal Fight Still Looms*, NPR (July 26, 2019, 7:47 PM), <https://www.npr.org/2019/07/26/745785115/supreme-court-lets-trump-border-wall-move-forward-but-legal-fight-still-looms>. As of Summer 2019, an appeal regarding President Trump’s actions was pending before the Ninth Circuit.

¹² See JOSEPH J. ELLIS, *HIS EXCELLENCY GEORGE WASHINGTON* 224–25 (2004) [hereinafter ELLIS, *GEORGE WASHINGTON*].

¹³ See *id.*

martial law.¹⁴ Fast forward to the 1940s, in the swirl of political unrest and fear associated with World War II, Franklin D. Roosevelt issued an executive order authorizing internment of Japanese resident aliens as well as Americans of Japanese descent.¹⁵ These are just three examples of particularly assertive exercises of executive power. There are, of course, many more.

On the other hand, in the face of significant protest and pushback, some presidents have taken a different approach. For example, Richard Nixon created a commission to understand the differing views of the anti-war protesters on college campuses, notwithstanding attempts at more extreme and potentially illegal measures.¹⁶ Lyndon B. Johnson, in the face of growing Civil Rights protests, did not leave it to the courts to handle or to Congress's timeline. But he also did not simply issue an executive order to try to resolve the matter as he saw fit. Rather, President Johnson worked within the structure of government to persuade Congress to pass the Civil Rights Act of 1964.¹⁷

When considering these moments, among others, of significant political pushback and the accompanying presidential response, a question emerges: how should the president respond? In considering this question, an examination of Davis's leadership offers insights that an examination of George Washington or Richard Nixon, for example, does not and cannot offer. Specifically, Davis is a powerful and rare example when it comes to evaluating a president's response to pushback and protest *because* the Confederacy fell. In other words, the Confederacy is a unique test case for understanding the significance of presidential responses to pushback and protest because everyone knows how the story ends, which means the focus can be on *why* the story ended as it did.

Further, the similarities between the types of protesters and the themes of the pushback in the Confederacy and in 2019 are striking. First, when considering the similarities in the political climates of the Confederacy and today, it is worth mentioning that although the Confederacy may have ostensibly championed states' rights, it maintained a heavily centralized and regulated

¹⁴ President Lincoln first issued a proclamation suspending habeas corpus. Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862). Congress, later, validated the suspension of habeas corpus through the Habeas Corpus Suspension Act of 1863. 37 Cong. Ch. 81, 12 Stat. 755 (1863).

¹⁵ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); Proclamation No. 2537, 7 Fed. Reg. 329 (Jan. 17, 1942).

¹⁶ See PRESIDENT'S COMMISSION ON CAMPUS UNREST, WASHINGTON, D.C., THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970), <https://files.eric.ed.gov/fulltext/ED083899.pdf>; see also Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974), <https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html>.

¹⁷ See Michael O'Donnell, *How LBJ Saved the Civil Rights Act*, ATLANTIC (Apr. 2014), <https://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/>.

national government, even more so than the Union at the time.¹⁸ Unsurprisingly, that centralization often did not sit well with Confederate citizens who believed that the Confederacy would be a bastion for states' rights.¹⁹ But this tension between an ostensible concern for states' rights (or a smaller role for national government) and a robust exercise of executive power should sound familiar. Indeed, President Trump, among many other U.S. presidents, has confronted this exact same tension.²⁰ Additionally, Davis often faced pushback from state governments that refused to heed the executive branch's determination regarding the constitutionality of certain laws passed by the Confederate Congress.²¹ Similarly, some state attorneys general have unabashedly opposed certain of the Trump administration's policies.²² Further, like Davis, President Trump faces large protests from women concerned with basic human rights.²³ And these are

¹⁸ See, e.g., EMORY M. THOMAS, *THE CONFEDERACY AS A REVOLUTIONARY EXPERIENCE* 58–59 (1971) (“The Confederate government, albeit unwittingly, transformed the South from a state rights confederation into a centralized, national state.”).

¹⁹ See *infra* Part IV.

²⁰ See, e.g., Lauren Camera, *With Push for States' Rights, Trump Team Stirs Fear*, U.S. NEWS & WORLD REP. (Feb. 27, 2017, 5:45 PM), <https://www.usnews.com/news/national-news/articles/2017-02-27/trump-administrations-calls-to-return-power-to-states-stirs-fear>; John Stoehr, *The GOP Only Selectively Cares About States' Rights*, WASH. MONTHLY (Jan. 10, 2018), <https://washingtonmonthly.com/2018/01/10/the-gop-only-selectively-cares-about-states-rights/>; see also Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1284 (2019) (discussing “fair-weather federalism” as well as a “systematic change in attitudes” and “potentially shifting ideological valence of judicial enforcement of federalism”). Even President Jefferson wrestled with this tension, notably when it came to the Louisiana Purchase. See JOSEPH ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 204–12 (1996) [hereinafter ELLIS, THOMAS JEFFERSON]. Indeed, President Jefferson “violated his most cherished political principles several times over in order to guarantee the most expansive version of the ‘noble bargain,’ and he temporarily made himself into just the kind of monarchical chief magistrate he had warned against.” *Id.* at 208. When it came to the Louisiana Purchase, Jefferson “managed to implement decisions that defied in so many ways his long-standing commitment to limitations on executive power and the near-sacred character of republican principles.” *Id.* at 211.

²¹ David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1264 n.32 (2004).

²² See *Democratic State Attorneys General Begin Trump Pushback*, ASSOCIATED PRESS (Jan. 31, 2017, 3:12 AM), <https://www.cnbc.com/2017/01/31/democratic-state-attorneys-general-begin-trump-pushback.html>; see also Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017, 12:01 AM), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump>.

²³ Indeed, during the Civil War, many Confederate women engaged in various protests, including the food riots to send a message to Davis that their basic needs (i.e., adequate food) be provided for or they would encourage their husbands, fathers, brothers, and sons to desert. See STEPHANIE MCCURRY, *CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH 190–92* (2010). Their efforts were effective. By the spring of 1863, the Confederate government was ready to “revise and reconsider a variety of policies from taxation to impressment,

just a few similarities. The punchline is that just as Davis encountered a political climate rife with pushback from Confederate citizens, state governments, and other branches of the Confederate government,²⁴ President Trump is encountering a similar political climate,²⁵ including what could be considered the ultimate form of pushback from within the federal government: a formal impeachment inquiry.²⁶

To be clear, although this Article takes a close look at the problems with Davis's leadership as a way to understand the significance of presidential responses to protest, this Article does *not* argue for the legitimacy of secession and the Confederacy. This Article simply focuses on Davis as a product of the American political tradition and as someone who applied American notions of executive power to lead a government modeled after the United States. To that end, recognizing the lessons from Davis's presidency does not require an acceptance or approval of the Confederacy.

With that caveat, working from the premise that this country is founded on a tradition of dispute²⁷ and considering the lessons from Davis's presidency, this Article contends that protest and pushback are vital to a healthy democracy and its continued existence. It is in the face of such disruptions where executive restraint may be most important.²⁸ On the other hand, when confronted with certain disruptions, a president may be justified in adopting a more assertive executive response. Every president will face political pushback, but not all presidents will respond the same way or achieve the same results. Davis's presidency provides a unique window into the significance of a president's response to pushback and offers a way of thinking about presidential responses to pushback in the current political climate.

This Article proceeds in three Parts before concluding. Part II defines two categories of protest and pushback to guide the discussion of presidential responses to such protest and pushback: disruptions to the domestic order and disruptions to the governmental order. Part II then explains a rudimentary methodology for identifying these two primary types of disruptions. From there, Part II discusses, in broad strokes, the value of protest and political pushback.

conscriptio, and exemption that bore on the problems of labor and subsistence" in an effort to help the Confederacy's poorest citizens. *Id.* at 192.

²⁴ See *infra* Section III.A

²⁵ See *infra* Part III.

²⁶ Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html?login=email&auth=login-email>.

²⁷ See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 404–05 (2007); see also Ashlee Paxton-Turner, *Preserving Tradition: The Antiquities Act & Perpetuating American Democracy*, 15 DARTMOUTH L.J. 102, 115 (2017) (discussing how "American history is rooted in 'traditions of argument'").

²⁸ Exercising executive restraint, for the purposes of this Article, means avoiding the temptation to use executive power to quash or silence protest and discontent.

Part III first discusses Jefferson Davis's presidency and provides a brief overview of the political landscape that Davis encountered before turning to Davis's responses to protest and pushback. Part III then contemplates the lessons learned from Davis's responses to protest and pushback. Part IV considers the current political climate by taking inventory of some of the protest and pushback President Trump has encountered as well as some of his responses. Part IV then reflects on the lessons from Davis's responses and the tension between government-in-theory and government-in-practice that those lessons reveal.

II. DEFINING DISRUPTIONS

Before evaluating a president's response to political pushback and weighing the significance of Davis's response, it is necessary and helpful to define two general categories of pushback that a president might confront: disruptions to the domestic order and disruptions to the governmental order. This Article uses these categories as tools to structure and guide a discussion of presidential responses to pushback. Of course, not every instance of criticism and protest will fit neatly into one category. Rather, the two categories merely bookend a spectrum of disruptions. Further, identifying instances of pushback as disrupting the domestic order or the governmental order is not meant to assign normative value to the merits of the pushback.

A. *Disruptions to the Domestic Order vs. the Governmental Order*

For purposes of this Article, disruptions to the domestic order refer to protests that disrupt complacency and contentedness with the current social order as well as current policies and politics. In other words, this type of political pushback fuels unrest among the American people and engenders ongoing debate on matters the public finds important. To that end, this variety of protest may have important and longstanding effects on American society and the laws that govern it. As general examples, a disruption to the domestic order might be a protest regarding civil rights or opposing a war. A current example would be the swell of protest around the latest abortion laws.²⁹

A disruption to the governmental order, however, goes beyond protest for political, legal, or social change. It does more than provoke unrest and debate and instead threatens the stability of the Union. Such a disruption interferes with the government's ability to function. In other words, this type of protest prevents the government from carrying out core responsibilities such as the power to tax, regulate commerce, or address issues of national security. Notable examples

²⁹ See Timothy Williams, *With Most States Under One Party's Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html>.

would be Colonial America's protest of British rule,³⁰ the Whiskey Rebellion,³¹ the Dorr Rebellion,³² the Confederacy's secession from the Union,³³ and, on an admittedly somewhat smaller scale, labor strikes to the extent they disrupted interstate commerce in the late nineteenth century or national security in the 1980s.³⁴ It is worth emphasizing at this point in the Article that these categories are part of a spectrum, any given instance of pushback may share characteristics of both categories.

1. Disruptions to the Domestic Order: Four Dead in Ohio,³⁵ Civil Rights, and the Alien and Sedition Acts

Defining the two primary categories of political pushback in broad terms, however, is only so helpful. As such, this Article next considers some specific examples of each type of disruption.

A discussion of political pushback that provokes unrest and ongoing debate without any reference to the Vietnam-era and Civil Rights protests would be remiss. After President Nixon announced the invasion of Cambodia on April

³⁰ The famous Boston Tea Party is but one example of Colonial America's protest against British rule. See Alison Peck, *Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in America*, 80 UMKC L. REV. 1, 2 (2011) (discussing "the Boston Tea Party as a symbol of anti-establishment populism that successfully subverted an unpopular government regime").

