

CHAPTER 1



Introduction

IN 1944, MISSOURI senator Harry S Truman, who four years earlier had cast little shadow on the American political stage, joined Franklin Roosevelt atop the Democratic ticket as the vice-presidential candidate. What could account for the meteoric rise of a junior senator once known as a pawn of Kansas City powerbrokers like Tom Pendergast to a figure of national stature, whom the media judged to be “one of the ten most valuable officials in Washington”?¹ Strikingly, Truman built his public reputation not through legislating, but by investigating as chair of the Senate Special Committee to Investigate the National Defense Program. Truman lobbied to create the committee to discover and correct instances of fraud and abuse in government contracting and war procurement programs. While the Roosevelt administration initially resisted any move that would empower congressional snooping into its conduct of the war effort, it eventually relented, and the committee compiled an impressive record of rooting out fraud, abuse, and maladministration during its three-year history.

In a speech to the Senate upon resigning his chairmanship of the committee, Truman extolled investigations as critical to ensuring Congress’s place in our separation of powers system: “In my opinion, the power of investigation is one of the most important powers of Congress. The manner in which the power is exercised will largely determine the position and prestige of the Congress in the future.”² Writing in the immediate aftermath of the Watergate scandal, in which President Richard Nixon orchestrated a massive cover-up of illegalities committed by the Committee to Reelect the President, the historian Arthur Schlesinger Jr. echoed Truman’s assessment. Indeed, Truman “could have gone further,” Schlesinger argued. “The manner in which Congress exercises the investigative power will largely determine

¹ The ranking was by *Look* magazine. See Wilson Miscamble, *The Most Controversial Decision: Truman, the Atomic Bombs, and the Defeat of Japan* (New York: Cambridge University Press, 2011), 23.

² *Congressional Record*, August 7, 1944, 6747.

in years to come whether the problem posed in the *51st Federalist* can be satisfactorily answered—whether the constitutional order will in the end oblige the American government to control itself.”³

The intervening forty years since Schlesinger wrote have produced no shortage of congressional investigations of alleged executive-branch malfeasance. Moreover, as Iran-Contra and the Monica Lewinsky scandal made clear, Richard Nixon would not be the last chief executive to fret over the very future of his presidency in the face of an investigative maelstrom on Capitol Hill. And yet, scholarly assessment of congressional investigations has been limited both in quantity and in scope. A legal literature has traced the evolution of the constitutional and legal authority underlying congressional investigations of the executive branch.⁴ Historians have largely focused on the dynamics of individual investigations,⁵ or traced the evolution of the investigative power over time.⁶ While valuable, these studies tell us comparatively little about the extent to which Congress is able to use the investigative arm of its committees to combat the steady increase in presidential power since World War II. Finally, apart from a handful of isolated studies, political science has paid scant attention to investigations as a potential mechanism for legislative influence.⁷

³ Arthur Schlesinger Jr. and Roger Burns, *Congress Investigates: A Documented History, 1792–1974* (New York: Chelsea House Publishers, 1975), xxvi.

⁴ See, e.g., Nelson McGeary, *The Developments of Congressional Investigative Power* (New York: Columbia University Press, 1940); Peter Shane, “Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress,” *Minnesota Law Review* 71 (1987): 461–542; John Grabow, *Congressional Investigations: Law and Practice* (Clifton, NJ: Prentiss Hall Law and Business, 1988); Neal Devins, “Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing,” *Administrative Law Review* 48 (1996): 109–137; Morton Rosenberg, “Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry,” *CRS Report* (1995): 95–464.

⁵ See, e.g., August Raymond Ogden, *The Dies Committee: A Study of the Special House Committee for the Investigation of Un-American Activities, 1938–1944* (Washington, DC: Catholic University of America Press, 1945); Donald Riddle, *The Truman Committee: A Study in Congressional Responsibility* (New Brunswick, NJ: Rutgers University Press, 1964); Arthur Schlesinger Jr. and Roger Burns, *Congress Investigates: A Documented History, 1792–1974* (New York: Chelsea House Publishers, 1975); Keith Olson, *Watergate: The Presidential Scandal that Rocked America* (Lawrence: University of Kansas Press, 2003).

⁶ Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* (New York: Simon and Schuster, 1955); James Hamilton, *The Power to Probe: A Study of Congressional Investigations* (New York: Vintage Books, 1976).

⁷ See, e.g., David Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (New Haven: Yale University Press, 1991); Douglas Kriner and Liam Schwartz, “Divided Government and Congressional Investigations,” *Legislative Studies Quarterly* 33 (2008): 295–321; David Parker and Matthew Dull, “Divided We Quarrel: The Politics of Congressional Investigations, 1947–2004,” *Legislative Studies Quarterly* 34 (2009): 319–345; David Parker and Matthew Dull, “Rooting Out Waste, Fraud and Abuse: The Politics

Building on Truman's and Schlesinger's insight, we take seriously the idea that investigations offer Congress a valuable tool for constraining an ascendant executive. Investigations do not require the assent of both chambers, the construction of a supermajority to avoid a Senate filibuster, or the president's approval. Critically in an era of intense partisan polarization and seeming institutional dysfunction, Congress can therefore investigate when it cannot legislate. To be sure, investigations cannot, on their own, compel presidential compliance and mandate changes in public policy. Moreover, Congress's investigative zeal waxes and wanes over time depending on the mix of incentives encouraging members to expose or pass over alleged executive-branch misconduct. However, when Congress does investigate, it can focus public scrutiny on the executive branch and bring public pressure to bear on the White House in ways that can materially affect politics and policy.

