

# War Powers and Congressional Acquiescence

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## I. INTRODUCTION

In January 2020, the U.S. House of Representatives voted to require that President Trump get congressional approval before beginning military actions against Iran.<sup>1</sup> In February 2020, the U.S. Senate then passed a similar measure intended to reassert congressional control over the decision to go to war.<sup>2</sup> But because President Trump never signed any version of this into law, the current analytical framework treats the resolutions as if they never existed. This framework, prescribed by the Supreme Court nearly forty years ago in *INS v. Chadha*,<sup>3</sup> considers Congress to have spoken only when a law is duly enacted and signed by the President. And yet, as the Iran example demonstrates, this approach erases actions taken by an entire branch of the government. Such a restrictive view of when Congress has spoken ignores the political reality in an unacceptable way.

The Constitution divides the power of the government between three branches: the legislature makes the law, the executive enforces the law, and the judiciary interprets the law.<sup>4</sup> Although this simple heuristic sufficiently explains the most basic situations, it does not account for circumstances where multiple branches have a decision-making role. The Constitution provides little guidance on how to settle interbranch squabbles in those cases where the President and Congress share responsibility. Some questions are justiciable and thus decided

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1. Catie Edmondson & Charlie Savage, *House Votes to Restrain Trump's Iran War Powers*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html>.

2. Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>.

3. 462 U.S. 919, 957–58 (1983) (holding that the Constitution requires legislative acts to go through both bicameralism and presentment before they become valid law to ensure proper deliberation). *Chadha* requires formal legislative action that alters rights to satisfy the Constitution's Bicameralism and Presentment Clauses. *Id.*; see U.S. CONST. art. I, § 7. This requirement necessarily extends to all “informal” legislative action as well if judges use legislative history to interpret statutory rights. As a result, *Chadha*'s strict procedural requirements prevent significant reliance on legislative history.

4. See *Patchak v. Zinke*, 138 S. Ct. 897, 904–05 (2018) (describing policies underlying the Constitution's separation of powers).

by courts, but other times the two political branches have to use their own exclusive powers to fight for supremacy.

One of the spaces where both the President and Congress share a role is deciding when to go to war. The President is the commander-in-chief,<sup>5</sup> but Congress is empowered with many specifically delineated war-making powers as well.<sup>6</sup> As a result, the Constitution does not provide a clear winner in situations when a president wants to use military force, but Congress does not, raising the question of how to decide who wins. Any interbranch conflicts are unbalanced, however, because the two entities have different capabilities. The President, as a single figure atop the executive branch, can act quickly. Congress, on the other hand, is made up of two multi-member bodies and requires agreement between 269 people before acting.

Presidents can take advantage of Congress's lack of flexibility to act unilaterally in policy areas that the Constitution vests in both the executive and legislature. Congress's conception of its own role matters because it has an independent obligation to act constitutionally, and to do so it necessarily must interpret the Constitution. As a result, when Congress does not respond, presidents claim that Congress has acquiesced in the executive's determination that the Constitution grants it exclusive authority.<sup>7</sup> Courts, executive branch lawyers, and scholars all engage in similar analysis.<sup>8</sup> They examine Congress's actions to determine whether it has agreed with the President's analysis and view congressional inaction as evidence of acquiescence to presidential action.

Congress's institutional morass means that it struggles to act legislatively in connection with its constitutionally prescribed war-making role, however. Thus, we should look for congressional

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5. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . .”).

6. U.S. CONST. art. I, § 8, cls. 11–13, 15 (granting Congress the power “[t]o declare War,” “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” and “[t]o provide for calling forth the Militia”).

7. See Jane E. Stromseth, *Rethinking War Powers: Congress, The President, and the United Nations*, 81 GEO. L.J. 597, 621–40 (1993) (discussing the interplay between Congress and President Truman during the Korean War).

8. See Laura A. Cisneros, *Youngstown Sheet to Boumediene: A Story of Judicial Ethos and the (Un)Fastidious Use of Language*, 115 W. VA. L. REV. 577, 612–622 (2012).

statements beyond what is enacted into law to ensure Congress's role in the process is respected. Getting a majority of both houses plus the President to agree on a statement about Congress's role in the decision is a nearly impossible task. This is particularly true in the war powers context; Congress rarely legislates on these questions because so much of the decision-making is left to the President and the executive branch's expertise. Congress does often speak authoritatively even without statutory law, though, and congressional rules can provide a framework for understanding when that has occurred.

This Article argues that the current framework for analyzing claims of congressional acquiescence tilts too heavily towards increasing executive power, and that, in the context of going to war, Victoria Nourse's "by the rules" paradigm for analyzing legislative history provides a more accurate method for determining whether acquiescence occurred. Part II explains the role acquiescence plays in analysis of foreign relations law. Part III summarizes "legislative history by the rules" and demonstrates why it is the preferable methodology for understanding congressional intent. Part IV then analyzes three recent examples of Presidents taking unilateral military action in which the Office of Legal Counsel argued Congress had acquiesced—Libya in 2011, Kosovo in 1999, and Iraq in 1998—and, applying legislative history by the rules, evaluates to what extent Congress did push back against executive overreach. Finally, Part V summarizes the lessons from these examples and provides a more coherent theory for determining when Congress has acquiesced.

## II. BACKGROUND ON FOREIGN RELATIONS THEORY

### *A. Acquiescence and Historical Gloss*

In certain spaces where the Founders deemed deliberation to be particularly important, the Constitution splits power between the executive and Congress—but the two groups do not always agree on the precise contours of their respective roles. Some duties, such as war

powers<sup>9</sup> or executive branch staffing,<sup>10</sup> are given to both, but each branch has a different conception of how to split the power. Courts sometimes settle these disputes.<sup>11</sup> Other times, however, they use a variety of justiciability doctrines to refuse to do so.<sup>12</sup> And when the courts do not provide an answer, the two political branches use their respective exclusive powers<sup>13</sup> to fight the issues out themselves.

Then, when later analysts are faced with similar questions about the extent of each branch's power, they look to how the branches resolved comparable disputes in the past. These analysts can be academics, lawyers from the Office of Legal Counsel ("OLC"), or courts (if the new question is justiciable).<sup>14</sup> Because there are few court

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9. Compare U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war), with U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief . . .").

10. U.S. CONST. art. II, § 2, cl. 2 (The President "by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States.").

11. For example, the Supreme Court has repeatedly weighed in on the type of restrictions Congress can place on the President's ability to fire certain members of the executive branch. *E.g.*, *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654 (1988); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

12. The political question doctrine is one such example; it allows courts to refuse to resolve issues that present, *inter alia*, a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Additionally, courts have created a high bar for when members of Congress have standing to challenge issues in court, so disputes solely between the legislature and executive rarely get adjudicated to the merits. *E.g.*, MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 15 (2012) (finding that courts had refused to address the merits of the separation of powers question "[i]n each and every case brought since the WPR's enactment").

13. When this Article refers to each branch's exclusive powers, it includes both those contained in the Constitution (such as Congress's power of the purse) and those that are a product of the modern political system (such as a president's persuasive power that stems from his status as the leader of his political party). For example, a president can make public statements to attempt to force Congress to pass certain legislation, but only Congress can actually provide the necessary funding.

14. Many justiciability doctrines are case-specific. Therefore, some issues become justiciable when circumstances change, so courts then weigh in on issues they previously refused. *See e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) (refusing to hold that partisan gerrymandering questions would always

precedents in many of these areas, judges and scholars look to other sources for clues as to the proper distribution of power.<sup>15</sup> Some observers rely solely on text and founding-era understanding.<sup>16</sup> Others consider functional concerns.<sup>17</sup> Still others, however, look to this historical understanding between the two branches and apply a “historical gloss” to the separation of powers.<sup>18</sup>

It is this historical gloss analysis that is the subject of this Article. Courts and scholars applying this theory consider each branch’s historical view of the proper distribution of power as evidence of the “correct” constitutional balance.<sup>19</sup> Sometimes, Congress has repeatedly allowed the President to exert sole control over a disputed power. In such cases, courts and theorists explain that Congress has “acquiesced” to presidential control over this power and it now resides exclusively with the executive.<sup>20</sup>

Notable judicial applications of this “historical gloss” theory are the Supreme Court’s decisions in *Zivotofsky ex rel. Zivotofsky v. Kerry*<sup>21</sup> and *Dames & Moore v. Regan*.<sup>22</sup> Both are illustrative of the positives and negatives that come with using acquiescence to help

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be nonjusticiable because the fact “[t]hat no such standard [for evaluating these types of cases] has emerged . . . should not be taken to prove that none will emerge in the future”).

15. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–14 (1952) (Frankfurter, J., concurring) (evaluating whether President Truman was authorized to seize domestic steel mills by considering Congress’s history of legislation on the issue).

16. See, e.g., Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy*, 80 U. CHI. L. REV. DIALOGUE 243, 244 (2013) (quoting Judge Robert Bork, who said: “[T]he framers’ intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.”) (internal citation omitted).

17. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2061 (2018) (Breyer, J., concurring) (explaining that whether he considers administrative law judges to be inferior officers for the purposes of the Constitution depends in part on the Supreme Court’s analysis of the constitutionality of their for-cause firing protections).

