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CONGRESSIONAL INVESTIGATIONS IN A POLARIZED ERA OR HAS POLARIZATION (AND TRUMP?) BROKEN THE INVESTIGATIVE CHECK?

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Since the dawn of the republic, investigations have afforded Congress a powerful tool to push back against wayward presidents, shine a light on alleged wrongdoing, and exercise an important check on executive aggrandizement. However, the investigative check is under threat in the contemporary polity.

Polarization in Washington, combined with partisan tribalism among the mass public, has seriously undermined the ability of investigations to move public opinion and generate political pressure for action in Congress or concessions from the White House. Perhaps even more dangerous is President Trump's blanket refusal to cooperate with congressional investigators. To place Trump's intransigence in a historical context, the chapter reviews cases from the Obama and Clinton administrations and offers an extended assessment of the Reagan administration's response to the Iran Contra scandal—another politically explosive investigation involving national security concerns and plausible arguments for executive branch secrecy. Trump's refusals to provide virtually any documents demanded by congressional committees, even when access to that information is guaranteed by statute, and his orders to both current and former administration officials to defy subpoenas for testimony are truly unprecedented. If the impeachment saga is a template for future presidents, it will have implications extending far beyond Trump's last day in office. Trump's unprecedented obstruction of Congress could seriously alter the balance of power across the branches for the foreseeable future.

Writing in the immediate aftermath of the Watergate scandal, in which President Richard Nixon orchestrated a massive cover-up of illegalities committed by the Committee to Reelect the President, the historian Arthur Schlesinger Jr. argued that “the manner in which Congress exercises the investigative power will largely determine in years to come whether the problem posed in the *51st Federalist* can be satisfactorily answered—whether the constitutional order will in the end oblige the American government to control itself.”²¹ The intervening forty years since Schlesinger wrote have produced no shortage of congressional investigations of alleged executive branch wrongdoing. Moreover, as Iran-Contra, the Monica Lewinsky scandal, and the impeachment of President Donald Trump have made clear, Richard Nixon would not be the last chief executive to face an investigative maelstrom on Capitol Hill. And yet there are good reasons to be concerned that investigations—even as they remain frequent and aggressive, at least under conditions of divided government—have lost much of their capacity to rein in the executive branch. Put simply, it is highly doubtful that the results of the Nixon scandals would have been the same had they taken place in today's context of all-out partisan warfare in Washington.

Moreover, for investigations, or “publicity probes” as Mayhew called them, to work, they must be able to uncover information and shine a light on alleged executive misconduct.² Since the very first congressional investigation in 1792, presidents and Congress have sparred over Congress’s right to gather information versus the executive’s right to secrecy in its deliberations. However, President Trump’s declaration of unconditional war on Congress’s investigative power—a war aided and abetted by his fellow partisans in the legislature—has eviscerated the investigative check with potentially disastrous long-term consequences for checks and balances. It simply no longer is clear what lines a president must cross to trigger severe consequences from Congress.

In this essay, we first briefly review prior work elucidating the pathways through which investigations have influenced policy and politics and detail the grounds for concern that contemporary polarization may undermine the effectiveness of these mechanisms. We then discuss the Trump administration’s war on congressional investigations, asking whether it is exceptional and focusing in particular on the contrast with the Reagan administration’s response to Iran-Contra. We conclude with a discussion of the implications of our argument for the durability of separation of powers.

PATHWAYS OF INVESTIGATIVE INFLUENCE

We argue in *Investigating the President* that congressional investigations have generally been an effective tool used by members of Congress to check the president.³ Although investigative activism has been higher under divided government than when one party controls both Congress and the White House, we find that investigations have been a regular feature of American politics and have had systematic, important effects on politics and policy.

While critics have often dismissed congressional investigations as mere political theater, they may be influential precisely because of their capacity to generate headlines.⁴ Indeed, one of the most important mechanisms through which investigations have historically influenced politics is by changing public opinion. By analyzing all congressional investigations between 1953 and 2014, we found that congressional probes systematically lower public approval of the president. Increasing the number of days of investigative hearings in a month from 0 to 20 (just under a two-standard deviation shift) is associated with a 2.5 percent decline in presidential approval. This drop in approval is comparable to that produced by a two standard deviation decrease in the Index of Consumer Sentiment, a factor long held to be one of the strongest predictors of presidential approval. Strikingly,

the impact of investigations is about as strong under divided as unified government, even as the frequency of hearings is higher under divided government.⁵

Eroding public support for the president is no guarantee that an investigation will ultimately produce concrete changes in politics and policy. Some investigations simply fade away leaving little mark. However, in our analysis of more than one hundred years of investigative history, we identified three pathways through which investigations regularly effect important shifts in politics and policy. The first and most direct pathway is that an investigation can spur Congress to use its constitutional powers to check the executive branch. In extreme cases, investigations can prompt the legislature to consider impeachment. Of course, the House has only impeached three presidents, and the Senate has never convicted a president and removed him from office. However, investigations of four of the last nine presidents have prompted serious consideration of the impeachment option. Nixon resigned under the immediate threat of impeachment and likely conviction. The Iran-Contra investigations marred Ronald Reagan's final two years in office, with many making unflattering Nixonian comparisons. Bill Clinton and Donald Trump, of course, were each impeached, though acquitted in the Senate.

More commonly, however, investigations have prompted Congress to act legislatively to counter perceived executive branch abuses. For example, the Church Committee's investigation of abuses of the national intelligence apparatus directly contributed to the passage of legislation both to rein in future abuses and to bolster congressional capacity vis-à-vis the president. This legislative legacy includes the creation of the permanent House and Senate Intelligence Committees—each of which played an important role in investigating President Trump—as well as the Foreign Intelligence and Surveillance Act, which also assumed a key role in the Russia investigation thanks to the use of FISA warrants to authorize surveillance of Trump campaign advisers.