Of course, investigations are a somewhat blunt instrument of counter-attack. Congress does not and cannot investigate every instance of presidential aggrandizement. However, Congress can use the investigative tool to weaken the president politically. And because presidents anticipate Congress's capacity to inflict political damage, the threat of investigations can limit presidential autonomy more broadly, even if the political costs investigations impose may often be fairly general, rather than tied to reversing a specific abuse.

WHY CONGRESS CAN INVESTIGATE WHEN IT CANNOT LEGISLATE

If the constitutional framework of separation of powers sets up an "invitation to struggle" among the branches, the Congress enters the battle at a distinct disadvantage vis-à-vis the executive.⁸ Despite the paucity of formal powers enumerated in Article II, presidents have repeatedly stretched the bounds of their authority by shifting policy unilaterally,⁹ by tightening their control over the bureaucracy to enhance their influence over the policy

of House Committee Investigations, 1847 to 2004," *Political Research Quarterly* 66 (2013): 630–644; Paul Light, *Government by Investigation: Congress, Presidents, and the Search for Answers, 1945–2012* (Washington, DC: Brookings Institution Press, 2014).

⁸ The historian Edward Corwin coined this description of the constitutional framework. Edward Corwin, *The President: Office and Powers* (London: H. Milford, Oxford University Press, 1940), 200.

⁹ Phillip Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence, University of Kansas Press, 2002); Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton: Princeton University Press, 2002); William Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003).

implementation process,¹⁰ and by making broad assertions of wartime power in both the international and domestic arenas.¹¹ The Constitution grants Congress an array of tools to defend its institutional prerogatives and restore the balance of power. Yet, while the Framers plainly believed that Congress would be the most powerful branch, Congress confronts several institutional limitations on its ability to respond to presidential power grabs.

First, as Terry Moe has stated most forcefully, Congress is beset by collective action problems.¹² Unlike the president, Congress is not a unitary actor. Rather, “Congress is made up of hundreds of members, each a political entrepreneur in his or her own right, each dedicated to his or her own reelection and thus to serving his or her district or state.” While members share a stake in the power of Congress vis-à-vis the White House, “this is a collective good that . . . can only weakly motivate their behavior.” By contrast, presidents are motivated to defend the power of their institution, since doing so will also directly enhance their power as individuals.¹³

Second, the legislative process is riddled with transaction costs that make it difficult for Congress to respond in a coherent fashion when its interests are threatened. Passing a bill typically requires the coordinated efforts of committees and leaders in two chambers; as a result, a supportive majority coalition is no guarantee of action. Instead, the transaction costs of putting together a coalition to fight the president are simply too great for individual members to bear, given that the benefits are shared by all members, regardless of their contribution to the collective good.

Third, even if Congress succeeds in mustering majorities in both the House and Senate behind legislation to rein in the executive, such efforts will often fail to become law. Presidential co-partisans stand poised to block any legislative initiative that cannot secure the sixty votes required to overcome a filibuster in the contemporary Senate.¹⁴ And even if such a super-majority

¹⁰ Terry Moe, “The Politicized Presidency,” in *New Directions in American Politics*, ed. John Chubb and Paul Peterson (Washington, DC: Brookings Institution Press, 1985); David Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Appointments* (Princeton: Princeton University Press, 2008).

¹¹ Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (Ann Arbor: University of Michigan Press, 2005); James Pfiffner, *Power Play: The Bush Presidency and the Constitution* (Washington, DC: Brookings Institution Press, 2008); William Howell and David Brent, *Thinking About the Presidency: The Primacy of Power* (Princeton: Princeton University Press, 2013).

¹² Terry Moe, “The Presidency and the Bureaucracy: The Presidential Advantage,” in *The Presidency and the Political System*, ed. Michael Nelson (Washington, DC: Congressional Quarterly Press, 1994), 451.

¹³ See also Howell 2003.

¹⁴ Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010); Gregory Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the United States Senate* (Princeton: Princeton University Press, 2006); Thomas Mann and Norman Ornstein, *It’s Even Worse than it Looks: How the*

is attained, the president wields a veto pen that requires only thirty-four senators to toe the party line.¹⁵

While acknowledging Congress's theoretical capacity to check presidential assertions of power, the conventional wisdom rightly notes that in only the rarest of circumstances will Congress actually pass legislation to counter such actions. Even the constitutional power of the purse—mandating that funds can only be spent subject to a lawful appropriation—provides less leverage in practice than is often supposed. Congress has routinely failed to defund programs and initiatives unilaterally instituted by the president. One need only recall congressional Democrats' futile efforts to force the Bush administration to begin a phased withdrawal from Iraq through the appropriations process in 2007 to be reminded that the power of the purse is a remarkably blunt instrument of coercion.¹⁶

In sum, Congress faces daunting odds when trying to combat the president legislatively. Information asymmetries, steep transaction costs in coalition building, and the looming threat of a filibuster or presidential veto all suggest that legislative efforts to constrain presidents will often fail, even when a strong majority of members opposes the president's action.

We agree with the conventional assessment that Congress is often institutionally hamstrung when trying to use legislation to rein in assertions of presidential power. However, existing scholarship has largely failed to consider how Congress might systematically retain a check on the executive branch through more informal means.¹⁷

American Constitutional System Collided with the New Politics of Extremism (New York: Basic Books, 2013).

¹⁵ David Brady and Craig Volden, *Revolving Gridlock: Politics and Policy from Carter to Clinton* (Boulder, CO: Westview Press, 1998); Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998); Charles Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000).

¹⁶ See Bruce Ackerman and Oona Hathaway, "Limited War and the Constitution: Iraq and the Crisis of Presidential Legality." *Michigan Law Review* 109 (2011): 447–517, for a discussion of the historical evolution of the power of the purse and its waning capacity to constrain the president.