18. See, e.g., *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

19. See *infra* text accompanying notes 21–28.

20. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 434–36 (2012).

21. 576 U.S. 1 (2015).

22. 453 U.S. 654 (1981).

determine the contours of each branch's power.<sup>23</sup> In both cases, the Court had to answer a novel question about whether the executive was the sole possessor of a specific constitutional right—recognition of a foreign government in *Zivotofsky*<sup>24</sup> and claim settlement in *Dames & Moore*<sup>25</sup>—and sought insight from the historical practices of each branch. The Court determined in each case that the power sought was indeed within the executive's purview, and in each holding it relied on the fact that Congress had continually acquiesced.

In *Zivotofsky*, for example, the Court observed that “[f]or the most part, Congress has acquiesced in the Executive’s exercise of the recognition power.”<sup>26</sup> The Court took this historical pattern and issued a constitutional holding that “the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.”<sup>27</sup> In *Dames & Moore*, the Court noted that Congress had “frequently amended the International Claims Settlement Act to provide for particular problems . . . thus demonstrating Congress’ continuing acceptance of the President’s claim settlement authority.”<sup>28</sup> As in *Zivotofsky*, the Court observed a pattern of Congress using its legislative authority to defer to the President. Rather than allowing both the executive and legislature to maintain a role, the Court removed Congress entirely from the decision-making process. Thus, a pattern of Congress allowing a president to act in a particular way was transformed into a president having exclusive authority.

Judicial reliance on these congressional actions appears logical, as legislators also take oaths to uphold the Constitution and thus are interpreting it when they act. However, the practical result of this type of analytical approach is that Congress acting in a particular way “for the most part” is transformed into granting an exclusive power to the President. As a result, as in most other cases where acquiescence is at issue, the Court’s opinions resulted in presidential aggrandizement of power.

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23. For additional examples, see Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 677 nn.27–29 (2016).

24. 576 U.S. at 28.

25. 453 U.S. at 688.

26. 576 U.S. at 23.

27. *Id.* at 28.

28. 453 U.S. at 681.

*B. Criticism of Acquiescence Theories*

A common criticism of relying on acquiescence is that observers draw too many incorrect conclusions from congressional inaction.<sup>29</sup> Congress is a multimember body, and no individual member is tasked with protecting the authority of the institution.<sup>30</sup> Instead, re-election is their dominant goal, so they base decisions on potential electoral consequences; research suggests that members of Congress decide how to vote based on whether they think their constituents will support the policy.<sup>31</sup> By contrast, the President is the sole head of the executive branch, and executive accumulation of power directly helps him carry out his policy prerogatives.<sup>32</sup> The President therefore has a more direct reason to assert his branch's powers.

As a result of this split in incentives, Congress has ceded some of its independent institutional authority. Its decisions instead generally reflect the country's increasing party polarization. For example, Congress holds hearings on constitutional questions less frequently than it used to, often doing so only when the President and Congress represent different parties.<sup>33</sup> When Congress passed the Affordable Care Act in 2009, the relevant committees did not analyze any of the constitutional issues.<sup>34</sup> Instead, Congress foisted those questions on to the courts—as it tends to do.<sup>35</sup>

Party polarization therefore creates structural reasons not to draw too many conclusions from congressional silence. First, members

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29. See Bradley & Morrison, *supra* note 20, at 440.

30. *Id.*

31. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 8–9 (1990).

32. See Bradley & Morrison, *supra* note 20, at 439–42.

33. Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 744 fig.3 (2011).

34. See generally Neal Devins, *Why Congress Did Not Think About the Constitution When Enacting the Affordable Care Act*, 106 NW. U. L. REV. COL. 261 (2012).

35. Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009). Because the courts are empowered to give the final judgment on a bill's constitutionality, members of Congress rarely view constitutional interpretation as a part of their job. *Id.* Judicial supremacy “may actually impair the public's ability to engage in serious thinking about what the Constitution means.” Sean Illing, *The Case for Stripping the Supreme Court of Its Power*, VOX (Oct. 12, 2018), <https://www.vox.com/2018/10/12/17950896/supreme-court-brett-kavanaugh-constitution>.



of Congress from the President's party may choose not to publicly express any disagreement with the President's claim of authority.<sup>36</sup> Second, a representative may agree with the chosen policy and thus not feel the need to speak about the proper constitutional separation of powers.<sup>37</sup> Because of these different possible reasons to remain silent, it is difficult to determine whether congressional silence is evidence of acquiescence or whether there is simply a lack of collective will to act. The different incentives make the carefully balanced tug-of-war imagined by the Founders into an uneven fight.<sup>38</sup>

A further issue is how analysts define "congressional speech." When people have different conceptions of when Congress has been silent, the same set of facts may lead to different conclusions. Some scholars and judges require a duly enacted law for Congress to be said to have "spoken."<sup>39</sup> Others, however, are more willing to look at legislative history to understand whether Congress has truly intended to be silent.<sup>40</sup> The various analyses of acquiescence thus begin from different premises, which makes creating a unified theory a difficult task. Nonetheless, as described above, analyzing acquiescence is still useful because Congress does have an independent duty to analyze the Constitution when acting. The analysis, however, must be based on a proper understanding of how Congress actually speaks.

### C. War Powers and Acquiescence

This Article focuses on how the Constitution splits the war powers between the two political branches. As commander-in-chief, the President has the authority to wage war, while Congress has the authority to declare it.<sup>41</sup> The United States has occasionally declared war in

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36. Bradley & Morrison, *supra* note 20, at 443.

37. *Id.*

38. *Id.* at 439 (quoting Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 884 (2007)).

39. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 957 (1983) (requiring formal bicameralism and presentment in order for Congress to exercise legislative power).

40. *See e.g.*, Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 87 (2012) ("It is just as easy for purposivists to come up with an interpretation vindicating losers' history as for textualists to come up with such an interpretation by, for example, focusing on a bit of text that is contradicted by other text.").

41. *See* sources cited *supra* notes 5–6.

the past,<sup>42</sup> but it has not officially done so since World War II despite involving itself in many conflicts.<sup>43</sup> Presidents have repeatedly used the constitutional authority allegedly inherent in the commander-in-chief power to begin using military force without congressional authorization.<sup>44</sup> In response to this perceived overreach, Congress enacted the War Powers Resolution (“WPR”), which purported to limit unilateral executive military actions to situations where Congress had declared war, statutorily authorized the specific action, or the United States was being attacked.<sup>45</sup> The WPR also requires the President to “consult with Congress” before entering military conflicts<sup>46</sup> and report any deployments to Congress within forty-eight hours.<sup>47</sup>

The WPR is an example of congressional speech that satisfies even the strictest standard. It is legislation that was designed to balance the distribution of war-making power between Congress and the President, and its mere existence is important for this Article. Congress enacted a law that asserts its constitutional role in the decision to use military force. As discussed above, without evidence that Congress disagrees that the executive can act unilaterally, observers who consider historical gloss are more likely to agree with the President. The critical issue, then, is whether Congress has spoken on the question at issue.

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42. *Official Declarations of War by Congress*, U.S. SENATE, [https://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_teasers/WarDeclarationsbyCongress.htm](https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm) (last visited Dec. 28, 2020).

43. Garance Franke-Ruta, *All the Previous Declarations of War*, THE ATLANTIC (Aug. 31, 2013), <https://www.theatlantic.com/politics/archive/2013/08/all-the-previous-declarations-of-war/279246/>.

44. E.g., Stuart Taylor, Jr., *Questions Raised Again on Reagan’s Limits Under War Powers Act*, N.Y. TIMES (Oct. 24, 1983), <https://www.nytimes.com/1983/10/24/world/questions-raised-again-on-reagan-s-limits-under-war-powers-act.html>; see also Martin London, *President Trump Can’t Declare War, Only Congress Can. So Why Won’t It?*, TIME (Apr. 18, 2018), <http://time.com/5245014/president-donald-trump-congress-syria-war-authorization/> (listing examples of presidents committing troops without congressional authorization).

45. 50 U.S.C. § 1541(c).

46. 50 U.S.C. § 1542.

47. 50 U.S.C. § 1543.

There are many different theories for deciding when Congress has been silent. Some judges and scholars require a duly enacted law,<sup>48</sup> while others trawl legislative history for supporting comments.<sup>49</sup> Despite (or as evidenced by) the lack of consensus, where exactly the line should be for qualifying as congressional speech is an important question.<sup>50</sup> Executive action should not be subject to a “heckler’s veto”; a small but vocal group of members of Congress should not be able to dictate executive practice for generations.<sup>51</sup> What is necessary, then, is a coherent theory through which to interpret congressional action that explains which types of statements should be considered authoritative and which demonstrate congressional inaction.

In the war powers context, this requires analyzing both the procedural question of who makes the decisions and the substantive question about the merits of the policy.<sup>52</sup> This distinction is subtle but important. The procedural question is which branch of the government gets to decide when the U.S. enters a military conflict, and this part is where acquiescence is relevant. The substantive question, meanwhile, is whether a particular use of force has been authorized by either the Constitution or specific statutory authorization. Separating the two questions is necessary because the procedural question must be answered first. It provides guidance regarding whose actions should be considered when analyzing the substantive question. As demonstrated in Part III, “legislative history by the rules” provides a basis to answer these questions.