Collective action dilemmas and a complicated legislative process replete with veto points often doom congressional efforts to rein in the executive branch. However, investigations may help Congress overcome these institutional deficiencies. Investigations may serve as a common carrier for multiple incentives.⁶ For example, one or a small number of members may pay the costs of spearheading an investigation in order to raise their public profile, furthering their career ambitions. In so doing, personal motives are linked to institutional ones. As an investigation concludes, these same forces may also lead investigative entrepreneurs to pursue concrete legislative steps to cement their legacy and raise their profile even further. By investing heavily in a new initiative's success, these members subsidize the cost of collective action for others.

More broadly, prominent investigations can change the political climate in ways that promote a legislative response. By fueling popular demand for action, investigations may encourage many members to perceive that their own electoral interests are now best served by backing legislative reform efforts. Furthermore, by weakening the president's approval ratings, an investigation can embolden the

president's partisan opponents while simultaneously encouraging copartisan representatives—who otherwise might be counted on to block legislation opposed by the White House—to reconsider the political merits of doing so. Finally, public pressure may induce presidents to sign legislation that they might have otherwise vetoed in the absence of voter demand for reform.

Beyond encouraging legislative redress, investigations have also impacted policy by encouraging presidents to make unilateral concessions in the hopes of preempting a more extreme congressional response. For example, in President Reagan's first term, congressional investigations of the EPA's administration of the Superfund program uncovered numerous damaging revelations of sweetheart deals and abuses of power. Faced with growing pressure for action on Capitol Hill, Reagan fired key personnel, including the EPA administrator, and tapped William Ruckelshaus, who had a much stronger environmental record, to lead the agency. Ruckelshaus immediately shifted the EPA's approach, dramatically strengthening environmental enforcement.⁷

Finally, a third, more indirect pathway of investigative influence is that their political costs can broadly influence presidential actions in areas unrelated to the investigation itself. These indirect effects are both more difficult to measure yet also potentially more far ranging. For example, we find in *Investigating the President*, that the president is less likely to use military force following a period of intense investigations (even if those investigations are not related to foreign policy).

Are Investigations Effective Under Intense Polarization?

Our evidence on the frequency and impact of investigations covered more than a century of history, during which there was considerable variation in partisan polarization. We found that the presence of divided government has a bigger impact on House investigations during periods of high polarization: Investigations are rare under unified government in the House when the parties are highly polarized, while polarization tends to increase investigative activity under divided government. The frequency of Senate investigations, however, was less responsive to the presence of unified versus divided government, regardless of the degree of polarization.

Nonetheless, there are grounds to believe that the current era of intense polarization may be qualitatively different from anything the United States has experienced, at least since 1898 when our data begin. Past eras of sharp party polarization have tended to be short lived and have proven highly vulnerable to disruption as cross-cutting issues emerge. By contrast, today's polarization appears to be self-reinforcing, as the declining autonomy of state parties, the deepened connections between nationally oriented interest groups and parties, and the decline in locally oriented media outlets have rendered countervailing forces less effective.⁸ At the same time, the overlap between partisanship and other social identities—such as race, religion, and ideology—has tightened, making partisanship akin to a

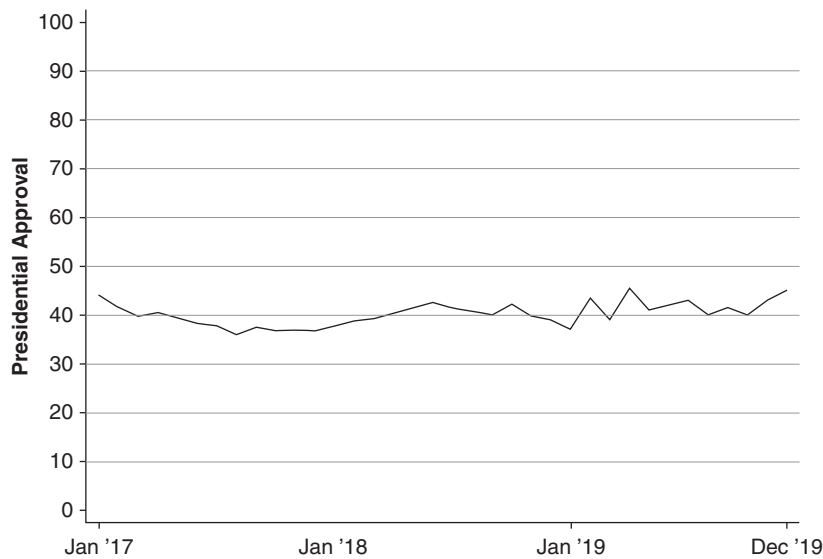
“mega-identity” that powerfully shapes all other evaluations.⁹ From this perspective, the dynamics evident during the Trump administration reflect the culmination of broad, gradual changes in our polity that could prove difficult to dislodge.

One distinctive feature of today’s politics that reflects these broader shifts is that President Trump’s approval rating has remained remarkably stable throughout his term (Figure 15-1), despite numerous major events that had generally affected presidential approval in the past, including investigations replete with seemingly damaging revelations. While it may be the case that the president’s ratings would have been higher had he not faced so many investigations, it is nonetheless striking that the onset of the Ukraine scandal and the ensuing impeachment left no mark on Trump’s approval.¹⁰ Put simply, citizens’ partisan and ideological commitments may be sufficiently hardened that it is much more difficult to move such politicized evaluations as presidential approval than in the past.

This shift in approval dynamics potentially short-circuits the mechanisms through which investigations historically reshaped politics and policy. If investigations no longer sap the president’s popular support, there is less pressure to give ground either on the issue being investigated or on other policies. It also may be harder for investigators to galvanize popular support for reforms if voters interpret investigations almost entirely through partisan lenses.

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FIGURE 15-1 ■ President Trump’s Approval Rating, 2017–2019



Source: Gallup Poll data obtained from The American Presidency Project, <https://www.presidency.ucsb.edu/statistics/data/presidential-job-approval>.

