Notes

HAWKS AND DOVES: EVALUATING PRESIDENTIAL POWERS AND DUTIES AGAINST CONGRESS'S POWER TO DECLARE WAR

ANDREA L. R. PILLAI†

ABSTRACT

What would happen if Congress declared war against the president's wishes? Would the president be forced to prosecute the war? Or are there mechanisms, whether through the system of checks and balances or the president's own delegated, independent powers, that give the president the authority to disregard Congress's declaration? This Note argues that a declaration of war must go through the process of bicameralism and presentment to be valid. Thus, the president has the authority to veto a declaration of war. If Congress overcomes the president's veto, this Note concludes that the president must prosecute the war. The president does not have the independent authority under the commander-in-chief power to overcome Congress's declare-war power. Further, the president has a separate duty under the Take Care Clause to faithfully execute the law, which includes a declaration of war.

INTRODUCTION

At the end of the nineteenth century, members of Congress approached President Grover Cleveland and announced their intention to declare war against Spain for its actions in Cuba.[1] President

† Duke University School of Law, J.D. expected 2024; Georgetown University, B.S.F.S. 2017. Thank you to the members of the *Duke Law Journal* for their feedback and contributions. This Note has benefitted tremendously from their insights and efforts. Thank you also to my parents, Nancy and Mike, my sisters, Caroline and Kimberly, and my husband, Suraj, for your endless guidance, support, and love.

1. Robert McElroy writes in his book about Grover Cleveland of an incident where members of Congress came to President Cleveland and asserted that they had decided to declare war against Spain over the conditions in Cuba. As outlined in the book, President Cleveland

Cleveland rebuffed those members of Congress and replied, "There will be no war with Spain over Cuba while I am President."[2] Despite the pro-Cuban sentiments and pressures to declare war, President Cleveland signed a proclamation of neutrality on June 12, 1895.[3] Although President Cleveland eventually announced that the United States might intervene against Spain if the crisis did not end in Cuba, he resisted hawkish pressures and stopped short of calling for a declaration of war.[4]

Imagine instead that, despite President Cleveland's disapproval, those members of Congress successfully persuaded enough of their colleagues to declare war against Spain. Under Article I, Section 8 of the U.S. Constitution, Congress has the unilateral authority to declare war.[5] Could Congress then force President Cleveland to engage in a war against Spain? More broadly, imagine the following scenario ("Hypothetical Scenario"): if Congress decided tomorrow to declare war against a fictional "Country *X*," but the president felt that committing to a war against Country *X* was against the United States' best interests, would the president be forced to engage in that declared war? To analyze this Hypothetical Scenario, the following questions must be answered. First, what is a declaration of war, and must it follow the processes of bicameral passage and presentment to become effective? Second, are any of the president's powers as commander in chief conclusive and preclusive of Congress's power to declare war such that the president may disregard the declaration of war?[6] Finally, does the president's duty to faithfully execute the laws require the president to go to war even if that war is contrary to their beliefs and executive discretion?[7]

---

responded that there would be no war with Cuba while he was President. When those members of Congress argued that the U.S. Constitution gave Congress the power to declare war, President Cleveland responded "Yes, but it also makes me Commander-in-Chief, and I will not mobilize the army." *See* 2 ROBERT MCELROY, GROVER CLEVELAND, THE MAN AND THE STATESMAN 249–50 (1923).

2. *Id.*

3. *The World of 1898: The Spanish-American War: Grover Cleveland*, LIBR. OF CONG. (June 22, 2011), https://loc.gov/rr/hispanic/1898/cleveland.html [https://perma.cc/FP3J-AYCM].

4. *Id.*

5. *See* U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have Power . . . [t]o declare war . . . .").

6. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

7. *See* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

The question of whether Congress can force the president to go to war is not covered heavily in legal scholarship. This Note focuses on issues of presentment; separation of war powers, including the power to declare war and the commander-in-chief power; and the duty of the president to faithfully take care and execute laws. This Note does not address Congress's power to direct war efforts through appropriations.[8]

As part of an extensive analysis for what it means to declare war, J. Gregory Sidak is one of the only scholars to interrogate whether a declaration of war must go through bicameralism and presentment.[9] In his article, Sidak argues that Congress should authorize war only through formal declarations and not through appropriating funds.[10] Although not the primary focus of his article, Sidak also posits that Congress must present a declaration of war to the president for approval before it becomes effective law.[11] Further, Sidak contends that, like other congressional bills and joint resolutions, a president could veto that declaration of war, and Congress could overcome that veto with a supermajority vote.[12] As this is not a settled question, this Note similarly argues that a declaration of war must be presented to the president and is subject to a presidential veto.[13] However, this Note

8. Existing pieces of scholarship discuss whether Congress has the power to direct and escalate war efforts through appropriations; although, some reach conflicting conclusions. In one, Professor Charles Tiefer argues "that the 'No Appropriation' clause has a one-way effect, supporting restrictions or limitations but not mandatory appropriations." Charles Tiefer, *Can Congress Make a President Step Up a War?*, 79 LA. L. REV. 391, 448–49 (2011). Examining both the text of the Constitution and historical practice, Tiefer concludes that the "No Appropriation" Clause is "used to limit or to constrain military activity. The clause does not empower Congress to push for more military activity." *Id.* at 417. In another, Russell A. Spivak argues that, through its appropriation power or by enacting authorizations for the use of military force ("AUMF"), Congress does have the power to force a president to escalate a military intervention. Russell A. Spivak, Note, *Co-Parenting War Powers: Congress's Authority To Escalate Conflicts*, 121 W. VA. L. REV. 135, 192 (2018). In addition to appropriations, Spivak also analyzes Congress's enumerated powers, including the power to declare war and the power to regulate commerce with foreign nations, the Necessary and Proper Clause, the Take Care Clause, the commander-in-chief power, and historical practices related to AUMFs to conclude that Congress "has a legitimate claim to step up military action as a tool in foreign affairs." *Id.* at 193.

9. *See generally* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 82–84 (1991) (analyzing whether presentment is necessary for a declaration of war).

10. *Id.* at 33.

11. *Id.* at 84.

12. *Id.* at 85.

13. *See infra* Part II (asserting that "a declaration of war is a legislative action . . . that must be presented to the President to become effective law").

goes beyond Sidak's conclusion and answers the question of what independent powers the president may have to stop a declared war if Congress overrides their veto.[14]

Part I addresses the relevance and probability of the hypothetical war against Country *X* and demonstrates that this Hypothetical Scenario is not impossible. Rather, it is conceivable that Congress could declare war and the president could disagree with that declaration, as branches often disagree on policy issues. Even though the United States has not formally declared war since World War II,[15] Part I further concludes that a declaration of war is a distinct and significant legal action that remains relevant. Next, Part II argues that a declaration of war is a resolution that requires presentment to the president to become effective law. To support this argument, Part II further analyzes the history of declarations of war in the United States, the legislative process for bills and joint resolutions to become law, and the text of the U.S. Constitution to determine functionally what a declaration of war is. Part II argues that the president can veto a declaration of war. And like other joint resolutions and bills, Congress can override the presidential veto by a supermajority in each house. Congress may also impeach the president under a theory of "other high Crimes and Misdemeanors"[16] for failing to pursue the declaration of war.

After establishing that Congress can override the presidential veto or pursue impeachment, Part III analyzes the balance of war powers between Congress and the president that would govern once Congress overrides the presidential veto. Part III concludes that Congress's power to declare war overrides any authority that the president may have as commander in chief in the decision to go to war and that the president's powers are only conclusive and preclusive on or near the battlefield. Finally, Part IV argues that the president's independent duty to take care that the laws are faithfully executed requires the president to prosecute the war and does not allow them to disregard the declaration.

---

14. *See infra* Part III (arguing that presidential authority is insufficient to "disobey Congress's declaration by choosing to not go to war").

15. The declaration of war against Romania on June 5, 1942, was the last time the United States formally declared war against another state. *See* JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 4 (2014).