³¹ When Congress passed an excise tax on whiskey in 1791, grain farmers began to protest, arguing that the tax "fell disproportionately on distilleries." ELLIS, GEORGE WASHINGTON, *supra* note 12, at 224. Washington decided to "crush the insurrection" by personally taking command of the troops. *Id.* He later justified this response to Congress "on the grounds that 'certain self-created societies' were in fact subversive organizations that threatened the survival of the national union." *Id.* at 225. Although Washington valued the citizenry's right to dissent, he "insist[ed] that dissent could not take the form of flagrant violation of federal authority." *Id.* It is that flagrant violation that helps distinguish threats to the governmental order.

³² In 1842, a group of Rhode Island citizens tried to replace Rhode Island's original charter with a new constitution. Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 56 (1997). Under the new constitution, Thomas Dorr was elected governor, while Samuel King had been elected under the original charter. *Id.* Despite King's pleas, the federal government refused to intervene. *Id.* This situation was maddeningly disruptive to the Rhode Island government's ability to function, and in that sense, the Dorr Rebellion is perhaps best described as a disruption to the *state* governmental order given that the federal government refused to intervene.

³³ See THOMAS, *supra* note 18, at 1–2 (discussing how during the Civil War, secessionists sought "independence, violent overthrow of an existing political structure, [and] political separation").

³⁴ See *infra* Section II.A.2.

³⁵ This subtitle is borrowed from "Ohio" written by Neil Young and performed by Crosby, Stills, Nash, and Young—a song which tidily captures sentiments regarding the turbulence of the Vietnam era and the inevitable disruption to the domestic order. CROSBY, STILLS, NASH, & YOUNG, *Ohio*, on SO FAR (Atlantic 1970).

30, 1970, university students across the country rallied in vehement protest.³⁶ Perhaps, most famous was the student response at Kent State University, where four students were ultimately killed by members of the National Guard.³⁷ President Nixon had not called upon the National Guard to respond to these student protesters.³⁸ In fact, in an effort to avoid what could have become a constitutional crisis, President Nixon attempted to reach out to student protesters across the country, despite sometimes referring to them as the “bums blowing up campuses.”³⁹ Indeed, just five days after the Kent State shooting, President Nixon responded to the pushback he faced by speaking with the thousands of gathered anti-war protesters at the Lincoln Memorial in the early hours of the morning of May 9, 1970.⁴⁰ President Nixon also established the President’s Commission on Campus Unrest.⁴¹ Although the escalation of the Vietnam War and shooting at Kent State intensified the anti-war protests, it would be unfair to characterize those protests as impeding the ordinary functioning of the government or its ability to carry out core responsibilities. After all, the government did not come to a grinding halt; it even maintained the U.S. military’s presence in Vietnam for several more years.⁴²

Although President Nixon also engaged in some extreme measures, such as illegal intelligence gathering regarding the anti-war leaders,⁴³ he presumably recognized that he could not flatly ignore the protesters or silence them without at least appearing to consider their concerns.⁴⁴ How a president chooses to respond to protest is not confined to how he ultimately attempts to resolve the debate. In other words, the rhetoric he uses is an equally important part of presidential responses to pushback. Language is powerful; “[t]he use of words is to express ideas.”⁴⁵ To that end, the rhetoric a president chooses communicates certain ideas and conveys a specific message. That message has an independent role in either tempering protest, engendering further debate, or escalating protest. President Nixon appears to have been well aware of this fact. Indeed, his

³⁶ HOWARD MEANS, *67 SHOTS: KENT STATE AND THE END OF AMERICAN INNOCENCE* 5 (2016).

³⁷ *See generally id.*

³⁸ *See id.* at 41 (explaining that the Ohio governor had called upon the National Guard).

³⁹ *Id.* at 7, 24. *See also* Howard Means, *The Story of the Really Weird Night Richard Nixon Hung Out with Hippies at the Lincoln Memorial*, WASHINGTONIAN (May 17, 2016), <https://www.washingtonian.com/2016/05/17/richard-nixon-kent-state-protests-white-house-lincoln-memorial/>.

⁴⁰ *See* Means, *supra* note 39.

⁴¹ *Id.* *See also* MEANS, *supra* note 36, at 24.

⁴² In 1973, the Paris Peace Accords were signed, which included a cease-fire and set in motion efforts at planning troop withdrawal. *Agreement on Ending the War and Restoring Peace in Vietnam*, Jan. 27, 1973, 24 U.S.T. 1, 935 U.N.T.S. 2.

⁴³ *See* Hersh, *supra* note 16.

⁴⁴ *See* MEANS, *supra* note 36, at 7, 24.

⁴⁵ THE FEDERALIST NO. 37 (James Madison).

administration has, at times, been credited with reviving the phrase “but will it play in Peoria?”⁴⁶

Additionally, the Civil Rights Movement, which had a profound effect on the cornerstones of everyday life and fundamentally altered how constitutional provisions are interpreted, is equally instructive. By the early 1960s, the Supreme Court had already issued opinions changing the social landscape such as *Brown v. Board of Education*⁴⁷ in 1954. But the Jim Crow era was far from over. President Lyndon Johnson, in the face of significant Civil Rights protest, could have responded in any number of ways, including hoping the courts might intervene as they had a decade before with *Brown v. Board* or that Congress would eventually pass the Civil Rights Act. Alternatively, President Johnson could have issued an executive order attempting to address, at least in part, certain important issues such as segregation in public places and employment discrimination. Doing so may have sent a forceful message to the Jim Crow South. Instead, President Johnson, working within the structure of government, persuaded Congress to get the Civil Rights Act passed sooner rather than later.⁴⁸

But even long before Vietnam and the Civil Rights era, presidents faced protests and political pushback that threatened the domestic order. Facing significant protest and pushback from Thomas Jefferson and the Republican party regarding a possible war with France, President John Adams signed into law the Alien and Sedition Acts passed by the Federalist Congress.⁴⁹ Notably, the Sedition Act made it a crime to make any “false, scandalous, and malicious writing against the government, Congress, or the President, or any attempt to excite against them . . . the hatred of the good people of the United States, or to stir up sedition.”⁵⁰ Under this law, most of those punished were editors of Republican newspapers.⁵¹ Although President Adams did not ask Congress to pass the law,⁵² it is worth mentioning as an extreme response to political pushback. It is true that much of this protest engendered widespread debate on

⁴⁶ See William Safire, *On Language; Playing in Pretoria*, N.Y. TIMES (Sept. 29, 1985), <https://www.nytimes.com/1985/09/29/magazine/on-language-playing-in-pretoria.html>. *But see* David H. Remer, *Playing in Peoria*, N.Y. TIMES (Nov. 3, 1985), <https://www.nytimes.com/1985/11/03/magazine/l-playing-in-peoria-127721.html> (arguing that the phrase did not originate in the Nixon administration and that Safire’s article is incorrect on this point).

⁴⁷ 347 U.S. 483 (1954).

⁴⁸ See SYLVIA ELLIS, *FREEDOM’S PRAGMATIST: LYNDON JOHNSON AND CIVIL RIGHTS* 2–3 (2013). *But see* CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 2–5 (2014) (discussing that in some sense popular history has exaggerated Johnson’s role).

⁴⁹ DAVID G. MCCULLOUGH, *JOHN ADAMS* 504–05 (2001).

⁵⁰ *Id.* at 505.

⁵¹ *Id.* at 506.

⁵² *Id.* at 504.

foreign policy and America's relationship with France, but it hardly threatened government operations or justified the extreme response of the Sedition Act.

These examples illustrate protest and pushback that fueled widespread debate and affected daily life for many Americans. At the same time, the government continued functioning, and the Union did not suddenly suffer a precarious existence. What these examples also demonstrate is that in the face of significant protest and pushback, a president's only recourse is hardly robust executive action. Instead, presidents may respond in a manner that allows them to recognize the concerns prompting the pushback and, where appropriate,⁵³ make efforts to ameliorate the problem by working with other branches of government.

2. Disruptions to the Governmental Order: The Whiskey Rebellion and Labor Strikes

The Whiskey Rebellion is an early and famous example of protest and pushback threatening the governmental order. When frontiersmen protested the "Whiskey tax," Washington responded by leading a military charge to quash the rebellion⁵⁴—a far cry from a mild response. To be fair, however, the Whiskey Rebellion represented a significant threat not only to the functioning of the young government by impeding Congress's power to tax but also the young government's very survival.⁵⁵ Indeed, Washington justified his response to Congress on the basis that this type of protest "threatened the survival of the national union."⁵⁶ In explaining his decision, Washington "was not disputing the right of aggrieved citizens to dissent, but he was insisting that dissent could not take the form of flagrant violation of federal authority,"⁵⁷ a sentiment with which Congress agreed.⁵⁸

Threats to the functioning of the government did not end with Washington. In the late 1800s, President Grover Cleveland faced the Pullman Strike, which signaled the tension between labor and capital.⁵⁹ The Pullman workers had continued to receive wage reductions while rents had remained the same in their company town.⁶⁰ This strike, which began in Chicago, ultimately

⁵³ In the case of the Sedition Act, President Adams, with the support of the Federalist Congress, actually made things worse.

⁵⁴ ELLIS, GEORGE WASHINGTON, *supra* note 12, at 224.

⁵⁵ *Id.* at 224–25.

⁵⁶ *Id.* at 225.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See ALMONT LINDSEY, THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL 1–2 (1942).

⁶⁰ HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 279–80 (1980).

escalated to a nationwide railroad strike.⁶¹ In response, President Cleveland sent federal troops to enforce an injunction, thereby ending the strike, a decision upheld by the Supreme Court in *In re Debs*.⁶²

Specifically, in *Debs*, the Court enjoined the labor strike because it was interfering with interstate commerce and the federal mail.⁶³ More importantly, the Court went on to explain that the president could have used force to control the disturbance.⁶⁴ But why? It is unlikely that anyone thought that the whole government would collapse if the labor unrest was not quelled. But disrupting the governmental order is not limited to the fall of the nation because interference with core governmental responsibilities creates a situation that (1) makes it difficult for the government to carry out its role, and (2) undermines the viability of the government. In other words, the threatened collapse of the nation is not the only moment when the government cannot effectively perform its role and responsibilities and when the government's continued viability is threatened. As to this latter point, a national government that loses its ability to regulate interstate commerce effectively, for example, begins to lose control over its core responsibilities. The continued viability of a government that cannot control its core responsibilities is (arguably) in doubt.

In *Debs*, the labor strike “threatened the basic conditions of public peace and order upon which all social relations, including market relations, were built.”⁶⁵ For some, the strike signaled the possibility of class warfare.⁶⁶ The strike then escalated to a nationwide strike, severely interfering with the government's functioning because interstate commerce and federal mail were put in jeopardy. At that point, the disruption to the domestic order had evolved into a disruption

⁶¹ *See id.* at 279–81.

⁶² 158 U.S. 564 (1895).

⁶³ *Id.* at 599.

