

## ARTICLES

### CONGRESSIONAL OVERSPEECH

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*Political theater. Spectacle. Circus. Reality show. We are constantly told that, whatever good congressional oversight is, it certainly is not those things. Observers and participants across the ideological and partisan spectrums use those descriptions as pejorative attempts to delegitimize oversight conducted by their political opponents or as cautions to their own allies of what is to be avoided. Real oversight, on this consensus view, is about fact-finding, not about performing for an audience. As a result, when oversight is done right, it is both civil and consensus-building.*

*While plenty of oversight activity does indeed involve bipartisan attempts to collect information and use that information to craft policy, this Article seeks to excavate and theorize a different way of using oversight tools, a way that focuses primarily on their use as a mechanism of public communication. I refer to such uses as congressional overspeech.*

*After briefly describing the authority, tools and methods, and consensus understanding of oversight in Part I, this Article turns to an analysis of overspeech in Part II. The three central features of overspeech are its communicativity, its performativity, and its divisiveness, and each of these is analyzed in some detail. Finally, Part III offers two detailed case studies of overspeech: the Senate Munitions Inquiry of the mid-1930s and the McCarthy and Army-McCarthy Hearings of the early 1950s. These case studies not only demonstrate the dynamics of overspeech in action but also illustrate that overspeech is both continuous across and adaptive to different media environments. Moreover, the case studies illustrate that overspeech can be used in the service of normatively good, normatively bad, and*

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*normatively ambivalent political projects. Overspeech is a potent congressional tool—and, like all tools, it can be put to a variety of uses.*

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#### INTRODUCTION

In the swirl of investigations leading up to the impeachment of President Donald Trump, Democrats and Republicans didn’t find much common ground. But one place they did seem to come together was in their conceptions of what good congressional investigations look like. In seeking to delegitimize the use of congressional oversight tools, the White House and its allies repeatedly insisted that, rather than engaging in nonpartisan fact-finding, the investigations were instead partisan performances aimed at a public audience. Strikingly, administration opponents largely *agreed* with the administration’s underlying premise that public-facing, performative, and partisan uses of oversight tools are improper or degraded—the opponents simply limited themselves to either denying that this was what they were in fact doing or warning their allies against doing so.

Consider the controversy surrounding Special Counsel Robert Mueller’s congressional testimony in July 2019. Mueller initially resisted testifying, announcing at a press conference that, “[a]ny testimony from this office would not go beyond our report . . . . We chose those words carefully, and the work speaks for itself. And the report is my testimony.”<sup>1</sup> Democrats

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1. *Letting the Report ‘Speak for Itself,’* N.Y. TIMES, May 30, 2019, at A16; see also Rachel Bade & Karoun Demirjian, *Mueller’s Statement Increases Pressure on Pelosi to Begin Trump Impeachment*, WASH. POST (May 29, 2019), [https://www.washingtonpost.com/politics/muellers-statement-increases-pressure-on-pelosi-to-begin-trump-impeachment/2019/05/29/60e8ec5c-8228-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/politics/muellers-statement-increases-pressure-on-pelosi-to-begin-trump-impeachment/2019/05/29/60e8ec5c-8228-11e9-933d-7501070ee669_story.html) [https://perma.cc/D3KS-L5RF] (“Privately, Mueller has been expressing reluctance to testify in public. On Wednesday, that sentiment was evident as he said that he would not answer questions beyond what he wrote in his report.”).

found Mueller's reticence less than compelling,<sup>2</sup> eventually issuing a subpoena for his testimony.<sup>3</sup> Republicans were not pleased. President Trump immediately tweeted that the subpoenas constituted "Presidential Harassment!"<sup>4</sup> Attorney General William Barr insisted that, because Mueller's testimony was unlikely to bring new facts to light, the subpoenas did not "serve[] an important purpose"—rather, their sole purpose was to "create some kind of public spectacle."<sup>5</sup> And Barr was not the only Republican to reach for the metaphor of public entertainment: Michael Conaway (R-TX), a member of the House Intelligence Committee, remarked that, "I can't imagine there's much to glean from him beyond what's in the report . . . I think it's just theater."<sup>6</sup> In his opening statement at the hearing at which Mueller testified, Intelligence Committee ranking member Devin Nunes (R-CA), too, referred to the proceedings derisively as "political theater,"<sup>7</sup> as did several other Republican members.<sup>8</sup> Conservative media

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2. See, e.g., Nicholas Fandos, *House Democrats Push for More from a Reluctant Witness*, N.Y. TIMES, May 30, 2019, at A17 (reporting Intelligence Committee Chair Adam Schiff's comment that "there are . . . a great many questions [Mueller] can answer that go beyond the report"); *Id.* (quoting other Democrats to similar effect); Sharon LaFraniere, *Breaking Silence, Mueller Declines to Absolve Trump*, N.Y. TIMES, May 30, 2019, at A1 (reporting Majority Leader Steny Hoyer's comment that "the American people deserve to hear testimony from the special counsel about his report and the report's conclusions"); Bade & Demirjian, *supra* note 1 (reporting Chief Deputy Whip Dan Kildee's comment that Mueller "has an obligation to explain in as much detail as Congress wants the process of this investigation and the conclusions that he drew").

3. See Letter from Reps. Jerrold Nadler & Adam Schiff to Robert S. Mueller, III, Special Counsel, U.S. Dep't of Just. (June 25, 2019), <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Letter%20to%20Special%20Counsel%20Mueller%20%286.25.19%29.pdf> [<https://perma.cc/2B7C-F93B>] ("Attached please find subpoenas from the House Judiciary Committee and the House Permanent Select Committee on Intelligence to compel your testimony . . . . Over the course of discussions about your appearance before Congress, we have consistently communicated our Committees' intention to issue these subpoenas, if necessary, and we now understand it is necessary to do so.").