¹⁷ To be sure, past scholarship has occasionally acknowledged this possibility. For example, Moe and Howell warn that should presidents "go too far or too fast, or move into the wrong areas at the wrong time, they would find that there are heavy political costs to be paid—perhaps in being reversed on the specific issue by Congress or the courts, but more generally by creating opposition that could threaten other aspects of the presidential policy agenda or even its broader success." Terry Moe and William Howell, "The Presidential Power of Unilateral Action," *Journal of Law, Economics, and Organization* 15 (1999): 132–179, 138. See also William Howell and Douglas Kriner, "Bending so as Not to Break: What the Bush Presidency Reveals about Unilateral Action," in *The Polarized Presidency of George W. Bush*, ed. George Edwards and Desmond King (Oxford: Oxford University Press, 2007). Nevertheless, having made this nod to the possibility of an alternate, nonlegislative mechanism for constraining the executive, the vast majority of scholarship focuses almost exclusively on the barriers to legislative action.

We focus here on one specific mechanism through which Congress might counter presidential aggrandizement: by using investigative oversight to expose wrongdoing, force executive-branch officials to answer difficult questions, and raise the political costs of noncompliance. These investigations fall within the broad category of congressional “oversight,”¹⁸ but have the particular feature of focusing on allegations of wrongdoing, mismanagement, or abuse of power, rather than simply evaluating the quality of the executive branch’s performance in implementing the law.

In an oft-overlooked chapter of his seminal 1991 study, *Divided We Govern*, David Mayhew argues, “Beyond making laws, Congress probably does nothing more consequential than investigate alleged misbehavior in the executive branch.”¹⁹ Yet few scholars have followed up on Mayhew’s assertion by exploring the dynamics governing investigative activity and its ultimate consequences for politics and policymaking.

We believe this is a mistake. Investigations are a crucial tool precisely because they avoid the most severe problems that plague legislative efforts to check presidential power. Most obviously, veto threats are irrelevant. Rather than requiring supermajority support, investigations can be commenced with only the swing of a chairman’s gavel. Moreover, transaction costs are also less likely to pose an important obstacle. Since adoption of the Legislative Reorganization Act of 1946, all Senate committees have had the power to issue subpoenas. On the House side, subpoena power was granted to three committees in 1946 (Appropriations, Government Operations, and Un-American Activities), with the authority extended to the rest of the committees in 1974. Before 1946, committees generally had to receive floor approval for investigations. But even then, the transaction costs were fairly limited. On the House side, the procedure was for the Rules Committee to decide whether to forward proposals for investigations to the floor; given approval from Rules, it required a simple majority vote on the floor to authorize an investigation.²⁰

Finally and more subtly, collective action problems may pose a less severe obstacle to investigative oversight activity than to legislation. The key is that the individual members who are most active in spearheading an

¹⁸ See Joel Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, DC: Brookings Institution Press, 1990); Joel Aberbach, “What’s Happened to the Watchful Eye?” *Congress and the Presidency* 29 (2002): 3–23; Linda Fowler, *Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Relations* (Princeton: Princeton University Press, 2015); Mathew McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms,” *American Journal of Political Science* 28 (1984): 165–179.

¹⁹ Mayhew 1991, 8.

²⁰ Funding the investigation did, however, require a second resolution in most cases.

investigation are likely to gain publicity that is often an individual benefit—helping boost their reelection and personal power—even as they contribute to the collective good of congressional power. Similarly, under divided party government, investigations can be used by party leaders and committee chairmen as an instrument to serve majority party members’ shared interest in tarnishing the brand name of the president’s party, even as those inquests simultaneously defend Congress’s institutional role. Investigations can thus serve as a “common carrier” for the goals of ambitious members and for all members’ shared stake in congressional power.²¹

Attention to members’ multiple goals can also help explain the important variation in the volume and intensity of congressional investigations over time. Specifically, we argue that the interplay between legislators’ partisan and institutional interests—a struggle the Framers themselves feared—significantly shapes the calculus of when Congress acts. We show that Congress, and particularly the House of Representatives, investigates most aggressively precisely when partisan and policy differences between the legislative and executive branches are maximized. That is, investigations are more likely when there is divided party control of Congress and the White House, particularly when the parties are highly polarized from one another.

HOW INVESTIGATIONS SHAPE AMERICAN POLITICS

Congressional investigations of the executive branch have produced some of the most dramatic moments in American political history: the impeachment and near conviction of President Andrew Johnson; the sensational Credit Mobilier corruption scandal, which targeted both a sitting vice president and future president in the midst of the volatile 1872 election season; the Army-McCarthy hearings; Watergate; Iran-Contra; Whitewater; and Lewinsky. But are investigations mere political theater? Or do they routinely have concrete implications for interbranch politics and policy outcomes?

While the desire for time in the spotlight may have motivated many investigators throughout congressional history, we argue that investigations are more than opportunities for public posturing. Rather, because they can systematically inflict political damage on the president, investigations can influence policy outcomes both in the specific issue area under investigation

²¹ Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton: Princeton University Press, 2001); Eric Schickler, “Entrepreneurial Defenses of Congressional Power,” in *Formative Acts: Reckoning with Agency in American Politics*, ed. Stephen Skowronek and Matthew Glassman (Philadelphia: University of Pennsylvania Press, 2007).

and—by informing presidents’ anticipatory calculations—more broadly in areas unrelated to the investigation itself.

But how can investigations impose political costs? We argue that one of the most important mechanisms through which investigations raise the costs of noncompliance for the president is by eroding his support among the public. To examine this dynamic, we marshal more than sixty years of public opinion data and couple it with a series of original survey experiments. Taken together, our data convincingly demonstrate that congressional investigations systematically depress presidential job approval ratings, one of the most important and visible metrics on which the president’s political capital is judged.