⁶⁴ *Id.* *See also* L. H. LaRue, *Constitutional Law and Constitutional History*, 36 *BUFF. L. REV.* 373, 391 (1987) (discussing a letter from Justice Harlan who “makes clear that the fundamental issue is controlling any ‘disturbance [such] as that raised by Debs,’ so that the social order is not disturbed”). Justice Harlan, though, is likely not using “social order” the way this Article has used the term. Justice Harlan’s use of “social order” is likely closer to Justice Brewer’s concerns about “the general confusion into which the interstate commerce of the country was thrown; [and] the forcible interference with that commerce.” *Debs*, 158 U.S. at 592. But it is important to emphasize that this use of “social order” is not the same as this Article’s use of “social order” to describe the disruption to the social order of the Civil War South that would have occurred had Davis succeeded in both arming the slaves and granting them their freedom in return for fighting for the Confederacy. *See Currie, supra* note 21, at 1300–01. Instead, the Confederate Congress “ultimately authorize[d] the arming of black soldiers . . . but specifying that they should not be freed without the consent of both their owners and of the state in which they lived.” *Id.* at 1305–06.

⁶⁵ Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 *U. MIAMI L. REV.* 373, 377 (2013).

⁶⁶ In the lead up to the strike, workers appealed to the union, citing five reductions in wages, “amounting to nearly thirty per cent, and rents had not fallen.” ZINN, *supra* note 60, at 279–80.

to the governmental order by disturbing interstate commerce to the point of creating “general confusion”⁶⁷ followed by “forcible interference with that commerce.”⁶⁸ There is some debate about whether the Supreme Court was right about this point—that the level of disruption from the nationwide railroad strike had escalated to the point of warranting federal intervention. And to be fair, a president may want to be careful in following the approach taken by President Cleveland whenever protest erupts. After all, sending federal troops to break up a protest or enforce an order because of “interference with commerce” could be used as a pretext for federal intervention in any number of instances of protest.⁶⁹ As will be discussed further in latter portions of this Article, the type of response a president offers is vital, and part of determining the appropriateness of a response depends on understanding the extent of the disruption. Whether *Debs* is correct about the appropriateness of sending federal troops to enforce an order, it is certainly fair to conclude that the nationwide railroad strike interfered with basic government functions.

This Article next considers the air traffic controllers’ strike in the 1980s as a more contemporary example of disruptions to the governmental order. There, President Reagan’s response to the air traffic controller strike shares similarities with President Cleveland’s response to the railroad strike. In 1981, when the union demanded better pay and better working conditions by declaring a strike, President Reagan considered the strike as a threat to national security.⁷⁰ Similar to the strikers in *Debs*, the air traffic controllers were disturbing cornerstones of the governmental order such as national security and commerce.⁷¹ In response, President Reagan first demanded that the striking controllers return to work within forty-eight hours or lose their jobs.⁷² Approximately 11,000 controllers ignored the order, so true to his word, President Reagan fired them and banned them from federal service for life.⁷³ Indeed, although President Reagan did not send federal troops to confront the air traffic controllers, like President Cleveland, his intervention effectively removed the pushback. But under *Debs*, when pushback “forcibly obstruct[s]” cornerstones of the governmental order (such as national security or interstate commerce), an assertive executive response that altogether removes (or at least

⁶⁷ *Debs*, 158 U.S. at 592.

⁶⁸ *Id.*

⁶⁹ See Harvard Law Review Ass’n, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 648 (1968).

⁷⁰ See JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* 7 (2011).

⁷¹ See *id.* at 300–01 (discussing the scope of the strike).

⁷² See *id.* at 7.

⁷³ See *id.* at 321–22. President Clinton later lifted this ban during his presidency. See *id.* at 357, 368.

significantly undermines) the pushback may be justified.⁷⁴ Of course, just because assertive executive action that quells protest *may* be justified does not mean such power *must* be exercised. Indeed, a president could alternatively acquiesce to the demands of the protesters, which could require a different strand of executive action. To that end, it is worth emphasizing that disruptions to the governmental order are just as important as disruptions to the domestic order; the distinction simply signifies what type of response may be justified.

B. Identifying Disruptions

Although the above examples are helpful for contextualizing disruptions to the domestic order and the governmental order, it is useful to have a rudimentary test for identifying disruptions, particularly in moments without the benefit of hindsight. Because political pushback and protest are closely related to core free speech considerations, First Amendment jurisprudence is an appropriate starting point. Specifically, the test in *Tinker v. Des Moines Independent Community School District*⁷⁵ sheds light on which type of disruption may be unfolding at any given time. In *Tinker*, the question was whether a black armband in protest of the Vietnam War “materially and substantially” interfered with “the work of the schools or the rights of other students.”⁷⁶ The distinction between disruptions to the domestic and governmental order fundamentally asks a similar question: does the protest “materially and substantially” interfere with the work of the government?

Answering this question is, of course, harder than merely asking it, and in some instances, it may be up to the courts to answer whether the president’s response was ultimately justified. In *Tinker*, the majority first held that the black armbands were pure speech and that in order to justify suppressing it, the school officials had to show that the speech would “materially and substantially interfere” with the school’s operations.⁷⁷ From there, the majority determined that suppressing speech out of a mere fear of disruption was unacceptable.⁷⁸ In fact, although the black armbands “caused discussion outside of the

⁷⁴ For a discussion considering the use of federal troops as the President’s “constitutional ability to respond to an emergency,” see Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SECURITY J. 537, 597 (2014). This Article, however, contends that the use of federal troops as well as other significant executive responses, such as firing nearly 11,000 air traffic controllers and banning them from further federal service for life, share much in common. But it may be that a disruption to the governmental order can escalate to a national emergency warranting the use of federal force. *See id.*

⁷⁵ 393 U.S. 503 (1969).

⁷⁶ *Id.* at 508–09.

⁷⁷ *Id.* at 509.

⁷⁸ *See id.* at 509–10.

classrooms,”⁷⁹ there was no disruption to the regular school order.⁸⁰ Similarly, political protests may cause discussions and even disruptions to the ordinary domestic order—just like those outside discussions may have caused slight disruptions to the normal school day even if not to the regular school order—but until such protests rise to the level of threats to the governmental order, they should be embraced rather than stifled by the president. Importantly, this test accords with the Supreme Court’s conclusion in *Debs* that robust executive action would have been proper given the extent to which the labor strikes interfered with the functioning of the government.⁸¹ In other words, a material and substantial interference with commerce or national security may justify expansive executive authority. But just as “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,”⁸² that same fear of disturbance to the domestic order is not enough to overcome the right (and long tradition) to protest and question the government’s actions.

The Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*⁸³ implicitly recognizes this point as to threats to the governmental order. There, President Truman engaged in assertive executive action in seizing the steel mills, a decision which the Supreme Court overturned.⁸⁴ In 1951, steel companies and their employees disagreed over the terms of the new collective bargaining agreement, and when the disagreement remained unresolved, the employees threatened to strike.⁸⁵ Hours before the strike began, President Truman issued an executive order seizing control of the steel mills because he believed that the strike would “immediately jeopardize [the] national defense.”⁸⁶ In his concurrence, Justice Burton perhaps came closest to articulating the idea that the mere fear of disturbance (to either the domestic order or, as in *Youngstown*, the governmental order) is insufficient when he observed that the seizure of the steel mills was “not [in response to] an imminent invasion or threatened attack.”⁸⁷ Safeguarding the national defense is a core governmental responsibility, and when the government cannot carry out that responsibility effectively, assertive executive action may be justified. But as in *Youngstown*, a mere fear of such interference is insufficient.

⁷⁹ *Id.* at 514.

⁸⁰ *Id.*

⁸¹ *In re Debs*, 158 U.S. 564, 592 (1895).

⁸² *Tinker*, 393 U.S. at 508.

⁸³ 343 U.S. 579 (1952).

⁸⁴ *See generally id.*

⁸⁵ *Id.* at 582–83.

⁸⁶ *Id.* at 583.

⁸⁷ *Id.* at 659 (Burton, J., concurring).

C. *Political Pushback as a Sign of a Well-Functioning Democracy*

But what is the value of this political pushback? Why are disruptions to the domestic order to be safeguarded? Democracy works well—perhaps even works best—when people can freely protest and compel debate on the issues that they value. After all, both the Confederacy and the United States were formed out of a tradition of dispute.⁸⁸

The First Amendment may be as close to a constitutional acknowledgement of this tradition and its importance as it gets. From that lens, the First Amendment is a constitutional protection for the people and for the government. Indeed, President Trump even acknowledged the value of protest in a tweet.⁸⁹ The protests and the First Amendment ensure that the government as a whole is getting more information, and more information makes the government stronger. Justice Brandeis's opinion in *Whitney v. California*⁹⁰ opinion bolsters this argument.⁹¹ As Justice Brandeis puts it, “the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”⁹²

Of course, there is also an argument that disruptions to the domestic order should generally be left to the purview of state governments and only when the states can no longer handle them should the president (or perhaps any branch of the federal government) act because a threat to the federal government may then be imminent. But this argument fails to appreciate the significance of what a disruption of the governmental order must truly entail. The governmental order is not threatened or disturbed every time states fail to maintain the domestic order. Rather, it is threatened in moments like the Civil War or even the Whiskey Rebellion when there is a “flagrant violation of federal authority,”⁹³ and the Union's very existence becomes precarious. Indeed, the interferences that occur at the state level, including instances like those in *Tinker* where students engaged in political speech in their local school, can spur a larger debate that challenges the national government. Those challenges ought to be welcomed by the president. Disruptions to the domestic order might often begin with something in the purview of the states like schools or police, but only if those threats “materially and substantially interfere”⁹⁴ with the functioning of the national government would expansive executive action be potentially justified. To that

⁸⁸ See Post & Siegel, *supra* note 27; see also Paxton-Turner, *supra* note 27.

⁸⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 22, 2017, 4:47 AM), <https://twitter.com/realdonaldtrump/status/823150055418920960?lang=en> (“Watched protests yesterday but was under the impression that we just had an election!”).

⁹⁰ 274 U.S. 357 (1927).

⁹¹ See *id.* at 375 (Brandeis, J., concurring).

⁹² *Id.*

⁹³ ELLIS, GEORGE WASHINGTON, *supra* note 12.

⁹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

end, the mere threat of potential governmental disruption by itself is likely not enough.

Returning to *Debs* is helpful for clarifying the importance of this distinction between forms of political pushback. In *Debs*, a real threat to the functioning of the government existed.⁹⁵ By jeopardizing interstate commerce and the federal mail, the labor unrest interfered with the day-to-day operations of the government and upset not only the domestic order but also the governmental order.⁹⁶ Part of the governmental order is the balance among speech, persuasion, political action, and government activities. More simply, it is a balance between government activities and citizen activities. When threats are merely to the domestic order, as in speech that challenges government activity, the governmental order is still intact. In fact, it is functioning at its best because more information is circulating, and the public is fulfilling its duty of public discourse.⁹⁷ But when the disruption of domestic order crosses the line and interferes with the balance of the governmental order, then the calculus must be different. In *Debs*, the political action went so far as to disrupt not only “social relations, including market relations” but also government activities by interfering with interstate commerce and the mail.⁹⁸ There, the balance of the governmental order was tipped too far afield from necessary government activities.

But this must raise the question of what is the point of protest and political action if it can never be so great as to interfere directly with government activity? This is the wrong question. It is not that such activity can never interfere. It is that if it does, then the president may be justified in responses that directly limit the protest. The swirl of protest and political action is vital for the functioning of the government because then the government has more information and can make adjustments.⁹⁹ When that activity, though, crosses into

⁹⁵ See *In re Debs*, 158 U.S. 564, 592 (1895) (discussing “the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right”).