16. U.S. CONST. art. II, § 4.

In sum, had Congress declared war against Spain, that declaration of war would have been successful even though President Cleveland disagreed with the declaration. Initially, President Cleveland could have vetoed the declaration of war. However, if Congress overcame the presidential veto with a supermajority in each chamber, President Cleveland's independent authority as commander in chief would not have allowed him to disobey Congress's declaration. And if President Cleveland had ignored the declaration, Congress could have pursued impeachment against him. Beyond war powers, President Cleveland's independent duty to take care that the laws are faithfully executed imparted a separate obligation to prosecute the war. Consequently, if Congress similarly declared war against Country *X* tomorrow and the president disagreed, the president could veto the declaration. That veto, however, could be surmounted, leaving the president with a duty to prosecute the declared war.

I. ADDRESSING THE RELEVANCE AND PROBABILITY OF THE HYPOTHETICAL SCENARIO

It is hard to ignore the fact that the United States has not issued a formal declaration of war since World War II.[17] Since the 1940s, instead of issuing formal declarations of war, Congress and the president have utilized authorizations for the use of military force.[18] These authorizations have granted "broad authority to use U.S. military force in a specific region of the world in order to defend U.S. interests or friendly states as the President deems appropriate."[19] With the rising use of these authorizations and the relative rarity of war declarations,[20] it is easy to question whether the power to declare war remains relevant in modern use of force.

Declarations of war, however, are a separate and distinct instrument from authorizations for the use of military force. Domestically, a declaration of war triggers a litany of statutes that expand the powers of the president and the executive branch.[21] These statutes include, but are not limited to, presidential powers to ban trade

17. *About Declarations of War by Congress*, U.S. SEN., https://www.senate.gov/about/powers-procedures/declarations-of-war.htm [https://perma.cc/F4D8-SYAY].

18. ELSEA & WEED, *supra* note 15, at 5.

19. *Id.*

20. The United States has only formally declared war eleven times. *See infra* Part II.A.

21. ELSEA & WEED, *supra* note 15, at 24.

with the newly declared enemy, direct transportation systems to prioritize the military, and control manufacturing facilities to produce items for the war effort.[22] Further, a declaration of war activates increased electronic surveillance to gather foreign intelligence under the Foreign Intelligence Service Act.[23] These examples are only a few of the expansive powers that a declaration of war automatically triggers. An authorization for the use of military force, on the other hand, does not automatically trigger these powers.[24] Thus, a declaration of war remains a distinct instrument from authorizations for the use of military force.

Beyond relevance, there is a question of plausibility. Namely, how plausible is it that Congress would want to declare war, but the president would not? The example of President Cleveland noted at the outset of this Note is one such historical example that demonstrates that at least some members of Congress and the president could diametrically disagree on whether to declare war.[25] Beyond this historical example, a contemporary example looms large with the war in Ukraine. At least one prominent candidate for the presidency in 2024 has signaled an unwillingness to provide substantial aid to Ukraine, all while Congress has already approved more than $112 billion in economic and military aid.[26] Although providing economic and military aid to Ukraine does not indicate a desire to declare war, this example demonstrates that the president and Congress could differ in their appetite for military engagement and use of force. It is thus not implausible that Congress and the president may also disagree on whether to declare war.

II. THE NEED FOR BICAMERALISM AND PRESENTMENT

Key in answering the questions posed by the Hypothetical Scenario is analyzing what a declaration of war is and whether that declaration of war must be presented to the president for consideration and approval. Presentment is the term for the procedure outlined in

22. *Id.*

23. *Id.*

24. *Id.* at 25.

25. *See supra* notes 1–4 and accompanying text.

26. Franco Ordoñez, *Ron DeSantis Says Backing Ukraine Is Not in the U.S. Interest, a Sign of a GOP Divided*, NPR (Mar. 14, 2023, 1:48 PM), https://www.npr.org/2023/03/14/1163363579/desantis-trump-ukraine-republican-split [https://perma.cc/3AXQ-P8AV].

the U.S. Constitution by which acts of Congress become law.[27] There are two primary constitutional foundations for the process of presentment: the Presentment Clause and the Presentment of Resolutions Clause.[28] Outlined in Article I, Section 7 of the U.S. Constitution, the Presentment Clause declares that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."[29] The Presentment Clause further outlines the presidential veto process: "If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated."[30]

If, after reconsideration by Congress, each house approves the vetoed bill by at least a two-thirds majority, the bill becomes law.[31] Under the Presentment Clause, the president has ten days to either approve or veto the legislation and return it to Congress.[32] If the president does not return or approve the legislation within ten days, the legislation proceeds as if the president approved it and it becomes law.[33] Under the Presentment of Resolutions Clause, "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" must also be presented to the president for consideration and approval.[34]

Presentment is a key constitutional function that preserves the separation and balance of powers between the legislative and the executive branches.[35] In *INS v. Chadha*,[36] the Supreme Court affirmed the importance of presentment.[37] Examining whether a legislative veto was unconstitutional, the Court held that the Constitution requires "passage by a majority of both Houses and presentment to the

27. *See* U.S. CONST. art. I, § 7 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States.").

28. *Id.*

29. *Id.* cl. 2.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* cl. 3.

34. *Id.*

35. *See* INS v. Chadha, 462 U.S. 919, 946–48 (1983) ("These provisions of Art. I are integral parts of the constitutional design for the separation of powers.").

36. INS v. Chadha, 462 U.S. 919 (1983).

37. *Id*. at 958.

President."[38] In short, following the presentment procedures outlined in Article I, Section 7 of the U.S. Constitution is the only legitimate manner for Congress to pass legislative actions.

This Note argues that a declaration of war is a legislative action, typically a bill or a joint resolution, that must be presented to the president to become law. Three primary arguments support this conclusion. First, the historical practice of U.S. war declarations supports the view that a declaration of war is either a joint resolution or a bill that Congress has consistently presented to the president for approval and signature.[39] Second, under *Chadha*, all legislative action must follow the Article I, Section 7 procedure outlined by the U.S. Constitution.[40] As a declaration of war is arguably a legislative action, it must be presented to the president for approval. Third, even if a declaration of war was considered a vote, which at a minimum requires the concurrence of both the House of Representatives and the Senate to be effective, that vote must still be presented to the president for approval under the U.S. Constitution.[41] This Note considers each argument supporting presentment in turn. Finding that a declaration of war must be presented to the president for approval, regardless of its form, this Note then outlines the probable legislative process and its outcomes.

A. Examining the Eleven Declarations of War

Given the political nature of war powers questions, the Court has consistently considered the importance of historical practice in weighing disputes and separations of power between the legislative branch and the executive branch.[42] As Justice Frankfurter noted in his *Youngstown Sheet & Tube Co. v. Sawyer*[43] concurrence:

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow

38. *Id.*

39. *See infra* Part II.A (discussing historical declarations of war).

40. *Chadha*, 462 U.S. at 958.

41. U.S. CONST. art. I, § 7, cl. 3.

42. *See, e.g.*, Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1355 ("Ultimately, war powers law does not lend itself to refined parchment solutions. It is rather the 'court of history,' an accretion of interactions among the branches, that gives rise to basic norms governing the branches' behavior in the area.").

43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.[44]

Thus, it is appropriate to use historical practice—Justice Frankfurter's "[d]eeply embedded traditional ways of conducting government" and "the gloss" of life—to determine what a declaration of war is and whether that instrument must be presented to the president.[45]

Since its founding, the United States has formally declared war eleven times across five different wars.[46] These formal declarations of war include the War of 1812 (against Great Britain), the War with Mexico in 1846, the War with Spain in 1898, the First World War (against Germany and Austria-Hungary), and the Second World War (against Japan, Germany, Italy, Bulgaria, Hungary, and Romania.).[47] Each of these eleven declarations followed a nearly identical procedure. The president asked Congress to declare war, Congress drafted a joint resolution or bill, Congress approved the joint resolution or bill by a majority, and Congress sent the approved instrument to the president.[48] The president subsequently approved the declaration of war in each of the eleven instances.[49] Only after receiving the president's approval did the country go to war.[50] Given the importance of historical practice in resolving this Note's questions, this Note briefly analyzes each declaration of war below.

