Congress-In-Chief: Congressional Options to Compel Presidential War-Making

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CONGRESS-IN-CHIEF:
CONGRESSIONAL OPTIONS TO
COMPEL PRESIDENTIAL WAR-
MAKING

Clark H. Campbell*

ABSTRACT

The last time Congress declared war was in 1942 against Rumania. Since then American troops have been sent into action with, and in some cases without, authorizations to use force instead of a formal declaration of war. Americans are accustomed to hearing about the President using more force than he is technically allowed by the Constitution, over the objections of Congress. But what if the roles were switched? If Congress declares war over the objections of the President, can the President be forced to make war in accordance with Congress’ demands? When Congress makes a formal declaration of war in accordance with Article I Section 8 of the Constitution, is the President obligated to direct US troops into battle against the enemy state or group? If Congress asks the President to use force, is the President required to comply?

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INTRODUCTION

The last time Congress declared war was in 1942 against Rumania.1 Since then American troops have been sent into action with, and without, authorizations to use force rather than with a formal declaration of war.2 Americans are accustomed to hearing claims that the current President has used more force than he is explicitly allowed by the Constitution, over the objections of Congress.3 But what if the roles were reversed? If Congress declares war4 over the objections of the President, can Congress force the President to make war5 in accordance with its demands? When Congress makes a formal declaration of war in accordance with Article I Section 8 of the Constitution, is the President obligated to direct US troops into battle against the enemy state or group? If Congress asks the President to use force, is the President required to comply? The Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer told us that “[w]hen the President takes measures incompatible with the expressed

4 U.S. CONST. art. I, § 8, cl. 11 (Congress’ power to declare war includes nuances and limitations that this article will not discuss).
5 U.S. CONST. art. II, § 2, cl. 1. The President’s constitutionally granted role of Commander in Chief includes the power to make war. See id. This article will not discuss the nuances and limitations of the President’s power to make war. The power to make war will be treated as a simple power to command U.S. forces in both peace-and war-time.
or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” The idea of the President resisting military action may seem absurd, but has been borne out by history:

Today, of course, we are so accustomed to thinking of Presidents as more hawkish than Congress that the hypothetical of a dovish President would strike many as preposterous. Yet, history provides a number of commonly ignored examples: John Adams resisted calls for a declaration of war against France in 1798 and instead sought authority for the limited and undeclared Quasi-War; James Madison was ambivalent about declaring war on Britain in 1812; Grover Cleveland in 1896 rebuffed the proposal by various members of Congress to declare war on Spain; William McKinley in 1898 reluctantly conceded to the same war fervor; and Woodrow Wilson successfully campaigned for reelection in 1916 on the slogan, “He kept us out of war.”

In fact, there are recent examples of Congress acting hawkish over the objections of the President. In 2015, Senator Tom Cotton of Arkansas sent a letter to the leaders of Iran warning against making a nuclear deal with President Obama. While Senator Cotton’s actions did not amount to an outright threat of war, his actions represented a more hardline approach toward Iran than that of President Obama.

It may give helpful context to the reader to imagine possible scenarios based on political sentiment in the not-so-distant past when Congress could have taken a more hawkish approach than the President. First, Congress

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6 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
could have sought a preemptive strike against Iran. As Senator Cotton’s letter shows, popular sentiment to some degree opposed any course of action that could result in Iran gaining nuclear capabilities.\(^{10}\) Senator Cotton seemed to be threatening a re-imposition of sanctions,\(^ {11}\) but if Congress wanted to disable Iran’s nuclear program permanently, the President could have been pressured to attack locations vital to Iranian nuclear development. Second, Congress could seek a greater American military presence in Syria. If the terror group The Islamic State of Iraq and Syria (ISIS) becomes resurgent in and around Syria, Congress may push for military action to control the situation and end the conflict. Third, greater Russian involvement in Ukraine could encourage Congress to request military counteraction to control Russian aggression and protect Eastern Europe. Finally, Congress could ask the President to respond more forcefully against Boko Haram in Nigeria, as the Nigerian Ambassador requested early in 2015.\(^ {12}\) These scenarios, while not the most current examples of Legislative-Executive tension, will be helpful to illustrate the application of the principles discussed in this article. Modern warfare can include myriad methods including cyber-attacks, economic attacks, biological attacks, espionage, or political subversion.\(^ {13}\) However, this article will focus on how Congress could force the President to make war in a traditional, physical attack. Congressional power and approaches will differ if Congress seeks to pursue other methods of warfare.

I will proceed based on a hypothetical situation in which Congress declares war or passes an act calling for military action, and the President responds by expressing his unwillingness to make war or by exercising his

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\(^{11}\) Id. (reminding Iranian leaders that Congress must approve any agreement made with Iran).


veto. After the President exercises his veto, Congress overrides that veto and expresses an intent to pursue military action over the President's objections. Congress then must decide under what theory of law the President must follow their orders or how Congress can force presidential action.

Congress would not lightly decide to override presidential objections and declare a war that the President refuses to support. But, the idea that Congress may seek war over the President's objections is not beyond imagination. This article will analyze that situation and the constitutional and practical issues attached to it. For this purpose, Congress will be treated as a single unit acting in concert against the President. In addition to prescribing avenues of action to a Congress seeking to compel the President, I hope to inspire thought and research into this and other areas of Legislative-Executive relations.

Congress has many possible courses of action to attempt to compel the President to make war. The options, in decreasing order of severity, include impeachment, a lawsuit to compel the President to act, a lawsuit against another executive officer, use of the power of the purse to constrain the President, a loan of US troops to a state or organization willing to make war, or an act directing specific presidential action. If Congress successfully forces presidential action, a new question becomes important: to what degree must the President make war? This question will be discussed after presenting each possible approach for Congress. Although there are some actions that Congress could take to compel the President to make war, the most likely to succeed are the application of the power of the purse or passage of a specific law directing presidential action.

This article will examine the options available to Congress, following the order listed above. Sections II through VII will present the mechanisms Congress can use to compel the President to make war and discuss problems with each approach. Section VIII will address the question of the degree of war-making required of a President.

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14 See U.S. Const. art. I, § 7, cl. 22.2.
15 See id.
16 See Letter from U.S. Senators, supra note 10.
I. IMPEACHMENT

A. Constitutional Power to Impeach

Impeachment—or the threat of impeachment—of the President, is one option for Congress to respond to a President that is unwilling to make war. If a President can be galvanized to action by the threat or initiation of impeachment proceedings, Congress may be able to “force” war-making. Alternatively, if a President does not respond to the threat of impeachment, Congress could remove that President from office. Once the President is removed, Congress could expect a more willing Executive to cooperate in plans for war. However, there are significant challenges to the use of impeachment as a tool to compel presidential action, the first being the ability of Congress to impeach.