⁹⁶ See *id.*

⁹⁷ See *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“[T]he greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

⁹⁸ Gordon, *supra* note 65, at 377. To that end, the labor strikes at issue in *Debs* appear to have escalated to disruptions beyond ordinary disruptions to the domestic order or “the social contract.” See OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 47–48 (1993). Instead, the strike disrupted “the market,” making government intervention likely more appropriate. See *id.*; Gordon, *supra* note 65, at 374–75, 378–79.

⁹⁹ This even happens in the context of Supreme Court decisions. See, e.g., Post & Siegel, *supra* note 27, at 375 (discussing “the potentially constructive effects of backlash”). The trajectory from *Roe* to *Casey* is one such example of the effects of backlash to the extent that in response to the backlash after *Roe*, *Casey* cuts back on abortion rights. See *id.* at 429–30.

disrupting the governmental order, then it may be that the president is justified in intervening and quelling it. But that is not to say that protest should never reach those heights. It is only a matter of what types of responses are appropriate and when certain executive responses are warranted.

To that end, although Eugene Debs and the labor unions lost, their actions spurred a national dialogue about labor unions that continued for decades after the violent strike.¹⁰⁰ In fact, 37 years later, Congress passed a decidedly pro-labor law, the Norris-La Guardia Act, that, among other things, prevented federal courts from issuing injunctions against nonviolent labor strikes.¹⁰¹ All this is to say that Debs's actions alongside organized labor were not wasted.

III. TESTING THE IMPORTANCE OF PRESIDENTIAL RESPONSES TO POLITICAL PUSHBACK: THE CONFEDERACY

President Trump has been sharply criticized for his administration's policies¹⁰² as well as his own attitude toward the presidency.¹⁰³ He has been further criticized for his responses to this criticism and political pushback.¹⁰⁴ But this is not a new story. In fact, when Jefferson Davis was the Confederacy's president, he, too, implemented policies that led to significant protest. Like President Trump, Davis struggled to find a role for the presidency that included accepting protest and criticism. For Davis, his tenure as the Confederacy's president ended when his nation fell, and it is not a stretch to argue that some of his missteps at least contributed to the Confederacy's downfall.¹⁰⁵ This Part first

¹⁰⁰ This conversation has shifted somewhat to the new role that unions should play. *See, e.g.*, John Burnett, *Old Unions Can't Cope with the New World*, U.S. NEWS & WORLD REP. (May 26, 2015, 2:15 PM), <https://www.usnews.com/opinion/economic-intelligence/2015/05/26/labor-unions-need-to-reinvent-themselves>.

¹⁰¹ 29 U.S.C.A. §§ 101–115 (West 2019).

¹⁰² *See, e.g.*, Michael R. Gordon, *John McCain Becomes Critic in Chief of the Trump Administration*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/john-mccain-donald-trump-critic.html>; Jena McGregor, *The Problem with Donald Trump's Blame Game*, WASH. POST (Feb. 21, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/02/21/the-problem-with-donald-trumps-blame-game/?utm_term=.8693222eba71.

¹⁰³ *See, e.g.*, David A. Graham, *Trump's Performative Presidency*, ATLANTIC (Feb. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trumps-performative-presidency/516531/> (“Yet here is Trump, now ensconced in the White House, not just displaying a vexingly casual attitude toward secrecy but flaunting it.”).

¹⁰⁴ *See, e.g.*, Aaron Blake, *Donald Trump Just Admitted He's Incapable of Acknowledging Legitimate Criticism*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/28/trump-when-asked-to-name-criticisms-he-deserved-no-probably-i-could-never-do-that/?utm_term=.658928dd39e6.

¹⁰⁵ Some have argued that the South was destined to lose from the beginning. But it is not clear that the Confederacy was necessarily destined to lose from the start, even if it did become clear as the war progressed that the South was at a severe disadvantage. *See* PRATT, *supra* note 2, at xiii

discusses Jefferson Davis's role as the Confederacy's president before turning to some of his responses to political pushback.

A. *Jefferson Davis: The Confederate President*

Jefferson Davis was a product of the American political tradition. Before he became the Confederacy's president, Jefferson Davis was President Franklin Pierce's Secretary of War, a member of the House of Representatives, and a United States Senator, representing Mississippi.¹⁰⁶ He was once referred to as "the Cicero of the Senate," and he cared deeply about "preserv[ing] what he always called the Union of 'our Fathers.'"¹⁰⁷ Leaving the United States Senate on January 21, 1861, was "the saddest day of [Davis's] life."¹⁰⁸ But Davis felt he had no choice but to follow Mississippi.¹⁰⁹ He would soon become the president of the Confederacy.¹¹⁰ Despite his tenure as a respected United States Senator,¹¹¹ Davis's tenure as the Confederacy's president revealed a president whose ostensible belief in a small government simultaneously compelled him to expand the role of the executive to address threats to this experimental nation's domestic order and survival. In doing so, Davis struggled to accept the political pushback that is ultimately necessary to a well-functioning democracy.

1. A Brief Overview of the Confederacy's Political Landscape

To put Davis's responses to pushback in context, a brief overview of the Confederacy's political landscape is necessary. Specifically, this Article discusses three important aspects of the Confederacy's political landscape: (1) the Confederacy's unanticipated centralization and heavy regulation;

("Put it otherwise: the North's economic strength had much to do with determining the result of the war, but not until events in the war had determined that economic strength would be important.").

¹⁰⁶ WILLIAM J. COOPER, JR., JEFFERSON DAVIS, AMERICAN 3 (2000).

¹⁰⁷ *Id.* at 3–4.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *See id.* at 5 (discussing how after learning of Mississippi's decision to secede, "[Davis] knew what he must do"). According to Davis, "[t]he stern conviction of necessity, the demand of honor governed his action." *Id.* Davis told former President Pierce that after Mississippi's decision he "c[a]me to the hard task of announcing to [Pierce] that the hour is at hand which closes [his] connection with the United States, for the independence and Union of which [his] father bled and in the service of which [Davis] . . . sought to emulate the example [his father] set for [his] guidance." *Id.*

¹¹⁰ Davis learned of his nomination on February 9, 1861, less than a month after leaving office in Washington. *Id.* at 327–28. In fact, Jefferson Davis was the only person nominated to be the Confederacy's president. *Id.* at 327. Davis's inauguration occurred just nine days later on February 18, 1861. *Id.* at 329.

¹¹¹ *Id.* at 3.

(2) pushback from certain citizens; and (3) pushback from the States alongside the Confederacy's lack of intragovernmental processes. Each is discussed in turn.

i. Government Regulation in the Confederacy

Although in 2019 domestic government regulation seems normal, this type of domestic regulation was almost unheard of in the United States after the War of 1812.¹¹² When the Confederacy enacted government regulation over cornerstones of the Confederacy's domestic life, including food and slaves, similar domestic regulation was not a facet of American life to such an extent.¹¹³ This irony has not escaped historians and scholars.¹¹⁴

This irony is particularly noticeable in the context of the Confederacy's impressment of slaves. As Professor Stephanie McCurry observes, “[f]or a nation established to give greater security and permanence to slaveholders’ enjoyment of their peculiar property, impressment came as a terrible blow.”¹¹⁵ Slaveholders no longer had exclusive control over their slaves. Their government, which was designed to protect their rights in their slaves, could impress their slaves into service for the Confederacy.¹¹⁶ The domestic order of the Confederacy quickly became unmoored from what secessionists initially envisioned.¹¹⁷ Indeed, the South had become a place where the social order, particularly as it related to slavery, was in the same position as it would have been had the South never seceded, particularly if Davis had succeeded in his attempt late in the war in arming the slaves and granting them their freedom in return for fighting for the

¹¹² See JOHN K. MAHON, *THE WAR OF 1812*, 385 (1972) (discussing how “the central authority [seemed to have] grown flabby since the Revolution”); see also RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877*, at 100 (1990) (discussing the Confederacy’s more centralized policies than those of the Union).

¹¹³ See BENSEL, *supra* note 112; see also MCCURRY, *supra* note 23, at 88 (discussing the growth of government power in the Confederacy and “government demands on citizens, subjects, and property [that] expanded to previously unthinkable proportions”).

¹¹⁴ See, e.g., THOMAS, *supra* note 18, at 58–59 (“The Confederate government, albeit unwittingly, transformed the South from a state rights confederation into a centralized, national state.”).

¹¹⁵ MCCURRY, *supra* note 23, at 274.

¹¹⁶ *Id.* Impressment “cut against the power masters had always claimed to govern slaves as their personal property.” *Id.*

¹¹⁷ See, e.g., *id.* (discussing “a newly immediate relationship with a central government whose former authority over slavery, and even more so over individual slaves, had been strictly delimited”).

Confederacy.¹¹⁸ This possibility troubled many Southerners.¹¹⁹ Among those troubled by the possibility of arming and then emancipating the slaves who fought for the South was Representative Foote.¹²⁰ He argued that if Davis “emancipate[d] the slaves without the consent of the several States, [Davis] would be made to occupy exactly the same position as Abraham Lincoln.”¹²¹

Perhaps less ironic but equally unusual was the police state that the Confederate government created in some places. For example, the Confederate government even went so far as to “mess with mountaineers’ apple brandy-making”¹²² by impressing the copper coils from the stills.¹²³ Despite the rhetoric of states’ rights, the Confederate government became much more centralized and focused on domestic regulation than the Union. When the Confederate Congress passed “An Act to Further Provide for the Public Defense,”¹²⁴ its conscription act, it was the first Congress in North America to pass such a law.¹²⁵ Moreover, it was passed nearly a year before the Union would pass a similar law.¹²⁶ The law stated that Davis could

call out and place in the military service of the Confederate States, for three years, unless the war shall have been sooner ended, all white men who are residents of the Confederate States, between the ages of eighteen and thirty-five years at the time the call or calls may be made, who are not legally exempted from military service.¹²⁷

The Confederate Congress also created the Conscript Bureau to carry out this law.¹²⁸

Certain tax regimes further illustrate just how centralized the Confederate government had become. Although many of the Confederacy’s economic

¹¹⁸ See Currie, *supra* note 21, at 1300–06. The Confederate Congress eventually decided to allow the arming of slaves, but no freedom would be granted to them without the consent of both their master and the state. *Id.* at 1305–06.

¹¹⁹ See *id.* at 1300 (Virginia Senator Robert M.T. Hunter responded to this idea by arguing that “[w]e dissolved the Union and went to war . . . because we feared the Republicans would free our slaves; now our own Government proposes to free them itself.”).

¹²⁰ *Id.*

¹²¹ *Id.*; see also *id.* at 1300 n.176.

¹²² THOMAS, *supra* note 18, at 70–71.

¹²³ *Id.*

¹²⁴ HUEBNER, *supra* note 1, at 258.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting STATUTES AT LARGE OF THE CONFEDERATE STATES OF AMERICA, COMMENCING WITH THE FIRST SESSION OF THE FIRST CONGRESS 30 (James M. Matthews, ed.) (1862)).

