Legislative Limelight: Investigations by the United States Congress

by

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Abstract

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Academic studies have often emphasized the law-making aspects of Congress to the exclusion of examining how Congress uses its investigative power. This is despite the fact that Congress possesses great power to compel testimony and documents from public and private persons alike, and that exercises of the investigative power are among the most notable public images of Congress. While several recent studies have considered investigations in the context of relations between the executive and legislative branches, far less effort has been committed to looking at how much Congress uses coercive investigative power to gather information on non-governmental actors.

I develop several new datasets to examine the historical and recent use of investigations of both governmental and non-governmental institutions. A major component of this work is a comprehensive study of all authorizations of subpoena power granted to committees over the period 1792-1944. I find that for both Executive and outside subjects, divided control of government was positively associated with the volume of investigations in the House, but not in the Senate. Through extended qualitative examination of contemporary news stories and other secondary sources, I consider how partisan and institutional factors influenced the focus, scope, and intensity of investigative projects, as well as which legislative chamber and committee came to undertake the information-gathering work. I demonstrate how stronger party leaderships limited opportunities for members to conduct investigations, and where necessary, shifted politically-sensitive subjects to venues—within the chamber, to the other chamber, or to joint committees—that would be more favorable to the desired results. Nevertheless, it was in the Senate that individual members consistently possessed greater opportunity to initiate inquiries to develop policy expertise as well as those that could be dangerous to their own party's interests.
Confronting changes to how Congress has made such grants *since* World War II, I examine the exercise of investigative power in its capacity to generate media coverage and witnesses' invocations of the Fifth Amendment protection against self-incrimination. Whereas the House and Senate experienced an extended period of near-parity in the quantity of investigations until the mid-1990s, since that time the Senate has been the more involved and consistent actor. The number of different investigative topics receiving media attention has also declined since the early 1990s. Increasingly, Congress's investigative initiative focuses on a small set of subjects, which often receive simultaneous scrutiny from a number of different corners.

To help motivate the evolution of Congressional investigations, I consider the Legislative branch's relations with the Executive and Judicial branches, as well as concerted attempts by the Legislature to build institutional capacity. I argue that the growth of the State and increased complexity of society have complicated Congress's investigative task, requiring it to seek new methods and driving it towards greater reliance on the other two branches, particularly the Judiciary. Ultimately, Congress's ability to summarily detain contumacious witnesses and police member qualifications and chamber legitimacy—the original means and ends of its powers as upheld in the 19th Century—are the weakest and most disused elements of its investigative repertoire. The work closes with a discussion of the possibilities for policy-making through investigations, and some ideas for encouraging greater member use of Congress's investigative power.

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Chapter 1
Introduction

St. Patrick's Day, 2005, featured a hearing of the House Committee on Government Reform on the use of steroids in athletic competition. Called before the committee were six well-known professional baseball players who had been linked to the steroid issue, either as critics of or whistleblowers on player use, or as alleged users of performance-enhancing drugs. In a hearing room packed with legislators, attorneys, press, and observers, players accustomed to reciting post-game clichés found themselves confronting a deeply critical panel of lawmakers. Perhaps the most the striking element of the players' testimony was how little their group behaved like a team: while some pointedly denied usage, others evaded legislators' questions. Former home run champion Mark McGwire cut a particularly pathetic figure, offering so little information that he declined to take even a position on whether a player's use of steroids constituted "cheating," and clasping desperately to the fiction that his refusals to answer questions were not rooted in the Constitution's protection against self-incrimination.

Reaction to the spectacle was mixed. For some, the ballplayers' unconvincing testimony obliterated a belief that burgeoning biceps, broken batting records, and bombshell memoirs had left unshaken. For others, the hearings confirmed longtime suspicions. Still others questioned what business a Congressional committee had prying into the conduct of grown men paid millions of dollars a year for their role in the entertainment industry.

For an alleged publicity stunt, however, the committee's hearing had a far-reaching legacy. One month later, baseball's commissioner proposed a strengthened regime for drug testing, which was adopted by agreement of the players' union later that year.[1] In late 2007, former Senator George J. Mitchell's report to the commissioner implicated over 80 players for using various illegal substances, even producing personal checks from ballplayers to a clubhouse employee who had pled guilty to distributing steroids and money laundering earlier in that year.[2] Happily for legislators' skeptics, this all occurred without Congressional legislation. The baseball players brought before Congress may have been somewhat unlucky in comparison with other athletes suspected of performance-enhancing drug use, paid a much greater cost in public prestige. But these were only the latest in a long line of victims of Congressional inquisition, an institution whose selective application and paucity of legal limits place it squarely within a political realm, even though many of the methods used share their origins with judicial procedures.

Despite the fact that investigations are among the most notable actions undertaken by members of Congress, they have generated relatively little scholarly attention in recent decades. Thus, advances in theories of Congress and in the statistical methodology employed to analyze politics have not been applied to this function of the legislative branch. At present, there exists very little understanding of how Congress uses the investigative power.

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[1] "Drug Policy in Baseball" Accessed November 8, 2012. http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline

[2] Mitchell, George J. Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players in Major League Baseball. DLA Piper US LLP, December 13, 2007

Investigations matter because the fact of being elected empowers members of Congress to perform both legislative and *non-legislative* roles in society. This is to say that as elected persons, legislators enjoy a certain legitimacy as the *embodiment* of the public. While the criticism is often levied that Congressmen are not "doing their jobs" while investigating and that their attentions are inappropriate, there is no comparable venue in American society where public figures may put witnesses through a sustained interrogation on the basis of mere *suspicion* of wrongdoing. The media must acquire voluntary participation from witnesses, and in America they must be conscious of the salability of their coverage in moments pedestrian and compelling alike. Courts are viewed as highly legitimate, but differ from Congressional investigations in three significant ways. First, Courts must generally await documentation that a violation of law has *probably* occurred, while Congress may investigate freely. Second, Courts deal in violations of *law*, while the legislative branch may look into conduct which offends sensibilities but is not illegal. Third, in the adversarial system questioning is undertaken not by judges but by counsel.

The purpose of this work is twofold—first, to chronicle and describe a substantively important dimension of behavior by elected officials, one which has been neglected for generations. Although a body of formidable, thought-provoking work on investigations of the *executive* has emerged in the past 20 years, the prevalence of important non-executive investigations—both historical and recent—merits effort to fully understand the phenomenon. Second, investigations afford a unique and conceptually-compelling view *into* Congress. Investigations are fundamental to questions of how and when legislators gather information. The output generated by committee investigations is contingent on forces within the chamber itself, as the bipartisanship and objectivity of members is of considerable importance for the dissemination and acceptance of investigation results.

Investigations and the Study of Congress

As an output of the Legislative branch, investigations engage much of the academic literature on Congress that has developed in the past forty years. Few works in this literature, however, have made use of investigations, either empirically or theoretically, in the refinement of models of Congress or in the development of hypotheses. Examining the occurrence of investigations helps to further advance our understanding of members, parties, committees, and Congress as a whole. Four principal topics in political science merit special consideration.

Separation of Powers

A number of important works in the past 25 years have examined the relationship between divided government and investigations of the Executive branch. Considering that a sizeable proportion of investigations *are* focused on Executive branch actors, these studies have contributed much of what modern scholars know about the investigative enterprise. Conventional wisdom has held that investigations of the executive branch should be more likely during periods of divided government than when one party controls Congress and the Presidency. In spite of the conventional wisdom—and to little effect on its persistence—scholars have not come to a firm conclusion on the relationship between divided/unified control of government and investigative activity. In the period 1946-1990, Mayhew (1991 [2005]) found 15 "high-publicity" investigations in 18 years of unified control and 14 such investigations in 26 years of divided government, hardly evidence of partisan victimization of presidents. Latter-day extensions of Mayhew's design paint a slightly different picture. Kriner and Schwartz (2008), and Parker and Dull (2009), re-examine Mayhew's list and supplement the analysis with a

broader sample of investigations, finding that press coverage was more extensive for Mayhew's divided-government investigations than for the unified-government cases. Parker and Dull (2006) identify a number of motivations for legislators and parties to conduct investigations of the executive branch. They posit that investigations provide opportunities to build reputation, as well as parties to take stances against the president.

The literature's emphasis on high-profile investigations raises questions about other types of investigation, and about investigations that might not receive a large amount of attention. High-profile investigations speak to the general balance of power between the President and Congress, but not necessarily to the amount of effort expended to *develop* investigations that pose difficulty to the President. Additionally, we know little about the relationship between this type of investigative activity and investigations of other institutions. A fuller understanding of investigative activity would add to studies of divided government by indicating whether the occurrence of high-profile investigations remains relatively constant as a share of the investigative agenda, and whether that agenda increases or stays the same in response to conflict between the Executive and Legislative branches.

Oversight

A second, related area of interest concerns oversight of the Executive branch, a subject that may be seen as less politically-oriented, as members of congressional committees seek to exercise control and influence over bureaucrats. There exists a longstanding tradition of legislators and other experts paying homage to review as an accompanying and parallel duty of Congress (Wilson 1885, Mann and Ornstein 2005). However meritorious and desirable it may be, Congress has repeatedly failed to inculcate investigative activity within its traditional system of standing committees. What is more, Congress has periodically found itself and its reputation handcuffed to investigative projects to which the chamber was indifferent or quietly opposed. In its experience with investigations, Congress has fared marginally better than the diners in the vintage joke about a Catskills resort: when the portions *aren't* small, the meal is too often terrible. The (alleged) systematic failure of Congress to provide oversight and investigations poses important questions about how it functions, and the responsibility of the systems that provide organization in Congress—parties and committees—to foster information-seeking.

Clues to this problem can be seen in a comparison of the costs and benefits of legislating versus investigating. While legislating requires considerable effort from members of Congress, members can arrange their activity to realize certain gains and minimize the likelihood of negative consequences. The inputs to unsuccessful legislative proposals can be re-applied to future legislation, and they are often supplemented in the first place with outside assistance (Hall and Deardorff 2006). Bill sponsors' benefits from position-taking benefits are clear By contrast, Congressional investigations require considerable effort at the onset, often against agencies or organizations resistant or hostile to probing. Members and staff must undertake investigative behavior with little advance knowledge of what the results will be, in terms of media attention, revelations, or remedial legislation. As a result, these initiatives emerge from a fundamentally different calculus than more conventional legislative activity. Historically, investigations were handled through select committees whose members could be expected to faithfully pursue the target of their inquiry. Attempts to systematize oversight and investigations within the standing committee structure have done little to alter member willingness to conduct review; without using select committees to bypass unambitious chairs, the chamber puts increased gate-keeping power into committee leaders.

McCubbins and Schwartz (1984) develop a model of "fire alarm" oversight, under which legislators create agencies and policy in ways that encourage outside groups to monitor agencies and their decisions, freeing Congress from the burden of looking into properly-functioning parts of the bureaucracy. A fire alarm oversight system need not imply large volumes of deliberate examination of agencies, McCubbins and Schwartz argue, in order to be effective at checking up on the executive branch. McCubbins and Schwartz certainly did not invent the idea that legislators conduct oversight through, and as a response to, resolving the problems encountered by constituents and other friendly actors.

However, a leading empirical work on congressional oversight, Joel Aberbach's *Keeping a Watchful Eye*, makes an argument for oversight as coinciding with legislator incentives. He finds that it takes a number of diverse forms, and that members who perform oversight have a much more sophisticated understanding of what's going on in agencies. While Aberbach finds that many legislators do perform a good job of oversight, the relationship that he posits between some amount of committee "police patrols" and success provides an important counter-argument to the McCubbins and Schwartz model.

In modern times, the standing committee system provides an additional obstacle to effective examination of legislative problems—an argument anticipated by Wilmerding's (1943) discussion of the difficulties of establishing an auditing organization for the national government. Simply put, to entrust committees that *make* laws regulating interests with the task of *examining* alleged failures in the same policy areas means that they must also weigh the possibility that *they*, the committee, were partially or fully responsible for the wrongdoing or policy failure. While the committees that have the greatest expertise in a substantive area may be best equipped to draw out and process information from agencies or groups, the use of other venues for investigation is likely to result in a treatment that can be perceived as more credible by both the group under investigation and the political actors ultimately responsible for enacting remedial legislation.

Congressional Organization

The party cartel model promulgated by Cox and McCubbins (1993) emphasizes the majority party's usurpation of the organizing task from the floor. Cox and McCubbins (1993, p. 44) push back against the distributive model, noting that ten percent of members still aren't on their preferred committees by their 5th term. In their conception of Congress, party leadership forces committees to compete for the opportunity to enact policies, increasing the benefits accrued to the party. The conferral of universal investigative jurisdiction on the Government Operations committee in the 1970s may be thought of to encourage an analogous competition: committees which spare friendly agencies and interests may be simply delivering their pet groups over to the less sympathetic attention of the oversight committee.

Corollary to the idea of party agenda control is negative agenda power—that is, the majority party can successfully block the policy initiatives of the minority. But it might be more difficult to gatekeep with respect to investigations than it would be to block legislation. In addition to competition from other committees, committee majorities must sometimes contend with the work of the minority. Since 1971, the standing rules of the House have required that committee minorities be permitted one-third of the staff appointments.[3] Additionally, the

[3] Maltzman (1997, p. 78) has claims that broad allocation of staffing permits the chamber to monitor the work of committees.

allocation of staffing permits the minority to conduct a sort of investigative activity of the executive branch and outside actors, though it obviously lacks subpoena power. On the Government Reform committee, this was a leading tactic of ranking member Henry Waxman (2009, pp. 157-8), permitting Democrats to create and circulate "Waxman reports" on district-related issues such as prescription drugs. These publications do not carry the committee's *imprimatur* but can be influential for media coverage and at persuading other members of the advisability of further activity.

Party cartel theory distinguishes among committees based on the nature of externalities—majority members on policy-oriented committees with generalized externalities are more representative of the caucus than committees with targeted or mixed externalities. Cox and McCubbins reason that, as concerns targeted-externality posts, party leaders will permit members to self-select, falling back to the protection of the Rules Committee or the floor to block any proposals with implications for many members. But a problem may occur for the party if committee members' willingness to investigate *exceeds* the party's preferences. Schickler (2007), examining an era before devolution of the subpoena power and investigative funding, finds that investigations of the executive branch were led by members more conservative than the rest of their respective chambers. Schickler identifies the Democratic leadership's inability to gate-keep against unfriendly inquests as indicative of its weakness.

The implications for investigative hearings under the party cartel theory are uncertain. Hearings do not suffer from the same inter-committee bottleneck applicable to legislation. Because committee resources are relatively fixed, and equal across committees, legislators do not need to advance a partisan agenda to acquire the necessary funding and staff for investigations. A fully-operative negative agenda power would suggest that congressional majorities are able to block inquiries centering around friendly institutions. But the House has eliminated the institutional means (a resolution requiring consideration by Rules, plus floor approval) by which opponents could prevent investigations from taking place. Instead, parties may only exert *ex post* control, by changing committee jurisdictions, giving less deference to the committee's legislation, or violating seniority. However, party cartel theory fits well with the Committee Reform Amendments' impact of duplicating the investigative jurisdiction of all of the committees in the House.

In the informational construction of Congress articulated by Krehbiel (1991), the critical interaction is between the median member of the chamber and the members who make up committees. Members are rewarded for specialization (measured in seniority terms) with a share of distributive benefits. In Krehbiel's formulation, the floor is intolerant of committees comprised of preference outliers; outliers produce unreliable signals about the wisdom of policy choices and are therefore undesirable. One caveat to information theory as concerns non-legislative activity is that even if *committees* are representative of the parent chamber, subcommittees need not be. The multi-dimensional policy space characteristic of many committees thus creates the potential for committee members to pool around the subcommittees most relevant to district interests. For instance, the House Financial Services committee is suited to members with large numbers of financial workers as well as members with poor, urban constituencies interested in the committee's jurisdiction over public housing and other urban issues (Salamon 1975). However, a reasonably heterogeneous mix at the committee-level (which is regardless not found in most Congresses—see Adler and Lapinski 1997) still admits the possibility that urban representatives will prefer a subcommittee such as Housing and Community Development, while members with constituents in the financial sector can find

places on a panel such as Financial Institutions and Consumer Credit, or Capital Markets, Insurance, and Government Sponsored Enterprises.

Subcommittee organization under Democratic control of the House between the Subcommittee Bill of Rights of 1974 and the 1995 Republican takeover also does not adhere to Krehbiel's (1991, pp. 143-44) proposition that an information-centric chamber will not formally observe seniority protections. Under Democratic control, committee members were entitled to their most-preferred subcommittee seats based on committee seniority. In the appraisal of King and Groseclose (2001), even the selection of committee chairs in a leadership-picked slate, subject to ratification by the floor, fully supports neither an informational nor a party-based theory of congressional organization. Republicans violated the seniority norm in the 104th Congress, and the 107th, when term limits on committee chairs forced a re-shuffling of personnel and jurisdictions.

A third class of scholarship examines congressional committees as self-interested actors who compete over jurisdiction. This is the thrust of Baumgartner and Jones (1993), who found their Policy Agendas work in an attempt to document the process by which committees redefine issues, thereby achieving control over disputed subjects. King (1997) argues that committees undertake hearings to expand their jurisdiction. However, Adler (2002) finds little relationship between a committee's hearing initiatives and its likelihood of winning new policy areas. Sheingate (2006) examines congressional hearings on biotechnology issues, and finds that committees whose jurisdictions were more closely related to the issue were more likely to hold hearings. Sheingate's study found that committees with more "complex" jurisdiction—those holding hearings on a wider variety of subjects—were more likely to hold hearings related to the medical aspects of biotechnology, but that committees with narrower jurisdictions were more likely to hold "non-medical" hearings.

Demand theories of Congress posit that members with heterogeneous preferences satisfy their demands by "swapping influence across jurisdictions" (Shepsle and Weingast 1994, p. 156). Committee assignments are central to this model: members seek positions which will allow them to attain those benefits maximally advantageous to re-election, as well as which have gatekeeping power over legislation which might negatively affect their constituents. Shepsle (1978) finds that even if members aren't initially assigned to their first-choice committees, they tend to end up there rather quickly.

Representation and Policy-Making

Additionally, Ii is important to note that members of Congress ultimately possess great power through their ability to influence both policy and public opinion. [The example of Sam Ervin during the Watergate hearings is indicative of this phenomenon.] In an abstract sense, the motivation for a legislative body to investigate is to bring an individual or group under greater control than presently feasible. Sometimes, members of Congress may find that the country's problems are not easily solved via legislation—a particularly thorny issue of this sort was the proliferation of Communists in a number of American institutions in the 1930s-1950s. Here, members who could not seriously hope to legislate away beliefs, speech, or assembly embarked on a ham-fisted, decades-long program of exposing and humiliating former and existing party members. For all of their efforts to expose substantive differences between "un-American activities" and other organizations and speech enjoyed by citizens, these members had little chance of seriously enacting legislation that would forbid Communism.

Investigations may serve partisan goals, permitting enterprising legislators to achieve goals in areas where existing legislation would be unconstitutional, technically infeasible, or politically difficult. While the foundational literature on Congress has often employed to emphasize similarity between members in terms of goals, decision-making, and activity, a number of scholars have sought to relate outcomes to members' differing talents, levels of effort, and interests. In the assessment of Hall (1997), institutional structures and norms impose few constraints on legislator participation, while the multiplicity of demands on legislators ensures that they have little involvement on matters in which they have little interest. Hall's interviews with members and staff and analysis of several indicators of participation in markups paint a portrait of "selective participation and deliberative bias" in the legislative process. Wawro (2000) creates a "legislative entrepreneurship" variable from a number of discretionary legislative activities, and finds that the electoral and campaign finance returns to legislative entrepreneurship are generally insignificant, if not harmful; but that enterprising Democrats were more likely to achieve leadership positions within the party and committee systems over his period of study, the 94-103d Congresses. And Woon (2009), comparing U.S. Senators' bill sponsorships across nine different area domains, finds that committee assignments have a greater coefficient on bill sponsorship than covariates related to relevant characteristics of the member's district. For what Woon calls "broad issues"—crime, employment, and health care—transfer off a committee does not affect the volume of a senator's bill sponsorship, while this is the case in "narrow issues," such as agriculture, banking, and transportation, for which Woon argues that "the cost of acquiring technical information…leads members to rely more heavily on the expertise of committee staff."

Examination of the records of Congress allows us to say more about the characteristics of members who undertake investigations, and the circumstances under which this occurs. Because member investigative activity has frequently resulted in greater public prestige for members, this provides us with a substantively-significant set of cases to examine. Additionally, study of investigations gives us access to measures of effort and cooperation—hearing-days, reports, authorizations—that may be difficult to obtain regarding law-making activity over such a long period of time.

Plan

This work charts how party government and Congressional institutions affect the emergence and success of investigations. The control of administration and legislator initiatives to look at the outside world are linked through the operation of Congressional precedent. This has generally obeyed the prescription of conditional party government. While Congress has experimented with systems that seek to institutionalize oversight and investigations, it is—and always has been—the product of individual member interest and disposition. The question is whether leadership tolerates or encourages such individuals. The upper house's toleration of inquisitive Senators, and their broader portfolios, has translated into a chamber that has more faithfully met the description "Grand Inquest of the Nation" since the late 19th Century. Recent decades have seen committees in the House of Representatives succeed in producing news headlines under divided government, but more often than not these committees have failed to live up to their own publicity. The primacy of the standing committee system, along with partisans' unwillingness to look into friendly administrations, has led to a decline in House investigations since the early 1990s. While comity is not a pre-requisite for initiating investigations, it effectively becomes one for successfully carrying them out.

The *law-making* business of Congress involves problems, situations, or conditions whose existence and severity emerge over time, and to which legislative projects are developed and presented for approval to other legislators for enactment. While the resulting law may effectively remove an issue from the public agenda, it may not appease proponents' appetite for more action, nor is it likely to disabuse opponents of the error of what has been enacted. From this standpoint, much of what a political institution does involves *ongoing* conflicts and *continuing* efforts. By contrast, investigative activity often occurs in reaction to episodes or issues that emerge *quickly*; the information gathered is evaluated on ostensibly objective grounds; the legislative solution (if one exists) seeks to *resolve a problem* rather than *advance towards* a programmatic or ideological goal. While law-making is, by a "who gets what, when, and how" proposition, inherently political, the work of investigating does not so easily lend itself to this description. Historically, individual members have been unable to engage in fact-finding in the same way that they have been able to advance legislation. When members introduce legislation, even if they are not members of the committee to which their bill is assigned, they are free to lobby their colleagues personally and to mobilize friendly interest groups to promote the benefits from enactment. While the outcomes of a particular piece of legislation may be debatable, its mechanism—the instructions made by the bill to governmental and non-governmental actors—are known.

The modern story, ultimately, is about how chairs' interests, partisanship, and other factors translate into legislative activity with high transaction costs and uncertain returns. Under what circumstances do committees develop skill at—and reputations for—engaging in hard-hitting investigations of the executive branch, looking into present controversies and scandals, or training their sights on otherwise unsuspecting institutions and groups? That expertise gained, when do chairs hold it back from revealing facts about issues of important public concern? What determines whether investigations will achieve non-/bi-partisan ends, pursue aggressively partisan objectives, or take a moderate approach only to be frustrated by minority opposition?

What follows is a stylized perspective on the course of investigations across time. It is important to note that the progression of investigative subjects over time has moved from a strong focus on corruption and personal misconduct, to a system where the focus—at least in government—is on the proper and efficient implementation of policy.

- Before the Civil War, Congressional investigators dealt mainly in the operations of the executive departments, and in the behavior of individuals in and around the legislature. In an environment where professional standards in government were poorly developed, and with a highly partisan media, investigations commonly sought to substantiate or undermine rumors against persons on the Executive or Legislative branches, Over time, distress over the issue of slavery gave rise to a number of important investigations, examining both events in the country (as with John Brown's attack on Harper's Ferry) as well as the consequences of the slavery issue on legislators themselves (such as Preston Brooks' assault on Charles Sumner). In a very loose sense, the impulse here was to push beyond the boundaries of what legal power could achieve, to force proponents or opponents of slavery to confront an institution that could compel appearance and testimony—in short, obedience.
- In the late 19th and early 20th century, Congress struggled against problems in government administration, reflected in their quixotic attempts to combine review and audit of expenditures. Institutions were required to standardize and

supervise the behavior of governmental agencies, and to bring them into line with the increased demands of the Progressive Movement. The development of such institutions as the GAO was a long process. Government also struggled to keep pace with a quickly-changing economy, in which new goods and new forms of transportation and communication opened up opportunities for rent-seeking through governmental institutions.

- In the 20th century, the focus of legislative investigations has generally moved further away from graft, fiscal malfeasance and gross misconduct of officials into the realm of "policy impropriety." Two notable scandals in recent decades concern whether the Attorney General acted properly in ordering the raid on a cult's compound, or whether an army officer violated the law by facilitating the sale of weapons to Iran in order to secure the release of hostages. In neither of these cases was financial gain alleged to have been the motive for the improper activity. The ABSCAM Congressional scandal of 1980 (itself an FBI sting operation) netted one Senator and five Representatives; Credit Mobilier implicated over 30 members. Interior Secretary Albert Fall received more than $233,000 in bribes for his role in the Teapot Dome scandal, worth more than $3 million in 2011.
- The middle of the 20th century brought to prominence another category of investigations, targeted at interstate organizations poorly controlled by government: Communists, organized crime, and labor unions. The investigations of communists and labor unions continued for decades. In them, we see more discernable limits on the capacity of Congress: near or absolute secrecy on the part of group members, and Constitutional protections of the freedoms of speech and association.

Chapter 2
Inside and Out: Examining Government and Society, 1837-1944

On June 1, 1933, J.P. Morgan, Jr. appeared before the United States Senate Committee on Banking and Currency. "Jack" was the second member of his family to appear before a hostile Congressional investigation in just over 30 years; in the "Money Trust" probe of 1912-13, Jack's father, then aged 75, had jousted with members of a House subcommittee. In the hearing room, just before Morgan Junior's testimony was to begin, a tabloid reporter dropped 27-inch-tall circus dwarf Lya Graf into the lap of the 6-foot-2 Jack. The papers had the image they wanted: the meeting of the World's Smallest Woman and the World's Largest Man. Jack's calm handling of the incident and his testimony to the committee were mostly well-received. But, as Ron Chernow writes in his magisterial history of the Morgan empire, the pre-hearing stunt had a lasting effect on both participants. Jack was scandalized by his rough treatment at the hands of the committee and newspapermen, and grew increasingly pessimistic about the Roosevelt administration and America generally. For Graf, the day begot a much grimmer future: embarrassed by the increased attention, she returned to her native Germany, where she was classified by the Nazis as a "useless person" and sent to perish at Auschwitz.

In the lore of Congress, episodes like the meeting of Jack Morgan and Lya Graf loom large. From the trial of Preston Brooks to the Teapot Dome scandal and Joe McCarthy's mostly vain quests to uncover Communists, investigations have provided many significant moments in Congress, and a great many of the public's *most* salient images of the legislative branch. Films as diverse as *Manhattan*[4] and *The Godfather* testify to the fact that Congress's investigative function is a part of America's societal furniture, recognized as an institution of power and authority.

Despite the importance of Congressional investigations to American society and the institution of Congress, we have little understanding of the circumstances under which investigations of the executive branch arise, and even less about those investigations touching on subjects wholly outside the government. David Mayhew's *Divided We Govern* (1991 [2005]), with its provocative thesis that divided government mattered little to the volume of major legislation enacted or high-profile investigations into the executive branch, inaugurated a body of work into this Congressional function. Subsequent studies (Kriner and Schwartz 2008, Parker and Dull 2009) have cast doubt on the durability of Mayhew's finding for investigations of the executive branch, but these works continue to rely on the post-war era, and in Kriner and Schwartz's case, the Mayhewvian method of case selection. Study of the politics *surrounding* investigations has been intermittent (Polsby 1960, Gibson 1988, Peffley and Sigelman 1990, Gibson 2008). And we know even less about the occurrence of investigations into domains other than the Executive branch. These other investigations are important because they bring heightened public attention to the workings of Congress, and because Congress's constitutional power to compel testimony and documents has ramifications for individuals, businesses, and organizations throughout the entire country.

[4] Woody Allen's character, Isaac Davis: "You talk about…you wanna write a book, but, in the end, you'd rather buy the Porsche, you know, or you cheat a little bit on Emily, and you play around with the truth a little with me, and the next thing you know, you're in front of a Senate committee and you're naming names! You're informing on your friends!"

One source of scholars' neglect of investigations more broadly may be a data-gathering one. In recent times, Congressional practice has been to grant committees broad powers to compel testimony and the production of documents, and to spend money on investigative staff and expenses. This empowers committees in their information-gathering activities generally, and blurs the boundaries between testimony and documents being *willingly* produced rather than given under duress. This practice traces from 1946 in the Senate and from 1974 in the House of Representatives. David Mayhew, for instance, identified investigations from their media salience. In another paper, I use a number of indicators to contextualize investigative activity in an era when committees enjoy the ability to subpoena witnesses as an uncontroversial and easily-renewed power. Before 1946/1974, authorizing resolutions approved in the parent chamber provide a record of each formal investigation in each Congress in which it took place. In the present work, I develop and exploit a dataset of grants of investigative authority from this period. This exercise allows us to build a modern study of investigations using a strong, highly objective measure. It provides a background to answer questions about the balance between investigations of the executive branch and other probes, and about the history of Congress's use of the power.

I first review the relevant literature on Congress and Congressional investigations in order to develop hypotheses about the occurrence and thoroughness of various types of investigations. Second, I introduce and describe a dataset of investigations from this era I have gathered. In a third section, I report the results of quantitative analysis of this dataset. The final part discusses the findings, limitations to this approach, and directions for further examination.

Hypotheses

While there has been a paucity of research on the broadly-construed subject of Congressional investigations, we may draw a number of testable propositions from the existing literatures on Congressional organization and investigations of the executive branch.

Constant volume models

David Mayhew's *Divided We Govern* (1991 [2005]) was notable for its finding that the rates of significant legislation and major investigations of the Executive Branch were similar across divided and unified government in the period 1946-1990. This work, however, does not examine investigations into subjects *outside* the executive branch. For Mayhew's question, disposition of Congress with respect to the President, this is an appropriate limitation on the scope of investigative initiative under examination. As an approach to the activity of *Congress*, this is somewhat less compelling. Even the quantity of investigations of the executive is subject to the behavior of the executive itself—some administrations may exhibit more venality than others, which may affect the appropriate volume of investigations as well as who controls Congress. By taking greater initiative in administration, or by creating new agencies, a President may stimulate greater investigative fervor in Congress.

For the relationship between the executive and legislative branches explored in *Divided We Govern*, this focus on a particular type of investigations makes sense. But when considering Congress and its members, the range of action is three-fold: investigate the executive branch, investigate other topics in society, or fail to do either of these. Mayhew's finding is a helpful starting point to approach this broader range of Congressional activity. We might also believe that other types of investigations, such as into the private sector or the judiciary, will follow the same pattern. Alternatively, it is possible that the patterns observed by Mayhew arise more from stresses on Congress than the relationship of the Executive and Legislative Branches. That is, the

volume of investigations could be more stable across divided and unified government than *either* the public-sector or private-sector figures alone, if there is a constant amount of investigating capacity in the legislature and the chamber's agents are omnivorous in their choice of targets. Some suggestions of this are seen in the modern era, and in historical accounts such as that of Caro (2002), wherein a young Lyndon Johnson desperately sought his own select investigating committee, ultimately receiving authorization into a probe of military readiness. A final possibility is that Mayhew is correct about investigations of the executive, but that other investigations *do* follow a divided/unified pattern. The dynamics of such a pattern are unclear: while divided government might diminish the returns to legislation and therefore encourage legislators to instead look at other malefactors in society, it is also possible that *unified* government is more encouraging of investigations of outside institutions, as legislators seek to build justification for legislation.

Thus, we may develop three separate hypotheses out of Mayhew's finding: first, eager (or uneager) legislators who undertake investigations as they prove promising (or necessary), (1) without reference to the division of power across the government; (2) a partisan model positing an investigation-hungry legislator who prefers non-governmental investigations in times when government is unified, and governmental ones when the President is of the opposite party. The final hypothesis (3)—that *only* non-governmental investigations are sensitive to divided/unified government, would indicate that such probes are quite unlike investigations of the executive.

Conditional Party Government and Procedural Cartel Theories

According to Rohde (1991) and Aldrich and Rohde (1997), parties whose members have homogeneous preferences allocate greater procedural resources to leaders to facilitate action in service of the party's goals. Cox & McCubbins (2005) tell a related, but somewhat different story: when the majority party is more united, fewer members will act to block measures they disagree with. To distinguish the two theories, it would be best to have estimates of the ideological "axe" of the investigations. Heterogeneity of investigation targets or sponsors under heterogenous parties would be more consistent with a conditional party government story. One way of achieving this to have data on resolution sponsors. Schickler (2007) does this for the investigations approved by the Senate and House from 1941-1946, and finds that House investigations were led by members with higher second-dimension DW-NOMINATE scores.[5] I look simply at whether party homogeneity has the effect on the total number of investigations consistent with either a CPG or procedural cartel theory of Congress. Conditional party government would hold that if parties are homogenous, they will generate much investigative activity under divided government and little investigative activity when the President and chamber are of the same party. Procedural cartel models of Congress would hold, by contrast,

[5] I do not undertake a similar analysis, for two reasons. First, the breadth of investigation subjects and time periods make it inappropriate: during the specific period Schickler examines, investigations by conservative members of Congress can reasonably be assumed to have a conservative bent; during another era, a member's interest in a particular subject matter may be permitted according to "distributive" principles because on that subject he is not particularly extreme. Second, investigations desired by minority members are usually introduced by a member of the majority. Third, investigation proposals were commonly amended, making the author of the initial proposal an imperfect indicator of the finished resolution.

that the incidence of investigations under unified government should remain low irrespective of the ideological cohesion of the majority party.[6]

Data

As stated above, a major obstacle to the study of Congressional investigations is the difficulty of identifying "investigative" behavior. In recent decades, House and Senate committees have enjoyed the power to subpoena witnesses and documents without issuing a special request to the chamber. The uncontestable authority to compel testimony and papers give committees a strong position in their dealings with others, leading some targets to volunteer information. Just as for oversight, where a variety of activities compose the ongoing review of agencies (Aberbach 1990), investigations may have a number of courses and outcomes. For instance, a committee chair may initiate an investigation by merely instructing her staff to look into a particular subject. The committee staff's findings may or may not prompt the committee to hold hearings, and regardless of whether hearings occur, the committee faces the question of whether to issue some sort of written summary of findings. The committee majority has the option of issuing an official House or Senate *report*, or to take the somewhat less-formal step of issuing a committee *print*, which is nevertheless frequently depicted in media accounts as a "report."[7]

This translates into a measurement problem, specifically that measuring "end results" of investigations, such as reports, risks omitting a large volume of cases that attain the hearing stage, for instance, but do not terminate in a set of written conclusions. But counting as "investigations" the entire volume of non-referral hearings conducted by Congressional committees sweeps in a large amount of activity that can scarcely be grouped with Congressional probes.

Such a difficulty is not present in the era before 1974 in the House of Representatives, and before 1946 in the Senate. Committees were obliged to go to the floor to receive subpoena authorization, generally for a very specific subject before it.[8] By collecting and counting these authorizations, I have an objective measure of Congressional activity. This is able to account for investigations initiated but not having great effect, and it is not affected by changes in how a media source covers public affairs.

Another benefit of using an earlier era is that it allows us to exploit situations in which a political party controls a single chamber in Congress but not the other. In recent decades, the House and Senate have usually been controlled by the same party in any given session. Mayhew (1991 [2005]) covers the period 1946-2002, which is an era in which there are only 4 (including the post-Jeffords-switch Senate in the 107th Congress) Congresses where one chamber was opposed to the President and the other controlled by his political party. The earlier three occurred

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[6] The question of whether any increase is due to an increase in delegation to party leaders, or to greater fiduciary responsibility and less blocking by certain well-positioned members, is left to further inquiry.

[7] A critical difference between reports and prints is that any member of a committee is entitled to submit separate views relative to a report, which are then published as part of the report.

[8] Typical language (House, 48th Congress) instructed the Committee on Public Buildings "to send a subcommittee of three of its members to Brooklyn, New York, to inquire into all the facts, and be empowered to summon witnesses to testify as to matters herein state, and to send for persons and papers…"

in a set of consecutive Congresses from 1981-1986, and all four have involved a Senate aligned with the President against an opposite-party House. One advantage of using an earlier period is more frequent divided political control *of Congress*: twice in each of the 1840s, 1850s, 1870s, and 1880s; and once each in the 1890s and 1910s. In other words, fully one quarter of Congresses over an 80-year period from 1840-1920 were split. Adding another 7 Congresses with House-plus-Senate divided government, the parameter "opposition to the President" can be more effectively identified. (This also highlights a particular advantage of studying investigations as opposed to other Congressional activity, specifically that investigations do *not* require the cooperation of the other chamber to be successful. Thus, when looking at investigations we may compare the House to the Senate in any given Congress as well as looking at the chambers over time.)

Data Collection

I collected my investigation data through a combination of (1) text searches on the Congressional Record and Congressional Globe, and (2) review of House and Senate Journal indexes. The text-search method helps to safeguard against the Journals' slight variations in recording Congressional business, while using the Journals addresses compensates for any failures of the text search.

A second difficulty concerns classifying investigations into categories signifying whether the focus is on the executive branch or another institution. For some investigations, this is quite obvious: among modern investigation subjects, the Monica Lewinsky scandal, the Federal government's response to Hurricane Katrina, and the U.S. Attorneys firings constitute probes of the executive, while steroid use in baseball or the safety of Firestone tires or Toyota Priuses are extra-governmental. A harder case is suggested by something like Halliburton or Blackwater's treatment of female employees and/or foreign civilians. In one sense, these relate to private corporations; on the other, Congressional interest is motivated *specifically* by the fact that these corporations are doing business with the United States government. The boundary between government wrongdoing and contractor wrongdoing can be blurry: an investigation may set out to learn whether overpayment for materials was the fault of the government official signing the contract or the business representative selling the product; much turns on whether a bribe was offered, or demanded. Where the focus was clearly on government officials, I have coded it as such; in questionable cases, this has been classified under "contractor." A similar rubric is applied to distinguish between companies holding or seeking contracts and members of Congress: in this manner, an episode like the 1872-3 Credit Mobilier scandal (in which money was distributed throughout Congress to buy silence for a company being overpaid by another government contractor for laying railroad track) is distinguished from petty member misbehavior (e.g., selling recommendations to the military academies), or incontrovertibly member-centered controversies (such as a contested election, or one legislator assaulting another). This generates an easy five-fold categorization: executive branch officials and procedures; organizations having or seeking business with the executive branch; non-governmentally-connected actors and situations; organizations seeking to influence members of Congress and the legislative process; conduct and qualifications of members.

Separate codes concerned the judiciary (but not the Department of Justice, coded with the executive) and foreign governments. Finally, I created a distinct code for investigations of sudden and catastrophic events, on the grounds that members would have little prior indication

of the actors at fault. An example of this would be the sinking of the *Titanic*, which was launched in virtually total absence of information about who, if anyone, was at fault.

I gave a second code to a minority of investigations that explicitly undertook topics falling under different categories, or that defied a single categorization. An investigation into the administration of Native American lands in the 68th Congress, for instance, looked at the conduct of both the Bureau of Indian Affairs and state courts in Oklahoma. Investigations of air accidents in the 1930s and 1940s looked not only at the actions of air carriers, but also into the adequacy of regulation. And alleged corruption of members by agents of foreign governments would be both member behavior *and* a foreign government.[9] The dependent variable for a particular type of investigation, therefore, is expressed as the sum of investigations for which *either* of the codings satisfies that category (executive/contractor/extra-governmental/contractor+extra-governmental/etc.). About 12 percent of cases received two codes. Only a handful of cases suggested the possibility of a third code—using all three codes does not change the results presented.

Finally, where the investigation was into a non-connected actor or situation, I coded these according to relevance to two different "clusters"—in one group, business or prices of specific products; in another group, societal and civil issues such as lawlessness in the South, immigration, and macroeconomic topics without a focus on specific business. A full explanation of these codings is available in the Appendix.

The resultant data product comprises approximately 1000 single-chamber investigation authorizations in the 2nd through 78th Congresses. A burst of scholarly interest in the subject of investigations in the 1920s provides four sources to corroborate the entries in this list over the period to 1925.[10] These sources, however, all use finished reports (or prints) as indicating the existence of an investigation.[11] George B. Galloway (1927) claims 285 Congressional investigations between 1789 and 1925 terminating in a report to either chamber. Galloway's list appears to have been relied on heavily by Landis (1926), who credits Galloway and provides 101 examples of investigations. Not all of the investigations presented by Landis possessed subpoena power—this was the case in several cases, mostly in the first half of the 19th century, when an executive branch official requested an exculpatory investigation. A similar survey by Dimock (1929) obtains "approximately 330" investigations between the 1st and 69th Congresses. My investigation and report totals far exceed Galloway and Dimock's figures, and with few exceptions my list includes all of the investigations alluded to in their work.[12] I have documented 692 instances of committees being granted subpoena power between the 2nd and 68th Congress, and approximately 300 more when this timeline is extended to 1944. In (preliminary) work on

[9] Not all inquiries into foreign actors have some sort of governmental hook. An example of such an incident would be alleged mistreatment of U.S. citizens by the governments of Mexico or Nicaragua in the 1900s, or attempts to influence the American public via propaganda.

[10] Eberling (1928), George B. Galloway's 1927 article in the *APSR*, James E. Landis (relying heavily on Galloway) in the *Harvard Law Review*, 1926, and Dimock (1929)

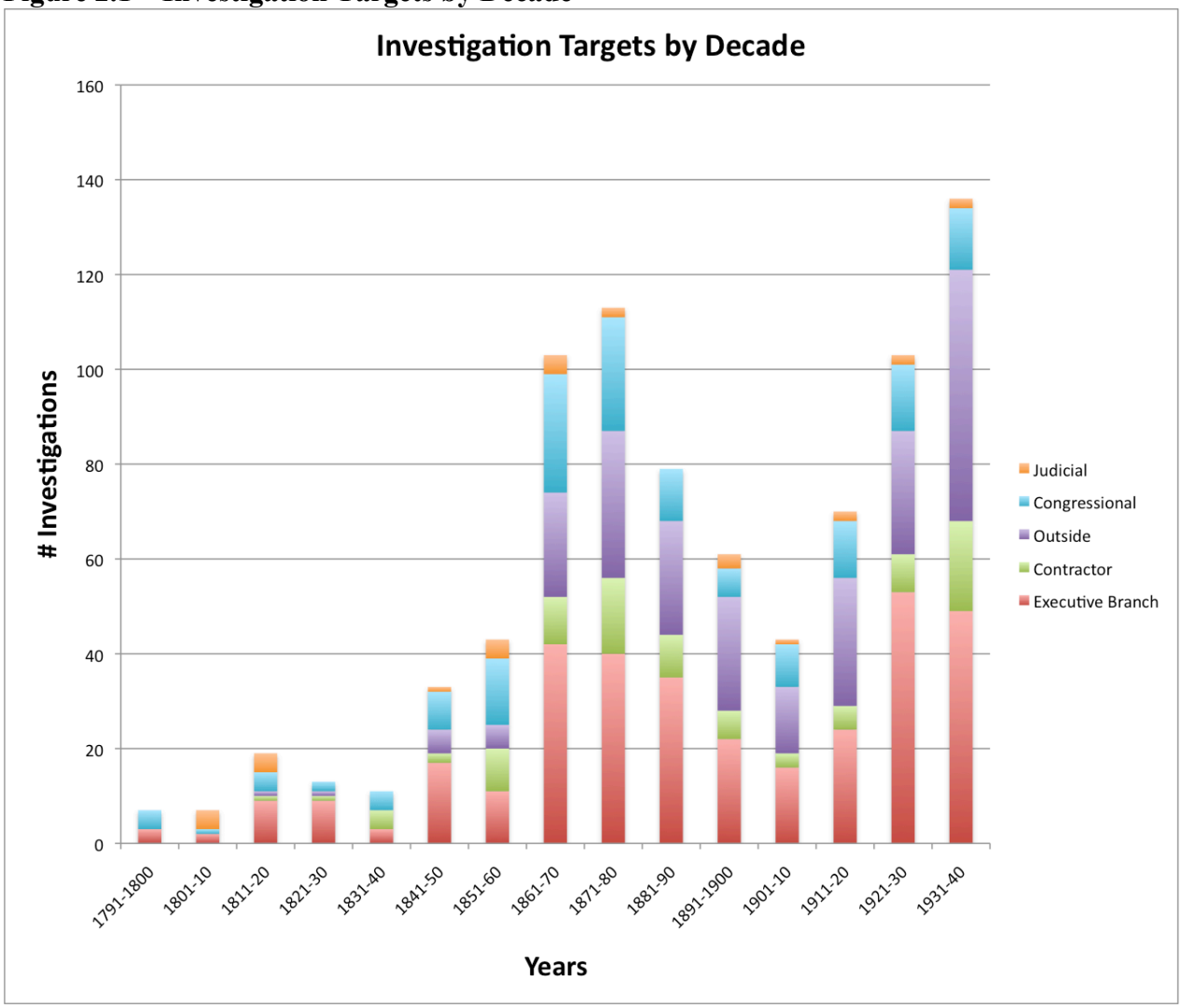
[11] Though Galloway and Dimock allude to a much greater number of investigations than are cited in their work, their complete records were unavailable.