While voters' partisanship is likely a key element of the story, it is also critical to think about how elite incentives have changed in ways that reinforce this partisanship.¹¹ Consider Republican members of Congress' response to the impeachment case. A member who bucks their party on Trump's culpability faced serious political risks: a primary electorate and conservative media ecosystem that would define such dissent as treasonous—not to mention a president with a Twitter feed eager to target the disloyal. For investigations to inform the public, it is very helpful if they are viewed as something more than simple partisan politics. For this to work, however, it is enormously valuable if at least a segment of the president's party treats the investigation as valid and serious. Investigations have long been highly partisan, but the most impactful probes generally secured at least some cooperation and even support from the other side of the aisle. When past investigations succeeded in triggering new legislation, this bipartisan support was critical. Presidents were also more likely to make concessions when investigations generated calls for change from at least some members of their own party.

Today, by contrast, it has become the norm for all Democrats to line up in favor of investigating president Trump and virtually all Republicans to line up in the president's defense—with that defense premised on denying the very legitimacy of the inquiry in the first place. When the congressional politics of investigations appear to be little more than another manifestation of tribalism, there is little basis for voters to update their beliefs.¹² In that context, it is much less likely that investigations will fulfill their crucial role in maintaining separation of powers and checking presidential abuses.

The one partial exception to this dynamic during the Trump administration has been in the area of foreign policy, where ideological commitments and partisanship were in conflict for at least some Republicans. The Senate Intelligence Committee, although controlled by Republicans, conducted a relatively bipartisan investigation of several actors in the Trump orbit, including former national security adviser Michael Flynn, resulting in numerous embarrassing disclosures related to members of the administration's ties to Russia. The investigations led to some policy setbacks from the administration, such as Congress's approval of tightened sanctions on Russia. More informally, sharp public criticism from prominent Republicans has led President Trump to backtrack on multiple fronts. After giving Turkish president Recep Tayyip Erdoğan the green light to take over northern Syria, President Trump quickly reversed course in the face of significant Republican pushback, even threatening to "swiftly destroy" the NATO ally's economy if the offensive continued.¹³ Similarly, while many Republicans stood by President Trump after his shocking decision to assassinate Iranian Quds Force Commander Qassim Suleimani, Trump's threat to bomb Iranian cultural sites earned a sharp public rebuke. The growing unease among Senate Republicans—eight crossed the aisle to vote with Democrats for a new resolution that would limit Trump's ability to use force against Iran unilaterally, twice the number that voted for a similar measure in June 2019—likely contributed to the administration's concerted effort

not to escalate further and instead to ease tensions. Even so, the more general stance of Senate Republicans has been to stick with the president on the most hot-button issues of impeachment and of Congress's access to information.

President Trump's War on Oversight

Particularly in the House of Representatives, partisanship has always fueled Congress's investigative fervor. In eras of intense partisan polarization, investigations have become almost exclusively features of divided government. Consistent with this broader pattern characterizing more than a century of congressional history, many Democrats campaigned in the 2018 midterms on the promise that a Democratic House would provide vigorous oversight of the Trump administration rather than the free pass that characterized its first two years. Rep. Elijah Cummings, D-Md., poised to become the next chair of the House Oversight and Government Reform Committee, explained "I am not looking for headlines. I am going to be defending the truth. We want to look at what is happening under this administration because all of us can agree this is not normal."¹⁴ The president's most ardent defenders, such as Ohio Republican Jim Jordan, warned that a Democratic victory would trigger a crusade to impeach the president. However, Rep. Brad Sherman, D-Calif., denied such charges, maintaining that the Democratic objective was to "constrain" where congressional Republicans had "enabled."¹⁵ Immediately after their midterm victory, presumptive Speaker Nancy Pelosi, D-Calif., reiterated that "we have a constitutional responsibility for oversight. This doesn't mean we go looking for a fight, but it means that if we see a need to go forward, we will."¹⁶

After seizing control of the committee gavels, House Democrats wasted little time pressing forward to investigate a wide array of nascent administration scandals that Republican committee chairs had succeeded in shielding from serious oversight in the preceding Congress. During the first ten months of the 116th Congress, House Democrats issued fifty-six public subpoenas for witness testimony and documents on a range of topics.¹⁷ The pace was far from record setting. By contrast, the House Oversight Committee alone issued more than 1,000 subpoenas over the course of its investigations of the Clinton administration.¹⁸

However, the Trump administration almost immediately embraced a strategy of complete intransigence. The administration ordered the Internal Revenue Service not to comply with a House Ways and Means Committee request for the president's tax returns, despite unambiguous statutory language stating that the agency "shall furnish" such documentation to the committee upon its request.¹⁹ The White House instructed former White House counsel Don McGahn, a key figure in the Mueller report who detailed presidential conduct that could be considered obstruction, not to comply with congressional subpoenas and later invoked executive privilege to prevent him from turning over documents requested by investigators.²⁰ The president and his businesses actually sued the House Committee on Oversight and

Government Reform in an effort to block its subpoenas for records into Trump's accounting and finances.²¹ And the White House ordered its former director of personnel security Carl Kline not to obey a congressional subpoena pursuant to its investigation into allegations that the White House ignored security protocols in granting clearances to presidential son-in-law Jared Kushner and others.²²

On April 24, 2019, the president publicly issued a blanket refusal to cooperate with investigative efforts at all. "We're fighting all the subpoenas," Trump bragged, denouncing the investigations as partisan-fueled witch hunts. "These aren't, like, impartial people. The Democrats are trying to win 2020."²³ Acting on Trump's directive, administration officials defied subpoenas and committee requests for information on multiple fronts.²⁴

The interbranch warfare only worsened in September 2019 when a whistleblower report alleged that President Trump sought to withhold congressionally appropriated aid from Ukraine in return for a public pledge to investigate his political rival Joe Biden and his son Hunter, who had worked for the Ukrainian gas company Burisma. Earlier that month, House Democrats had already launched an investigation into the machinations of the president's personal lawyer, Rudolph W. Giuliani, and his alleged efforts "to coerce the Ukrainian government into pursuing two politically-motivated investigations under the guise of anti-corruption activity."²⁵ However, the quid pro quo alleged in the whistleblower complaint led Speaker Pelosi on September 24 to formally open an impeachment inquiry into the Ukraine scandal and alleged presidential abuse of power. In an effort to defuse the situation, the following day the White House surprisingly released an edited rough "transcript" of the July 25, 2019, call between Presidents Trump and Zelensky.²⁶ Despite Trump's insistence that the call was "perfect," the transcript showed that immediately after President Zelensky discussed U.S. military assistance at length, President Trump said "I would like you to do us a favor though." The transcript prompted immediate comparisons with the infamous "smoking gun" tape of Watergate fame.²⁷