¹²⁸ *Id.*

policies failed,¹²⁹ in 1861, it enacted a “war tax” that taxed “slaves, real estate, and other forms of property, at a rate of 50 cents per \$100 of assessed value.”¹³⁰ The Confederacy was never able to collect this tax successfully,¹³¹ but its very passage reveals the significant centralization and domestic regulation that existed across this new government. By 1863, the Confederate Congress desperately needed to raise revenue and enacted new taxes, including a direct income tax, a tax on professional and business licenses, and an in-kind agricultural tax.¹³² Unlike its failed war tax, the Confederacy was able to collect the in-kind agricultural tax with some degree of success, in part because it established assessors and collectors across the new nation to enforce the tax.¹³³ Indeed, these assessors and collectors even collected crops from “the most humble farmstead.”¹³⁴ Again in 1864, the tax regime was revised; this time, the Confederate Congress established a 5% tax on land and slaves.¹³⁵

But tax regimes are not the end of the story. As to the suspension of the writ of habeas corpus, Davis quickly denounced Lincoln’s suspension of the writ, stating “[the Confederacy] may well rejoice that [it] ha[s] forever severed [its] connection with a Government that thus tramples on all the principles of constitutional liberty, and with a people in whose presence such avowals could be hazarded.”¹³⁶ But Davis later suspended the writ with the Confederate Congress’s approval.¹³⁷ It is worth noting, however, that although habeas corpus was only suspended in the Confederacy for fifteen months, some historians estimate that “the Confederate military arrested and detained more than 4,000 individuals,”¹³⁸ which “angered [at least some Confederate citizens], who saw little reason to sacrifice more liberties to a government that seemed as oppressive as the one they were fighting.”¹³⁹ It is not surprising that when the suspension expired, “despite Davis’s continued pleas”¹⁴⁰ to renew the law, the Confederate

¹²⁹ See *id.* at 262–67.

¹³⁰ *Id.* at 263.

¹³¹ *Id.*

¹³² *Id.* at 264.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Jefferson Davis, *Message of President Davis*, DAILY DISPATCH (July 20, 1861), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2006.05.0224>; see also Frank J. Williams, *The Great Writ, North and South*, N.Y. TIMES (Nov. 14, 2013, 1:00 PM), <https://opinionator.blogs.nytimes.com/2013/11/14/the-great-writ-north-and-south/>.

¹³⁷ HUEBNER, *supra* note 1, at 273–74.

¹³⁸ *Id.* at 275.

¹³⁹ *Id.* at 274–75.

¹⁴⁰ *Id.* at 275.

Congress refused to do so.¹⁴¹ For all the talk of a decentralized government, the Confederacy was anything but.

Moreover, although many Southerners may have believed that the Confederacy would be a “slaveholding, agricultural, decentralized, Christian republic,”¹⁴² the Confederacy’s founders drafted the Confederate Constitution such that it shared much in common with the United States Constitution, including the very provisions, such as the Supremacy clause and the “necessary and proper clause,” that supported moves toward centralized government in the United States.¹⁴³ The Confederacy’s founders did not stop there, though. The Confederate president was also granted a “line-item veto,” which further bolstered executive power.¹⁴⁴ As previously mentioned, the Confederacy did not shy away from policies such as “conscription, taxation, and suspension of habeas corpus.”¹⁴⁵ These policies, and the way Davis implemented them, might not ordinarily have been expected from a government ostensibly founded on decentralization.¹⁴⁶ It is unsurprising, then, that Davis received significant pushback across the South and was forced to defend these policies, often on the grounds of “short-term hardship and sacrifice for the sake of long-term success,” as one historian describes it.¹⁴⁷

ii. *The Protest and Pushback of Confederate Citizens*

While the Confederate government was expanding, many of its citizens were starving and its women were taking a stand and demanding protection. Although formally citizens, Confederate women were unable to vote,¹⁴⁸ and the Confederacy’s “body politic [was] the exclusive preserve of white men.”¹⁴⁹ Nevertheless, Confederate women were considered “objects of protection.”¹⁵⁰ Although the government initially used this imagery of protecting women as a call to arms to fight the Union, the women later repurposed this image to plead with government officials to provide for them and their families.¹⁵¹ With their

¹⁴¹ *Id.*

¹⁴² *Id.* at 255.

¹⁴³ *Id.* at 256.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 281.

¹⁴⁶ *See id.* at 255 (discussing the Confederacy as “a nation in which [Confederate citizens believed] white liberty, especially the right to hold slaves, would be preserved under the loose authority of a central government”).

¹⁴⁷ *Id.* at 281–82.

¹⁴⁸ *See* MCCURRY, *supra* note 23, at 23–25.

¹⁴⁹ *Id.* at 25.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 88.

husbands, fathers, brothers, and sons off fighting, there were fewer men to help harvest crops and, in some instances, oversee slaves.¹⁵² This absence of men hit poor white women particularly hard.¹⁵³ In response, women across the South staged so-called food riots,¹⁵⁴ and in doing so, these women helped “reshap[e] labor and welfare policy”¹⁵⁵ in the Confederacy. To put the food riots (sometimes referred to as bread riots) in context, by spring 1863, drought and low food production inflicted famine-like conditions across parts of the Confederacy.¹⁵⁶ Confederate women believed that the Confederate government maintained an essentially secret food supply for the military either in warehouses or through agreements with storekeepers.¹⁵⁷ To that end, the women organized throughout the Confederacy and armed themselves before descending on various shops, taking what they wanted after first asking the price, which they denounced as “extortion.”¹⁵⁸ One of the largest food riots occurred in Richmond in 1863 and required Davis to “calm the people” personally.¹⁵⁹ Indeed, in Richmond, women first headed to the governor’s mansion and demanded that he release emergency food supplies.¹⁶⁰ Amidst cries of “Bread or blood!” the crowd began to turn violent, and militia men and Davis appeared on the scene.¹⁶¹ Davis gave the crowd five minutes to disperse, explaining that after five minutes, he would order the militia to fire.¹⁶² Five minutes passed, and the crowd dispersed.¹⁶³ But it was not all in vain for the protesters. The Confederate government released some of its supply of rice, merchants brought out reserve supplies, prices dropped, and Congress passed a law requiring planters to convert some of their tobacco or cotton acreage to acreage for food crops.¹⁶⁴

But women whose husbands and fathers were off fighting were not the only vocal citizens protesting Davis’s policies. Indeed, in North Carolina, Mississippi, and Texas, communities of Confederate dissenters formed.¹⁶⁵ Within these communities, certain Southerners actively protested and rebelled

¹⁵² See *id.* at 190–92 (discussing some of the motivation behind the food riots).

¹⁵³ See *id.* at 7–8.

¹⁵⁴ *Id.* at 191–92.

¹⁵⁵ *Id.* at 7.

¹⁵⁶ MCPHERSON, *supra* note 6, at 167.

¹⁵⁷ *Id.* at 167–68.

¹⁵⁸ *Id.*

¹⁵⁹ HUEBNER, *supra* note 1, at 306.

¹⁶⁰ MCPHERSON, *supra* note 6, at 168.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 169.

¹⁶⁴ *Id.*

¹⁶⁵ VICTORIA E. BYNUM, *THE LONG SHADOW OF THE CIVIL WAR: SOUTHERN DISSENT AND ITS LEGACIES* 5–7 (2010).

against secession.¹⁶⁶ For example, in the North Carolina Piedmont, a group of men focused their energies on “robbing slaveholders and punishing the Confederate militia.”¹⁶⁷ Further, these communities offered shelter to the Confederate deserters.¹⁶⁸ The dissent from one of these communities escalated to such an extent that the community “allegedly seceded from the Confederacy,” requiring the Confederacy to deploy troops to the area to quell the protest.¹⁶⁹

iii. *The Pushback from Confederate States and the Lack of Intragovernmental Processes*

Davis also faced pushback from other corners of the fledging nation, including from the states and within the Confederate government.¹⁷⁰ Importantly, within the Confederate government, the traditional political order that valued constitutionality of laws was disrupted.¹⁷¹ For example, the Confederacy’s executive branch, through the attorneys general, sometimes simply “passed on the constitutionality of laws, and their decisions were accepted as final by the [Davis] administration.”¹⁷² But when others disagreed with these decisions, Davis would urge acceptance for the sake of “[c]omity between the different [departments].”¹⁷³ Meanwhile, the states would often flatly ignore many of these opinions.¹⁷⁴ Further, there could never be a final word on a law’s constitutionality because the Confederacy never had its own Supreme Court due to political disagreement within the Confederate Congress.¹⁷⁵ Although tasked with creating a Confederate Supreme Court, the Confederate Congress was never able to fulfill this obligation,¹⁷⁶ and Davis was never able to work with Congress to prioritize and achieve this goal. Beyond these attorneys general opinions, the Confederacy did not have a “nationwide” way to resolve legal disputes, so it is easy to see how legal disputes could remain unresolved and only further exacerbate the political tensions.

¹⁶⁶ *Id.* at x–xi.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 8.

¹⁷⁰ *See, e.g.,* Currie, *supra* note 21, at 1264 n.32.

¹⁷¹ *See* REMBERT W. PATRICK, JEFFERSON DAVIS AND HIS CABINET 308 (1944).

¹⁷² *Id.*; *see also* Currie, *supra* note 21, at 1264 n.32.

¹⁷³ Letter from Jefferson Davis to Secretary of War George W. Randolph, in 5 JEFFERSON DAVIS, CONSTITUTIONALIST: HIS LETTERS, PAPERS AND SPEECHES 316, 316–17 (Dunbar Rowland ed., 1923). *See also* Currie, *supra* note 21, at 1264 n.32.

¹⁷⁴ Currie, *supra* note 21, at 1264 n.32.

¹⁷⁵ *See* Charles E. George, *The Supreme Court of the Confederate States of America*, 6 VA. L. REG. 592, 594–95 (1920).

¹⁷⁶ *See id.*

The political landscape of the Civil War South was replete with disruptions to its domestic order regarding issues such as hunger, poverty, the possibility of slave impressment, and centralized regulation instead of the anticipated emphasis on states' rights. As the Confederacy's president, Davis came to believe that he had to engage in a more robust exercise of executive power, which sometimes included neglecting or silencing pushback, if the Confederacy were to survive.¹⁷⁷

2. Davis's Response to Political Pushback

Understanding Davis's responses to pushback first requires framing his responses against a common view of government in the years leading up to the Civil War, that is, the Jeffersonian tradition. To that end, a brief digression regarding the Jeffersonian tradition is helpful. Under the Jeffersonian tradition, government is small, and in the decades leading up to the Civil War, it was a foundation for arguments against central authority, making Davis's apparent operation within the Jeffersonian tradition, at least in part, hardly unusual.¹⁷⁸ In keeping with the Jeffersonian tradition, early legal figures, like Virginia lawyer and judge Spencer Roane, emphasized that "the people of this country [are] the only sovereign power."¹⁷⁹ In the midst of the federal bank controversy, Roane held firm to a view that "[t]he *states* were the parties to the federal compact and had granted only the specific powers and powers fairly incidental to them."¹⁸⁰

Roane defined his country as that of Virginia and not the entire United States.¹⁸¹ This view was not uncommon, particularly in the years after the War of 1812, which had severely tested national authority.¹⁸² In *Hunter v. Martin*,¹⁸³ the political background against which Davis operated was already developed. In that case, the Virginia judges declined to follow the United States Supreme Court's ruling and argued that Supreme Court review of state court decisions was

¹⁷⁷ That something also included "absolute allegiance to the Confederate cause." COOPER, *supra* note 106, at 365. Simply, Davis was willing to make significant sacrifices, including "setting aside . . . states' rights for the sake of Southern independence," and he encouraged others to do the same. HUEBNER, *supra* note 1, at 281.

¹⁷⁸ See THOMAS, *supra* note 18, at 3.