1. *1812 – The War Against Great Britain*. From the country's first formal declaration of war, Congress recognized the requirement of presenting the declaration of war to the president "for his approbation."[51] On June 1, 1812, President James Madison requested

---

44. *Id.* at 610 (Frankfurter, J., concurring).

45. *Id.*

46. ELSEA & WEED, *supra* note 15, at 1.

47. *Id.* at 1, 4. This Note uses the contemporary and preferred spelling of "Romania" rather than the spelling ("Rumania") that is used in the joint resolution. *See* PERMANENT COMM. ON GEOGRAPHICAL NAMES, TOPONYMIC FACTFILE: ROMANIA 2 (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089326/Romania_Factfile.pdf [https://perma.cc/3KZV-2KA8] (discussing the different historical and contemporary spellings); H.R.J. Res. 321, 77th Cong., 56 Stat. 307 (1942) (declaring war against Romania).

48. ELSEA & WEED, *supra* note 15, at 1.

49. *Id.*

50. *Id.*

51. 24 ANNALS OF CONG. 1683 (1812).

that Congress declare war against Great Britain.[52] In his message, President Madison remarked that "British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and of seizing and carrying off persons sailing under it . . . ."[53] He went on to note that these ships were "violating the right and the peace of our coasts. . . . [A]nd have wantonly spilt American blood within the sanctuary of our territorial jurisdiction."[54] Concluding that Great Britain was in "a state of war against the United States," President Madison requested that Congress declare war on Great Britain.[55]

Three days later, on June 4, 1812, the House of Representatives passed a bill to declare war by a vote of 79 to 49.[56] The Senate, by a vote of 19 to 13 in favor, affirmed the declaration of war on June 17, 1812.[57] On June 18, 1812, the House received a confidential message that the Senate passed the bill.[58] Congress then "presented the . . . bill to the President of the United States, for his approbation . . . ."[59] Once approved, the president instructed that both congressional houses be notified that "he had approved and signed" the declaration of war.[60] Thus, from the very beginning, the president approved and signed the first declaration of war.[61]

2. *1846 – The War Against Mexico*. On May 11, 1846, President James Polk asked Congress to declare war against Mexico.[62] In his message to Congress, President Polk accused Mexico of attacking Americans north of the Rio Grande River on U.S. territory.[63] With this accusation, President Polk "invoke[d] the prompt action of Congress

52. ELSEA & WEED, *supra* note 15, at 4.

53. 24 ANNALS OF CONG. 1624–25 (1812).

54. *Id.* at 1625.

55. *Id.* at 1629.

56. ELSEA & WEED, *supra* note 15, at 4.

57. *Id.*

58. 24 ANNALS OF CONG. 1679–80 (1812).

59. *Id.* at 1683.

60. *Id.*

61. *See* ELSEA & WEED, *supra* note 15, at 4 (noting that the president signed the declaration of war against Great Britain on June 18, 1812).

62. *Id.*

63. *The Senate Votes for War Against Mexico: May 12, 1846*, U.S. SEN., https://www.senate.gov/artandhistory/history/minute/Senate_Votes_for_War_against_Mexico.htm [https://perma.cc/LZ4D-3DRZ].

to recognise [*sic*] the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace."[64]

That same day, the House of Representatives passed a bill declaring war by a vote of 174 to 14.[65] The following day, the Senate passed the declaration by a vote of 40 to 2.[66] On May 13, 1846, President Polk "approved and signed the Mexican war bill."[67] Like the previous war in 1812, Congress sought the president's approval and signature to finalize the declaration of war against Mexico.

3. *1898 – The War Against Spain*. On April 25, 1898, President William McKinley asked Congress to declare war against Spain.[68] His request followed Spain's refusal to renounce its sovereignty over Cuba.[69] In his message to Congress, President McKinley recommended "the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain."[70] Unlike previous declarations of war, the House of Representatives and the Senate passed this declaration by a voice vote on April 25, 1898.[71] Following the presentment procedures of the previous declarations, President McKinley approved and signed the bill declaring war later that day.[72]

4. *1917 – The War with Germany*. On April 2, 1917, President Woodrow Wilson asked Congress to declare war against Germany.[73] Although President Wilson had previously expressed an intent to stay neutral in World War I, Germany's decision to renew unrestricted submarine warfare and to approach Mexico to form an alliance against

64. CONG. GLOBE, 29th Cong., 1st Sess. 783 (1846).

65. ELSEA & WEED, *supra* note 15, at 2.

66. *Id.*

67. CONG. GLOBE, 29th Cong., 1st Sess. 817 (1846).

68. ELSEA & WEED, *supra* note 15, at 2.

69. *Id.*

70. 31 CONG. REC. 4229 (1898).

71. ELSEA & WEED, *supra* note 15, at 4.

72. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364, https://catalog.archives.gov/id/299824 [https://perma.cc/6J3X-2SCX].

73. President Woodrow Wilson, *Joint Address to Congress Leading to a Declaration of War Against Germany*, NAT'L ARCHIVES (Apr. 2, 1917), https://www.archives.gov/milestone-documents/address-to-congress-declaration-of-war-against-germany [https://perma.cc/8SY8-U6CW].

the United States prompted President Wilson to reverse his stance of neutrality.[74] The Senate passed a declaration of war in the form of a joint resolution by a vote of 82 to 6 on April 4, 1917.[75] Two days later, the House of Representatives passed the joint resolution declaring war by a vote of 373 to 50.[76] President Wilson approved and signed the joint resolution on April 6, 1917.[77]

5. *1917 – The War with Austria-Hungary*. In the course of World War I, on December 4, 1917, President Woodrow Wilson asked Congress to declare war against Austria-Hungary.[78] Three days later, on December 7, the House of Representatives passed the declaration of war in the form of a joint resolution by a vote of 365 to 1.[79] That same day, the Senate passed the joint resolution by a vote of 74 to 0,[80] and President Wilson signed it into law.[81]

6. *1941 – The War with Japan*. On December 8, 1941, President Franklin D. Roosevelt asked Congress to declare war against Japan.[82] This request followed Japan's attack on Pearl Harbor, which killed 2,403 U.S. service members and civilians.[83] In his speech to Congress, President Roosevelt asked Congress to declare that "a state of war has existed between the United States and the Japanese Empire" since December 7, 1941.[84] That same day, the House of Representatives and the Senate passed a joint resolution declaring war against Japan with votes of 82 to 0 and 388 to 1 respectively.[85] President Roosevelt

74. *U.S. Entry into World War I, 1917*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1914-1920/wwi [https://perma.cc/92VC-F9LM].

75. ELSEA & WEED, *supra* note 15, at 4.

76. *Id.*

77. S.J. Res. 1, 65th Cong., 40 Stat. 1 (1917), https://catalog.archives.gov/id/5916620 [https://perma.cc/LJC3-3YVK].

78. ELSEA & WEED, *supra* note 15, at 4.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 2.

83. *Remembering Pearl Harbor: A Pearl Harbor Fact Sheet*, THE NAT'L WWII MUSEUM, https://www.census.gov/history/pdf/pearl-harbor-fact-sheet-1.pdf [https://perma.cc/FV2M-CRUP].

84. *Joint Address to Congress Leading to a Declaration of War Against Japan (1941)*, NAT'L ARCHIVES (Dec. 8, 1941), https://www.archives.gov/milestone-documents/joint-address-to-congress-declaration-of-war-against-japan [https://perma.cc/S7KS-VNSK].