The White House had learned its lesson and from that point forward it refused to turn over virtually every document subpoenaed by investigators, even in the context of an impeachment inquiry where Congress' constitutional prerogatives in matters of oversight are strongest.²⁸ In an extraordinary letter to the House declaring its refusal to participate in the impeachment inquiry, White House counsel Pat Cipollone paradoxically blasted the inquiry as "constitutionally invalid," arguing that it ignored "fundamental fairness and constitutionally mandated due process" and even more brazenly that it violated the separation of powers.²⁹ Article I, Section 2 of the Constitution gives to the House "the sole Power of Impeachment," was never mentioned by Cipollone, and legal experts widely dismissed his letter as fundamentally flawed.³⁰

As part of its zero-cooperation strategy, the White House ordered a bevy of current and former administration officials not to comply with congressional subpoenas and appear before the impeachment inquiry. Some defied the administration

and testified before investigators, including ambassador to the European Union Gordon Sondland, former ambassador to Ukraine Marie Yovanovitch, Special Envoy William Taylor, former National Security Council official Fiona Hill, and associate director for national security at the Office of Management and Budget Mark Sandy. However, almost all of the House Democrats' top targets, including acting White House chief of staff and Office of Management and Budget director Mick Mulvaney, former national security advisor John Bolton, Secretary of State Mike Pompeo, and Secretary of Energy Rick Perry obeyed the White House directive and refused to testify. Far from acting to defend Congress' institutional prerogatives—indeed, Congress's subpoena powers are well-established by almost a century of judicial precedents dating back to cases involving the Teapot Dome scandal in the 1920s—House Republicans rallied to their party leader's defense, in some cases literally. On October 23, 2019, a group led by Minority Whip Steve Scalise, R-La., and Matt Gaetz, R-Fla., stormed a closed-door hearing in a secure room to demand greater access to the proceedings and opportunities to defend the president.³¹ Ultimately, the White House's intransigence led the House to make obstruction of Congress its second article of impeachment.

As the impeachment process moved to a Senate trial, Democrats hoped that the world's self-styled greatest deliberative body would be more willing to stand up for its institutional prerogatives and responsibilities and to pursue evidence that the White House had denied the House. Historically, divided government has been less stifling to investigations in the Senate, even in periods of intense polarization.³² However, President Trump's grip on the Republican Party was quickly manifest as the trial began, with the Senate defeating, on a series of party-line votes, a string of Democratic amendments to subpoena John Bolton and Mick Mulvaney and documents from the State Department and Office of Management and Budget. Insisting that the Senate was simply following the Clinton impeachment model, Majority Leader McConnell repeatedly emphasized that the Senate would consider the question of witnesses and new evidence after opening arguments. Senate Republicans' partisan fealty to the president would be sorely tested when, as the president's attorneys were presenting his defense, the *New York Times* broke a bombshell story. In his forthcoming but still unpublished book manuscript, former national security advisor John Bolton directly linked President Trump to the decision to withhold military aid until Ukraine announced investigations into the Bidens.³³ This directly undercut a main argument of the defense team that no evidence explicitly linked President Trump personally to the quid pro quo at the heart of the abuse of power charge. While he had refused to comply with the House subpoena, Bolton had previously announced his willingness to testify at the Senate trial if called to do so. This willingness, coupled with stunning revelations that he seemed to have direct evidence of the president's involvement in the very core of the case, led Utah Republican Mitt Romney, an open supporter of calling witnesses, to judge it "increasingly likely" that enough senators would now join him to support calling witnesses and faithfully discharging their constitutional responsibilities.

However, Romney was wrong. Retiring swing senator Lamar Alexander, R-Tenn., announced on January 30 that he would not support calling witnesses. In his statement, Alexander plainly acknowledged that Trump solicited dirt on the Bidens from Ukraine and that he conditioned military aid, “at least in part,” on that assistance.³⁴ However, Alexander judged that the action, while improper, did not merit removal from office. As a result, he argued further investigation was unnecessary. Alaska Republican Lisa Murkowski echoed Alexander’s sentiments. The vote for witnesses failed, and the trial moved toward a speedy acquittal with Romney the only Republican to cross the aisle. President Trump’s acquittal was never seriously in doubt. Enough Republicans had clearly stated that even if guilty of all of the accusations levied against him by the House prosecutors, they would not vote to convict.³⁵ However, by failing to push back in any meaningful way against Trump’s unconditional war on Congress’s investigative power, Senate Republicans potentially set a dangerous precedent. Presidents can, at least under some conditions, flout Congress’s oversight power, even in the context of a constitutionally mandated impeachment investigation, with impunity.

Is Trump’s Intransigence Really Exceptional?

It is a common mistake to examine a development in contemporary politics and claim it is somehow unique in American political history. For example, the late nineteenth century was also a period of intense partisan polarization, and by some accounts, the policy divides separating the two parties were even steeper than those today.³⁶ America’s first elections were every bit as nasty as our current ones; after all, in the Election of 1800, a prominent Adams supporter warned that should Jefferson become president “we would see our wives and daughters the victims of legal prostitution.”³⁷ And President Trump’s cringe-worthy attacks on judicial independence have solid precedents, including President Jackson’s and President Lincoln’s blatant refusals to comply with court orders.³⁸