The Constitution of the United States grants power to Congress to remove the President from office if he is impeached by the House of Representatives and convicted by the Senate. In the history of the U.S., no President has ever

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18 U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

19 U.S. CONST. art. I, § 3. ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

20 Cass R. Sunstein, Impeaching the President, 147 U. PA. L. REV. 279, 286 (1998). ("The third position, which ultimately carried the day, was that the President should be impeachable, but only for a narrow category of abuses of the public trust—for example, by procuring office by unlawful means, or using distinctly presidential authority for ends that are treasonous.").

been removed from office through the process of impeachment. The Constitution grants Congress the power to impeach the President in cases of "high crimes and misdemeanors." Scholars disagree over the meaning of high crimes and misdemeanors. Some argue that "impeachment is an appropriate remedy only where a public officer has committed a criminal act while in office." This would shut the door on the ability of Congress to impeach a President for any political action or inaction unless those acts can be prosecuted as a criminal offense. Others posit that "an impeachment offense is whatever a majority of the House [considers it] to be at a given moment in history." This view gives much greater power to Congress, essentially turning impeachment into a political weapon to be used at the discretion of whichever elected representatives can command a majority of the House and a two-thirds majority of the Senate.

A possible hook for Congress’ impeachment comes from the word “high” in the Constitution’s description of impeachable offenses as high crimes and misdemeanors. This modifier, scholars suggest, does not apply to the magnitude of the offense, but rather to the nature of the crime or misdemeanor. The word “high” suggests that an act for which Congress may

22 Stephen B. Presser, Standards for Impeachment, in Essays on Article II, The Heritage Guide to the Constitution: Fully Revised Second Edition (David F. Forte & Matthew Spalding eds., 2014) http://www.heritage.org/constitution/#!/articles/2/essays/100/standards-for-impeachment (last visited Aug. 29, 2018). Presidents Andrew Johnson and William Clinton were both impeached but were not convicted by the Senate. See id. President Richard Nixon resigned his office before the House was able to vote on articles of impeachment. See id.

23 U.S. Const. art. II, § 4, cl. 1.


26 Id. at 1602 (alteration in the original) (internal quotation marks omitted); see also Gary L. McDowell, "High Crimes and Misdemeanors": Recovering the Intentions of the Founders, 67 Geo. Wash. L. Rev. 626, 634 (1999) (internal quotation marks omitted).

27 Sunstein, supra note 20, at 283.
impeach is "a 'crime or misdemeanor' carried out against the commonwealth itself." In this case, certain political acts would fall within the range of Congress' ability to impeach. Congress could argue that a President who fails to follow Legislative directives, particularly a declaration of war, has put our nation at risk—committed a crime against the commonwealth. Assuming Congress is unified enough to act together in declaring and seeking war, voting on articles of impeachment would not present a major challenge.

B. Impeachment of President Andrew Johnson

The impeachment of President Andrew Johnson exemplifies the circumstances under which a president could be impeached for opposing the will of Congress. President Johnson was impeached for violating an act that sought to take a portion of his executive power. The Tenure of Office Act, enacted in 1867, restricted the President’s power to remove officers by requiring Senate approval for any removal. The President vetoed the Act after it was passed. Congress overruled the President’s veto, and the Act became law. The cabinet of President Johnson advised him that the Act was unconstitutional because it subjected the executive power of the President to

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28 McDowell, supra note 26, at 638. See also Joseph Isenbergh, Note, The Scope of the Power to Impeach, 84 Yale L.J. 1316, 1324 (1975).
29 McDowell, supra note 26, at 641.
30 See, e.g., Isenbergh, supra note 28, at 1332 (ignoring the possibility of Congressional censure of the President). A President who vetoes an act of Congress and then ignores the subsequent overruling of his veto would not likely respond to a simple censure by Congress. Even if Congress formalized their censure and supported their actions with arguments based in the Constitution, an unwilling President would be unlikely to respond.
31 See generally EDMUND G. ROSS, HISTORY OF THE IMPEACHMENT OF ANDREW JOHNSON (The Echo Library ed., 2007) (1868) (detailing an exhaustive history of the events leading up to and constituting the impeachment and trial of President Andrew Johnson).
33 See Ross, supra note 31, at 66.
34 Id. at 63; Myers v. United States, 272 U.S. 52, 176 (1926) (ruling the Act unconstitutional).
the review of Congress.\textsuperscript{35} After being advised on the unconstitutionality of the Act, President Johnson suspended Secretary of War Edwin Stanton in direct violation of the Act and appointed Ulysses S. Grant to take Stanton’s place.\textsuperscript{36} As a result of President Johnson’s violation of the Tenure of Office Act, he was impeached in February of 1868.\textsuperscript{37} After the House approved the articles of impeachment, President Johnson was tried in the Senate.\textsuperscript{38} He avoided conviction by just one vote.\textsuperscript{39}

In the case of President Johnson’s impeachment, Congress passed an act over the veto of the President. When President Johnson acted in violation of that act, Congress impeached the President for refusing to follow its directive.\textsuperscript{40} Rather than refusing to act, as in the premise of this article, President Johnson acted in opposition to Congress, but the situations are closely related. The articles of impeachment adopted by Congress, although presented under the name of “high crimes and misdemeanors,” evidence an attitude that an impeachable offense is “whatever a majority of the House [considers it] to be at a given moment in history.”\textsuperscript{41} The political nature of President Johnson’s impeachment suggests that Congress was not above using its power of impeachment as a tool to force the President to take or refrain from taking certain actions. Considering the example of President Johnson, it is not difficult to imagine Congress taking a similar course of action to compel a President to make war. Impeachment is difficult, even when a President has clearly committed criminal acts, such as perjury.\textsuperscript{42} The difficulty of conviction, especially based on non-criminal articles of impeachment, is a substantial roadblock to the use of impeachment to compel presidential action.

\textsuperscript{35} See Ross, supra note 31, at 63–64.
\textsuperscript{36} See Ross, supra note 31.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See Ross, supra note 31, at 66–67.
C. Problems with Impeachment

Other problems with the impeachment approach are significant. First, the process of impeachment could take a significant amount of time. Declaration of war would be put on hold during the presentation of and voting on articles of impeachment and the trial and removal of the President from office. The longest impeachment trial in the U.S. lasted only three months, but assuming Congress felt a pressing need for military action, even such a slight delay could prove disastrous. Second, once the President is successfully impeached and removed from office, Congress would have no guarantee of Executive action. The Vice President would assume the office of the President, and there is no guarantee that he would comply with Congress' intentions. The new President could appoint another Vice President, and the cycle would continue. If the Vice President were impeached concurrently with the President and the Speaker of the House assumed the Presidency, action would be more likely, because the Speaker would come from the body of Congress, which has declared and is seeking to make war. But that would only take place after having passed through the significant delay of two impeachments. Finally, articles of impeachment based on the President's failure to make war would be highly political. Congress' impeachment of President Johnson proves that such articles can result in impeachment, but that impeachment, and all other attempts at impeachment since, show that successful conviction is unlikely.