85. ELSEA & WEED, *supra* note 15, at 4.

approved and signed the joint resolution into law on December 8, 1941.[86]

7. *1941 – The Wars with Germany and Italy*. On December 11, 1941, three days after declaring war on Japan, President Roosevelt returned to Congress and requested declarations of war against Germany and Italy.[87] Congress passed joint resolutions declaring war against Germany and Italy that same day.[88] The House of Representatives passed the joint resolution against Germany with an affirmative vote of 393 to 0 and against Italy with an affirmative vote of 399 to 0.[89] The Senate also passed both resolutions without dissent. President Roosevelt approved and signed the joint resolutions that same day.[90]

8. *1942 – The Wars with Bulgaria, Hungary, and Romania*. Following the declarations of war against Japan, Germany, and Italy in 1941, President Roosevelt asked Congress to declare war against Bulgaria, Hungary, and Romania on June 2, 1942.[91] On June 3rd, the House approved all three joint resolutions with votes of 357 to 0, 360 to 0, and 361 to 0, respectively.[92] The following day, the Senate passed all three joint resolutions by votes of 73 to 0.[93] On June 5, 1942, President Roosevelt approved and signed the joint resolutions declaring war against Bulgaria, Hungary, and Romania into law,[94]

86. S.J. Res. 116, 77th Cong., 55 Stat. 795 (1941), https://catalog.archives.gov/id/299850 [https://perma.cc/Y48Z-DCCN].

87. ELSEA & WEED, *supra* note 15, at 4.

88. *Id.*

89. *Id.*

90. *Joint Resolution of December 12, 1941, Public Law 77-331, 55 STAT 796, which declared war on Germany*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/299851 [https://perma.cc/X4F2-F9MD]; *Joint Resolution of December 11, 1941, Public Law 77-332, 55 STAT 796, which declared war on Italy*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/299852 [https://perma.cc/T2TP-8BQ6].

91. ELSEA & WEED, *supra* note 15, at 3.

92. *Id.* at 4.

93. *Id.*

94. *See* H.R.J. Res. 319, 77th Cong., 56 Stat. 307 (1942) (declaring war against Bulgaria); H.R.J. Res. 320, 77th Cong., 56 Stat. 307 (1942) (declaring war against Hungary); H.R.J. Res. 321, 77th Cong., 56 Stat. 307 (1942) (declaring war against Romania).

marking the last time Congress formally declared war against another state.[95]

9. *Conclusions Drawn from the Eleven Declarations of War*. In each of the eleven declarations of war, Congress always followed the same procedure: after the House of Representatives and the Senate both approved a bill or a joint resolution declaring war, Congress sent the declaration to the president for consideration and approval. The "gloss [of] life,"[96] as highlighted by Justice Frankfurter, is clear: historical practice between Congress and the president dictates that any declaration of war issued by Congress would take the form of a joint resolution or a bill. Congressional practice throughout history affirms Congress's recognition of the importance of presidential presentment and approval for a declaration of war to be effective. In each of the eleven formal declarations of war, the declaration was effective only after the president approved the measure.

Notably, in each of these eleven instances, Congress sought out formal presidential approval through the presentment process even though the president had already implicitly approved the war by requesting Congress declare war in the first place. Continual congressional compliance with the need for formal presidential approval, even when the president has already informally approved the war by asking for it, solidifies the importance of this portion of the declaration of war process. Consequently, the gloss of history indicates that historical practice would influence Congress in the Hypothetical Scenario to present its declaration of war against Country *X* to the president for consideration and approval, even where the president has not requested the declaration of war like in the eleven previous instances. By presenting the declaration of war against Country *X*, Congress also implicitly allows the president the opportunity to veto that declaration of war.[97]

95. *See* ELSEA & WEED, *supra* note 15, at 2 ("The last formal declaration of war was enacted on June 5, 1942, against R[o]mania during World War II.").

96. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

97. *See infra* Part II.D.

B. Declarations of War as Legislative Actions

Although Congress has historically styled declarations of war as joint resolutions or bills, Congress could attempt to formulate the declaration of war against Country *X* in some other form of congressional action to avoid the presentment requirement. In practice, there are four principal forms of congressional action: a bill, a joint resolution, a concurrent resolution, and a simple resolution.[98] "A bill is the form used for most legislation . . . . [It is] presented to the President for action when approved in identical form by both the House of Representatives and the Senate."[99] A joint resolution usually follows the same procedure as a bill, the one exception being a joint resolution that proposes an amendment to the Constitution.[100] Outside of this exception, all joint resolutions must be presented to the president to become law.[101] Concurrent and simple resolutions, which impact only the operation of one or both congressional chambers, do not need to be presented to the president.[102] Because a declaration of war impacts more than congressional operations and brings the entire country into a state of war, it cannot legally be a concurrent or simple resolution. It follows that if a declaration of war falls under one of the four typical congressional actions, it must either be a joint resolution or a bill—both of which require presentment.

However, a declaration of war is arguably not a typical congressional action. Under the plain interpretation of the U.S. Constitution, Congress, and Congress alone, has the power to declare war.[103] With this grant of seemingly unilateral authorization to declare war, it is plausible that no other branch of government has the authority to intervene. To support this proposition, J. Gregory Sidak quotes Judge Harold Greene's opinion in *Dellums v. Bush*,[104] where Judge Greene states "if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the

98. *Bills and Resolutions*, U.S. HOUSE OF REPS., https://www.house.gov/the-house-explained/the-legislative-process/bills-resolutions [https://perma.cc/976R-SHQ6].

99. *Id.*

100. *Id.*

101. *See id.* (noting that both bills and joint resolutions "are subject to the same procedure, except for a joint resolution" that proposes a constitutional amendment and that "[b]ills are presented to the President for action").

102. *Id.*

103. *See* U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have Power . . . [t]o declare [w]ar.").

104. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

Congress."[105] Consequently, given the plausible exclusion of all other branches of government, a declaration of war is arguably not a typical congressional action, and it may not need to follow the typical legislative procedures.

A stronger argument, however, is that even if a declaration of war is not a typical congressional action, it nonetheless falls within the Supreme Court's definition of a "legislative action," which is an action that must be presented to the president.[106] In *INS v. Chadha*, the Court held that to take legislative action, Congress must act "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."[107] In his opinion, Justice Burger defined legislative action as "action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons."[108] When Congress formally declares war, a person's legal rights, duties, and relations change. As the Court outlined in *Bas v. Tingy*:[109]

> If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised [*sic*] to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.[110]

In writing that "all the members of the nation declaring war[] are authorised [*sic*] to commit hostilities against all the members of the

105. Sidak, *supra* note 9, at 83 (quoting *Dellums*, 752 F. Supp. at 1144 n.5) (emphasis omitted).

106. INS v. Chadha, 462 U.S. 919, 958 (1983).

107. *Id.*

108. *Id.* at 952.

109. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). In *Bas*, the Court was tasked with addressing the applicability of two conflicting statutes. *Id.* at 37. Operating in the background of the Quasi-War with France, Congress first enacted a statute that allowed payment for the return of U.S. ships captured by the French in the amount of one-eighth of the ship's value. *Id*. A year later, Congress enacted a second statute that allowed payment for the return of U.S. ships captured by the enemy in the amount of half of the ship's value, so long as return occurred within ninety-six hours. *Id.* To determine the applicability of the statutes, the Court had to determine whether France was considered an "enemy" under the later statute. *Id.* Holding that the Quasi-War was considered an imperfect war, France qualified as an enemy under the later statute. *Id.* at 45. Unlike a perfect war, an imperfect war is a conflict where the hostilities between two countries are more confined and limited in nature, scope, and extent. *Id.* at 40.

110. *Id.* at 40 (emphasis in original omitted).

other,"[111] with "all the rights and consequences of war attach[ed] to their condition,"[112] it is probable that the Court recognized that the "legal rights, duties and relations of persons" are altered by war. Further, formal declarations of war effectuate numerous statutes that endow the president and the executive branch with expanded authority.[113] These statutes confer special powers that allow the president to, for example, "order manufacturing plants to produce armaments and seize them if they refuse, control transportation systems in order to give the military priority use, and command communications systems to give priority to the military."[114] Under this statutory regime, the "legal rights" of citizens are inevitably altered. Given this impact, a declaration of war must be considered a legislative act that requires presidential presentment, regardless of the specific form the declaration takes.