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48. *INS v. Chadha*, 462 U.S. 919, 957 (1983).

49. Nourse, *supra* note 40, at 87.

50. Bradley & Morrison, *supra* note 20, at 451.

51. *Id.*; see also *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (where ten members of the House of Representatives claimed President Obama had violated the War Powers Resolution and the Constitution).

52. In practice, these two questions usually get decided at the same time; for example, when presidents unilaterally deploy troops, they are answering both the procedural and substantive questions in their favor.

## III. BACKGROUND ON LEGISLATIVE HISTORY THEORY

A. *Legislative History and War Powers*

Before discussing “legislative history by the rules,” it is important to understand why legislative history plays such a prominent role in a war powers analysis. Congress does not often legislate in foreign relations spaces because the executive has so much authority and is granted so much deference,<sup>53</sup> so there is a lack of statutory law for courts or observers to evaluate. Additionally, once soldiers have been deployed overseas, Congress is unlikely to defund them,<sup>54</sup> so almost any statement of congressional disapproval would appear in legislative history rather than through any enacted laws. Decisions about the use of military force are highly political, and some would argue that use of legislative history to decide these issues is inappropriate because these arguments should take place in public, which is guaranteed by the *Chadha* requirement of enacted law.<sup>55</sup> Ultimately, however, “by the rules” seems particularly appropriate for foreign relations issues because of how unlikely Congress is to pass laws on the subject. Without some other method of determining congressional intent, there would be little evidence of Congress ever pushing back on executive overreach.

The modern approach to statutory analysis is to begin with the law’s text.<sup>56</sup> If the text does not provide a clear answer, then many judges turn to legislative history.<sup>57</sup> They tend to follow the traditional

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53. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (referring to the President as “the sole organ of the federal government in the field of international relations”).

54. JENNIFER K. ELSEA, MICHAEL JOHN GARCIA & THOMAS J. NICOLA, CONG. RESEARCH. SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS 20 (2013) (explaining that “some Members of Congress who support the winding down of a military operation might nevertheless be reluctant to reduce the funds for troops on the battlefield”).

55. 462 U.S. 919, 957 (1983).

56. LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2014).

57. Some judges and commentators take a firm stance against the use of legislative history regardless of any ambiguity in a statute and thus analyze only the text. *E.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (referring to the use of legislative history as “a waste of research time and ink” and “a false and disruptive lesson in the law”).

hierarchy of legislative history: the most authoritative sources are reports from the congressional committee that drafted the bill, followed by statements made by bill sponsors, and then by statements made during floor debates and testimony.<sup>58</sup> Many judges, however, do not understand Congress's procedures,<sup>59</sup> so their research appears to amount to digging through legislative history records for supportive comments. A coherent theory of legislative history is necessary to accurately reflect Congress's will.

A particularly notable component of legislative history is appropriations committee reports. Because money is so important in Congress, appropriations bills receive an outsized amount of attention.<sup>60</sup> As a result, appropriations committee reports are an important source—but not the only source, as described below—for determinative congressional statements.

### B. “Legislative History by the Rules”

As described above, determining how Congress views its role in a given situation is the cornerstone of an acquiescence analysis. But because Congress does not often legislate in the war powers context, it is necessary to develop a theory that allows accurate analysis of legislative history. Although there are many such theories, Nourse's “legislative history by the rules” provides the most coherent and accurate methodology.<sup>61</sup>

Nourse presumes that judges are supposed to effectuate legislative intent, so she argues they should interpret legislative history with a view towards how Congress actually works.<sup>62</sup> She outlines five key principles for understanding legislative history and provides examples

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58. EIG, *supra* note 56, at 46; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1879–80 (1998).

59. Nourse, *supra* note 40, at 77. *See generally* Abbe Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (explaining that Congress is generally unaware of many of the canons courts use to interpret statutes).

60. *See* Nourse, *supra* note 40, at 131 (“As a practical matter, appropriations chairs are the most powerful members of their respective houses.”).

61. Nourse, *supra* note 40, 140.

62. *Id.* at 78.

for each.<sup>63</sup> The application of each principle is fact-specific and independent of the others; each principle is a “canon[] for judicial or agency interpretation” rather than a step-by-step process.<sup>64</sup> The theoretical underpinning of each is the same, however. Congressional decisions are made through an agreed-upon process. That process is reflected in Congress’s rules, so understanding Congress’s rules is necessary to determine how Congress reached its decision.<sup>65</sup>

Nourse’s five principles are: (1) never read legislative history without knowing Congress’s own rules; (2) later textual decisions trump earlier ones; (3) the best legislative history is identified by proximity to the textual decision; (4) never cite legislative history without knowing who won; and (5) structure-induced misunderstandings.<sup>66</sup> Her analysis of each principle explains the usefulness of each. First, she details the relevance of the fact that Congress’s rules do not allow conference committees to implement substantive changes to laws.<sup>67</sup> Second, she uses *Green v. Bock Laundry Machine Co.*<sup>68</sup> to illustrate why legislative history should be read in reverse, as the Supreme Court discussed committee reports analyzing a bill that did not yet contain the language at issue in the case.<sup>69</sup> Next, she explains the importance of identifying the piece of legislative history that actually addresses the text at issue.<sup>70</sup> Then, she analogizes quotes from a legislator on the losing side of a debate to a judicial dissent in outlining why it is important to focus on statements made by the side supporting a particular bill.<sup>71</sup>

This Article will focus on Nourse’s final principle, which occurs when judges do not know how Congress is set up: structure-induced misunderstandings. It is particularly applicable to the war powers context because of the uncertainty present in all war-making decisions. As detailed above, the Constitution divides war-making powers between Congress and the President, but the precise outlines of each entity’s

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63. *Id.* at 76–78.

64. *Id.* at 76 n.14.

65. *See id.* at 75.

66. *Id.* at 92–128.

67. *Id.* at 94.

68. 490 U.S. 504 (1989).

69. Nourse, *supra* note 40, at 102.

70. *Id.* at 115.

71. *Id.* at 119–20.

role in modern war is unclear. Thus, the decision-making structure is ambiguous, and courts need to understand how Congress operates within that ambiguity to understand congressional action.

To explain this principle, Nourse uses *Tennessee Valley Authority v. Hill (TVA v. Hill)*<sup>72</sup> to illustrate the importance of understanding the rules by which Congress appropriates. Specifically, the Supreme Court dismissed a series of comments published in House appropriations committee reports because it apparently did not understand that congressional rules forbid substantive statements of law in appropriations bills.<sup>73</sup> Further, the Supreme Court treated the authorizing legislation as trumping the appropriations legislation because the latter was just about finances,<sup>74</sup> but members of Congress have different incentives than does the Court. Because money is the driving factor in Congress, appropriations bills should be given appropriate weight. A comprehensive understanding of these factors would have made this case far easier to decide.

Nourse focuses particularly on the Court's incorrect application of the canon against "repeal by implication."<sup>75</sup> She acknowledges that it may be "both wise and important" in certain circumstances but concludes it was misapplied in this context.<sup>76</sup> The Court sought textual clarity from the appropriations bill, but Congress's own rules forbade the level of specificity the Court was looking for.<sup>77</sup> As a result, any clear statement of policy would have to appear in the appropriations committee reports. Had the Court understood this, it could have undertaken a more accurate analysis of congressional action.

Nourse argues that Congress's rules provide the necessary context for understanding legislative history.<sup>78</sup> The traditional hierarchy is applied as a one-size-fits-all approach, but it does not explain all circumstances equally. A more accurate examination of congressional intent would include an understanding of the context of the bill's passage so that courts do not mechanically apply inapplicable rules.<sup>79</sup> As

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72. 437 U.S. 153 (1978).

73. Nourse, *supra* note 40, at 133.

74. *TVA v. Hill*, 437 U.S. at 189.

75. Nourse, *supra* note 40, at 132.

76. *Id.*

77. *Id.* at 133.

78. *Id.* at 73.

79. See *supra* text accompanying notes 72–74.

“agent[s] of Congress,” courts must contemplate the actual rules that constrain the legislature.<sup>80</sup> Failure to do so invites accusations that courts are merely substituting their policy judgments for those of the legislature.<sup>81</sup>

One general criticism of any attempt to understand legislative intent is that Congress is a “they” rather than an “it,” and there is no way to find the common understanding of the 535 people who voted on the statute at issue.<sup>82</sup> Nourse argues, however, that Congress’s decisions do evince its collective intent.<sup>83</sup> And because Congress makes its decisions by following its rules, observers must understand the congressional process to understand legislative intent. The rules provide key decision points at which observers can determine collective intent. “Legislative history by the rules” is therefore the best method for interpreting congressional action.

### *C. Criticisms of Legislative History by the Rules*

When interpreting statutes, judges focus on congressional intent because it helps maximize the legitimacy of courts.<sup>84</sup> Congressional intent is important because the legislature is the group of government officials that is democratically accountable.<sup>85</sup> Although some judges and scholars quibble with the phrase “legislative intent,”<sup>86</sup> even

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80. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 616 (1991). As Eskridge notes, whether the federal courts are in fact “agents” is a disputed question. However, adherence to the traditional model of legislative history analysis requires courts to view themselves as agents because otherwise there is little justification for their focus on congressional intent.