II. LAWSUIT AGAINST THE PRESIDENT

A. Authority to Sue the President

Congress can seek to compel a President to take certain action by resorting to the third branch of the Government, the Judiciary. Historical cases of individuals and groups suing the President of the United States have been numerous. Courts have hesitated to assess judgments against the President, even when they had the authority to do so. Two important cases in U.S. history have explored the option of compelling presidential action through lawsuit: National Treasury Employees Union v. Nixon, and Mississippi v. Johnson. Other pertinent cases, discussed at the end of this section, highlight problems with this approach. A Supreme Court ruling against the President would be a major step for Congress toward compelling presidential action. The basis on which a lawsuit is brought affects the success and reach of that lawsuit and any resulting judgment. Nixon and Johnson provide valuable lessons for framing suits against the President.


46 See, e.g., Nat’l Treasury Emp. Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974) (“But because this Court possesses that jurisdiction and accordingly possesses the authority to mandamus the President to perform the ministerial duty involved herein does not mean that this Court must or should exercise that authority at this time. On the contrary, this Court may, if it believes it more appropriate, refrain at this time from issuing a writ of mandamus to the President and opt instead to act pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1970)’’); Franklin v. Massachusetts, 505 U.S. 788, 802 (1992) (“... the District Court’s grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows.”).

47 492 F.2d at 587.


i. National Treasury Employees Union v. Nixon\textsuperscript{50}

In \textit{Nixon}, the National Treasury Employees Union (NTEU) sought to compel the President to perform his duties under an act of Congress, the Federal Pay Comparability Act (FPCA).\textsuperscript{51} NTEU argued that the President was required to implement a comparability pay adjustment by a certain date or to inform Congress of an alternative pay adjustment plan.\textsuperscript{52} The District Court for the District of Columbia dismissed the claim for lack of jurisdiction on separation of powers grounds.\textsuperscript{53} The District Court also held that the statute directing the President to act was subject to various constructions and applications, and so was at the President's discretion in enactment.\textsuperscript{54} But on appeal, the U.S. Court of Appeals for the D.C. Circuit found jurisdiction and decided that the FPCA created a ministerial duty that did not allow for presidential discretion.\textsuperscript{55} The court found the duties required of the President to be "mandatory, involving no discretion."\textsuperscript{56} Because the FPCA did not leave any discretion to the President in adjusting federal pay scales, the NTEU was entitled to have the President act according to the statute.\textsuperscript{57} The court next considered the question of the remedy available to the NTEU.\textsuperscript{58} Were the FPCA to require action of another federal official other than the President, a writ of mandamus would be the appropriate remedy, requiring little deliberation by the court.\textsuperscript{59} After a lengthy discussion of constitutional principles and pertinent case law, the court decided that it also had the jurisdiction to issue a writ of mandamus compelling the President to fulfill his duty under the FPCA.\textsuperscript{60} But the court declined to say that the power to issue a writ of mandamus necessarily implied

\textsuperscript{50} 492 F.2d 587 (D.C. Cir. 1974).
\textsuperscript{51} \textit{Id.} at 591.
\textsuperscript{52} \textit{Id.} at 592.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} (holding that with no clear duty established by the statute, the President was free to act in a number of discretionary ways to meet the intent of the statute).
\textsuperscript{55} \textit{Id.} at 601.
\textsuperscript{56} \textit{Id.} at 616.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 602.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 616.
a duty to issue a writ. The court instead issued a declaration of law, judging that to be sufficient to compel the President to act in this case.

ii. Nixon Applied

The U.S. Court of Appeals for the D.C. Circuit decided in *Nixon* that it had the power to issue a writ of mandamus compelling the President to take action in certain cases. The court specifically stated that it is the duty of the Judiciary to keep the Executive within Legislative limits. In the case of President Nixon, the court failed to issue a writ of mandamus, instead issuing a declaratory ruling against the President for failure to faithfully execute the laws. How does *Nixon* apply to the issue of compelling the President to make war?

As the court stated in *Nixon*, the fact that an actor is the President does not mean that all duties are discretionary. Some areas could be so firmly within the Executive's realm that action in those areas cannot be compelled by the court. The issue of areas committed to the Executive was addressed more fully in *Johnson*, but the primary focus here is that the *Nixon* court was clear that a statute giving only ministerial duties is one that does not raise a political question and can thus be enforced by the court. A problem arises when the clear ministerial duty is one that infringes on the President's Executive authority. Can Congress pass a law that removes the President's discretion from an Executive function? But assuming that such a law could be passed in the area of war-making, it seems feasible that the court could find a power to compel the President to stay within the Legislative limits. Laws affecting

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61 Id.
62 Id. at 616.
63 Id. at 602, 616.
64 Id. at 604.
65 Id. at 616.
66 Id. at 613.
67 Id. at 615.
69 Id. at 603–04.
70 See Discussion, infra Part VII.
the power to make war were more directly discussed by the Supreme Court over 100 years earlier, in *Johnson*.\textsuperscript{71}

iii. Mississippi v. Johnson\textsuperscript{72}

The State of Mississippi filed a motion with the Supreme Court, asking for leave to file a bill restraining the President from enforcing the Reconstruction Acts.\textsuperscript{73} Although Mississippi wanted to restrain the President from carrying out certain responsibilities, the Court found that the general principles that apply in restraining the President apply to compelling presidential action.\textsuperscript{74} The Court decided that it did not have the power to compel the President to act in cases where Congress allowed the President any discretion in action.\textsuperscript{75} Because the Reconstruction Acts allowed the President discretion, the Acts did not create a ministerial duty, and the Court could not compel or restrain presidential action.\textsuperscript{76} The Court conspicuously distinguished their opinion from a discussion of ministerial duties.\textsuperscript{77} In duties where the President has no discretion, the Court's decision in *Johnson* is less applicable.

iv. *Johnson* Applied

The Court in *Johnson* recognized that there are certain presidential duties that cannot be compelled by the Court, even when a specific law directs those actions.\textsuperscript{78} In areas "purely executive and political" the Court can have no power to force the President's hand.\textsuperscript{79} Duties of the President that fall within his role as Commander in Chief are a prime example of "purely executive and

\begin{footnotesize}
\textsuperscript{71} See Miss. v. Johnson, 71 U.S. 475 (1867).
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 497.
\textsuperscript{74} Id. at 499 ("It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.").
\textsuperscript{75} Id. at 500.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 498.
\textsuperscript{78} Id. at 500-01.
\textsuperscript{79} Id. at 499.
\end{footnotesize}
Although in *Nixon* the Court ruled that they had the power to compel presidential action, the Court in *Johnson* declared that to compel the President as Commander in Chief would be "an absurd and excessive extravagance." The power of the Judiciary to compel the President in war-making seems to be dubious at best. Therefore, Congress would have a problem using the Courts to compel the President to use force because the use of force is a purely Executive area of responsibility.

### B. Problems with a Lawsuit Against the President

More problems await Congress in an attempt to compel presidential action through judicial process. The political question doctrine, ministerial law requirement, and requirements for standing make a lawsuit against the President an uphill battle. Even if Congress succeeds in a suit against the President, the judgment won could be unenforceable for the reasons discussed below.