[12] Dimock's references are considerably less reliable than those of the other authors—many concern inquiries that did not receive "persons and papers" subpoena authorization and produced only legislation, not a report of findings. Without either of these two elements, the boundary between legislating and investigating becomes exceedingly difficult to patrol.

reports, I find at least 348 investigations to have terminated in an official report between 1789 and 1923, the end of the 67th Congress. An additional 37 generated prints, and 148 failed to produce either a print or report. The failure of approximately thirty percent of authorized investigations to terminate in an official report or other committee document inspires a number of questions about how these "unfinished" or "forgotten" investigations differ from the universe of investigations that receive mention in the 1920s-era accounts.

Figure 2.1 gives an indication of the rise of Congressional investigations. The data show that in the early days of the Republic, investigations were relatively few, and were focused on the institutions of government itself. Not counting investigations invited by cabinet officials, 24 investigations into the executive were authorized between the St. Clair investigation in 1792 and the close of the 21st Congress in 1831, an average of more than 1 per Congress. Other forms of investigation, however, were at lower levels relative to later years. In spite of the legal importance of the 15th Congress's investigation into John Anderson's alleged bribery of a Representative, Congress authorized few subpoena-empowered probes into member behavior, member qualifications, or lobbying misconduct until the late 1830s.

Figure 2.1 – Investigation Targets by Decade



Such internally-focused investigations became a fixture of life in Congress in the 1850s through the 1870s, as the House and Senate sorted through member-on-member violence (4 investigations from 1856-1866), allegations of vote-selling and theft from the Library of Congress, and the disloyalty of southerners holding or claiming seats after the war's conclusion.

Another two classes of targets for Congress, businesses holding contracts with the United States, or "outside" groups/firms, were also subject to few inquiries until the 1870s. My data indicates only 23 investigations into outsiders before 1870, versus 28 such investigations in the 1870s alone. Nine of these concerned conditions and alleged misconduct in the South (including one investigation of African-American migration to the North), but members also scrutinized the Western Union telegraph company; railroads; the First National Bank of Washington, DC; and Chinese immigration. The 1880s saw Congress continue to look at railroads and voter suppression in the South, but adding new major axes, such as the Senate Indian Affairs committee's investigations into the conditions of Native Americans and their business dealings with outsiders (four investigation authorizations in the 1880s). Meanwhile, the railroad probes of the 1870s, which had focused mainly on the disposition of federal moneys in building the transcontinental railroad, took on a broader hue in the 1880s, examining the effect of railroad monopolies on farming and other industries, and related labor practices (specifically looking the Reading Railroad's treatment of coal miners). But Congress was also looking more widely at the conduct of business, examining monopolies generally, and meat production in the United States.

The return of Republicans to control of Congress in the 54th Congress (1895-1897) and the Presidency (from 1897), resulted in a decline in the investigative aggressiveness of the House with respect to outside subjects. In this era, the House Rules Committee performed considerable gatekeeping over investigative proposals. In the Senate, investigations proceeded largely unaffected by the ascendancy of Republicans. The Senate authorized three investigations into isthmian canal matters between the 55th and 59th Congresses, continuing a line of Congressional scrutiny that had produced probes in both Senate and House in the 52d Congress. Starting with the Transcontinental Railroad, and carrying through the building of the Panama Canal, the United States' efforts to create and develop new transportation resources encouraged a slew of subpoena authorizations.

Table 1 provides totals for the House of Representatives and Senate across the different classifications of investigation. While over the entire period the number of total and Executive Branch investigations authorized in the Senate and the House were roughly equal, the two chambers differed considerably in their attention to other targets. In the Senate, 246 investigations considered a contractor or outside group (either by themselves, or in conjunction with an executive branch target), while the House generated 40 percent fewer such inquiries. If we look at investigations of outsiders, we find that just over 200 Senate investigations (and only 106 House investigations) related to an outside actor; eliminating from this category investigations that might have combined governmental and outside targets, the figures are largely unchanged.

Table 2.1 – Investigations Authorized By Chamber, 1792-1944

	Senate	**House**
Subject of Inquiry		
Executive Branch	199	213
Executive *or* Contractor	232	248
Outside *or* Contractor	246	154

Outside	201	106
Outside, no Executive co-code	175	94
Judiciary	3	34
Congress-related (includes qualifications and elections, lobbyists, employees of House/Senate, Congressional printer)	65	98
Type of Committee		
Select	142	237
Standing	366	240
Total Investigations	**508**	**477**

Investigation can receive multiple subject codings, hence categories do not add up to total.

As shown in the table, the House produced the overwhelming majority of subpoena-empowered probes of the judicial branch, a result we might predict from the chamber's constitutional role in impeachment. While the House authorized a larger number of internally-focused investigations, this difference is not proportional to the considerably larger number of members in the House. The Senate's comparatively impressive per-legislator performance on this measure arises largely from a high incidence of probes into the qualifications and elections of members.

Measures and Results

Three measures suggest themselves to quantify investigative activity. The first—and the one that I use in this paper—is simply authorizations. It is very easy from the text of resolutions to determine which and how many committees have been given subpoena power. Specifically, I count all times a resolution grants a particular committee this power. A resolution may grant subpoena power to several committees; likewise, a single committee may receive multiple authorizations in the same Congress. The aggregate, chamber measure, is the *number of committees* granted subpoena power in a given Congress. Because this measure includes each separate select/special committee, the per-Congress figure is not significantly influenced by the number of standing committees existing in a given Congress. I begin my quantitative analysis from the 25th Congress and not the 1st—around the time that investigations began to become routine in both chambers, and coinciding with the coalescing of the anti-Jacksonians into the Whig Party.

Estimation

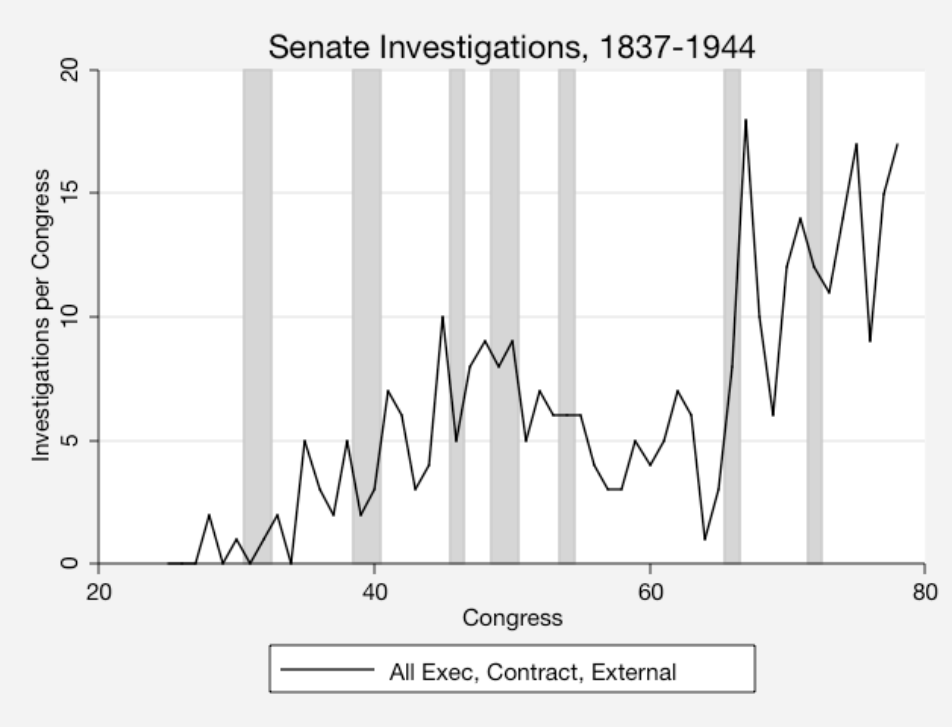
I model separate equations for the House and Senate for investigations of "governmental" and "non-governmental" subjects. This distinction poses potential implications for modeling. Tapping the underlying occurrence of malfeasance in society, rather than a relationship between the practices of particular presidential administrations and their relationship to opposing/favorable Congresses, non-governmental investigations are more likely to possess autoregressive properties. The occurrence of investigations also depends considerably on the tolerance of chamber leaders and members towards investigating committees and the perceived profitability of investigations to prospective investigative chairs, attitudes that are mostly stable from term to term but which may change relatively quickly. Against these considerations, it must

be recalled that most investigations take place in a single Congress, and that with respect to investigations of government, this is subject to blunt instruments such as unified/divided control.

Comparability is limited by the fact that the House and Senate adhered to somewhat different practices, particularly over the later portion of my dataset. For most of the models (particularly with respect to Senate investigations), a Durbin-Watson test supports the hypothesis of serial correlation for the raw number of authorizations; by adding a lag of the dependent variable, however, I am able to reject this hypothesis. I use a negative binomial regression model to model the occurrence of investigation authorizations.

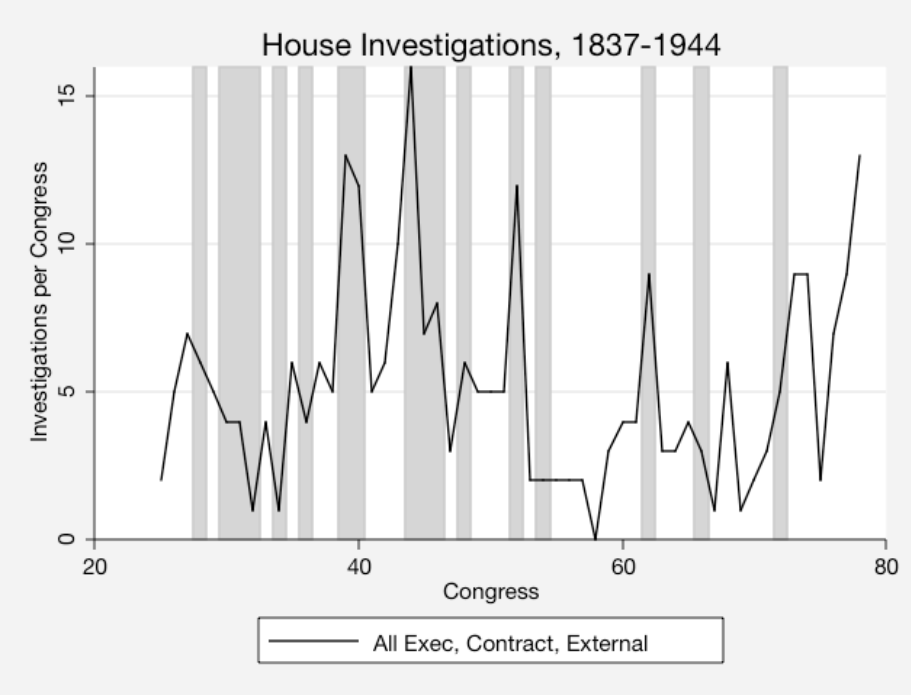
The dependent variable is the number of committees authorized in a given Congress to conduct an investigation bearing on a particular "type" of target. This avoids the need to make judgments about whether a committee's subsequent authorizations in the same Congress represent an extension of an investigation or a brand-new one. Historical analysis rather forcefully demonstrates divergent patterns between the Senate and House. As seen in Figures 2.2 and 2.3, the Senate was slow to authorize subpoena power to its committees, but from the 41st Congress began a relatively steady upswing in the number of investigations per term, generating authorizations for over 10 committees per Congress from the 70th (1929-1931) through the end of World War II[13]. This examination of Senate investigations does not readily suggest the importance of divided versus unified government.

Figure 2.2 – Senate Investiations, 1837-1944



[13] With one exception, the pre-war 76th (1939-1941)—9 investigations.

Figure 2.3 – House Investigations, 1837-1944.



By comparison, the House saw no sustained build-up in investigative frequency until the late 1930s; while the first two Congresses of FDR's administration saw nine investigations apiece, this investigation boom was throttled in Roosevelt's second term (see Schickler 2007 and Schickler and Pearson 2009 for how investigation authority was contested between liberal Democrats and Conservatives). Figure 2.3 also shows that the investigative fervor of the early Roosevelt days presents something of a historical anomaly, as it occurred under unified government. Non-governmental investigations play a large role in the case of the early FDR investigations; 10 of 18 House probes Roosevelt's first term had an identifiable extra-governmental target, while only 7 specified an executive branch target. Generally, Figure 2.3 indicates that activity was concentrated into those periods when the House and Presidency were controlled by different parties. In Figures 2.4 and 2.5 I provide a visualization of investigation type by Congress: the figure shows the total number of investigations touching on an executive branch, contractor, or external target; the number of investigations having an executive target; and having an executive or contractor target (what remains are those investigations having *only* a non-governmental target). Again, marked differences must be observed between the Senate and the House: in the House, executive and contractor investigations track the total very closely; the Senate, by contrast, saw extended periods where investigations took on a more non-governmental flavor.

Figure 2.4 – Moving Average, House Investigations 1837-1944.

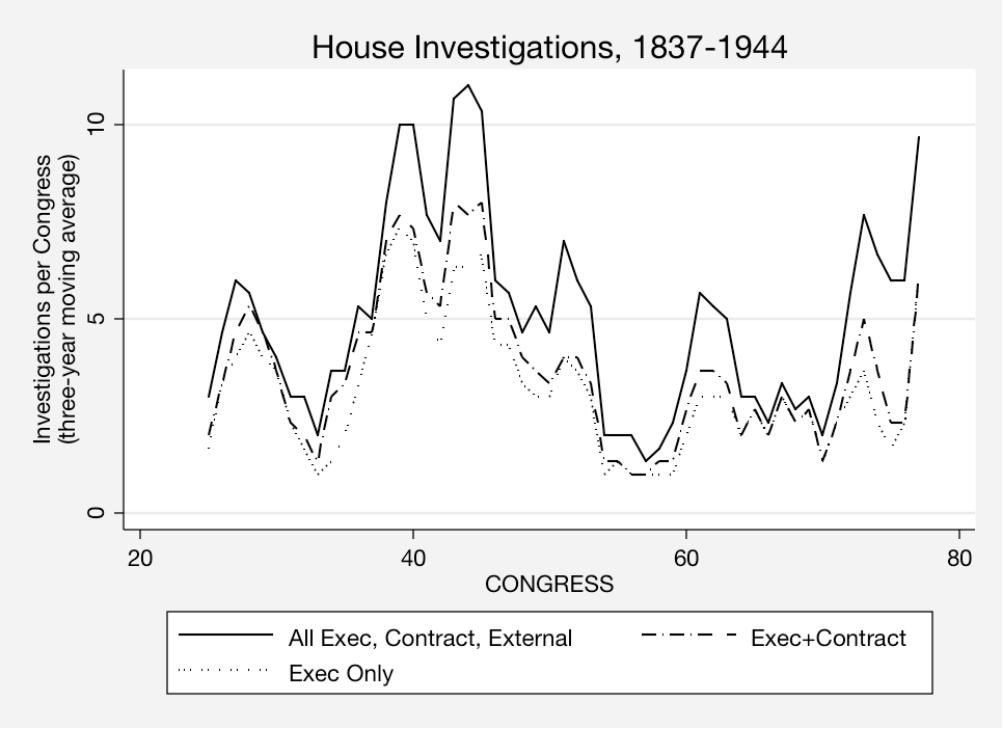
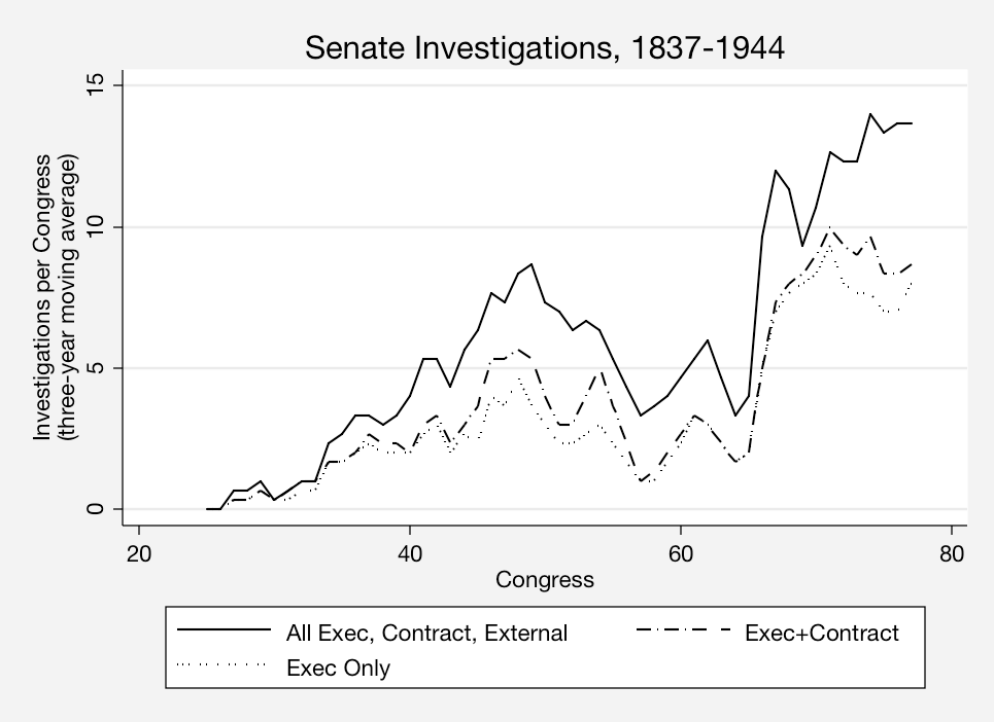


Figure 2.5 - Moving Average, Senate Investigations 1837-1944.



Controls

I also include information on whether there is a new President, on the premise that Presidents are unlikely to face many hostile investigations in the first two years of their term, while the intensity and frequency stands to increase with his duration in office. If members are extremely eager investigators constrained by the availability of Executive branch scandals, this should produce opposing coefficients for Executive-focused and outside-focused investigations, as the lack of fully-formed executive scandals should encourage investigators to seek out extra-governmental targets. Alternatively, new presidencies could sweep in investigations of the previous administration.

To account for whether lawmaking activity affected the amount of investigative activity, I used statistics from the 45th-79th Congresses on the number of the "Top 1000" laws passed during that Congress.[14] And I included a party variable, on the grounds that Democrats or Republicans might be more likely to undertake investigations. To determine divided government and majority party status, I harmonized Congressional and Presidential parties into the "Democratic" and "Republican" scheme used by Lebo et al. (2007).

Finally, I included a variable for whether the United States was at war, or whether GDP had declined in the previous year.

Both Kriner and Schwartz (2008) and Parker and Dull (2009)[15] include a variable for presidential approval, which is negatively related to the frequency of investigations and other investigation-related outcomes. Clearly, this data is unavailable prior to the 1940s, but the consequences of this for my analysis are muted because elites also operated under less information about the popular standing of the President than they do today.

Results

I present two sets of analysis: first, a longer time-frame (1837-1944), examining all variables mentioned above except the number of Top 1000 laws enacted in the Congress. Second, a shorter time-frame (1879-1944), incorporating both the law-making data and an interaction term between divided government and the first-dimension DW-NOMINATE difference between the party means.

Table 2.2 shows results for the House and Senate for Executive branch and outside investigations, with the middle two columns indicating two alternative treatment of contractor investigations—grouped either with investigations into the Executive, or with outside investigations. In the House, divided government was associated with increased investigative activity in all four equations, while the coefficient on the first-dimension DW-NOMINATE difference between party means was negative, indicating that as parties were more divergent, fewer investigations were authorized. The incidence of war had a positive effect on investigations of the executive branch, but not either of the dependent variables incorporating contractors. The other independent variables did not attain statistical significance in any of the equations, a result of particular note for the trend variable, which is positive and strongly significant in the Senate.

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[14] These data were generously provided by John Lapinski.

[15] Parker and Dull use polls averaged over the year, which has the potential for endogeneity if presidential approval is itself affected by major investigations, or if revelations of impropriety spur both declines in approval *and* Congressional probes. Kriner and Schwartz rely on the more sensible measurement of approval in the first month of the year.

Table 2.2 – Committees Authorized, 1837-1944

House of Representatives

	Executive Only		Executive + Contractor		Outside + Contractor		Outside Only	
Investigations$_{T-1}$	.077	***	.060	**	.050		.014	
	(.028)		(.028)		(.038)		(.068)	
Divided Government	.475	***	.420	**	.634	**	.693	*
	(0.171)		(.195)		(.315)		(.372)	
Distance btw. parties (DW-1)	-1.62	**	-1.57	**	-2.90	***	-2.94	**
	(.767)		(.759)		(1.03)		(1.30)	
Republican Majority	0.232		.01		-.125		-.197	
	(0.166)		(.02)		(.291)		(.360)	
Recession	-.207		-.197		-.070		.096	
	(0.167)		(.172)		(.250)		(.302)	
War	0.341	*	.231		-.230		-.170	
	(0.184)		.190		(.303)		(.321)	
President's first term	0.064		.111		.192		-.057	
	(.180)		(.194)		(.275)		(.312)	
Congress	.003		.0001		.006		.015	
	(.005)		(.005)		(.008)		(.009)	
Constant	1.56	***	2.02	***	2.47	***	1.85	
	(0.642)		(.641)		(.93)		(1.14)	
N	54		54		54		54	

*Values in parenthesis are robust standard errors. *p<.1, **<.05, ***<.01*

Senate

	Executive Only		Executive + Contractor		Outside + Contractor		Outside Only	
Investigations$_{T-1}$	.033		.064	*	.079	**	.072	*
	(.036)		(.035)		(.031)		(.040)	
Divided Government	-.085		-.005		.126		-.050	
	(0.213)		(.194)		(.169)		(.230)	
Distance btw. parties (DW-1)	-1.86	**	-1.04		-.500		.904	
	(.780)		(.940)		(.804)		(.902)	
Republican Majority	.643	**	.432		.270		.460	**
	(.257)		(.270)		(.228)		(.233)	
Recession	0.147		.137		.285	*	.259	
	(0.140)		(.143)		(.158)		(.184)	
War	-.013		.029		.072		.113	
	(.176)		(.009)		(.138)		(.151)	
President's first term	.208		.169		-.072		-.179	
	(.166)		(.162)		(.162)		(.197)	
Congress	.034	***	.029	***	.028	***	.033	***
	(.009)		(.009)		(.007)		(.009)	
Constant	-.775		-.698		-.839		-1.21	
	(.608)		(.622)		(.686)		(.869)	
N	54		54		54		54	

*Values in parenthesis are robust standard errors. *p<.1, **<.05, ***<.01*

In the Senate, the negative binomial equations explain less of the variation between Congresses. With respect to the Executive branch, the DW-NOMINATE between-party difference attains significance; however, this variable does not appear to have an effect on investigations of outside subjects or contractors. Republican control of Congress was associated with greater investigative fervor relative to the executive and of outside subjects, but not either of the dependent variables related to contractors. The recession coefficient is positive in all four equations, but only attains significance in the outside/contractor equation (and at a relatively modest p=.07).

In Table 2.3, I present results examining the effects of lawmaking activity and an interaction between divided government and party polarization. I also break the outside investigations category into social and economic components. In the House, the results for divided government mirror those found above over the longer time frame. However, within situations of divided government, polarization does not appear to have a very strong effect, with

this variable registering a statistically-significant effect only for social-oriented outside investigations. While more legislatively-productive Congresses generate more investigations of outside actors and contractors, this result does not carry over to either social or economic investigations.

Table 2.3 – Committees Authorized, 1879-1944.
House of Representatives

	Executive Only		Outside + Contractor		Outside Social		Outside Economic	
Investigations$_{T-1}$	-.013		-.029		-.090		-.187	
	(.052)		(.042)		(.182)		(.168)	
Divided Government	.621	***	.688	**	.663		1.24	**
	(.182)		(.289)		(.558)		(.545)	
Distance btw. parties (DW-1)	-2.92	***	-4.82	***	-6.96	**	-3.28	
	(1.01)		(1.35)		(2.88)		(2.03)	
Distance * Divided govt	.703		1.94		7.90	*	1.70	
	(1.29)		(2.42)		(4.62)		(4.10)	
War	.457		-.110		.483		-.672	
	(.330)		(.244)		(.347)		(.548)	
Top 1000 Laws	.014		.029	***	.024		.034	
	(.013)		(.011)		(.021)		(.022)	
Congress	-.027		-.028		-.022		.007	
	(.019)		(.022)		(.042)		(.029)	
Constant	2.30	**	1.96		.015		-1.11	
	(1.11)		(1.38)		(2.40)		(1.88)	
N	34		34		34		34	

*Values in parenthesis are robust standard errors. *p<.1, **<.05, ***<.01*

Senate

	Executive Only	Outside + Contractor	Outside Social	Outside Economic
Investigations$_{T-1}$	.087 **	.026	.260 *	-.040
	(.038)	(.036)	(.157)	(.080)
Divided Government	-.120	.273 **	.192	.240
	(.149)	(.133)	(.233)	(.292)
Distance btw. parties (DW-1)	-.715	-2.54	-2.69 *	-2.31
	(1.20)	(1.60)	(1.49)	(1.85)
Distance * Divided govt	-.734	.211	-.901	1.69
	(1.35)	(.922)	(1.77)	(2.34)
War	.074	.162	.010	.079
	(.206)	(.140)	(.281)	(.229)
Top 1000 Laws	-.002	.003	.004	-.011
	(.012)	(.010)	(.014)	(.014)
Congress	.012	-.014	-.050	.043
	(.031)	(.022)	(.026)	(.033)
Constant	.364	2.18	2.72	-2.04
	(1.80)	(1.43)	(1.70)	(2.11)
N	34	34	34	34

*Values in parenthesis are robust standard errors. *p<.1, **<.05, ***<.01*

The same models that explain House behavior again fail in the Senate to explain much of the variation in frequency of committee authorizations. While under the different set of controls and shorter time period, divided government appears to have an effect for outside/contractor investigations, this result does not carry over to Executive branch investigations, or to either of the outside components. As in the House of Representatives, the interaction of party polarization and divided government does not appear to have an effect on the incidence of any type of investigation.

Discussion

The weakness of shifts in institutional control and the positive coefficients on economic contraction suggest that the Senate's use of the investigative power responded, more so than the House's, to bipartisan and neutral factors. By contrast, House investigations appear to have been authorized according to their partisan usefulness. These results are broadly consonant with the observations of Rogers (1926), who noted that investigations had become much rarer in the

House relative to the Senate, except when the House and the Presidency were controlled by different political parties.

The results also suggest that while political parties in the House matter for the quantity of investigations initiated, greater party polarization does not translate into more aggressiveness during divided government. This runs counter to some intuitions about ideological extremity in Congress, which would suggest that the more partisan a President's opposition, the greater their appetite for inquests that might ensnare the President. At least in this era, having divided government does not mediate the relationship between polarization and investigation authorizations, which is negative when other controls are introduced. However, this is not an entirely unexpected result: given the right of minority committee members to attach additional and dissenting views to any report issued by investigators, authorization supporters must be wary of overreaching. Over the time period studied, more temperate relations between the parties provide greater opportunity that minority members on a standing committee (or assigned to it, for a select committee) will be able to come to an accord with the majority's findings.

Qualitative work looking at the House of Representatives suggests that, if anything, polarization may have had the effect of constricting *unified* government investigations when the parties were polarized. By the late 19th century, committee investigating authorizations were tightly controlled by the Rules Committee, the Speaker, and the Committee on Accounts, except when facing an opposite-party President (or for a brief time in the 61st Congress). That some prospective investigators may have been looking to examine non-governmental targets, as opposed to a same-party administration, did not matter to those in control of authorizations—both found resistance.

As concerns the Senate and House on investigations, the weaker leadership in the Senate is often suspected to be at work. The lower frequency of House investigations in non-executive matters suggests that the pro-administration orientation of House leaders had an effect in other areas, where legislators might have generated publicity and other positive benefits from investigating other organizations, but where party imperatives necessitated systematically putting the reins on any and all prospective investigators. This is an especially pronounced result when we consider that until the Civil War the House was recognized as the predominant engine of investigative activity. In related work, I suggest that divided government had less of an effect on the Senate via the operation of two separate mechanisms: first, the smaller size of the Senate and the possibility for unlimited debate made it possible for minority members to put investigations onto the agenda. The second mechanism is that when political circumstances appeared to necessitate some sort of investigation, party leaders preferred that an investigation occur in the Senate. If a House committee dragged its feet in an investigation or otherwise did a poor job, Senate leaders would have a difficult time heading off calls for a duplicate inquiry. But if the *Senate* had already begun an investigation into an explosive subject, any member initiatives in the House could be stifled more easily.

Considering the modern era, my results also suggest that recent criticisms of the House's inability to exercise oversight (Mann and Ornstein 2006) underemphasize the institutional barriers to activity in that chamber. While stronger institutional structures in the House may be thought mostly responsible for the divided/unified pattern, the Senate's predilection for recess investigations and—particularly towards the latter part of this era—investigations carried over from one Congress to the next suggests that legislators' time horizons may play some role in the profitability of investigatory activity. Whether due to member orientations or institutional limits, a much larger share of the House's authorized probes focus around the politically-profitable

Executive branch. The subject matter and patterns of investigation occurrence in the Senate differ substantially from those of the House of Representatives. To the degree that recent decades have seen a number of House members (most notably John Dingell and Henry Waxman) develop reputations as prolific investigators into a variety of subjects, this represents something of a deviation from the historical experience of that body. The point of departure is less the Republican-controlled House's failure to perform investigations of the Iraq War—we can see that there were few inquiries into World War I—than the factors that lead members to develop investigative expertise to deploy in a wide variety of probes having little bearing on the most pressing political matters.

By putting our modern experience with Congressional investigations into historical context, we see important differences between the two chambers that bear on questions of institutional design, legislative organization, and member goals. Despite being considerably less able to explain differences in Senate behavior, these results suggest promising avenues for both quantitative and qualitative research into this form of Congressional behavior.

Appendix A – Gathering Investigation Authorization Data

The indexes of the House and Senate Journals, which indicate resolutions adding authority to particular select and standing committees, as well as whether the resolutions were approved. This assumes accurate reporting by House and Senate clerks—imperfect indexing could produce a bias because more active investigations would be more likely to show up in the index.[16] Investigations by select committees offer the longest record trail, since a new committee appears in the index listing, regardless of whether it submits a report or is merely appointed. Nearly all session indexes contain at least one mention of an effort to have a standing committee conduct an investigation—not all such proposals are adopted by the chamber, but the inclusion of investigation *proposals* suggests assiduous work by the chamber's clerical staff.[17] Additionally, the index indicates in painstaking detail other committee requests for resources, such as stenographic assistance, for additional clerks; and to meet during sessions of the House/Senate.

Separate tables of House and Senate resolutions in the index of the Congressional Record begin with the 62d Congress (1911). These can be easily searched for variants of the words "investigation," "persons," or "papers" When resolutions introduced in one session of a Congress are approved in a subsequent session of the same Congress, the resolution title is repeated, meaning that a lack of immediate Congressional action does not result in the loss of a hit. During the 62d Congress, the Senate also became much more liberal about granting subpoena power to its committees: standardized resolution language granted wide power to hold hearings during sessions and recesses, and subpoena powers, to virtually any committee wishing to introduce a resolution. But though they were free to summon witnesses and documents, committees still required separate resolutions to provide funding for any major investigations. Thus, a reasonable approach was to catalog these "subsidiary" Senate investigations, and to simply chart whether reports were issued as a product of these inquests.[18] "Subsidiary" investigations reports are fairly easy to identify by their resolution number, but investigations conducted under the committee's customary authorizations were less likely to bear a resolution number.

To pick up investigations held under customary authorizations in the Senate, I searched Lexis Congressional for "investigation," with that term able to appear in the description of the report, or the report title itself. Generally, however, reports did *not* appear without the investigation receiving some form of additional authorization (i.e., to spend money). For a

[16] Though counting House/Senate Journal index mentions would seem to be the most reliable solution, there are slight variations in reporting method, that in turn require different amounts of sifting through the Journal themselves (to verify whether a resolution was indeed *approved*, or whether an approved resolution indeed included subpoena power).

[17] Of course, no easy method of counting investigations over such an extended period provides complete protection against the existence of authorizations that were approved by a chamber, but were not consequential enough for notice by chroniclers. And while it appears that the records of even the earliest Congresses include the full text of all passed resolutions, permitting it to be determined whether subpoena power existed, there may exist a small number of authorizations that do not appear in text.

[18] Another (excellent) method would have been to gather all funding authorizations. This is conceivable, but nearly as time-consuming as the search for all subpoena authorizations, because of the existence of resolutions increasing the amount of money available to a particular investigation.

selection of larger committees, I checked *all* of the reports produced in a given Congress, and this produced few investigation candidates. It is significant that, in one chamber, committees had easy access to subpoena authority, even if not all committees made a habit of using it. By having some access to investigations, and with a number of select investigating committees in operation, Senate committees had a reasonable expectation of being able to fulfill any desired investigations. These "blanket" authorizations, repeated with each Congress, reveal investigative possibility, and such committees were undoubtedly strengthened in their hearings, but many committees made little use of this power to produce reports, or even to conduct hearings that could be described as "probes." Instead, their activity reveals only bill referral hearings and reports on legislation.

Appendix B – Coding "Outside" Investigations

I assigned outward investigations into ten categories, encompassing a number of persistent problems in the era 1840-1946. I was able to group the investigations into two major clusters, social and business.

The least economic have to do with *Internal Unrest* and *Social conditions*. The Internal Unrest category describes instances in which Congress examined breakdowns in social order, including John Brown's raid on Harper's Ferry, violence and intimidation in the former Confederacy, and alleged infiltration by anarchists or Communists. Social conditions investigations examine issues of concern whose relation to the economy is secondary at best, three major subjects being immigration and internal migration, employment, and the conditions and treatment of Native Americans; as well as a set of authorizations into the "political, economic, and social conditions" in a U.S. territory or other region of interest. The social cluster includes a third category whose subject matter is a bit more slippery—*Criminal or Illegal Behavior*. These investigations concern instances of fraud, racketeering, personal violence in the District of Columbia, and the like: on one level they may differ from internal unrest in their extent and gravity; a racket or fraud may similarly become an economic issue by its extent or connection to an ostensibly respectable business.

From these, I distinguish a second cluster of "business" investigations, incorporating four main categories. Here, the furthest from the social cluster are those investigations concerned with *Financial Institutions and Stock Exchanges*, and investigations into whether particular businesses are *Monopolies* or the effect of said monopolies on markets. Two other categories are closely related: *Corporate Regulatory Issues*, and *Supply & Demand* investigations. At times, Congress casts a wide net with respect to corporate regulations, including behavior that may facilitate or preserve monopoly power: an example would be railroads' rebate practices, or an investigation into the conditions of telegraph operators which specifically inquired about the tendency of the industry towards monopoly. Questions about supply, demand, and prices of products may in some respects verge on social conditions, in that they are of interest to consumers; but the relationship is closer to business regulations, monopolies, and the operation of exchanges and markets. Many of these investigations were a stalking horse for criticism of the tariff, with legislators attempting to establish or disprove the effect of the tariff on prices.

Two categories (excluding seven investigations into claims) did not fall easily into either the social or business clusters. Investigations related to *Unions* may focus on the concerns of workers, or they may take a more critical view of business or the union's organizational structure. Second, Congress during this time undertook a considerable volume of investigations related to *Economic Conditions and Infrastructure*, such as fact-finding about the optimal route

for an isthmian canal and the economic benefits of various internal improvements; the management of fisheries; labor shortages in particular areas of the country or occupations; and, in the early years of commercial aviation, air accidents. These subjects do not easily fit with business inquiries, as the *nature* of information being sought is different: when investigating the practicability of a canal, Congress seeks scientific and economic knowledge that may be held privately, but it is not examining the records of corporate *transactions*, only the data corporations may themselves have gathered. While committees' interactions with businesses in this realm may have deeply damaging effects on landholders or businesses, the investigation is not undertaken with a view towards malfeasance, or with any desire to understand a particular business, only to inform a proposed project.

As can be surmised, even these boundaries admit some degree of interpretation, and suppose a perfect understanding of the investigation's background, intentions, and possible outcomes when many pertinent facts are not easily obtainable, or lost to history entirely. A relatively benign-looking 1911 investigation into the potential for self-government in Alaska takes on a different hue when we consider the enormous land holdings of J.P. Morgan and the Guggenheims in the territory at that time; similarly, investigations into the problems on Indian reservations targeted sometimes small-time hucksters, sometimes large corporations seeking to strip the land of natural resources. Committee members, too, disputed the causes of the problems being investigated: the House investigation into the Pinkerton assault at Homestead, Pennsylvania, became partially sidetracked over whether the episode reflected poorly on the steel industry's ability to lobby for protective tariffs.

Chapter 3
Towards an Explanation of House-Senate Differences

The quantitative study of Congressional investigations advanced in the last chapter helps to establish a rudimentary understanding of when particular types of investigations occur. However, this only hints at the answers to a number of questions related to the initiation, conduct, and outcome of these investigations, and as to the specific dynamics, differences and distinctions *between* House and Senate. Even within one chamber, there are still important questions to consider. In the Senate, which engaged in a similar volume of investigations during periods of unified and divided party control of government alike, we need to go beyond the numbers and ask about the purpose of these investigations and whether that purpose – and targets of these investigations – varied depending on which party held control of the Executive branch, and which the House and Senate. Who called for these investigations? Who opposed them? What alternatives were considered as a means of achieving the ends ultimately pursued by these investigations?

This sort of analysis is undoubtedly a difficult task to undertake in a large-*N* study, as any individual investigation may arrive at a condemnatory or exculpatory result solely on the basis of information revealed over its course. A committee may set out believing it will restore or undermine the reputation of an individual group, only to have information emerge which makes that outcome impossible. Bound by the norms of impartiality and the limited Constitutional protection for compelling witness testimony—that there must be a legislative purpose to the investigation—Members of Congress have a strong incentive to mask any bias motivating an inquiry. For all these reasons and more, in-depth, qualitative examinations of salient investigations are needed to help uncover the political antecedents, expected benefits, and follow-through of this activity.

In this chapter, I trace the politics of authorizing Congressional investigations as reported in media accounts and a wide spectrum of historical studies. There are at least four variables of interest: whether an issue of national import is investigated by the Senate, the House, or a joint committee; the composition of the committee and its general attitude relative to the organization or subject under examination; and the progress of the inquiry.

To answer these questions, I identify four periods between the Civil War and World War II, with a particular focus on Senate investigations. While the House was the leading investigator for most of the 19th century, the post-bellum Senate saw increased subpoena authorizations to committees. As Senate investigations grew in frequency, the pattern followed differed considerably from that of the House of Representatives. First, the frequency of investigation authorizations in the Senate did not differ between situations of divided and unified party control of government – which, by contrast, was an important determinant in the House. And second, a far greater proportion of Senate probes were undertaken within the standing committee system, as opposed to more frequent use of select/special committees in the House. This relationship of House investigations to divided/unified government was apparent to scholars even in the 1920s, but much less is known about how the Senate rose to prominence in investigations.

Since the upper house's assertion as a major investigative venue, two major exceptions to the Senate-House, divided/unified pattern have occurred--both during periods of unified government: first, in the early 1900s, Republicans in the Senate conducted few investigations, impeded by the actions of their leadership, a membership lacking moral authority because of its

cozy ties to business and dubious election, and a vigorous executive who seized regulatory and reformist initiative from the legislative branch. In the late 1930s, conservatives' control of the House Rules Committee subjected Franklin Roosevelt's administration to an unusual number of hostile investigations from that chamber. Here, the Senate's role was to reduce the intensity of House activity, diluting what would likely have been aggressive House inquiries by working to form joint investigating committees.

Aside from these interruptions, I find that the Senate's practice of authorizing committees to subpoena testimony and documents in unified government operates according to two important logics. First, for subjects where action was *not* obligatory, but strongly desired by a minority, this minority stood a better chance in the Senate. Second, when political conditions and public opinion seemed to *necessitate* inquiry into a subject, the Senate's smaller size and greater comity meant that a Senate investigation was preferable to a House investigation. In this way, the Senate could serve as a safe venue for the majority party to handle politically sensitive topics. The existence of a House investigation could not be so easily used to curtail a Senator's demands for a duplicate investigation in the upper chamber as a Senate investigation could justify inactivity by the House. The larger membership of the House also makes a greater number of investigations possible: therefore, permitting the marginal investigation in the House is more likely to encourage activity by members who have ideologies at odds with the mainstream of their political parties.

It is difficult to assess the degree to which legislators embarking on investigations understood the structural barriers to successful legislation. But their efforts provide a window into legislative behavior that goes beyond a mere focus on votes, laws, or administrative decisions.