81. Whether this already occurs is beyond the scope of this Article.

82. See, Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

83. Nourse, *supra* note 40, at 83–84.

84. *Id.* at 86.

85. *Id.* at 142.

86. See *e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”).



textualists try to carry out the intent of Congress—they just believe the only evidence that can be considered is the text of the law.<sup>87</sup>

As with all theories of statutory interpretation, legislative history by the rules has its critics. In general, these come in two camps. One is that legislative history is misleading and confusing, and it therefore should not be used in any circumstance (or at least very few).<sup>88</sup> Justice Antonin Scalia was a key proponent of this theory.<sup>89</sup> The other acknowledges that legislative history is useful but takes issue with Nourse's particular interpretation because she draws important conclusions from mere procedural facts.<sup>90</sup> This is the more relevant criticism for this Article, as those who oppose any use of legislative history are not likely to be convinced by one well-reasoned theory.

Critics who disagree with Nourse's by-the-rules approach argue that she does not establish the foundational leap required for serious use of legislative history: she does not establish that the individual statements that comprise legislative history actually correspond to collective legislative intent.<sup>91</sup> At most, all congressional rules do is provide a better hierarchy for analyzing statements under the contemporary, unsatisfying framework.<sup>92</sup> And although a definitive hierarchy would be helpful, it is not as illuminating as one would hope.<sup>93</sup>

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87. Nourse, *supra* note 40, at 90 (explaining that “textualists look to text to find purpose”).

88. Adrian Vermeule, *The Judiciary Is A They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 556 (2005).

89. See *supra* note 51.

90. Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1010–12 (2017).

91. *Id.* It is worth noting here that Nourse does claim to do so, arguing that congressional rules provide the basis for imputing individual statements on to the collective of Congress. Nourse, *supra* note 40, at 84–85. However, this is an assumption required by her theory, and not everyone may be convinced.

92. Judges and scholars are often accused of simply looking for the most helpful statement in a particular bill's legislative history, regardless of who made the statement or in what context it occurred. See Nourse, *supra* note 40, at 87.

93. One obvious counterargument Nourse would make in defense of her research is that she did not set out to conduct exhaustive analyses of every case. She simply identified several high-profile instances where the Supreme Court's misunderstanding of how Congress works led to mistaken understandings of congressional intent.

It also requires judges to interpret congressional rules. The Constitution grants Congress the power to create its own procedures,<sup>94</sup> so this could violate the constitutionally required separation of powers. Additionally, although judges are experts on due process and judicial procedure, they may not be experts on congressional procedure. The two need not be identical, as judicial process is designed to elicit facts and aid judges in their decision-making while congressional process is about persuasion as much as fact-finding. Thus, placing judges in charge of interpreting congressional procedures may improperly expand their role and infringe on Congress's ability to govern itself.

Despite these criticisms, "by the rules" is the most effective method to analyze legislative history. The legislative process is dynamic, and any consideration of legislative history should take into account how a particular bill was created. As the structure under which Congress operates, congressional rules provide the clearest insight into how legislative history is developed. Where the traditional method enables observers to cherry-pick helpful quotes, considering Congress's rules imposes a rigorous framework onto any analysis.

#### IV. CASE STUDIES

This Article uses three case studies to illustrate the importance of looking beyond statutory text to determine whether Congress has acquiesced in the executive's interpretation of the Constitution's distribution of military power. Although only three examples is too small a sample from which to draw overarching conclusions, these stories are nonetheless indicative of the type of resistance we might expect from Congress. They also provide guidance regarding how to analyze other scenarios. Congressional pushback on an individual military campaign is important because it indicates a lack of acquiescence—which matters because a pattern of acquiescence is what observers look for when trying to evaluate future claims.

##### *A. Libya 2011*

A recent attempt by the executive branch to control the power to go to war was President Obama's 2011 support for the North Atlantic

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94. U.S. CONST. art. I, § 5 ("Each House may determine the Rules of its Proceedings. . .").

Treaty Organization's ("NATO") invasion of Libya. Muammar Gaddafi, the President of Libya, was violently oppressing protests that were sparked by the Arab Spring revolutions.<sup>95</sup> The U.S. military responded with a short aerial assault on Libya.<sup>96</sup> President Obama did not seek Congress's support because he argued he could take these actions unilaterally;<sup>97</sup> the WPR required consultation with Congress only in cases of "hostilities" lasting longer than sixty days.<sup>98</sup>

### 1. Claims of Acquiescence

The OLC's statutory argument that President Obama did not need congressional approval was based on the WPR, and the statutory analysis did not reach any legislative history.<sup>99</sup> Instead, it focused on the text of the WPR and then applied a historical gloss by focusing on how prior presidents had interpreted the act.<sup>100</sup> The OLC ultimately concluded that Congress's consent was not required.<sup>101</sup> It offered two reasons for this conclusion: (1) air support did not rise to the level of "hostilities" as contemplated by the WPR, and (2) the structure of the WPR itself indicated acquiescence to any short-term military action because it only required notice and consultation for actions longer than sixty days.<sup>102</sup> The OLC claimed that by only requiring the President to report actions of a specific length, Congress acknowledged that military actions shorter than sixty days did not rise to the level of a "war"

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95. Zineb Abdessadok, *Libya Today: From Arab Spring to Failed State*, ALJAZEERA (May 30, 2017), <https://www.aljazeera.com/indepth/features/2017/04/happening-libya-today-170418083223563.html>.

96. Andrew Glass, *Obama Approves Airstrikes Against Libya, March 19, 2011*, POLITICO (Mar. 19, 2019), <https://www.politico.com/story/2019/03/19/barack-obama-libya-airstrikes-1224550>.

97. Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, WASH. POST (June 15, 2011), [https://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH\\_story.html](https://www.washingtonpost.com/politics/obama-administration-libya-action-does-not-require-congressional-approval/2011/06/15/AGLttOWH_story.html).

98. Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 1, 8 (2011), <https://www.justice.gov/file/18376/download> (discussing the limited scope of United States action in Libya).

99. *See id.* at 8.

100. *See id.* at 8–9.

101. *Id.* at 14.

102. *Id.* at 8–9.

for the purposes of the Constitution's Declare War Clause.<sup>103</sup> Thus, any action not covered by the WPR must necessarily be outside the scope of Congress's constitutionally required involvement in military decisions.<sup>104</sup>

The OLC's analysis here is particularly jarring given how frequently Congress pushes back against presidential control of troop deployment. The OLC essentially argued that the WPR foreclosed any future protest against short-term military action. The Congress that passed the WPR cannot bind a future Congress by preventing it from rejecting uses of force, however, which the OLC actually argues in a 2000 memo discussing whether Congress acquiesced in President Clinton's control over military action in Kosovo.<sup>105</sup> Instead, as the OLC claimed in 2000, each Congress gets to make its own decision about what types of actions the Declare War Clause applies to. The fact that Congress objects to some short-term uses of force—such as this particular action in Libya—demonstrates that the WPR's structure cannot imply acquiescence in all similar circumstances. Legislative history supports the idea that in 2011, Congress also disagreed with the OLC's interpretation, as explained below.

## 2. Legislative History

Here, this Article focuses on two pieces of relevant legislative history: a conference committee report and a House resolution. These are different types of statements that deserve different types of consideration.

The conference committee report<sup>106</sup> accompanying the 2012 Military Construction and Veterans Affairs and Related Agencies

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103. *Id.*

104. *See id.*

105. *See infra* note 124.

106. Conference committee reports are different from other committee reports because of the role that conferences play in Congress. *See Nourse, supra* note 40, at 94. Conferences exist to reconcile differences between the two houses of Congress when they pass similar but differently worded versions of the same bill. *See id.* Because only one set of text can leave Congress and go to the President to be signed, the two houses must go to conference and resolve any disagreements about the final wording. *See id.* Each house selects a set of representatives to do the negotiating for the entire chamber, and then both chambers must vote again on the final proposal. *See id.*

Appropriations Act contains a clear statement that Congress believed the WPR covered actions such as the one in Libya and thus President Obama should have consulted with Congress:

General provisions 10003 and 10017, included in the House version of the Department of Defense Appropriations bill, restricted the use of Department of Defense funding for certain activities in or against Libya. The conference agreement does not include those provisions. Since the House passage of the Department of Defense Appropriations bill, political conditions in Libya have changed and power has transferred to a new regime.

As part of a greater NATO force, the United States participated in, and took direct forceful action against the country of Libya to topple its former regime. The action was successful and fortunately no American lives were lost during this incursion. *However, the conferees insist that when determining that military engagements are necessary, the President is subject to the terms of the War Powers Resolution.*<sup>107</sup>

There are two notable aspects of this report. First, the Conference Committee rejected the House's proposal to restrict American actions in Libya. As the Conference Report notes, Gaddafi's regime fell between when the House voted on the bill and the Conference Committee convened.<sup>108</sup> Thus, competing conclusions could be drawn from the Conference Committee's rejection of the House's proposal. The disclaimer against the use of force in Libya was not adopted as part of

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Notably, conference attendees are not allowed to change the meaning of the bill; they are only selecting between one of the two versions passed by each chamber. *Id.*

107. H.R. REP. NO. 112-331, at 752 (2011) (Conf. Rep.) (emphasis added), <https://www.congress.gov/congressional-report/112th-congress/house-report/331>.