#### i. Political question doctrine

First, the Judiciary may never accept a case based on the President declining to make war, in part because political questions are eschewed by the courts. The courts will find that a political question exists when six factors are met. The Court in *Baker* held that a political question involves (1) a commitment of the issue to another branch by the Constitution; (2) an inability to apply judicial standards to the question; (3) the need for an initial policy determination, not appropriate to be made by the Court; (4) disrespect to another branch of government if a decision were made; (5) a need to follow

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80 Id.
81 Id.
82 See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (finding cases that involve a political question are nonjusticiable).
83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
political decisions that have already been made; and (6) the potential for confusion and embarrassment if multiple branches of government gave differing guidance on an issue. The Court distinguished political cases, which involve political rights or repercussions, from political questions. Some areas of presidential action, such as foreign relations, were thought to always present political questions, thus outside the purview of the courts. However, foreign affairs are not exclusively a political question, and the Supreme Court determined that those areas may sometimes involve questions subject to judicial determination. On the other hand, compelling a President to make war is a situation so clearly fitting in the six factors for a political question that the courts may choose to avoid it completely.

ii. Ministerial law requirement

The second problem for a lawsuit against the President is the need to pass a sufficiently ministerial law as to be enforceable by the courts. A law that removes enough discretion from the President to be ministerial would likely be considered unconstitutional, for reasons discussed in Part VII of this article. But the very creation of such a law would itself be difficult. The Supreme Court decided that even when the President made only the final act

88 Baker, 369 U.S. at 217.
89 Id.
90 Id. at 211 (stating that cases involving the six elements that define a political question are nonjusticiable).
91 Id.
92 See id. at 209–24 (including specific examples of justiciable questions in traditionally political areas).
93 Id. at 217 (listing the elements for identifying a question as a function of separation of powers, to include (1) Declaring and making war are clearly committed to the Legislative and Executive branches, respectively, excluding completely the Judiciary; (2) Judicial standards are ill-equipped to determine the providence of war-making; (3) whether or not to make war is soundly based on policy determinations by President and Congress; (4) a judicial determination would fly in the face of either Congress or the President; (5) second-guessing the state of war by the Court would cause confusion in Government and the Public; (6) embarrassment of either Congress or the President would be the sure result of a judicial determination of this issue.).
94 Id.
96 See infra Part VII.
in a long string of directed actions, that duty was not ministerial. If a law were not sufficiently ministerial, leaving any discretion to the executive, the President would be immune from suit in performing that duty. The difficulty involved in creating a ministerial duty to make war makes the prospect of suing the President unlikely.

iii. Requirement of standing

Courts only have the jurisdiction to decide cases brought by litigants who have suffered some actual injury and whose claims are meant to be addressed under the law. In *Campbell v. Clinton*, the U.S. Court of Appeals for the D.C. Circuit found that a group of congressmen did not have standing to sue the President for committing U.S. forces to Yugoslavia without congressional authorization. Congress sought a declaration from the court that the President had acted beyond the confines of the law. Instead of reaching a decision on the merits of the case, the court held that the congressmen did not have standing to bring the suit. Part of the court's reasoning was based on the myriad political tools available to Congress to restrain the President. The congressmen brought the suit because they had been frustrated in their attempts to use those tools to restrain the President effectively. The court held that unless a President acted in a way that nullified congressional votes, legislators should use the political means available to influence the President. Although Congress in *Clinton* was seeking to restrain the

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98 Nat'l Treasury Emp. Union., 492 F.2d 587 at 609.
99 Standing, BLACK'S LAW DICTIONARY (10th ed. 2014)
100 Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000).
102 Campbell, 203 F.3d at 20.
103 Id.
104 Id. at 23–25.
105 Id. at 23.
106 Id.
107 While a presidential veto may be seen as a “nullification” of congressional votes, it is instead an override. The nullification spoken of is one that removes any effect from votes, essentially destroying the ability of congressional members to express their political opinions or desires. Cf. id.
President, similar arguments can be made when Congress seeks to compel presidential action. The availability of political means may result in a lack of standing for congressional efforts to compel the President by recourse to the Judiciary.

iv. Presidential indifference

Assuming there is recourse through the courts, the Judiciary may be unable to enforce any judgment against the President. A President who disagrees with a decision of the Judiciary could conceivably ignore any injunction issued by the court. The Supreme Court made this clear in *Johnson*: "[s]uppose the bill filed, and the injunction prayed for allowed. If the President refuses obedience, it is needless to observe that the court is without power to enforce its process."\(^{108}\) The Court relies on the Executive to enforce its decisions, and this has resulted in a lack of obedience to Court decisions in the past.\(^{109}\)

### III. LAWSUIT AGAINST ANOTHER OFFICER

#### A. Authority to Sue another Officer

Judicial action is not limited in application to the President. The Secretary of Defense could be sued,\(^{110}\) resulting in an analysis similar to that of a suit against the President. Congress could also attempt to enforce their desires for war by bringing a lawsuit against another executive officer, such as a general in actual command of U.S. troops. The United States cannot be sued except as it allows itself to be sued, but exceptions to this rule may be made by Congress.\(^{111}\) Courts have disallowed suits against military officers in the

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\(^{111}\) See *U.S. v. Sherwood*, 312 U.S. 584, 586–88 (1941) (stating that under the principle of sovereign immunity, the United States is generally immune from suit unless it gives its consents to being sued).
past, but Congress has the authority to authorize lawsuits against executive officials. The Supreme Court is especially willing to allow congressional suits in areas more subject to civilian control, such as the military. Congress could conceivably allow a suit against not only the Secretary of Defense, but also against general officers of the military.

B. Possible Outcomes of Suing Another Officer

This course of action, rather than compelling the President to act, seeks to circumvent the President and bring about the same result by effectively cutting the President out of the picture. At best, this approach would create an issue of conflicting directives to military commanders. Within the realm of reasonableness, there are three possible outcomes to a lawsuit seeking to compel an executive officer other than the President.

In the first possible outcome, a court would dismiss the suit as representing a political question. Since the power to make war is constitutionally committed to the Legislative and Executive branches, the doctrine of separation of powers suggests that those branches are the ones that should resolve the issue. Nixon suggested that a statute allowing discretionary action would be a political question outside the realm of ministerial duties and, thus, outside the Court’s right to decide. The second possible outcome of a lawsuit seeking to compel an executive officer other than the President would be a

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114 Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”).