President Trump is not the first president to invoke executive privilege to refuse to turn over documents to Congress. Nor are Trump officials the first to be held in contempt of Congress for their refusal to comply with congressional subpoenas.³⁹ For example, House Republicans voted to hold President Obama’s attorney general Eric Holder in contempt of Congress in June 2012 for his refusal to turn over specific documents related to its “Fast and Furious” probe of the Bureau of Alcohol, Tobacco, Firearms, and Explosives controversial “gunwalking” program. Notably, seventeen Democrats crossed the aisle and voted with Republicans for contempt, and twenty-one Democrats voted to allow the House Oversight and Government Reform Committee to sue the Justice Department for additional documents. However, in stark contrast to recent precedents under Trump, Attorney General Holder testified before Congress about the Fast and Furious probe on multiple occasions, including before the Senate Judiciary Committee in November 2011. At that hearing, Holder acknowledged inaccuracies in earlier DOJ accounts;

and to rectify the matter, the DOJ deviated from its general policy not to honor requests for materials “seeking information about the Executive Branch’s deliberations . . . [that] implicate significant confidentiality interests grounded in the separation of powers” and turned over an additional 1,400 pages of documents to investigators.⁴⁰ Over the course of the lengthy inquest, the administration turned over more than 7,600 pages of documents to investigators, and administration officials testified before eleven different investigative hearings. However, President Obama asserted executive privilege over some of the remaining documents that Chairman Issa sought, which triggered the contempt vote.⁴¹

What *is* truly unprecedented is President Trump’s blanket refusal to cooperate with Congress as it discharges its constitutional oversight duties on any front and the legal theories it has offered denying Congress’ power to compel access to information from the administration, despite more than a century of jurisprudence clearly establishing a broad investigative power.⁴²

Logically, most media comparisons focused on the most recent presidential impeachment process: the attempt to remove President Clinton from office in 1998/1999. However, in many respects, the Clinton case is a poor comparison to the Trump impeachment. The most glaring difference is that the bulk of the investigation that ultimately led to Clinton’s impeachment occurred not in Congress (though Congress did plenty of its own investigating on a litany of scandals, real or alleged, from Whitewater, to “Filegate,” to an investigation of whether Clinton improperly used the White House Christmas card list) but in the office of the Independent Counsel, Kenneth Starr. Backed with broad powers to compel testimony and evidence through the courts, Starr interviewed almost one hundred witnesses, secured tens of thousands of pages of documents, and even compelled the president to give a blood sample for DNA testing. As a result, when Starr appeared before the House Judiciary Committee, he handed the impeachment inquiry a detailed record of his four-year-long investigation. A four hundred–page version of the report was sold publicly with an initial print run of more than 1.5 million; indeed, sales were so strong that publishers raced to issue “sequels” with almost three thousand pages of additional evidence collected by the independent counsel.⁴³ For its impeachment inquiry, House Republicans only called a single witness: Starr himself to present his findings in salacious detail.⁴⁴

By contrast, the independent counsel statute was allowed to lapse in 1999, and the Department of Justice opted against appointing a special prosecutor to investigate the Ukraine whistleblower complaint. House investigators ultimately heard from some witnesses who defied instructions from the White House not to testify; however, as noted above, most of their top targets refused to appear. And in sharp contrast to the tens of thousands of pages of documents secured by Starr, the Trump White House refused to turn over almost every document requested by House investigators. As such, the debate over the “Clinton model” during President Trump’s Senate trial was a red herring.

Perhaps a better comparison for evaluating Trump's response is President Reagan's handling of the investigation of the Iran-Contra scandal. Here, too, there are important differences, not the least of which being that Iran-Contra also had an independent counsel conducting his own investigation into alleged administration wrongdoing. However, substantively there are much stronger similarities. Both involved core questions of national security and the president's rights and responsibilities in conducting the nation's foreign policy. Presidents have traditionally claimed executive privilege in this arena, as secrecy and confidentiality in executive branch communications and counsel is commonly held to be essential to rational and efficient foreign policy. Yet Congress has an important constitutional role to play, particularly when it exercises the power of the purse. As such, a comparative assessment of Reagan's and Trump's response to congressional investigations in these cases is particularly instructive.

The Iran-Contra Scandal and Interbranch Politics

From the earliest days of his administration, President Reagan sought to take a tougher line against communist expansion, particularly in Latin America. Nicaragua quickly became one of the central fronts in this battle as the administration ramped up its mostly clandestine efforts to support the Contra guerrillas in their war against the communist Sandinista government. As early as 1982, congressional critics of the administration's policies began placing legislative limits on the use of funds to overthrow the Nicaraguan government. However, when news that the CIA had mined Nicaraguan harbors became public, Congress became increasingly assertive in its efforts to rein in the administration, and in 1984, it passed the final and most restrictive version of the Boland Amendments terminating all aid to the Contras.⁴⁵ The amendment's language was carefully constructed to explicitly prohibit funds for "directly or indirectly" aiding the Contras "by any nation, group, organization, movement, or individual." As Sen. Chris Dodd, D-Conn., explained at a hearing, the provision was necessary because there were suggestions that the administration would seek to "funnel funds through friendly third nations." Assistant secretary of state for Inter-American Affairs Langhorne S. Motley assured Dodd that this was not the case: "Nobody is trying to play games with you or any other Member of Congress. That resolution stands, and it will continue to stand; and it says no direct or indirect. And that is pretty plain English."⁴⁶

However, even as Motley denied it publicly, the administration was actively trying to circumvent the legal prohibition on multiple fronts. One program sought to recruit private individuals who would raise funds and directly purchase arms and materiel for the Contras. Administration officials repeatedly lied to Congress to conceal these activities.⁴⁷ The second and ultimately more scandalous program violated both the law and President Reagan's public pledge that he would not trade arms for hostages. Under this scheme run out of the National Security Council, the administration sold arms to Iran, at first indirectly through Israel and then directly through the CIA, in exchange

for the release of American hostages in Lebanon, and it then diverted the profits from these sales to the Nicaraguan Contras.

Shortly after the 1986 midterms, details of the plan leaked in the press and the Iran-Contra scandal was born. The administration's initial response to the scandal was halting and politically disastrous. At a November 19 news conference, President Reagan explicitly denied that the administration had traded arms for hostages and downplayed the scale of the arms sales by saying that everything sold could fit in a single cargo plane.⁴⁸ Less than a week later, Reagan had to publicly backtrack and admit "he was not fully informed," as the Justice Department not only provided new details on the scale and scope of the arms shipments to Iran but also revealed that some of the profits had been diverted to the Contras in clear violation of federal law.