108. The House passed its version of the bill on June 14, 2011. Consolidated Appropriations Act, H.R. 2055, 112th Cong. (2012). The Senate then passed its version on July 20, 2011. *See id.* However, the Conference Committee did not convene until December 8, 2011, *id.*, and Gaddafi was captured and killed on October 20, 2011. By the time the Conference began, Libya leaders had declared they would establish procedures to hold elections. Patrick J. McDonnell, *Libya Declares 'Liberation,' Path to Elections, Constitution*, L.A. TIMES (Oct. 23, 2011, 12:42 PM), [https://latimesblogs.latimes.com/world\\_now/2011/10/libya-declares-liberation-path-to-elections-constitution.html](https://latimesblogs.latimes.com/world_now/2011/10/libya-declares-liberation-path-to-elections-constitution.html).

the law and thus did not satisfy the Supreme Court's required strict bicameralism and presentment procedures. On the other hand, because of the changed circumstances, the Conference did not need to seriously consider the proposal. Thus, it would be unfair to say the Conference rejected the House's proposed limitation on military action as a matter of either policy or constitutional theory.

Legislative history "by the rules" helps place this report in context. Because this report was published with an appropriations bill, any policy statements within it should be treated as relatively authoritative statements. Although the changed circumstances were relevant, members of Congress would still place great weight on policy statements made in appropriations committee reports because those statements cannot appear in the bills themselves. The fact that it is a conference committee report adds further weight because it is a statement by both houses of Congress.

Second, the Conference Report contends the President needs to abide by the War Powers Resolution when deciding whether to engage in military action.<sup>109</sup> This assertion is particularly notable given the O.L.C.'s argument that the W.P.R. allowed the President to engage in short-term conflicts without congressional authorization. Here, Congress is insisting that it must be consulted before actions like Libya can be started. How Congress feels about the merits of the military action is beside the point; the relevant question is just whether it claims a role in the decision-making process. And because it states that it should be consulted, Congress cannot be said to have acquiesced in the executive's assertion of power in 2011.

The other relevant piece of legislative history is the House of Representatives Resolution from June 2011, which is worthy of discussion even though it played no role in the OLC's analysis. The Resolution declared that the "President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya."<sup>110</sup> The Senate, however, never even voted on the resolution,<sup>111</sup> so the natural next question is how much weight it

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109. H.R. REP. NO. 112-331, at 752 (2011) (Conf. Rep.).

110. H.R. Res. 292, 112th Cong. (2011) (enacted).

111. S.J. Res. 18, 112th Cong. (2011). Interestingly, the Senate Resolution was sponsored by two senators—one of whom was a Democrat (Jim Webb, D-Va.). The fact that a Democrat was willing to sponsor a resolution essentially censuring a President of his own party is relevant. It is not determinative, however, because it would

should receive. It is not a duly enacted law; the Senate never approved it, and the President never signed it. It is not a statement by the whole legislative branch because only one-half of Congress passed it. And it is also not a clear institutional rebuke of the President because the House was controlled by the opposite party and thus party politics played a role.<sup>112</sup>

On an intuitive level, it is difficult to completely disregard this type of congressional action. It is a policy statement by the House of Representatives, which is one of three elected parts of the federal government. The House stated that it did not believe the President should conduct military actions in Libya. However, under both a strict, *Chadha*-inspired view of congressional action and a “by the rules” analysis, the Resolution should be severely discounted.

When the House voted on the Resolution, it knew that it was making purely a policy statement. Members of Congress who voted for the Resolution knew that it likely would not become law,<sup>113</sup> as the Senate—which was controlled by the President’s own party—refused

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be irresponsible to draw conclusions about the opinion of all Democratic senators from the actions of just one. But the political realities of the modern party system mean that such an intraparty disagreement is notable.

112. Which party controls Congress matters because of the functional difficulty Congressmembers have in disagreeing with presidents of their own party. Bradley & Morrison, *supra* note 20, at 443. Therefore, we can draw more conclusions from instances where Congress and the President spar but are of the same party. An example of this type of situation is the passage of the War Powers Resolution in 1973. President Nixon was a Republican and both houses of Congress were majority-Democratic—but the majorities were not the two-thirds necessary to override his veto. *To Override the President’s Veto of H. J. Res. 542, Concerning the War Powers of the Congress and the President*, 93rd Cong. (1973). President Nixon vetoed the WPR; thus, when Congress overrode the veto, some members of his own party had to vote against him.

113. Additionally, it is difficult to consider this particular resolution without also considering that a Republican-controlled Congress (with many of the same members and leadership figures) failed to pass any health care reform bills after obtaining unified control of the government in 2016 despite repeatedly passing such bills when they would be vetoed by President Obama. Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017), <https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832>. Analysts do not traditionally examine congressional action in this way, though, and for good reason; each Congress is considered its own body and concluding from one failed bill that another bill would also have failed is counterintuitive and methodologically suspect.

to even hold a vote. The traditional method of analyzing legislative history would allow judges and scholars to utilize this statement when helpful. A “by the rules” analysis places it in its appropriately limited context.

### *B. Kosovo 1999*

In 1998, armed conflict broke out between the government of Serbia and ethnic Kosovans.<sup>114</sup> Both the United Nations and NATO condemned the conduct of Serbian President Slobodan Milosevic, and NATO then continued airstrikes it had begun in 1994.<sup>115</sup> Without congressional approval, President Clinton offered U.S. air support for the NATO attacks.<sup>116</sup>

Members of Congress claimed the Constitution required the President to consult with them before committing troops.<sup>117</sup> President Clinton disagreed and argued that air strikes were within his unilateral authority.<sup>118</sup> In the early months of the conflict, Congress introduced bills to attempt to repudiate some of Clinton’s decisions but failed to pass any of them.<sup>119</sup> The situation only got more complicated, however. Congress proceeded to issue conflicting messages about what type of involvement they approved: on April 28, 1999, Congress restricted the use of ground forces in Kosovo, failed to authorize air strikes, and also failed to require withdrawal.<sup>120</sup> The President and Congress then continued to spar over proposed limitations in Congress’s appropriations bills, with President Clinton threatening to veto proposals that contained restrictions he believed unconstitutionally infringed on his commander-in-chief power.<sup>121</sup> The appropriations bills

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114. *A Kosovo Chronology*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html> (last visited Dec. 28, 2020) (providing a timeline of the events in Kosovo and collecting sources).

115. *Id.*

116. *See, e.g.*, JULIE KIM, CONG. RESEARCH SERV., RL30729, KOSOVO AND THE 106TH CONGRESS (2001) (describing tensions between Congress and the White House during the Kosovo conflict).

117. *Id.* at 9.

118. *See id.* at 1.

119. *See id.* at 8–9.

120. *Id.* at 11.

121. *Id.* at 12.



ultimately contained some reporting requirements but fewer restrictions than Congress initially proposed.<sup>122</sup> The situation in Kosovo resolved itself without a clear answer when Milosevic lost a reelection bid.<sup>123</sup>

### 1. Claims of Acquiescence

Here, the OLC's statutory analysis generally followed the traditional legislative history hierarchy in considering four funding and authorization bills.<sup>124</sup> The OLC relied on drafting history and conference committee reports where available, as well as statements by members of the relevant committees.<sup>125</sup> It also looked at statements made during floor debates.<sup>126</sup> However, it did not conduct a detailed analysis of the relevant legislative history for each bill; rather, it considered only the parts of the legislative history that were helpful to its argument. This cherry-picking demonstrated the type of disregard for congressional procedures this Article is based on.

The OLC's substantive argument that Congress acquiesced in President Clinton's use of force in Kosovo claimed that continued appropriations demonstrated tacit support for the President's decisions.<sup>127</sup> Although the OLC did mention the appropriations committee reports when evaluating the scope of Congress's authorizations, its actual analysis of relevant legislative history focused on other items. It therefore did not demonstrate an understanding of how important these reports were.<sup>128</sup> As described below, an analysis of the reports establishes that Congress did in fact give conflicting messages because it did not speak

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122. *Id.* at 11–12.

123. Ivo H. Daalder, “*He’s Gone*”—*The End of the Milosevic Era*, BROOKINGS (Oct. 15, 2000), <https://www.brookings.edu/opinions/hes-gone-the-end-of-the-milosevic-era/>.

124. Auth. for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 362–63 (2000), <https://www.justice.gov/file/19306/download>.

125. *See id.* at 354–61.

126. *Id.*

127. *Id.*; *see also* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 431 (2018).

128. Additionally, a 2000 article from John Yoo describes the Kosovo intervention as a culmination of “executive initiative and legislative acquiescence.” John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1679 (2000).

clearly on either the role it was supposed to play in the decision or the wisdom of the decision itself. However, the OLC's failure to properly consider these important sources casts doubt on the validity of its reasoning.