C. Presentment

Even if the argument that a declaration of war is a legislative action was rejected, must a declaration of war still be presented to the president? Under Article I, Section 7 of the U.S. Constitution, the answer is yes. Article I, Section 7 announces that "[e]very *Order*, *Resolution*, or *Vote* to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States."[115] Before the order, resolution, or vote takes effect, the Constitution provides that it "shall be approved by [the president], or being disapproved by [the president], shall be repassed by two thirds of the Senate and the House of Representatives . . . ."[116]

Notably, the Constitution endows *Congress* with the power to declare war, rather than either the House of Representatives or the Senate individually.[117] Unlike other constitutional provisions that delegate authority to only one chamber, like the power to try impeachments or give advice and consent to the president to make

111. *Id.* (emphasis in original omitted).

112. *Id.*

113. ELSEA & WEED, *supra* note 15, at 24.

114. *Id.*

115. U.S. CONST. art. I, § 7, cl. 3 (emphasis added).

116. *Id.*

117. U.S. CONST. art. I, § 8, cl. 11 (writing that "Congress" shall have the power to declare war).

treaties, the power to declare war is a power of Congress.[118] Consequently, for a declaration of war vote to pass, a simple majority of each chamber must approve it. Thus, at an absolute minimum, a declaration of war is a vote that requires the concurrence of both the Senate and the House of Representatives. Under Article I, Section 7, that vote must be presented to the president of the United States.[119]

D. Presidential Vetoes and Congressional Supermajorities

Whether a declaration of war is a joint resolution, bill, unspecified legislative action, or vote, each of these legislative mechanisms must be presented to the president for approval and signature to become effective law. Presentment not only allows the president to approve the legislation, as each president did for the eleven declarations of war throughout U.S. history,[120] but also to veto the legislation.[121] Therefore, in the Hypothetical Scenario, the president could veto Congress's declaration of war against Country *X*.

A presidential veto, however, does not spell automatic death for the declaration of war. Article I, Section 7 allows Congress to overcome a veto with support from "two thirds of the Senate and House of Representatives."[122] In this Hypothetical Scenario, both the House of Representatives and the Senate could override the presidential veto with a supermajority.[123] Given historical support for declarations of war, this outcome is not unlikely.[124] Each of the previous eleven declarations of war was passed by an overwhelming supermajority in each chamber.[125] Alternatively, however, this Hypothetical Scenario differs from historical precedent in one key area: the hypothetical president here did not request the declaration of

118. U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *id.* art. II, § 2, cl. 2 ("[The president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

119. U.S. CONST. art. I, § 7, cl. 3.

120. *See supra* Part II.A (explaining how each of the eleven declarations of war in United States history were presented to the president).

121. U.S. CONST. art. I, § 7.

122. *Id.*

123. *Id.*

124. *See supra* Part II.A (describing how in each of the eleven declarations of war in the United States, Congress approved the joint resolution or bill declaring war by a majority).

125. *See id.* (explaining how "[e]ach of these eleven declarations followed a nearly identical procedure" wherein "Congress approved the joint resolution or bill by a majority").

war. The absence of pre-approval from the president may impact how each chamber votes, and it is impossible to determine the impact that this lack of pre-approval would have. For argument's sake, however, this Note assumes that each chamber would pass the declaration of war in a manner consistent with historical practice: unanimously or near-unanimously.[126] Consequently, Congress likely could, and would, overcome the presidential veto and successfully declare war.

E. Impeachment

Beyond its ability to pass the declaration of war through a supermajority after a presidential veto, Congress could also pursue impeachment. The Constitution endows the House of Representatives with the power of impeachment in Article I, Section 2.[127] Article II, Section 4 further elaborates that "[t]he President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[128] Treason and bribery are relatively well-defined and understood crimes.[129] However, what constitutes "other high Crimes and Misdemeanors" is vague.[130] Historically, three presidents have been impeached.[131] President Andrew Johnson was impeached for violating the Tenure of Office Act.[132] President Bill Clinton was impeached for perjury under oath and obstruction of justice.[133] President Donald Trump, the only President to be impeached twice, was charged with abuse of power, obstruction of the House impeachment investigation, and incitement of insurrection.[134] Although not formally impeached, President

126. *See id.* (examining historical practice of the eleven declarations of war in the United States).

127. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

128. U.S. CONST. art. II, § 4.

129. The U.S. Constitution itself narrowly defines "treason," stating that "[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3, cl. 1. For a definition of bribery, see 18 U.S.C. § 201 (defining bribery of public officials and witnesses).

130. Madeleine Carlisle, *What Are High Crimes and Misdemeanors? Here's the History*, TIME (Jan. 17, 2020, 9:22 AM), https://time.com/5745616/high-crimes-and-misdemeanors [https://perma.cc/287C-4FPX].

131. *Id.*

132. *Id.*

133. *Id.*

134. Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2019/12/18/us/

Richard Nixon was charged with obstruction of justice, abuse of power, and contempt of Congress.[135]

Beyond these historical examples, law professor and constitutional law scholar Charles Black argues that, under the canon of *ejusdem generis*, or "of the same kind," the character and meanings of "treason" and "bribery" inform the meaning of "other High Crimes and Misdemeanors."[136] Black posits that the offenses covered under "other High Crimes and Misdemeanors" would be those offenses that are extremely serious, subvert the political and government process, and are wrong in themselves to a reasonable citizen.[137]

Members of Congress could certainly charge that, by refusing to abide by their declaration of war, the president has committed an offense that subverts the political and government process—namely, by curbing Congress's constitutionally endowed right to declare war. Further, one public official, even if it is the president, disobeying the will of 535 other democratically elected, public officials may seem wrong to a reasonable citizen. Thus, under Black's understanding of "other High Crimes and Misdemeanors," Congress could successfully frame the president's refusal as a high crime or misdemeanor suitable for impeachment proceedings.

Finally, given that each house of Congress has historically voted overwhelmingly in favor of the declarations of war,[138] and this Note assumes in its Hypothetical Scenario that the Senate followed a similar path,[139] the Senate would likely achieve the two-thirds vote necessary

politics/trump-impeached.html [https://perma.cc/5NFC-X977]; Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html [https://perma.cc/98BB-MPC7].

135. Carlisle, *supra* note 130.

136. Though the term is vague, Charles Black argues that "other high Crimes and Misdemeanors" distinctly does not mean "maladministration" by the president. *See* Charles L. Black, Jr., *The Impeachable Offense*, LAWFARE (July 20, 2017, 2:00 PM), https://www.lawfareblog.com/impeachable-offense [https://perma.cc/5T7X-7BV2] (explaining how a discussion of the phrase at the 1787 Constitutional Convention "definitely establishes that 'maladministration' was distinctly *rejected* as a ground for impeachment" (emphasis in original)).

137. *Id.*

138. *See supra* Part II.A (describing the historical practice of Congress approving each of the eleven declarations of war in United States history).

139. *See supra* note 126 and accompanying text ("For argument's sake, however, this Note assumes that each chamber would pass the declaration of war in a manner consistent with historical practice: unanimously or near-unanimously.").

to convict.[140] If the Senate votes to convict, the president would be removed from office, and Congress would likely proceed, unimpeded by the president, with its war against Country *X*.

III. BALANCING CONGRESSIONAL AND PRESIDENTIAL WAR POWERS AFTER A DECLARATION OF WAR

Putting the option of impeachment aside, if Congress can override the presidential veto of the declaration of war, the president's independent powers as commander in chief do not allow the president to disregard Congress's will. As the Hypothetical Scenario outlined above presents a problem where the president is acting against the express will of Congress, the president must act on powers that are conclusive and preclusive of any overlapping congressional authority to permissibly disregard the declaration of war. As argued further below, the president's independent authority as commander in chief is not strong enough to allow the president to disobey Congress's declaration by choosing to not go to war.

A. The Youngstown *Framework*

In his famous *Youngstown Sheet & Tube Co. v. Sawyer* concurrence, Justice Jackson outlines three tiers of analyzing presidential powers in light of congressional powers.[141] In the first tier, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[142] In the second tier, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[143] Finally, in the third tier, "[w]hen the President takes measures incompatible with the expressed or implied

140. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . [but] no Person shall be convicted without the Concurrence of two thirds of the Members present.").

141. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–49 (1952) (Jackson, J., concurring) (outlining a tripartite framework for analyzing the president's national security powers based on the level of congressional approval).