Because investigations can lower presidential approval and change the political landscape, they also can have tangible consequences for policy outcomes. We propose three pathways through which investigations can effect concrete changes in policy. The first two pathways are direct. When Congress investigates the president’s actions in a specific policy sphere, it shines a public spotlight on alleged maladministration. By raising the salience of a policy problem and by turning public opinion against the president, an investigation may trigger a legislative response mandating a change in policy. In this way, investigations help Congress overcome collective action dilemmas and other barriers to legislative redress by creating a political environment that incentivizes legislative action. The end result is legislation being written into law that never would have emerged in the absence of the political pressure generated by the investigation.

Even without spurring legislation, however, investigations can lead to direct policy changes by prompting the president to change course on his own initiative. In such cases, the president attempts to preempt further damaging investigative hearings by making policy concessions. We explore these pathways through a series of illustrative case studies that detail how each pathway operates and what conditions must be met for an investigation to influence policymaking (see Chapter 4).

While these direct pathways of influence are important, investigations may be even more consequential to interbranch politics because of their ability to influence presidential behaviors and policy outcomes beyond the immediate focus of ongoing investigations. When deciding what course to chart, presidents anticipate Congress’s likely reaction. Most prior scholarship focuses on anticipations of the likelihood that Congress would enact legislation to overturn a presidential action and directly alter policy. However, we argue that the president also surely considers Congress’s capacity to impose political costs on the White House through high-profile investigations should the administration stray too far from congressional preferences. Testing for indirect influence through anticipatory calculations is notoriously difficult. However, we marshal substantial evidence that presidents who have experienced heavy investigative oversight are more reluctant to

use force in response to international disputes than are presidents who have experienced a relatively quiescent Congress.

Put simply, investigations are far more than a political sideshow. While investigations do not negate the president's many institutional advantages, they offer an important mechanism for increasing the political costs of non-compliance even when legislative coercion is not feasible. By reducing presidential approval and changing the president's anticipatory calculations, investigations can systematically affect policy outcomes both in the area under investigation and more broadly in areas unrelated to the investigation itself.

THE ORIGINS AND EVOLUTION OF CONGRESS'S INVESTIGATIVE POWER

Our main objectives in the chapters that follow are to identify the conditions under which Congress uses its investigative power, and to demonstrate that the real or anticipated exercise of this power significantly constrains the president and produces tangible changes in policy outcomes. As a result, we contend that investigations offer Congress a check on presidential aggrandizement that is often more effective than that provided by its legislative function.

However, Article I of the Constitution makes no mention of Congress's authority to investigate the executive branch. Rather, this power is implied in broader grants of legislative authority, and it has evolved over time in the political give and take that defines our system of separated institutions sharing power.²² As such, a brief overview of this development provides crucial context before turning to the empirical analyses that form the core of the book.

The first congressional investigation arose in the second Congress and involved a direct challenge to the conduct of a cabinet officer. In August 1791, an army of approximately 1,400 American soldiers under the command of General Arthur St. Clair marched north from Fort Washington (modern day Cincinnati) to construct a series of forts that would become bases of operation against Indian Tribes that were attacking American settlers on the Ohio frontier. At the end of a long day's march on November 3, St. Clair permitted his men to set up camp without first constructing defensive earthworks, a task he thought could wait until the morning. However, before daybreak St. Clair's forces were attacked by Indian fighters. The onslaught took the Americans by surprise, and the ill-trained army was little match for their Indian adversaries. St. Clair soon realized that the only hope was to retreat southward toward Fort Jefferson; after receiving the order to fall

²² Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: The Free Press, 1990 [1960]).

back, most of his force dropped their kit and ran. More than 650 soldiers, including one of the commanding generals, were killed and 271 more were wounded. The American losses that day far exceeded those of the massacre of Custer and his men at Little Bighorn more than eighty years later.²³ The defeat of St. Clair's army would be one of the greatest Indian victories over American forces in history.

In the midst of a dinner party in Philadelphia on November 9, President Washington received a messenger with news of the fiasco on the Ohio frontier. After suffering through the remainder of the evening in silence, Washington erupted following the departure of the last guest, declaring "Oh God! Oh God! How can he answer to his country?"²⁴ The news caused a political sensation, with most of the public animus directed toward St. Clair.

On February 2, a motion was made in the House to form a committee to investigate the disaster. However, the motion failed, and the issue slipped from the House's agenda until March 27 when William Giles of Virginia introduced a new motion asking President Washington to conduct an inquest into the St. Clair affair. Opponents countered that the House had a responsibility to conduct its own independent investigation into the episode. Some, like South Carolina's William Smith recoiled against such a plan, noting that it would be the first instance in American history of the House investigating the actions of public officials "immediately under the control of the executive." Invoking separation of powers, Smith argued that the president alone should take the lead in superintending the executive branch.²⁵ The House was torn by competing considerations. On the one hand, few wanted to offend President Washington; however, on the other, the scale of the disaster and the sizeable appropriations such operations on the frontier required from the Treasury convinced many that an investigation was necessary. Ultimately, the House passed a resolution creating a select committee "to inquire relative to such objects as come properly under the cognizance of this House, particularly respecting the expenditures of public money."²⁶

The committee began its investigation by writing the War Department and asking Secretary Henry Knox to deliver to the committee all relevant materials to assist its inquiry into the St. Clair matter. As recorded in the notes of Secretary of State Thomas Jefferson, the request prompted considerable turmoil within Washington's cabinet. Did the House have a right to

²³ Taylor 1955.