Prior Research on House and Senate

In a burst of scholarly interest into Congressional investigations over 80 years ago, scholars noted that the Senate had evolved over its history to become a greater investigative force (Eberling 1928, p. 272, Rogers 1926, p. 205). Telford Taylor (1955, p. 51) identifies the period after 1880 as one in which the Senate "took the lead," at least in terms of investigations into the executive branch. Ernest Eberling, whose principal focus was on the development of Congress's *legal* powers in investigations, wrote of their occurrence that

> Whereas, the House was formerly the 'grand inquest' of the Nation and conducted most of the more important investigations, the tables have been turned and now the Senate is the grand inquisitor. The stricture now placed upon the procedure in the House has served to curb its investigating activities until it has become impotent, while on the other hand the Senate, having better publicity methods and not being restricted by closure, has become the watchdog of the Nation and can and will investigate any matter of potential importance. (278)

Rogers (1926) chalked this up to stronger party control in the House

> ….party control in the House of Representatives is now so strong as to shut that body off from embarrassing inquiries into executive performances. Only when the majority of the House and the President belong to different political parties do the latter's agents suffer any scrutiny… But when a President has a Congress of his own political faith, inquisitions are not so frequent; their institution by the House of Representatives is extremely rare, and Senate majorities are not anxious to act. The House, as I have pointed

> out, is almost completely in bondage to a few leaders. A resolution authorizing an investigation, in order to escape death, must pass several lines of defense which the masters of the House have made impregnable…This body, in short, by reason of its rules of procedure, must fail completely as a critic or watcher of the executive. [pp. 202-203]
>
> The shadow of the always imminent congressional election makes the majority party of the House reluctant to probe for possibly embarrassing disclosures, and the interests of the popular chamber are not in administrative efficiency but in sops for parochial interests…The result is that so far as the majority of the House is concerned, an executive of the same party is an unsupervised king. [p. 204]

While the ability of the majority party leadership in the House to block investigations can easily be understood, it is less well known why the Senate developed as an investigative force during this time period, and how it came to investigate friendly and opposition Presidents alike. Scholars and other observers all agree that the House and Senate operate in very different ways, but disagree on the specifics of these differences. For example, the fact of the Senate's smaller size is commonly used to portray Senators as "generalists," as compared with the "specialists" in the House. Attempts to measure this phenomenon have led to mixed findings. Fenno (1966) and Ferejohn (1975) find that the Senate does better than the House in getting its items adopted in conference committees, while Baker's (1989 [2001]) interviews show that the Senators themselves feel outmatched on policy by their counterparts in the House. In all, conclusions about the House and Senate generate conflicting expectations about the overall volume of investigations: while Senators are perceived to be harried generalists, their ability to initiate discussions on a national scale (see Polsby 1971) provides them with greater returns to investigative initiative.

Returning to a more historical examination, we may see that the Senate was widely regarded as the less influential branch, essentially "reactive" to what was happening in the House. Swift (1996) describes the how the Senate changed its modes of operation between 1809 and 1829, imitating the House's legislative productivity, party organization and system of standing committees; while exerting greater autonomy from both the executive whose appointments it confirmed, as well as from the state legislatures that selected its membership.

Rothman's (1966) study of the post-Civil War Senate highlights the development of party organizations in that chamber, a change he attributes in part to the rise of a "new breed" (p. 6) of Senator who had achieved distinction in his prior career and was therefore more appreciative of professional structures than his predecessors. In Rothman's estimation, the greater role of parties (especially from the late 1880s forwards) had the effect of mainstreaming member positions: "politicians…entered the caucus ready to compromise for the welfare of the organization; no matter if sugar rates and coal duties were not exactly to their liking." (p. 219) In the final assessment, this empowering of parties had mixed results for the Senate; while the chamber grew in prestige and political power relative to the House (p. 248), it struggled to keep up with the needs of a country whose economic and social complexity was increasing rapidly. "Hoping to avoid controversy," he writes, "Democrats and Republicans hesitated to make the country sensitive to the problems that accompanied the growth of modern America. They did not stimulate inquiry into the fate of the farmer or spark debate on the place of labor." (p. 263)

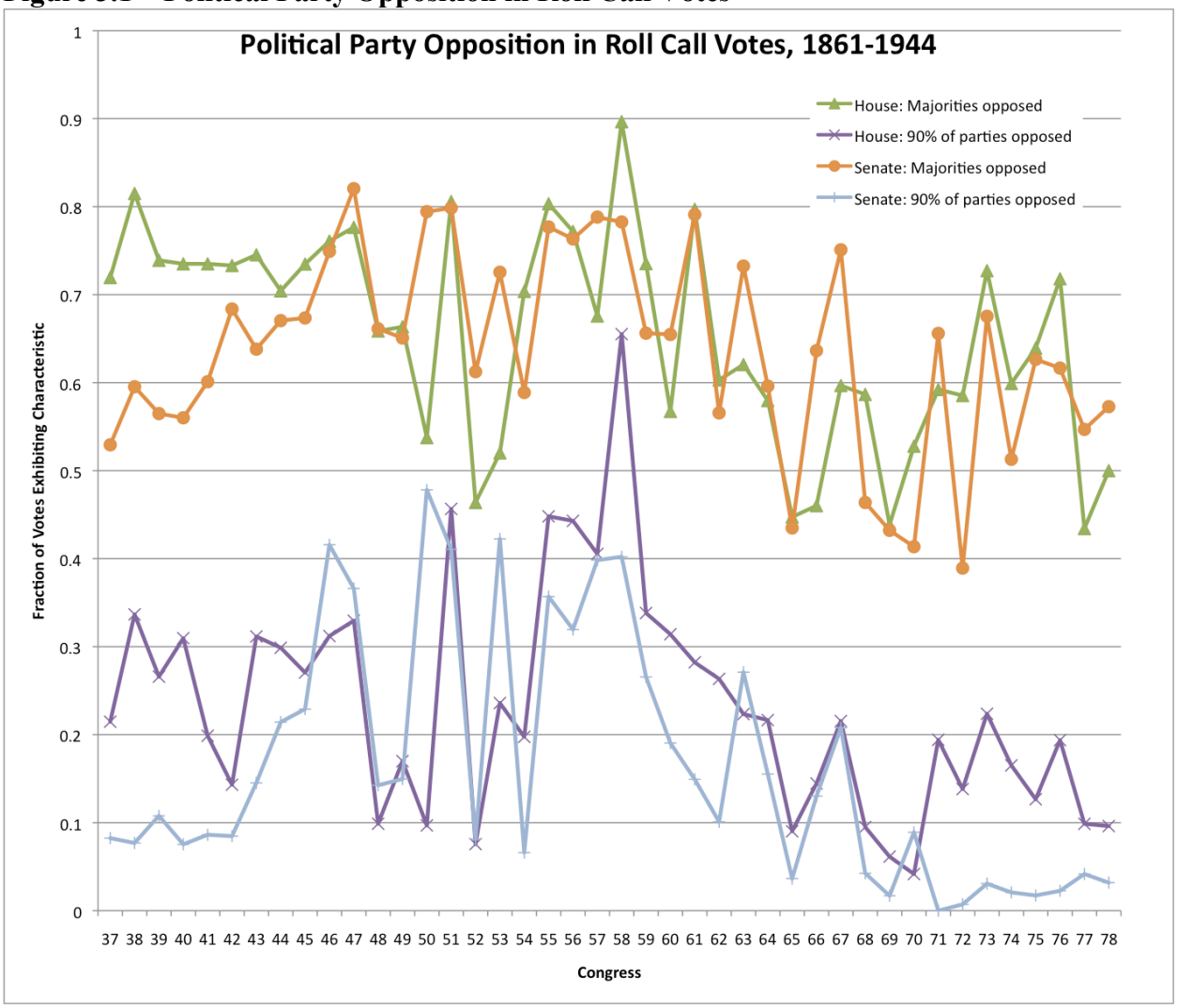
More recent accounts have cast doubt on the course of centralized power in the Senate. Smith and Gamm (2001) find, by reviewing coverage of Senate affairs in the *Washington Post*,

that even in the 1899-1900 the agenda was being set by the Republican Steering Committee (and not a single leader), and that there was no record of any member having regular meetings with the President or speaking to the press. Rhode Island Senator Nelson Aldrich, elsewhere portrayed as the mastermind of the Senate Republicans, is in Smith and Gamm's assessment limited principally to matters of financial legislation. This validates the observations of Barry (1924) and Stephenson's (1930) rather hagiographic Aldrich biography, both of which depict a legislator focused not on Congressional organization, but principally on banking and tariff policy, as well as construction of his own investment portfolio. And Schickler (2001, pp. 59-63) similarly takes exception to "exaggerated assessments" of concentrated power in the Senate during this time, pointing to the decentralization of appropriations for several departments from the Appropriations Committee to the relevant committee. Brown (1922, p. 255), while acknowledging that Aldrich lacked formal authority in the caucus, prevailing only "through the power of brains," notes the Senator's "extraordinary natural talent for leadership at a time when the party was strongly united and obedient to the dominant economic influence in the country." (p. 256)

Empirical study of voting in the late 19th and early 20th centuries disappoints any simple characterization of the Senate. Measures of party unity were subject to fairly wide variation, depending both on the measure used and whether government was divided or unified. For instance, in the 51st Congress (1889-91, unified Republican government), 41 percent of Senate votes divided 90 percent of the party memberships. But in the following Congress, when the House had gone over to Democrats but Republicans retained the Senate, only 8 percent of Senate votes divided the parties at this level. Even with the same Senate leadership, in other words, the voting behavior of its members could vary greatly from term to term.

By comparing situations of wholly unified government, however, we can observe the operation of some tendencies identified by Rothman. In the first two years of Ulysses S. Grant's presidency, a similarly-aligned Senate produced 9 percent 90-percent divided votes; the similar figures for the first Congressional terms of James Garfield/Chester A. Arthur, Benjamin Harrison, and William McKinley generate figures between .35 and .42. At the lower, 50-percent level the Senate during this time exhibited similar party division to the House; at the more contentious 90 percent level, the House under Republican control from 1895-1911 consistently had higher party unity than the Senate.

Figure 3.1 – Political Party Opposition in Roll Call Votes



As we will see, the Senate's record of authorizing investigations around the turn of the century reflects some—but not all—of the Rothman account. The Senate may have been coming under greater organization, but this did not translate into the sort of capacity that a political party could wield to actively promote investigations. An opposition Senate, such as the one in the 54th Congress, did not undertake a flurry of investigations in the manner typical to the more-organized House. But during Theodore Roosevelt's administration, a Republican-controlled Senate produced few investigations, and fewer still posing significant challenge to the executive branch or powerful outside actors. This was a marked departure from times before and after, when Senators freely investigated That the rise in investigative activity began in the late Theodore Roosevelt administration, and saw marked increases in the 1920s in particular, is testament to a negative correlation present between investigative activity and polarization.

In examining Congressional Record debates during first major rise in Senate investigations, I also find little to suggest that the use of investigations represented a coordinated effort or that members' greater focus on review generated controversy over expenditures or the effectiveness of the chamber. To be sure, opponents of probes into the conduct of Southerners

after the Civil War complained about investigator expeditions into their states, but there was neither (1) *repeated*, principled opposition to the investigative function regardless of the proposed subject; or (2), comprehensive, researched objection to the investigative enterprise generally. Many of the investigations in this era received authorization in the Senate without *any* debate on a resolution, something which is not the case in the 1920s, when Senators engaged in much greater floor discussion about the benefits and costs of investigative activity, with reference to successful and unsuccessful examples.

If Senate investigations originate from the initiative of individual members, the next question is how the individual characteristics of members influence whether to propose investigations. This limited examination questions the strength of a relationship between constituency characteristics and the onset of Congressional interest. While local interests are clearly important in the initiation of many investigations, a great number are begun by members whose constituencies are scarcely connected with the object of inquiry. For these members, interest groups and national exposure made up for the lack of electoral incentive.

Investigative activity by members without a constituency interest, however, carried a danger, specifically that these members lacked influence in the overlapping committees with jurisdiction over legislation bearing on their policy interests. That is not to say that the bills encouraged by investigative committees were not successful. Rather, the ever-shifting boundaries of late 19th century economic and political interests, and the organization of the Senate committee structure, made it difficult for members to hold off legislation in other committees that might undermine their plans.

Senate Investigations from 1876 to 1900

Immigration

The Senate's greater deference towards investigations can be seen in the creation of a joint committee to investigate Chinese immigration in 1876. With the nation recovering from the Panic of 1873, and with a Chinese community in California that reached almost 9 percent[19] of the state's population in the 1870 Census, anti-immigrant sentiment ran high on the West Coast. Seeking support from California and Oregon, both party conventions adopted anti-Chinese language: Republicans, meeting at Cincinnati, promised an investigation of "the effects of the immigration and importation of Mongolians on the moral and material interests of the country;" Democrats, holding their convention second, went further to "demand such modification of the treaty with the Chinese Empire, or such legislation within constitutional limitations, as shall prevent further importation or immigration of the Mongolian race."[20] Back in Congress, the vote on an authorizing resolution by California Democrat John K. Luttrell failed to gain a quorum in the House, leading him to meekly move for its referral to the Foreign Affairs committee.[21] The *San Francisco Chronicle* explained that the House's failure to act "does not indicate any weakness of the anti-Chinese movement [in the House]" but the "well-grounded feeling that the House had taken more efficient action on the subject" by passing a pair of measures authored by Californians.[22]

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[19] Ninth Census, Tables of Race, Nationality, Sex, Selected Ages, and Occupations. Washington: GPO, 1872. Pages 3-8.

[20] The American Presidency Project. http://www.presidency.ucsb.edu/platforms.php

[21] 4 Cong. Rec. 4160. June 26, 1876.

[22] "The Chinese Question in Congress" *San Francisco Chronicle*, July 4, 1876.

In the Republican-controlled Senate, A. A. Sargent of California, had similarly faced difficulty in his efforts to advance anti-Chinese proposals. Having been unable to win support for a resolution communicating to President Grant the "opinion of the Senate" that the 1868 Burlingame Treaty with China be renegotiated, Sargent lent his support to the creation of a select committee to examine the "character, extent, and effect of Chinese immigration." The debate on the sense of the Senate resolution revealed Sargent's inability to get support for his positions referred out of the Committee on Foreign Relations, reflecting both deference towards the Grant administration's treaty with China as well as liberal opposition to the racial intolerance manifest by the resolution's proponents.[23] When it appeared that the "sense of the Senate" resolution was doomed, Indiana Republican Oliver Morton offered an amendment gutting Sargent's resolution in favor of an investigation. Days later, the House took up its own investigation proposal, and this time approved it—a further round of resolutions merged the two panels into a joint committee.

The group began its hearings in San Francisco just 3 weeks before the November election. California's six electoral votes went to Republican Rutherford B. Hayes by less than two percent of the votes cast, a margin of fewer than 3,000 votes. Viewed from this perspective and considering the intensity of anti-immigrant sentiment on the West Coast, Sargent and Morton's effort may have neutralized the Chinese issue for the Republican Party in California, facilitating Hayes' narrow victory over Samuel J. Tilden.

The committee's report, however, failed to add facts to bolster the anti-Chinese arguments which had been used to justify the expedition. Testimony running to almost 1,150 pages of hearing transcripts produced a scant six pages of findings, in which claims about immigrants' effects on wages, or the criminality of the Chinese community, passed without examples or figures. For actual details, readers were encouraged to sift through the heft of hearing transcripts, notwithstanding the panel's warning that some of the testimony on morals and habits in China was "too revolting for miscellaneous reading."[24] The committee's findings also struggled with the presence of contrary views by businesspeople and religious organizations, the former supportive of Chinese labor and commerce, the latter pleased with the China treaties' protections for missionaries. The report also suffered from an inherent contradiction of logic, between an alleged Chinese threat to American institutions and the apparent home-focused orientation of immigrants who did not participate in government, start families, or even stay in the country any longer than necessary to provide for a comfortable living back in China.

Even within the committee, an anti-immigrant conclusion was not obvious. After his death in November 1877, Senator Morton's family found among his papers evidence that he took a dimmer view of anti-Chinese legislation than his colleagues. These writings were published as a separate report. America's commitment to upholding "natural God-given and inalienable right[s] of universal man," Morton wrote, implied as its "necessary outgrowth…the policy which throws open the doors of our nation to all who desire to make our country their home." Reflecting on the tradition of only permitting White persons to become naturalized, Morton reasoned that such a restriction had been "placed in the law when slavery was the controlling influence in our Government, and is now retained by lingering prejudices growing out of that institution." The only means of protecting Chinese from the labor conditions they suffered in the

[23] *4 Cong. Rec.* 4418-4421. July 6, 1876.
[24] Page VI.

West, Morton concluded, was to allow them to become citizens and to have political representation.[25]

Other Republican supporters of Chinese immigration and the Burlingame treaty similarly emphasized American values and responsibility to uphold treaty obligations. The *New York Times* characterized Ohio Senator Stanley Matthews's oration as "one of the most eloquent, manly, and logical speeches ever heard in the Senate," noting that he "spoke at times with a vehemence and feeling which he has not hitherto exhibited during his term of service."[26] In the absence of firm data from the select committee's report, mere claims about the living conditions and integration of the Chinese population could be disregarded. Maine's Hannibal Hamlin conceded that Sargent's "graphic and…revolting" depiction of immigrants' living conditions at San Francisco was probably accurate, but speculated that the Californian could find "social evils still more revolting" elsewhere, and doubted that "there is a class of immigrants coming to us from any nationality among whom you cannot find men in whom you discover in person, in morals, in all the attributes almost that belong to humanity" the faults comparable to those alleged among Chinese immigrants.[27] For these Republicans it must have been galling to hear Southern Democrats such as Louisiana's James Eustis play up fears of "turbulence, violence, anarchy, revolution, and bloodshed" in the Pacific states to justify Southern resistance to political rights for African-Americans, and wipe away crocodile tears when proclaiming that "When it comes to the question of race, Mr. President, I confess that the Senator from California has touched a very tender and a very weak spot in my nature."[28]

Senate Republicans split 18-17 on passage, sending to President Hayes the proposal to limit ships entering the United States to carry no more than 15 Chinese passengers.[29] Hayes' veto message relied on the impracticality of abrogating the China treaty, but acknowledged supporters' concerns as to the assimilation of the Chinese as well as the "very grave discontents of the people of the Pacific States."[30] A year later, Hayes dispatched University of Michigan President James Burrill Angell to China to negotiate changes to the treaty permitting both countries to suspend immigration.

This sequence of events indicates how Senate investigative activity was initiated in spite of active resistance by leading Republicans and the members of the pertinent committee. Though the committee's fact-finding did little to distinguish the Chinese from other immigrants, it provided enough fodder for the supporters of immigration restriction to press for legislation that received only mixed support from the majority party, and which necessitated a veto from a same-party President.

Indian Affairs

A second area of legislator concern in the late 19th century was the condition of Native Americans. Unlike the xenophobic thrust of the Chinese immigration investigation, following the trail of Congressional activity on this subject illuminates a policy environment in which legislators used Congressional tools to advance the agenda of reformers. The Indian Bureau beset

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[25] "The Chinese Question" *Chicago Daily Tribune*, January 18, 1878.
[26] "The Chinese Bill Debated" *New York Times*, February 14, 1879.
[27] 8 *Cong. Rec.* 1386. February 15, 1879.
[28] 8 *Cong. Rec.* 1387. February 15, 1879.
[29] Among Republicans, the vote was 21-9
[30] Veto of the Chinese Immigration Bill. March 1, 1879. House Ex. Doc 45-102.

by corruption and the existing system of interactions between whites and Native Americans being a further source of corruption and conflict, opportunity existed for the creation and implementation of a new system. Actually changing this system, however, required the cooperation of a variety of actors, and could not be achieved with the leadership of executive branch officials alone. In the Senate, expert legislators motivated by public policy goals used investigations to gather information for policy-making and to advance their proposals.

The Constitution's sole reference to Native Americans acknowledges Congressional power to "regulate commerce…with the Indian tribes," but does not specify a method of concluding agreements with tribes. In the early years of the Republic, this often took the form of formal treaties, which were negotiated by the Executive and ratified by the Senate. As westward expansion brought the government into interaction with a greater number of tribes, it became a more difficult question as to whether Indian Affairs should occur through treaties or legislation. The House of Representatives, having no constitutional treaty role, supported statutory handling of relations with Native Americans. The 1851 Indian Appropriations Act gave the President the power to create reservations, onto which tribes could be settled. In 1871, the House won an appropriations rider declaring that the US was to cease negotiating treaties with tribes (but that existing treaties would be honored).[31] This moved Indian policy firmly into the statutory/administrative realm.

In Congress, the misdeeds of traders and Indian Bureau officials provided grist for criticism of the executive branch. Frequent periods of divided government between the House and President generated numerous investigations of the Indian Bureau, a number in excess of the Senate. Legislators had few reservations about criticizing mistreatment of Native Americans, as seen in an 1873 House report that described a "great and revolting waste of the patrimony of the Indians" which had escaped the Executive Branch's notice despite acts that "disgrace the nation and our civilization."[32]

Meanwhile, civic groups began to take a much greater interest in the situation of Native Americans. While reformers generally possessed a high level of admiration for the American Indian, and lacked the Social Darwinist pessimism on race that characterized their counterparts working on Freedmen's issues, they nevertheless sought to impress white beliefs and lifestyles on him (Bolt 1987). By providing a more scrupulous administration of the Indian Bureau and developing institutions to "civilize" Native Americans, these groups hoped to eliminate any vestiges of tribal structures.

Reformers' interests found voice in the activities of Senators, who began to inquire into the conditions of Native Americans for its own sake, and not merely as a bludgeon against the Indian Bureau and Presidential administration. Expeditions to the Northern Cheyennes in 1879, the Sioux, and the White Earth Reservation all examined conflict between the government and tribes, who, having been removed from their homelands or deceived in agreements, mounted escapes from their reservations or (in the case of the Sioux) were violent to local settlers. These investigating committees were, by and large, sympathetic to the Native Americans' situation and considered the conflicts predictable outcomes of an ill-managed Indian Bureau. As the Senate accumulated evidence on different tribes, its inquiries became more specifically focused on the

[31] See Deloria, Jr., Vine. 1984. "Congress in Its Wisdom." In *The Agressions of Civilization: Federal Indian Policy since the 1880s*, Cadwalader, Sandra L., and Vine Deloria, Jr., eds. Philadelphia: Temple University Press. Page 107.
[32] Report 98, 42d Congress. Page 3.

potential for *allotment*, the division of collectively-possessed lands to individual tribe members, to provide a favorable solution to Indian problems. Consequently, most of the principal legislative initiatives would issue from the Senate, facing difficulty in the House only for being seen as overly generous to Native Americans.

A central character in late 19th century US-Native relations was Senator Henry E. Dawes of Massachusetts, who served as chairman of the chamber's Indian Affairs Committee from 1881 to 1893, and subsequently was appointed by President Grover Cleveland as an envoy to the Five Civilized Tribes, leading an eponymous commission. Under Dawes, the Senate Indian Affairs Committee requested and received at least one subpoena authorization in each term, visiting and observing the conditions of many tribes, examining leases of Native American land, and claims against the Choctaws for payment of legal counsel. Dawes was also supportive of other investigations by select committees, as can be seen in the approval of an 1886 resolution undertaking an investigation of Indian traders. Initially, Dawes supported simply voting on the authorization without sending it to his committee for approval, but when the resolution *was* referred to Indian Affairs, the committee amended the resolution to call for a select committee—hardly a sign that its members sought control of the matter. When the five Senators chosen for the committee were announced, three—including Wilson—immediately requested replacement. Once fully appointed, the committee served assiduously, producing a 635-page report volume.

Dawes also had a close relationship with the influential community of philanthropists and religious groups who sought legislative action to reform Native Americans. These self-described "Friends of the Indian" met annually at a conference at Lake Mohonk, NY, and published the proceedings of the conference. The centerpiece of late-century reformers was "allotment," the conversion of collectively-held tribal lands into individualized plots, to be developed by Native American families. To supporters of allotment, the persistence of tribal structures impeded Native Americans' adoption of Christianity and other elements of European civilization. That the policy would open large quantities of un-allotted tribal lands to Whites was viewed as a secondary benefit, both for the Whites granted land as well as for the Native Americans whose acculturation would be accelerated by closer contact with Caucasians. However noble or sophisticated they deemed the Civilized Tribes, reformers regarded individual entrepreneurship the *sine qua non* of advancement.

While Dawes sometimes privately expressed concern about the projects of these reformers, his legislative proposals largely incorporated their vision, and it was not obsequiousness that led him to declare that the Dawes Act was in substance a "Mohonk bill." The activity of the Indian Affairs committee gave its chairman credibility with the important outsiders whose approval might be thought influential in building support for legislation in the House and among public opinion generally. Dawes' remarks in 1886 to the Lake Mohonk Conference merge first-hand experience with the prejudices of late 19th century reformers. While recounting his committee's expedition to Indian Territory in the previous Congress, Dawes pointed to the Five Civilized Tribes as an example of how other groups of Native Americans could successfully achieve economic success and adapt Western forms of government. But even among the tribes of Indian Territory, Dawes believed that greater progress could be made. Admitting that "[t]here was not a pauper in that Nation, and the Nation did not owe a dollar," Dawes lamented that "There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their

citizens so that each can own the land he cultivates, they will not make much more progress."[33] By the Dawes Act of 1887 and the Curtis Act of 1898, Native lands came under the allotment policy, in the former enactment by the order of the President and in the latter extended to the Five Civilized Tribes, previously exempt on the basis of their special treaty status.

Allotment was by no means unanimously regarded as an optimal solution by policy makers. The dissenters from an 1880 House report observed that the "communistic idea" of the Indians

> has grown into their very being, and is an integral part of the Indian character. From our point of view this is all wrong; but it is folly to think of uprooting it, strengthened by the traditions of centuries, through the agency of a mere act of Congress, or by the establishment of a theoretical policy. The history of the world shows that it is no easy matter to change old methods of thought or force the adoption of new methods of action…There are singularities in the Anglo-Saxon character and peculiarities in Anglo-Saxon belief which run back over a thousand years, and which all the enlightenment of progressive centuries has been unable to overcome.[34]

These two Democrats and one Republican concluded that "Gradually…they [the Indians] are working out their own deliverance, which will come in their own good time if we but leave them alone and perform our part of the many contracts we have made with them." Scholars generally regard allotment as a failed policy. An economic model by Carlson (1981) suggests that the setting aside of lands for individuals without assisting them with the cultural transition to a sedentary lifestyle could reduce Native Americans' investments in the development of farming-related skills.

Independent of allotment's capacity to induce capitalistic behavior in Native Americans, the Indian Affairs committee found its efforts to manage matters in the Indian Territory increasingly difficult, however, as promises of fertile land and a sparse Native American population to contend with encouraged Whites to inhabit Native lands, either leasing or squatting on these vast landholdings. By some accounts, 30,000 Whites lived on these lands illegally, in hopes of claiming land opened by the federal government. The presence of such settlers impeded the goals of reformers, since the settlers' presence weakened the government's reputation for making credible promises, while the settlers' precarious status inhibited development of the social institutions believed to assist in the Natives' civilization. Opening Oklahoma to white settlement was a goal of the Committee on Territories, however, which hoped that new settlement could accommodate a half-million people. Senator William M. Stewart of Nevada, member of the Territories Committee, evinced none of the respect for the Five Civilized Tribes customary for Indian Affairs members when he said of the Oklahoma situation that "I hope there will be action, and action now, because this is a contest between barbarism and civilization, and a contest between cattle barons and the people."[35]

The Oklahoma provision of the 1889 Indian Appropriations Act, authorizing the President to permit homesteaders to claim lands in the center of Oklahoma, marked a failure for Republicans and reformers like Dawes on several fronts. First, the House origin of this provision

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[33] Proceedings of the Third Annual Meeting of the Lake Mohonk Conference. 1886. Philadelphia: Sherman & Co. Page 43.

[34] Report of the House Indian Affairs Committee. May 28, 1880. 46th Congress, 2d Session. #1576. Page 9.

[35] 20 *Cong Rec* 2608. March 2, 1889.

and its approval by Grover Cleveland indicated its acceptability from a Democratic perspective: quite simply, a populated southern territory was likely to become a Democratic state. In a Congress that haggled over the admission of four new states (North and South Dakota, Washington, and Montana, with Wyoming and Idaho to be added the following year), members were not blind to the partisan implications of population shifts. Nor could members ignore the voraciousness of Oklahoma settlers, who moved to Eastern parts of the territory in anticipation of the Land Run even before it had been authorized by President Harrison.[36]

The famous Land Run of 1889 and subsequent openings of territory in present-day Oklahoma produced a rapid change in the composition of the Territory. According to the Dawes Commission, development of Oklahoma and other surrounding states had made the tribes' situation untenable.

> The resources of the [Indian] Territory itself have been developed to such a degree and are of such immense and tempting value that they are attracting to it an irresistible pressure from enterprising citizens. The executory conditions contained in the treaties have become impossible of execution. It is no longer possible for the United States to keep its citizens out of the Territory. Nor is it now possible for the Indians to secure to each individual Indian his full enjoyment in common with other Indians of the common property of the territory.[37]

Quickly, assessments of the Five Civilized Tribes themselves shifted. By 1894, the *Washington Post* claimed that

> Amalgamation with the whites has well-nigh exterminated the Indian. It is said that the preponderance of blood in the tribes is white to the extent of nine-tenths. The few Indians who have retained their homogeneity have been relegated to the waste places by the large landlords who enjoy tribal rights through intermarriage, or whose dominant blood is white.[38]

And the *New York Times*, reflecting the Dawes Commission's findings, found that the "attempt to establish laws and courts among the people too ignorant to understand or comprehend right from wrong and too indolent and indifferent to enforce anything but mob law, has only worked to protect the lawless and prevent the honest, law-respecting people from protecting their own rights and property."[39]

At that moment, Commissioner Dawes received a boost from one of his former colleagues in the Senate, Henry M. Teller of Colorado. While never a member of the Indian Affairs Committee, Teller had been Secretary of the Interior in the Arthur administration (1882-1885), and was appointed to the select committee on the Five Civilized Tribes upon his return from the executive branch. Senator Teller's committee, authorized to send for persons and papers on March 29, 1894, left the session almost immediately, arriving at Muscogee on the 8th of April, conducted an inquiry over 10 days, and returning to Congress to file their report on May 7th. A write-up in the *Chicago Daily Tribune* brought the headline "Reform Needed in the

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[36] So foolhardy were these prospective landholders that observers began to worry that, if they were not given land soon enough, many would die of starvation after not having enough time to plant crops.

[37] "Report of Commission to the Five Civilized Tribes." Senate Mis. Doc 24, 53d Congress. November 20, 1894. Page 9.

[38] "A Unique Statehood Problem." *Washington Post*, February 2, 1894. Page 4.

[39] "Crisis in the Indian Country." *New York Times*, November 15, 1894. Page 9.

Territory—Senator Teller Talks of Queer Conditions Among the Civilized Indians." Teller's committee report provided additional support to the claims of the Dawes Commission and others who wanted to allot the lands accorded by treaty to the Five Civilized Tribes.[40] Having earlier been an opponent of allotment, and being on good terms with such figures as Helen Hunt Jackson and Frederick Douglass from his time at Interior, Teller sent a credible signal when declaring that "[I]t is apparent to all who are conversant with the present condition in the Indian Territory that their system of government can not continue. It is not only non-American, but it is radically wrong..."[41]

Indian policy in the late 19th century provides an example of weak state institutions struggling to confront a rapidly changing policy landscape. In spite of the best hopes of reformers inside and out of Washington, demographic pressures in the territories and fragmentation in Congress permitted the intrusion of policies that literally reshaped the West to the disadvantage of Native Americans. In the absence of centralized activity, member entrepreneurship led to contradicting and destructive policy initiatives. Legislators skeptical of allotment were unable to head off the project pushed by Dawes and reformers, but neither reformers nor well-meaning skeptics such as Teller were unable to prevent damage to the very tribes who came closest to achieving reformers' objectives. Senator Dawes' investigative initiatives may have helped him win support for allotment legislation, but the effectiveness of this proposal was compromised by other actors in the Legislature and by an Executive Branch which had for years been unable to prevent White settlers from infiltrating Native American territory. These factors constrained the policy options available to Congress and helped guarantee the failure of the ones they did choose.

Monopolies – Railroads and Communications

Another dynamic situation requiring government attention was the development of new national transportation and communication networks, the consolidation of industry facilitated by these developments, and their effects on trade throughout the country. I identified 83 investigations from the 41st to 79th Congresses that dealt with ownership of companies, commodities, or precious metals; organizations alleged to be in restraint of trade; or the supply and demand of necessities of life.

A rapid analysis of this set of investigations reveals considerable differences between the House and Senate. First, there was a far greater volume of this type of investigation in the Senate than the House—59 versus 24. Of these, the Senate investigations occurred approximately equally between Democratic and Republican control of the chamber—33 versus 26—but Republicans controlled the chamber for twice as many Congresses, meaning that the rate of investigations under Democratic control averaged 2.5 per Congress, against one investigation per term of Republican control. Second, a chamber majority opposed to the President did not affect the rate of investigative activity in the Senate, which averaged 1.5 investigations per term when controlled by the President's party, against 1.67 when in opposition to the President. Again, the House demonstrates a different pattern, with just over 1 investigation per term when opposed to the President, versus an average of .47 investigations when controlled by the President's party.

From nearly its beginning, the construction of railroads and their regulation necessitated Congressional scrutiny. The Credit Mobilier scandal, in which members of Congress received

[40] *Chicago Daily Tribune*, April 23, 1894. Page 5.
[41] "Five Civilized Tribes of Indians." Senate Report 377, 53d Congress. May 7, 1894. Page 12.

bribes to continue making large payments in land and money to the Union Pacific for miles of track completed, was an early indication—but not the first—of the railroads' appetite to expand their networks using whatever means might be available. Skowronek (1982) discusses how competing lines raced to build new track that would increase the profitability of their existing network. When a major, "trunk" line was confronted with a small, "branch" line that controlled the short-yet-profitable connection between its trunk and a city, its strategy was to build duplicate track and attempt to drive the other line into bankruptcy. The end results of this activity were the construction of vast quantities of excess track and over-capitalization of the railroad companies engaged in this competition. A similar dynamic overtook construction of the telegraph network. Which companies would emerge victorious, and what the network as a whole would look like, were questions whose answers eluded investors and lawmakers alike. Even from the perspective of hindsight, critical empirical questions about the necessity for and effects of specific types of railroad regulation have not received definitive answers (Bensel 2000, p. 307). Considering the pace of change in the American economy, the emergence of new powerful actors and the decline of others, and the shifting desires of these actors in response to still-newer developments, we may reasonably conclude that those members of Congress tasked with formulating regulatory infrastructure must have struggled mightily to imagine the consequences—both individually and together—of proposed rules. For those members *without* an intensive understanding of industrial and transportation, the calculus of constituency and party advantage must have been exceedingly difficult.

The development of the 1887 Interstate Commerce Act provides another illustration of the differing legislative styles of House and Senate. The House version of the bill traced its origins to a Commerce Committee investigation into alleged combinations of the "leading railroads engaged in interstate commerce and in commerce from the inland States to the seaboard for exportation."[42] This investigation was conducted during the most active Congress in my dataset, the 44th, notable for being the tail end of the infamously scandal-ridden administration of Ulysses S. Grant. But its hearings failed to generate information, as the railroad executives contested the authority of Congress to regulate freight rates—and therefore, the power of the committee to compel testimony and documents.[43] The committee never produced a report—eight years later, the investigation's sponsor would claim that "by some process, never yet explained, the investigation was smothered at a critical juncture, and the testimony already taken disappeared from the committee-room."[44]

My examination of investigation authorizations finds no further inquiries into railroad combinations until the 50th Congress—that is, one year after enactment of the Interstate Commerce Act. This means that the House Democrats created their bill without the groundwork of a report to the chamber about the conditions necessitating action—a report whose findings could be disputed in print by any dissenting committee members. And during its existence, the committee had failed to obtain its desired testimony from the railroads, forcing them to collect information exclusively from the independent oil producers unhappy at their treatment by the railroads.

Without even a set of hearing transcripts from the House investigation, the stage was set for a Senate investigation in 1885, under the leadership of Illinois Senator Shelby Cullom.

[42] House Journal, 1st session, 44th Congress. Page 1005.
[43] "Unjust Freight Charges." *New York Times*, June 28, 1876, page 4.
[44] 16 *Cong. Rec.* 63. December 4, 1884.

Cullom's select panel of five, usually missing Warner Miller of New York and Arthur Gorman of Maryland, toured the country from New York and Boston to Chicago, Kansas City, and New Orleans. The Senate panel attracted considerable attention in the newspapers, both for the testimony collected as well as the comings and goings of its members, particularly Cullom, who between representing the Prairie State and in his "manners and intellectual structure" reminded observers of President Lincoln.[45] The Senate hearings were friendlier than the House Commerce Committee's probe eight years earlier. In its report, the Senate committee claimed that

> not a few of the ablest railroad men of the country seem disposed to look to the intervention of Congress as promising to afford the best means of ultimately securing a more equitable and satisfactory adjustment of the relations of the transportation interests to the community than they themselves have been able to bring about.[46]

And the Cullom committee's report devoted extensive attention to fundamental questions of markets and economic development. The *New York Times* was critical of these seemingly tangential discussions, questioning the committee's need to lay out, for instance, the volume of agricultural traffic in the United States and the prospects for large-scale exportation of grain.[47] But such "asides" buttressed the committee's view of railroad transportation as a matter of public interest and for Congressional legislation—their erroneous conclusion that foreign countries would not require American grain, for instance, expands the question of regulation beyond a matter between producer and shipper to one about the development of the American nation. The report approvingly quoted New York's mid-century governor Horatio Seymour that "economy of transportation of persons and property…is the marked fact in the difference between civilization and barbarism."[48] Whatever objections the *Times* had towards irrelevancies among the Senate committee's findings, the newspaper concurred in the "undisputed propositions" and declared itself satisfied with the resulting proposals.

The bill that emerged from a House-Senate conference in December 1886 represented a middle ground the House and Cullom proposals. The *Chicago Daily News*, reliably supportive of its home-state Senator, proudly declared that Cullom's bill "almost untouched, is at the basis of the compromise," while most accounts called the conference's outcome a draw. Nonetheless, this was a favorable outcome for a Senate Republican Party losing three seats in the upcoming Congress, leaving only a narrow 39-37 majority in the upper house.

Just as the nation's telegraph lines ran alongside railroad track, so public debate over the financing and consolidation of the telegraph industry paralleled the controversies over the railway system. In the 1860s and 1870s, telegraph lines consolidated at a rapid pace, with Western Union emerging as the dominant carrier. Opposition emerged as prices for telegrams in the United States exceeded those in European countries. The Senate Post-Offices and Post-Roads Committee's 1884 investigation indicated that Western Union's expansion had come at a cost, according to the committee, "vastly in excess of either the cost or earning potential of the property acquired." Senators concluded that, in the language of the authorizing resolution, the cost of telegraphic correspondence *had* been "injuriously affected" by Western Union's consolidation activity and practice of distributing large dividends. The committee's unanimous

[45] *Los Angeles Times*. May 27, 1886.
[46] Senate Report, p. 175.
[47] "Inter-State Commerce." *New York Times,* Jan 19, 1886. Page 4.
[48] Senate Report, p. 4.

recommendation was to permit the government to contract with telegraph operators to transmit messages between postal customers serviced by "postal telegraph offices" at fixed rates. The bill also envisaged that where there was no offer by a local operator to transmit messages, the government could buy the lines (but not forcibly) or construct its own. To critics of government competition, the committee remarked that

> All persons engaged in any business, not protected by the monopoly of a patent, know and act upon the knowledge that they are exposed to the competition of other persons and of the public authorities. The postal money-order system interferes with the business of bankers. The parcel post interferes with the business of the express companies. Postal savings banks, existing in many countries and often proposed in this country, would interfere with the business of private savings banks.

The committee's investigation and the proposal to create a public service telegraph perturbed Western Union's president, Norvin Green. Green claimed that he could not inform Congress on "private contracts and matters which were not in his control,"[49] and dismissed evidence about the volume of popular sending of telegrams in European countries such as France and Switzerland, saying that "Millions of wealthy tourists were there every year, with no other business than to enjoy themselves, and nothing but social affairs to telegraph about."[50] At the conclusion of his testimony and, in the account of the *Times*, "after putting on his overcoat and hat and enveloping his papers," Green leveled a final shot at the committee, which he invited to "consider as testimony or not, as they please"; that when and if Congress proceeded to "condemn and take our property" the company would recognize the power of the appraisers to review Western Union's contracts.[51]

Though Senator Hill's bill for a government-constructed system made little headway, various forms of postal telegraphy received discussion in ensuing sessions. The prospect of federal *purchase* of Western Union, remedying its difficult financial situation, seems to have been kept alive by Republican friends of the company and its owner, Jay Cooke. The multitude of voices calling for *some* form of postal telegraphy failed to crystallize into a single proposal. For example, the *Chicago Daily Tribune* commented in 1887 that "[t]here probably has not been a time…when a bill to purchase or build lines could have received a favorable report from the committee" since 1845.[52] In that session, the Senate passed a mild regulatory bill putting the telegraph industry under the control of the nascent Interstate Commerce Commission, but the House failed to take up the bill.

An important source of ambiguity about the future of the telegraph industry was the Executive branch itself. In 1889, President Harrison's postmaster general, John Wanamaker, attempted to negotiate with Green and the head of the (private) Postal Telegraph Company, John W. Mackay, to establish a service that would combine the telegraph infrastructure with the Postal Service's delivery network. Unpersuaded by Green's objections that any such service would necessarily correspond to a second-class delivery, Wanamaker pressed forward in combat against

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[49] "National Capital Topics" *New York Times,* Feb 26, 1884. Page 3.
[50] "National Capital Topics" *NYT*, Feb. 1, 1884. Page 3.
[51] "National Capital Topics" *NYT*, Feb. 27, 1884. Page 3. Report of the Committee on Post-Offices and Post-Roads on Postal Telegraph. 48th Congress, 1st Session. Report No. 577. Page 247
[52] "Early Upon the Field: Friends of a Postal Telegraph Talking in Washington" *Chicago Daily Tribune*, Nov 27. 1887. Page 6.

the telegraph companies, proclaiming a 50 percent reduction in the rate paid the federal government's own use of the telegraph, and unveiled plans for an aggressive postal telegraph plan.

A March 1890 meeting of the House Post-Offices and Post-Roads Committee brought to a head the rivalry between the Postmaster General and the Western Union president, with a discussion of the government rate proclamation causing the latter to become

> somewhat excited at this point and, looking hard at Postmaster-General Wanamaker, who steadfastly returned the gaze he exclaimed: "And yet he says that he is on first-rate terms with the telegraph companies. He may congratulate himself that he can sit, smile and smile, and murder while he smiles. We propose to controvert that order in the courts, and to demonstrate that it is not one-half of the cost of the services.[53]

According to a piece in the *New York Times*, Wanamaker's advocacy of postal telegraphy drew a private rebuke from President Harrison, who allegedly told the Postmaster General that "[t]he friends you have slapped in the face were most valuable to us in 1888, and we will need them in 1892. To attack them is political insanity…This whole postal telegraph scheme might just as well be dropped; it never should have begun."[54] Curiously, Wanamaker continued to push for the program, without apparent damage to his relationship with Harrison. Coverage of the department's annual report in the nation's leading newspapers made prominent mention of the postmaster's recommendations for telegraphy, with the *Washington Post* going so far as to title its article "QUICK MAIL DELIVERY – Electric Wires Instead of Limited Trains and Stage Coaches."[55]

Eventually, the telegraph industry was brought under jurisdiction of the Interstate Commerce Commission in the Mann-Elkins Act of 1910. The history of efforts to break the Western Union monopoly and/or create a postal telegraph reveals a situation subtly different from the railroad industry. For many persons, if not most, personal and business applications telegraphy was a dubious improvement over the postal system. Outside urban areas, access to wires and training of personnel to operate telegraph equipment posed large obstacles to democratizing the telegraph system. Whatever effect Western Union's market share may have had on communication rates, the number of consumers affected was insufficient to provoke a groundswell for either regulation or government-sponsored competition. Additionally, the telegraph quickly faced competition from the growing telephone network. Finally, disagreement in the Senate over the proper legislative solution produced the perverse situation where members of the Inter-State Commerce committee sponsored bills to be considered in the Post Offices and Post Roads committee, while members of that committee sponsored bills necessitating referral to Inter-State Commerce.

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[53] "To Brand Their Lard: Congressmen continue to discuss a greasy question" *Chicago Daily Tribune*, March 2, 1890. Page 4.

[54] "Jay Gould Kicks." *New York Times*, April 13, 1890. Page 16.