142. *Id.* at 635.

143. *Id.* at 637.

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."[144] In Justice Jackson's third tier, the president's power must be both "conclusive and preclusive,"[145] which means that the president's authorization and power to act is "within his domain and *beyond* control by Congress."[146]

Justice Jackson's *Youngstown* tiers provide a persuasive framework to analyze whether the president can disobey Congress's declaration of war using the powers of the commander in chief. If the president disobeyed Congress's declaration of war, the president would be "tak[ing] measures incompatible with the expressed or implied will of Congress."[147] As such, the Hypothetical Scenario and analysis falls under Justice Jackson's third tier. Thus, the president can only rely on exclusive and preclusive powers as commander in chief.[148] To determine whether any of the commander-in-chief powers are relevant, conclusive, and preclusive, this Note examines Congress's power to declare war and the president's commander-in-chief power.

B. The Declare-War Power

Article I, Section 8 of the U.S. Constitution plainly states that Congress has the power "[t]o declare [w]ar."[149] Although the U.S. Constitution authorizes Congress to declare war, it does not outline what "to declare war" means in practice. Courts have largely interpreted the power broadly,[150] while academic scholars have been divided on the power's meaning and breadth.[151]

---

144. *Id.*

145. *Id.* at 638.

146. *Id.* at 640 (emphasis added).

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

148. *Id.* at 640.

149. U.S. CONST. art. I, § 8, cl. 11.

150. *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1870) (explaining how Congress's power to declare war is unrestricted); *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (Chase, C.J., concurring) (describing how Congress's power to declare war "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns").

151. *See* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 48 (2007) (arguing that Congress alone has the power to declare and dictate the course of the war). *But see* Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 127–29 (2007) (arguing that the power to declare and make war was given to Congress and the president).

The Court's broad understanding of Congress's power to declare war includes an interpretation that imposes no restrictions on the decision to engage in or conduct the war in a particular manner. In *Miller v. United States*,[152] the Court noted that "[t]he Constitution confers upon Congress expressly power to declare war . . . ."[153] In the Court's view, this express power to declare war is expansive. The Court has stated that "[u]pon the exercise of [this] power[] *no restrictions* are imposed" and that "the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted."[154] Specifically, the Court analyzed whether Congress had the authority to pass an act that authorized U.S. marshals to seize and confiscate property used for insurrectionary purposes.[155] The Court ruled that it was not unconstitutional[156] because the law fell properly within "the power to prosecute [a war] by all means and in any manner in which war may be legitimately prosecuted."[157] Under this interpretation, Congress's declare-war power is necessarily broad and involves not only the initial declaration of war but also the choice to dictate the legitimate means of prosecuting the war.

In line with the theory of broad powers conferred to Congress under the declare-war power, some academic scholars argue that the Declare War Clause grants Congress the exclusive power over the choice to both commence and engage in hostilities of any form. Saikrishna Prakash argues that because the U.S. Constitution does not provide evidence of what "to declare war" means, the scope of this power must be found from the original meaning of the terms at the time of the clause's ratification.[158] After examining a variety of historical meanings of "to declare war,"[159] Prakash concludes that the Declare War Clause grants Congress the *exclusive* power, what Prakash terms as a "unitary war power," to determine whether the country should commence and engage in hostilities of any form.[160] Among other sources, Prakash looks to the ratification debates and

152. Miller v. United States, 78 U.S. (11 Wall.) 268 (1870).
153. *Id.* at 305.
154. *Id.* (emphasis added).
155. *Id.*
156. *Id.* at 313.
157. *Id.* at 305.
158. Prakash, *supra* note 151, at 54.
159. *Id.* at 67–94.
160. *Id.* at 50.

select Federalist Papers, both of which expressed opposition to granting the president war powers because that would give the president powers too similar to a monarch.[161]

Prakash argues that "Congress's power to declare war includes the power to decide which means of force will be used against the enemy" and that "Congress may judge what level of martial force is appropriate in wars that it commences."[162] This expansive view of Congress's power to declare war mirrors the Supreme Court's comments in *Miller v. United States*, in which Congress's power to declare war necessarily includes the power to dictate how to fight the war.[163] Under Prakash's theory of the power to declare war, once Congress has declared war, Congress dictates the course of the war's prosecution—not the president. Consequently, once Congress overcomes the president's veto and declares war, Congress would choose how to fight the war against Country *X*. Any presidential input in this decision would be residual and subordinate to the will of Congress.[164]

Advancing a separate theory, scholars Robert J. Delahunty and John Yoo argue that "the Declare War Clause gives Congress the power to define the legal state of our relations with another country under international law."[165] In contrast to Prakash, Delahunty and Yoo argue that the Declare War Clause does not "give the authority to start military conflicts solely to Congress."[166] Delahunty and Yoo draw this conclusion by analyzing other words in the U.S. Constitution related to war-making activities—including "engage" in war and "levy" war.[167] As "engage" and "levy" are broader terms than "declare," Delahunty and Yoo argue that the Framers could have used a broader term than

161. *Id.* at 86–90.

162. *Id.* at 59.

163. The Court in *Miller* wrote about the power to declare war: "[u]pon the exercise of [this] power[] *no restrictions* are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." Miller v. United States, 78 U.S. 268, 305 (1870) (emphasis added).

164. *See* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 384 (2008) (arguing that "the President lacks exclusive military powers . . . . Notwithstanding the fact that the Constitution makes the President Commander in Chief, Congress can attempt to make all meaningful operational decisions, overriding the President's preferences").

165. Delahunty & Yoo, *supra* note 151, at 127.

166. *Id.*

167. *See* U.S. CONST. art. III, § 3, cl. 1 (defining "[t]reason" as "levying war"); *id.* art. I, § 10, cl. 3 (prohibiting states from "engag[ing] in war, unless actually invaded, or in such imminent Danger as will not admit of delay" without the consent of Congress).

"declare" if it meant to give more than just the power to initiate war to Congress.[168]

Delahunty and Yoo's analysis is also in line with a pervasive canon of statutory interpretation.[169] Under the canon that presumes consistent usage of words, we should interpret the Framers' choice to use different words across the U.S. Constitution as intentional and meaningful.[170] Thus, the Framers' choice to use "declare" was intentional, and it means something different than "engage" or "levy."

Delahunty and Yoo also argue that Prakash's view ignores the limiting power of the commander-in-chief power on Congress's ability to declare war.[171] Specifically, they argue that "the Commander-in-Chief Clause is a grant of power that makes clear that the Executive still retains the bulk of the war power, minus whatever Article I, Section 8 conveys to Congress."[172] Although the Supreme Court does not have any rulings that support the full breadth of Delahunty and Yoo's position, Chief Justice Chase's concurrence in *Ex parte Milligan*[173] suggests that Congress's power to declare war extends only so far as it does not interfere with the president's commander-in-chief power.[174] In particular, the concurrence notes that:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*.[175]

168. *See* Delahunty & Yoo, *supra* note 151, at 125–26 (arguing that "if the Framers sought to give Congress the broadest possible power over war, 'levy' would have been, like 'engage,' the more appropriate choice").

169. The Court employs the canon of statutory construction of consistent usage. The variation in terms across a text implies a parallel variation on meaning of those words. *See, e.g.*, United States v. Castleman, 572 U.S. 157, 174 (2014) (Scalia, J., concurring) ("One is the presumption of consistent usage—the rule of thumb that a term generally means the same thing each time it is used.").

170. *Id.*

171. Delahunty & Yoo, *supra* note 151, at 128.

172. *Id.* at 129.

173. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

174. *Id.* at 139 (Chase, C.J., concurring).

175. *Id.* (emphasis added).

If Congress's powers from the Declare War Clause were limited in this manner, the president arguably has some control over how to conduct the war.

C. The Commander-in-Chief Power

Article II, Section 2 of the U.S. Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[176] Like Congress's power to declare war, the Commander-in-Chief Clause in the U.S. Constitution contains no references to the breadth or depth of this power.