²⁴ George Chalou, "St. Clair's Defeat, 1792," in *Congress Investigates: A Documented History, 1792-1974*, ed. Arthur Schlesinger Jr. and Roger Burns (New York: Chelsea House Publishers, 1975), 8.

²⁵ *Ibid.*, 9.

²⁶ Taylor 1955, 22.

request such documents and conduct such an inquiry, and did the executive have a duty to comply? And so began the opening salvo in the centuries-long struggle between the branches over claims of executive privilege versus the right of the legislature to obtain all requisite information to perform its constitutional functions. The cabinet members debated whether earlier parliamentary inquiries of the prime minister in Britain served as a precedent for congressional action.²⁷ Ultimately, Washington acknowledged the House's right to convene the inquest and the administration's duty to provide information to it. At the same time, the president declared that he had a solemn duty to withhold any information that might endanger the public security. However, in the present case Washington judged that all of the materials requested could be safely released.

As the committee's inquest proceeded, Jeffersonians in the House used it as an opportunity to score political points against key Federalists in the administration. Indeed, the final report exonerated St. Clair himself, and instead reserved most of its criticism for the War Department. The quartermaster general, Samuel Hodgdon, and a War Department contractor, William Duer, friends of Knox and Secretary of the Treasury Alexander Hamilton, were assailed for "gross and various mismanagements" in failing to properly provision the force in a timely fashion. Secretary Knox, himself, also was chastised for failing to spend all of the funds appropriated by Congress for the Indian campaigns.

When the House took up the committee report at the start of the second session, a complicated mix of political battles undermined the investigators. Defenders of Knox successfully reopened the case and thwarted efforts to have the House act on the committee's initial report. However, the inquest did result in several significant policy changes. Spurred on by the report

²⁷ Parliament had long claimed the power to acquire information essential to perform its constitutional duties, and this capacity to investigate questions of policy and maladministration grew dramatically in the era of Parliamentary Supremacy precipitated by the expulsion of the Stuarts in 1688. Just decades before the American Revolution, Parliament embarked on its most audacious investigation in history: a massive inquest into the alleged abuses of the Walpole regime, which the prime minister's detractors disparaged as "twenty years of treason," after his ouster. The scope of the inquest raised constitutional objections from many parliamentarians, but William Pitt the Elder famously defended the propriety of the Commons' investigative power: "We are called the Grand Inquest of the Nation, and as such it is our duty to inquire into every step of publick management, either Abroad or at Home, in order to see that nothing has been done amiss" (Taylor 1955, 9). Colonial legislatures followed British precedents in embracing investigative powers for themselves. For example, in 1722 the Massachusetts House of Representatives ignored the objections of the crown-appointed governor in demanding that the commanders of the colonial forces in Maine appear before the House to account for their failure to pursue offensive operations called for by the House in the previous session. See C. S. Potts, "Power of Legislative Bodies to Punish for Contempt," *University of Pennsylvania Law Review* 74 (1926): 691–725.

of negligence in the War Department, the Senate authorized Secretary of the Treasury Alexander Hamilton to take charge of military procurement. Under considerable pressure, Knox also relieved his ally, Quartermaster General Hodgdon, of command. Furthermore, the public attack on the War Department and Secretary Knox spearheaded by Jeffersonian legislators embarrassed and politically damaged the Federalists.

The St. Clair affair firmly established Congress's power to investigate the conduct of executive-branch actors, and served as an important precedent for numerous congressional investigations throughout the nineteenth century. Many of these early inquests, like the one into the St. Clair affair, directly involved questions of military policy, a realm in which presidents have consistently claimed considerable prerogative powers.²⁸ Perhaps most important, congressional critics of the Lincoln administration mobilized early on to investigate the executive's conduct of the Civil War and in so doing to try to maximize Congress's influence over military affairs. After witnessing firsthand the disaster suffered by Union forces at Bull Run in July 1861, Senator Benjamin Wade of Ohio and Senator Zechariah Chandler of Michigan spearheaded the creation of the Joint Committee on the Conduct of the War.²⁹ Over the next three and a half years, virtually every major decision of the Lincoln administration in prosecuting the war was subjected to congressional scrutiny and second-guessing. So great was their harassment of the administration and its generals, that Confederate Commander Robert E. Lee is alleged to have remarked that the committee was as valuable to his cause as two divisions of Confederate soldiers.³⁰

²⁸ For example, Congress investigated General Andrew Jackson's unauthorized invasion of Spanish Florida to attack Seminole Indians in 1818. Congress was also active in the investigative realm outside of military policy. Congress used its investigative powers to launch inquests into the administration of the Treasury Department in 1800 and 1824, the Internal Revenue Bureau in 1828, and the Post Office in 1830. Other investigations focused on specific officials, including hearings targeting the commissioner of Indian affairs in 1849 and the secretary of commerce in 1850 (Taylor 1955, 33–34). After the Civil War, Congress engaged in the most important investigation of governmental corruption of the nineteenth century, the Credit Mobilier scandal, which ultimately ensnared both the sitting and incoming vice president, in addition to multiple members of Congress. Summarizing the scope and tenor of the investigative activity in the antebellum era, James Schouler wrote: "Committees instituted inquiries, ran the eye up and down accounts, pointed out little items, snuffed about dark corners, peeped behind curtains and under beds, and exploited every cupboard of the executive household with a mousing alacrity." *History of the United States Under the Constitution*, vol. 3, 1817–1831 (New York: Dodd, Mead and Company, Publishers 1885), 258.

²⁹ Ironically, given his future experience at the other end of a congressional investigation that would ultimately result in articles of impeachment, the third senate seat was given to the sole southern Democrat to remain in office after secession, Tennessee Democrat Andrew Johnson.