[55] While Wanamaker's leadership of the Postal Service was marked by improvements in efficiency and profitability, the Postmaster General's initiatives for integrating new technology failed to be enacted (in the case of postal telegraphy) or to bring the expected improvements, as evidenced in another notable Wanamaker project, the conveyance of mail in urban areas by pneumatic tube. See also, Robert A. Cohen. 1999. "The Pneumatic Mail Tubes: New York's Hidden Highway and its Development." http://about.usps.com/who-we-are/postal-history/pneumatic-tubes.pdf

As a growing population, industrialization, and new forms of transport and communication changed the face of the United States, the nation's elected officials struggled to retain influence and bring about desired policy outcomes. Mowry (1958, p. .38) describes the state of American political ideology at the turn of the century as "seething with economic and technological change" which had shattered the nation's traditional ideological views into groups whose "bewildering diversity almost defy analysis." In this world, it was possible for "one-time conservatives [to become] progressives or radicals" while "some men, torn between old memories and loyalties and the new conditions and the impact of the new thought, never could decide just what they believed and why." The subjects inquired into by Congressmen over this time, the course of their investigations, and the legislative follow-through document the tensions between the issues identified requiring political adjustment and the capacity of Congress and the State to provide feasible remedies. For some easier questions, solutions were readily at hand. For others, the diffuse nature of congressional organization prevented legislators from gaining and maintaining control in the substantive areas where they were acquiring expertise. Without control over the allocation of government lands, those legislators interested in the condition of Native Americans could not prevent a sharp deterioration in their welfare. Similarly, the impossibility of policing the telegraph market without the ability to simultaneously control developments in the railway network stymied even the most attentive legislators. That investigations proceeded in spite of this difficulty suggests the depth of member feeling on these issues. And even though comprehensive legislation was difficult to achieve, the power to compel testimony made it possible to reveal information that would otherwise have remained secret, altering the balance between outside actors and political institutions.

Revolt and Party Transition: Investigations under Republican dominance, 1897-1913

The election of 1896 ushered in a fourteen-year period of unified government, the third-longest such string of uninterrupted party control in American history. Aside from its length, this era is notable for an initially high degree of harmony between the Executive and Legislative branches, which would disintegrate and ultimately end in the "revolt" of the 61st Congress. The early years of unified Republican control featured a rare dearth of Senate investigative activity. Great concentrations of wealth combined with the system of indirect election of Senators enabled Establishment Republicans to exert a high degree of control over the ideology of those chosen to represent states in the upper house. This affected the strategy of Insurgent Republicans by necessarily delaying their contestation for places in the Senate, as control of state legislatures was a crucial intermediate goal. As their differences evolved into an open breach towards the end of the 20th century's first decade, the Insurgent and Regular Republican camps waged war to construct a narrative that would favor their respective sides' ideological positions and noted personalities.

The firm party control of Congress practiced under Speakers Reed and Cannon and the increased centralization of Senate leadership were, for the Republicans generally, potent yet volatile weapons. Accounts of the early Roosevelt years indicate a group capable of working together despite diverse backgrounds and interests. From 1897 to 1907—the 55th to 59th Congresses, inclusive—between 87.2 and 92.1 percent of Senate Republicans' votes were cast

with the majority of the party, the highest ten-year period of party voting for the Republicans in history.[56]

Table 3.1 – Senate Investigative Volume, 1881-1912

Congress	Years	President	President Party	Senate	Executive investigations	Outside investigations	Total (Executive, outside, blanket)*
47	1881-83	Garfield/Arthur	R	R	6	5	8
48	1883-85	Arthur	R	R	4	5	9
49	1885-87	Cleveland	D	R	4	4	8
50	1887-89	Cleveland	D	R	3	7	9
51	1889-91	B Harrison	R	R	2	3	5
52	1891-93	B Harrison	R	R	2	5	7
53	1893-95	Cleveland	D	D	3	5	7
54	1895-97	Cleveland	D	R	3	4	6
55	1897-99	McKinley	R	R	3	3	6
56	1899-1901	McKinley	R	R	2	3	5
57	1901-03	McKinley/TR	R	R	1	4	5
58	1903-05	T. Roosevelt	R	R	1	2	3
59	1905-07	T. Roosevelt	R	R	2	4	6
60	1907-09	T. Roosevelt	R	R	3	1	4
61	1909-11	Taft	R	R	3	2	5
62	1911-13	Taft	R	R	4	4	7

* May be greater or less than executive + outside due to committees with multiple-topic investigations, committees with authority to undertake investigations over a wide domain.

Table 3.1 illustrates the relative paucity of Senate investigations during the Presidencies of William McKinley and Theodore Roosevelt. The table gives some suggestion of this phenomenon, but these numbers would be easily refuted if the inquiries conducted during the McKinley/Roosevelt period were of considerable weight or threatened damaging charges against the administration or other actors. But as Table 3.2 documents, the subjects undertaken by congressional investigators tended to be minor and relatively uncontroversial; subjects that appear to have been more controversial, like that into the sugar trust's control of the Cuba crop, or the internal revenue, did not produce reports.[57] Indeed the sugar trust investigation sought to *knock down* allegations that a proposed tariff reduction on Cuban sugar would simply be a handout to the sugar trust, thus serving no benefit for Cuban growers. In this conflict, beet sugar

[56] "Party Unity Scores by Chamber for All Two-Party Systems," voteview.com. Accessed September 8, 2012.

[57] Surprisingly, the most completely worked Senate investigation of the 57th Congress was the examination of affairs in Hawaii. A subcommittee of 4 produced a 177-page report (issued as a committee print) structured into many sections, which were individually concurred or dissented on by the committee members. Another bit of Congressional trivia is the fact that it was legitimately difficult to get Senators to make the undertake the voyage and 25-day stay. "Senators' Trip to Hawaii," *New York Times*, July 10, 1902. Page 1.

interests from the Midwest and mountain states threatened to divide the Republican Party. On the investigating subcommittee, the anti-reduction side was represented only in the minority, by Colorado's Henry Teller (who had by this time become a Democrat). Here, the probe was *ahead* of many members of the Republican caucus, many of whom preferred alternative measures favoring Cuba (such as a tariff rebate given to the country) rather than the tariff reduction. The investigation was unable to get a reciprocity bill enacted in the 57th Congress, but a renewed attempt a year later was successful.[58]

[58] "Senate Committee Hears Mr. Havemeyer," *New York Times*, May 2, 1902. Page 1. "Status of the Cuban Bill in the Senate," *New York Times*, May 28, 1902. Page 8. "Cuban Bill is Passed," *New York Times*, December 17, 1903. Page 3. Committee on Relations with Cuba. 1902. "Cuban Sugar Sales" 57th Congress, 1st Session. Washington: Government Printing Office. (testimony transcript only)

Table 3.2 – Senate Investigations 1901-1906.

Cg	Investigation	Committee	Chair	DW-NOMINATE 1st dim.	Relative GOP median	Report
57	Alleged sugar trust control of Cuban sugar crop	Relations with Cuba	OH Platt	0.544	Right	No
57	Price and distribution of coal in the District of Columbia	District of Columbia	McMillan	0.351	R	No
57	claim of Ogden Land Co. to lands of the Seneca Nation in New York State; Indian schools and reservations (recess)	Indian Affairs	Stewart	0.045	Left	No
57	General conditions in Hawaii	Pacific Islands & Porto Rico	Foraker [Mitchell subcmte]	0.281	L	Committee Print
57	Affairs in the Philippine islands	Philippines	Lodge	0.495	R	No
57	Internal revenue, customs, currency and coinage	Finance	Aldrich	0.419	R	No
58	Work on Mississippi River, effect on Glen Haven channel	Commerce	Frye	0.41	R	No
58	[no subject]	Military Affairs	Hawley	0.36	L	No
58	Consider question of additional legislation to regulate interstate commerce; acquire further information as to interstate commerce, violations or evasions of antirebate law and devices and methods by which accomplished	Interstate Commerce	Elkins	0.359	L	Committee Print
58	Condition of the Tennessee River	Select	Morgan (Dem)	-0.333	L	Committee Print
58	Right of Reed Smoot of Utah to a seat	Privileges & Elections	Burrows	0.41	R	Yes
58	Allegations against Senator Dietrich	Select	Hoar	0.265	L	Yes
58	[no subject]	District of Columbia	Gallinger	0.559	R	No
58	Internal revenue, customs, currency and coinage [recess]	Finance	Aldrich	0.434	R	No
59	Hazing at the naval academy	Naval Affairs	Hale	0.385	L	Committee Print
59	All matters relating to the panama canal and govt of pcz and management of panama rr co	Interoceanic Canal	Millard	0.491	R	Committee Print
59	Any bills which may be pending; mckinley manual training school	District of Columbia	Gallinger	0.583	R	No
59	Matters relating to copyright laws	Patents	Kittredge	0.301	L	No
59	Condition of affairs in Indian territory in relation to the Act of April 26, 1906 and kindred matters in said Territory	Select	Clarence D. Clark	0.358	L	Yes
59	Whether Kickapoo Indians defrauded in sale of Oklahoma	Indian Affairs	Clapp	0.048	L	Committee Print

lands.

One particularly controversial situation, American military actions in the Philippines, received a Senate investigation in the 57th Congress, but although many provocative allegations had been raised in the media and by the Democratic minority, hearings on the subject failed to build momentum for anti-imperialists. A parade of witnesses called, including Gov. William H. Taft, promoted a pro-occupation viewpoint and minimized the importance or severity of alleged abuses. As the Philippines hearings ran on, they consumed column-wide stories on page 3 or 8 of the *New York Times*, even as the paper often ran front-page coverage of debate over military expenditures in the islands or tariffs on Philippine goods. And while early dispatches suggested that the majority was willing to accede to a minority request to send the Philippines committee to the country to continue its investigation, this proposal was ultimately blocked, leading one Democrat on the committee to complain that a serious probe had been "choked, strangled, and destroyed" and that there had been "no investigation."[59]

Table 3.2 provides the first-dimension DW-NOMINATE scores for Senators chairing panels with subpoena authorization in the 57th-59th Congresses, along with whether that score was to the Right (more conservative) or Left (more liberal) than the Republican Party median. A pattern of note is that of the ten investigations led by Senators to the Right of the party median, only one—into the eligibility (and alleged polygamy) of Reed Smoot—issued so much as a committee print.[60] By contrast, of the ten led by members from the Left of the median, six produced prints or reports. In this environment, an investigation by strong party members aimed less at producing a set of conclusions that might find consensus, and more at advancing a line of argument that would promote the party leadership's legislative initiatives.

As the leading personalities in Congress came into increasing conflict with the executive, however, the efficacy of the Republican Party at advancing legislation was sharply reduced. Instead, resistance to Roosevelt helped nourish disagreement between Congressional leaders and membership. Members were torn between support for a popular executive and the incentives offered by chamber leaders in exchange for acquiescence to their strategy. Faced with conflicting pressures, few initiated the types of legislative inquiry that, while perhaps providing cover to congressional leaders, would invite a conflict with the President. The Executive-Legislative conflict was further exacerbated by Roosevelt, whose written messages to Congress increased in frequency and virulence, culminating in a 1908 dispute over Roosevelt's plan to expand the Secret Service, in which he accused Congress of having opposed the plan in order to avoid exposure of its own corruption. Hatch (1967), analyzing editorials and taking note of legislators' recollections about public response to the contending sides, provides evidence for an observer to conclude that however damaging inaction might have been for Congress, a more aggressive

[59] "To Send A Committee to the Philippines," *New York Times*, May 8, 1902. Page 1. "Senate's Final Debate," *New York Times*, July 1, 1902. Page 3.

[60] The committee's majority report, signed under Chairman Burrows' name only, found that Smoot was *not* entitled to membership in the Senate. Five of the committee's 14 members (including 3 Republicans) issued a minority report. "Reed Smoot," Report of the Committee on Privileges and Elections. 59th Congress, First Session. Senate Report 4253. Washington: Government Printing Office, 1906.

stance relative to the President would have carried greater risks. Merrill and Merrill (1971), though generally more sanguine about the inter-branch relationship, also note the growth of anti-Roosevelt sentiment in Congress (p. 265) during the 60th Congress, as well as a contemporaneous decline in Aldrich and Cannon's public popularity (p. 297). But unlike the conservative reaction against the New Deal in the House some thirty years later, the Republicans who were most upset by Theodore Roosevelt's ideological apostasies lacked the electoral security to fully challenge the administration in hearing rooms.

Compounding Roosevelt's personal popularity as a danger to investigating the administration was the prospect that the Hero of San Juan Hill might respond forcefully to investigative activity, as evidenced by his eagerness to appear in hearings after his presidency ended. Investigative activity in the late Roosevelt years was limited in volume, but reflected both jockeying over the 1908 election as well as isolated grievances against the Executive. An example of the intrusion of presidential politics came in the case of the 1906 "Brownsville Affray." A small number of soldiers from Black military units were alleged to have gone on a shooting rampage in Brownsville, Texas, firing scores of bullets into residences near their fort and killing one person. After the three companies unanimously refused to testify about the incident, Roosevelt took the dubious step of issuing dishonorable discharges to all 160 soldiers, but carefully delayed the order until after the November midterm election to avoid alienating Northern Black voters. This episode upset Roosevelt's earlier delicate efforts to cultivate African American support, with leaders such as Booker T. Washington (whose 1901 White House dinner with Roosevelt had enraged Southerners) angered that Medal of Honor recipients and other decorated servicemen were collectively punished with the loss of their employment and pensions. According to the *Times*, Ohio Senator Joseph B. Foraker's investigation seemed primarily focused on winning the votes of Southern Black delegations to the Republican National Convention.[61] Yet the *Times* gave in to the prevailing wisdom of the day, averring that "[t]he Republicans never permit the strife of faction to imperil the continuance of their rule. The President and the Republican oligarchy in the Senate may terrifyingly scowl and thunder at each other, but the end will be concession somewhere, probably mutual, and a more perfect union in the party sense."[62] It would take some time for the *Times*'s predicted outcome to produce itself: Foraker's continued activity on the issue, including introducing a bill to reinstate the soldiers, extended Republican anxiousness about the Northern Black vote into a presidential election year. Ultimately, Roosevelt was forced to take full responsibility for the discharges, affirming that Taft, his Secretary of War, had attempted to intercede on their behalf.[63]

The other significant investigations of the Roosevelt administration issued from provocations made *by* the administration against members of Congress. In Congress's post office investigation of 1904, the instigation was the department's report that members had taken advantage of lax verification of workloads, telling the department that their volume constituent mail necessitated additional employee allocation when no such need existed: the additional salary allocation was spent for months or even years until a department audit discovered the discrepancy. Angry House members, faced with re-election concerns, pushed for a probe that

[61] "The Plans to Upset Roosevelt in 1908," *New York Times,* December 29, 1906. Page 1.
[62] "The Sham Fight at Washington," *New York Times*, January 20, 1907. Page 6.
[63] "Roosevelt Helps Taft With Negroes," *New York Times*, August 9, 1908. Page 2.

could exculpate them. Wrote the *Times*, "The humor of the House is savage. Such a scene has not been witnessed in the House of Representatives in a long time as that of to-day."[64]

Again at the very end of his presidency, Roosevelt levied a broadside at the honor of the nation's legislators. Unhappy that Congress had failed to back his expansion of the Secret Service into a FBI-like organization the previous year, the President shot back in a section of his State of the Union message that "the chief argument" to eliminate the proposed expansion "was that the Congressmen did not themselves wish to be investigated by Secret Service men." Somewhat sardonically, Roosevelt offered to make "a special exception…prohibiting the use of the Secret Service force in investigating members of Congress." Inattentive listening among those assembled left the membership initially unaware of the insinuation against their branch, but once the charge was discovered and the offending section read again, angry denunciations of the President followed. Ultimately, investigations were authorized in both the Senate (first) and House.[65] The House investigators, however, were quickly cowed by the strength of their constituents' support for Roosevelt. For the House investigation's sponsor, messages from home came in approximately nine to one against, and other members similarly reported that the public was speaking clearly in the dispute between the Executive and Legislature, congratulating members who had voted against investigation and criticizing those who had voted for it.[66] The Senate persisted, winning such revelations as the fact that the Secret Service had grown in size from 167 at the time of the McKinley assassination to more than 3,000. And the Senate's report again engaged the President, who attacked what he viewed as "misleading" statements by the committee and praised the Service's successes in winning convictions against "many defendants, some of them being among the wealthiest and influential people in their communities."[67] While the House Appropriations committee had, simultaneously to the Senate's inquiry, maintained Congress's position restraining Roosevelt's ambition for an expanded Service, their use of negative action was matched by positive, investigative action only in the Senate.

The precursors of a full split within the party were thus present, but the development of an organization-ready Rooseveltian wing in Congress remained slow. Of six Senators Brown (1922, p. 257) could describe, in opposition to the structure of the Senate Four, as men who "took orders from nobody," two—Dolliver of Iowa and Beveridge of Indiana—first came to the Senate in 1899, but the remaining four—Borah, Cummins, Kenyon and Norris—were only elected between 1907 and 1913, while La Follette moved from the governorship of Wisconsin to the Senate in 1906. Merrill and Merrill (1971, p. 285) re-tell the story of how Aldrich's failure to grant Dolliver a seat on the Finance Committee in 1908 helped ensure the latter's prominent opposition to the Payne-Aldrich tariff in 1909. Members of the famed "Senate Four" may not always have seen eye-to-eye with President Theodore Roosevelt or Speaker Joe Cannon, but the mutually-respectful and productive relationship deteriorated as Roosevelt's presidency went on.

Confronted by dangerous fissures in its party, Republican leadership in the Senate also exerted subtle control over subpoena power. In the 1900s and early 1910s, beginning-of-session resolutions granting subpoena authority to Senate committees without specific investigative agendas had become common. As late as the 61st Congress, however, committees chaired by Regular Republicans received "persons and papers" authority, while authorizing resolutions by

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[64] "Angry House Rides Over Its Leaders," *New York Times*, March 10, 1904. Page 1.
[65] "Congress Fights On Roosevelt Serene," *New York Times*, January 10, 1909. Page 1.
[66] "House Gives Up War on Roosevelt," *New York Times*, February 2, 1909. Page 1.
[67] "Roosevelt Attacks Hemenway's Report," *New York Times*, February 22, 1909. Page 2.

insurgents or other Republicans of questionable loyalty were amended or pigeonholed.[68] As such, the Senate did not yet actively *encourage* investigations, especially by Insurgent Republicans. In 1909, Senator William Borah proposed that the Civil Service and Retrenchment Committee investigate "the civil service[,] and as to the enforcement and administration of the civil-service law, rules and regulations..." with power to send for persons and papers, authorization to sit during recesses or sessions of the Senate, and to employ "such stenographic, clerical experts, and other assistants as may be necessary."[69] Audit and Control's amended resolution stripped the provisions relating to subpoenas and sitting during recesses and sessions, and limiting the committee's supplementary staff allocation to authorization "to employ a stenographer *from time to time*."[70] (my italics) By the next Congress (the 62d), committee proposals to send for persons and papers were not stripped by the Audit and Control the Contingent Expenses of the Senate. Thus, even the Committee on Woman Suffrage was capable of subpoenaing witnesses and documents for any investigations it might conduct.[71] Other actors within the Senate still controlled the amount of spending on investigations and the employment of clerical assistance, but perfunctory approval of investigative *authority* meant that committees could perform smaller investigations on their own, or get a start on larger ones before seeking funding from the chamber.

The early part of the 20th century represented a particularly difficult time for the Senate, as the body was ultimately unable to stave off pressure to change its means of selection from the indirect model set forth in 1787 to the direct election established by the 17th Amendment. Rather than a simple democracy-enhancing initiative, direct election was heavily motivated by dysfunction in the state legislatures' handling of senatorial selections. In order to easily control pivotal groups of state legislators, influential persons had an incentive to prevent redistricting, or to simply buy off the necessary votes. Prominent exposés by Lincoln Steffens in *McClure's* and David Graham Phillips in *Cosmopolitan* did some injustice to their subjects, but nevertheless helped diminish the Senate in public opinion (Merrill and Merrill, 206-7). Haynes (1906, p. 51) cited seven cases over the previous fifteen years where the allegations of corruption had "been put forward with enough of presumptive evidence to make them a national scandal." Haynes (1906, p. 131) attributed the move for popular election of Senators to a "feeling [which] has become widespread that many of the men who, in recent years, have found their way to the Senate, are little disposed to hold themselves responsible to the people, or to heed the broader interests of our country." Contrary to Riker's (1955) argument that public canvasses had achieved a *de facto* popular election of Senators in many states by the turn of the century, Schiller and Stewart (n.d.) find considerable divergence in the amount of multi-candidate contestation, and note a high rate of state legislatures which adjourned having been unable to pick a Senator. Schiller and Stewart note that for five states where mining and railroads were

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[68] In the 61st Congress, this power was given to the standing committees headed by Regular Republicans Francis E. Warren (Military Affairs), Jacob Gallinger (D.C.), and Clarence Clark (Judiciary), Regular Republicans all. Similar resolutions from insurgents Moses E. Clapp and Albert J. Beveridge were not approved, and Robert M. La Follette, Sr.'s resolution for the Committee on the Census did not even request this power. In the 60th Congress*, prior to his vote against the Payne-Aldrich tariff*, Beveridge's resolution had been approved.

[69] Journal of the Senate, 61st Congress, 1st session. July 9, 1909. Page 146.

[70] Journal of the Senate, 61st Congress, 2nd session, January 19, 1910. Page 89.

[71] 48 *Congressional Record* 2041. February 14, 1912.

particularly strong, there was a smaller number of Senate candidates receiving votes, but it is unclear whether this is due to canvassing or other forces.

The Senate's decline and resurgence in public esteem in the early 20th century supports the notion that the Senate's modest investigative workload was a unique and uncharacteristic occurrence, not the product of sustainable political practice. Great concentrations of wealth and heavily-capitalized corporations provided a backdrop for bribery and extortion alike, and as the Senate became increasingly noted for questionable elections, their legitimacy to mount investigations of other institutions necessarily declined. These Republicans achieved success in the short-run by avoiding conflict over measures—most notably the tariff—that threatened to unsettle relationships between legislators as well as those between lawmakers and their constituents. As the fraying of these relationships became inevitable at the end of the decade, the outcome was quite often the unexpected retirement of men who had just earlier been regarded among Washington's most powerful.

In the 61st Congress, a period that tests the conceptual definition of "unified party government," inquiries into the tariff and the Ballinger-Pinchot affair threatened to damage the party and embarrass the Taft administration. By drawing scrutiny to scandal and economic difficulties, Insurgent Republicans hoped to destabilize the Regulars and lay groundwork for a return by former president Theodore Roosevelt. But Republican leaders in the Senate used their position to co-opt investigative fervor, conducting their own investigation into the tariff and helping to steer the Ballinger probe to a joint committee. In these examples, the House's defenses against damaging investigations bent almost to the breaking point, but illustrate a second means by which the Senate generates activity under unified government—that is, deliberate efforts to entrust difficult, publicly-salient subjects to the more collegial, credible membership of the upper chamber. In William Howard Taft's first Congress, inter- and intra-party conflict was channeled into venues that would provide greater security for Regular Republican interests.

The best-known investigation from this period is the joint committee effort into the Ballinger-Pinchot affair. This controversy revolved around accusations that Ballinger, Taft's Secretary of the Interior, had aided the joint Morgan-Guggenheim [popularly shortened to "Morganheim"] syndicate's mining operations in Alaska at the expense of conservation projects initiated during the Roosevelt administration. Gifford Pinchot, Roosevelt's appointee as Chief Forester, pressed the allegations strenuously and criticized Taft for firing the General Land Office official who had initiated the allegations.

As soon as the first allegations against Ballinger broke in the summer of 1909 there was a clamor for an investigation. While both sides of the Taft-Ballinger/Roosevelt-Pinchot rivalry early on sought an inquiry, the President and Secretary's partisans intimated that the fullest probe would reveal "acts of indiscretion and subordination" in Pinchot's Forest Service and ultimately usher in an "overhauling of the land office" and an "imperiling" of more officials in that office. The *Washington Post* on December 19, 1909, reported on the "confident attitude" of Ballinger and alluded to "ammunition which is known to have been laid by and kept dry by the Secretary and the President."[72]

Unhappily for Ballinger and Taft, both of the appropriate Senate standing committees for an investigation were under the control of conservationist chairmen. Moreover, Public Lands member Wesley M. Jones of Washington state was a close personal friend of Ballinger (the

[72] Johnson, Arthur C. "Ballinger to Fight," *Washington Post*, December 19, 1909. Page 2.

former Seattle mayor) while Senator Weldon Heyburn of Idaho stood among those accused of wrongdoing in the affair. Dueling investigation resolutions introduced in the Senate by Jones and by Democrat Thomas Gore of Oklahoma reflected the Senate's difficult position regarding the personnel of an investigative committee.[73] The *Times* speculated that regardless of the route taken, that there was "little question" that Minnesota Senator Knute Nelson, chair of the Committee on Public Lands, would be enlisted to chair the committee; nevertheless, the paper noted that the other Senators named in the Gore resolution were too extreme to be partial to Ballinger. Nelson, a Roosevelt supporter and sometimes-Insurgent well regarded for integrity, was indeed chosen to lead the joint committee, but the remainder of the Republicans chosen were decidedly of a Regular Republican character. According to reports, Taft desired the joint committee in order to signal, by his signature on the joint resolution, his support of the inquiry. In late December 1909, Rules Committee chair John Dalzell met with Taft to work out the form of the investigation.[74] But this proved to be something of a miscalculation after House Insurgents were able to force a chamber vote on the members chosen to the panel, departing from the traditional practice of the majority and minority party leadership selecting their respective parties' appointees.

Even though the House vote to select committee members seated Insurgent Edmond H. Madison of Kansas, who would vote with the Democratic minority to condemn Ballinger, the joint nature of the committee permitted pro-Administration legislators to avoid some of the greatest political damage. The joint committee's June meeting provided the baseline result, that by a 7-5 majority (7 Republicans versus 4 Democrats and Madison) Ballinger was, in the headline of the *Wall Street Journal*, "Not Guilty."[75] But the intensity of two minority briefs was blunted by the committee's decision to take no further action until the committee's members could read the reports, a timeframe that coincided with Congress's summer recess. A meeting scheduled for early September in St. Paul, Minn, brought controversy when Republican Senators Elihu Root and Frank Flint announced that they would not attend, giving the minority the window necessary to prevail on a resolution condemning Ballinger—until the attending Republicans vacated the meeting, calling into question whether a quorum was present. Though the minority made their findings public, Republican maneuvering prevented official release of any report until after the November election. Secretary Ballinger was reportedly "greatly disappointed" at Root and Flint's failure to travel to St. Paul, but the committee's foot-dragging merely signaled his diminishing standing: as the committee gathered, Taft announced the appointment of Pinchot partisan Joseph Holmes as Director of Mines, which the *Times* reported "displeased" the Secretary; and another of "Ballinger's enemies," Frederick Haynes Newell to the Reclamation Service.[76] Taft's continuing steps to undermine his Interior Secretary would eventually force him out, in a resignation dated January 1911 but announced in early March.

The activities of the Joint Committee to Investigate the Department of Interior and the Forestry Bureau in the Department of Agriculture, thus, amount to a messy but conservative handling of the Ballinger-Pinchot affair. Given the Insurgent clamor in the House of Representatives (shown in the vote to bypass the Speaker in choosing the chamber's representation) a House select committee might have given the Taft administration considerable

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[73] "First Step Taken in Ballinger Inquiry" *New York Times*, December 22, 1909. Page 7.
[74] "Land Inquiry Laid Out," *Washington Post*, December 29, 1909. Page 4.
[75] *Wall Street Journal*, June 4, 1910. Page 8.
[76] "Director of Mines" *New York Times,* September 5, 1910. Page 6.

trouble—more than that produced by the joint committee minority's release of its views. Supposing that the House had deferred to a Senate-only investigation, however, greater pressure would have fallen on the selection of members. Referring the matter to a standing committee in the Senate was an untenable proposition, given the links between members and the persons involved in the alleged misconduct. Some form of Senate participation in the investigation, however, via a joint committee, provided greater input for pro-administration Republicans than could be expected from the deeply divided Republican membership of the House.

A second challenge for Republicans arose from the aftermath of the Payne-Aldrich tariff, which was followed by dramatic increases in the prices of many household necessities.[77] As pressure built to uncover the causes of the price increases, leading Republicans in Congress plotted a defense of the previous year's legislation. Wrote the *Washington Post*,

> "Frankly admitting the fear that a prolonged investigation of the increased cost of living by the ways and means committee of the House, or as provided for by any of the rival resolutions, might drag throughout the summer and work to the disadvantage of the Republicans in the elections next fall, the Senate finance committee yesterday formulated a program for a quick, sharp inquiry of the subject in all its phases."

The article continued by relaying the Washington consensus that "[n]o problem, it is said, has proved so embarrassing to the Republican party…Several senators declared the high prices would be attributed directly to the tariff, and unless something were done to refute these charges the Republican party would be compelled to bear the brunt of the attack."[78] An article in the *New York Times* the same day noted that Senator Lodge had recently "devoted weeks to a study in defense of the tariff bill."[79]

Here again, the Senate's actions helped to quiet dissenters in both chambers. The *Post*'s headline of February 1, 1910 had been: "Food Inquiry Sure: Ways and Means Committee to Draft Resolution." Four days later, the *Post* noted that Payne and Aldrich had been discussing the subject, and speculated that Payne "eventually may see the uselessness of a double inquiry."[80] The Senate opted not to endorse the resolution of West Virginia Republican Stephen Elkins, instructing the committee to examine whether the tariff was responsible for price increases. A number of possibilities suggest themselves for why the Senate ended up with the inquiry. One, that the Republican Insurgency in the House was too volatile at that time to add to the mix the controversial subject of Payne-Aldrich. Evidence for this interpretation comes from the Insurgents' win earlier that year, forcing a chamber vote on the House appointees to the investigation of the Pinchot-Ballinger scandal. Second, that any fallout from a disputed course of investigation (that is, an attempted whitewash) would have less consequence among the six-year

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[77] At a minimum, Congress's failure to reduce the duty on newsprint helped ensure that the newspapers would give full voice to complaints about the cost of living.

[78] "Inquiry By Senate." *Washington Post*, Feb. 3, 1910. Page 1.

[79] "Senate Inquiry Now Into Cost of Living." *New York Times*, Feb. 3, 1910. Page 4.

[80] "For One Food Quiz," *Washington Post*, Feb. 5, 1910. Page 1. A related set of committee hearings, into cold storage and food prices in the District of Columbia, produced some of the most startling findings when it was revealed that rotten meat had been served in the White House during the Roosevelt administration, and even alleged that "the practice of using unduly aged meat was well established in many wealthy homes." ("Roosevelt's Guests Ate Aged Meat." *New York Times*, Feb. 8, 1910. Page 2.)

terms of the Senate than in the House, the entire membership of which stood for re-election that November. Third, and perhaps most significant, that it might be politically impossible for the Senate leadership to block its members from trying to duplicate an eventual House investigation; but that the House leadership could (and did) use the existence of a Senate probe to justify shutting down activity in their chamber. The story of the cost of living investigation's migration to a select Senate committee, however, provides additional mechanism for how investigations in unified government occur in the Senate and not the House.

The return of the House of Representatives to Democratic control in 1911 brought three significant investigations of corporations—the well-known "Money Trust" probe by Arsène Pujo's Banking and Currency Committee, and select committee investigations of anti-trust violations by U.S. Steel and the American Sugar Refining Company. These were facilitated by new caucus rules that barred members of the Ways and Means committee from serving on the Rules Committee, advancing Kentucky Representative Augustus O. Stanley to membership on Rules and Robert Lee Henry of Texas, "an antitrust advocate" (in the words of the *Post*) to its chairmanship.[81] Thus, Stanley's resolution to investigate U.S. Steel, stuck in Rules after its introduction in the third session of the 61st Congress, was virtually assured movement to the floor with its sponsor's improved station.[82] Moreover, the investigation was reputed to be popular in Congress, with the *Wall Street Journal* relaying notice that many members "would submit to the personal inconvenience incident" to the investigation, concluding sarcastically that

> The manly patriotism of the average member of the House of Representatives is wonderful, and the readiness with which he could be induced to forego everything for the sake of undertaking onerous duties…is simply miraculous.[83]

Indeed, the greatest debate setting up the two select committees revolved around the method of choosing Democratic members—following the precedent from the Ballinger-Pinchot investigation in the previous Congress, Henry of the Rules Committee introduced a resolution naming the proposed members of the select committee, bypassing the party caucus. A lively discussion arose when a resolution was introduced to name the members of the sugar trust committee, but while members questioned the propriety of bypassing the caucus (or the Speaker), the remarks did not devolve into criticism of either investigation itself.[84]

The investigation of U.S. Steel featured a parade of blockbuster witnesses: Andrew Carnegie, Charles M. Schwab, and Theodore Roosevelt, along with U.S. Steel's president, James A. Farrell. Recapping the former President's testimony, the *Washington Post* wrote that "Probably nothing in the vigorous life history of Theodore Roosevelt was more dramatic than his public appearance today…" noting that after arriving "unheralded" at the committee's borrowed hearing-room in New York City Hall, he "vigorously shook hands with members of the committee, declared himself delighted to see everybody, and got down to business."[85] Part of that business, for Roosevelt, consisted of an indirect criticism of the Taft administration's

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[81] "Steel Trust Under Fire" *Washington Post* March 28, 1911. Page 6.
[82] "Steel Inquiry Delayed" *Wall Street Journal*, January 31, 1911. Page 2. (reporting that the minority Democrats supported Stanley's investigation, with three Republicans "on the fence")
[83] "Broad Street Gossip" *WSJ* April 8, 1911. Page 7.
[84] 47 *Cong. Rec.* 1253-1258. May 16, 1911.
[85] "Saved Nation's Ruin, Says T.R." *Washington Post*, August 6, 1911. Page 1.

handling of trusts, advocating greater government regulation of large corporations rather than attempting to break them up.

The Senate's most notable investigation of the 62d Congress was its probe into the financing of presidential campaigns in the 1904 and 1908 elections, with heaviest emphasis into Standard Oil's contribution of $125,000 to the 1904 Roosevelt campaign. This example emphasizes a number of unique elements of Senate investigations. First, the collegiality of the Senate is evident in the choice of Moses Clapp, Progressive Republican from Minnesota and a Roosevelt supporter, to chair the sub-committee of the Privileges and Elections committee performing the investigation. The involvement of a Roosevelt partisan helped ensure that the group's work would be conducted in an equitable manner; for Clapp, chairmanship appears to have been something of a poisoned chalice, as efforts to forestall or limit the committee's work would be seen unfavorably by the public. Second, the use of a standing committee (rather than a select committee) was consequential to the course of the investigation: when, in late August, the former President angrily telegraphed Senator Clapp, asking to appear before the subcommittee to refute statements made by Standard Oil president John C. Archbold, Clapp's colleagues had already left the capital on recess. According to the *Washington Post*, committee members were exhausted from two years of work on another investigation (into William Lorimer's use of vote-buying to win his seat), and out of the five subcommittee members, only two (including the chairman) were left in the city, denying the group a quorum.[86] Denying Roosevelt a venue to respond to Archbold's charges for over 5 weeks deprived the former President of a valuable opportunity during the height of the campaign season. That it could happen with Roosevelt's own supporter chairing the inquest is almost incomprehensible; a select committee would have had far less excuse for abandoning Washington before permitting a witness the chance to respond to pressing allegations.

It should be noted that this expansion of authority among committees headed by reliable Republicans, and ultimately universalization to all committees, of subpoena power in the Senate predated the popular election of Senators. Though the 17th Amendment was approved in the Senate in June 1911, it took almost two years for direct election to receive a vote in the House of Representatives and be ratified by the states. While it is conceivable that liberalization of the Senate procedure in the 62d Congress anticipated the closer relationship Senators would be forced to cultivate with mass publics, we have seen that the Senate had long been tolerant of investigators.

Senate Dominance, Reprise

If agitation among the Insurgent Republicans in the 61st Congress and the voluminous record of House Democrats in the 62d suggested that investigative activity in the House might model more closely the traditional patterns of the Senate, these hopes were dashed within Woodrow Wilson's first term of office. After producing a still-impressive 8 subpoena authorizations in the 63d Congress (three on the conduct of individual federal judges, another into the physical assault on Rep. Thetus Sims in Washington, DC), the House authorized only 7 investigations over the next four years. Unlike the many committee studies concerned with aspects of World War II, America's participation in the First World War motivated the House only to look into the Ordnance Department.

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[86] "T.R. Asks Hearing," *Washington Post*, August 25, 1912. Page 1; "Roosevelt's Request Denied," *New York Times*, August 26, 1912. Page 2.

Divergence during World War I is evident in closer examination of the work of House and Senate committees. In September, 1917, Alabama Congressman J. Thomas Heflin, commenting on the release of a telegram by German Count von Bernstorff requesting money from his government to influence members of Congress, stated before the House that he "could name 13 or 14 men in the two bodies who, in my judgment have acted in a suspicious manner" and later told journalists that he had heard "that there is a gambling room in Washington where pro-German and peace-at-any-price Members of Congress get their pay by being extraordinarily lucky at cards." A resolution was introduced proposing a select committee of seven to look into Heflin's charges, as well as "all other statements, matters, or things pertaining to such telegram of said Von Bernstorff and comments of Members of Congress thereon."[87] This committee was to be given power to "enforce attendance of persons to Washington" and "to require the production of such books and papers as may be pertinent." However, the Rules Committee reported a resolution referencing only Heflin's remarks—not the Von Bernstoff telegram more generally—and granting no investigative powers to a select committee of five. Heflin unsuccessfully attempted to have the committee enlarged, hoping that he would be able to win inclusion of an ally in a bigger group.[88] In the same Congress, the 65th, the House Committee on the District of Columbia undertook an investigation of the Commerce Department's purchase of land from the Chevy Chase Land Co., but none of the D.C. committee's investigative resolutions during the Congress had been approved.[89] The committee appears to have been able to speak with all of the important participants in the deal, but the distrustful nature of many exchanges with the real estate company employees suggests that the investigators were not very far from requiring formal subpoena power.

Beginning with the Republicans' return to control of the Senate in the 66th Congress, authorizations for specific investigations began to be renewed easily from one term to the next. This appears to have had mixed effects. On one hand, new practice could facilitate a potentially-profitable probe such as that of Teapot Dome, a scandal which was slow in developing and required a second authorization before compelling evidence started to become available. On the other, Senators were able to extend indefinitely investigations with little or no potential and which apparently served little purpose other than to provide members with access to supplementary funds and staffing. The Senate's Audit and Control committee mostly limited its review of investigations to the questions of what the expected cost of the investigation would be, and whether there was sufficient funding to carry out the investigation. In 1921, authorizations began to be accompanied by a funding limit, subject to subsequent resolutions amending the figure.[90] According to Haynes (1938, p. 556), a procedural change in 1926 to remove Audit & Control from sole referral of investigations was intended to increase standing committees' gatekeeping power. In this way, each committee's investigative workload was its own choice, and there was little central authority to judge the relative merits and performance of different committees' investigations.

[87] 55 Congressional Record 7368, September 24, 1917. House resolution 148.
[88] 55 Congressional Record 7786, October 4, 1917. House resolution 165.
[89] "Purchases of Land by the Bureau of Standards." House Report 65-1157.
[90] 61 Cong. Rec. 1056, May 5, 1921. House resolution 56.

The Rise of Conservative Investigations in the House, 1938-1945

The different dynamics of the House can again be seen upon its return to Democratic control in 1931, after 12 years of Republican dominance. Out of over 40 investigating resolutions proposed in the first session of the 72d Congress (1931-1933), only 5 were approved, most languishing in the Rules Committee. But thirteen were approved in the 73d Congress and twelve in the 74th, indicating much greater access to investigations than under previous periods of unified government in the House. The investigation of the American Retail Federation's alleged creation of a "superlobby," old-age pension organizations such as that of Francis Townsend (which netted contempt of Congress indictments for Townsend and two aides), and real estate "bondholders committees" in the 74th Congress suggest the ability of Democrats to use investigative power as a means of defending the President and attacking real or potential enemies. Schickler (2007) and Schickler and Pearson (2009) argue that after 1938, conservative Democrats became advantaged in their access to investigation authorizations, and used this resource to militate against New Deal programs and other liberalism in the Roosevelt administration. This finding turns out to be overly modest, as Schickler and Pearson overlook the degree to which the chamber generated *liberal* investigations before the 75th Congress. But as conservatives gained control of the Rules Chairman, liberal-oriented probes slowed to a crawl while conservative investigations accelerated.

The change in polarity of the House's investigative work, however, was not an immediate one, as leadership and access to the Rules Committee continued to matter through the 75th Congress (1937-1939). In 1936, Rules member (and later chairman) Howard W. Smith used his influence on the committee to curtail Vito Marcantonio's investigation into silicosis fatalities in workers at a Charlottesville construction firm (Dierenfield 1987, p. 62). Dierenfield (p. 95) concludes that as a result of Rep. Smith's investigation of the NRLB the Congressman "became a recognized and influential expert on labor matters despite not being a member of the Labor Committee." Of 96 resolutions whose title bears the word "investigate" (or some variant thereof) were introduced in the House[91] in the 75th Congress, only four House-only probes were authorized—the customary investigation into House candidates' campaign expenditures, the Un-American activities special committee, a probe into the organization and costs of the federal courts, and blanket authority to the Merchant Marine committee during the 1938 summer recess. Rules in 1937 approved investigations of un-American activities and sit-down strikes, only to have them rejected by the floor.[92] The nature of this change can be seen in Table 3.3. Considering that in the two previous Congresses and the four subsequent Congresses, between 11 and 20 percent of proposed investigations were approved, this represents a considerable tightening of the overall investigative agenda.

[91] These figures do not include resolutions concerning the funding of investigations (which at this time were sent to the House Accounts Committee), or which asked executive officers to investigate subjects.

[92] A separate un-American activities investigation would be approved in 1938, after an FBI investigation into the German-American *bund* found no evidence of illegal activity.

Table 3.3 – Resolutions introduced in the House and containing word "investigate" in title, 1932-48 and 1953-54.