To try to right the ship and counter assertions of an emerging credibility gap, the administration sought to signal that it was committed to total cooperation and transparency moving forward. First, the two figures most directly responsible for orchestrating and running the covert scheme, national security advisor Vice Adm. John Poindexter and NSC staff member Lieutenant Colonel Oliver North, were forced to resign. In an effort to defuse pressure, on December 1, President Reagan announced the creation of the Tower Commission, led by former senator John Tower, R-Tex., former secretary of state Edmund Muskie, D-Maine, and former national security advisor Brent Scowcroft, to review the NSC's operations and engage in a general fact-finding mission concerning the scandal.

The following day, Reagan addressed the nation and announced two additional steps to investigate the scandal. First, the president announced that the Attorney General Ed Meese, under the post-Watergate 1978 Ethics in Government Act, would ask the special three-judge panel to name a special prosecutor to investigate the Iranian arms sales. Reagan announced his full support for the Attorney General's decision, and later that month, the D.C. court named Lawrence Walsh special prosecutor and gave him a sweeping mandate to examine the Iranian arms sales as well as "the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the government of Nicaragua since 1984 [when Congress cut off funding]."⁴⁹ Understanding the political risks of appearing intransigent, Reagan also explicitly acknowledged Congress's right and responsibility to investigate the scandal and pledged White House cooperation.⁵⁰ Toward this end, the administration announced that it would waive executive privilege and encourage current and former administration officials to testify before all inquiries.⁵¹

Congress quickly launched a series of investigations into the matter. Both chambers' Intelligence Committees as well as the House Foreign Affairs Committee held hearings, and the Senate Intelligence Committee published a preliminary report in January 1987 chronicling the arms-for-hostages deal but offering no conclusions about culpability. More importantly, both chambers also voted in January to create special Select Committees specifically tasked with investigating the

scandal. Recognizing a growing trust deficit between key administration officials, including White House chief of staff Don Regan, and major players on the Hill, the president appointed U.S. ambassador to NATO David Abshire as special counsellor to the president with cabinet rank to coordinate the administration's efforts to fulfill requests for documents and cooperation with the various investigations. By the end of Abshire's ninety-day tenure, his office had significantly accelerated the declassification process, established secure protocols for handling and viewing still-classified materials, and released more than three thousand documents to investigators.⁵² While some Democratic investigators would complain that the White House was not fully forthcoming, co-chairs of the Senate Select Committee Daniel Inouye, D-Hawaii, and Warren Rudman, R-N.H., would write in their final report, "once our investigation commenced, the White House rose above partisan considerations in cooperating with our far-reaching requests and ensuring the cooperation of other agencies and departments of the Executive Branch."⁵³

Among the thousands of documents released to Congress were a number of internal communications that the White House counsel's own internal investigation acknowledged could be highly problematic; nevertheless, they were turned over to investigators. For example, a May 1987 memorandum from White House counsel Arthur Culvahouse to White House chief of staff Howard Baker, National Security Advisor Carlucci, Press Secretary Marlin Fitzwater, and others alerted them to the transmittal to congressional investigators of a PROF (Professional Office System) note from a National Security Council meeting in May 1986. The memo highlights a quote attributed by Poindexter to Reagan, "yesterday in a meeting that I had with the President, he started the conversation with 'I am really serious.' 'If we can't move the Contra package [through Congress] (by?) June 7, I want to figure out a way to take action uni-laterally to provide assistance.'" ⁵⁴ This, of course, was long after the Boland Amendment prohibiting any such assistance.

Other documents included notes concerning a critical December 7, 1985, meeting in which Secretary of State George Schultz, Secretary of Defense Weinberger, CIA Deputy Director John McMahon, current and former national security advisers John Poindexter and Bud McFarlane, Chief of Staff Don Regan, and President Reagan directly discussed the legal barriers to any Iran arms deal. Many of the principals had discussed the meeting in their interviews before the Tower Board. However, as the White House counsel's office acknowledged, most either did not mention or denied that legal concerns were raised. The notes clearly showed that both Weinberger and Schultz argued vehemently that any such sales would violate the Arms Export Control Act. According to the notes, President Reagan dismissed these concerns and said the American people would forgive him for breaking the law if he could free the hostages. According to the notes, "The President said 'they' could impeach him if they wanted; visiting hours in prison were on Thursdays. Weinberger pointed out that, in such a case, the President would not be alone."⁵⁵ The information fueled intense grilling of Schultz and produced damaging headlines.⁵⁶

As the televised hearings continued, some in the White House worried about the political damage being inflicted and advocated a more combative posture. Some recommended “put[ting] the hearings on trial” and beginning “to question the credibility and legitimacy of the hearings, particularly the actions of some Democrats.”⁵⁷ Former president Nixon also urged a more combative approach vis-à-vis Congress in a lengthy meeting with the Office of Political Affairs.⁵⁸ However, the ranking Republican on the House committee, Dick Cheney, R-Wyo., urged the administration to hold its fire. Cheney argued that it was unwise for Reagan to “get down in the trenches” and criticize the investigations, as he did at a Senate Republican Policy Luncheon; instead, he should “remain above the fray” and project command.⁵⁹

The contrast between the Reagan administration’s approach to Iran-Contra—desperate to avoid comparisons to Watergate and the cover-up that brought down the Nixon presidency—and the Trump administration’s complete intransigence and blanket refusal to cooperate with House investigations into the Ukraine whistleblower allegations is clear. However, it is important not to push the argument too far. A commitment to transparency is easier with the knowledge that Oliver North had already held “shredding parties” at which he destroyed every document at the National Security Council that he believed to be incriminating or problematic for the administration.⁶⁰ While the Tower Board found no direct evidence that Reagan knew of or approved of the Contra diversion and mainly criticized Reagan for his aloof style and poor management of the national security apparatus, the board emphasized that notes of key meetings were missing and Brent Scowcroft ruefully concluded “it may be that some went into the shredder, but we can’t prove it.”⁶¹ While the administration did turn over thousands of surviving documents to Congress, these releases were selective. It was not until years after Congress concluded its investigation, for example, that the independent counsel discovered that many officials, including Weinberger and Vice President Bush, had kept detailed notes and diaries that they had failed to provide investigators. Ultimately, fourteen individuals were charged with criminal offenses in connection with Iran-Contra, including Weinberger, Poindexter, North, McFarlane, and Assistant Secretary of State Elliot Abrams, all of whom were charged with giving false statements to, withholding information from, or obstructing Congress. Moreover, in his final report, Walsh charges that President Reagan himself “knowingly participated or at least acquiesced in the efforts” of his aides in covering up the affair and his approval of the arms sales despite the prohibitions of the Arms Export Control Act.⁶² Nevertheless, the broader contrast between Reagan’s and Trump’s assertions of executive privilege and overall response to the scandals and their ensuing investigations remains instructive.