³⁰ David McCullough, *Truman* (New York: Simon and Schuster, 1992), 304.

Many of these early investigations proved quite consequential and politically damaging to the incumbent president. In part because of the persistent bludgeoning he received in Congress, Lincoln genuinely believed that he would lose his reelection bid; only General Sherman's seizure of Atlanta reversed Lincoln's political fortunes. The wartime investigative fervor in Congress continued during Reconstruction and provided Radical Republicans with a potent tool to wield against President Andrew Johnson. Johnson, a Democrat and the sole southern senator to remain in his seat after secession, confronted a Congress in which his co-partisans comprised only 20% of both chambers. The resulting investigations of Johnson's alleged abuses in implementing a more lenient Reconstruction policy precipitated the president's impeachment; he survived conviction in the Senate by a single vote. A half century later, a congressional investigation into charges and counter-charges of misconduct in a seemingly minor policy dispute between the conservationist Gifford Pinchot, a Theodore Roosevelt loyalist who was chief of the Forest Service, and President William Howard Taft's secretary of the interior Richard Ballinger, proved so politically damaging to Taft that it split the Republican Party in two, launched Roosevelt's return to politics and third party campaign, and handed the election of 1912 to the Democrat Woodrow Wilson.

Although Congress had investigated alleged executive-branch misconduct for more than a century, it was not until the 1920s that the Supreme Court entered the fray and codified the scope of the legislature's investigative power. The impetus for the Court's action was the most wide-ranging congressional probe into presidential corruption in American history: a multiyear investigation into bribes accepted by high-ranking Harding administration officials to lease the naval oil reserves at Teapot Dome to private corporations. Reversing Wilson administration policy, President Harding transferred authority over the reserves to his secretary of the interior, Albert Fall. In early 1922, Fall concluded a secret agreement with Harry Ford Sinclair and Mammoth Oil Company, a subsidiary created for the express purpose of extracting the oil from Teapot Dome.

When news of the deal leaked, a coalition of opposition party Democrats and progressive Republicans led by Wisconsin senator Robert La Follette called for a formal investigation of alleged misconduct. The Senate unanimously passed La Follette's resolution authorizing an investigation by the Committee on Public Lands and Surveys.³¹ Fearing that the committee's chair, the conservative Utah Republican Reed Smoot, had little desire to aggressively investigate the Harding administration, La Follette convinced Montana Democrat Thomas Walsh, the junior Democrat on the panel, to

³¹ See Senate Resolutions 282 and 294, Sixty-seventh Congress, second session.

lead the inquest.³² The Teapot Dome investigation is unusual in that the minority Democrats were able to exploit a division within the Republican Party's ranks to become a leading force of the Senate investigation; we explore this dynamic and interchamber differences in the forces driving investigative activity more systematically in the following chapter. As the investigation unfolded, most members of the Republican majority endeavored to thwart Walsh at every turn, even recruiting their own geologists to cast doubt on the investigators' claims. By contrast, Walsh received significant help from Cordell Hull, the chairman of the Democratic National Committee, who provided him with information about additional land deals in New Mexico on which Fall had made considerable sums of money.³³

The investigators finally broke through in 1924, tracing the money trail to show that Fall had received large kickbacks from Sinclair for the lease at Teapot Dome. The casualties of the investigation ultimately included three cabinet members who resigned in disgrace: the secretary of the interior, Albert Fall; the secretary of the navy, Edwin Penby; and the attorney general, Harry Daugherty.³⁴

In addition to generating considerable political fallout, the Teapot Dome scandal also triggered a number of legal challenges concerning the scope of congressional investigative powers that eventually reached the United States Supreme Court. In a pair of landmark decisions, the Supreme Court codified Congress's sweeping power to superintend the executive, and it upheld the constitutionality of two of the most important instruments of investigative practice. In *McGrain v. Daugherty*, 273 U.S. 135 (1927), the Court upheld Congress's power to investigate charges of maladministration concerning the failure of the Justice Department to prosecute violations of the Sherman Anti-Trust and Clayton Acts, as well as the attorney general's failure to arrest and prosecute Secretary of the Interior Fall and the oil company officials who had allegedly conspired to defraud the government. The case involved the attorney general's brother Mally Daugherty who refused to testify before the Senate investigative committee despite being subpoenaed to do so. Daugherty challenged the committee's right to subpoena a private

³² See Laton McCartney, *The Teapot Dome Scandal: How Big Oil Bought the Harding White House and Tried to Steal the Country* (New York: Random House, 2008), 116. Smoot was the chairman of Public Lands in the 67th Congress, when the resolution authorizing the investigation was passed. The first hearings were held in October of 1923 during the 68th Congress. By that time, Edwin Ladd (R-ND) chaired the committee; though Smoot retained his seat on the committee as well. For Walsh's own account of how he was recruited to lead the charge, see Thomas Walsh, "The True History of Teapot Dome," *The Forum* 72(1) (1924): 1–12.

³³ McCartney 2008, 170–175.

³⁴ Fall had resigned before the investigation began, but his political reputation was utterly destroyed by committee revelations that he had received \$400,000 worth of bribes for his role in leasing the naval reserve.

individual in this matter, as well as the constitutionality of the investigation as a whole on the grounds that it was not legislative in character. A federal district court in Cincinnati ruled in favor of Daugherty. The Supreme Court, however, overturned the lower court's ruling and articulated a broad constitutional interpretation of Congress's investigative power.