Congress	*Year*	*Proposals for legislative investigations*	*Approved by House*	*Total investigation proposals*	*Percent approved*	*Proposals to fund investigations*	*Requests for investigations by the executive*
72	1932	49	5			3	8
73	1933	32	6	91	16.48%	5	5
	1934	59	9			21	0
74	1935	51	12	82	19.51%	10	3
	1936	31	4			4	1
75	1937	59	1	96	5.21%	11	1
	1938	37	3			2	2
76	1939	46	7	89	11.24%	9	4
	1940	43	3			5	4
77	1941	79	14	115	14.78%	14	4
	1942	36	3			15	0
78	1943	85	15	124	16.94%	29	0
	1944	39	6			20	2
79	1945	106	15	141	13.48%	35	0
	1946	35	4			9	1
80	1947	59	14	104	17.31%	36	1
	1948	45	4			21	2
83	1953	60	18	87	25.29%	24	1
	1954	27	4			12	1

In the Senate, the chairmanship of the crucial Committee to Audit and Control the Contingent Expenditures of the Senate never passed from administration loyalists during FDR's administration, held first by James F. Byrnes of South Carolina (from 1933 until Byrnes's appointment to the Supreme Court in 1941) and then Scott Lucas of Illinois. By 1945, conservative Judiciary chairman Pat McCarran found his investigative proposals blocked by Lucas's committee. A resolution renewing the Judiciary Committee's investigation into the alcoholic beverage industry was held up, ostensibly because the committee's intended examination of monopolistic practices in the industry would cost "much more" than the $10,000 proposed budget. This was a meager excuse for denying the committee, as other committees had routinely received small sums to investigate sprawling investigation topics.[93] The following month, McCarran appeared as the opening witness before the Joint Committee on the Organization of Congress and immediately addressed himself to the problem that "The Committee on Audit and Control has…set itself up as the censor…of the activities of every standing committee that seeks to investigate or enlighten itself on a subject within its jurisdiction," asserting that the members of a committee, "many of them men quite senior in their

[93] 91 *Cong. Rec.* 785-791 (February 5, 1945).

experience and training here in the Senate…should certainly be responsible for a sum of money sufficient" to conduct investigations.[94]

In the joint 1938 investigation of the Tennessee Valley Authority, clamor among the administration's opponents was successfully channeled into a joint committee free of outward hostility to the project. The controversy began in March, when the TVA's chairman, Dr. Arthur E. Morgan, came out in support of a federal commission's ruling against a monetary claim by Tennessee Senator George Berry for marble deposits rendered unusable by the Norris Dam. In a long statement, Morgan criticized his two fellow directors for attempting to settle what he believed to be a frivolous claim, and charged that the TVA struggled in its "effort to secure honesty, openness, decency, and fairness in government," asking that Congress appoint a joint committee to investigate.[95] Senator Norris, eager to protect the agency he had helped create, initially called for the investigation to be undertaken by the FTC, but this received scant support in Washington. Arthur Krock wrote that the Norris/FTC proposal was a non-starter, as the Commission had "been not unmindful of the fact that the acts of the TVA majority, now under attack…have been repeatedly called to Mr. Roosevelt's attention without any corrective action on his part."[96]

Though Morgan had requested a joint committee of House and Senate, a power struggle developed in Congress over the structure of an inquiry. The charge for a Senate select committee was led by Republican Styles Bridges of New Hampshire and Utah Democrat William H. King; while on the House side, calls rose up from the Republican leadership and Texas Democrat Maury Maverick. After continuing to press for an FTC investigation, Norris yielded to the proposal for a select Senate committee, on the condition that neither he, Bridges, nor King would take part. At a conference of Congressional leaders and the President on March 14, a joint investigation was agreed. According to the *Chicago Daily Tribune*, the President's price for supporting an investigation was that no "avowed enemies" of the TVA would be appointed to the select committee.[97] Additionally, Roosevelt—who had been holding his own fact-finding meetings—asked that he be allowed another opportunity to interrogate the directors before Congressional votes. Norris was able to win the Senate's approval for a clause asking the investigative committee to look into the "manner in which the utilities ha[d] impeded or harassed" the TVA, and while this received a great deal of criticism in the House Rules Committee, Rules did not strip the language from the proposal that went to the floor. The administration won again when appointments to the committee were announced, with none of the resolution sponsors seated; as well as when the committee chose Francis Biddle as chief counsel.

The majority report, filed April 3, 1939, cleared the TVA of wrongdoing and dismissed Arthur Morgan's criticisms of his fellow directors. Three of the committee's four Republicans composed a spirited minority report, criticizing "waste and inefficiency" in the Authority and alleging that the government erroneously calculated the user savings and flood control benefits

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[94] "Organization of Congress, Part 1." Joint Committee on the Organization of Congress. CIS Number 79 S762-0-A. Page 3.

[95] Catledge, Turner. "Full TVA Inquiry Asked of Congress," *New York Times*, March 3, 1938. Page 1.

[96] Krock, Arthur. "In the Nation," *New York Times*, March 4, 1938. Page 22.

[97] Manly, Chesly. "President Acts to Bar Foes of TVA in Inquiry," *Chicago Daily Tribune*, March 17, 1938. Page 1.

from the project. In a separate statement, one of the dissenters, Republican Thomas Jenkins of Ohio, slammed Biddle's leadership and characterized the majority report as a "whitewash."[98]

In contrast with the Ballinger-Pinchot affair, the TVA investigation reflects demonstrates the utility of a strong presence of a more robust Congressional leadership in seating a favorable select committee. By seating a contingent solidly in favor of the New Deal, Democrats were able to avoid divisions that threatened to give the opposition wins in committee votes. Instead, it was Republicans who divided, not only on whether to support the majority report, but also on whether a "whitewash" had occurred. Even in the House Rules Committee, whose chairman John O'Connor would be marked that August as a target of the President's "purge" for his opposition to the Reorganization Act, conservatives failed to modify the authorizing resolution's language to exclude examination of private utilities. In floor debate over the TVA resolution, Representative Maverick criticized how the House failed to take up his earlier call for a TVA investigation—in his words, "sat back and bowed down and scraped before the Senate." Responding to a question from a Texas colleague as to whether inaction was simply "failing and refusing because of a situation existing in the Rules Committee about reporting out any resolution that does not suit them," Maverick remarked drolly that he was "criticizing everybody in general. The House needs it as a whole; possibly the Rules Committee needs it in particular."[99]

The emergence of the House Un-American Activities Committee has traditionally been seen as another piece of evidence of a rise in conservative activity in the House, and which failed to invite a more moderate Senate counterweight. Here again, the record indicates that the committee's early (pre-1939) activities prominently included anti-Nazi investigation, and that this was not merely a cover for conservative efforts to uncover Communists. The *Post*'s report on the Rules Committee vote on the 1938 Dies resolution characterized the measure first in relation to "the German-American bund" and only second to other "Nazi, Fascist, or Communist activities." In the Rules Committee, Rep. Dickstein cited the upcoming Bund training camp on Long Island as likely to spark unrest, while anti-New Deal Edward Cox of Georgia said he desired "an investigation that would run them out of the country."[100] While liberal critics of the committee such as its original sponsor, Samuel Dickstein, criticized a perceived Dies' focus on Communism to the neglect of Nazism, hearings into the Bund continued. The Bund focus produced revelations, drama, and newspaper headlines. At a September 1938 hearing, committee investigator John Metcalfe, who had infiltrated the Bund, testified wearing the storm-trooper uniform he had acquired during his membership in the organization, reporting a slew of allegations about the organization and loyalty of the Bund and other Fascist groups, and their penetration into military contractors such as the Douglas Aircraft Corporation and Boeing.[101] In October, the *Times* gave front page coverage to HUAC allegations that the Gestapo had established a "special section" for propaganda and espionage in the United States.[102] And when

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[98] Catledge, Turner. "TVA Gets Approval of Investigators; Cleared of Wrong." *New York Times*, April 4, 1939. Page 1.

[99] 83 *Cong. Rec.* 4393 (March 30, 1938).

[100] "House Group Asks Inquiry on Nazi Bunds," *Washington Post*, May 11, 1938. Page X1.

[101] See Metcalfe's testimony, "Investigation of Un-American Propaganda Activities in the U.S." Vol. 2, pp. 1108-1180. The *Times'* description was of "a young man with a Hitlerian mustache and haircut, appeared on the witness stand wearing what he said was the Bund uniform--a 'Hitler brown shirt,' with Sam Browne belt and a blue and gold brassard."

[102] "Says Gestapo Aids Nazi Activity Here," *New York Times*, October 6, 1938. Page 1.

the Bund's leader was in attendance at a business luncheon where Dies was slated to speech, the Texas Democrat departed from prepared remarks about Communism to include "a denunciation of Nazism and Fascism."[103] Recapping a 1939 hearing in which former Major General Van Horn Moseley defended the Bund from the witness table and made a number of outlandish charges against the Roosevelt administration, even a conservative newspaper like the *Los Angeles Times* could offer an even-handed appraisal of the information that had been conveyed by HUAC.

> That various people, both of left and right, seek to set up Communism or Fascism here was not exactly news even before the general's testimony and its rather theatrical accompaniments. There seems reason to believe, however, that the numbers concerned in either movement are not large, and that both sides are making a noise out of all proportion to their importance….That the Reds are themselves spreading tales of plots in order to enhance their apparent importance and that the Nazis and Fascists are copying the tactic seems the most probable explanation of the hullabaloo. Gen. Moseley seems to be taking the situation somewhat too seriously.[104]

An editorial in the *Washington Post* later that year gave credit to Dies for having given the public "a much better idea" of the finances and operations of both the Communist Party and the Bund, with the paper supporting measures that would reveal membership lists and require persons following foreign instructions to "register" with the State Department while warning against efforts to ban membership in un-American organizations.[105] And for Walter Lippmann, the nature of HUAC's quarry explained the committee's weak legislative record and excused much, but not all, of the committee's poor behavior. While conceding that Dies and his associates were "often lawless in spirit and disorderly in their methods," Lippmann maintained that "only the very innocent and self-deluding have any doubt that the Dies Committee have been attacking a formidable evil…The menace is real. It is not imaginary. And it must be met."[106]

Dies' Committee on Un-American Activities thus met considerable criticism from liberals for its methods and disproportionate focus on Communism rather than Nazi and Fascist groups, but the committee's anti-Nazi efforts in its early years have been minimized by later commentators focused on connections between the pre-World War II years and the abuses of the 1950s and 60s. It was not until 1943, for instance, that committee liberal Jerry Voorhis submitted minority views on a committee report. By this time, the committee had been in existence for nearly a decade, and well astray of Lippmann's counsel that Un-American Activities needed reform and better staffing to be of continued service to the country. But neither the committee's creation, nor its early existence, stands as an open rebuke to the majority party's interests. To the extent that the House Rules Committee took a more conservative tack after the election of 1938, this was a development that was met by Senate efforts to pre-empt or overshadow hostile investigations, as Schickler (citing Barone 1990) notes of the Truman Committee to Investigate the National Defense Program.

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[103] "Nazi Leader at Dies Luncheon Hears Inquiry Head Attack Bund," *New York Times*, December 9, 1938. Page 10.
[104] "The Townsend Rout," *Los Angeles Times*, June 2, 1939.
[105] "Democracy in Practice," *Washington Post*, October 1, 1939. Page B8.
[106] Lippmann, Walter. "Today and Tomorrow: The Dies Committee," *Washington Post*, Jan 11, 1940. Page 9.

The House's re-authorization of Un-American Activities in consecutive Congresses in the 1930s was an exception to its practice of *not* renewing committees' investigation power. In the Senate, by contrast, investigations were commonly permitted to span two or more Congresses. This ran against previous patterns, which saw approximately 95 percent of reports issued in the Congress the investigation was first authorized. One somewhat egregious example of an unfulfilled Senate investigation concerns an inquiry into alleged wrongdoing by the Superintendant of Shiloh National Park—initially delegated to a select committee at the end of the 73d Congress (June 1934) investigative authority was extended in February of 1936 to extend to the end of the 74th Congress (i.e., June of that year), meaning that the inquest lingered for fully two years without either exculpating the superintendant or getting to the root of the alleged malfeasance. And despite two resolutions into this presumably simple matter, no report appears to have been issued. Similarly, a select committee's investigation into the "production, transportation, and marketing of wool" spanned from the 74th Congress to the 78th. Authorization extensions for these inquiries foreshadowed renewals for examinations of organized crime, unions, and subversive organizations. Another consistent part of the Senate's activity involved repeated permission to look into minor affairs requiring travel to desirable locales—prospective changes to the boundaries of Yellowstone and other National Parks, or the administration of the Virgin Islands. The Senate's propensity for junkets and other frivolous investigations provided context during discussions of the Legislative Reform Act of 1946.

What led investigations—previously conducted within a single session of Congress, often completed within weeks or days of an authorizing resolution—to morph into the extended enterprises of the 1930s and 1940s? Increased complexity of investigation subjects is an explanation that garners little support: small and conceptually simple investigations received multi-Congress treatment just as studies into more difficult subjects. Another hypothesis is that increased ideological diversity in Congress led members to position themselves as overseers of particular institutions, industries or other institutions. Because reduced homogeneity within the Democratic Party meant that members could not easily implement their legislative preferences, they sought to exert influence through hearings and other aspects of non-legislative action. A related hypothesis links long-duration investigations to their increasing prevalence in the *standing* committee system and not via select committees. With fewer junior members clamoring to win plaudits in hearing rooms and reports, and with investigations increasingly under the control of standing committee chairs, the pace slowed. When, in the Senate, investigation authorization and funding resolutions began to be referred to standing committees, the result was less scrutiny of legislator proposals. During a 1943 discussion of the state of Senate investigations, Audit & Control committee chairman Scott Lucas (D-Ill.) stated that the Truman committee was different from most other investigations in that the Senate "know[s] exactly what that committee is constantly doing, and its activities are matters of public knowledge and are in the public interest."[107] Majority Leader Alben Barkley (D-Kentucky) betrayed a similar skepticism towards investigation authorizations, estimating that 9 out of 10 proposed probes cleared the standing committee stage without any preliminary hearings on the necessity and scope of Senate investigative activity.[108]

Even as World War II afforded many more opportunities for members to look into the acts of government, and interest in investigations was high, House authorizations stayed

[107] 89 *Cong. Rec.* 10530 (December 9, 1943).
[108] Ibid.

concentrated among conservatives, particularly from the South (Schickler 2007). Growing skepticism from liberals prevented conservatives from having free rein in examining the Executive and other preferred topics. Dierenfield (p. 104-105) notes that by the end of 1940 Smith had begun to worry about the floor's willingness to continue conservative investigations such as the Un-American Activities committee. This prompted a proposal (unsuccessful) to enshrine his investigation of extra-authorization agency activities as a standing joint committee, inserted amidst measures to create a joint legislative staff and appropriations committee. The story of how the House Un-American Activities committee won promotion to standing committee status in 1945 similarly shows how wrangling over investigation authorizations had moved inside the Democratic Party.

Epilogue

The reforms to the system of Congressional investigations in the Legislative Reorganization Act of 1946 did very little to return activity to the patterns prevailing before the Rules Committee's capture by the conservative coalition. By granting Senate committees an inherent subpoena power, the legislation merely formalized practice in the upper chamber that had been in place for many years. The joint committee's staff director, George B. Galloway reported in a 1951 *American Political Science Review* article that the "spirit" of the Act "clearly frown[ed]" on the future creation of select committees, and noted that their number had diminished in the years following enactment. But at the very time that Galloway was writing, a Democratic House was on its way to authorizing investigations in no fewer than 20 committees in the 82d Congress (1951-1953). There were nine select investigating committees, including a study into tax-exempt educational and philanthropic institutions with an eye towards "determin[ing] which such foundations and organizations are using their resources for *un-American and subversive activities* or for purposes *not in the interest or tradition of the United States*."[109] (my italics) Such a probe was plainly redundant of HUAC's mission and jurisdiction, as well as that of Ways and Means, an argument that was raised by resolution's numerous opponents on the House floor.[110]

This new subversion probe would be conducted moderately and with considerable respect for the nation's major foundations by Georgia Democrat Edward E. Cox, but a revived investigation under Republican control in the 83d Congress erupted into bitter recriminations, outlandish claims, and widespread mockery. The history of the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations closely parallels that term's most famous investigation, Senator Joe McCarthy's use of the Government Operations Committee. When Democrats retook control of the House in 1957, select committee investigations finally receded from the scene, with Rules Committee chairman Howard W. Smith declaring his opposition to the expense and distraction of investigating committees. This marked a sort of stalemate between the House and the Executive, but from the perspective of conservatives, a stalemate preferable to assertiveness from an unbowed group of Northern liberals, notably Wayne L. Hays of Ohio, whose defiance of his colleagues on the tax-exempt foundations committee went without electoral consequences, and who went on to introduce the resolution renewing the committee in the 84th Congress, bidding to be its chairman. Under these conditions, the House still could not return to its usual role as an intermittent and frenetic

[109] 98 *Cong. Rec* 3491. April 4, 1952.
[110] Ibid, pp. 3489-3503.

inquisitor. It would require greater advances by Democratic liberals to restore to the chamber the rhythm of partisanship that had characterized its interactions with the White House and the outside world for the past century.

In the next chapter, I examine the concentration and institutionalization of the investigative enterprise in an age when select committees had fallen out of favor. Systems that had previously accommodated energetic members now provided few opportunities to pursue topics outside of the standing committee system. Consequently, it was Congress's generalists—members of units with wide jurisdiction—who performed an increasing share of the major inquiries undertaken.

Chapter 4
Measuring Congressional Investigative Activity in the Post-War Era

In the previous chapters, I have discussed the initiation of investigations during the time period when legislators were required to receive chamber authorization to compel the production of documents and testimony. However, in recent decades, the standing rules of the Senate and (later) House have permitted committees to undertake investigative activity without making an appeal to their parent body. These changes have been contemporaneous with a changed media environment, which members of Congress have often leveraged to achieve enormous publicity. More recently, demands on legislators' time have reduced the amount of time spent in Washington, DC, on legislative work. How these factors translate into the occurrence of investigative activity is unclear. This chapter brings this issue into the present day, by relying on a number of softer measures of investigative activity than that in Chapter 2.

Every year, Congress holds thousands of hearings which do not relate to the passage of a specific legislative proposal. The breadth and number of these meetings are impressive, and involve everything from wonkish check-ups on government agencies to explorations of new sectors of the economy to field hearings on intractable problems such as teenage drug use and nursing home conditions. If we are to consider Congress as a "transformative legislature," this is an important aspect of its capacity to affect outcomes, and the quotes above by a single Senator suggest the vastly different relationships possible between legislators and members of the outside world. Even if such hearings do not pertain to a piece of prospective legislation, or never ultimately result in the development of legislation, they possess the capacity to influence public opinion, expose wrongdoing, aid criminal investigators, or compel businesses or groups to change their ways. Armed with subpoena power and the authority to immunize witnesses, congressional committees have extensive ability to gather and disseminate facts.

While the investigative function of Congress has long been recognized as an important one (Wilson 1885), it has not been the subject of sustained empirical focus by political scientists. Here, the innumerable possibilities for inquiry, the subtle strategic interactions between investigator and investigat*ee*, and the sheer difficulty of measuring hearing outcomes that differ in kind across cases—can easily overwhelm a student's efforts to systematically collect data about investigations. In this paper, I develop a number of measures of investigative activity and, examining their results, discuss the different portraits of modern (post-1950) congressional investigations produced by these diverging perspectives.

The problem of measuring investigative activity

The first obstacle to measuring investigative activity is the difficulty of defining and distinguishing "investigative" conduct. One dictionary provides the definition of the verb "to investigate" as "to observe or inquire into in detail; examine systematically"[111], while a more comprehensive definition reads "[to] carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth."[112] The term "systematic" suggests few obvious indicia to distinguish some hearings from others. Consider two hearings: in one, a single witness is examined at length on a number of specific topics. In

[111] *American Heritage*, Fourth edition. 2000.
[112] New Oxford American Dictionary.

another, several witnesses representing different perspectives (employees, investors, CEOs; professional athletes, physicians, parents) are invited to give their insight on a particular subject. It is difficult to discern which of these is more "systematic"—depending on the circumstances and the intensity of questioning, either of these hypothetical hearings may better meet the standard of "investigative." The second definition's stipulation of the word "formal" gives us considerable purchase if congressional committees required special authority to make their inquiries, but this was only the case before 1946 in the Senate and 1974 in the House of Representatives. Since that time, the power to subpoena witnesses and documents has been an inherent committee power. This complicates efforts to determine whether specifically *investigative* powers are being used in a given interaction: if a witness understands that a committee can easily subpoena his appearance, there is little reason for him to refuse to comply with a committee request which is not accompanied by a subpoena.

The definitions' use of "discover", "examine" and "inquire" provide a bit more guidance to an operationalization of investigations. Despite the fact that we cannot use formal investigating authority for the post-1946/1974 era, we can nonetheless exclude "legislative," or "bill-referral" hearings from our list of investigation suspects. In the presence of a legislative proposal, Congress may perform inquiry into the advisability or impact of the proposal which takes the appearance of an investigation. While important testimony may be produced, such hearings cannot properly be termed "informative." Consider that the development of a bill is prior to the scheduling of hearings on it: if legislators are operating under uncertainty about the severity of the condition which is to be rectified by the bill, they harm their interests by allowing this uncertainty to be resolved at the referral hearing stage. If an "investigation" on a bill's subject matter showed that the solution required was less extreme than that proposed, the bill is likely to fail. However, if fact-finding revealed that a much stronger bill would be accepted by Congress, then the bill's proposer realizes suboptimal benefit from the policy innovation.

One class of congressional activity, therefore, would include any policy-oriented activity not actually performed in the process of enacting a *specific* bill. This would sweep out a wide class of congressional information-gathering. For instance, the Chairman of the Board of Directors of the Federal Reserve makes semi-annual appearances before both the Senate Banking and House Financial Services committees. These hearings undoubtedly constitute oversight—they meet Aberbach's standard of "congressional review of the actions of federal departments…and of the programs and policies they administer." However, these meetings are generally cordial and do not threaten to reveal incompetence or improper behavior at the Fed. Indeed, nothing about the appearance of a senior administration official or other witness before a congressional committee necessarily *implies* that Congress is obtaining information about the outside world. The Fed chairman's appearances are required under the Humphrey-Hawkins Act of 1978, so they do not demonstrate present members' interest in hearing him. And even if these hearings were *not* required, we might have a difficult time verifying that they were intended to provide information to members of Congress. Instead, members might appreciate the presence of a well-known figure so that they can appear on C-SPAN, or to take positions on financial matters. (Many hearings will do nothing to disabuse a viewer of this hypothesis.) Aberbach's finding that most oversight takes place in an advocacy context generates additional skepticism about the information-*gathering* aspect of hearings.

A less cynical observer would respond that oversight hearings serve an important function, even if they are not always a credit to legislators' intelligence and incisiveness. Simply by putting witnesses on the record and forcing them to explain the activities of their departments

to an audience, oversight hearings have the effect of setting standards for officials and constraining the behavior of bureaucrats. Routine oversight permits the legislature to develop expectations about how agencies should work and how officials should act; disregarding these expectations is at the peril of the official and his bureaucracy. With this in mind, it may make sense to talk about this wide swath of hearings as "investigation candidates"—it is conceivable that useful information is being gathered, but there is no guarantee.

In clarifying the dynamics of information and hearings, it may be helpful to interject on the likelihood of diminishing return to congressional hearings. If members were canny, incisive, obsessive overseers of the bureaucracy, then congressional investigations of the executive branch would be unnecessary. If bureaucrats understood that no malfeasance would go unnoticed, they would not commit malfeasance. And if legislators fully understood the implementation of policy by bureaucrats, legislators could continuously update legislation to maximize the policy benefit to themselves. This remark is nothing more than a corollary of the principal-agent problem, but by this formulation we may acknowledge that oversight must be imperfect. When congressional reformers decree that "each standing committee…shall exercise continuous watchfulness of the execution by the administrative agencies," as they did in the Legislative Reorganization Act of 1946, they aim at an executive which is fully understood by the legislature, and consequently admits no surprises.

Wilmerding (1943), writing about the birth and difficult early years of the GAO, identifies another concern with "watchfulness." In Wilmerding's view, Congress repeatedly failed to understand that an accounting body—being responsible for signing off on expenditures—would face strong difficulties in exposing and impugning improper conduct post-hoc. With greater involvement from an oversight body, agents can more plausibly argue that failed initiatives were undertaken at the recommendation—or with the consent—of the overseers. And the oversight body will naturally be reluctant to look into matters in which its acquiescence—or failure to prevent malfeasance—might become an issue. Wilmerding documents how legislators misunderstood the British institution which served as a model for the GAO, and repeatedly failed to understand the inherent shortcomings of an accounting-slash-investigations organ. The watchfulness-oversight model contains elements which make it an imperfect substitute for investigations. First, it may consume legislators' time while only producing a specific form of benefit—agency compliance with member requests. Second, the oversight relationship may produce governance problems of its own, frustrating efforts to improve legislation and programs, and preventing malfeasance from being uprooted. To understand how effective Congress is at policing its area of cognizance, two behaviors require considering. How much time does Congress spend interacting with the agencies it supervises, or in other words, what is the gross amount of knowledge? But also, how much time does Congress spend in its most highly volatile, most systematic exercise of information-gathering?

As pertains to the executive, investigations are therefore a form of oversight, but must be understood as distinct from that model of oversight which seeks to continually review an agency and fully understand its operations. To return to an earlier example, if the banking committees' meetings with Ben Bernanke are perfectly effective at gaining information about monetary policy and communicating Congress's preferences about that policy, then Congress should never have cause to initiate supplementary fact-gathering about the Fed.

In many cases of Congressional hearings, it may be difficult to observe whether the questions into executive behavior possess a meaningful *investigative* element, or whether they are essentially within the world of "continuous watchfulness." An early student of congressional

investigations distinguished formal investigations from informal ones on the grounds that the former "get information which is not regularly or readily obtained." (Dimock 1929, p. 17) A raw count of the number of hearings conducted by a congressional committee need not tell us whether that committee is conducting investigations, or merely routine oversight. Years ago, it was possible to identify when Congress undertook extraordinary information-gathering by looking to the chamber's creation of select investigating committees, vesting these (or, less often, standing committees) with subpoena power, and appropriating funds for these investigations. Ever since the Senate and House vested their committees with plenary authorization to conduct investigations and issue subpoenas, this indicator has disappeared.[113] For Mayhew (1991 [2005]) the problem is obviated by the high threshold for what constitutes an "high-profile" exposure probe. No mere oversight is likely to produce the requisite 20 days of front-page coverage necessary for inclusion in Mayhew's dataset.

What is needed, then, is a means of measuring the investigative activity of congressional committees. Prior to 1946 in the Senate and 1974 in the House, select committee authorizations provided an indicator which could be used for this purpose, but because we would like to study the effects of these reforms on investigative activity, we must find another indicator for both pre-reform and post-reform eras.

Related studies of Congressional activity

Oversight

Most academic literature on Congress's investigative function has focused on oversight of the executive branch. According to the leading authority on the subject, oversight constitutes "congressional review of the actions of federal departments, agencies, and commissions, and of the programs and policies they administer, including review that takes place during program and policy implementation as well as afterward." (Aberbach 1990, p. 2) Research in this vein has attempted to assess the adequacy of Congress's monitoring and control of the bureaucracy. Because Congressmen and their staffs learn about agencies in numerous ways, many of them quite informal, scholars have struggled to measure oversight. Early work (Bibby 1968, Ogul 1976) determined that the act of overseeing the bureaucracy did not appreciably advance the interests of individual members, that the resources devoted to oversight were largely insufficient, and that member turnover and inattention produced inadequate review of agencies.

Starting from the postulate that oversight is costly to members and may provide relatively few benefits, rational-actor models have attempted to identify the implications of legislator incentives on monitoring of agencies. McCubbins and Schwartz (1984) made an important theoretical contribution by hypothesizing that Congress outsource oversight, making agencies porous to outside groups who prefer the agencies work a certain way and who are willing to bear the costs of monitoring.[114] However, Joel Aberbach's (1990) statistical analysis of hearings, and

[113] Congressional authorizations for subpoena power and committee expenses were never a perfect marker of investigative activity. Discussion of the investigative function in newspapers and in Congress are rife with observations about the wastefulness of certain committees. On expenditures and authorizations data alone, it remains entirely possible that sudden reductions in "investigative" activity could be as much about the chamber imposing control over its members as reduced inclination to uncover and examine wrongdoing.

[114] McCubbins and Schwartz categorize oversight into "police patrol" and "fire-alarm" models, and though they elaborate on the greater monitoring task associated with police patrols, they do

interviews of legislators and staff, provide strong evidence that Congress is generally well-informed about what happens in agencies, and that it is the legislators who do the most snooping around agencies that are best able to participate in more formal forms of oversight. But despite its extensive documentation of the scope of oversight activities and the ingenuity of members in gathering information, the work does not look into the characteristics which encourage members to undertake oversight in the first place.

More recent work on oversight has related a number of congressional and agency variables to the occurrence of oversight. Gailmard (n.d.) indicates that committees whose agencies put more pages in the *Federal Register* perform more oversight as a share of the committee's hearings. Gailmard's analysis also shows that greater polarization within the chamber produces higher proportions of oversight, a result also found at the subcommittee level by Feinstein (n.d.). Feinstein shows that designated "oversight & investigations" subcommittees perform a greater number of oversight hearings than other subcommittees. Subcommittees with members who write more successful bills, with greater average member seniority, and whose parent committees win closed rules more frequently, all perform less oversight.

High-Profile Investigations of the Executive

A second major axis of academic study of investigations has used high-profile investigations to study relations between executive and legislative branches. Conventional wisdom holds that investigations of the executive branch should be more likely during periods of divided government than when one party controls Congress and the Presidency. In spite of the conventional wisdom—and to little effect on its persistence—scholars have been largely unable to establish a relationship between divided/unified control of government and investigative activity. In the period 1946-1990, Mayhew (1991 [2005]) finds 15 "high-publicity" investigations in 18 years of unified control and 14 such investigations in 26 years of divided government, hardly evidence of partisan victimization of presidents. Latter-day extensions of Mayhew's design paint a slightly different picture. Kriner and Schwartz (2008), and Parker and Dull (2009), re-examine Mayhew's list and supplement the analysis with a broader sample of investigations, finding that press coverage was more extensive for Mayhew's divided-government investigations than for the unified-government cases. Additionally, since Watergate the number of investigative days and volume of hearing transcript pages have been higher under divided government. Similarly, Gailmard (n.d.) and Feinstein (n.d.) see increased oversight activity under divided government.[115]

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not add Wilmerding's argument, that close relations with the agency have their own costs. Indeed, the police patrol example comes with its own historical legacy of corruption in American cities. Samuel Walker's (1984) review of the history of the police's political legitimacy notes that rotation of officers' beats was an important part of the "de-personalization" of policing in the early and middle twentieth century. In at least one era in the nation's history, it was by *abandoning* the specialized, intimate presence of patrols that departments were able to achieve professionalization and reform.

[115] Mann and Ornstein (2006, pp. 151-158) present the most widely-cited recent account of congressional oversight's alleged decline. However, their only quantification of this phenomenon comes from a 2005 *Washington Post* article, which in turn mistakenly cites Aberbach's (2002) numbers on *legislative* hearings and meetings as oversight numbers. In fact, Aberbach's methodology tallied 587 and 559 oversight days in the first six months of 1983 and 1997

Mayhew (2002) looks at congressional investigations with a view to Congress itself. Identifying "member actions" mentioned in 38 general and era history works, Mayhew finds investigative activity to not have "come of age" until 1910, and that noteworthy probes have declined since the 1970s. Mayhew goes on to note that though the number of noteworthy investigative actions has declined in recent years, the possibility of member rewards from investigative activity has not disappeared, speculating that an enterprising legislator could have called CEOs to task for drawing huge salaries as they sent jobs overseas (p. 90). In some sense, Mayhew's vision has been realized in recent years, with congressional investigations of Enron (2001-2002), and the banking industry after 2008. Mayhew's methodology is superlative as a means of comparing member actions across type, but admiring students of investigations may nonetheless question whether it works as well within the same category of action: here, investigations themselves. As an example, Mayhew credits Everett Dirksen and Mike Mansfield for blocking the Bobby Baker investigation, the same number of member actions for the organized crime investigation in the 81st Congress, or for Iran-Contra. The concept of "actions in the public sphere" may diminish the study's ability to pick up investigations that had subsequent importance but were not blockbuster episodes themselves, or may over-report the activities of notable members of Congress (and in particular Senators) relative to more sporadic activity by more obscure legislators.[116] We are also interested in comparing investigative activity across chambers and committees, so it is beneficial to have a lower threshold for an investigation's significance. What is needed, therefore, is a measurement strategy that can provide valid indicators of investigative activity, applicable to a variety of investigation targets (i.e., executive branch, organizations, individuals), and sensitive to the possibility that investigations of subjects other than the executive branch may have impact on targets without the intensity or duration of a conflict with the executive branch.

Three Measures of Committee Information-Gathering

Non-referral hearings

As a first examination of non-legislative congressional activity, I consider all hearings where there has been no bill referred. The data for this analysis comes from the Policy Agendas Project, one component of which is the coding of all published hearings from 1946-2008 by subject matter. The Policy Agendas hearing data includes covariates designating whether the

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respectively, not the 60 percent declines reported in the article and, ultimately, *The Broken Branch*. The standard claim ran that if Republicans had neglected oversight in divided government, they would utterly abandon it under a president of the same party. Figures collected by Mann, Binder, and Reynolds (2007) indicate that oversight hearings in 2005 (unified Republican government) were off only 10 percent from 1995 (divided). A return to divided government in the 110th Congress was accompanied by a marked increase in oversight hearings.

[116] While Mayhew's list of member actions produces hits for many of the major investigations identified by other works (such as Schlesinger and Bruns 1975), there are omissions, most notably the Pecora investigation of 1934 (not surprising given it is commonly known for its counsel, not the relevant Senate committee chair (Duncan U. Fletcher of Florida). Mayhew's list also does not capture any investigations before 1835. These observations are not intended as a criticism of Mayhew's methodology, but to argue that an examination of Congress's investigative activity requires different dependent variables than does a broader work on significant member actions.

hearing was to consider a referred bill, appropriations, an administration proposal, or the creation of a new agency. Hearings not falling into these four categories include the phenomenon of interest, investigative hearings, but they also contain a good deal more. I call this group of hearings "non-referral, non-appropriations" (NRNA). NRNA hearings represent a large proportion of all congressional hearings. As shown in Figures 4.1 and 4.2, panel-days spent on hearings without bills have long outnumbered hearings where bills were discussed, and since the 100th (in the Senate) and 102d (House) Congresses, NRNA hearings have exceeded referral and appropriations hearings combined.

Figure 4.1 - Hearing Days in the House of Representatives

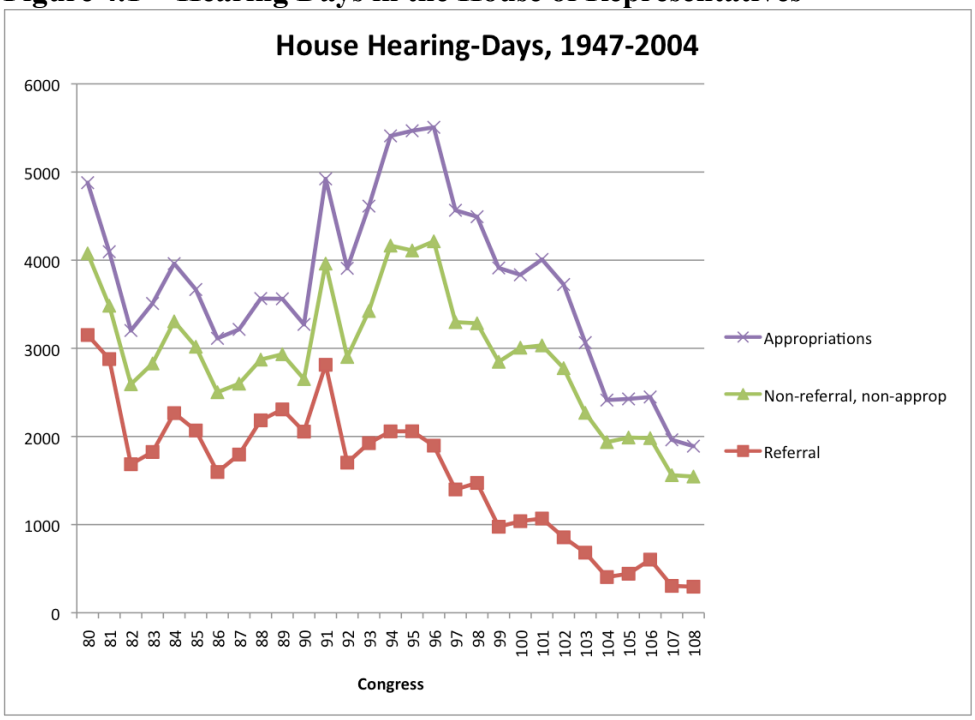


Figure 2 – Hearing Days in the Senate

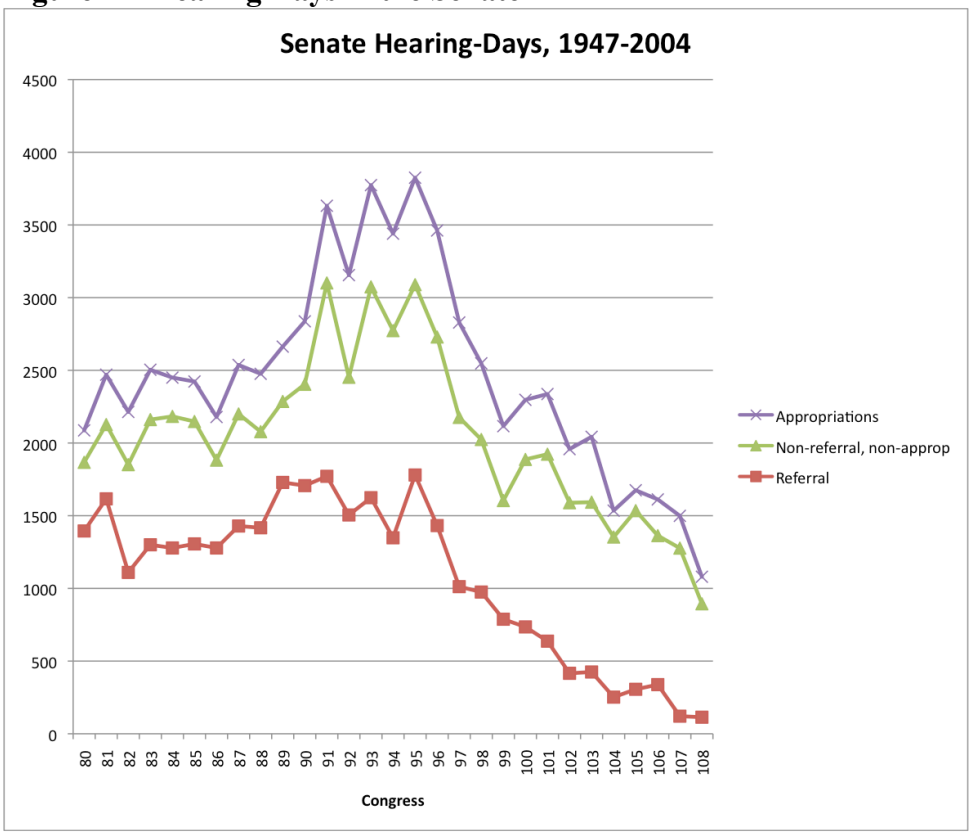


Table 4.1 shows a sample of NRNA hearings from the House Banking and Financial Services in 1998. These hearings include both routine appearances (such as the semi-annual appearance of the Fed chairman), as well as reviews of recent developments, reviews of programs, and other general fact-finding activities. The transcript from the hearing on "Restitution of Art Objects Seized by the Nazis…" reveals that this was one of a series looking into restitution of World War II property, with prior hearings "review[ing] questions about Swiss bank accounts and the disposition of Nazi gold." Recalling the definition presented earlier, this enterprise could surely be said "to observe or inquire into in detail; examine systematically." The committee's hearing into a Supreme Court's ruling on credit union legislation, by contrast, focused on reviewing the decision with a view towards crafting new legislation.

Table 4.1 – Example Non-Referral Non-Appropriations Hearings in the House Banking and Financial Services Committee, 1998

Hearing Title	Days
Conduct of Monetary Policy, Report of the Federal Reserve Board Pursuant to the Full Employment and Balanced Growth Act of 1978, P.L. 95	1
Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs	1
Federal Money Production	1
Year 2000 Readiness of HUD, Treasury, and Federal Financial Regulatory Agencies	1
Counterfeiting Using Personal Computers	1

Operations of the Department of the Treasury's Financial Crimes Enforcement Network	1
Supreme Court's Feb. 25, 1998 Decision Regarding the Credit Union Common Bond Requirement	1
East Asian Economic Conditions, Part 2	2
Electronic Funds Transfer of Government Benefits	1
Review of the Operations of the International Monetary Fund	1

Another of these hearings, on the Treasury Department's upcoming implementation of electronic delivery of government benefits, fits with a pattern of "continuous watchfulness" rather than looking to find wrongdoing or failures at an agency. In the introduction to the hearing, subcommittee chair Marge Roukema praised the "significant benefits to both the Federal Government and the recipients of Social Security and veterans benefits," but remained concerned by how the planned change, *nine months away*, would impact the elderly and veterans, who

> "…are likely to be the most affected by the move to electronic delivery of benefits, because of all kinds of physical as well as economic limitations, unfamiliarity with electronic banking, and limited income that will make it difficult for them to absorb any new costs which are associated with electronic delivery of benefits. *Close attention and review must be given*, in my opinion, to the Department of the Treasury's implementation of EFT '99."[117] (my italics)

Such concerns put Congress at the heart of policy implementation, and the exercise of working closely with Treasury may have many benefits for members of Congress: better understanding of the department and its personnel, greater appreciation by bureaucrats of the congressional presence, potential credit-claiming opportunities for members. But whatever success such a hearing may have as an act of *oversight*, it can scarcely be labeled "investigative." Non-referral, non-appropriations hearings, therefore, constitute a range of information-gathering activities which can be employed to inform legislators and the public, and to communicate with and send signals to agencies and outside groups.

Congressional Publicity

Another measure of Congress's information-gathering activities focuses on episodes where legislators' efforts to receive information received media attention. While any hearing may provide an opportunity for Congress to learn about agencies and outside groups, and to communicate legislator preferences, the legislature's power is at its greatest ebb when its procedures are in full view of the public. Publicized hearings increase the reputational costs to witnesses of exercising privileges they might readily avail themselves of outside of the glare of cameras: conferring with counsel, or refusing to give testimony that might incriminate oneself. When journalists are present at a hearing, their reporting may characterize the appearance of witnesses—"deceptive," "uncertain," "unprepared"—in ways that may incur heavy damage to personal and professional reputations. Only rarely, as in the case of Oliver North, has a witness

[117] "Electronic Funds Transfer of Government Benefits," Committee on Banking and Financial Services, Subcommittee on Financial Institutions and Consumer Credit. March 4, 1998.

emerged from a difficult encounter with a congressional committee with undiminished public standing.[118]

Legislators also have more selfish reasons to seek publicity for their investigative activities. Any notion of a "personal vote" for members of Congress (Cain, Ferejohn & Fiorina 1987) requires that the public recognize the name of their elected representatives and have some familiarity with their issue positions or constituent/district service. Political science literature has long emphasized that it is *in*-district presentation of a representative's Washington activities which is of primary importance (Fenno 1973). But for legislators who aspire to higher office, exposure solely in the district's media will usually be insufficient to build public support. For the ambitious member, therefore, high-publicity activity takes on vital importance. Unfortunately for these individuals, however, members of Congress compete for a small and dwindling share of the public spotlight. Analyses of media coverage show that with few exceptions, Congress has received less attention than the executive since at least the beginning of the 20th century (Cornwell 1959, Balutis 1977, Farnsworth and Lichter 2006). Farnsworth and Lichter (2006), examining network news stories from 1981, 1993, and 2001, find that Congress received 32 percent fewer stories than the president personally; when mentions to the White House, staff, and the cabinet are added, the entire legislature is out-covered by nearly two to one. Fowler and Law (2008) find that mentions of Congress in the *New York Times* have declined over time, from an average of over 800 per month in 1947 to approximately 450/month by 2006. Fowler and Law find that the *Times*'s attention to the Senate Foreign Affairs and Armed Services committees increases with the committee members' seniority relative to the rest of the chamber. [Nevertheless, Fowler and Law do not find that Senators adjust their transfer behavior with respect to the Foreign Affairs and Armed Services committees according to changes in the media visibility of those committees.] While news stories about the President have also declined over time, research suggests that this trend is less pronounced for the president than Congress (Cohen 2008).[119] Hess (1994) explains the technological and commercial factors behind Congress's decline as a newsmaker: generally, as communications technology has become cheaper, television networks and affiliates have shifted away from a reliance on expensive news bureaus. Instead of mining news from the single largest source (Washington), journalists have become free to gather stories over a larger geographic space.