¹⁷⁹ *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 36 (1793).

¹⁸⁰ *Judge Spencer Roane of Virginia: Champion of States' Rights – Foe of John Marshall*, 66 HARV. L. REV. 1242, 1253 (1953).

¹⁸¹ See generally *id.* In doing so, Roane basically made clear the Jeffersonian view that the Union is but a compact with the states.

¹⁸² See THOMAS, *supra* note 18, at 3 (discussing the prevalence of this view in the decades leading up to the Civil War).

¹⁸³ *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1815), *rev'd sub nom. Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

unconstitutional.¹⁸⁴ The United States Supreme Court subsequently reversed the Virginia Court of Appeals, but resistance to federal authority marked a view of government that would influence Civil War politics. It was this Jeffersonian tradition that insisted that the “Union was a compact by which the states ‘constituted a general government for special purposes.’”¹⁸⁵

Decades after Roane advanced this “ultra-Jeffersonian vision” in *Martin*, “Southerners . . . appropriated Jefferson’s position that the Union was a compact of sovereign states and reasoned that the ultimate ‘mode and measure of redress’ was secession, withdrawal from the compact.”¹⁸⁶ Unsurprisingly, Davis operated within that tradition.¹⁸⁷ And yet, this tradition leaves open a question of the scale of executive power. Against this backdrop, when Davis perceived the political pushback as threatening the success of the Confederacy, he had no choice but to take robust executive action. In other words, when the domestic order was disrupted, Davis’s theoretical view of small government made him less likely to wait on Congress and more likely to take matters into his own hands, even calling for Southerners to adopt a “practical nationalism” for the sake of Southern independence.¹⁸⁸

Examples of how this tension between the Jeffersonian tradition and strong executive responses are reflected in Davis’s responses to pushback abound. To start, there were certain projects, like the railroad connecting Greensboro, North Carolina, and Danville, Virginia, that had Congress not provided authorization, “Davis would have built it anyway ‘under his own authority as the commander-in-chief.’”¹⁸⁹ Although that one anecdote comes from a Davis biographer without documentation,¹⁹⁰ the anecdote captures the spirit of Davis’s view of small government and executive power. Fast forward to 2019, and this anecdote is eerily similar to President Trump’s decision to build the wall at the Mexican border.

¹⁸⁴ See generally *Martin*, 18 Va. (4 Munf.) 1.

¹⁸⁵ THOMAS, *supra* note 18, at 3 (quoting the Kentucky Resolutions).

¹⁸⁶ *Id.*

¹⁸⁷ The Jeffersonian tradition is not without its foothold in the Trump administration and the current political landscape. President Trump’s challenges to the Washington establishment are but one example. See Susan Milligan, *Trump Is Winning: The President Ran on Disrupting Washington—and He’s Doing Just That*, U.S. NEWS (Oct. 27, 2017, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2017-10-27/trump-wanted-to-shake-up-washington-and-he-has>. Indeed, this type of challenge to the “elite” echoes the Jeffersonian tradition, which emphasized “democracy rather than aristocracy.” JEFF TAYLOR, WHERE DID THE PARTY GO? WILLIAM JENNINGS BRYAN, HUBERT HUMPHREY, AND THE JEFFERSONIAN LEGACY 5 (2006).

¹⁸⁸ HUEBNER, *supra* note 1, at 281.

¹⁸⁹ Currie, *supra* note 21, at 1311 n.221. Currie takes this anecdote from William E. Dodd’s 1907 biography of Jefferson Davis. WILLIAM E. DODD, JEFFERSON DAVIS 260 (1907).

¹⁹⁰ Currie, *supra* note 21, at 1311 n.221.

Although Davis was willing to wait on Congress on certain issues like suspending the writ of habeas corpus,¹⁹¹ Davis also incorporated a “vigorous use of the veto power”¹⁹² into his executive power. In fact, he used the veto power “more liberally than any U.S. President before Grover Cleveland—not only on constitutional grounds, which practically everyone conceded was appropriate, but also for reasons of mere disagreement with congressional policy, which had been more controversial in the United States.”¹⁹³ For Davis, executive power had to be protected from “congressional encroachment,” and the veto power could do just that.¹⁹⁴

Davis’s response to the food riots is another example of this assertive executive power. In one instance, Davis tried to “ban the telegraph office from relaying news of the riot out of the city.”¹⁹⁵ Although Davis later acknowledged the significance of women’s support—or lack thereof—and “bid openly for their loyalty and leadership in a campaign against desertion,”¹⁹⁶ his attempts to cut off their protests showcased an expanded and exaggerated role for the president. When protest and pushback became newsworthy, as happened with the food riots, Davis tried to stymie the very flow of information that encouraged such pushback in the first place.¹⁹⁷ Although Davis, unlike some presidents, was not subject to “widespread personal hostility,” he faced criticism of certain policies¹⁹⁸ and found himself leading citizens, who were increasingly frustrated by the lack of protection and their growing poverty.¹⁹⁹ Of course, it cannot be forgotten that Davis was a wartime president, and whether he would have taken the same approach if the survival of the Confederacy did not hang in the balance is unknowable. That said, his responses remain worthy of examination and likely cannot all be written off as the consequence of war.

Perhaps unsurprisingly as a wartime president, Davis also faced significant criticism of his war policy.²⁰⁰ As a graduate of West Point and a war

¹⁹¹ See *id.* at 1327–28 (“Unlike President Lincoln, moreover, Davis never claimed such power for himself; he thrice asked Congress to suspend the writ, and when Congress finally declined[,] he acquiesced in its decision.”). Congress eventually authorized Davis to suspend habeas corpus “where (and presumably only when) necessary to repel invasion.” *Id.* at 1328.

¹⁹² *Id.* at 1266.

¹⁹³ *Id.* at 1345.

¹⁹⁴ *Id.*

¹⁹⁵ MCCURRY, *supra* note 23, at 192–93.

¹⁹⁶ *Id.* at 206.

¹⁹⁷ *Id.* at 192–93.

¹⁹⁸ COOPER, *supra* note 106, at 444.

¹⁹⁹ See, e.g., MCCURRY, *supra* note 23, at 190–91 (discussing the food riots as one example of the way some of the women dealt with their frustration over the lack of food).

²⁰⁰ COOPER, *supra* note 106, at 444.

hero of the Mexican-American War,²⁰¹ Davis had reason to have confidence in his own military expertise.²⁰² When Davis's military prowess met his new role as president of the Confederacy, Davis became a micro-manager of his generals.²⁰³ For example, he would write directly to his generals and issue directives.²⁰⁴ Davis also felt that "he had to maintain a visible military presence throughout his country, or . . . face 'dissatisfaction, distress, [and] desertion of soldiers.'"²⁰⁵ He could hardly stay away from the military campaign while he struggled to listen to the women and other Confederate citizens and understand that their protests were about more than just empty stomachs. Their protests were also about administrative change that if left ignored would actually encourage desertion of Davis's soldiers.²⁰⁶ Specifically, Confederate women not only desperately wanted their new government to take care of their husbands and fathers who were serving in the Confederate army but also to take care of the Confederate citizens who did not go to war.²⁰⁷ As previously discussed, the women sought basic necessities like food as well as help on their farms.²⁰⁸ As long as Davis ignored them, they would continue writing to their husbands, fathers, brothers, and sons to come home and help—to desert.²⁰⁹ If the Confederate government would not change its ways, then its women would deprive the government of the one thing it would never have enough of: soldiers. Similarly, the communities within Confederate states dedicated to rebelling against secession would also continue to deprive the Confederacy of soldiers and require the Confederacy to divert its already scarce resources to manage these protests and rebellions.²¹⁰ Davis realized this, but perhaps a little too late.

Pushback aside, Davis believed that he was acting with deep patriotism with his administration's policies, and that "he had overcome the ambition that had been so central in his career both because of his absolute allegiance to the Confederate cause and because he was at the top."²¹¹ His role as the Confederate president included a personal conviction in "suppress[ing] all personal concerns" and a conviction that Confederate independence could only be won if

²⁰¹ *Id.* at 4.

²⁰² In fact, he was chosen as the Confederacy's president "in considerable part because of his military qualifications." MCPHERSON, *supra* note 6, at 16.

²⁰³ *Id.* at xiii.

²⁰⁴ *Id.* at 346.

²⁰⁵ *Id.* at 352.

²⁰⁶ MCCURRY, *supra* note 23, at 206.

²⁰⁷ *See id.* at 190–92.

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See* BYNUM, *supra* note 165, at 8.

²¹¹ COOPER, *supra* note 106, at 365.

“Confederates [also] . . . put aside or suppress[ed] all personal concerns.”²¹² Although he recognized that many of his citizens were in need,²¹³ “the cause . . . bec[a]me all-encompassing for him.”²¹⁴ To that end, Davis was compelled to perceive political pushback as interfering with his understanding of “the cause,” which required “suppressing personal concerns.”²¹⁵

B. *Lessons Learned*

What do Davis’s responses to political pushback reveal about how a president should respond to protest or criticism in times of great disagreement? First, and no doubt easier said than done, it is imperative that the president know how to manage the meaningful political pushback that may come from the people, from the states, or even from other parts of the federal government. Indeed, Davis received pushback from all three. The women protested with the food riots,²¹⁶ the states often ignored orders from the Confederate government,²¹⁷ and within the Confederate government, Davis received pushback from Congress on various issues, including the suspension of the writ of habeas corpus, which, as previously discussed Congress declined to renew.²¹⁸ Unsurprisingly, Davis also received pushback from Congress when it came to arming and possibly emancipating the slaves who fought for the Confederacy,²¹⁹ after many “members of the Confederate Congress spent more time considering their self-interest as slaveholders than the needs of the Confederacy as a whole.”²²⁰ But Davis also faced general criticism from the Confederate Congress regarding military decisions.²²¹ In fact, just days after giving his inaugural address, a “resolution [was introduced] in the House calling for the investigation of the capture of [a Confederate fort] with the consequent evacuation of Nashville, and of the capitulation of Roanoke Island.”²²² Along those lines, a bill was passed in the Senate and the House to limit Davis’s military power by reducing “his secretary of war [to] a mere bureau clerk,” and creating an “office of a

²¹² *Id.*

²¹³ *Id.* at 494.

²¹⁴ *Id.* at 365.

²¹⁵ *Id.*

²¹⁶ *Id.* at 191–92.

²¹⁷ *See, e.g.,* Currie, *supra* note 21, at 1264 n.32 (“State authorities, on the other hand, were known to ignore opinions of the Attorneys General, which obviously did not bind them.”).

²¹⁸ HUEBNER, *supra* note 1, at 273–75. *See also supra* notes 137–141 and accompanying text.

²¹⁹ *See, e.g.,* Currie, *supra* note 21, at 1303–06.

²²⁰ HUEBNER, *supra* note 1, at 266.

²²¹ Robert G. Cleland, *Jefferson Davis and the Confederate Congress*, 19 SW. HIST. Q. 213, 217–18 (1916).

²²² *Id.* at 218.

commanding general of the armies of the Confederate States.”²²³ This bill, however, ultimately did not survive after Davis vetoed it, citing the Confederate Constitution as vesting the powers the bill assigned to the “office of commanding general” with the commander-in-chief.²²⁴ It is a fine and difficult balance between not interfering with political pushback and ensuring that the government systems are not ignoring the new information that the pushback provides.