115 Id. at 11–12 (“[I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel whether by way of damages or injunctive relief.”).


successful suit. In the case that a court decided that it had the power and right to decide the question, the court could issue a judgment ordering the official to follow the law. 118 The probability of such an outcome is extremely low, as it would require a law sufficiently specific to take all discretion from the officer in the making of war. 119 Such a law would almost certainly be unconstitutional. 120 But if a court did reach a decision compelling an executive officer to make war, the solution would be quite simple for the President: reassignment of the officer. The President could not remove the officer altogether without good cause, 121 but reassignment would be just as effective. 122

The third outcome—and the ultimate outcome of the second course—would be the removal of the officer by the President as soon as the suit was filed, making the point moot. If an executive officer were to compromise the President’s desire to remain aloof from war, the President would need only remove that officer from his place of duty by reassignment. Any attempt by Congress to restrict the ability of the President to remove an officer would surely be deemed unconstitutional, especially as applies to the removal of an official as closely connected with the Executive as a military commander. 123

118 Id. at 612–13.
119 Another impediment in this scenario would be that the more liable to suit an officer is, the more likely she is to be far from the President, meaning she has more tactical decision-making ability but less ability to make strategic decisions.
120 See infra Part VII; Cf. Nat’l Treasury Emp. Union, 492 F.2d at 612.
121 Cf. McElrath v. United States, 102 U.S. 426, 437–38 (1880) (“[N]o officer of the military or the naval service should in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.”).
C. Problems with Suing Another Officer

The three outcomes discussed above clearly highlight the issues associated with a congressional attempt to compel war-making through a lawsuit against an executive officer. But other problems would further complicate a suit against another officer. The Supreme Court is reluctant to "extend the waiver of sovereign immunity more broadly than has been directed by the Congress."124 And even an extension of the waiver may encounter difficulty in passing political question analysis.125 Beyond what has been discussed, a lawsuit of this kind would entail great expense and large amounts of time. Congress could probably authorize suit against a military officer, file suit, and ultimately compel an officer to act or be removed, but the result would not be the fulfillment of congressional will.126 The President could quickly replace the officer who was compelled to act or removed by Congress. If Congress were to attempt to pursue this route, it would almost surely be an exercise in futility.

IV. The Power of the Purse

A. Constitutional Authority for the Power of the Purse

The Legislative branch of the United States Government has one weapon that has been extremely effective in Legislative-Executive battles, the power of the purse. "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . ."127 This power is especially pertinent as applies to the power to make war.128 Congress' power to control the budget and spending of the President may be the best chance at controlling presidential action, especially in the realm of war-making.

126 Myers, 272 U.S. at 109–10.
This area of Congress' power has been extensively explored by scholars and repeatedly tested by the Judiciary.\textsuperscript{129} The power of the purse has even been explored in its application to Congress' ability to compel war-making in an excellent article by Charles Tiefer.\textsuperscript{130} Tiefer focused on the ability of Congress to use spending riders to force the President to increase the tempo and intensity of an ongoing war.\textsuperscript{131} Drawing from the work of Tiefer and others allows greater insight into the ability and limitations of Congress not only to step up a war, but also to compel the President to enter a war.\textsuperscript{132}

\textbf{B. Appropriations Riders}

The main route for Congress to exercise the power of the purse is through riders to appropriation bills.\textsuperscript{133} Riders force a President to follow certain conditions or become subject to certain limitations to receive the funding appropriated.\textsuperscript{134} While the President has discretion to reject the bill and the included rider, the funding would also be lost. Congress has much more solid ground on which to stand for limitation riders than riders compelling action, but both are available to Congress.\textsuperscript{135} While many scholars and pundits argue against the power of Congress to compel presidential action, "even supporters of presidential power would concede that Congress could plainly and simply cut off funds" and end a war.\textsuperscript{136} Past appropriation riders have sought to use limitations to prohibit the President from acting in various areas, for example continuing war in Afghanistan.\textsuperscript{137}

\textsuperscript{129} Notably, in 2007, the House Judiciary Committee held a special scholarly hearing on Congress's war powers. See Tiefer, \textit{Can Congress Make A President Step Up A War?}, \textit{supra} note 123, at 416.

\textsuperscript{130} See generally Tiefer, \textit{Can Congress Make A President Step Up A War?}, \textit{supra} note 123, at 391–449.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}


\textsuperscript{134} \textit{Id.} at 67.

\textsuperscript{135} \textit{See generally id.}


\textsuperscript{137} See H.R. 780, 112th Cong. (2011–2012). This proposed bill restricted the use of military funds in Afghanistan "only for purposes of providing for the safe and orderly
Tiefer posits that the ability of Congress to attach enforceable conditions to appropriations bills falls into three categories, closely resembling the Jackson concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.

On one end of the spectrum, Congress is most likely to successfully attach riders when they deal with issues of shared responsibility between the Executive and Legislative branches. In the middle, where Congress' ability to use riders is dubious, riders are attached to influence the President in areas where the President has Executive responsibility, but not central to those areas of Executive power. The third category involves areas central to the President's responsibilities. Tiefer states that due to *Youngstown*, in this last category, congressional attempts to legislate are presumptively unconstitutional because it infringes on one of the President's core powers – the power to make war.

In the context of this article, Congress could attempt to add riders to appropriation bills forcing the President to make war. Riders would direct the President to take specific action against enemies of the United States. If the President wanted to keep the country funded and other projects operating, the bill would be approved, and the rider would come into effect. However, myriad problems erupt once the provisions of the appropriation rider become law. The main dilemma for Congress would be the invasion of the President's area of core Executive responsibility. While the power to declare war rests firmly with the Congress, the authority to make war belongs to the President.

withdrawal from Afghanistan of all members of the Armed Forces and Department of Defense contractor personnel who are in Afghanistan." *Id.*


139 Tiefer, *Can Congress Make A President Step Up A War?*, supra note 123, at 417.

140 *Id.* Tiefer gives the example of Congress increasing troop levels in a country neighboring a war zone. Allocation of troops outside of combat would not fall directly into the core responsibility of the President to make war but is an area where the President has executive responsibility and therefore falls into *Youngstown's* second category. *See id.*

141 *Id.*

142 *Id.*


144 U.S. CONST. art. I, § 8, cl. 11.
as Commander in Chief.\textsuperscript{145} Because the power to make war is a clearly Executive power, using Tiefer’s analysis, this law would be presumptively unconstitutional as invading an area of core Executive responsibility.\textsuperscript{146} Even assuming the law were constitutional, enforcement would still be an issue. Congress would have to resort to impeachment\textsuperscript{147} or judicial action\textsuperscript{148} to force the President to follow the law. Therefore, while Congress would probably have some success compelling action through an appropriation rider, the passing of such a rider would only be the first step in compelling presidential action.

C. Government Shutdown

The second avenue open to Congress through the power of the purse is the equivalent of the nuclear option. Congress could refuse to allocate funding to \textit{anything} unless the President responds to congressional directives to make war. Congress has threatened and carried out government shutdowns in the recent past, both purposefully and because of an inability to reach consensus.\textsuperscript{149} While this option seems to have great potential to force presidential action, it carries with it a host of issues. Constituents are likely to be unhappy with their representatives if a government shutdown occurs.\textsuperscript{150} By precipitating a shutdown, Congress runs the risk of committing political suicide with the American people and permanently damaging relations with the Executive. Further, if a President is firm enough to ignore congressional requests, laws, and other congressional actions, there is a strong likelihood that the President would ignore the threat of a shutdown, even at great cost to

\textsuperscript{145} U.S. CONST. art. II, § 2, cl. 1.
\textsuperscript{146} Id.
\textsuperscript{147} See supra Part II.
\textsuperscript{148} See supra Part III.
the taxpayer.151 Forcing a government shutdown would be unlikely to have the desired effects while causing harmful collateral damage.