I searched front-page *New York Times* articles for stories referring to congressional hearings, where there was either an investigation by legislators or staff, or if Congress was reviewing the results of an externally-generated investigation. Front-page mentions in the nation's leading newspaper are a common measure of attention to specific topics in public affairs. I reviewed all the search results for relevance to proposed or actually-conducted *Congressional* hearings—many of the results concerned administrative or legal hearings which drew comment from members of Congress. Articles were then classified by subject matter. All of the investigations noted by Mayhew appear prominently among my results. Hearings (and calls for them) relating to Iran-Contra, Whitewater, Clinton's 1996 fundraising practices, and the Monica Lewinsky scandal all appeared in numerous front-page stories. My results also elevate

[118] A *Los Angeles Times* poll conducted during the weekend break in North's testimony found that although only 48 percent of those polled thought North not guilty, 67 percent had either a very favorable or somewhat favorable opinion of him.

[119] See specifically Thomas E. Patterson's *LexisNexis* data on presidential coverage as a percentage of news stories (in Cohen, p. 66).

the congressional investigation of 9/11 in the 107th Congress to the level of the subjects covered by Mayhew.

Apart from investigations of the executive branch, the front-page dividends for legislators can be meager. Henry Waxman's celebrated hearings into the health consequences of using tobacco products, climaxing in a panel of tobacco company presidents declaring their belief that nicotine was not addictive, garnered only four front-page mentions in the *New York Times* despite their important impact on public opinion and political actors. Certainly, coverage did occur off the front page, but this example does illustrate the almost qualitative difference between attention to Congress's battles with the President as compared with nearly every other target. The President is continually followed by the news media, and any hint of malfeasance within his administration is reported on with great fervor. Similarly, the President's status as a co-equal branch of government, and the executive privilege which accompanies that status, produce an added layer of interactions between investigator and investigated.

Fifth Amendment Invocations

A third consideration in a committee's investigative activity is the degree to which it is *systematic*. Does the committee obtain facts which are readily available or which may be easily divulged, or does it push the boundaries of what witnesses are willing to talk about? As discussed earlier in this work, Congress enjoys the unique power to compel testimony and documents without the judicial stricture of probable cause. Confronted with a committee's demand for testimony or papers, a witness's safest escape is to invoke his Fifth Amendment privilege against self-incrimination.[120] One sensible measure of committee aggressiveness in investigations is then to note the frequency with which witnesses refuse to answer questions put to them. A witness's invocation of the Fifth Amendment is among the greatest spectacles of a congressional hearing, and familiar in the public consciousness through popular accounts of the McCarthy hearings, HUAC, the Watergate hearings, and Iran-Contra. The drama is heightened by the fact that most witnesses who "take the Fifth" do not provide any testimony *at all*: the right against self-incrimination does not allow witnesses to answer questions relating to part of a subject while refusing other questions on the same matter.[121] Thus, from the 1940s-1960s, when accused Communists and others wished to avoid admitting subversive activities, they had to refuse seemingly innocuous questions about their attendance at meetings, acquaintances, and the like. In the public mind, this shrouded even the most elementary interaction among Communists in a haze of illegality and villainy.

I searched the CIS summaries of congressional hearings for instances where a witness came before a committee or subcommittee and refused to testify. This represents a substantively-important subset of all Fifth Amendment invocations, but not all refusals to present testimony. For many witnesses, merely indicating to committee staff one's intention to take the Fifth is enough to prevent being called to a public hearing. However, when a witness is particularly prominent, or integral to the committee's fact-finding mission, a committee may insist on hearing the claim the privilege against self-incrimination. Summoning a witness to physically

[120] Witnesses may refuse to testify on the grounds that a committee is not pursuing a valid legislative objective, but the courts have traditionally given relatively generous leeway to committees on this question, and the finding of contempt against a witness stands once the committee has been upheld.

[121] *Rogers v. United States*, 340 U.S. 367 (1951).

appear before a committee may also make him more cooperative. As Sam Nunn explained in a 1995 hearing:

> We also have a practice of usually calling Fifth Amendment witnesses because we have had occasions where they decided to testify even after the Subcommittee had been notified by their attorney that they would assert their Fifth Amendment privileges.[122]

Refusals honored before the formal hearing may be mentioned within the hearing, or in committee reports, but a full accounting is complicated by the fact that committee members frequently make reference to the Fifth Amendment in other contexts, such as due process, takings, or self-incrimination privileges against government agencies. Since 1970, CIS has provided short, panel-by-panel descriptions of witness testimony in hearings, which notes whether a witness refused to testify. Before 1970, I searched the transcript for the phrases "tend to incriminate" or "might incriminate." The former language has been in use since at least 1890[123] and appears in numerous statutes. When a witness tends to employ a clumsy formulation of the Fifth Amendment privilege, this is usually the clarifying phrase offered by counsel or a member of the committee.

To check whether the change to panel-by-panel descriptions adequately captures hearings where a witness invoked Fifth Amendment protection, I repeated my full-text search for the period 1970-1972. Of the 41 hearings where the words "tend to incriminate" or "might incriminate" appeared without an appropriate notation in the panel-by-panel descriptions, only 2 pertained to bona fide refusals to provide answers. This compares to 30 percent of "tend to/might incriminate" hits being pertinent in the 1950s and 1960s. Most in-text hearing references to incrimination are simply the text of proposed legislation or relevant statute; many are discussions of what information an individual should be required to provide an executive branch agency.

Descriptive Results

While "non-legislating" hearings occur widely across congressional committees, committees differ greatly in the degree to which they generate intensive and noteworthy activity. Historically, a small number of committees have been responsible for most of Congress's investigative initiatives.

As shown above in Figures 4.1 and 4.2, NRNA's have increased over time as a share of all hearings, a development which has been consistent across committees. Unsurprisingly, committees differ fairly systematically in the proportion of hearings devoted to NRNA activity. For instance, hearings of the House Education and Labor committee have traditionally had a relatively low proportion of NRNA's: in 21 Congresses between 1955 and 1996, Education and Labor was below the median percentage of NRNA's 18 times. Likewise, the Banking committee was below median only 3 times between 1963 and 1994. Party control of the House seems to matter for which committees devote greater proportions of their time to non-legislating review. Though the principal committees tabbed with conducting investigations—the House and Senate committees variously labeled Government Operations, Governmental Affairs, Oversight and Reform over time—engage in NRNA hearings at higher rates than most other committees in their chambers, these panels scarcely possess a monopoly on this activity.

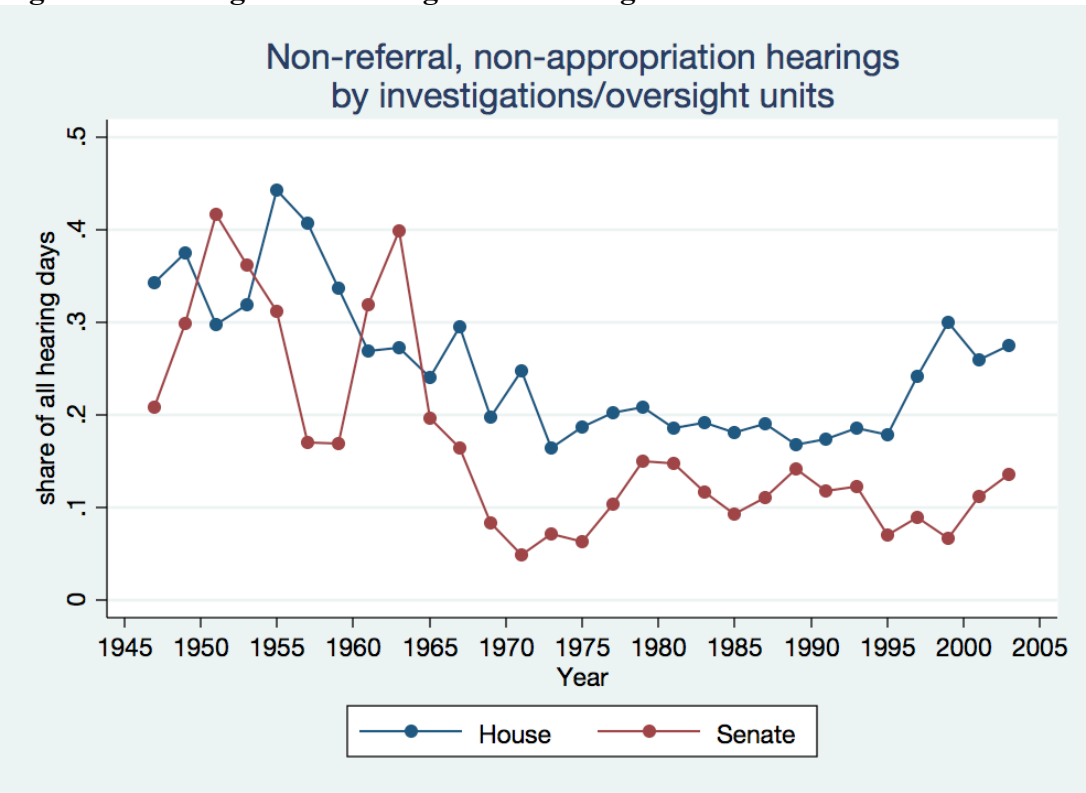
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[122] "Abuses in Federal Student Grant Programs—Proprietary School Abuses" Hearing before the Permanent Subcommittee on Investigations, July 12, 1995, page 33. S401-22.

[123] *Counselman v. Hitchcock*, 142 U.S. 547 (1891).

NRNA hearings are relatively well divided between Congress's designated investigations/oversight panels and other subcommittees. As shown in Figure 4.3, between the 80th and 108th Congresses (1947-2004), designated investigations/oversight subcommittees performed 23.2 percent of House of Representatives NRNA hearing-days, and 15.0 percent of such hearings in the Senate. But House and Senate demonstrate slightly divergent patterns on dedicated oversight in recent years.

Figure 4.3 – Designated Investigations/Oversight Subcommittees



In the Senate, specialized oversight/investigating subcommittees accounted for between 16 and 42 percent of NRNA hearing days in each Congress between the 80th and 90th. Since that time, however, oversight/investigating committees have produced only 10 percent of the total NRNA days, and never more than 15 percent. In the House, investigating committees similarly produced high shares of the chamber's information-gathering hearings. But despite a drop in the relative contribution of investigating committees between 1969 and 1996, the late years of the Clinton administration and even George W. Bush's first term saw quite high concentrations of NRNA hearings within designated investigating units, attaining 30 percent under divided government in the 106th Congress. By contrast, investigation/oversight subcommittees only conducted 6.7 percent of the Senate's NRNA hearing days in the 106th. In the House, the increased importance of designated subcommittees under Republican control of the chamber at the end of the 20th century results from these units keeping their activity at the same or higher levels as preceding Democratic Congresses, while other subcommittees reduced their levels of activity. In simpler terms, the Republican Revolution produced fewer informative hearings in the House, but only among subcommittees whose stated purpose was not investigations and oversight. On the whole, the Senate produced roughly the same amount of NRNA activity (until the 108th Congress) as

preceding Democrat-led Congresses, but less information was generated by the designated oversight and investigations units.

Thus, in the House, the response to divided government and skepticism about the role and performance of the state was to increase the prominence of dedicated investigators. In the Senate, divided government resulted in little change to existing patterns of behavior.

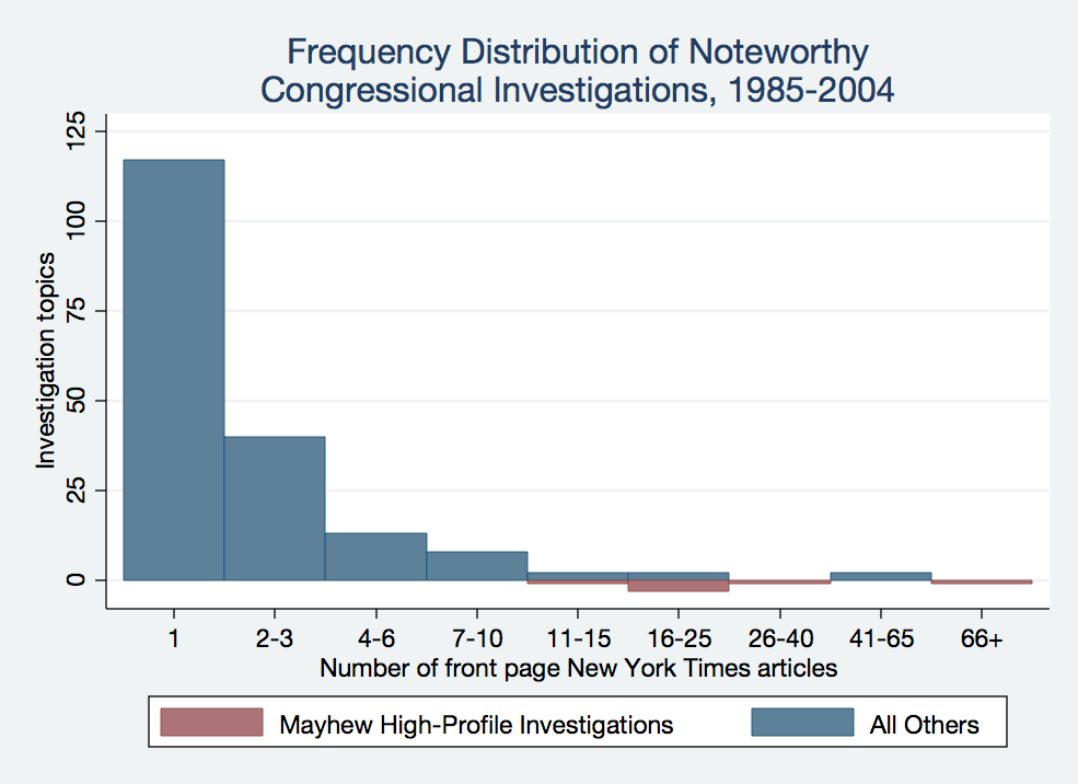
Congressional Publicity

The results for front-page *New York Times* coverage indicate that in recent times, the greatest media focus falls on investigative hearings in a relatively small number of congressional committees, and within those committees, a handful of subcommittees. In spite of the efforts of congressional reformers to encourage oversight and investigations across all committees, in many committees attention is rare. Either committees do not engage in much newsworthy investigative activity, or the media largely ignores the committees' investigative contributions.

Another major subject of inquiry from the 107th Congress, the failure of Enron, produced 25 front-page *Times* stories, more than all but the Clinton campaign finances scandal of the 105th Congress and the Iran-Contra investigation in the 100th. The several angles at work in the Enron scandal (executive fraud, loss of employee savings, energy policy, and accounting practices) provided material for no fewer than eleven standing committees to conduct hearings, all but two of these committees holding hearings with the company's name explicitly in the title.

Figure 4.4 shows the distribution of investigation coverages. The modal committee investigation receives only a single mention, but the mean is skewed heavily towards large investigations which receive extensive coverage in the *Times*. The six investigations highlighted by Mayhew (1990 [2005]) receive 227 of the 705 committee mentions in the dataset. Two more from the 107th Congress, the investigation into Enron and accounting practices, and the probe into the 9/11 attacks, each account for more than 40 committee-mentions. Of 262 committee-investigation dyads, six standing committees—the two Government Operations and Judiciary Committees, the House Energy and Commerce Committee and the Senate Foreign Relations Committee—combine for precisely one-half. These six committees accounted for only 26 percent of Congress's NRNA hearing days over the same time period.

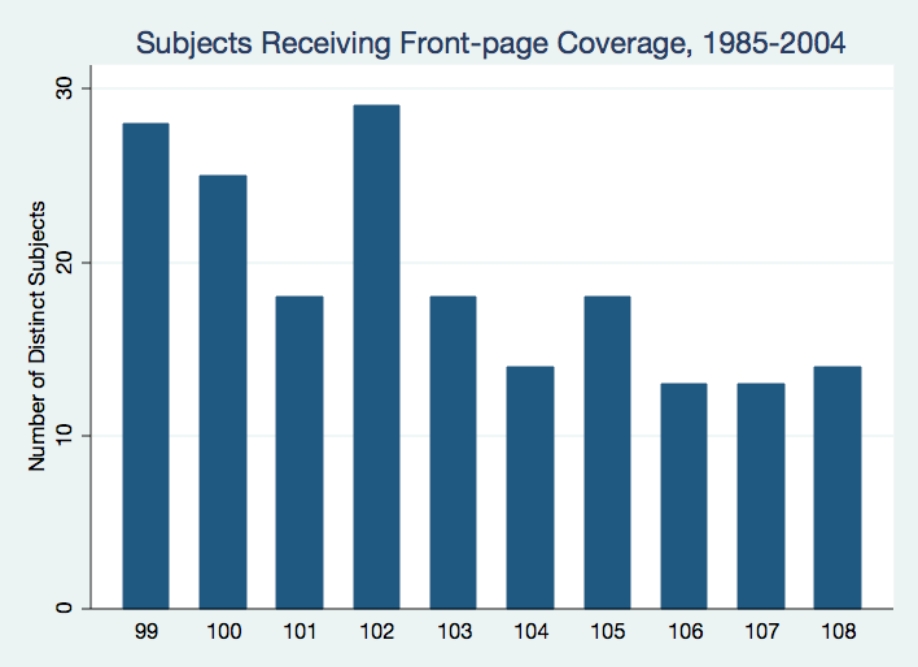
Figure 4.4 – *New York Times* Coverage of Investigations, by Investigation



Media attention to committees' non-legislative work appears to be rather heavily out of proportion to the rate at which they perform this work. Undoubtedly, congressional panels conduct meetings which are closely followed in the media but which do not involve investigations—the appearances of Fed chairmen is a prime example of this. Such media mentions do not appear in this dataset. These results disprove, however, any contention that committees conduct investigations at the same rate, or that an underlying "energy" characteristic produces both non-legislating *and* investigative hearings. Instead, committees are situated differently with respect to investigations. Some have the inclination to make a large proportion of their work devoted to uncovering difficult facts; others have a less confrontational orientation.

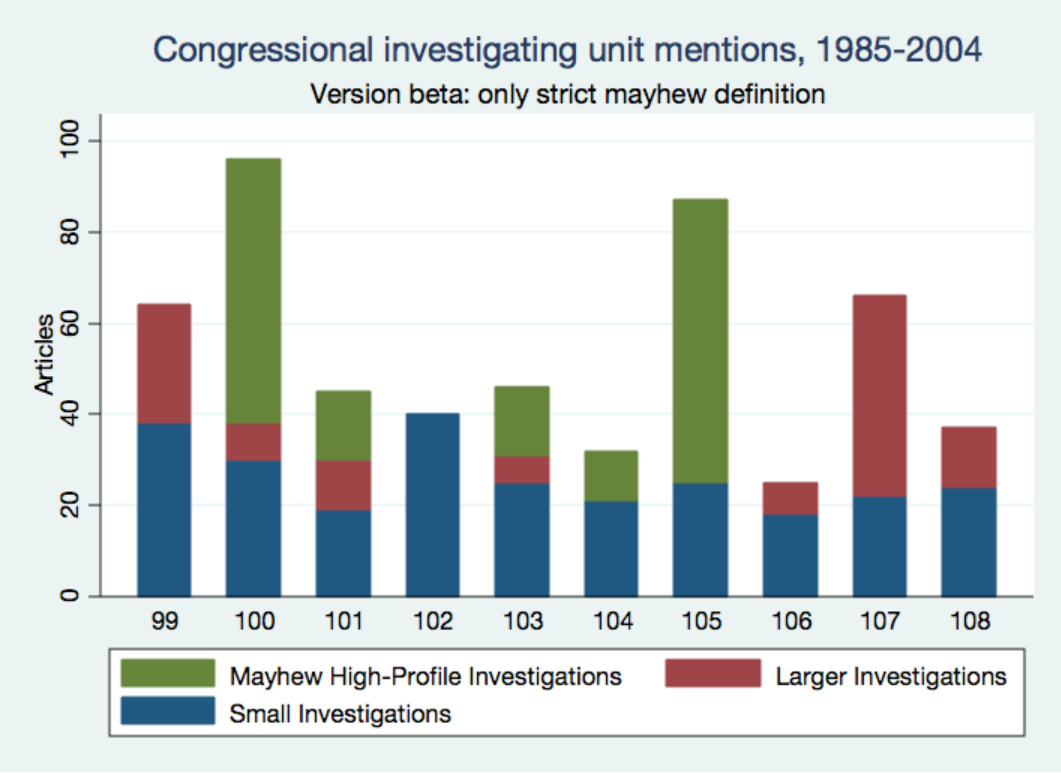
A raw per-Congress count of the number of investigation-related stories does not suggest a decline in this phenomenon over the period 1985-2004, but a closer examination of coverage indicates a change in the distribution of attention to congressional investigations. Figure 4.5 charts the number of different investigation "subjects" which received coverage on the front page in each Congress. While 100 investigation subjects received attention from the *Times* between the 99th and 102d Congresses, only 58 subjects received mention between the 105th and 108th. Thus, despite drawing only 13 percent fewer mentions than the 1985-1992 period, the Congresses of 1997- 2004 were observed to be inquiring on 42 percent fewer subjects. Figure 4.6 illustrates this development: the green portions of the stacked bars show Mayhew's high-profile investigations of the executive branch; red indicates subjects which received more than five articles in a single Congress but which did not otherwise fit Mayhew's criteria; the blue represents articles on subjects which themselves received five or fewer articles. The figure shows that the attention paid to Congress on relatively small investigations has been relatively low since the 103d Congress (1993-94). While the 102d Congress was able to produce 40 mentions on "small" investigations alone, more recent Congresses have attained relatively few such mentions.

Figure 4.5 – Number of Different Investigation Subjects on Front Page, 1985-2004



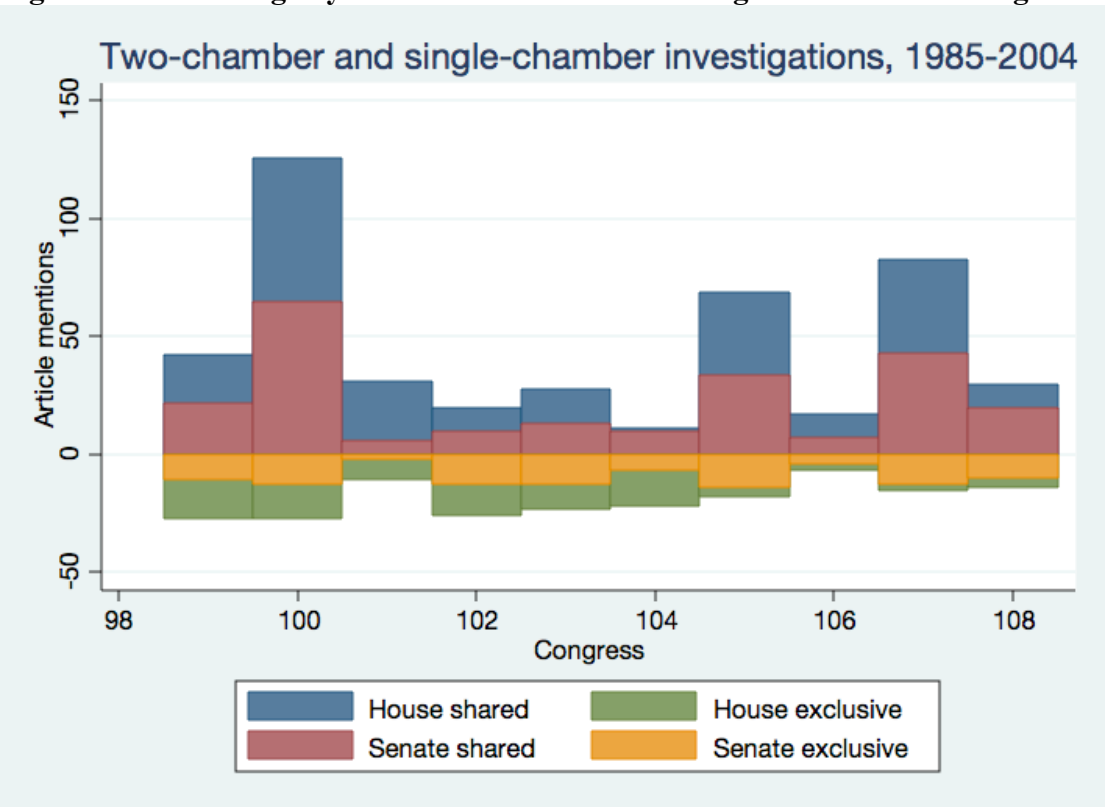
Instead, the comparison with earlier years is almost exclusively contingent on the occurrence of a large investigation—impeachment and allegations about Clinton's 1996 campaign in the 105th, Enron and 9/11 in the 107th, and Abu Ghraib in the 108th.

Figure 4.6 – Major and Minor Investigations as Share of Total Coverage



Surprisingly, the results do not suggest that coverage discriminates by chamber. In Figure 7, article mentions are grouped by investigation subject and subjects are classified as "shared" if *Times* coverage of the investigation mentioned participation (or proposed participation) at any time from both chambers; "single" means that all references on the investigation subject involved committees from one chamber. Broadly, the figure shows that when investigations receive attention from both chambers, mentions of one chamber do not overwhelm mentions of the other. A notable exception occurs in the 101st Congress, when the House did the lion's share of the work in two investigations, HUD and the S&L scandal (distinct from those related to the Keating Five), but where there was a limited Senate element. This figure is remarkable, however, for the fact that it shows a paucity in coverage of House-only investigations between 1997 and 2004.

Figure 4.7 – Coverage by Chamber of Shared and Single-Chamber Investigations



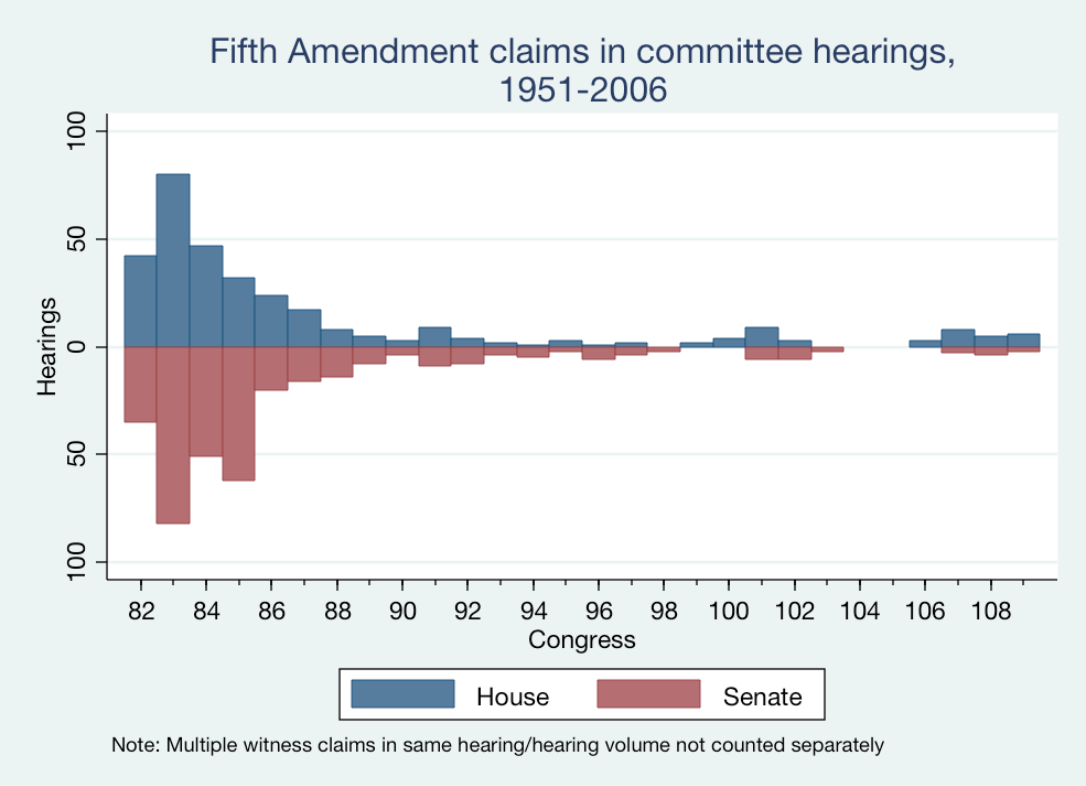
One of two possibilities emerges from this result: either House committees came to focus on larger, politically-advantageous investigations during this time; or the *Times* ignored or relegated to back pages its small-time, idiosyncratic investigative work. The latter is not an idle possibility: with the larger size of the House, and more frequent changeover in membership and committee chairs, the Republican committees of this era might have had a harder time attracting media for hearings on smaller subjects. Alternatively, the news and editorial orientation of the *Times* might have been a poor match for the subjects which these Republican House members saw fit to study. Such caveats emphasize the disclaimer that patterns in *Times* coverage are not dispositive of changes in how Congress operates. But if *Times* coverage is representative of newsworthy investigations, the results would suggest that the Republican Congresses of the late 1990s and early 2000s were about half as inquisitive as the Democratic Congresses of the 1980s,

but were no less effective in garnering attention in connection with highly salient subjects. It would be improper to go so far as to conclude, on the basis of this evidence alone, that Congress (and particularly the House) abandoned this activity. These results, however, provide empirical validation of a the *perceived* decline in the effectiveness of Congress's investigative and oversight function, which had been noted by a number of experts.

Congressional Aggressiveness

As shown in Figure 8, Fifth Amendment invocations have been rare in formal hearings since the early 1970s, appearing in fewer than 3 hearings per year. In addition, Table 2 indicates that they are heavily concentrated in a few committees—out of the 100 such hearings from 1973-2008, Senate Governmental Affairs, House Government Operations (Reform), and House Energy and Commerce conducted 70. This may indicate a preference by certain committee to persist in calling recalcitrant witnesses, while other committees handle refusals more passively. However, this choice is not without consequence for committee publicity—or the witness—and may reflect differences in expertise among committee membership and staff. Prior to 1973, House HUAC/Internal Security, Senate Judiciary, and the Senate Select Committee on Improper Activities in the Labor or Management Field were the leaders in hearings where witnesses claimed Fifth Amendment protection.

Figure 4.8 – Hearing Volumes Including One or More Fifth Amendment Invocations



Data on Fifth Amendment invocations also provides a measure of the duration of adversarial investigation activity. The Senate Judiciary Committee's subcommittee to Investigate Administration of Internal Security Act and Other Internal Security Laws called non-cooperative witnesses in every year from 1955 to 1963, while the House Internal Security Committee/HUAC missed holding such a hearing in only one year between 1950 and 1966. HUAC/HISC and

Senate Judiciary's Internal Security Subcommittee trained their focus on Communist threats in a number of specific institutions—Hollywood, the media, anti-war organizations—but kept up a steady level of adversarial investigations over time. This is in spite of the decline in newsworthiness of Fifth Amendment invocations as time progressed. References to the Senate Internal Security subcommittee and "Fifth Amendment" or "self-incrimination" in the *New York Times* dropped from 42 in 1956 and 41 in 1957 to 12 in the period 1961-1963, even as the subcommittee held hearings into Cuba sympathizers and the Pacifica Foundation. For subcommittee members who were already well-known anti-Communists, the benefits from position-taking or credit-claiming were by this point minimal.

Table 4.2 – Fifth Amendment Invocations by Committee, 1951-2006

Committee	**Fifth Amendment Invoked (Volumes)**
House	
Armed Forces	4
Banking/Financial Services	4
Education & Labor	1
Energy & Commerce	27
International Relations	1
Government Operations/Reform	14
Public Lands/Resources	2
Judiciary	3
Post Office	1
Public Works	3
Small Business	1
Internal Security	80
Crime (select)	7
Assassinations (select)	1
Senate	
Appropriations	1
Commerce, Science and Transportation	3
[Homeland Security and] Governmental Affairs	61
Judiciary	52
Rules and Administration	7
Small Business	4
Aging	3
Ethics (select)	1
Indian Affairs (select)	4
Alcee Hastings Impeachment (select)	1
Improper Activities in the Labor or Management Field	43
Presidential Campaign Activities (1973-74)	1

Outside these three committees, however, pre-reform hearings where a witness invoked the Fifth Amendment were rare. That several committees in the House, while only four in the

Senate, *had* generated this witness behavior suggests that the Rules procedure for obtaining investigation authorization (and the Administration committee for expenses) did not egregiously impact the ability of committees to hold difficult hearings. In fact, between 1965 and 1972, 7 House committees and 5 Senate committees held at least one hearing in which a witness asserted his constitutional right against self-incrimination; from 1973 to 1980, only 4 House committees did so, at a time when the number of Senate committees inducing self-incrimination claims was unchanged. Easy access to investigative resources did not widen the use of coercive investigation activity. Since then, the House has conducted as many privilege-invoking hearings as the Senate. This was not true prior to the House's adoption of decentralized subpoena power: from 1957-1972, witnesses invoked their Fifth Amendment privilege in 141 Senate hearings, versus 102 in the House.

Since the final convulsions of the Senate Permanent Subcommittee on Investigations's inquiries into subversive groups in the 91st Congress, these results indicate a relatively steady pace of adversarial congressional investigations. By my count, no more than 15 hearings in a Congress have provided the spectacle of a witness claiming his constitutional protection against self-incrimination.

One exception to the impressive consistency of Congress to generate adversarial hearings is the paucity of Fifth Amendment invocations during the mid-1990s. My Lexis search of hearing summaries turned up no instances from 1994-1998 where a witness's testimony fell under the subject of "self-incrimination"; a deeper search, targeting invocations in the hearing text, found only one instance of a witness claiming protection against answering questions that would "tend to incriminate" him. This result requires squaring with traditional accounts of the Republican congresses of the 1990s, which launched numerous investigations into the Clinton administration. Here, though, Republicans declined to force witnesses to come before the committees investigating Clinton's campaign finances in the 1996 election and Whitewater. Considering that committee chairs frequently used hearings to rail against witnesses who had claimed the privilege, they either saw no additional benefit from confronting such witnesses in the hearing chamber, or they actually found it preferable to castigate the uncooperative persons *in absentia*. During the Bush administration, however, Fifth Amendment hearings have re-appeared. In the 107th Congress, investigators looking into matters as diverse as the Enron collapse, President Clinton's pardon of Mark Rich, eco-terrorist groups, and decades-old misconduct by the FBI all compelled witnesses to publicly refuse testifying. Focusing on the past thirty years in particular, it appears that Fifth Amendment hearings do not follow a divided government pattern. Democratic members of Congress held few Fifth Amendment hearings during the Reagan administration, but conducted several during George (H. W.) Bush's presidency. Republicans in control of Congress heard few Fifth Amendment pleas during the Clinton administration, but became more aggressive on this front when George W. Bush was president. Instead, it appears that economic conditions may play an important role in explaining whether congressional committees choose to produce the spectacle of a witness admitting that responding to certain questions would put him in legal jeopardy.

Combining the *New York Times* data on notable investigations with data on fifth amendment invocations provides valuable context for understanding the occurrence of significant congressional investigations. Members of both parties have been effective at using the committee subpoena power to instigate dramatic confrontations with outsiders. In this manner, they can use their positions to gain publicity and possibly score political points. However, in

recent decades, full use of the subpoena power has not been a major feature of congressional investigations.

It is also evident that only a few committees are responsible for the majority of the legislature's more salient activity. Additionally, the committees that *do* conduct investigations look into a wide variety of subjects. Both the House Government Operations/Reform and Senate Governmental Affairs Committees have jurisdiction over any matter, and the House Energy and Commerce Committee has historically possessed the largest jurisdiction in the House. Investigation topics for these committees range relatively broadly, rather than reflecting intense, repeated examination of a limited number of subjects. For instance, in the 102d Congress, the Senate Permanent Subcommittee on Investigations drew self-incrimination refusals from witnesses in hearings on Asian organized crime, insurance industry fraud, and corruption in professional boxing. Each of these topics is far afield of the committee's legislative focus, the civil service, the operation of the federal government, and inter-government relations. Senators may have a more generalist orientation than members of the House, but two additional hypotheses bear on the tendency for a few committees to perform the lion's share of notable investigations. One concerns selection to the committees by reform- and publicity-seeking members. Because many members—particularly in the House—have few opportunities to gain air time for their activities in Congress, investigative hearings may provide a valuable resource. Alternatively, there may be widespread interest in holding the types of hearings undertaken by Governmental Affairs, Government Operations, and Energy and Commerce, but other committees lack the experience, investigative staff, or reputation for "good copy" that the main three investigators possess. Finally, the diverse jurisdiction of designated oversight/investigations committees may afford members more mutually-agreeable investigation subjects. The composition of a committee concerned with banking or agriculture may have a difficult time uniting around investigations which might cast a favored person or group in an undesirable light.

This diverse examination of Congressional investigative activity demonstrates that while there have been declines in a number of investigation-related measures, Congress remains capable of gathering much attention when the circumstances are right. An important change that has occurred in recent years concerns Congress's propensity for smaller investigations which may not gain much media attention: front pages from the late 1980s and early 1990s starred legislators looking into many different areas of potential mismanagement, misconduct, and fraud; in more recent years, members' investigative activity seems to focus around a small number of targets.

The more catholic approach to measuring investigative activity also reveals a texture to Congress's work that cannot be seen by merely observing oversight hearings or high-profile investigations of the executive. When we consider MCs' attention to Enron and the related accounting scandal in the 107th Congress (not to mention the legislative exigencies produced by the 9/11 terror attacks), low levels of oversight *of the executive* during this period are easily understood. Similarly, the paucity of investigations in the 104th Congress relative to its successors suggests that a new crop of Republican committee and subcommittee chairs needed time to develop into investigative roles. Richard Fenno's axiom--that a member of Congress's most valuable resource is that of time—is particularly salient in light of these data. Students of oversight and investigations cannot look simply at whether a particular class of activity is occurring or not, and infer from this that members are abdicating their obligation to review

programs and the world outside government. Instead, scholars must look for shifts among a range activities closely related.

Chapter 5
Locus of Control: Subpoenas and Contempt

As we have shown, Congressional investigations arise out of legislators' political and institutional interests. Their operation and efficiency depend heavily on the powers and resources possessed by investigator and investigat*ee*. Congress's contemporary investigations make use of powers and institutional structures that would have been quite foreign to the select committee that investigated General Arthur St. Clair's defeat in 1792. The challenges of keeping pace with an increasingly complex government and growing demands on legislators have encouraged Congress to seek new procedures and institutions enabling it to gather information and look into alleged wrongdoing. As time has progressed, the execution of these powers has become increasingly dependent on the actions of—and relationships with—the Executive and Judicial branches. This development speaks to both the unchanging centrality of information gathering to Congress's position in national politics, as well as to the possibilities for innovation within a system of separated institutions sharing power. In this chapter, I examine how Congress's investigative activities have evolved over time, particularly in how conflict and cooperation with the other branches have influenced the development of the legislature's investigative capacity.

Because the Constitution does not specify or enumerate a congressional investigative power, Congress has relied on the Courts to recognize the legislative body's ability to compel testimony and the production of documents. The Court has sanctioned the congressional investigation power as a necessary and proper means to achieve powers that were enumerated such as gathering information needed to properly legislate, or as needed to aid Congress in its responsibility to power to protect the integrity of elections and expose corruption, these very same investigative powers have also enabled members to indulge in witch hunts, embarrass enemies, and callously disregard individual privacy in the interest of a member's personal or partisan policy or political initiative.

In this account, two factors play an important role in the development of congressional capacity and authority. The first is the reputation of the Legislative branch, which helps determine the short-run willingness of other institutions, and especially the courts, to maintain and help expand Congress's activities. In Carpenter's (2001, p. 14) construction, a bureaucratic agency's autonomy depends on a "belief…that agencies can provide benefits, plans, and solutions to national problems found nowhere else in the regime." The congressional committee system has a much closer link than Executive agencies to political power, but differs from modern bureaucracies and the judiciary in the strength of professional norms and devotion to collective outcomes. Nevertheless, if enterprising congressional investigators are judged to, on balance, have a positive effect on administration and legislation, arguments for greater use of that power are more likely to be successful.

A second factor is the relationship between the growth of the state and the interactions between the branches. As Congress has observed the development and legitimation of the Executive and Judicial powers, its own activities have come to rely to a greater extent on one or both of the others. The history of congressional investigations bears a strong imprint of what Silverstein (2009) terms "juridification"—Congress having invited legal forms and procedures to become incident for executing its own investigative goals, to the total abandonment of its "inherent" contempt power. With the Executive in recent decades making greater use of legal arguments to avoid compliance with Congress's demands, the Legislative branch has turned to

the Judiciary's legitimacy as a powerful, in inconstant, resource in its interactions with the President.

In this chapter, I examine major court cases, legislative enactments and reorganizations, and executive policy changes that served to alter the *capacity* and *authority* of congressional investigators. I take *capacity* to encompass the resources at hand for a willing legislator to commence an investigation. These can be relatively straightforward, like staffing or financial resources. The question of capacity is also engaged when a member faces institutional hurdles to *conducting* an investigation. If, for instance, the power to inquire into defense contracts is possessed exclusively by the chair of the Armed Services Committee, capacity is necessarily limited relative to a situation in which others are free to request and obtain the ability to investigate. Thus, changes to the procedures for initiating investigations may affect congressional capacity—that is, whether investigations are possible or not.

A related concept, *authority*, is the extent to which members with duly-authorized investigations have their demands for answers and documents recognized as legitimate by other institutions. A congressional investigator can issue a subpoena for testimony or the production of documents, but may nevertheless fail to obtain the desired information for a number of reasons. Most immediately, a witness may refuse to testify if the questions being asked are not pertinent to the committee's authorization. Alternatively, questions that *are* valid according to an authorizing resolution may fail judicial scrutiny because the *type* of investigation being conducted is not permitted as a valid exercise of congressional power. Finally, the questions may impinge on other protections, such as the constitutional protection against self-incrimination in the Fifth Amendment. In each of these cases, investigators' authority is reduced. The ability to obtain evidence in each of these instances may be established, however, by legislative fixes or changes in Constitutional doctrine instigated by federal court rulings. If legislation permits Congress to authorize certain types of investigations, the information-gathering that results is conducted under the aegis of an Act of Congress signed by the President--not the Constitution alone. Correspondingly, a procedure to immunize witnesses for testimony delivered before a congressional committee obviates claims about self-incrimination. And depending on the mechanisms for challenging improper exercises of congressional power, a contumacious witness may face more or less peril: under the criminal contempt of Congress statute enacted in 1857, a witness who loses her case in court faces jail time *even if* she renounces her opposition to testifying and appears before the committee. As a result, the criminal statute has been regarded as putting committees at a considerable advantage relative to witnesses, who therefore may provide testimony even when they suspect that they would stand a good chance of prevailing in a legal challenge.

My construction of "authority," then, identifies the extent to which investigators stand on solid, recognized ground to demand—and obtain—the written and oral testimony they desire. Capacity and authority can be alternative routes for a legislature to obtain wanted information—instead of requesting trade secrets from businesses to inform lawmaking, legislators could build research units that would help provide equivalent information. Oftentimes, the substitutability of capacity and authority is merely hypothetical—it is difficult to imagine how increases in congressional capacity would have provided the names of Communist party members, or how legislators could obtain information on highly technical subjects without staffing or funds to make on-site visits. Taken together, capacity and authority set the background and ground rules for Congress's attempts at answering important questions.

Unlike Schickler (2001), my aim is not to identify the forces or intentions that *motivated* congressional innovations, but rather to understand which changes in the institution and the motives of its members had major impacts on investigations – a critical activity and source of legislator power and influence.

We would certainly expect that major changes in Congress and its institutional structure would have a significant impact on the investigations. And yet, this effect has received far less attention than have other aspects of legislative behavior. We may well expect unintended consequences for investigations in the wake of significant, multi-element changes to congressional rules, capacity, and committee structures. Using political science and law works to identify the major episodes bearing on the vitality and organization of investigations, I use data on the types of investigation conducted before and after the changes to further develop the historical context and trace the relationship between changes to the political landscape and the eagerness and ability of members to advance goals via investigations.