As a primary matter, the Court has adopted a position that the president's power as commander in chief includes preclusive and exclusive powers, which do not overlap with Congress's powers.[177] As discussed above, in Justice Jackson's third tier in *Youngstown*, the president's power is "conclusive and preclusive,"[178] meaning that the president's authorization and power to act is "within his domain and *beyond* control by Congress."[179] The mere existence of this third tier demonstrates that the Court believes there is some zone of the commander-in-chief power that Congress cannot limit or diminish. Taken together with Chief Justice Chase's views in *Ex parte Milligan*, where Congress's power to declare war extends until it interferes with the president's power command forces and conduct campaigns, there is some power that the president has as commander in chief that is conclusive and preclusive of the scope of Congress's power under the Declare War Clause.[180]

Although the Court has supported that the commander-in-chief power is exclusive, it has not clearly defined the power's full grants and limitations. While the Court has clearly stated that the commander in chief has the power to direct troops, it has not explicitly stated whether this power endows the inverse power of choosing *not* to direct troops.[181]

---

176. U.S. CONST. art. II, § 2, cl. 1.

177. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

178. *Id.* at 638.

179. *Id.* at 640 (emphasis added).

180. *Ex parte* Milligan, 71 U.S. at 2.

181. *See* Fleming v. Page, 50 U.S. 603, 615 (1850) (discussing the president's power to direct troops but omitting discussion on whether the president has an inverse power not to direct troops).

Therefore, it is not clear whether the breadth of the commander-in-chief power includes the authority to not go to war. Still, the Court's interpretation of the reach of the president's power is more revealing. As the Court has held that the president's commander-in-chief power is at its maximum for actions taken on or near the battlefield, it does not encompass the power to decide whether to send troops to war.[182] That decision is outside of the scope of actions taken on or near the battlefield. Once troops have been deployed, the president has full discretion to direct the troops, though this discretion does not clearly include the power to decide whether to engage troops in the first place.

1. *Command of Forces and Directing Troops.* In 1850, the Court articulated key components and attributes of the commander-in-chief power. In *Fleming v. Page*,[183] Chief Justice Taney wrote that:

> [The President's] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.[184]

Under this understanding of the commander-in-chief power, the president is endowed with the clear authority to "direct the movements of the naval and military forces placed by law at his command."[185] Moreover, the president has the authority to "employ [those forces] in the manner he may deem most effectual to *harass* and *conquer* and *subdue* the enemy."[186]

A question arising out of the Court's interpretation of the commander-in-chief power is whether the authority to "direct" forces and "employ them . . . to harass and conquer and subdue"[187] the enemy includes the choice not to deploy troops at all. Nineteenth-century

182. *See infra* Parts III.C.1–2 (discussing the limitations on the commander-in-chief power).
183. Fleming v. Page, 50 U.S. 603 (1850).
184. *Id.* at 615.
185. *Id.*
186. *Id.* (emphasis added).
187. *Id.*

definitions of "direct" and "employ" alone do not answer this question.[188] It is inconclusive whether "[t]o determine the direction or course of"[189] and "to make use of . . . for a specific purpose"[190] include the choice to not take an action—here, to not deploy troops.

Taken together with the remainder of Chief Justice Taney's opinion in *Fleming v. Page*, however, "employ" and "direct" take on a meaning that appears to preclude not deploying troops. When outlining the authority to "employ" troops, Chief Justice Taney writes that the purpose of that authority is to "harass and conquer and subdue the enemy."[191] It is difficult to imagine how not deploying troops will achieve this purpose. Further, Chief Justice Taney gives an example of how to use the commander in chief's authority: "[The president] may invade the hostile country, and subject it to the sovereignty and authority of the United States."[192] Directing and employing troops to invade a country is not clearly analogous to the authority to not deploy troops. Although not clear in the ordinary meanings of "direct" or "employ," Chief Justice Taney's examples may indicate that the president exercises the authority to direct and employ forces by actually making use of those forces.

However, the Court has also expressed that the president "must determine what degree of force the crisis demands."[193] In the *Prize Cases*,[194] the Court includes no limiting language on the president's ability to determine what degree of force is required to confront a crisis.[195] Under the Court's reasoning, the president in the Hypothetical Scenario could determine that the degree of force required to prosecute the declared war against Country *X* is zero. Further, the

188. In a nineteenth-century dictionary, "direct" is defined as "[t]o determine the direction or course of; to cause to go on in a particular manner; to order in the way to a certain end; to regulate; to govern." *Direct*, WEBSTER'S INT'L DICTIONARY OF THE ENG. LANGUAGE (Noah Porter ed., 1895). In the same dictionary, "employ" is defined as "to make use of, as an instrument, a means, a material, etc. for a specific purpose; to apply." *Employ*, WEBSTER'S INT'L DICTIONARY OF THE ENG. LANGUAGE (Noah Porter ed., 1895).

189. *Direct*, WEBSTER'S INT'L DICTIONARY OF THE ENG. LANGUAGE (Noah Porter ed., 1895).

190. *Employ*, WEBSTER'S INT'L DICTIONARY OF THE ENG. LANGUAGE (Noah Porter ed., 1895).

191. *Fleming v. Page*, 50 U.S. at 615.

192. *Id.*

193. The Brig Amy Warwick (The Prize Cases), 67 U.S (2 Black) 635, 670 (1863).

194. The Brig Amy Warwick (The Prize Cases), 67 U.S (2 Black) 635 (1863).

195. *Id.* at 670.

Court determined that it would have no say in evaluating that choice. Rather, the Court noted that it "must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[196] Here, that political department is the executive, which acts through the president as commander in chief.

Given the possible conflict between these aspects of the commander-in-chief power, it is unclear whether the president could decide that the necessary force was zero from the beginning. It is then unclear whether the power to direct forces also includes the power to not direct forces. Thus, it is ambiguous whether the president, relying solely on the commander-in-chief power, could further disobey Congress's declaration of war and determine that no troops should be sent to fight against Country *X*.

2. *Footprint of the Commander-in-Chief Power.* Regardless of whether the Court believes the president's commander-in-chief power includes the power to *not* engage forces, some members of the Court have suggested that the commander-in-chief power should focus on military actions taken on or near the battlefield.[197] Justice Jackson's concurrence in *Youngstown* indicates that the commander-in-chief power is stronger on the battlefield. For example, Justice Jackson noted that "a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment . . . ."[198] While the president as the commander in chief could seize private property abroad, that power does not extend off the battlefield to the domestic arena, even in wartime, unless otherwise authorized by Congress.[199]

Justice Jackson's concurrence in *Youngstown* is relied upon in other opinions that distinguish between the president's powers as commander in chief on and off the battlefield. Namely, in Justice Souter's concurring opinion in *Hamdi v. Rumsfeld*,[200] Justice Souter

196. *Id.*

197. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) (noting that the president maintains "his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society").

198. *Id.* at 644.

199. U.S. CONST. amend. III ("No Solider shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

200. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).

draws attention to Justice Jackson's opinion, whereby Justice Jackson writes that the president is not the commander in chief of the country—but instead just the commander in chief of the military.[201] By highlighting that the president is solely the commander in chief of the military, and not the whole country, Justice Souter suggests that the president's power relates solely to the military and the battlefield. Further in *Hamdi*, a plurality of the Court distinguished between its ability to review decisions of initial captures on the battlefield and the choice to continue to detain.[202] In its analysis, the Court determined that the decisions to make initial captures on the battlefield were unreviewable.[203] However, the choice to continue to detain those who were captured was reviewable.[204] Adopting this standard, the Court gives more deference to the president on the battlefield and within the theater of war than outside of it.

Therefore, the Court has suggested that the president's power is strongest and preclusive within the theater of war and on the battlefield.[205] But when Congress declares war on Country *X*, the president would not yet be making any decisions within the theater of war and on the battlefield until the first troops were deployed. Under this interpretation of the commander-in-chief power, the president would not have independent authority in the pre-battlefield arena. And they would have no power to stop Congress from deploying troops to fight against Country *X*.