Another important difference between the two scandals is how the president’s copartisans viewed the underlying allegation. Many Republicans on the Iran-Contra Committee admitted that if the president knew of and authorized the diversion, it would have been an impeachable offense. But they and the Democratic

majority insisted on evidence of direct presidential involvement in the diversion as the necessary threshold. As Warren Rudman recounted, “If it’s nonfeasance and negligence, there’s too much at risk. We could go on [in an atmosphere of crisis] for four years.”⁶³ The investigations produced various claims that Reagan knew or circumstantial evidence that he must have known of the diversion. For example, Major General Richard Secord, who helped organize the arms deal and Contra resupply effort, testified that Oliver North had told him that Reagan knew of the diversion.⁶⁴ And while North shied away from implicating Reagan in his congressional testimony, he minced few words in his 1991 book: “I have no doubt that he [Reagan] was told about the use of residuals for the contras, and that he approved it. Enthusiastically.”⁶⁵ However, direct evidence was elusive. The investigative committee majority report concluded that on the “critical point” of whether Reagan knew of or ordered the diversion, “the shredding of documents by Poindexter, North, and others, and the death of Casey, leave the record incomplete.” Instead, the majority charged Reagan with extreme negligence and mismanagement of the national security apparatus that allowed these illegal acts to occur.⁶⁶

By contrast, President Trump’s copartisan defenders initially denied there was any quid pro quo involving Ukraine; then they denied that there was evidence that Trump was personally involved; and then, when John Bolton offered to provide that evidence, they determined—without hearing from him—that the underlying action, even if improper, did not rise to the level of impeachment.

A second key difference is that the committees investigating Iran-Contra were significantly less polarized than those in 2019. This is not to say that partisan motives played no role. Far from it. The minority report, which was joined by all House Republicans and two of the four Senate Republicans, denounced some of the majority’s conclusions as “hysterical” and even argued that “virtually all of the NSC staff’s activities were legal, with the possible exception of the diversion of Iran arms sale proceeds to the Resistance [i.e., Contras].”⁶⁷ However, there is strong evidence that many on both sides of the aisle wanted to avoid a serious interbranch constitutional showdown. Participants in a preliminary meeting of the Senate Select Committee describe a consensus that no one “want[ed] to go after the President,” whom many deemed “too old” and without the mental capacity to fully understand what was going on. Many expressed the belief that “the country didn’t need another Watergate.” This, critics charged, caused investigators to not follow up on important leads and to circumscribe their investigation in important ways.⁶⁸ By contrast, the Trump impeachment process—like virtually every investigation into an alleged Trump scandal in the 116th Congress—was intensely polarized. Democrats aggressively sought to use their newfound powers to check Trump and inflict political damage on the administration. Republicans, by contrast, went to great lengths to defend him, even at great costs to their own institutional power.

Finally, it is tempting to conclude that an important similarity across the two cases is that both had relatively little effect, all sound and no fury. To be sure, President Reagan avoided impeachment and his vice president George H.W. Bush

succeeded him to the presidency in 1989, despite the continuing cloud over his own role in and knowledge of the scandal. The direct legislative legacy of Iran-Contra was also relatively meager. However, its broader political costs did have significant ramifications for Reagan's final two years in office. The effects of Iran-Contra on Reagan's approval were immediate and sharp. In the last Gallup poll before news of the scandal broke, President Reagan enjoyed a 63 percent approval rating. In the next poll in early December, his approval rating had fallen to 47 percent. And while investigators failed to tank Reagan's approval to Nixon-esque levels, the characterization of Reagan as a Teflon president misses the mark in a key respect. Reagan could not shake Iran-Contra in 1987, and his approval rating remained severely weakened until he became a lame duck following the 1988 election. Oliver North's defiant testimony may have rallied support for the Contras—a development that cheered administration officials and encouraged them (unsuccessfully) to try to get more Contra aid from Congress.⁶⁹ But it had little effect in rallying support for the president more generally. Investigators succeeded in keeping the scandal and a string of embarrassing details in the public eye for months on end, damaging the president and lowering his political capital. A weakened Reagan lost a number of political battles during this period, including two veto battles over the Clean Water Act and a highway reauthorization bill; the Senate also rejected Reagan's nomination of Robert Bork for the Supreme Court, and Douglas Ginsburg was forced to withdraw. A more powerful president with an approval rating still in the sixties might have prevailed in some or all of these contests.⁷⁰

CONCLUSION

Even before President Trump, the rising tide of polarization had begun to change the tenor of many investigations. As legislative responses became ever less likely, investigators increasingly focused on using their perch to inflict political damage on the White House. Consider, for example, the years-long Benghazi probe that never really aimed at effecting policy change. Instead, investigators' primary purpose was clearly to cause political problems for Democrats. On this metric, the investigation mostly failed, with one notable exception—the revelation that Hillary Clinton had used a private email server while secretary of state. The ultimate political effects were incalculable.