D. Problems with the Power of the Purse

Congress faces many limitations in using the power of the purse to attempt control of the President. These limitations go beyond the political dangers described above and may limit the ability of Congress to use its power in the area of war-making altogether.152 Such limitations on congressional power may be for the best.153

i. Practicality

Practicality limits Congress. Tiefer cautions, "[i]t is all but impossible to write . . . riders that carry out delicate and complex policies while satisfying the requirements for a limitation amendment."154 Limitation riders—laws that restrict presidential action—are complex enough to cause serious issues for lawmakers. But crafting riders compelling the President to make war would be an almost impossible task. The complexities of logistics, strategy, joint operability, and tactical execution are only a few of the facets that Congress would have to address. Some scholars believe that riders that go beyond limitation may be unconstitutional.155

Tiefer’s paradigm for analyzing appropriation riders is useful in this analysis.156 The ability to make war is a function central to the Executive.157 The actual operations of war-making, including target selection, strategy, and


152 See Tiefer, Appropriation Riders Speed Exit, supra note 136.

153 Nicolas L. Martinez, Pinching the President’s Prosecutorial Prerogative: Can Congress Use Its Purse Power to Block Khalid Sheikh Mohammed’s Transfer to the United States?, 64 STAN. L. REV. 1469, 1482 (2012) (“James Madison, for one, supported keeping the power of the purse at arm’s length from the war power, and George Mason likewise counseled that the ‘purse & the sword ought never to get into the same hands.’”).

154 Tiefer, Appropriation Riders Speed Exit, supra note 136, at 307.

155 See Devins, supra note 133.

156 See Tiefer, Appropriation Riders Speed Exit, supra note 136, at 307.

157 U.S. Const. art. II, § 2, cl. 1

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troop movements are core elements of the Executive's commander-in-chief power. As the issue is so central to the Executive, a rider seeking to control the President in this area would be presumptively unconstitutional. Some scholars suggest that Congress may not even be able to introduce riders in the area of foreign affairs generally. For example,

in the area of foreign affairs, Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties. Congress ... may not exercise this power in a manner inconsistent with the direct commands of the Constitution.

Since the Constitution explicitly gives the President power to make war, and the drafting history of the Constitutional Convention suggests that the Framers specifically chose not to give this power to Congress, the specific acts of war-making seem to fall in the exclusive purview of the Executive. One scholar suggests a two-step approach to determine if Congress has the authority to use riders to influence a specific area:

In short, it seems to me that the starting point should be to first ask whether Congress, under an enumerated power, has the ability to legislate in the particular foreign affairs area that is under consideration, and if so, from where do they get the power. Further, it must be determined whether the power or ability of Congress to legislate derives from a specific grant or from some reasonable penumbra of a specific grant. The second question that must be

159 Id.; see also Martinez, supra note 153, at 1491. These are what Tiefer calls "provisions that collide with one of the central issues for the Commander in Chief--command, disposition of forces, or campaigning." See id.
160 See Kate Stith, Congress' Power of the Purse, 97 YALE L. J. 1343, 1350–51 (1988) (Asserting that Congress could run afoul of the Constitution by not funding constitutionally mandated Presidential activities). Although Congress is constitutionally barred from doing so, unconstitutional action by Congress would force the President to decide to sue Congress or let the rider stand. If the President were to sue Congress, a host of additional issues would result.
161 Id.; see also John Norton Moore, Do We Have an Imperial Congress?, 43 U. MIAMI L. REV. 139, 153 n.25 (1988).
asked, even if the answer to the first question is yes, is whether Congress, in a particular case, has interfered with an area exclusively under presidential authority. An answer of no to the first question, or yes to the second, should prohibit congressional activism in the area.¹⁶³

Whatever the approach, Congress is sure to walk a fine line of constitutionality when legislating in the area of war-making.

ii. Presidential counter-action

The President can also take some specific actions to counteract congressional efforts to introduce an appropriation rider. The President may take some action to directly attack the rider. The President does not have the option to veto just the appropriation rider while keeping the money appropriated. Presidents in the past have appealed to Congress to grant the Executive a line-item veto.¹⁶⁴ A line-item veto would give the President power to veto only a part of a bill, without affecting other parts of the bill. This power was granted for a short time, but the Supreme Court later found it unconstitutional.¹⁶⁵ As an alternative, Presidents have historically used signing statements to express their interpretation of a law or belief that a law is unconstitutional.¹⁶⁶ But signing statements do not have the force of law, and the President would therefore still be bound by the law.¹⁶⁷ A President can use the signing statement of a bill to express their belief that a law is unconstitutional, that the law does not apply in certain situations, or merely to express an unwillingness to follow the provisions of the rider. In fact, through a signing statement, a President can effectively ignore a rider. For example, President Clinton relied on the characterization of a law as unconstitutional when he “opined that the President could reject a condition on national security funding and yet still spend the funds.”¹⁶⁸ A signing statement by President George W. Bush

¹⁶³ Moore, supra note 161, at 144–45.
¹⁶⁵ Id.
¹⁶⁷ Id.
¹⁶⁸ Tiefer, Appropriations Riders Speed Exit, supra note 136, at 312.
"asserted that the notice requirement of a funding bill concerning new military installations abroad might violate his constitutional grants of executive power as Commander in Chief." 169 The President can also attempt to use public opinion against Congress. President Theodore Roosevelt turned a limiting rider into a trap for Congress. 170 In such a situation, Congress is left with no real recourse but to pull the purse strings tighter and hope the President gives in to the pressure.