The interplay of legislative enactments, executive branch actions, and court decisions allows us to see within a relatively specific category of congressional activity the opportunities for influence both within and outside the Legislative Branch. Increases in the authority of investigators require a greater degree of cooperation from other institutional actors, but the new opportunities made available may not immediately reveal themselves in new types of investigations. Increases in capacity occur when demands for a greater volume of investigations are honored by congressional leadership and/or the Executive branch. While Congress can rather easily increase its gross capacity for action by expanding staffing or creating supplementary organs to aid in its research functions, it often has difficulty ensuring that those resources are utilized only by members and committees that advance the interests and/or prestige of the larger group. A tense equilibrium with other branches may ensue when the availability and versatility of the subpoena power helps explain the liberties taken with its use—cynical applications and insincere invocations of legislative pertinency may have the result of limiting the ways in which investigations can be conducted, which in turn restricts the practice to those committees which stand to gain the most benefit from investigating a topic…and win greater deference from other actors in Congress and elsewhere. All of these assertions of power, however, have the cumulative impact of reducing the sphere of activity in which Congress could take action exclusively on its own authority, or without credible opposition from other forces within government.

Inherent Contempt and the Politics of Honor, 1792-1857

The history of investigations in the early days of the American Republic reflects the principal features of that era's politics. The United States government was weakly institutionalized, with a small number of thinly-staffed departments charged with administering the nation's laws. In Congress, legislative business was handled through an *ad hoc* structure of committees, which—exacerbated by high levels of turnover in membership—limited the branch's ability to provide expert and consistent policy. While political parties were quick to develop within the political landscape, regional interests and personal factors accounted for a greater share of outcomes than modern-day observers are accustomed. A diffuse but highly-partisan press, partially nourished by official contracts to print documents for the government, traded heavily in scurrilous attacks by and against political personalities. Consequently, the resulting structures for investigating and supervising government possessed three features—they

arose irregularly, were centered around the honor and reputation of individuals in government, and closely engaged the members of Congress charged with carrying them out.

Histories of congressional investigations generally begin by noting the House of Representatives' 1792 investigation of the defeat, by Native American forces, of army units under the command of Major General Arthur St. Clair. This was the first time that Congress authorized a committee (here, a select committee) to "call for such persons, papers, and records, as may be necessary to assist their inquiries." The St. Clair investigation is important not just as a historical milestone, but for the debate that arose in the House over which branch should be responsible for probing failures and improprieties in the executive branch. The debate on this resolution is informative, as representatives proposed a legislative committee only after a resolution requesting the President "institute an inquiry into the causes of the late defeat of the army…and also into the causes of the detentions or delays which are suggested to have attended the money, clothing, provisions, and military stores, for the use of said army, and into such other causes as may, in any manner, have been productive of the said defeat."[124] Opposition to a presidential inquiry took a number of forms: it was argued that the resolution was too informal, setting a task for the President without indicating the manner in which Congress wished it to be carried out. Additionally, it was argued that the President's inquiry would be unable to gain access to military officers in the field. John M. Vining of Delaware argued that "this indefinite mode of procedure would only embarrass the President, without producing the desired effect,"[125] while James Madison cautioned that "the House ought to deliberate well, before they requested the President to do a thing which he had it not in his power to do."[126] Supporters of a presidential inquiry countered that a legislative committee would be less capable than the executive of investigating events that had occurred along the present-day Ohio-Indiana border. But members opposed specifically to legislative intervention were few: of the ten members voting against the select committee, six had also opposed directing the President to conduct an investigation.[127]

The St. Clair investigation draws attention as the first congressional investigation, but Congress's early use of its investigative power was focused as much on the Judiciary and Congress itself as the Executive. A search of the *Annals of Congress*—a predecessor publication to the congressional Record—produces 40 instances in which a committee was granted the authority to "send for persons and papers."[128] Nine of the 40 dealt with the judiciary, committees charged with preparing articles of impeachment or otherwise looking into the conduct of courts. Another six concerned the operations of the legislature—three with elections and member qualifications, an investigation of Ohio senator John Smith's role in the Burr conspiracy, and two concerning alleged contempts against the chamber. Only two investigations had a non- or quasi-governmental focus – an 1816 probe of "the existence of an inhuman and illegal traffic of slaves carried on in and through the District of Columbia,"[129] and an 1818 investigation into alleged charter violations by the Second Bank of the United States. The rest of these inquiries examined the executive branch, from allegations of fraud during John C. Calhoun's leadership of the War Department to the causes of fires in the State and Treasury buildings during the winter of 1800-

[124] 3 Annals of Cong. 490 (March 27, 1792).
[125] Ibid.
[126] Ibid., 493.
[127] Ibid., 493-494.
[128] In another construction, "to send for persons, papers, and records."
[129] 29 Annals of Congress 1117 (March 4, 1816)

01. Only seven of the 40 investigations were assigned to standing committees of the legislature, the rest conducted by select committees named by the Speaker of the House. The Senate accounted for only four investigations, three dealing with chamber business, and an investigation into General Andrew Jackson's conduct during the Seminole Wars.

Canon and Stewart (2001) find that the House practice during this era of Speaker-selected committees produced committees that were not strictly representative of the chamber. Special committees assembled to handle private claims were chaired by congressmen from the claimant's state at double the rate attributable to chance; select committees exceeded the nascent standing committee system in the rate of having multiple committee members from a single state. The import of this research into early standing and select committees is to indicate that the composition of select committees did not closely reflect the composition of the chamber. From an early stage, the organization of Congress took steps favoring the development of issue expertise (Haynes, Swift—see Canon and Stewart 168) and having members perform committee work on subjects about which they can be assumed to have had specific preferences. Indeed, *Jefferson's Manual* enunciates the principle that a committee should *not* include legislators fundamentally hostile to a given legislative proposal. "For he that would totally destroy it will not amend it; or as it is said, the child is not to be put to a nurse that cares not for it." Cooper (1960, p. 61) notes the issue of non-hostility in relation to the early 19th century debate over select versus standing committees: select committees were implicitly "special juries" positively disposed towards an object, while standing committees justified their development on the grounds that they were close to the interest or sector concerned. Harlow (1917) notes that in the Georgia colonial assembly, when the membership of a select committee was contested, the member proposing the committee and the person seconding the motion were to be appointed (p. 107). By censoring the prospective pool of committee members, chamber leadership can be assumed to have influenced the production of legislation

With the election of Henry Clay as Speaker of the House in late 1811, the House began to emphasize the use of standing committees as a means of conducting its business. A considerable volume of literature has sought to understand this development as a key to the intended purpose of the committee system, and therefore its consequences for legislative action. Jenkins (1998) highlights the entrepreneurial aspect of Clay's use of standing committees: as a politician with presidential ambitions, Clay gained popularity by providing members with privileged ways of obtaining benefits for their constituents. Gamm and Shepsle (1989) note that the move towards referring bills to standing committees occurred contemporaneously—albeit in different ways—in the House and Senate, suggesting that institutional motivations, and not Henry Clay, were responsible for the innovation. But the record of investigations empowered to call for persons and papers suggests continuity with past practice in the House. Even during Clay's speakership, most investigations—including a number of potentially sensitive ones—were conferred on select committees rather than standing committees. Floor debate on authorizing resolutions sometimes provoked the standing vs. select question. An investigation into the management of the Naval Department was proposed in January 1814, and specified use of a new select committee. When a member attempted to seat the investigation within another existing select committee concerning the Navy, Representative Post of New York, a member of that committee, replied that "with all the business now requiring their attention, they would be incompetent to the task proposed."[130] Similarly, the post office investigations authorized in 1820 and 1822 were not conducted under

[130] 26 Annals of Congress 1011.

the auspices of the (standing) Committee on the Post Office and Post Roads, and only one member of that committee, John Culpepper of North Carolina, served on either investigating committee.

Congress and the Courts

Considering the frequency of investigations concerning congressional corruption in the pre-Civil War era, it is hardly surprising that the Supreme Court's ruling authorizing chambers to detain citizens—the original means of compelling testimony from recalcitrant witnesses—arose out of the House's investigation into the alleged bribery of one of its own members. The 1821 case *Anderson v. Dunn* dealt with attempts to ascertain whether Colonel John Anderson had attempted to bribe Rep. Lewis Williams of North Carolina. Finding the House's detention of Anderson during his contempt trial to have been legal, the Court provided an expansive defense of Congress's power to detain recalcitrant witnesses, declaring that

> "…if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers."[131]

This language, and congressional usage of its subpoena power, foreclosed the need for any further judicial clarification on the limits of the national legislature's investigative power in the period before the Civil War. Consistent with other Marshall Court grants of expansive authority to national decision-makers[132], *Anderson* made few moves to constrict investigative power during an era when most probes were focused on validating the conduct of officials in the three branches.

Congress and the Executive

In the Republic's first few decades, investigations for which committees received subpoena powers were supplemented by another politically-significant set of cases—investigations undertaken at the encouragement of executive officials, rendering subpoenas unnecessary. Congress's investigative powers seem to have served a helpful political function during the early 19th century. In 1792-3, Rep. William Branch Giles—secretly encouraged by Thomas Jefferson and James Madison—introduced a number of resolutions requesting a large volume of information from Treasury Secretary Alexander Hamilton. Hamilton responded gamely, working around the clock to produce several reports detailing the operations of his department, leading to the rejection of a flurry of censure charges in the House on March 1, 1793, as the congressional session wound down. When the new Congress met in December 1793, Hamilton pressed the issue himself. Shortly after the opening of the Third Congress, Hamilton sent a letter to the Speaker "request[ing] of the House of Representatives…that a new inquiry may without delay be instituted in some mode." Despite his claim that "the more comprehensive it is, the more agreeable will it be to me," the letter was not a complete exercise of braggadocio. Secretary Hamilton adverted the House that "a like plan to that which was

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[131] *Anderson v. Dunn*, 19 U.S. 226-227 (1821)

[132] Marbury v. Madison (1803), McCulloch v. Maryland (1819), Gibbons v. Ogden (1824)[133] 4 The Works of Alexander Hamilton 495-6.

pursued in the last session, will never answer the purpose of a full and complete inquiry, while it would lay on me a burthen, with which neither a proper discharge of the current duties of my office, nor the present state of my health is compatible."[133] But what one Hamilton biographer describes as "a rare political spectacle" would recur several times in the early years of the Republic (Chernow 2004). In 1800, outgoing Treasury Secretary Oliver Wolcott offered to submit "the whole of my conduct to any investigation which the House of Representatives may be pleased to institute." John Nicholas of Virginia spoke against immediately referring the matter to a committee, arguing that

> It was notorious that the duties of the Secretary of the Treasury were *so extensive and complicated, that a general inquiry into them all would not be in the power of a large deliberative body*. And unless the greatest care were taken, the proposed examination might result in a disregard of those points which required attention, and a notice of those which required no investigation at all. *Thus, under the name of an inquiry, nothing but the form of an investigation would be effected*.[134]

The investigation was nevertheless agreed to, with Henry Lee of Virginia maintaining that it would be "an act of injustice to the country at large, to withhold an agreement" to the resolution establishing an investigation, for "[i]t was known to the whole world that the most fictitious charges had resounded from one end of the Union to the other."[135] Unsurprisingly, the select committee's report, submitted two months later, concluded by stating that "generally…the financial concerns of the country have been left by the late Secretary in a state of good order and prosperity."[136]

And in 1826, Vice President John C. Calhoun, having thrown his support to Andrew Jackson for the 1828 election, found himself facing allegations from the Alexandria *Phoenix Gazette* about misconduct while he had been Secretary of War. Similar allegations had first surfaced four years earlier—John Quincy Adams had chalked up the controversy to presidential politics, writing that Calhoun's support in Congress had "roused all Crawford's and Clay's partisans against him," and that "the administration of his Department was scrutinized with severity, sharpened by personal animosity and factious malice."[137] Despite the Jacksonian party's victory in the congressional election of 1826, Calhoun asked the lame-duck House on December 29, 1826 to look into the matter—a select committee dominated by Adams' National Republicans delivered its report less than two months later, exculpating Calhoun.[138] Systematic investigation—of the sort we would today term "oversight"—was rare, however much it might have been desired by advocates of frugal, effective government.

We may pose a number of hypotheses as to why officials would seek congressional inquests. First, officials were susceptible to blistering attacks in the press, and had little means of refuting charges that appeared in print. Congress may have been one of the only available ways to authoritatively clear one's name. Second, allegations of misconduct may necessitate a response on terms suboptimal to the executive branch or other institution. Calhoun might have waited for the election of a more sympathetic Speaker to request a congressional investigation, but at potentially great risk to his reputation and to the electoral chances of the Jacksonians.

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[134] 10 Annals of Congress 786-788. My italics.
[135] Ibid., 788.
[136] 10 Annals of Congress 986.
[137] 6 Memoirs of John Quincy Adams 43 (1874).
[138] 3 Congressional Debates 1124.

In sum, while both chambers streamlined their lawmaking apparatus into standing committees, investigations remained under the close control of legislative leaders. In an era in which political personalities were easily moved by affairs of "honor" and jockeying took place within a narrow Washington elite, investigations provided invaluable opportunities to embarrass one's rivals. Tempting as it was to attack, investigations did not invariably lead to findings of impropriety and the discredit of the investigation's subject. And the quarry, unharmed, might come back against the hunter. Though the House did not authorize subpoena power in its investigation of Jackson's actions, Henry Clay's support of a bill censuring the General's actions in Florida won him the eternal enmity of the future president; correspondingly, a Senate committee's report on the subject was abandoned in view of overwhelming support for the General in New York and Philadelphia. And thirteen years later, Andrew Jackson was still attempting to figure out whether Calhoun had assisted the Senate investigation from his perch as Secretary of War. [139] Judged against future Congresses, the legislators of the early 19th Century required little formal authority and relatively little capacity: the small size and function of government departments ensured that even inexpert members of Congress could arrive at judgments about the conduct of the Executive Branch. Even more, these investigators received easy access to cabinet secretaries themselves. As the country progressed towards Civil War, the subject of Congress's investigations turned increasingly inward, towards member-on-member insults and violence, and into alleged attempts to advance legislation through corruption. Divisive and time-consuming as these investigations were, they occurred on substantive grounds that were the most solid from a constitutional standpoint. Novel exercises of the investigative power, and opportunities for the Executive and courts to influence congressional behavior, would require reaffirmation of national institutions and the emergence of new policy domains that would increasingly challenge legislators seeking the necessary information to legislate.

Struggling Against Executives and Courts, 1857-1946

The erosion of comity in the run-up to the Civil War helped end an era in which legislators and executive branch officials turned to investigators to settle controversies in a cool and respectful fashion. Three separate investigations into member conduct in the House during the 33d Congress (1853-55) looked at alleged bribery in the vote on extending Samuel Colt's revolver patent, misrepresentations by the Ways and Means chairman on the bill indemnifying America's southern neighbor for the Mexican Cession, and post-ratification tampering with a bill funding railroad construction in Minnesota. The following term saw the most corrosive membership episode ever, South Carolina Congressman Preston Brooks' vicious assault on Massachusetts Senator Charles Sumner, which produced investigations in both the House and Senate, and required a week of debate to adopt the House committee's report (Bruns 1975). Greater friction with witnesses and an increased legislator appetite for investigations led Congress in 1857 to augment its powers over contumacious witnesses. However, Congress made little productive use of its new power in the decades following enactment of the criminal statute. The relationship with the Executive and Judicial branches engendered by a criminal contempt procedure was not the only way in which Congress became tied to the other departments—by proclaiming in 1881 that persons held under the legislature's inherent contempt provision could appeal their detention in court, the Judiciary weakened investigators' positions relative to witnesses. And by undertaking to judge the testimony demanded of witnesses against the

[140] 4 Cong. Rec. 414 (January 14, 1876).

authorization granted to committees by their parent chambers, Courts further constrained the activity of investigators.

In Chapters 2 and 3, I discuss how political factors affected the volume of Congressional investigations in the period 1871-1944. After the Civil War, the House was the venue for a binge of investigations. Galloway (1927) described the Grant administration as the "high-water mark" of congressional probes, counting no fewer than 37 inquests which submitted reports back to Congress. Under divided government in the 44th Congress—Democrats having taken control of the House in the elections of 1874—the House passed broad subpoena authority for committees to investigate "errors, abuses, or frauds that may exist in the administration and execution of existing laws," and instructing several of the Committees on Expenditures "to proceed at once" to examine the state of accounts in their respective departments.[140] In the 44th Congress, this measure passed without a vote or much discussion; debating a similar measure in the 45th, Republicans complained that the resolution's predecessor had led to "Every disaffected man, every broken-down officer, every dead-beat who had been running around the Departments…summoned before one committee or another, and the whole session was given up to this business."[141] Eberling (1928) comes to a similar conclusion when discussing congressional debates on the use of the subpoena power to develop legislation: while there was consistently a group opposed on principle to the use of subpoenas where member qualifications, contempt against the chamber, or member conduct was not at issue; but "[t]he cases studied…indicate that this power was used indiscriminately, regardless of the argument of the opposition." The costs of investigations in the 44th Congress, alleged James Garfield, had run to half a million dollars.[142] After an afternoon of debate and a failed attempt by the minority to remove the automatic subpoena, more than a dozen House committees were again granted the power to call for persons and papers.[143] Where the House had attempted to maintain a long-term supervisory role over government—the various committees on Expenditures in Executive departments—the results were notoriously meager. Members readily confessed that their expenditures committees had done "practically no work whatever for nearly thirty years,"[144] and chairs admitted ignorance of who their fellow committee members were.[145] When investigations did occur, it was most commonly during divided government, which occurred as frequently during the last quarter of the 19th century than it had in the previous 86 years of the Republic's existence. Writing in 1881, Woodrow Wilson observed that "The Senate, though it has no similar permanent committees, has sometimes discovered dishonest dealings that had altogether escaped the vigilance of the eight House Committees," noting the recent revelation that Treasury funds had been spent to "repair the Secretary's private residence."

The development of the investigative enterprise during this period is therefore mostly a Senate story. Haynes (1938) speculates that the House's increase in centralization prevented

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[141] 7 *Cong. Rec.* 272 (January 10, 1878).
[142] Ibid., 275.
[143] 7 *Cong. Rec.* 289 (January 11, 1878).
[144] 48 *Cong. Rec.* 11847 (quoted in Wilmerding 1943).
[145] Hearings before the Committee on Consideration of a National Budget, U.S. Senate, 66th Cong., 2d sess., p. 194. Wilmerding, p. 248. See also Galloway 1946, p. 263, for a member resigning from the House Committee on Expenditures in the Interior department as a waste of taxpayer money, "the most inefficient and expensive barnacle that ever attached itself to a ship of state."

members from introducing investigations that leadership found objectionable. This account blamed the majority's "control of the order of business and such limitations on debate both as to time and relevance that there is little hope that the proponents of a resolution for an inquiry can get it effectively before the House." (Haynes 1938, p. 552). By contrast, the Senate provided a member "ample opportunity to preface his introduction of an investigation resolution by a vigorous presentation of the conditions which demand it." The 1920s in particular would see an important shift in the investigative landscape, as the Senate undertook a number of well-publicized inquiries, and the courts issued rulings more encouraging to investigators.

Legislative Authority

Congress's new power to refer contemptuous witnesses to the U.S. Attorney arose somewhat unexpectedly, after *New York Times* journalist John W. Simonton refused to reveal which House representatives had asked Simonton whether he could arrange for the selling of their votes, Congress swiftly enacted a statute permitting contumacious witnesses to be pursued criminally. This remedied the defect in the House's efforts to obtain Simonton's testimony—with the congressional term slated to end on March 3, the chamber's inherent power could detain Simonton for only six weeks—but the *Times* correspondent had already relented three days before the criminal statute was enacted. (Eberling 1928, pp. 150-154) The new statutory prohibition on contempt of Congress prescribed a jail term of between one and twelve months, and a maximum fine of $1000. According to the accounting by Beck (1959, pp. 194-205), of the 48 instances in which witnesses initially refused to testify before a congressional committee after Simonton and before the 1876 refusal of Hallet Kilbourn, only two were pursued using the criminal statute. [Following the Supreme Court's 1880 decision in *Kilbourn v. Thompson*, chambers made more frequent use of the criminal statute (Eberling, p. 355), and after 1934 no further use was made of the inherent (sometimes called "summary") power to detain witnesses.] The threat of criminal contempt proceedings expanded the authority of Congress to obtain information from witnesses: not only would the chamber have recourse against witnesses whose contempts came at the end of a term, but even at other times the flexibility offered from an alternative method of proceeding meant that Congress could ostensibly choose the option more upsetting to the specific recalcitrant witness.

The institutional cost of the criminal procedure was the reliance on other branches that it imposed. The executive branch was responsible for prosecuting the contumacious witness, and conviction depended on the cooperation of judges and juries. While the case law on prosecutorial discretion in cases of contempt of Congress has favored the interpretation that the government *must* charge a witness whose contempt has been voted by a chamber of the legislature, Rosenberg and Tatelman (2008) identify precedents suggesting that such a rigorous interpretation need not be followed. Additionally, a formalist approach such as that favored by Antonin Scalia in *Morrison v. Olson* (1988) would strongly affirm the Executive's power to abstain from prosecuting a witness.[146]

Creation of the General Accounting Office

The GAO's creation in 1921 provided Congress with an additional mechanism for examining the operations of the national government. For generations, models of congressional control of expenditures had failed to satisfy legislators or outside observers concerned with

[146] 487 U.S. 654, 697.

efficiency and clean government. Wilmerding (1943) identifies in GAO's creation and early years the common error in congressional attempts to monitor and control spending. Inevitably, an accounting body faced existential difficulties when asked to perform both *pre-hoc* and *post-hoc* control over government activities. With greater involvement from an oversight body, agents can more plausibly argue that failed initiatives were undertaken at the recommendation—or with the consent—of the overseers. And the oversight body will naturally be reluctant to look into matters in which its acquiescence—or failure to prevent malfeasance—might be called into question. As GAO's work became less about *pre-hoc* review of expenditures, its practical utility to members increased. As an organization responsible to Congress, GAO expands legislative investigative capacity by reducing the fact-finding burden on time-starved members and staff. Additionally, over its history, the GAO has blended its work *at bequest of* members of Congress with its own initiatives at auditing and program evaluation (O'Connell 2007), permitting members to follow up on targeted programs with additional scrutiny.

Bipartisanship in the Senate

A coalition of Democrats and Progressive Republicans came together to form special committees that would aggressively investigate their targets. The 1924 resolution authorizing an investigation of Attorney General Harry Daugherty stipulated that the committee's membership be elected by the Senate, bypassing the usual method of selection by party leaders. Upon passage of the resolution, Wisconsin Senator Robert M. La Follette nominated Iowa Senator Smith W. Brookhart, a fellow insurgent Republican.[147] The regular Republican organization chose not to contest the control of the committee, offering up only two names to fill out the majority party's allotted three seats. Thus, after what the *Washington Post* described as a "long and dramatic pause" as members listened for additional nominations, the membership nominations were agreed to on a voice vote without debate.[148] The Progressive-Democrat coalition was formalized in the proceedings of the panel, with Democrat Burton K. Wheeler of Montana—who had introduced the resolution calling for the investigation—recognized as "chief prosecutor."[149] The Progressive-Democrat alliance took other forms, including La Follette's instigation of an investigation into gasoline prices as a means of gathering information from oil companies on the oil leases that were the subject of the Teapot Dome scandal. La Follette claimed to have uncovered leads through this investigation which were then passed on to Senator Walsh's committee (La Follette and La Follette 1953). Bipartisanship and patience with slow-developing scandals paid important dividends for Senators, as the main evidence of criminality in Teapot Dome did not become available until the investigation had already been renewed once. The Senate's investigations provided the impetus in 1924 for Felix Frankfurter, then a professor at Harvard Law School, to write a piece titled "Hands Off the Investigators" for *The New Republic*, arguing that "any quantitative and qualitative judgment" of the performance of Senators Walsh and Wheeler "leaves the experiences and disinterested mind, duly regardful of the investigating duties of Congress, wholly without justification for changing congressional procedure."[150] The Senate's successful practice of bipartisanship in investigating committees continued into the

[147] 65 Cong. Record 3410 (March 1, 1924)
[148] "Committee to Conduct Inquiry is Chosen by Senate," *Washington Post*, Mar 2, 1924, pg. 1.
[149] "Daugherty Return Today Expected to Decide His Position", *Washington Post*, Mar 7, 1924, pg. 4.
[150] May 21, 1924, pp. 329-331.

Roosevelt administration, with the Special Senate Committee Investigating the Munitions Industry voting—despite a 4-3 Democratic majority—to vest Gerald Nye with the chairmanship. While the Senate's contingent fund for investigations had paid out $330,000 from 1910 to 1919, between 1920 and 1926, more than one million dollars was spent, a rate four times greater than in the 1910s (Haynes 1938, p. 553).

Preserving the institution against exorbitant spending remained an investigation-related concern, leading Congress in 1932 to voluntarily limit its own capacity. By limiting staffers to an annual salary of $3,600, the legislature threatened its ability to mount significant investigations. In this instance, Congress sought to score political points against President Hoover by proposing more significant cuts in the federal budget; limiting investigator salaries was evidently irresistible as a policy item. The effect of this appears to have been twofold: first, legislators could not make highly lucrative job offers to their friends; second, the capacity of committees to hire legal counsel was seriously curtailed. Thus, Ferdinand Pecora, eponymous counsel to the investigation of the nation's banks, famously received $255 per month in pay while his quarry stayed in blocks of suites at the Carlton Hotel in Washington, charging $2000 a night to J.P. Morgan & Co (Chernow 1990). And in 1936, Sen. Hugo Black's investigation of lobbying was sued by William Randolph Hearst to prevent congressional use of telegrams subpoenaed from the telegraph companies. Hearst, having lost in the D.C. Supreme Court, appealed the case to the D.C. Circuit Court of Appeals. Speculation held that the case would eventually rise to the U.S. Supreme Court, leading the committee to introduce a resolution requesting exemption from the $3,600 limit so that it might hire an experienced counsel to litigate the case. The measure failed in the House, despite an impassioned appeal from Black's fellow Alabamian, Speaker William Bankhead, that the Black Committee's troubles were really an attack on Congress and therefore required the legislative branch to meet Hearst's legal challenge. In 1938, the $3,600 limit quietly disappeared during passage of an appropriations measure.[151] In a further indication of divisions over the usefulness of investigations, the House in 1937 added language to an appropriations bill *forbidding* spending on investigations. It would not be until later in the same term of Congress that a new appetite would be found in the House for investigations, this time of a conservative and anti-administration flavor.

Congress and the Courts

In the *Kilbourn* case, the Supreme Court ruled that an individual's imprisonment under Congress's common law contempt power was reviewable in the courts. Hallet Kilbourn had refused to answer questions related to a "real estate pool" that had gone bankrupt, taking with it deposits made in London on behalf of the U.S. government. The Court derived the House committee's "judicial" intent from language in the preamble of the authorizing resolution stating that "the courts are now powerless…to afford adequate redress to creditors." Because, in fact, court proceedings on the real estate pool had still been ongoing at the time the resolution was enacted, a unanimous Supreme Court reasoned that the committee could not have been seeking a legislative objective.[152] The criminal contempt procedure having been enacted two decades

[151] 83 *Cong. Rec.* 1095 (Jan. 26, 1938), 52 Stat. 26.

[152] *Kilbourn v. Thompson* 103 U.S. 168, 194-95. James M. Landis argues that the Court's determination that the investigating committee had no valid legislative purpose could have existed for the investigation reflects an ignorance of the underlying policy issues and the breadth of the legislative task. 40 *Harvard L. Rev.* 153, 214-18 (1926)

earlier, this decision erased the principal advantage of the common law contempt procedure; namely, that Congress, by jailing a recalcitrant witness, could prompt him to purge himself of the contempt by answering the (sub)committee's questions. After *Kilbourn*, the witness would be able to bring the matter to the courts for resolution, regardless of the authority under which he was first charged. (Eberling 1928, p. 294) Insofar as the common law contempt power can validly jail a person only until the end of a Congress, it provided little additional utility to the chamber.

The other result of *Kilbourn* was to suggest that Congress might lack power to compel documents and testimony via the common law route *regardless* of an inquiry's purpose. Reviewing English precedent on contempt of Parliament, the Court reasoned that the House of Representatives possessed the authority to compel testimony in cases involving impeachment, elections, and member qualifications.[153] But Justice Miller's reading of English practice failed to see "much aid given to the doctrine" that a body like the House could imprison witnesses when the testimony in question was merely in service of legislating.[154] The *Kilbourn* ruling thus encouraged Congress to use statutory, as opposed to inherent, power as a means of compelling testimony; accordingly, in a 1914 case arising out of the House Banking and Currency's "Money Trust" investigation, the Supreme Court declined to uphold a New York banker's refusal to reveal the identities of members of an oil syndicate.[155] The Court held that "the presumption is in favor of the validity of every act of Congress," ensuring that the banker's case proceed on under the 1857 statute.[156]

The *Kilbourn* decision gave encouragement to subpoenaed witnesses resisting Congress, but a sequence of cases coming out of the Teapot Dome scandal of the 1920s affirmed legislative power and de-emphasized the necessity for investigating committees to be charged with highly specific authorizations for their activities. In *McGrain v. Daugherty* (1927), Mally S. Daugherty, brother of former Harding Attorney General Harry M. Daugherty, alleged that the Senate's investigation of his brother's conduct in office was of a judicial, and not legislative nature. The district court agreed, highlighting language in the Senate's resolution that contemplated obtaining "information necessary…for such legislative and other action as the Senate may deem necessary and proper" as evidence of non-legislative purpose, and noting "[the] extreme personal cast of the original resolutions; the spirit of hostility towards the then Attorney General which they breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view."[157] The Supreme Court reversed, reasoning that "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."[158] The usefulness of the Senate's claim, Justice Van Devanter wrote for a unanimous Court, "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

[153] *Kilbourn v. Thompson*, at 190.
[154] Ibid., at 189.
[155] *Henry v. Henkel*, (1914) 235 U.S. 219.
[156] Henry v. Henkel, at 230.
[157] *Ex parte Daugherty*, 299 F. 620, 638 (1924).
[158] *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

Congress are needed from year to year."[159] As to the ample historical study underpinning the *Kilbourn* Court's dictum that the House had "assumed a power which could only be properly exercised by another branch of the government," the *McGrain* justices pointed to their predecessors' decision to rule on the narrow question of the committee's authorization as license for their latter-day affirmation of wide-ranging investigations.

Congress and the Executive

While Congress kept up a steady (in the case of the Senate) or reliable (in the House) beat of investigations in this period, remarkably few probes achieved a high degree of damage to the President and senior members of the administration. Considering a retrospective listing of "significant" investigations such as Schlesinger and Bruns (1975) or Mayhew (2000), the Executive Branch was rarely troubled by scandal from the end of the Grant administration (in 1877) to the Teapot Dome investigation of the mid 1920s, a period of almost 50 years. Schlesinger and Bruns—quite legitimately—list the Ballinger-Pinchot affair as a major investigation, while Mayhew omits Ballinger-Pinchot but includes the Theodore Roosevelt-era investigation into the Brownsville Affray. Both Ballinger-Pinchot and Brownsville, however, occurred against the backdrop of an extraordinarily divided Republican Party, wherein the investigation had strong implications in the contest for the Republican nomination for President in 1908 and 1912. Taken against modern standards this record is remarkable. Any listing of significant investigations since 1946 would include Watergate, Iran-Contra, and the Monica Lewinsky scandals on the highest level of gravity; Army-McCarthy and Richard Russell's hearings into American foreign policy; and on a third level, the Church Committee investigation into the intelligence establishment and the Whitewater and Clinton campaign finance scandals.[160] Considering also the frequency of divided government in the late part of the 19th Century, the absence of major Presidency-threatening scandals is almost difficult to imagine.

The lack of investigations was not for want of trying on the part Congress. As I demonstrate in Chapter 2, a greater volume of House investigations occurred when the chamber was not controlled by the President's party. This suggests that investigative activity *was* politically motivated, which would hardly support the conclusion that members had no interest in uncovering major wrongdoing that might harm the presidential party's chances for retaining the office. A 1924 article in the *New York Times* proclaimed that "never before in the annals of the nation has Washington witnessed so many inquiries into the conduct of Government departments and high Government officials; never before has the air been so thick with startling rumors nor have so many reputations been assailed."[161] The *Times* article described pending Senate investigations into bread prices, the fertilizer industry, banks, the Shipping Board and Emergency Fleet Corporation, the Bureau of Internal Revenue and listed no fewer than 26 investigations in progress or proposed. For some, the scandals in the Veterans' Bureau and Interior had delegitimized government: said one unnamed Senator, "I am thinking how ridiculous our position would be if Congress passed a resolution reflecting in any way on

[159] Ibid., at 178.

[160] Republican investigations into the ATF's "Fast and Furious" operation may, for some, rise to the same level as the Whitewater investigation, though the recency of this episode makes such comparisons difficult.

[161] "Investigation Blizzard Sweeps Capital" *New York Times*, Feb. 24, 1924, pg. XX5.

political conditions in another country—Russia, for instance. Why, even the Soviet would receive the admonition with a smile."[162]

Even where House committees targeted important subjects, investigations failed to excite significant attention. For instance, the Banking and Currency Committee opened hearings into "Branch, Chain, and Group Banking" in February, 1930, but failed to garner front page coverage in the *New York Times* or *Washington Post* on the day of or the day after the first day of testimony. By contrast, a *Times* page 1 headline announced the Senate Judiciary Committee's thwarting of an attempt by Nebraska Senator George W. Norris to investigate enforcement of Prohibition. Abdication by the House led to greater prominence of the Senate in investigations, as a coalition of Progressive Republicans and Democrats were able to pass resolutions authorizing committees. The best example of this is the celebrated work by Thomas Walsh of Montana in bringing to light the highly damaging Teapot Dome scandal.

It is interesting, then, to consider the situation of an Executive Branch whose activities were of great hypothetical interest to members of Congress, but which did not admit a large volume of damaging investigations. Institutionally, the President had little means of fending off the most troublesome investigations considering the fact that a large volume could occur in the first place. Two possibilities remain to help explain the paucity of politically sensitive investigations: either the President and Executive Branch officials understood the likelihood that improper activity would result in investigation, the frequent occurrence of divided government signifying that one chamber was always likely to fall under opposition control. Or, legislators lacked the resources in Congress necessary to develop their investigations into major political threats. In either event, the President hardly needed to strike a more confrontational posture towards Congress. While Executive Branch officials no longer voluntarily offered their records to the legislature for examination, neither did the branch construct the legal arguments that would be a hallmark of the late 20th Century.

The growth of investigations in the Senate in the 1920s did not occur without criticism. As the number increased and a greater variety of subjects fell under scrutiny, standards fell. Galloway (1927) observed that the Senate's spate of investigations in 1923-4 "savored of personal spleen and party politics." Haynes (1938, p. 554) wrote that "It cannot be questioned that in recent years the prestige of the Senate has been damaged by the work of some of its investigating committees," particularly the prolongation of dead-end investigations for continued use of the contingent fund. Senators employed and paid expenses for relatives, paid staffers in excess of their market value, and ran up bills for travel and other expenses.[163] Gerald Nye's Committee on Senatorial Campaign Expenditures became a lightning rod for criticism in 1931 when details of its lavish expenses were revealed, including a $50 charge for a day's hire of a taxi in Boston.[164] By the mid 1930s, a mixed record had developed. On one hand, the Teapot Dome and Pecora investigations had uncovered vital information and had achieved public acclaim. On the other, the Nye and Black Committees in the Senate came under fire for being outside of the mainstream (Nye) and for employing abusive methods (Black). Black's investigation of lobbying helped make him a controversial figure, such that when Black's nomination to the Supreme Court was announced in August 1937, it was met by a "startled Senate," which departed from its traditional practice of immediately confirming nominees from

[162] Ibid.
[163] Ibid.
[164] "Senate Inquiries Stir More Protests" *New York Times*, Feb. 2, 1931, pg. 5.

within its own membership. During the Senate's debate on the nomination several days later, Nebraska Democrat Edward Burke laid out the case against Black—first, his associations with such organizations as the Ku Klux Klan; second, Black's conduct in the lobbying investigation; and third, his attitude towards the Court, in which Burke perceived "something of a sneer in [Black's] references to the judges whose social and economic philosophy the Senator does not share." But the negative reaction to Black's conduct of investigations was not universal—the President of the United States was a notable supporter, appreciating the aggressiveness the Senator showed in his investigation.[166]

The second dimension of the power of congressional investigations relevant during this time period was a committee's ability to access records held by the executive branch, most notably income tax returns. This has traditionally taken two forms: the lending of Executive branch personnel and resources, and the authorization (or denial) of access to tax records. Congress's interest in obtaining Executive branch information and personnel is a direct outcome of the growth of the administrative state. After the United States adopted an income tax, the records produced were of considerable informational value. The Revenue Act of 1926 granted the power to view tax returns to the Senate Finance Committee and the House Ways and Means Committee, as well as to select committees specifically authorized by a vote of the appropriate parent chamber. Access for other standing committees of the Congress was made subject to presidential authorization.[167] This requirement ostensibly put presidents in a position to affect the course of investigations, or to more generally influence the behavior of standing committees. McGeary (1940, p. 65) reports that upon FDR's inauguration in 1933, the administration moved to increase assistance to investigating committees, to particular effect in the Senate. In 1938, Franklin D. Roosevelt permitted Martin Dies' Special Committee on Un-American Activities to examine "income, excess-profits, and capital stock tax returns;"[168] permission would also be extended to the committee in 1939, 1942, and 1944.

"Continuous Watchfulness," McCarthyism, and Constitutional Protections: 1945-1974

The high levels of oversight performed during World War II sparked optimism that Congress's investigative attention could be sustained and directed towards the entire range of agencies and subjects important in the post-war America. When, in 1946, Congress undertook the restructuring of the committee system, one of the stated objectives was to situate investigative activity within the standing committee system. By consolidating the committee system, the 1946 Legislative Reorganization Act sought to provide better oversight of the executive agencies. "Sporadic investigations," stated the Senate report on the proposed legislation, "…have often served a salutary purpose by exposing administrative incompetence or corruption and by improving execution of the laws. But they have lacked continuity and have not provided the members of standing committees with direct knowledge of the information they have gathered."[169]

Discussion of the LRA's oversight and investigative provisions, particularly in the Senate, is testament to the reformist intentions of legislators gazing out across the post-war landscape. Despite a number of wildly successful investigations by special committees in recent

[166] See Ball, Howard. 1996. *Hugo Black: Cold Steel Warrior*.
[167] §257
[168] Executive Order 7933-A, 3 Federal Register 1943.
[169] Page 6.

years, legislators sought a dramatic shift towards standing committees. Supporters of ending special committees paid homage to the "spectacular" work done by the committees in "exposing administrative errors already committed and preventing others," yet worried that this attention "is not applied to all phases of the Government's program."[170] Investigations by standing committees, it was alleged, would bring "greater expertise, economy, and efficiency" to the review of governmental activities.[171] The "continuous review" provision of the LRA, at least in how legislators interpreted it, sought to elevate review as a form of congressional *participation* in the administrative process (Cooper 1960, p. 206). Unaddressed was the question of whether committees could be induced to provide the comprehensive oversight of government that reformers sought. Nor did legislators consider how "free-form" investigative activity might discourage wrong-doing in agencies *not* investigated by the members of Congress.

The most intensive attempts at "continuous review" in the post-war era, notably, were those that were the most embarrassing to Congress—the anti-Communist probes pursued by the House Un-American Activities Committee and Sen. Joe McCarthy. These brought adverse Judicial and Executive branch responses that set back congressional attempts to re-assert the Legislature's importance in the political system.

Legislative Capacity

The 1946 Legislative Reorganization Act took as its central purpose to restore Congress's ability to influence policy in a world whose "grave and complex problems" had grown beyond the capacity of legislators' "inherited and outmoded congressional machinery."[172] As originally proposed in the Senate, the LRA would have gone further, eliminating special committees entirely. The Senate bill also would have granted subpoena power to House committees; the House substitute removed the lower house from the section granting subpoenas, and eliminated the ban on special committees altogether. The excuse offered on the floor by the bill's sponsors was that the Senate had more of a problem with special investigating committees, in Rep. Monroney's words, "a rash that has broken out over there which practically destroys the continuity and the power of the standing committees."[173] In hearings on reorganization, members of Congress told a somewhat different story, focusing on how the large quantity of standing committees gave rise to select committees: because investigative topics spanned multiple standing committee jurisdictions, special committees eliminated the need to choose between the two (and thereby threaten to reallocate jurisdiction from one to the other permanently).[174] Another defect cited was that the temporary nature of special committees was inimical to the acquisition and development of independent staff expertise, forcing investigators to rely on bureaucrats borrowed from the executive branch agencies that were putatively under examination.[175] Finally, by reducing the number of standing committees, reformers hoped that, in Cooper's words, "concentrating the attention of most members on one committee plus

[170] Robert M. La Follette, Jr. "A Senator Looks at Congress," in *The Organization of Congress*. GPO, 1945. Page 135.
[171] Cooper, Joseph. 1960. *Congress and its Committees*. P. 206.
[172] *Legislative Reorganization Act of 1946.* Report of the Special Committee on the Organization of Congress. Senate Print 79-1428. Page 2.
[173] 92 *Cong. Rec.* 10073 (July 26, 1946).
[174] Testimony of Rep. James Wolcott, Jr., p. 96.
[175] Testimony of Sen. Kenneth Wherry, p. 165-7.

establishing a better correlation between the committees and the existing policy areas and departments would improve the quality of committee work in the postnatal task of reviewing administrative decision-making as well as the prenatal task…" (Cooper 1960, p. 203)

Though the Senate and House adopted different procedures through the 1946 Legislative Reorganization Act, their operation in the late '40s and 1950s indicates considerable similarity with respect to the use of select committees. Proposals to vest standing committees with investigative authority were approved by the House in the post-war years, quieting any speculation that the chamber would return to the pattern of few subpoena grants in the 1930s. With the accession of conservative Democrat Howard W. Smith to the chairmanship in 1955, the Rules Committee narrowed authorization resolutions proposed by committees, turning language permitting probes "of all matters coming within the jurisdiction" of committees into specific, itemized lists of acceptable areas on investigation.[176]

But over time, Rules became less miserly with investigative jurisdiction. In 1957, the committee sent to the floor a controversial proposal by Banking and Currency chair Wright Patman to investigate the monetary system; on reaching the floor, it was defeated by a coalition of Republicans and Southern Democrats.[177] The packing of the Rules Committee in 1961 appears to have further loosened investigation boundaries. By 1963, a standing committee chairman no less liberal than Adam Clayton Powell would receive blanket investigative authority.[178] According to Chairman Smith, House spending on investigations increased from $2.6 million in the 83d Congress to $8.1 million in the 88th.[179] Growing spending, however, did not buy success. Between the 84th Congress (1953-54), when Democrats re-took the House, and the 92d (1971-72, i.e. before Watergate), the House produced only one investigation of the Executive branch suitable of Mayhew's "major" appellation. In hearings on the Committee Reform Amendments of 1974, members' remarks about House oversight showed that little improvement had been made since the 1946 LRA. Describing Congress's oversight record as "its greatest shortcoming," and "derelict to a great degree," these witnesses pointed to *widespread* failure, questioning whether there was "sufficient oversight in any committee,"[180]

The increased willingness by the House to permit investigations reflected congressional worries about the growing power of the executive branch. Rather than permit investigative activity to arise out of member interest, by channeling investigations into the standing committees congressional leaders sought to organize legislators into surveillance of the entire government. This effort to direct Congress's investigative energies did not come without a price, as it hampered the ability of party leaders to initiate investigations *without* the consent of relevant standing committees. Powerful members who wished to block investigations could do so from their committee seats—if in the majority—or could heap negative publicity from the minority. Additionally, the novelty of a special committee was lost, and the energy of motivated members was diluted by routing investigation pressure back through the appropriate standing

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[176] 101 *Cong. Rec.* 1905. February 22, 1955. (Dealing with Foreign Affairs and Interstate and Foreign Commerce)

[177] Mooney, Richard E. "House Bars Study of Fiscal Policies" *New York Times,* March 28, 1957, page 1.