Second, although it may be tempting simply to veto Congress²²⁵ and “micro-manage” certain departments or even attempt to micro-manage the states,²²⁶ to do so would be a mistake. After all, the Confederacy did not survive, and even during its short existence, it was hardly a well-functioning government.²²⁷

What is also clear is that when citizens voiced their opinion to the Confederate government, they spurred a public discussion and fulfilled an important political duty. Their determination and persistence paid off on some level—Davis recognized the value of their political support.²²⁸ Things might have been different for Davis had he listened sooner and more closely.²²⁹ Similarly, protests and pushback that percolate at the state level should not be wholly ignored. Of course, the president need not intervene unless the ordinary functioning of the national government is in jeopardy. But in the Confederacy’s case, Davis may have been better off not simply allowing the states to ignore the opinions of his attorneys general.

Simply put, Davis’s responses reveal that mismanaging political pushback worked against establishing a thriving government. Although likely not the only reason the Confederacy fell, there is every reason to think that Davis’s poor response to political pushback was at least a contributing factor. Specifically, Confederate citizens were hungry. Soldiers were deserting. There was no Supreme Court. Pockets of Confederate states actively rebelled against the Confederacy and diverted the Confederacy’s scarce resources. Taxes could not be collected, and Davis could not effectively navigate these problems. Navigating these problems successfully would have necessarily required Davis to process and address the information that the political pushback generated.

²²³ *Id.* at 220.

²²⁴ *Id.*

²²⁵ *See* Currie, *supra* note 21, at 1266.

²²⁶ COOPER, *supra* note 106, at 4.

²²⁷ Recall, there was no Supreme Court, and the executive branch often simply passed on the constitutionality of laws.

²²⁸ MCCURRY, *supra* note 23, at 206.

²²⁹ This is not to say that the Confederacy necessarily would have won but rather that Confederate citizens may have been able to hold out longer, or that they would not have resorted to actions like the food riots and encouraging desertion. Professor McCurry further discusses the “pressures” that the Confederacy was under during this time. *Id.* at 4.

Instead, Davis merely focused on his own obsession with the cause²³⁰ and did not adequately respond to the political pushback.

It is also evident that at least some of the pushback, such as that from the Confederate women, did not materially and substantially interfere with the government's ability to function or carry out its core responsibilities. The careful observer may point out that the Confederate women were jeopardizing Davis's ability to maintain an army. After all, these women effectively were encouraging desertion in some instances—something Davis later acknowledged when he tried to court women's support.²³¹ The operation of the military is certainly included within the vital aspects of a well-functioning government. But in the case of the Confederacy, the women no more prevented the maintenance of an army than the anti-war protesters on college campuses during Vietnam prevented the maintenance of an army. Rather, the women called attention to government policies and practices. In the end, the Confederacy was still able to maintain its army; the women did not force the government to come to a grinding halt.

Importantly, the Confederate women (among other protesters Davis faced) could only interfere with the domestic order and the functioning of the government to the extent that they could persuade others of their objections to the executive's policies. To be fair, if the *only* objective the Confederate women achieved was to incite some of the men to desert, then that incitement could likely have been independently criminalized. In the end, these protests highlight how a president's response to pushback has as much to do with the success of the government as the actual activities and policies of the government.

IV. THE IMPORTANCE OF PRESIDENTIAL RESPONSES TO POLITICAL PUSHBACK TODAY

This Part first turns to the current political climate, importing some of the lessons learned from Davis's time as the Confederate president. Second, this Part considers some of President Trump's responses to the protest and pushback that he has encountered. Third, this Part reflects on the lessons from Davis's responses and the tension between government-in-theory and government-in-practice that those lessons reveal.

A. *Donald Trump: America's Current President*

Donald J. Trump was elected the 45th President of the United States.²³² Before becoming president, President Trump was a businessman.²³³ Indeed, the

²³⁰ COOPER, *supra* note 106, at 365.

²³¹ *Id.* at 206.

²³² *Donald J. Trump, 45th President of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/people/donald-j-trump/> (last visited Aug. 27, 2019).

²³³ *See id.*

presidency was the first political office he ran for.²³⁴ From the moment President Trump was elected, he has faced significant political pushback. During this time of great public and political disagreement, the lessons from Davis's responses to political pushback are especially compelling.

1. A Brief Overview of the Current Political Landscape

Much like Davis, President Trump is a president in a time of deep political turmoil. In 2019, many women, much like their Confederate counterparts (who they might be loath to find a parallel with at first blush), are at the forefront of the protests that are seeking to reform welfare policy and improve basic human rights.²³⁵ For example, much of the current pushback focuses on rights for transgender Americans, women, immigrants, and the poor.²³⁶ At the same time, President Trump has also engaged in the rhetoric of "protection" as to the nation's borders, businesses, and unborn children.²³⁷ Although the rhetoric of "protection" is used on both sides of the political aisle, it is used to communicate intensely different messages.²³⁸

Moreover, like Davis, President Trump has faced state attorneys general, who oppose his policies. Shortly after President Trump's inauguration, 17 attorneys general "signed a letter vowing to 'use all of the tools of our offices to

²³⁴ *Id.*

²³⁵ See, e.g., Gretchen Frazee, *What the Women's March Wants*, PBS: NEWS HOUR (Jan. 18, 2017, 2:23 PM), <http://www.pbs.org/newshour/updates/womens-march-wants/>. See also *What the Women's March Stands For*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/opinion/what-the-womens-march-stands-for.html> (discussing the following as just some of the things that the Women's March stands for: "[a]ffordable birth control[,] [e]qual pay for equal work[,] [f]ull access to health care for transgender Americans").

²³⁶ See, e.g., Hansi Lo Wang, *Protesters Prepare for Women's March After Trump's Inauguration*, NPR: TWO-WAY (Jan. 20, 2017, 1:55 AM), <http://www.npr.org/sections/two-way/2017/01/20/510706246/protesters-prepare-for-womens-march-after-trumps-inauguration>.

²³⁷ See, e.g., *President Donald J. Trump Wants to Fully Secure Our Border and Reform Our Immigration System to Put America First*, WHITE HOUSE (May 16, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-wants-to-fully-secure-our-border-and-reform-our-immigration-system-to-put-america-first/>; see also Dave Boyer, *Trump Says Amid N.Y., Va. Abortion Controversies: U.S. Must Protect Children 'Born and Unborn'*, WASH. TIMES (Feb. 7, 2019), <https://www.washingtontimes.com/news/2019/feb/7/donald-trump-says-ny-va-abortion-controversies-us/>.

²³⁸ For example, the media is littered with sound bites about protecting the border, protecting immigrants, protecting a woman's right to choose, and protecting unborn children. Compare, e.g., *President Donald J. Trump's Border Security Victory*, WHITEHOUSE.GOV (Feb. 15, 2019) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>, with *Trump's Wall Gets America Nowhere on Border Security*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/opinion/trump-wall-immigration.html>.

fight this unconstitutional order,”²³⁹ referring to Executive Order 13,769, otherwise known as the travel ban, which “temporarily close[d] the U.S. to all refugees and all people from seven majority-Muslim countries and bar[red] Syrian refugees indefinitely.”²⁴⁰ But pushback from state attorneys general has not stopped at that initial letter:

[19] state AGs [have since] sued [the Trump administration] to stop [it] from withholding Obamacare subsidies from states, 16 to halt the rollback of environmental regulations, and 20 to reverse its decision to rescind a program that had protected young immigrants brought to the U.S. illegally as children from deportation.²⁴¹

President Trump has also faced significant pushback within the federal government, something Davis faced and something every president faces on some level. For example, President Trump’s first version of his Executive Order suspending “the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks”²⁴² was blocked by the lower courts.²⁴³ Although the Supreme Court ultimately upheld a revised version of the so-called “travel ban,” President Trump nevertheless faced multiple challenges in the lower courts.²⁴⁴ President Trump has also faced pushback in the lower courts regarding construction of the border wall,²⁴⁵ though the Supreme Court has allowed construction as the litigation proceeds.²⁴⁶ In Congress, President Trump has faced pushback as well on any number of issues ranging from the confirmation of Justice Kavanaugh²⁴⁷ to the Mueller Report.²⁴⁸ Additionally, at the end of 2018 and into early 2019, pushback and significant disagreement over how to handle immigration concerns culminated in the longest

²³⁹ *Democratic State Attorneys General Begin Trump Pushback*, CNBC (Jan. 31, 2017), <https://www.cnn.com/2017/01/31/democratic-state-attorneys-general-begin-trump-pushback.html>.

²⁴⁰ *Id.*

²⁴¹ Neuhauser, *supra* note 22.

²⁴² *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018); *see also* *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (2017).

²⁴³ *See* *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

²⁴⁴ *See Trump*, 138 S. Ct. at 2403–04.

²⁴⁵ *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

²⁴⁶ *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019).

²⁴⁷ *See Everything on Brett Kavanaugh, the Senate Vote and the Fallout*, N.Y. TIMES (Oct. 6, 2019), <https://www.nytimes.com/2018/10/02/us/politics/kavanaugh-news-fbi-investigation.html>.

²⁴⁸ *See* Anthony Zurcher, *Mueller Report: Five Looming Legal Battles Between Congress and Trump*, BBC NEWS (May 9, 2019), <https://www.bbc.com/news/world-us-canada-48138636>.

government shutdown in American history.²⁴⁹ In that moment, a healthy debate escalated to a disruption to the governmental order. Most recently, pushback from within the government has taken the form of an impeachment inquiry about an alleged request to the Ukrainian government for personal political gain.²⁵⁰

2. President Trump Takes Action

Unlike Davis, President Trump has faced significant personal hostility.²⁵¹ But very much like Davis, President Trump has taken robust executive action, often breaking with the Republican tradition of “limited government.”²⁵² In other words, Davis broke with his own Jeffersonian principles and the anticipated states’ rights focus of the Confederacy, and President Trump broke with party principles and contradicted certain statements about returning power to the states and the American people.²⁵³ For President Trump, the border wall is only one such example of executive action that oversteps what is commonly expected, even in an era where domestic regulation is common. Moreover, this action is a prime example of how President Trump may not have fully appreciated or responded to the concerns of the protesters. President Trump’s interpretation of what it means to protect the nation’s vulnerable citizens as well as the nation’s diverse heritage appears to be inconsistent or in tension with the protesters’ vision of what protection from the President looks like.²⁵⁴

²⁴⁹ See Mihir Zaveri, Guilbert Gates, & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here’s the History.*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html>.

²⁵⁰ See Fandos, *supra* note 26.

²⁵¹ See COOPER, *supra* note 106, at 444 (“This band of viciously hostile critics remained small. They never managed to stir up formidable personal animosity toward the president . . .”).

²⁵² Indeed, in his inaugural address, President Trump observed that his inauguration was “not merely transferring power from one administration to another, or from one party to another—but . . . transferring power from Washington, D.C. and giving it back to you, the American People.” Donald J. Trump, President of the United States of America, Inaugural Address (Jan. 20, 2017). In another statement, President Trump stated that he would “make states the laboratories of democracy once again.” Donald J. Trump, President of the United States of America, Remarks in Meeting with the National Governors Association (Feb. 27, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-national-governors-association/>). But President Trump is hardly the first president to champion the sovereignty of the people and then exercise his executive power quite differently. See, e.g., ELLIS, THOMAS JEFFERSON, *supra* note 20 (discussing this tension in the context of Thomas Jefferson’s political principles and the Louisiana Purchase).