Although Congress’ power of the purse is a mighty force in many other areas of legislation and governance, it seems that in compelling the President to make war this power may fall short. If the President ignores efforts by Congress to use the power of the purse to compel war-making, Congress cannot do much in response. 171 Even if the President does not ignore an appropriation rider, the will of Congress could still be frustrated. 172

IV. Loan of Troops

A. Possible Authority to Loan Troops

To circumvent the President and make war, Congress could try to loan U.S. troops to another actor. This option is not completely feasible and may be one that Congress would not even consider. However, the legal issues presented in this option are interesting and have been considered by advisors and scholars apart from this article. 173 A loan of troops to the United Nations or a U.S. ally would be a risky move, but a desperate Congress might make an

169 Id. at 312–13 (internal quotations omitted).
170 Id. at 332 ("[W]hen Congress halved the appropriation President Theodore Roosevelt had requested for a Navy fleet to sail around the world, he is said to have responded that he would have the fleet sail halfway around the world and leave it up to Congress if they wanted to bring it back.").
171 Congress would likely have no ability to impeach or sue the President for allowing a shutdown, especially since the blame for a shutdown would be shared by Congress and the President.
172 See Part VIII, infra
attempt. This course of action will almost surely fail because the Constitution directly grants the power of Commander in Chief to the President. 174 Supreme Court jurisprudence seems to concur.175 In Youngstown, Justice Jackson, in his famous concurrence, states that the Commander in Chief clause “undoubtedly puts the Nation’s armed forces under presidential command.”176

B. Problems with Loaning Troops

Apart from the clear constitutional issues with loaning troops to another entity, Congress would encounter additional practical roadblocks. The President, as Commander in Chief, is possessed of established lines of communication to direct U.S. armed forces.177 Because of easy communication and the historical arrangement of presidential command, U.S. armed forces would arguably be more likely to follow the directives of the Executive than those of Congress, were instructions from those parties to the conflict. American commanders and soldiers might also take issue with being asked to fight under the command of another entity, even if the alternative command were the United Nations.178 If Congress left U.S. commanders enough control over troops to be effectively in charge, the President would likely be able to retain command. If Congress were to give over command of U.S. troops to

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174 U.S. Const. art. II, § 2, cl. 1
175 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (“Whatever the scope of this authority in other contexts, there can be no room to doubt that the Commander in Chief clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces.”).
176 See id.; see also Tiefer, Can Congress Make A President Step Up A War?, supra note 123, at 419.
178 U.S. forces do not typically operate under the operational control of other nations. See NATO, Why SACEUR Has Always Been an American Officer, https://shape.nato.int/page214845858 (last visited Mar. 11, 2019) (discussing the rationale for U.S. command of NATO forces in Europe).
another entity, there could be repercussions more serious at home than any occurring abroad.

V. **SPECIFIC LAW DIRECTING PRESIDENTIAL ACTION**

A. **Constitutional Authority for Creating a Specific Law**

Involved in many of the possible approaches discussed above is the matter of issuing a law specific enough to direct the President to act in accordance with congressional will without allowing him to undermine that will by exercising executive discretion. A ministerial law is necessary to allow the Supreme Court to issue a writ of mandamus directing the President to act. A specific law would also be required in the suit of an executive official other than the President and in creating appropriations riders. Nixon requires a law directing the President to perform a ministerial duty before that duty can be enforced by the Court. Johnson also requires that Congress must act to remove presidential discretion before the Court can compel presidential action.

In order to write a sufficiently narrow law, Congress would need to direct every aspect of war-making so as to deprive the President of any discretion. While Congress has shown itself to be expert in the crafting of complex legislation, a law directing every aspect of war would be extremely difficult to create. However, assuming that Congress could create legislation meeting the requirements of a ministerial law, would the President be compelled to follow that law? Assume Congress could write a law to meet each of the proposed scenarios in Part I. A law listing critical targets for disabling Iran's nuclear program, directing when strikes would take place, and which forces

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180 Id.
181 Id.
182 See Miss. v. Johnson, 71 U.S. 475, 499 (1867) (stating that in the area of war-making even a specific law may not be allowed to compel the President).
183 See, e.g., U.S.C. Title 26 (demonstrating the thoroughness, complexity, and detail with which Congress can craft legislation).
184 See supra Part I.
would carry out the strikes seems to be sufficiently specific to compel the President. The same would be true of laws directing specific detachments to make ground attacks on specific targets in Syria; designating cities in Ukraine as locations for stationing defensive military groups and equipment; or creating strategy to combat Boko Haram in Nigeria. Ministerial duties prescribed by law would require the President to take the action Congress ordered.\footnote{Nat’l Treasury Emp. Union v. Nixon, 492 F.2d 587, 602 (D.C. Cir. 1974).} If a President chose to ignore those laws creating ministerial duties, Congress could then impeach the President with a firm legal basis.\footnote{Id.} Congress would encounter the same problems enumerated above \footnote{See supra Part II.} but would have a more certain argument for impeachment than they would in the absence of a specific law directing presidential action. A lawsuit against the President or another executive officer would also have a better chance of success after the passage of a specific law.\footnote{Nat’l Treasury Emp. Union, 492 F.2d at 604.} The Supreme Court would look more favorably on a request to issue a writ of mandamus if the President were refusing to follow specific directives set forth by congressional action.\footnote{See supra Part III; Nat’l Treasury Emp. Union, 492 F.2d at 604.} Again, Congress would face many of the difficulties explained above but would stand on a more secure legal footing.


Does the Constitution even allow Congress to pass a law so specific as to take away the President’s discretion in making war? The Supreme Court considered a similar question in the case *Immigration and Naturalization Service v. Chadha*.\footnote{Id.} Chadha, a foreign national, sued Congress challenging the constitutionality of a part of the Immigration and Nationality Act.\footnote{8 U.S.C. § 1254(c)(2).} Congress had created a mechanism whereby a resolution from the House of Representatives could defeat immigration decisions of the Executive branch.\footnote{Chadha, 462 U.S. at 923.}
This effectively created a legislative veto of executive action. The Court found that the legislative veto was unconstitutional because it violated separation of powers principles. Congress is required by the Constitution to involve both houses and the President in the creation of legislation. Although the Court recognized that the legislative veto was a useful political invention, Congress' violation of the President's constitutionally granted role made the law unconstitutional.

C. Chadha Applied

The Court made clear that Congress cannot act in a way that violates the Constitution. As the Court decided in Chadha, Congress acts unconstitutionally by invading or removing constitutional powers of the President. Separation of powers is one of the central principles of the Constitution of the United States and is inherent in the very structure of our Government. Congress is limited to taking action in those areas delegated to it by the Constitution. The position of Commander in Chief, holding the power to make war, is specifically delegated to the President by the Constitution. Congress was given the power to declare war, arguably removing from Congress' purview the power to make war. The President, while restricted from issuing a declaration of war, is the sole repository of the power to carry out war-making. The Supreme Court described the duties of

\[\begin{align*}
194 & \text{ld. at 944-45.} \\
195 & \text{ld. at 959.} \\
196 & \text{U.S. Const. art. I, § 8, cl. 11.} \\
197 & \text{Chadha, 462 U.S. at 967-68.} \\
198 & \text{Id. at 960.} \\
199 & \text{ld.} \\
200 & \text{ld.} \\
201 & \text{ld. at 946.} \\
202 & \text{ld. at 957-58.} \\
203 & \text{U.S. Const. at II, § 2, cl. 1; see also Madsen v. Kinsella, 93 F. Supp. 319, 323 (S.D.W. Va. 1950) aff'd, 188 F.2d 272 (4th Cir. 1951) aff'd, 343 U.S. 341 (1952) ("[T]he President, as commander-in-chief, is given the power to wage the war which Congress has declared.").} \\
204 & \text{U.S. Const. art. I § 8, cl. 11; Yoo, supra note 162.} \\
\end{align*}\]
the Commander in Chief as "purely executive and political."\textsuperscript{206} The specific areas of chain of command, disposition of forces, and military campaigning are central to the President's power to make war.\textsuperscript{207} To allow Congress to control the President in those areas, or to allow the Court to do so, would be "an absurd and excessive extravagance."\textsuperscript{208} The areas of core importance to the role of Commander in Chief are those which are necessary to making war.\textsuperscript{209} Thus, if Congress were to seek to legislate in the area of war-making, any such law would almost certainly be found to offend to the Constitution.