## 2. Legislative History

Congress spoke often but not clearly on the issue of American military involvement in Kosovo. In some circumstances, it expressed its disapproval, and it specifically focused on Congress's institutional prerogative to weigh in on these questions:

While the recent violence in Kosovo is clearly a serious matter, the Committee expects any decisions altering the present deployment of the U.S. force in the Balkan region or in any other contingency operation will be made in full consultation with the Congress. It is not acceptable that these decisions, and the attendant financial implications which are the ultimate responsibility of Congress, occur without appropriate notification to and consultation with the Congress.<sup>129</sup>

In addition, a 2000 report from the Senate Appropriations Committee notes: "The Committee has included a general provision prohibiting the expenditure of funds for the continued deployment of United States military forces in Kosovo after July 1, 2001, unless the President seeks and secures congressional authorization to continue the deployment beyond that date."<sup>130</sup> Although subject to multiple interpretations, it seems Congress is arguing that the Constitution requires it to have a role in the military decision-making process. Congress stated that it was "unacceptable" that the President made military decisions without its input. It then required congressional authorization before further military actions could begin. Congress is asserting its role in the process—not making a statement on the wisdom of the policy—and so it is speaking directly to the constitutional question of whether the President has the unilateral authority.

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129. H.R. REP. NO. 105-469, at 9 (1998).

130. S. REP. NO. 106-290, at 64 (2000).

On other occasions, however, Congress seemed to agree with the executive's chosen actions in Kosovo. A 2000 report from the Conference Committee accepts that the President has the authority to decide when to begin military operations, and Congress inserts itself into the decision-making process only to provide guidelines for withdrawal; it is not speaking to the question of whether the President has the inherent authority to begin or continue conducting the operations by himself:

The House bill contained a provision (sec. 1203) that would require the President to establish, not later than May 31, 2001, militarily significant benchmarks for conditions that would achieve a sustainable peace in Kosovo and ultimately allow for the withdrawal of the U.S. military presence in Kosovo.

. . . .

The Senate recesses . . . .<sup>131</sup>

And on still other occasions, Congress acknowledged that there were ongoing military actions but refused to take a stand one way or the other on the correct course of action. These are the statements most likely to imply acquiescence. They clearly acknowledge there is an ongoing war, but they punt on answering any of the constitutional questions about who has decision-making authority. An Appropriations Committee report noted: "The Committee defers action on this request [for increased funding] at this time, owing to continued uncertainty over the duration and conditions of U.S. activities in the Balkans region, particularly in light of the situation in Kosovo."<sup>132</sup> Similar statements are found in other committee reports: "The Committee strongly supports a peaceful resolution of the conflict and supports the efforts of the Administration to end hostilities."<sup>133</sup>

Congress did repeatedly address the dispute in Kosovo. It did not do so in duly enacted law, but it did do so often, and any attempt to argue that Congress acquiesced in the Kosovo action must account for

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131. H.R. REP. NO. 106-945, at 868 (2000) (Conf. Rep.).

132. H.R. REP. NO. 105-591, at 8 (1998).

133. H.R. REP. NO. 105-719, at 22 (1998).

this fact.<sup>134</sup> Given all of Congress's ambiguities, it is still possible to find that Congress did cede control over this decision to the executive; we simply must consider all the relevant statements when trying to determine whether this rises to the level of acquiescence.

A "by the rules" approach to legislative history directs us to the most determinative parts of the record. It is not a flaw in Nourse's theory—or its application to foreign relations—that there is no clear answer to be found in the committee reports. Legislative history is frequently contradictory, and there is no reason that committee reports would be different. However, even in a situation where the committee reports do not provide a single, unified statement of congressional intent, judges and scholars must still conduct the appropriate analysis.<sup>135</sup>

And here, the two Committee Reports are only a part of the story. There were votes on actual bills, and those should be considered more authoritative because they are on-the-record statements by the whole legislature, even if they are as contradictory as the Committee Reports.<sup>136</sup> There were also public communications between the executive and Congress about how to conduct the operations in Kosovo.<sup>137</sup> Each of these statements is relevant, and a comprehensive theory of legislative history allows us to value each one properly.

The Committee Reports do not support the OLC's view that Congress acquiesced in President Clinton's assertion of unilateral authority. When a judge or scholar finds congressional acquiescence, she is stating that the President is now the sole decision-maker in whether to go to war in these circumstances. As discussed in Section II.A above, acquiescence is a constitutional finding. If Congress acquiesced

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134. Some theorists argue statements from Congress that do not pass through bicameralism and presentment should not be considered at all. See *INS v. Chadha*, 462 U.S. 919, 957 (1983). However, most observers do consider legislative history to be useful in at least some form but do not know how best to use it. A systematic approach is necessary to make sense of any conflicting statements.

135. During this discussion of when Nourse's theory just provides a hierarchy of statements, it is worth remembering that in some circumstances it provides authoritative answers. *TVA v. Hill*, 437 U.S. 153 (1978), is one of them. See *supra* text accompanying notes 72–80.

136. See *supra* text accompanying notes 130–32.

137. See KIM, *supra* note 116, 3; see also Charles Babington, *Clinton: Containing Milosevic is a Goal*, WASH. POST (Mar. 25, 1999), <https://www.washingtonpost.com/wp-srv/national/daily/march99/clinton25.htm> (describing President Clinton's speech regarding the Kosovo conflict).

in these circumstances, then it would no longer have a constitutional role in deciding whether to take military action should similar scenarios arise in the future. Given that Congress repeatedly (if inconsistently) argued that its opinion did matter, the OLC's finding that Congress acquiesced was an error.

### C. Iraq 1998

In 1998, the United States bombed Iraq in a strike known as Operation Desert Fox. President Clinton ordered these strikes in response to Iraqi President Saddam Hussein's failure to cooperate with scheduled weapons inspections.<sup>138</sup> Some members of Congress wrote President Clinton a letter that expressed their support for Operation Desert Fox but argued that he had not gone far enough combatting Iraqi weapon development.<sup>139</sup>

#### 1. Claims of Acquiescence

A 2002 OLC opinion argued that Congress had acquiesced in the 1998 invasion, but it did not engage the traditional legislative history hierarchy.<sup>140</sup> Instead, it began with the text of the relevant Authorizations for the Use of Military Force and then analyzed the purpose of those statutes.<sup>141</sup> Its acquiescence argument was that, by continuing to fund the operation, Congress did not explicitly disapprove of it.<sup>142</sup> Congress had stated its "sense" that it disapproved of the strikes, but the OLC relied on Supreme Court precedent and its own previous opinions to argue that this "sense" was nonbinding.<sup>143</sup>

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138. Andrew Glass, *Clinton Orders Airstrike on Iraq: Dec. 16, 1998*, POLITICO (Dec. 16, 2016), <https://www.politico.com/story/2016/12/clinton-orders-airstrike-on-iraq-dec-16-1998-232571>.

139. Letter from Trent Lott et al. to Bill Clinton (Aug. 11, 1999), <https://www.nci.org/c/c81199.htm>.

140. See Auth. of the President Under Domestic and Int'l Law to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143, 153 (2002).

141. See *id.* at 153–57.

142. See *id.* at 157 n.14.

143. *Id.* The idea that senses of Congress are nonbinding is not controversial. CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-825, "SENSE OF" RESOLUTIONS AND PROVISIONS 1 (2015). However, they are usually considered nonbinding in that they do not impose binding restrictions on the President, not that they are not worth

## 2. Legislative History

This case study pairs disapproving (but nonbinding) statutory language with approving legislative history. As mentioned in Part III, competing indicators of congressional intent do not nullify “by the rules” as a theory for analyzing legislative history. In fact, under the current hierarchy, courts frequently have to balance contradictory statements and decide which position is more authoritative. The same balancing must be done here, but Nourse’s theory is more helpful than the traditional approach because it is less haphazard. It directs us specifically to appropriations bills and the corresponding committee reports.

First, Congress’s 1998 Appropriations Bill stated that “[i]t is the sense of the Congress that none of the funds appropriated or otherwise made available by this Act may be made available for the conduct of offensive operations by United States Armed Forces against Iraq.”<sup>144</sup> The OLC dismissed this statement as merely the “sense” of Congress rather than an actual restriction.<sup>145</sup> This view of “senses of Congress” as nonbinding is generally correct.<sup>146</sup> The OLC stretches its argument too far, though, by saying that because a sense of Congress is not binding, it is also not probative of congressional intent. The phrase is inserted into bills specifically to demonstrate the opinion of Congress. Its sole purpose is to make an argument without binding the President; this must be considered congressional resistance, especially in the context of drafting a bill that can survive both bicameralism and presentment.

By contrast, the House Committee Report that corresponds to the appropriations bill contains a clear statement of support for the operation.<sup>147</sup> The Report states that the Committee “firmly believes in the

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considering. The OLC relying on them as evidence of acquiescence is likely taking this “nonbinding” argument too far.

144. 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, § 17, 112 Stat. 58, 66 (1998).

145. *See* Auth. of the President Under Domestic and Int’l Law to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143, 157 (2002).

146. DAVIS, *supra* note 143, at 1. Although it is strange to dismiss language from enacted law as nonbinding, Congress seems to agree with how courts have weighed “senses of Congress.” Therefore, there is no real claim that O.L.C. misinterpreted the statute.