²⁵³ See Ross Douthat, *The Era of Limited Government Is Over*, N.Y. TIMES (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/opinion/conservatives-republicans-trump.html>.

²⁵⁴ Compare *President Trump’s Bold Immigration Plan for the 21st Century*, WHITEHOUSE.GOV (May 21, 2019), <https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century/>, with Ruthie Epstein, *The Immigration System Is Inhumane. The*

When it comes to women's rights, this inconsistency is even more stark. For example, for many protesters, protecting women's rights includes, among other interpretations, maintaining access to contraception and creating equality in the workplace.²⁵⁵ Notwithstanding these concerns, President Trump signed an order that stopped many women's access to contraception around the globe, and he signed this order within a week of the Women's March.²⁵⁶ Debate on this topic has only gained further traction with the recent passage of various abortion bans in certain states.²⁵⁷

As to President Trump's specific response to some of the protesters, these responses sometimes share similarities with how Davis tried to quell the women protesting during his time in office. For example, President Trump's initial response to the Women's March was a tweet saying the following: "Watched protests yesterday but was under the impression that we just had an election!"²⁵⁸ Although President Trump later followed up with another tweet about peaceful protests as a hallmark of democracy, this later tweet is much like Davis's later realization that he needed to recognize the influence of the women protesting the Confederacy—too little, too late.

As already mentioned, President Trump has also adopted a rhetoric focused on protecting America from various threats.²⁵⁹ Sometimes the most important response to pushback is selecting the appropriate rhetoric. Indeed, responding to protest is a performative act, and President Trump, through his rhetoric and tweets, further highlights the significance and impact of this point. For example, President Trump's rhetoric in response to the riots that erupted in Charlottesville, Virginia, at a white supremacist rally demonstrate just how

Next President Must Dismantle It., ACLU.ORG (June 17, 2019), <https://www.aclu.org/blog/immigrants-rights/immigration-system-inhumane-next-president-must-dismantle-it>.

²⁵⁵ See Susan Chira & Yamiche Alcindor, *Defiant Voices Flood U.S. Cities as Women Rally for Rights*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/women-march-protest-president-trump.html>. The protesters are also seeking protection for immigrants, the environment, and voter rights. *Id.* The protesters' concerns further include police brutality and mass incarceration. *Id.*

²⁵⁶ Nicholas Kristof, *Trump's War on Women Begins*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/opinion/president-trumps-war-on-women-begins.html>.

²⁵⁷ See Laurel Wamsley, *Across the Country, Protesters Rally to Stop States' Abortion Bans*, NPR (May 21, 2019, 3:21 PM), <https://www.npr.org/2019/05/21/725410050/across-the-country-protesters-rally-to-stop-states-abortion-bans>.

²⁵⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 22, 2017, 4:47 AM), <https://twitter.com/realdonaldtrump/status/823150055418920960?lang=en>.

²⁵⁹ For example, in his inaugural address, President Trump emphasized "protecting" America. Trump, Inaugural Address, *supra* note 252. Recently, the focus of such protection has centered around immigration. See, e.g., *President Donald J. Trump Is Ensuring Non-Citizens Do Not Abuse Our Nation's Public Benefit*, WHITEHOUSE.GOV (Aug. 12, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ensuring-non-citizens-not-abuse-nations-public-benefit/>.

powerful rhetoric can be. In that instance, President Trump only engendered further criticism and pushback by failing to condemn racism in his initial remarks.²⁶⁰ In this way, President Trump may pay more attention than Davis ever did to how his response will be received, particularly how some of his supporters will receive it. But the question remains what is the appropriate response? Is a response directed towards, for example, the political base or certain supporters the most appropriate response? More recently, President Trump has tried to clarify when he does not support the language of some of his supporters. For example, he explained that he did not condone the “send her back” chant regarding Representative Ilhan Omar.²⁶¹ In this instance, perhaps, President Trump was attempting to offer a response directed to a broader audience.

As discussed above, selecting an appropriate response to pushback is no small task and was a significant problem for Davis.²⁶² Indeed, Davis’s struggle with disruptions to the domestic order of the Confederacy are eerily similar to some of President Trump’s struggles with pushback, particularly disruptions to the domestic order. But to be fair, neither Davis nor President Trump was left with an easy task. Nevertheless, at times, both have appeared to take on an exaggerated sense of executive power in responding to disruptions to the domestic order. As the next Section discusses, this problem may well be the root of problematic responses to political pushback.

3. The Role of Government in Theory and in Practice

The lessons from Davis’s responses provide important insights for the modern era. Perhaps most relevant for this Article is the tension between an

²⁶⁰ See generally Samuel Perry, *President Trump and Charlottesville: Uncivil Mourning and White Supremacy*, 8 J. CONTEMP. RHETORIC 1, 57 (2018); see also Katy Tur, *Two Years After Charlottesville, A Look at President Trump’s Rhetoric*, MSNBC (Aug. 12, 2019), <https://www.msnbc.com/katy-tur/watch/two-years-after-charlottesville-a-look-at-president-trump-s-rhetoric-65946693532>.

²⁶¹ Seung Min Kim, John Wagner, Rachel Bade & Mike DeBonis, *Trump Says He Disagrees with ‘Send Her Back!’ Chant Directed at Rep. Omar During Rally Despite His Previous ‘Go Back’ Tweet*, WASH. POST (July 18, 2019), https://www.washingtonpost.com/politics/some-republicans-condemn-chant-at-trump-rally-but-stand-by-his-characterizations-of-four-minority-lawmakers/2019/07/18/dded4b92-a962-11e9-86dd-d7f0e60391e9_story.html.

²⁶² For instance, Davis got sidetracked with his own “all-encompassing” “commitment to the cause” and worried about a lack of commitment from others anytime he “detected others acting for personal advantage.” COOPER, *supra* note 106, at 365. Davis also was (rightly) concerned about not having enough manpower to fight the war but struggled to link the women’s concerns with the soldiers’ desertion until later on during the Civil War. MCCURRY, *supra* note 23, at 206. The women and those not as committed to the cause as Davis were likely not going to bring down the Confederacy. But by failing to receive this type of pushback, Davis’s executive actions were not as effective as they could have been. After all, when all was said and done, the South never could come up with enough manpower, and the Confederacy fell.

outward idea of less robust federal government responsibility²⁶³ and a more robust role for executive authority in practice. In other words, a president who imagines a *less* robust role for government may think that the slow processes of legislation will not adequately, effectively, or timely address a problem that seems to threaten the domestic order or governmental order. In fact, this type of president might worry that a disruption to the domestic order will inevitably escalate to disruption to the governmental order before the legislative processes have accomplished anything. Under this view, a natural inclination would be to address the issue quickly by adopting a broad sense of executive power.

This tension that Davis experienced and, on some level, President Trump has also experienced²⁶⁴—small government but robust presidential power—is not unique to them. President William Howard Taft wrote about a similar problem in criticizing President Theodore Roosevelt.²⁶⁵ According to Taft, “the president’s power to act depends on the existence of some demonstrable legal source of authority.”²⁶⁶ Although Taft thought that Article II powers included broad executive action, he also recognized the institutional limits and, most importantly for this Article, “the impact of public opinion on the practical exercise of executive authority.”²⁶⁷ Public opinion, including protest, can and should influence executive authority. When a president fails to respond or

²⁶³ For example, Davis ostensibly believed in states’ rights, perhaps most notably in the lead up to the Civil War and his own congressional campaign before the Civil War. COOPER, *supra* note 106, at 109 (discussing how “Davis emblazoned states’ rights . . . on the Democratic banner” on which he campaigned). That said, *during* the war, Davis “cultivated the idea of setting aside . . . states’ rights for the sake of Southern independence,” promoting a “practical nationalism that called for short-term hardship and sacrifice for the sake of long-term success.” HUEBNER, *supra* note 1, at 281. President Trump also promised small government on some level. *See, e.g.*, Ron Grossman, *Trump’s Cabinet May Fulfill GOP Promise of Small Government—For Better or Worse*, CHI. TRIB. (Dec. 13, 2016, 11:02 AM), <http://www.chicagotribune.com/news/ct-trump-cabinet-grossman-20161213-story.html>.

²⁶⁴ *See, e.g.*, Zachary B. Wolf, *Trump Wants Radically Less Government. Here’s What That Looks Like.*, CNN POL. (June 15, 2019, 1:46 PM), <https://www.cnn.com/2019/04/12/politics/trump-deregulation/index.html>. *See also* Donald J. Trump, President of the United States of America, Presidential Proclamation for Loyalty Day 2019 (Apr. 30, 2019) (transcript available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-loyalty-day-2019/>) (“As Americans, we recommit to preserving our liberty and the framework of limited government that safeguards it from abuse.”). It is true that President Trump has not always personally touted the traditional Republican party message of small government, though he has at least made reference to the importance of states’ rights and limiting regulations. *See, e.g.*, Michael Stratford, *Trump Endorses States’ Rights—But Only When He Agrees with the State*, POLITICO (Apr. 2, 2018, 5:00 AM), <https://www.politico.com/story/2018/04/02/trump-states-rights-education-sanctuary-drilling-492784>.

²⁶⁵ H. Jefferson Powell, *Editor’s Introduction to WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS* xxvi (H. Jefferson Powell ed., 2002).

²⁶⁶ *Id.* at xxvii.

²⁶⁷ *Id.* at xxxi.

consider the public's concerns in a meaningful way, he has not only failed in his executive duties but has also put his government's healthy functioning at risk. How? Quite simply, public opinion plays a central role in shaping the country's policies through the democratically accountable branches, which include the executive.²⁶⁸ Overcoming this tension, then, may be the key to an effective and tempered executive response to political pushback.

V. CONCLUSION

The parallels between Davis and President Trump and their responses to pushback and protest reveal important aspects of how presidents should catalogue and respond to such pushback and protest. It is especially important in the modern era to learn as much as possible from Jefferson Davis who watched his administration and his "country" fall. National memory often focuses on the Vietnam era and the Civil Rights Movement when thinking about protest and political turmoil.²⁶⁹ But, the Civil War and the internal conflict within the Confederacy provide equally valuable lessons for navigating political turmoil. Because the Confederacy fell, Davis provides a unique opportunity to understanding the significance of presidential responses to pushback and protest. Indeed, the lessons Davis never learned may be especially important for a president confronted with what could be the ultimate form of pushback: a formal impeachment inquiry.

When confronted with a disturbance, an American president who believes in small government or who does not believe in the effectiveness of legislation may be less likely to wait for congressional or judicial action. The tension between wanting to follow the Jeffersonian tradition of states' rights and wanting to maintain the domestic order can quickly lead to a robust exercise of executive power, which may result in missing the point of the political pushback in the first place. The disruptions to the domestic order are usually a good thing because they engender widespread debate and bring attention to the people's values and concerns. Squaring a tolerance, and even support, of protest with robust executive power is not always easy. But that is what must be done. That is the lesson for modern presidents, and the lesson Davis learned too late.

²⁶⁸ See *id.* at xxxii–iii.

²⁶⁹ See Sarah Jaffe, *Echoes of Vietnam-Era Protests in Today's Demonstrations*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/opinions/echoes-of-vietnam-era-protests-in-todays-demonstrations/2017/02/02/abc0f896-cc59-11e6-a747-d03044780a02_story.html?utm_term=.05c83bcf0f23.