**D. Problems with a Specific Law**

As discussed above, Congress faces significant hurdles when seeking to create a specific law directing the President to act. The practical issue of creating a law sufficiently specific to be ministerial is a major obstacle. If Congress left any discretion to the President, the law would not be enforceable as a ministerial duty.\textsuperscript{210} Creating a law specific enough to be ministerial would be even more difficult because it would have to respect the separation of powers doctrine.\textsuperscript{211} A law that gave Congress any of the powers specifically granted to the President would likely be found unconstitutional, leaving the President to act according to his discretion. As a result, although a specific law would give Congress powerful leverage to compel the President to act, significant obstacles militate against the use of this approach.\textsuperscript{212}

**VI. To What Degree?**

Based on the discussion above, the ability of Congress to compel war may be quite limited. However, there have been various points in this article where analysis has shown that Congress might have a chance of compelling the President to make war. Assuming any of the points addressed in this paper are reached where the President or another officer is compelled to make war,

\textsuperscript{206} Miss. v. Johnson, 71 US 475, 499 (1866).
\textsuperscript{207} Tiefer, Can Congress Make A President Step Up A War?, supra note 123, at 400.
\textsuperscript{208} Miss., 71 U.S. at 499.
\textsuperscript{209} Tiefer, Can Congress Make A President Step Up A War?, supra note 123, at 400.
\textsuperscript{212} Id.
to what degree can Congress commit the President to action? Consider one of
the previously discussed scenarios: the military is poised to make a
preemptive strike against Iran, move into Syria, take up defensive positions in
Ukraine, or initiate a military campaign against Boko Haram. Is the President,
reluctant up to this point to take any action, required to bring all the combined
might of the U.S. military to bear to comply with a law compelling him to take
military action? Could the President instead comply by launching one missile
against the enemy? By dropping just one bomb? Could the President send
one lone soldier into battle? While these actions would certainly not meet the
vision of a Congress that sought war, would they satisfy the legal requirement
to make war? Absent a law directing specific military action, which would
likely be unconstitutional; Congress seems to have little power to directly
control the military action taken by the President in making war.

The President has recently shown his willingness to water-down the
actions directed by Congress.213 Recently, Congress authorized sanctions,
military coordination, and other actions in Ukraine and Syria.214 The President
has followed many of the directives in these bills but has, in some cases, taken
actions of a lesser magnitude than Congress intended.215 The power of
Congress to compel action by the President is severely limited by the fact that
the degree of action required is often unclear.216 This is true especially when
the constitution restricts Congress in the specificity of law allowed to be made
due to constitutional restrictions.217

VII. Conclusion

For better or worse, a hawkish President seems to be the norm in modern U.S.
politics. History books and the news are both full of examples of Presidents

213 Josh Lederman, Foreign Affairs chair says Trump is ignoring sanctions on Russia for
215 See id.
217 See supra Part VII.
making war or using force without congressional approval.\textsuperscript{218} The Office of Legal Counsel has argued that the President has the authority to make war, or take war-like actions, in many situations without the express approval of Congress.\textsuperscript{219} While the ability of the President to take unilateral action has been examined and dissected, the opposite of the situation has not been analyzed. If the President takes a dovish approach and Congress acts hawkish, what is the result? Can Congress compel the President to make war?

In each of the scenarios presented in this article Congress would declare war or ask the President to use military force, the President would decline or veto Congress' request, and Congress would overrule the veto and continue to pursue the use of force. A declaration of war against Iran or Russia, a request of military action against ISIS or Boko Haram, or any other attempt to commit U.S. forces to action could create a situation where Congress is forced to seek an alternative method to compel presidential action. The scenarios presented may seem unlikely, but the legal issues surrounding them are both interesting and important. This article has analyzed various options for Congress in seeking to compel the President. This discussion has not been exhaustive, but the main points for each option have been presented and discussed.

Impeachment of the President requires that Congress frame the actions of the President as a high crime or misdemeanor.\textsuperscript{220} Congress has shown itself willing to impeach for seemingly political offenses, as in the impeachment of President Johnson.\textsuperscript{221} Yet, Congress would still face the problems of delay in the face of military threat while conducting the impeachment proceedings, as well as a potentially belligerent replacement for the impeached President.

\textsuperscript{218} Every use of military force since World War II has been without a formal declaration of war. Many uses of military force have been conducted under authorizations for the use of force; but others have been carried out without any direct approval from Congress.


\textsuperscript{220} U.S. CONST. art. II, § 4, cl. 1.

\textsuperscript{221} See Discussion, supra Part II.
Congress can sue the President to compel action, but only for his conduct in carrying out a ministerial duty\textsuperscript{222} in an area not committed exclusively to the executive.\textsuperscript{223} A suit by Congress would also face the issues of being dismissed by the court as presenting a political question or due to a lack of standing. Congress could sue an officer other than the President, but it would face issues similar to those posed by suing the President. Even in a successful case against another officer, the President could reassign that officer to another post and thwart Congress’ efforts.

The power of the purse is available to Congress as a tool to compel presidential action. The use of appropriations riders or the threat of a government shutdown provides powerful leverage to force the President to act. Congress would face the issue of crafting riders specific enough to compel the President to take the action intended by Congress. Even if a specific rider where created, the President could discount the rider in a signing statement or even ignore it completely. But despite these problems, the power of the purse seems to be Congress’ best bet at compelling the President to act.

Congress could attempt to loan U.S. forces to another nation for use in making war. However, as discussed above, loaning troops to another nation or entity would be completely ineffective both politically and practically. Congress would likely have the least amount of success in making war by this method.

Congress can write a law specific enough to be a ministerial duty, enforceable by the courts and by impeachment. However, congressional attempts to create a law including sufficient specificity would likely fall short and be ineffective or invade the constitutional powers of the President and be declared unconstitutional.

Congress is unlikely to compel the President to make war. Each of the above options is fraught with difficulty in both implementation and enforcement. Thus, although Congress has been given many constitutional tools to influence the balance of power between the branches of government, those tools seem better suited to restraining rather than compelling action. Justice Jackson famously wrote that “[w]hen the President takes measures

\textsuperscript{223} Miss. v. Johnson, 71 US 475, 499.
incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."²²⁴ But when, instead of taking measures, the President refuses to take action, it appears that Congress has little power to compel such action. Congressional power is often overtaxed when Congress seeks to restrain the President from the use of force, but it would be even more taxed to compel military action.

²²⁴ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).