147. “The Committee firmly believes in the validity of the mission of these forces presently in the Gulf, as well as their continued deployment until such time that

validity of the mission” to Iraq.<sup>148</sup> Given the importance of appropriations committees (and following Nourse’s principles), this statement by itself would generally be a clear affirmation of President Clinton’s use of troops. However, in this case it is superseded by the intent of the whole Congress as expressed in the final bill.<sup>149</sup>

A statement made by both houses of Congress has more authority than it would if it were from just one, and the “sense of Congress” the OLC improperly dismisses is a quote from both the enacted law and the Conference Committee Report.<sup>150</sup> Conference Committee reports are more authoritative than reports from a single house because they are the opinions of both houses. This is especially true when a committee report contradicts the statement of a single house because the compromise supersedes any previous proposal.<sup>151</sup> Additionally, an enacted law is even more authoritative than either type of report because it incorporates the approval of the President and satisfies even the Supreme Court’s high standard for legislative speech created in *Chadha*.<sup>152</sup>

Competing statements from Congress (as are arguably present in the enacted law and the committee report) do not invalidate the “by the rules” to analyzing legislative history. In fact, a systematic view of congressional motivations helps observers decide how to weigh these different comments. Other principles from Nourse’s article—namely the focus on later-in-time text and the importance of conference

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Iraq complies with the United Nations agreement regarding its weapons of mass destruction program.” H.R. REP. NO. 105-469, at 8 (1998). *But see* H.R. REP. NO. 105-504, at 53 (1998) (“The conferees agree to restore and amend section 17, as proposed by the House, which expresses the sense of the Congress that the conduct of offensive operations by United States forces against Iraq should be specifically authorized by law.”).

148. H.R. REP. NO. 105-469, at 8.

149. Later-in-time statements are more probative of congressional intent. Nourse, *supra* note 40, at 98.

150. *See* 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, § 17, 112 Stat. 58, 66; *see also* H.R. REP. NO. 105-504, at 53.

151. Nourse’s second principle is that later decisions trump earlier ones, and she looks for the “last act.” Nourse, *supra* note 40, at 98. “This Principle of reverse sequential consideration explains [that conference committee reports are] . . . the most reliable evidence of congressional decisions.” *Id.* (internal quotations omitted).

152. *See* *INS v. Chadha*, 462 U.S. 919, 957 (1983).

reports—explain how different statements should be prioritized.<sup>153</sup> Without Nourse’s guidance, observers may be tempted to resort to cherry-picking comments without any indication that they actually reflect congressional will.

Additionally, it is not clear that the House Committee Report and the “sense of Congress” expressed in the Committee Report and enacted law are actually inconsistent, so the balancing discussed above may be unnecessary. The House Appropriations Committee expressed its support for the merits of the military action by stating that it “firmly believe[d] in the validity of the mission.”<sup>154</sup> The entire Congress, meanwhile, wanted any “offensive operations by United States forces against Iraq [to] be specifically authorized by law.”<sup>155</sup> A reasonable conclusion to draw from this, therefore, is that Congress supported the U.S.’s involvement in Iraq but wanted to retain its role in the decision-making process.

## V. CREATING A THEORY OF LEGISLATIVE HISTORY IN FOREIGN RELATIONS CONTEXTS

### *A. How to Weigh Different Types of Congressional Statements*

As indicated above, various and conflicting types of legislative history arise in the war power context. This raises the question—how should one evaluate these different types of legislative history? Nourse’s arguments about legislative history by the rules establish that the congressional record provides certain cues for understanding congressional intent. This Article seeks to apply those cues specifically to the power to begin military operations by considering when

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153. Nourse, *supra* note 40, at 98.

154. H.R. REP. NO. 105-469, at 8 (1998).

155. H.R. REP. NO. 105-504, at 53 (1998). This language appears in the Committee Report, and it does not appear in the actual appropriations bill. However, committee reports are the basis by which the entire Congress decides whether or not to vote and thus contain the authoritative understanding of Congress. *See* Nourse, *supra* note 40, at 98.



congressional speech in places other than enacted law is evidence of acquiescence or resistance to presidential overreach.<sup>156</sup>

This Article begins by pointing out the peculiarity of ignoring a unified statement by both houses of Congress.<sup>157</sup> The 2020 Iran resolutions are beyond the scope of this Article because they were voted on and passed, and committee reports were the focus here. However, the Iran anecdote is a useful starting point for this analysis because it demonstrates the necessity of finding a new approach to dividing the war powers between the branches of government. The current approach is too heavily tilted towards the executive. A new framework is necessary.

First, in foreign relations, we should give more weight to appropriations committees than we do in other contexts. Above, this Article analyzes different pieces of legislative history to decide whether Congress has acquiesced in the executive's claim of authority.<sup>158</sup> Not every statement is equally valuable, though, so the question becomes how to decide which is most important. There is a traditional hierarchy of statements:<sup>159</sup> enacted laws are the most persuasive, followed by conference committee reports because they represent both houses, then committee reports, and then statements by individual members of Congress.<sup>160</sup> In foreign relations in particular, this traditional hierarchy is unlikely to provide the most accurate insight into congressional intent.

As Nourse describes, congressional rules do not allow policy statements in appropriations bills, so such statements would need to be in reports.<sup>161</sup> The lack of congressional action in foreign relations

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156. This Article does not argue that statements by a minority of Congress members are constitutionally binding on the President; rather, it focuses on when such statements are evidence of acquiescence.

157. See *supra* notes 2–3 and accompanying text.

158. This Article considers enacted statutes, conference committee reports, committee reports, and lawsuits by individual members of Congress. See *supra* Part III.

159. Nourse, *supra* note 40, at 109; see also George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L. J. 39, 41 (1990).

160. There are different types of these statements, undoubtedly; floor statements by bill sponsors or committee leadership are more persuasive than public speeches by random members. Costello, *supra* note 159, at 41.

161. See *supra* text accompanying note 77.

makes formal statements of law especially unlikely.<sup>162</sup> Consequently, appropriations committee reports are particularly relevant. The point of Nourse's theory, however, is that a one-size-fits-all approach is not an appropriate method to analyze legislative history. Different circumstances require different approaches. Enacted law may be more common in certain subject matters, such that appropriations committee reports would no longer be as definitive a source. On the other hand, even in the war powers context, the circumstances of a particular bill may invoke one of Nourse's other principles.<sup>163</sup>

Second, we must place more emphasis on the content of congressional statements rather than strictly focusing on their type. This allows policy statements to play a meaningful role in an acquiescence analysis. Members of Congress can object to either the precise policy the President is carrying out or to the encroachment on their constitutional authority to declare war. Above, this Article presents examples of both types: in some circumstances Congress disagreed with the President's policy choice,<sup>164</sup> while in others it insisted the President receive authorization before beginning operations.<sup>165</sup>

Although these two categories of statements are substantively different, the question is whether there is a philosophical difference when attempting to find acquiescence. The conventional wisdom is that they are distinct because statements about a policy are not statements about the proper constitutional separation of powers.<sup>166</sup> Although this makes intuitive sense, it is ultimately incorrect.

First, we start with the fact that Congress has a difficult time acting and does not often reach a quick consensus on constitutional theory.<sup>167</sup> Therefore, we should more broadly interpret their statements

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162. See *supra* Section III.A.

163. See *supra* Section III.B. The WPR is an example of this. This Article analyzes appropriations committee reports because clear foreign policy statements in duly enacted law are rare. However, the WPR is authoritative legislation, and it therefore takes precedence over committee reports.

164. E.g., H.R. Res. 292, 112th Cong. (2011) (enacted) (expressing the House of Representatives' disagreement with President Obama's use of force in Libya).

165. E.g., H.R. REP. NO. 105-469, at 9 (1998).

166. E.g., Curtis Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 70-71 (2017).

167. Bradley & Morrison, *supra* note 20, at 440. In fact, Congress has evaluated constitutional issues less often in recent years. See *supra* text accompanying note 33-35.

that counter the President. For example, when the House of Representatives passed its resolution condemning U.S. involvement in Libya in 2011, it was framed as a policy statement—the House believed President Obama made a bad decision.<sup>168</sup> To be sure, the resolution itself contains references to Congress's constitutional role in the war-making process. But the House narrowly frames its oversight role, referring primarily to its appropriations power.<sup>169</sup> Should we thus extrapolate from this choice that the House does not believe it has a constitutional role to play in the decision to go to war?

It does not make sense to go this far. Instead, any policy pushback should also be considered constitutional pushback for reasons similar to the arguments that inaction-as-acquiescence is flawed: it is difficult for Congress to speak in general, so drawing conclusions based on omissions leads to too narrow a view of Congress's role.<sup>170</sup> Therefore, because policy statements are examples of Congress asserting itself in the decision-making process, they should be considered resistance to the President's view of his own power, as well. Requiring magic words is both asking too much of Congress and placing an unhealthy emphasis on formal actions rather than reasonable constructions of congressional actions.

Second, any theory focusing on the importance of historical gloss relies on healthy interbranch dialogue. The premise of historical gloss as a guiding theory is that the two political branches fight each

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168. H.R. Res. 292, 112th Cong. (2011) (enacted).