The impeachment of Donald J. Trump represented something of a perfect storm. It brought together an iconoclastic president unafraid of breaking norms and conventions with unparalleled levels of partisan polarization among both elites and the mass public. These forces combined to produce an unprecedented level of presidential obstruction of Congress' investigative power—as the White House even refused to recognize the legitimacy of the impeachment inquiry itself. Enabling Trump's bold gambit was the iron-clad support he knew he could count on from his copartisans in Congress, even as he trampled on the legislature's

institutional power and a century of jurisprudence upholding that power. Trump's Senate acquittal has only further intensified his war on Congress's oversight powers, as Trump has fired the inspector general who transmitted the Ukraine whistleblower report to Congress and announced his refusal to comply with hard-won oversight provisions in the \$2 trillion coronavirus relief bill. These moves provoked cries of outrage from congressional Democrats but no serious legislative response. Investigative politics have always had an important partisan dimension, with opposition partisans more eager to challenge the president than copartisans. However, congressional Republicans' surrender in the face of an all-out assault on their institutional power is truly exceptional.

The lasting legacy of Trump's impeachment remains far from certain. In the short-term, the impeachment battle left little or no imprint on the president's approval rating, with some arguing that it may have even provided a small short-term boost. However, the dynamics of this case—in particular, the near-perfect party lineup in responding to President Trump's intransigence—portend a legacy that represents a genuine departure. Put simply, the ultimate weapon that Congress holds to check presidential abuses of power and refusals to cooperate with oversight—the threat of impeachment—may lose much or all of its force if a president can count on party lines to hold regardless of his actions. More generally, the informational role played by investigations, which undergirds the mechanisms through which it has traditionally shaped policy and politics, may be lost as the public increasingly views oversight through a partisan lens and political elites themselves act in ways that simply reinforce party lines. If the investigative check is ultimately weakened, it could seriously disrupt the balance of power between the branches and remove an important, if fragile, check on presidential aggrandizement.

Notes

1. Arthur Schlesinger Jr. and Roger Burns, *Congress Investigates: A Documented History, 1792–1974* (New York: Chelsea House Publishers, 1974), xxvi.
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4. For example, Walter Lippmann famously argued that investigations are “more effective at dramatizing than illuminating issues.” Walter Lippmann, *Public Opinion* (Minneapolis: Filiquarian Publishing, 2006, first published 1922). While

Woodrow Wilson generally hailed “vigilant oversight of administration” as just as important as legislation, even he acknowledged that many investigations failed to meet such lofty standards or have the intended impact: “Even the special, irksome, ungracious investigations which it from time to time institute[s] in its spasmodic endeavors to dispel or confirm suspicions of malfeasance or of wanton corruption do not afford it more than a glimpse of the inside of a small province of the administration.” Woodrow Wilson, *Congressional Government: A Study in American Politics* (Boston: Houghton Mifflin, 1885), 297, 271.

5. Kriner and Schickler, *Investigating the President*, 86–96. Similarly, Josh Chafetz emphasizes public communication as a primary aim of many investigations, labeling it “congressional overspech.” In a comparative analysis of the Munitions Inquiry of the 1930s and the Army-McCarthy hearings in the 1950s, he traces how public performance, even when it is divisive, can be impactful. Josh Chafetz, “Congressional Overspech,” *Fordham Law Review*, forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546976.
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8. See Paul Pierson and Eric Schickler, “Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization,” *Annual Review of Political Science* 23 (2020): xx. As Lawrence Dodd argues, a broader crisis of legitimation in our politics has deepened the left–right divide as the two sides offer very different visions about how to respond to the major economic and social transformations facing the United States. See C. Lawrence Dodd, “Congress and the Politics of Renewal: Redressing the Crisis of Legitimation,” in *Congress Reconsidered*, 5th ed., ed. by Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, DC: CQ Press, 1993), 417–46.
9. See Liliana Mason, *Uncivil Agreement: How Politics Became Our Identity* (Chicago: University of Chicago Press, 2018).
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the remainder of the impeachment process and Senate trial. See Aaron Bycoffe, Ella Koeze, and Nathaniel Rakich, "Do Americans Support Removing Trump From Office?" *Fivethirtyeight.com*, February 12, 2020, <https://projects.fivethirtyeight.com/impeachment-polls/>.

11. See Paul Pierson and Eric Schickler, "Madison's Constitution Under Stress: A Developmental Analysis of Political Polarization," *Annual Review of Political Science* 23 (2020): xx.
12. See Paul Pierson and Eric Schickler, "Polarization and the Durability of Madisonian Checks and Balances: A Developmental Analysis," in *Democratic Resilience*, ed. Suzanne Mettler, Robert Lieberman, Ken Roberts, and Tom Pepinsky (Cambridge and New York: Cambridge University Press, forthcoming).
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64. David Rosenbaum, “Secord Recounts Being Told Reagan Knew of His Work,” *New York Times*, May 7, 1987, <https://www.nytimes.com/1987/05/07/us/secord-recounts-being-told-reagan-knew-of-his-work.html>. This prompted an immediate response from White House press secretary Marlin Fitzwater, who sent a memo that day to Chief of Staff Baker, cc’d to the vice president and a host of other top officials, laying out the official administration line: “Our position remains: the President said he was unaware of the diversion of funds.” Memorandum from Marlin Fitzwater to Senator Baker, May 6, 1987, Duberstein Box 2, Folder “Iran/Contra Issues #1 o 2.”
65. Oliver North, *Under Fire: An American Story* (New York: HarperCollins, 1991), 14–15. However, in his final report, the independent counsel concluded that he could not prove that Reagan knew of or ordered the diversion beyond a reasonable doubt. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters*, 445.
66. Lee Hamilton and Daniel Inouye, *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Washington, DC: American Presidency Project, 1987), 21–22.
67. Lee Hamilton and Daniel Inouye, *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Washington, DC: American Presidency Project, 1987), 437, 444.
68. Seymour Hersh, “The Iran-Contra Committees: Did They Protect Reagan?” *New York Times*, April 29, 1990, <https://www.nytimes.com/1990/04/29/magazine/the-iran-contra-committees-did-they-protect-reagan.html>.
69. Memorandum Frank Donatelli to Tom Griscom, Iran/Contra Hearings, July 15, 1987, In Duberstein Box 2, Folder “Iran/Contra Issues #1 o 2.”
70. Kriner and Schickler, *Investigating the President*, 172–73.