[178] 109 *Cong. Rec.* 1553 (January 31, 1963)

[179] "House Authorizes Inquiries and Trips," *New York Times* (UPI), February 17, 1965. Page 21.

[180] *Committee Reform Amendments of 1974.* Report of the Committee on Committees. Rpt. 93-916, Part II. March 21, 1974. Page 63.

committees. Congress attained a more consistent product, and one less likely to embarrass the legislative branch with the conduct of the investigators, but also one which was less likely to produce spectacular successes. [It is quite another question how well low quality, high energy congressional probes would have fared in an era of television and, later, the Internet.]

One House precedent, that of cautious grants of investigative authority subject to renewal in each successive Congress, was broken in on the first day of the 79th Congress, when Mississippi Democrat John E. Rankin offered an amendment to the yet-unadopted Rules of the House to establish the Committee on Un-American Activities as a permanent committee with standing authority to hold hearings and issue subpoenas. Rankin faced a Rules Committee unfavorable to reporting a resolution re-establishing the panel under its longstanding status as a special committee[181]; thus, the Mississippian took his bid to the floor. Majority Leader John W. McCormack, speaking against the amendment, appealed to precedent, saying that he was "urging the House to realize that a vote against this is not a vote against the special investigating committee" that had operated for the previous decade. "It is a vote against the procedure that in one-hundred-and-fifty-odd years of constitutional history, no Congress, no membership of this body, has ever followed to establish a permanent committee of this kind."[182] This logic helped send Rankin's amendment to a temporary defeat, 134-146, but Rankin swung back by requesting a roll call vote, thereby prevailing by on a vote of 207-186.[183] The precedent thus broken, the House would change its rules a number of times to grant committees standing investigative authority, as in 1947 to the Committee on Expenditures in the Executive Departments and the Appropriations Committee, and in 1970 to the Committee on Official Standards and Conduct.

Committee Authority

Beyond granting the power to Senate committees, the LRA did not establish rules for how committees would *issue* subpoenas, and to this day Rule 26 of the Senate does not state how subpoenas should be issued, whether by subcommittee or committee chairs, members designated by the chairs, or even staff members. Laxity in Senate procedures would be used extensively by Senator Joseph McCarthy in his role as chairman of the Senate Government Operations Committee and its Permanent Investigations Subcommittee.

Writing of McCarthy's investigation of the Army Signal Corps, Taylor (1955) comments that "the members of the Government Operations Committee, like many of our legislators, displayed small sense of responsibility in the use of Congress' investigative power, and allowed Senator McCarthy to take off on a frolic of his own without paying sufficient attention to the matter." (p. 258) Taylor quotes Senator Wayne Morse acknowledging that the Senate had "written a series of blank checks' to its committees." (p. 259) After a spate of abuses involving Senator Joseph McCarthy, Senate committees moved in 1955 to reform procedures which had facilitated McCarthy's anti-Communist investigations. The Government Operations Committee's Permanent Subcommittee on Investigations, the platform for McCarthy's probes, adopted a rule limiting the issuance of subpoenas to the subcommittee chairman (or another member explicitly delegated by the chairman). The import of this reform was to prohibit staffers from issuing subpoenas, a practice which had been abused heavily by McCarthy's investigative counsel. The

[181] McLaughlin, Kathleen. "Rankin Puts Over New Dies Group." *New York Times*, January 4, 1945. Pg. 36.
[182] 91 *Cong. Rec.* 14, January 3, 1945.
[183] 91 *Cong. Rec.* 14-15, January 3, 1945.

subcommittee also bound itself to only initiate major investigations upon a majority vote of the subcommittee or parent committee; to conduct public hearings only upon assent of at least one minority member; and to introduce a number of protections for witnesses.[184] Legislation in the House passed in 1955 adopted many of the same protections for witnesses, and provided that requests for the calling of *additional* witnesses be acted upon by the full investigating (sub)committee. Though the (sub)committee chair might still retain the authority to call witnesses, the chair would not himself be able to prevent the hearing of exculpatory witnesses or testimony.

In 1954, Congress enacted a statute authorizing committees, by a two-thirds vote, to grant transactional immunity to witnesses in cases involving "danger to the national security or defense of the United States by reason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence."[185] For validation, the grant of immunity required assent from the federal district court with jurisdiction over the location where the testimony was to be taken. Looking at a number of congressional probes in the early 1990s, Ronald F. Wright concluded that legislators had become reluctant to make offers of immunity to witnesses, for fear of jeopardizing prosecutions.

Congress and the Courts

The volume of criminal contempt cases in the years after World War II ensured that the Judiciary would play a central role in defining the authority of Congress to compel testimony from witnesses. Beck (1959) lists 135 persons cited for contempt between 1944 and 1957 by HUAC alone, versus 108 in approximately one hundred fifty years of prior Congressional history. The number and diversity of cases delivered to into the judicial system resulted in a series of setbacks for Congress in the 1950s. A first strike against congressional investigators occurred in 1952, when the Court limited the usefulness of the "Fifth Amendment trap." While the Fifth Amendment prevents individuals from being forced to incriminate themselves, the courts have long held that the privilege cannot be selectively invoked in a way that would allow the witness to talk about only certain elements of an incident or topic. In *Brown v. Walker* (1896), Justice Henry Brown summarized the principle by stating that "…if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."[187] In 1951, the Supreme Court ruled that a woman who had been Treasurer of the Communist Party of Denver could not refuse to disclose the names of the persons to whom she had transferred party records.[188] But the following year, the D.C. Circuit ruled that simple admission of *membership* in the party did not constitute an admission of guilt. Refusing to answer questions about other individuals in the party—thus implicating associations and activities that might be illegal under the Smith Act—constituted a valid exercise of the privilege even when a witness had admitted membership.[189] With this, the Circuit Court opened a path allowing witnesses to make admission of party membership—taking

[184] Annual Report of the Committee on Government Operations, made by its permanent subcommittee on investigations, 1955. S. Rp. 1444. Published January 25, 1956.
[185] 68 Stat. 745 (1954).
[187] *Brown v. Walker*, 161 U.S. 591, 597 (1896).
[188] *Rogers v. United States*, 340 U.S. 367 (1951).
[189] *United States v. Nelson*, 103 F. Supp. 215 (1952).

the Fifth on this question, though permissible, might suggest to outsiders a more malevolent involvement with the Communist Party—but to avoid aiding the committee or betraying acquaintances.

Subsequent court activity continued to take careful, deliberate bites at the investigative practices of Communist-hunters. In *U.S. v. Rumely* (1953), the Supreme Court ruled that the House's authorization to its Select Committee on Lobbying Activities could not conceivably be employed to compel the secretary of an organization to disclose the names of persons who purchased large numbers of books with the intent of distributing these to influence public opinion. Four years later, the Court threw out proceedings against a former Communist who refused to answer questions from the House Un-American Activities Committee about whether a number of named individuals had been members of the Communist party. The decision in *Watkins v. U.S.* was one of four vindicating alleged Communists on June 17, 1957— a day that would win the sobriquet "Red Monday." Two of the four Red Monday decisions concerned legislative investigations. Writing for the Court in *Watkins*, Chief Justice Earl Warren faulted HUAC for failing to "convey sufficient information as to the pertinency of the questions to the subject under inquiry." Watkins "was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer."[190] Noting that Congress had "practically abandoned" its common law contempt procedure[191], Warren proclaimed that the legislature would need to provide witnesses with clear indication of the "standard of criminality" in order for the courts to sustain convictions under the 1857 criminal contempt statute.[192] Warren's opinion also took a number of slaps at HUAC itself, finding that the chamber had exercised "slight or non-existent" control when setting up the committee.[193] Similarly, in *Sweezy v. New Hampshire*, the Court found that the Granite State's legislature had failed to properly shepherd its law-making intentions when it delegated to the state attorney general an investigation into "subversive persons."

Before long, HUAC adopted means of conducting its proceedings questioning witnesses that passed muster with the Court. In *Barenblatt v. U.S.* (1959), the Court distinguished HUAC's questioning of a Vassar College psychology instructor from the controversy in *Watkins*, citing the list of constitutional objections presented at the committee hearing by Barenblatt and HUAC's clear description of its intended inquiry into education.[194] Given a longstanding committee curiosity towards Communists in education, repeated authorization from the chamber, and openness in the committee's statement of purpose, witnesses could not simply refuse to answer questions, but would have to cite the Fifth Amendment's protection against self-incrimination.[195] The Court's rulings of the 1950s may not have adequately censured HUAC or addressed the non-legislative reality of congressional investigations, but neither did they give the committee all it wanted. [196] These rulings left the Un-American Activities Committee largely

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[190] *Watkins v. U.S.* 354 U.S. 178, 215.
[191] *Ibid.*, 207.
[192] *Ibid.*, 208.
[193] *Ibid.*, 204.
[194] *Barenblatt v. U.S.* 360 U.S. 109, 124.
[195] *Barenblatt v. U.S.* 360 U.S. 109 (1959).
[196] Martin Shapiro (1964) notes that the Court in Barenblatt abandoned its skepticism of the Un-American Activities Committee's legislative mission, restoring the doctrine that a legislative function would be presumed. Confronted with an investigative regime whose purposes were

stripped of the power to compel witnesses to supply lists of names, a recurring element in their hearings. Witnesses could take an "honorable" approach to questioning, admitting membership in the party but not taking action that might lead others to become subject to public scrutiny. The committee came to tolerate witnesses' refusals, restraining its attempts to prosecute witnesses to instances where witnesses had been particularly fractious in attacking the committee's legitimacy. Moreover, the Court's stipulations had an effect outside HUAC, as committees attempts to use the criminal contempt statute were defeated in the courts on technicalities.[197] The exigencies of pursuing witnesses in the courts was cited by supporters of the 1978 Ethics in Government Act as an argument for establishing an Office of Legislative Counsel that could advise committees on procedure, and represent committees in the event of controversy.

Congress and the Executive

The end of World War II initially saw a decline in Presidential cooperation with investigations. While Truman was highly complimentary of the 1946 re-organization of Congress, communicating to Co-chairman Bob LaFollette that the proposal was "tops," and predicting that "the business of the Congress would be very much expedited."[198] But in the first 5 years of the Truman administration, only two orders would be issued authorizing standing and special committees to access tax returns—to the Special Committee to Investigate the National Defense Program (the unit responsible for Senator Truman's rise to fame) and the House Naval Affairs Committee. From 1950-52, seven congressional committees would be granted this power, including Estes Kefauver's Special Committee to Investigate Crime in Interstate Commerce. Inspection of tax returns would also take on a more explicitly political dimension in 1952, when Truman authorized the Senate Committee on Rules and Administration—then investigating allegations against Senator Joseph McCarthy—access to tax records "in connection with its studies of matters relating to the election of Members of Congress, corrupt practices, contested elections, credentials and qualifications, and Federal elections generally."[199] Meanwhile, the Truman years saw no orders granted to the House Committee on Un-American Activities. In 1947, Truman issued a directive instructing agencies that "any subpena or demand or request" from non-executive sources be "respectfully declined" and referred to the Office of the President, thus depriving congressional investigators of another rich resource.[200]

The interplay of executive and legislative interests in investigations is further illustrated by the authorizations to inspect tax returns granted in the first two years of the Eisenhower administration, when Republicans controlled the presidency and both houses of Congress. While

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often non-legislative, Shapiro argues, the Court restored a balancing test in which "The whole weight of Congress's general power to legislate on internal security is thrown into one side of the scale, the particular loss of personal rights on the other, and the result is a foregone conclusion." (p. 64.)

[197] "Public Officials Integrity Act of 1977," Report of the Committee on Governmental Affairs, U.S. Senate. Report 95-170. P. 15.

[198] Letter from Truman to LaFollette, March 11, 1946. Records of the Joint Committee on the Re-Organization of Congress, National Archives.

[199] Executive Order 10321, 17 Federal Register 791.

[200] "Directive on the Need for Maintaining the Confidential Status of Employee Loyalty Records." March 13, 1948. 13 Federal Register 1359.

many contemporary[201] and later accounts (Greenstein 1982) have highlighted Eisenhower's acute dislike of Senator Joseph McCarthy and distaste for his methods, this did not prevent the President from granting access to tax returns to McCarthy's Committee on Government Operations in February 1953. Eisenhower's failure to follow his initial impressions of McCarthy in this matter would only abet McCarthy's abuses of fair investigative procedure—by September 1954, columnist Drew Pearson would claim that the IRS had turned over more than 2000 individuals' tax returns to McCarthy's committee.[202] In 1955, the administration tightened its rules for providing access to tax returns, requiring that committees—other than House Ways and Means, and Senate Finance—approve a resolution setting forth "the names and addresses of the taxpayers…and the taxable periods covered by the returns." The new Treasury rules also stipulated that "Any information thus obtained…shall be held confidential," with only "any portion thereof relevant" to the investigation capable of being submitted by the committee to the chamber.[203] Eisenhower *did* however deploy executive power to successful effect against McCarthy—relying on his position as chief executive to aggressively denouncing McCarthy's overtures to potential Executive branch whistleblowers and signaling to bureaucrats that they would be punished for funneling information to the Wisconsin Senator, and developing executive privilege arguments to resist inquiries into senior-level discussions about how the administration had responded to McCarthy (Greenstein 1982, 204-210).

In the wake of the McCarthy episode the House in particular undertook a number of measures intended to restrict the ability of individual members to question witnesses, and ensuring the right of individuals to present testimony rebutting the testimony advanced in hearings. By increasing the degree of member participation required and forcing committees to sit through the presentation of additional evidence, the new rules decreased the utility from investigations.

Civil Contempt and Confronting an Imperial President: 1974-present

Approximately a quarter-century after the LRA, Congress embarked on a second set of internal and government-wide reforms intended to increase oversight and rein in the excesses of the Executive Branch. Watergate, the inextricability of the Vietnam War, and impoundment gave rise to a raft of enactments to limit executive power and increase Congressional influence. The War Powers Resolution (1973), Budget and Impoundment Control Act (1974), and Ethics in Government Act (1978) instituted new procedures and set legal requirements for the Executive.

Silverstein (1997, 2009) identifies two tendencies in the flurry of reforms undertaken in the 1970s. First, that Congress's attempts to control the Executive in this era were often counter-productive, as its preferred inter-branch bargain traded increased delegation to the President in exchange for implausible or constitutionally-dubious controls occurring *after* presidential decisions. Second, Congress's actions on war powers, budget controls, the independent counsel, and line-item and legislative vetoes fit with a broader pattern of "juridification"—the adoption of

[201] Lawrence, W.H. "Eisenhower to Back M'Carthy if Named, but Assails Tactics," *New York Times,* August 23, 1952. Pg. 1. Eisenhower said: "I am not going to support anything that smacks to me of un-Americanism—that is un-American in character, and that includes any kind of thing that looks to me like unjust damaging of reputation, where the man has not the usual recourse to law."

[202] Pearson, Drew, "McCarthy's Tax Woes." *Washington Post*, September 20, 1954, page 33.

[203] 20 Federal Register 3024

legal mechanisms and modes of reasoning instead of normal, political means of negotiating and problem-solving. The elements of these reforms touching on investigation and oversight bear similar characteristics: in the creation of a civil procedure for obtaining testimony and evidence, and by establishing an Office of Legislative Counsel in the Senate, Congress integrated the courts even more into its investigative methods. These initiatives were met, however, by an increasingly aggressive Presidency whose claims to executive privilege and authority over subordinates in the Executive Branch have led to greater conflict over allowing officials to testify before investigating committees.

Congressional Capacity

Under the Committee Reform Amendments of 1974, proposed by the House Select Committee on Committees and modified by the Hansen Committee, standing committees were granted the ability to issue subpoenas as a fundamental power, ending in the House the era in which investigations required a resolution of the chamber. The Committee on Government Operations was granted authority to "at any time conduct investigations of any matter" regardless of whether such an investigation overlapped another committee's jurisdiction.[204] The Select Committee on Committees staff interpreted this change to "substantially broaden the present jurisdiction of Government Operations with respect to oversight."[205] Undoubtedly, this special power injected the system with greater investigative fervor. By permitting Government Operations to bypass other standing committees, the House ensured that no single committee could block an investigation. It also provided a venue for the development and employment of investigative expertise.

The present pattern of concentration of investigative activity in Government Operations presents some differences with the previous use of select and special committees to perform oversight and inquiries. One is size: the smallest subcommittee on the Oversight and Government Reform committee has ten members, reducing the likelihood that all members of a group are motivated by the subject of an investigation. Reformers argued that substantive committees would be capable of more comprehensive oversight, but this system increases the likelihood that a few members of a committee or subcommittee will be favorably disposed towards the agency or firm being investigated. Aggressive investigations may be better served by specially selecting to a committee members who are interested in examining the workings of government. Insofar as the 1946 Legislative Reorganization Act sought to connect investigations with lawmaking, a dedicated investigative committee re-builds the barrier between oversight/investigations and policymaking.

For better or worse, the concentration of investigative power into standing committees means that groups are more dependent on their reputation for producing dramatic hearings and/or reports. The novelty of a particular chairman in earlier times encouraged openness to the panel's work; if members today produce uninteresting hearings, the reputational impact is greater (Waxman 2009)

[204] Committee Reform Amendments of 1974 – Explanation of H. Res. 988 as Adopted by the House of Representatives, October 8, 1974. Staff Report of the Select Committee on Committees. Committee Print. H962-8. P. 72.

[205] Staff Report of the Select Committee on Committees, p. 73.

Congressional Authority

In addition to the inherent contempt procedure residing in Congress and the criminal contempt procedure established with the 1856 statute, legislators have in recent decades attempted to employ courts to sue recalcitrant witnesses for documents and testimony directly. Possessing standing to a legislative body to sue to enforce a subpoena, members avoid both the awkward spectacle of apprehending and detaining an individual *and* interaction with the Department of Justice. Congress further benefits from the high levels of public support enjoyed by the Judicial branch.

However, only the Senate enjoys use of the civil contempt procedure, dating to the creation of a Senate Legal Counsel by the 1978 Ethics in Government Act. Proposing a "Modern Congress Act" in 1974, Sen. Hubert Humphrey cited impoundment and the Nixon administration's "dismantlement" of the Office of Economic Opportunity as instances where Congress had been poorly served by the practice of having individual legislators employ counsel.[206] Creation of a Legislative branch counsel provided an opportunity to address a recent difficulty faced by Congress in its investigative activity—dealing with corporate or governmental officers who refused to supply documents. As stated in the Senate Government Operations Committee's report on an earlier version of the Ethics in Government Act, the criminal contempt procedure was now seen as inappropriate by members of Congress who merely wanted the production of the documents in question, and not punishment of the persons holding them.[207] While House members have attempted to make use of the courts to enforce subpoenas against witnesses, the operant standard appears to be that the House explicitly grant a committee, via resolution, the power to sue in district court; that is, members or a committee may not merely bring a suit to force compliance with another law or rules (Rosenberg and Tatelman 2009). For a brief time, the issuance of subpoenas required a majority vote of the committee, thus preventing subcommittees or chairs from unilaterally compelling the presence of witnesses. The rules were again amended at the beginning of the 95th Congress to allow committees to delegate the subpoena power to the committee chair.[208]

Generally, subpoena power in House committees has been retained in the committee membership despite the freedom for committees to vest the power more narrowly in chairmen. In the 99th Congress, the Government Operations Committee opted for this procedure, but its use did not become controversial until 1997, when Rep. Dan Burton (R-Ill.) began to unilaterally subpoena witnesses in connection with the investigation of fundraising improprieties in President Bill Clinton's 1996 re-election campaign. In a contentious April 1997 hearing, a party-line vote approved protocols allowing Burton to unilaterally release information, and omitting the traditional rule that the minority be consulted prior to issuance of subpoenas.[209] On an anecdotal

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[206] 120 *Cong. Rec.* 2157. February 5, 1974.

[207] Senate Report 95-170. Page 17. The report cited in particular the case of the executive director of the Port Authority of New York, who had received instructions by the governors of both New York and New Jersey not to respond to a House committee's subpoena.

[208] GPO. Constitution, Jefferson's Manual, and Rules of the House of Representatives, 108th Congress, 2d session. House Document 108-241, p. 560.

[209] http://www.c-spanvideo.org/program/InvestigationPr

level, breaking this precedent later made it possible for the committee to be pressured by majority party leaders.[210]

While prerogative for issuing subpoenas was devolved to the committee level, authority for certifying contempt of Congress remains with the parent chamber—except when Congress is out of session, whereupon the Speaker of the House or President of the Senate is responsible for certifying the contempt[211] and referring it to the U.S. attorney. From a political science standpoint, this establishes an odd situation for a would-be contumacious witness: the seemingly inconsequential detail of whether Congress is in session or not theoretically determines whether the chamber's pivot point or the majority party's median makes the decision on referring the contempt for prosecution.[212]

Congress and the Courts

The Supreme Court's opinion in *Eastland v. United States Servicemen's Fund* (1975) demonstrated continuance with *Barenblatt* and further retreat from the Warren Court's rumblings in *Rumely* and *Watkins*. Citing a 1973 case involving a committee whose report on the District of Columbia schools had included exhibits from the academic and disciplinary records of specifically-named students[213], Chief Justice Burger declared that "The wisdom of congressional approach or methodology is not open to judicial veto."[214] "Nor," continued Burger, "is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function - like any research - is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises."[215]

Another win for Congress came in *U.S. v. American Telephone and Telegraph Co.* (1976), the D.C. Circuit validated a House subcommittee's efforts to obtain national security request letters sent by the FBI to AT&T, over DOJ orders not to turn over the documents. Struggling to resolve a situation wherein the Executive's objection included national security grounds, the Circuit Court declared itself unwilling to make a determination, sending the matter back to negotiation between the two branches. However, in laying out the claim of the subcommittee, the judges saw fit to note that they were not "confronted here by the possibility of a wayward committee acting contrary to the will of the House," suggesting that the actions of a

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[210] See the claim by former chairman Tom Davis, III, that this power led House Majority Leader Tom DeLay to request that Government Reform—as opposed to any other committee—issue a subpoena to Terri Schiavo in 2005 to prevent her feeding apparatus from being disconnected. Peter Baker, "Tom Davis Gives Up", *New York Times*, October 5, 2008. Pg. MM63. http://www.nytimes.com/2008/10/05/magazine/05Davis-t.html

[211] The U.S. Court of Appeals for the DC Circuits ruled in 1966 that the Speaker/President must perform some "consideration of the issues following the Committee's action and prior to certification." *Wilson v. U.S.* (369 F.2d 198; 125 U.S. App. D.C. 153)

[212] There is no evidence to suggest that this factor affects how committees set their schedule for hearings.

[213] *Doe v. McMillan*, 412 U.S. 306 (1973).

[214] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509.

[215] Ibid. Fisher (2003) cites (disparagingly) an Office of Legal Counsel opinion from 1981 which speculates that "A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information." 5 O.L.C. 27, 30.

committee might be scrutinized in relation to the parent chamber, even where an explicit authorization to subpoena documents existed.[216]

Court cases over use of civil procedures to obtain documents demonstrates the strategic potential presented by the courts. In a dispute between the House Judiciary Committee and the George W. Bush White House, a chamber authorization to the committee to bring suit led to the advancement—and adoption—of new constitutional claims for the Legislature. Soon after the December 2006 dismissals of 26 U.S. Attorneys became public, Senators from the Attorneys' home states sought to find out whether the administration had eliminated the attorneys for prosecuting Republican officials and/or refusing to investigate Democrats. A newly-elected Democratic Congress investigated, to withering effect.[217] Handed a potentially potent scandal and with conflicting signals as to the extent of the White House's involvement in the firings, investigators sought to receive testimony from Harriet Miers, former White House counsel, and Joshua Bolten, White House Chief of Staff. The Bush administration claimed that executive privilege protected Miers and Bolten from prosecution under the statute. The House Judiciary Committee issued subpoenas to Miers and Bolten in June; a month later, the committee voted to ask the House to find the two in contempt and refer the matter to the Justice Department under the criminal statute.

After the House voted—February 13, 2008—in favor of referral to the U.S. Attorney, the Justice Department refused to bring the case before a federal grand jury. This was, at long last, exercise of the prosecutorial discretion speculated on by legislators and legal scholars. The House Judiciary committee responded to this impasse by suing for injunctive relief in federal district court. On July 31, 2008, District Court Judge John D. Bates ruled that the administration could not assert a "claim of absolute immunity from compelled Congressional process for senior presidential aides."[218] Going further, Bates concluded that the Article I power to legislate *established* Congressional rights. "For instance," wrote Bates, "by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a legal right to the responsive information that those subpoenas will yield."[219] Where in the past, courts had affirmed the power of Congress to have contumacious witnesses *jailed*, Congress was not deemed entitled to the very information itself. The plaintiffs appealed to the D.C Circuit Court of Appeals, but the appellate court did not take up the matter before Barack Obama took office in January 2009. The incoming administration worked to resolve the impasse between the committee and the Bush administration, and in a settlement announced on March 4, 2009, it was announced that Miers and Bolten would testify on matters relating to the firing of the U.S. Attorneys, but that they would not divulge details of communications with President Bush.

The Court has also played a role limiting the ability of Congress to investigate wrongdoing without foreclosing criminal prosecution of the acts revealed by immunized

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[216] 551.F2d.384

[217] A Senate Judiciary Committee hearing on April 19, 2007 brought heavy damage to Attorney General Alberto R. Gonzales who, according to the *Los Angeles Times* said "I don't recall" more than 50 times over the course of his testimony, leading to harsh criticism from even Republican senators. Schmitt, Richard B. "Senators Aim Stiff Criticism at Gonzales," *Los Angeles Times*, April 20, 2007, page A.1.

[218] *Committee on the Judiciary, U.S. House of Representatives v. Miers, et al.* Civil Action No. 08-0409. https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0409-49

[219] Ibid. Emphasis in the original.

witnesses. In 1990, the D.C. Circuit ruled that Independent Prosecutor Lawrence Walsh's case against Oliver North had been compromised by the congressional investigation into the Iran/Contra affair. Despite extensive efforts to insulate the prosecution *team* from details and news issuing from North's testimony before the joint committee, the Court ruled, Walsh could not assure that the testimony of government witnesses had not been tainted by the revelations made by North to the committee.[220] By this standard, writes Akhil Amar (1997, p. 60), "little difference" is left in the practical effect of awarding use immunity or "transactional" immunity (whereby a witness is given absolute immunity for the crimes about which he speaks). Thus, if the legislative branch has a supplementary interest in seeing the target of an investigation receive criminal punishment, it must be wary of whether by granting use immunity to a witness, it might jeopardize the success of the prosecution. One proposal to avoid compromising prosecutions is to simply take testimony in executive session.[221] However, this would seem to revive the worst abuses of the McCarthy era—committees would be virtually unrestrained in their questioning of witnesses, and the witness would have no recourse to an open hearing whereby misconduct of committee members might be exposed. Another alternative is to delay congressional investigations until prosecutors have amassed the evidence and testimony necessary to win convictions. But as Wright points out, Congress's tendency post-*North* to defer to criminal prosecutors betrays some lack of confidence in the institution—either to embarrass wrongdoers or to generate new legislation. By punting to criminal investigators, Congress accepts a less prominent role in the administration of government and laws. Simultaneously, it renounces a means by which it might *gain* respect as an uncoverer of misdeeds and source of sound public policy.[222]

Congress and the Executive

The 1970s saw escalating conflict between Congress and the President over subpoenas of documents and executive officials.[223] A trio of investigations during the Ford administration were opposed on the grounds that committee requests for documents violated statutory prohibitions on the release of those documents. These cases resulted somewhat easily in victories for Congress, one through clarification of the statutory language to exempt congressional inquiries, the other two by agreement that because Congress clearly had the power to subpoena certain documents from citizens and firms, that it was needlessly dilatory to require committees to issue subpoenas to firms when the requests might just as easily be made of executive agencies to which they were submitted.

The 1978 Inspector General Act provided that agency inspectors general submit reports directly to Congress, without being subject to review or approval by the President. In an early invocation of unitary executive theory, the Office of Legal Counsel advised that this provision limited the President's role as chief executive. In addition to restoring the executive's power to suppress IG reports, OLC objected to language requiring the President to furnish a justification

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[220] *United States v. North*, 920 F.2d 940 (1990).

[221] See Ronald F. Wright, "Congressional Use of Immunity Grants After Iran-Contra" 80 Minnesota L. Rev. 407, 449.

[222] Ibid. 465-469.

[223] This paragraph draws heavily upon Louis Fisher, "Congressional Investigations: Subpoenas and Contempt Power," CRS report RL31836, April 2, 2003.

to Congress upon any removal of an inspector general.[224] But despite this concern, President Carter signed the legislation, making no mention of the OLC's concerns in a signing statement that congratulated the bill's sponsors and affirmed the administration's commitment to combating waste, fraud and abuse.[225]

The executive branch has made similar claims that the courts should distinguish between investigations. In 1981, Reagan Attorney General William French Smith issued an opinion stating that "the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question."[226] French argues that "A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information." In this, French relies on the 1974 rulings in *United States v. Nixon* and *Senate Select Committee on Presidential Campaign Activities v. Nixon*. But in the latter case—the only of the two to involve the legislature—the D.C. Circuit's reasoning hinged on two facts: first, that a Senate committee had subpoenaed copies of tapes which had already been given to the House Judiciary Committee; and second, that transcripts of the tapes had already been released to the public. The circuit court used the first fact to conclude that release of the tapes to the Select Committee couldn't be justified on "an asserted power to investigate and inform."[227] The court then argued that the Committee hadn't indicated what sort of "specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain."[228] Thus, the Court found the "need demonstrated by the committee…too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena."[229]

Conclusion

Confronted with greater opposition in the Executive branch, Congress in the 1970s developed new avenues to access the judicial system without requiring the cooperation of the Department of Justice to issue indictments, nor having to revert to the inherent contempt power. While the legislature enjoyed virtually unimpeded authority in making demands on witnesses, the increased role of the courts in reviewing the procedures of the other branches complicated Congress's ability to successfully compel testimony.

In this area, Congress developed its capacity and procedures in *response* to increasing sophistication and complexity in the governmental and societal actors whose regulation comprises the Legislature's principal business. In crafting new powers to accomplish its objectives, Congress must interact with the other branches for fine-tuning their use and limits. The resulting patterns encourage members to conduct investigations wherein the use of those powers has been validated. Other types of investigation fall by the wayside, from disuse, or

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[224] 1 Opinions of the Office of Legal Counsel of the Department of Justice, pp. 16-19. 1977.
[225] "Statement on Signing H.R. 8588 the Inspector General Act of 1978 Into Law," October 12, 1978. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=29968.
[226] 5 Op. Off. Legal Counsel 27, 30 (1981).
[227] Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F. 2d 725, 732 (1974).
[228] Ibid., 733.
[229] Ibid., 733.

because the development of new powers creates standards and expectations for the use of power generally that are not appropriate to other cases. Polsby (1968) cites the decline in contested seats per Congress as evidence that elections were no longer overturned for "frivolous reasons." While it is certainly true that the decline of election contests indicates increasing expectations of impartiality and consistency in congressional business, it may also speak to members' diminished focus on Congress as an institution. Increasingly, both member behavior and electoral qualifications have been matters for other institutions to settle. And as seen in examples as diverse as the dispute over seating Adam Clayton Powell and controversy over the Bipartisan Campaign Reform Act of 2002, the Judiciary has blocked efforts by Congress to make important decisions about membership and, consequently, the image and functioning of the branch. As Congress increased its focus on oversight of the Executive Branch, its attention went away from disputed election cases and campaign finance issues. As seen in *Kilbourn v. Thompson*, it was in examining elections and abuses against the Legislature, the Supreme Court found, that Congress had its greatest power against contumacious witnesses.

Over time, the tables were turned, as Congress made more use of investigations for purposes of legislating and overseeing the Executive branch, and eventually put far less time and effort into matters involving the honor of Congress or its members. By setting up a civil mechanism for satisfying subpoenas, Congress expanded its means of obtaining information from the Executive branch and others, but engaged itself to a procedure that would require further use of resources. So far, the civil contempt statute has been beneficial to Congress, the courts having gone further than ever before in upholding its ability to demand information from other actors. What has changed is that the Congressional power is no longer executed by the Legislature itself, with no participation from outside, but is decided externally.

The result would undoubtedly appear strange to the Congressional investigators of the 18th and 19th centuries: by effectively renouncing the most punitive *manifestations* of its power to compel testimony, Congress has succeeded to a greater extent than ever before at establishing its claim to investigating authority. The Supreme Court's insertion into Congress's use of the inherent contempt procedure may have reduced the Legislature's ability to jail persons at will, but the continuing pattern of interaction the Court initiated helped to burnish Congress's claims in far larger matters than anticipated in the late 19th century.

Another consequence of this development has been that a power that was very much exercised by a *single* branch of the national government now relies on multiple branches. Neustadt's (1960 [1990]) description of American government as one of "separated institutions sharing power" has become true in this area. But this also limits the deference shown towards Congress when confronting abuses against its own institution and legitimacy. If the lion's share of Congressional investigative activity occurs in domains where witnesses' due process rights are well-protected, it is hard to believe that legislators will be able to summarily send contumacious witnesses in cases of suspected bribery or electoral fraud. And if members have abundant opportunities to investigate outside the branch, they are likely to exhibit less interest in the business of their own institution. While many internally-focused investigations of the 19th century may have been motivated by partisanship or other biases, it is possible that greater Congressional responsibility for member conduct and election procedures might increase the body's public standing. The difficulty for the political system is that unchecked Congressional authority to investigate has, in the past, produced both significant successes and embarrassments. Even from the perspective of legislators themselves, greater responsibility over the image of Congress and its members would be unwelcome.

In the final analysis, developments in capacity and authority have helped Congress keep pace with the growth of the Executive, but the Legislature's investigative power has changed from one that was grounded and exercised within Congress, to one whose *inter-branch* properties are central to its understanding. The potential for abuses of witnesses through arbitrary actions by legislators is reduced; however, the greater contentiousness between the Executive and Congress and the greater participation of the Courts means that the potential reputational benefits to members of Congress are diminished.

Chapter 6
Conclusion

Virtually everything that happens in America happens with the assent—implicit or explicit—of government. The broad authority of the federal government makes possible legislation on almost any subject relating to almost ever aspect of a citizen's existence. Some substantive limits are imposed by the Constitution, but these can often be sidestepped by fiscal and other devices—state autonomy has been broken down in criminal statutes and education; tax incentives similarly affect the choices of individuals. Broad though this potential power may be, it is scarcely oppressive: the fragmented nature of American government and the relative weakness of the State mean that the exercise of this power can be only intermittent. "Government" cannot strike out in a hundred different directions simultaneously, in part because "Government" does not exist as a unified, discrete entity. Even in making the nation's laws—to say nothing of carrying them out or interpreting them—fragmentation prevails. This is no accident. The Founding Fathers, bringing together a diverse populace and creating a bicameral legislature, explicitly sought to complicate the passage of laws, reasoning that only the best and most necessary legislation would be successful.

Congress's broad lawmaking power—executed slowly and deliberately, following its 18th century blueprint—provides the justification for a robust information-gathering power which can be quickly and easily employed. In contrast to the use of its legislative power, Congress *can* conduct inquiries into a wide variety of subjects without unduly reducing the effectiveness of other inquiries. If Congress acts like a battleship in carrying out its lawmaking function—singular, focused and tremendously powerful, but not easily turned around—the exercise of the investigative power has over history resembled more closely a sailing regatta, with members setting out in teams and individually but with no collective direction or pattern.

In studies of the interaction between Congress and the executive branch, scholars have emphasized the means by which legislators grapple with the principal-agent problem. But this method of thinking has not been applied to the interactions between Congress and firms, who are responsible for many outcomes in which Congress is interested. Beyond the requirements set by law, Congress may prefer that firms adopt stricter (rather than looser) environmental standards, more progressive hiring of minorities, or safer workplace standards. Most commonly, the method for Congress to follow through on these wishes is the legislative process, meaning that firms should be most attentive to those members and committees having the greatest ability to advance legislation. But where opportunities for law-making are few, members may nonetheless threaten to inflict a reputational toll on a firm which does not implement Congress's preferences.

These considerations appear to encourage legislators and firms to make policy outside of the normal legislative or administrative frameworks. While serving as chairman of the Senate Commerce Committee, Sen. John McCain was able to negotiate deals with television networks on ratings for sexual and violent content, and with airlines on a number of pricing and service measures. In the case of television ratings, the networks received letters from influential members of both parties—from the (Republican) Senate Majority leader to the (Democratic) ranking member on the House Subcommittee on Telecommunications, Trade, and Consumer Protection—promising a moratorium on legislation covering "television content, scheduling or

ratings."[230] Warren Buffett's comment that ratings firm Moody's took an overly sanguine view of mortgage-backed securities because it feared that it would be denounced as "un-American" before Congress suggests that this dynamic may occur even without explicit congressional pressure—firms know (or think they know) what legislators want, and consider these preferences when calculating business decisions. In the early 2000s, oil companies found themselves squeezed between Republican desires to open the Arctic National Wildlife Reserve to drilling, uncertain projections of the amount of oil available, and public disapproval. Their failure to take a stronger line on ANWR was identified as a reason why some Republicans provided only tepid support for the industry during a 2006 uproar over gasoline prices.[231]

The role of public pressure in generating congressional investigations, and its role in making sure that investigations carry through and have the desired effect is an important and complicated question. A rigorous answer to this question is beyond the scope of this dissertation and its focus on revealing historical patterns in the occurrence of investigations generally. However, a number of important points may be made. First, the consistency of Senate investigations across periods of divided and unified government suggests that, provided that "pressing issues" arise relatively equally across situations of divided vs. unified government, these are likelier to find voice in the Senate. Second, longer terms in the Senate permit members to more easily anticipate that a long, complex investigation will achieve a satisfactory completion. Third, the extension of a divided/unified pattern to investigations related to the Executive scarcely or not at all, indicates either that (1) when it is politically inconvenient to investigate the President, the House investigates little; or (2) fundamentally, investigations about "non-political" subjects are chosen because they do indeed have a political angle for exploitation.

Traditionally, the dice have been loaded against the prospects of the House of Representatives generating the sort of "continuous review" of administration so often sought by reformers. That does not necessarily mean, however, that the House's pattern is dysfunctional, or gives too much license to bad actors in government or society. The possibility of future investigation may deter bad behavior in the present, and occasional plagues of eager, publicity-seeking legislators armed with subpoenas—as has been the common House pattern—may be tremendously effective at ensuring that bureaucrats and others take actions that will not jeopardize themselves and their institutions. When we consider the considerable success of the Obama administration at avoiding major scandal in its first term, it is difficult to calculate how important the negative example of Bill Clinton's administration may have been in influencing officials' behavior. Should control of the elected branches continue to oscillate as greatly as it has since the mid-1990s, we might expect that a rough equilibrium will emerge between legislative probes and the sorts of activities that invite them. Those reformers who observe a paucity of investigations may fail to appreciate the strategic interaction between prospective investigators and their potential targets, and they may *additionally* fail to understand that gratuitously dispatching legislators to poorly-understood, poorly-directed oversight implicitly puts them at fault for what they fail to turn up.

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[230] Mifflin, Laurie. "Deal on Making Ratings for TV Specify Content." *New York Times*, July 10, 1997. Page A1. Republicans promised a moratorium lasting "several years," the Democratic pledge specified a length of only three years.

[231] Brody Mullins and Russell Gold, "Under Attack, Big Oil Finds Reserves of Clout Running Low, " Wall Street Journal, May 24, 2006.

In studies of the interaction between Congress and the executive branch, scholars have emphasized the means by which legislators grapple with the principal-agent problem. But this method of thinking has not been applied to the interactions between Congress and firms, who are responsible for many outcomes in which Congress is interested. Beyond the requirements set by law, Congress may prefer that firms adopt stricter (rather than looser) environmental standards, more progressive hiring of minorities, or safer workplace standards. Most commonly, the method for Congress to follow through on these wishes is the legislative process, meaning that firms should be most attentive to those members and committees having the greatest ability to advance legislation. But where opportunities for law-making are few, members may nonetheless threaten to inflict a reputational toll on a firm which does not implement Congress's preferences.

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For reformers who want legislators to engage in more deliberate, sustained review of government and societal malefactors, it is instructive to examine the periods when oversight and investigations have flourished. In the House of Representatives, we may point to the conservative Democrats' push to investigate in the years leading up to and continuing through World War II; but also the period following Watergate and continuing to the early 1990s, when liberals such as John Dingell and Henry Waxman made diverse use of the Legislature's investigative powers. In both instances, power within Congress had been devolved to committees

[232] Mifflin, Laurie. "Deal on Making Ratings for TV Specify Content." *New York Times*, July 10, 1997. Page A1. Republicans promised a moratorium lasting "several years," the Democratic pledge specified a length of only three years.

[233] Brody Mullins and Russell Gold, "Under Attack, Big Oil Finds Reserves of Clout Running Low, " Wall Street Journal, May 24, 2006.

(and in the 1970s-1990s, subcommittees), and the charge was led by members who enjoyed strong electoral support, a strong probability that their party would continue to control Congress in the next term, and strong views on issues of national policy and government. Broad jurisdictions—by creating special committees in the late 1930s and 1940s, explicitly on committees such as Government Operations or Energy and Commerce in the later period—ensured that investigators would find subjects for investigation that would not jeopardize their own favored programs or interests, and also that, at least occasionally, bipartisan support for investigations could be found. A critical ingredient for developing good investigative habits in Congress, then, is the maintenance of systems that allow members' focus to range fairly widely. This is, of course, inimical to the spirit that seeks to improve Congress as a law-*making* body: a committee system with strict, relatively narrow jurisdictional limits may be helpful at encouraging members to develop expertise within a specific topical area, but this also magnifies the danger these legislators face when casting hostile looks at the agencies and interests they are charged with regulating.

Here, then, we see an inherent contradiction between facilitating specialization and allowing others to harm the interests favored by the members who have specialized, between law-makers and investigators—put another way, between hedgehogs and foxes (Berlin 1953, Tetlock 2006). The remarks of a 29-year-old Woodrow Wilson—that "the informing function of Congress should be preferred even to its legislative function"—have been repeated many times by proponents of greater investigative activity, but we may seriously question what authority, history, or theory supports such a statement. Indeed, there have been many serious flaws in the operation of the investigative power over time. Insofar as we may successfully encourage members of Congress to increase their investigative *activity*, we may be encouraging injustices towards individuals and harm to the reputation of the Legislative branch as a whole.

Better than to use legislative reforms to encourage investigations may be to encourage a legislative "culture" in which vigorous-but-responsible investigative effort is supported and rewarded. While the McCarthy era's harmful use of the investigative power resulted in disputes between members and harm to the institution's reputation, successful use has sped the emergence of candidates for higher office and brought reputational benefits to individual members and Congress as a whole. Legislative leaders would do well to recognize that while the short-run hazards from member inquests may be considerable, there are important short- and long-term benefits that accrue from members who undertake work of this nature. At a time when approval ratings for Congress flirt with all-time lows, opinion towards the institution might be improved by making greater use of the subpoena power to document societal problems, expose bad actors, and lay the groundwork for effective policy.

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