169. *Id.* at § 4 (“Congress has the constitutional prerogative to withhold funding for any unauthorized use of the United States Armed Forces, including for unauthorized activities regarding Libya.”). The House does say that “[t]he President has not sought, and Congress has not provided, authorization for the introduction or continued involvement of the United States Armed Forces in Libya.” *Id.* However, the remedy it identifies is withholding funding rather than any action related to authorization. This is precisely the dichotomy that Nourse criticizes the Supreme Court for relying on in *TVA v. Hill*, 437 U.S. 153 (1978), *supra* notes 72–77, but it is raised here only to differentiate between procedural and substantive critiques.

170. An issue with the approach here is that particular language being absent is not actually inaction. The House did in fact vote and pass a resolution; that resolution just did not contain a specific reference to the House's constitutional war-making role. It is less suspect to draw conclusions from statements left out of a text than from the fact that there is no text at all. However, as with complete inaction, language may be absent from the final text for many reasons, including that the House believed it was implied and thus unnecessary to include.

other over their proper roles; this implies there is not a single, fixed conception of the separation of powers but rather that the “correct” conception results in part from conversation between the branches. It therefore makes sense to impute some level of conversational intent to congressional actions.

Congress has clearly recognized it has a role in the war-making process, even when it does not explicitly state so.<sup>171</sup> The Constitution grants it the power to declare war, and Congress has acted on this role in the past.<sup>172</sup> Therefore, when it speaks in the war-making context, it is impliedly acting pursuant to this constitutional power even if it does not use magic words.

Statutes passed by Congress are not unconstitutional simply because they do not state they are enacted pursuant to the Commerce Clause or Taxing and Spending Power,<sup>173</sup> and the President does not have to announce to Congress or the public if he is acting pursuant to the Vesting Clause or the Commander-in-Chief Clause or any other clause (until or unless there is a relevant lawsuit). Therefore, we also should not require Congress to identify a constitutional power under which it is speaking.

There are strong arguments to the contrary. First, such a loose view of congressional action risks infantilizing Congress.<sup>174</sup> Second, the hurdle of passing anything at all is the most difficult one. If Congress has the political will to pass a statement on the merits of a war, it should also be able to assert its constitutional role. After all, disagreeing with a President’s policy choices (rather than his assertion of power) is the action likely to draw attention. If Congress is willing and able to do this, then it should be held to the text of its statement.

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171. *E.g.*, H.R. Res. 292 § 4(b).

172. Congress has declared war in the past. *See Official Declarations of War by Congress, supra* note 42.

173. The Supreme Court recently addressed whether the Affordable Care Act could be constitutional pursuant to Congress’s taxing and spending power despite the law explicitly referring to the fines paid for not having health insurance as a “penalty.” *See generally Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

174. Such an attack could also be levied on this theory of analyzing legislative history. However, the two situations are distinguishable; legislative history by the rules takes a more rigorous approach to analyzing how Congress works.

Modern criticisms of acquiescence question how often Congress is even aware that there is a constitutional question.<sup>175</sup> To account for this, a finding of congressional acquiescence should only follow from evidence that Congress knew the full scope of what it was agreeing to.<sup>176</sup> This makes sense and is in keeping with the theme of this Article: developing a systematic approach to analyzing government speech rather than allowing too much extrapolation from simple actions. Nourse's "by the rules" theory provides a basis for that systematic approach. Any analysis of congressional intent should be based on the way that Congress actually works rather than an idealized concept of what should happen.

Ultimately, there is not an easy answer to the question of how much constitutional intent to impute to congressional statements on the merits. However, because we do not require Congress or the President to otherwise identify which power they are acting under, we should also treat statements of policy as statements of constitutional theory.

*B. How Each Relevant Actor Should View Legislative History by the Rules*

Different audiences<sup>177</sup> may view the arguments in this Article differently. Executive branch lawyers, judges and scholars, and members of Congress all have different responsibilities, and thus their

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175. See *supra* Section II.B.

176. See, Roisman, *supra* note 23, at 688 (“[I]t simply cannot be assumed that just because one branch engages in conduct and the other branch accepts it that either branch has done so based on a deliberate legal (or functional) analysis that such conduct is constitutional. To the contrary, there are examples where it seems quite likely that both the Executive and Congress engaged in or accepted conduct without being aware that it raised a constitutional question at all.”); see also Bradley, *supra* note 166, at 70–71 (arguing that statements about the constitutional separation of powers are more important than statements on the merits of an issue). Additionally, James Madison argued for a fluid separation of powers and considered the possibility that “constitutional liquidity” would result in shifting notions of the separation of powers. But he required “attention to the constitutional issue, and disdained reliance on ‘midnight precedents’ from Congress.” William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 48 (2019) (citation omitted).

177. The four parties mentioned in this section are not the only relevant actors. They are, however, the most obviously affected ones, and thus the analysis focuses on them.

responses to the concepts proposed here should differ accordingly. Because of justiciability doctrines,<sup>178</sup> interbranch disputes are not often litigated in courts, so executive branch lawyers conduct the first and most consequential analysis. Scholars (and judges, to the extent they are asked to weigh in) conduct public-facing analysis because they do not have a particular client to serve the way the OLC operates within the executive branch. And finally, Congress is relevant because it is the party whose actions are being interpreted; guidance on how it can make itself clearer is generally helpful.

How executive branch lawyers should view these arguments is a relatively easy question because of their role in any President's decision-making process. This Article primarily critiques the OLC's use of the relevant legislative history because its memoranda demonstrate the executive branch's approach. Thus, the OLC is the primary audience for the suggestions above about how to properly analyze legislative history. Because it is the set of executive branch lawyers tasked with determining whether Congress has acquiesced in the President's claim of authority, the OLC is the group who should be paying the most attention to the statements from appropriations committee reports.

Scholars<sup>179</sup> should take similar lessons as the OLC. Because they generally attempt to be more unbiased than the OLC, they should be even more interested in developing an accurate framework through which to view congressional action.<sup>180</sup> After all, both the OLC and courts sometimes cite scholars, and courts will occasionally use particularly prescient scholarly work to create new legal frameworks. Thus, scholars should use the information presented above to develop workable theories of congressional action. Widespread use (and increased understanding) of Congress's rules would help improve the public's statutory analysis, and this increased focus might also put pressure on courts to adopt a more representative theory of how the legislature works.

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178. See *supra* text accompanying note 12.

179. As discussed above, this section focuses on scholars because justiciability doctrines prevent judges from issuing opinions with any regularity.

180. The OLC is a department within the executive branch, and thus its work focuses on the issues facing the executive branch. Although the OLC and the executive agencies do not have a traditional lawyer-client relationship, it nonetheless tends to support the administration's preferred outcome. Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, 28 *YALE L. & POL'Y REV.* 439, 449 (2010).

By contrast, though, this type of analysis likely would not (and should not) change how Congress views legislative history. As the Supreme Court suggested in *Chadha*,<sup>181</sup> Congress can authoritatively speak on constitutional issues by passing a duly enacted law. And because *Chadha* indicated that courts would respect such statements by a coequal branch, Congress already has an incentive to pass laws asserting its own power—but has proven unable to do so.<sup>182</sup> Thus, even if Congress knew that courts would be looking at this particular piece of legislative history,<sup>183</sup> its incentive structure will not have changed.

## V. CONCLUSION

This Article set out to provide a systematic approach to evaluate when Congress has acquiesced in presidential control over the decision to use military force and then to apply that system. The analysis started with Congress's rules and identified appropriations committee reports as the place most likely to contain authoritative statements from Congress about the proper separation of powers because of the lack of formal legislation in the foreign relations context. Then, through consideration of three different instances of unilateral executive military action, this Article determined when Congress has acquiesced and when it has resisted presidential overreach.

The conclusions in this Article are both narrow and broad. The analysis of the individual case studies is narrow; the goal was to use “legislative history by the rules” to determine whether Congress had acquiesced in the way the OLC argued it had. The conclusions we can draw from those individual case studies are broad, however. When the OLC argues that Congress has acquiesced in a particular view of the separation of powers, it considers past similar examples. So, when the President next claims the unilateral authority to engage in short-term military actions, the OLC will analyze whether Congress has

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181. *INS v. Chadha*, 462 U.S. 919, 957 (1983).

182. *See supra* text accompanying notes 6–7.

183. One possibility is that certain members of Congress would use this knowledge to ensure that favorable statements are included in the committee reports for military appropriations bills. However, certain commentators who distrust legislative history fear that this already occurs. *See Nourse, supra* note, 40. It seems unlikely that yet another statement that legislative history is relevant would promote any significant additional gamesmanship.

acquiesced in similar situations. In addition to the fact that those similar situations were precisely the ones considered here, this Article provides a coherent framework for the OLC and other scholars to analyze future scenarios.

It is important to remember the scope of this project. This Article does not analyze whether the President was authorized to conduct particular operations, nor whether those operations were justified. It considers only whether a “by the rules” analysis supports the idea that Congress acquiesced in the President’s claim of unilateral authority. As evidenced by all three case studies, the structure of the two political branches means that in times of direct conflict, the executive will likely get his way. But that does not mean Congress has no role, only that it lost that particular fight. Going to war remains a two-branch pursuit; analysis of Congress’s actual record demonstrates it has not ceded its place in the decision.