Delivering the opinion of the Court, Justice Willis Van Devanter acknowledged that there was no express constitutional provision empowering Congress to initiate investigations and subpoena testimony. The main question at hand, therefore, was whether this power was materially incidental to Article I's general grant of legislative power. The Court concluded: "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."³⁵

To reach this conclusion, the Court drew heavily on British precedent and American practice from the St. Clair affair onward. Indeed, the Court noted that as great an authority on the separation of powers as James Madison voted to authorize the St. Clair inquest, strongly suggesting a general and broad grant of investigative power to the legislature. But how directly must an investigation be tied to a legislative purpose? Here, the Court gave Congress considerable latitude.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties . . . Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as, in the judgment of Congress, are needed from year to year.³⁶

Given that all federal agencies are governed by congressional appropriations, *McGrain* established that virtually any inquest into the affairs of an executive department or agency would meet constitutional muster. Pursuant to exercising this power, the Court also confirmed that Congress

³⁵ *McGrain v. Daugherty*, 273 U. S. 135, 174 (1927).

³⁶ *McGrain v. Daugherty*, 273 U. S. 135, 177, 178 (1927).

possessed wide-ranging subpoena powers to gather the requisite information for the discharge of its responsibilities: “The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary of the legislative function.”³⁷

In a subsequent case, *Sinclair v. United States*,³⁸ in which the founder of Sinclair Oil, Harry Ford Sinclair, challenged his conviction for contempt of Congress, the Supreme Court again upheld its articulation of broad congressional investigative powers not directly tied to legislation. Moreover, it affirmed Congress’s power to hold in contempt private citizens who as witnesses deliberately withheld information from congressional investigators.³⁹

The abuses of the McCarthy era prompted the Court to articulate some limits on Congress’s investigative power in an effort to rein in its most egregious excesses. For example, labor organizer John T. Watkins, when called before the House Committee on Un-American Activities (HUAC), dutifully answered its questions about his own affiliation with the Communist Party as well as questions about others whom he still believed to be party members. However, Watkins refused to answer inquiries about people who had left the movement years earlier. Watkins maintained that such questions fell outside of the committee’s scope of inquiry and exceeded its constitutional mandate. In *Watkins v. United States*, the Supreme Court agreed. Chief Justice Earl Warren was careful to affirm past precedents granting to Congress broad latitude in exercising its investigative power: “The power of the Congress to conduct investigations is inherent in the legislative process. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” However, Congress’s investigative authority did not extend to inquiries strictly focused on exposing the wrongdoing of private individuals: “But, broad as is this power of inquiry is, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.”⁴⁰ Yet, two years later, the Supreme Court in a 5–4 ruling upheld the contempt of Congress conviction of university professor Lloyd Barenblatt for refusing to answer questions about his personal political beliefs

³⁷ *McGrain v. Daugherty*, 273 U. S. 135, 174 (1927).

³⁸ *Sinclair v. United States*, 279 U. S. 263 (1929)

³⁹ Rosenberg 1995.

⁴⁰ *Watkins v. United States*, 354 U. S. 178, 187 (1957). John Quincy Adams raised similar arguments during the House’s investigation into the Second National Bank in 1832. Having returned to the House after his defeat in the election of 1828, Adams sought to amend the resolution authorizing the investigation to limit its focus to the bank’s books and proceedings, and to preclude inquiries into the religious and political beliefs of bank officials themselves. See John Macoll, “The Second Bank of the United States, 1832,” in *Congress Investigates: A Documented History, 1792–1974*, ed. Arthur Schlesinger Jr. and Roger Burns (New York: Chelsea House Publishers, 1975).

and affiliations. The Court ruled that HUAC did not violate Barenblatt's First Amendment rights and reaffirmed broad congressional investigative powers stating, "the scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."⁴¹

* * * * *

With these investigative powers formally entrenched in congressional practice and constitutional law, recent decades have produced a dizzying array of investigations that have inflicted significant political damage on presidential administrations. Truman grappled with investigative assaults on multiple fronts from his China policy, to his firing of MacArthur, to allegations of communist infiltration throughout the executive branch. Lyndon Johnson faced off against Senator Fulbright's Foreign Relations Committee over Vietnam. Barack Obama has been besieged by congressional inquests into everything from the Department of Justice's failed "Fast and Furious" operation, to his response to the attacks on the American consulate in Benghazi, to his conduct of immigration policy. Most dramatically, for three presidents—Nixon, Reagan, and Clinton—congressional investigations even provoked concerns about their removal from office. Yet, important questions remain concerning when Congress uses its investigative powers, and when it does so, with what effect. It is to these questions that the remainder of the book turns.

PLAN OF THE BOOK

A *sine qua non* for congressional investigations to play an influential role in rebalancing our separation of powers system is that Congress must actually employ the investigative tools at its disposal to challenge executive-branch actions of which it disapproves. Yet, even a cursory examination of recent history shows that Congress does not use its investigative powers uniformly. Trumped-up charges with little factual basis can provoke a whirlwind of activity in the hearing room, while seemingly clear cases of misconduct can escape sustained congressional scrutiny. Chapter 2 explores the forces driving variation in congressional willingness to use its investigative powers over time. Marshaling an original data set identifying more than 11,900 days of investigative hearings held in the House and Senate from 1898 to 2014, we explore the institutional, partisan, and ideological forces that drive the considerable temporal variation in the frequency with which Congress

⁴¹ *Barenblatt v. United States*, 360 U. S. 109, 111 (1959).

exercises its investigative powers over more than a century of American political history. We find that both partisan forces and policy disagreements drive variation in investigative activity. These effects are most robust in the House of Representatives, where there is a strong, consistent relationship between divided government and investigative activity, and where heightened polarization boosts the impact of divided party control. Because the Senate affords the majority party leadership considerably weaker procedural tools—and accordingly grants much greater prerogatives to individual senators—divided government has little influence on the sheer volume of investigative activity in the aggregate. However, our case studies and additional data analysis show that partisan forces are nonetheless important in shaping aspects of investigative politics in the Senate. By uncovering the dynamics driving variation in investigative activity, we begin to identify the political environments in which presidents are likely to face push-back from congressional investigators, versus those in which they operate relatively insulated from investigative pressures.