D. Youngstown *Revisited*

After examining Congress's and the president's war powers, a plausible framework is clear. Inherent in Congress's power to declare war is the power to make laws and decisions to wage and prosecute the war. This inherent power is limited, however, by the president's powers as commander in chief. The limiting aspects of the president's powers concern commanding forces and directing troops. The power to command forces and direct troops, however, is preclusive only in the theater of war and on the battlefield.

---

201. *Id.* at 552 (Souter, J., concurring).

202. *Id.* at 534.

203. *Id.*

204. *Id.*

205. *See id.* (holding that the president's decision on initial captures are unreviewable whereas decisions to continue to detain individuals were subject to review).

Consequently, under *Youngstown*'s third tier, the president's power as commander in chief is not conclusive and preclusive when considering how to wage a declared war and whether to deploy troops. Congress and the president arguably share some authority in the decision to deploy the initial troops to fight the declared war. Although the president's powers as commander in chief to direct and command troops are preclusive on the battlefield, the battlefield does not extend back domestically to grant the president the power to disobey the express will of Congress. There, the president's power is at its lowest ebb. And the president does not have the independent authority, rooted in the commander-in-chief power, to disobey Congress's declaration of war against Country *X*.

IV. THE TAKE CARE CLAUSE

Beyond the commander-in-chief power, the U.S. Constitution imposes on the president a duty to execute the law. Known as the Take Care Clause, Article II, Section 3 of the U.S. Constitution outlines that "[the president] shall take Care that the Laws be faithfully executed."[206] The Take Care Clause not only grants the president with enforcement authority but also endows them with the duty to "faithfully execute[]" laws passed by Congress.[207] Although the Take Care Clause grants the president significant authority to enforce the laws, the duty to take care does not include a power to forbid the execution of the laws. Consequently, the president does not have the authority to disregard Congress's declaration of war against Country *X*. On the contrary, the president has an obligation to faithfully execute the declaration of war, even against their own beliefs and wishes.

Scholars describe the duties and powers of the Take Care Clause in multiple ways.[208] Professors Jack Goldsmith and John F. Manning argue that the Court has interpreted the clause in five primary ways: (1) to establish the president's removal power; (2) to define standing

206. U.S. CONST. art. II, § 3.

207. *Id.*

208. *See, e.g.*, Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 4 (2019) (arguing that "the Take Care Clause does impose independent constraints on the President's administrative discretion"); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 119, 118 (1993) (delineating three different possible interpretations of the Take Care Clause); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836–38 (2016) (outlining five ways the Supreme Court has interpreted the Take Care Clause).

limitations; (3) as the source of the president's prosecutorial direction; (4) as the source of the president's duty to respect legislative supremacy; and (5) as a source of inherent authority to take actions to protect the operations of the federal government.[209] Most relevant to whether the president can disobey Congress's declaration of war is the fourth category: the president's duty to respect legislative supremacy and abide by federal law.

Goldsmith and Manning highlight two principal cases to elucidate the president's duty to abide by Congress's laws: *Youngstown Sheet & Tube Co. v. Sawyer* and *Kendall v. U.S. ex rel. Stokes*.[210] Each case is discussed in turn.

In *Youngstown*, where the Court analyzed President Truman's decision to issue an executive order to seize steel mills, Justice Black wrote:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed *refutes the idea that he is to be a lawmaker*. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.[211]

For Justice Black, the president does not have the power to be a lawmaker.[212] Rather, the Constitution limits the president to recommending and vetoing laws.[213] In the Hypothetical Scenario with Country *X*, the president has already engaged in the constitutionally prescribed procedures for legislative involvement: recommendation and veto. Although the president did not recommend the declaration of war in the Hypothetical Scenario, they did veto the declaration of war. By vetoing the declaration of war, the president expressed displeasure with the law in accordance with the U.S. Constitution. To refuse to execute the declaration of war, however, would be to step outside the bounds of what the U.S. Constitution sets forth as the proper role for the president in lawmaking procedures, which is to recommend and veto laws.[214] Although President Truman's actions are

209. Goldsmith & Manning, *supra* note 208, at 1836–38.

210. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).

211. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (emphasis added).

212. *Id.*

213. *Id.*

214. *Id.*

not a complete analogy to the president in the Hypothetical Scenario, as President Truman enacted an unauthorized executive order while the hypothetical president would simply disobey Congress, disobeying a law remains outside of both recommending good laws and vetoing bad ones. Thus, in disobeying the declaration of war against Country *X*, the president would be acting contrary to their duty to faithfully take care and execute the law.

Beyond *Youngstown*, *Kendall v. United States ex rel. Stokes* provides a more analogous scenario to the hypothetical president. In *Kendall*, the defendant attempted to argue that he did not need to abide by a writ of mandamus because he, as the postmaster general, was under only the direction and control of the president.[215] The Court, however, rejected this argument.[216] Writing that this argument would have vested the president with a dispensing power, the Court concluded that this power would give the president "a power entirely to control the legislation of Congress, and paralyze the administration of justice."[217] Further, the Court held that "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[218] Here, if the president were permitted to reject Congress's declaration of war beyond the veto, the president would be given a dispensation power, allowing them to control the entire legislative process—a concept that the *Kendall* Court expressly rejected. Further, *Kendall* appears to imply that any presidential action to prevent the declaration of war's execution, including deploying few troops or engaging in a purely defensive war, would also violate *Kendall*'s central holding. The president's duties under the Take Care Clause, therefore, forbid them from taking any action that either directly or indirectly obstructs the execution of the declaration of war.

CONCLUSION

To determine whether the president can disobey a congressional declaration of war, this Note posed three principal questions. First, what is a declaration of war, and must it follow the processes of bicameral passage and presentment to become effective? After

215. *Kendall*, 37 U.S. at 534–35.
216. *Id.* at 613.
217. *Id.*
218. *Id.*

analyzing the history of declarations of war in the United States, rulings by the Supreme Court, and the text of the U.S. Constitution, the proposed answer is that the declaration of war's form does not matter. Whether it is a bill, a joint resolution, other legislative action, or a vote, a declaration of war must be presented to the president for consideration and approval. In following the bicameralism and presentment process, however, Congress can overcome the presidential veto through a supermajority. Beyond the legislative process, Congress could also impeach the president for committing high crimes or misdemeanors.

Second, are any of the president's powers as commander in chief conclusive and preclusive from Congress's power to declare war, such that the president may disregard the declaration of war? The proposed answer here is no. Employing the framework offered by Justice Jackson's concurrence in *Youngstown*, the president's commander-in-chief power does not extend so far as to negate Congress's declaration of war. Congress has authority to prosecute the war under its power to declare war, and the president's duties remain highly centralized and are preclusive only on the battlefield.

Third, does the president's duty to faithfully execute the law require the president to go to war, even if that war is contrary to their beliefs and executive discretion? The proposed answer here is yes. The president's independent duty to take care that the laws are faithfully executed requires them to dutifully prosecute the declaration of war. Further, the president's duty to take care that the laws are faithfully executed does not include the power to disobey or undermine the laws, even if that is what the president believes is best.

Consequently, had Congress declared war against Spain despite President Cleveland's wishes, he may have been forced to prosecute a war if he was unable to successfully veto the declaration. Similarly, in the proposed fictional war against Country *X*, the United States would be at war, despite the president's disapproval. Outside of the president's ability to express disagreement through the presentment process, the Constitution leaves little room for the president to dictate the initial stages of the war, as the president is duty-bound to follow the declaration.

Although this Note answers the questions it posed at the outset, many related questions remain unresolved. Namely, if Congress were to declare war and the president were to disagree with that declaration, would a court even have the opportunity to weigh in and resolve the separation of powers issues in a time of war? Even if it had the

opportunity, would a court weigh in on what may fundamentally be a political question? Further, what would it mean for public perception of the presidency, both domestically and abroad, if the president was forced to take an action of such great magnitude that they did not support?

Arguably most importantly from a policy perspective, would the legitimacy of the president, and by extension, the United States, be undermined by such a public display of governmental division? A probable answer to this question is yes. Thus, key to maintaining the legitimacy of the United States and the unity of the government will be firmly resolving the separation of powers question between Congress and the president before the Hypothetical Scenario against Country *X* comes to fruition.