But do congressional investigations matter? Can they impose political costs on the president and his administration? Writing in 1885, Woodrow Wilson praised congressional interrogations of the executive branch in the abstract as a valuable tool to inform the public, but expressed considerable skepticism concerning most investigations' substantive reach, and therefore of their efficacy in practice. According to Wilson, "even the special, irksome, ungracious investigations which it from time to time institutes in its spasmodic endeavors to dispel or confirm suspicions of malfeasance or of wanton corruption do not afford it more than a glimpse of the inside of a small province of the administration."⁴² Similarly, many modern commentators have concluded that investigations "are more effective at dramatizing than at illuminating issues."⁴³

Nevertheless, to sway public opinion and bring popular pressure to bear on the White House, perhaps investigations need not penetrate into every crevice of the federal bureaucracy or illuminate the full complexities of the matter at hand. Indeed, the sensational, headline-grabbing character of many investigations—which led the great journalist Walter Lippmann to decry, "that legalized atrocity, the congressional investigation, where congressmen, starved of their legitimate food for thought, go on a wild, feverish manhunt, and do not stop at cannibalism"—may prove an asset if the primary objective is to move public opinion.⁴⁴ Even in the nineteenth century, many investigations appear to have been designed with precisely this goal in

⁴² Woodrow Wilson *Congressional Government: A Study in American Politics* (Boston: Houghton Mifflin, 1885), 271.

⁴³ Grabow 1988, 7.

⁴⁴ Walter Lippmann, *Public Opinion* (Minneapolis: Filiquarian Publishing, 2007 [1922]), 268.

mind.⁴⁵ But the question remains: Do investigations systematically damage the president's public standing?

Chapter 3 explores this question empirically. The analysis begins by examining the relationship between investigative activity and fluctuations in presidential approval for all presidents from Eisenhower to Obama. The chapter then presents the results of several survey experiments that allow us to further isolate the influence of investigations, and various features of each inquest, such as the party leading the hearings, on public support for the president. Through multiple rounds of analysis using both observational and experimental evidence, we find that investigative activity erodes presidential approval.

Finally, we turn to the effects of investigations on public policy. Chapter 4 traces and documents two pathways through which investigations can directly produce concrete policy changes: by prompting legislative action from within Congress, and by encouraging presidents to change course of their own accord to avoid more stringent or costly action from Capitol Hill. A series of case studies explores the operation of these pathways in different policy areas and political environments.

Chapter 5 explores a third pathway of investigative influence: investigations in one policy area may affect presidential actions in unrelated policy areas by raising the threat of new investigative actions should the president stray too far from congressional preferences. In his 1940 analysis of Congress's investigative power, McGeary highlighted the importance of just such an anticipatory mechanism:

The possible importance of the threat of investigation should not be overlooked. There are no scales with which to measure the unethical and undesirable practices which it may prevent. The fear of publicity through investigation may carry the same restraint as fear of the law.⁴⁶

While the anticipation of future inquests may well affect presidential calculations, we often lack a viable scale on which to assess just how much influence this anticipatory mechanism affords. In Chapter 5, we exploit several important characteristics of military policy making—particularly the plausible assumption that most international crises arise independently of the domestic political environment in the United States—to assess the

⁴⁵ As Schouler (1885, 258) concluded, more often than not investigators were “not so eager, it would appear, to correct abuses as to collect campaign material for damaging some candidate and playing the detective in preference to the judge.” When viewing members' incentives through the lens of Mayhew's electoral connection, this emphasis on publicity seeking is completely consistent with theories of legislative behavior. See David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974).

⁴⁶ McGeary 1940, 24.

concrete impact of even unrelated investigations in the recent past on future policy outcomes. The analysis suggests that the scope of investigative influence may be even greater than it superficially appears. Even when Congress does not investigate, the threat of an investigation and the political costs it generates may well affect the administration's political calculus and its implementation of policy accordingly.

The final empirical chapter uses investigative activity during the Obama administration as a lens for evaluating presidential-congressional relations in the early twenty-first century. Investigative activity declined in intensity in the late 1980s through the first decade of the new century, but Republicans' takeover of the House of Representatives in 2010 sparked a series of high-profile probes. None of these investigations hit their mark and became the next Watergate or provided the impetus for major policy changes. However, collectively they demonstrate the continued vitality of investigations as a mechanism for members of Congress to inflict damage upon the executive branch. In the intensely polarized contemporary era, forcing major direct policy change may have become increasingly difficult, but investigators in divided government have focused their investigative energies on imposing political costs on the president, and they have regularly achieved this goal to considerable effect.

Taken together, our results demonstrate that members of Congress are able to use investigations as an instrument to fight back against the White House, and thus to defend the legislative branch's power even when institutional barriers all but preclude legislative action.

Our approach is rooted in the idea that members are not solely reelection seekers who devote all of their energies to procuring narrow benefits for their districts. Rather, two additional sets of member interests can promote investigative activism that ultimately helps defend their institution's place in the separation of powers system. First, under conditions of divided party government, majority party members' shared interest in undermining the reputation of the opposition party can generate aggressive investigations that target executive power. Second, even under conditions of unified control, individual members can use investigations to promote their own personal power and national prominence. In this way, members' personal interests coincide with the broader goal of institutional maintenance, bolstering the Framers' system of checks and balances even amid the many advantages enjoyed by the modern president.