4. Donald J. Trump (@realDonaldTrump), TWITTER (June 25, 2019, 10:34 PM), <https://twitter.com/realDonaldTrump/status/1143709133234954241> [<https://perma.cc/MM2U-QT7N>].

5. David Shortell, *Barr Says Mueller Subpoena Done to Create 'Public Spectacle'*, CNN (July 8, 2019, 7:07 PM), <https://www.cnn.com/2019/07/08/politics/william-barr-robert-mueller-testimony-spectacle/index.html> [<https://perma.cc/2E52-SGBM>].

6. Chris Megerian & Jennifer Haberkorn, *Eager to Hear Their Version of the Truth; Democrats Want to See Trump Declared Guilty; the GOP Wants Him Cleared. Mueller May Do Neither*, L.A. TIMES, July 24, 2019, at A1, ProQuest Doc. No. 2262592036.

7. WATCH: Nunes Calls Mueller Hearing 'Political Theater,' PBS NEWS HOUR (July 24, 2019, 1:45 PM), <https://www.pbs.org/newshour/politics/watch-nunes-calls-mueller-hearing-political-theater> [<https://perma.cc/3P29-MQZH>].

8. See Rachael Bade et al., *Mueller to Testify to Congress in Open Session About His Investigation*, WASH. POST (June 25, 2019), [https://www.washingtonpost.com/politics/mueller-to-testify-to-congress-in-open-session-about-his-investigation/2019/06/25/dde8c95a-975b-11e9-916d-9c61607d8190\\_story.html](https://www.washingtonpost.com/politics/mueller-to-testify-to-congress-in-open-session-about-his-investigation/2019/06/25/dde8c95a-975b-11e9-916d-9c61607d8190_story.html) [<https://perma.cc/BG35-4R5R>] (reporting Representative Mark Meadows (R-NC)'s comment, "I just think it's more political theater"); Sarah Gager, *Representative Reed Calls Mueller Hearings "Political Theater"*, WSKG (July 24, 2019), <https://wskg.org/news/rep-reed-calls-mueller-testimony-political-theater/> [<https://perma.cc/Z7S8-6J2R>] (reporting Representative Tom Reed (R-NY)'s statement to reporters); see also Ronna McDaniel, Opinion, *RNC Chairwoman Ronna McDaniel: Dems Stage Political Theater with Mueller Instead of Serving American People*, FOX NEWS (July 24,

got in on the showbiz metaphors, as well. The day of Mueller's testimony, the *Wall Street Journal* editorialized that, "[t]here's nothing like a celebrity guest to boost a flagging TV show, and House Democrats are hoping Robert Mueller's congressional performance this week revives their impeachment ratings. Yet if the former special counsel stays true to his own investigation and report, this episode will be the last."<sup>9</sup> A conservative columnist for the *New York Post* described Mueller's forthcoming testimony thus: "The circus is coming to town and the carnival barkers are working up a sweat trying to spark interest. So far, ticket sales are slow."<sup>10</sup> In the aftermath of Mueller's testimony, the *Wall Street Journal* declared that "The Mueller Show is a Bust."<sup>11</sup> And Trump-skeptical conservative Kevin Williamson managed, in the space of a single column (of fewer than 800 words) appraising the aftermath of the hearings, to use "circus," "reality-show," "goat rodeo," "putting on a show," "theater," and "spectacle."<sup>12</sup>

But Republicans weren't the only ones to use the language of public performance in a derogatory manner with respect to Mueller's testimony. Before Mueller testified, former Democratic Representative Timothy Roemer (D-IN) wrote to warn against the hearings becoming "a wild circus show."<sup>13</sup> *Slate* commentator Dahlia Lithwick thought it would inevitably be degradedly performative: "It will be like a cover of k. d. lang's cover of Rufus Wainwright's cover of Leonard Cohen's *Hallelujah*, except actually it will be Mueller doing a cover of himself, in the hopes that people will tune in to the live made-for-TV version."<sup>14</sup> A distinguished left-leaning scholar of law and politics thought the hearings held more potential, tweeting that House "Democrats questioning Mueller should avoid theatrics and grandstanding and let staff walk Mueller through [his] report conclusions . . . . Should be a moment for seriousness."<sup>15</sup> And in the

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2019), <https://www.foxnews.com/opinion/rnc-chairwoman-ronna-mcdaniel-dems-stage-political-theater-with-mueller-instead-of-serving-american-people> [<https://perma.cc/2L3A-NJQT>] (the RNC chairwoman using the same metaphor).

9. Editorial, *Robert Mueller's Summer Re-run*, WALL ST. J., July 24, 2019, at A16.

10. Michael Goodwin, Opinion, *Dems Take Desperate Final Shot at Trump with Mueller Testimony*, N.Y. POST (July 20, 2019), <https://nypost.com/2019/07/20/dems-take-desperate-final-shot-at-trump-with-mueller-testimony/> [<https://perma.cc/BCJ7-6RB9>].

11. Editorial, *The Mueller Show Is a Bust*, WALL ST. J., July 25, 2019, at A14.

12. Kevin D. Williamson, *The Mueller Hearings Revealed Why You Shouldn't Bet Against Trump*, NAT'L REV. (July 25, 2019, 10:30 AM), <https://www.nationalreview.com/2019/07/the-mueller-hearings-revealed-why-you-shouldnt-bet-against-trump/> [<https://perma.cc/89UC-DK4L>].

13. Timothy Roemer, Opinion, *Lawmakers Should Not Turn the Mueller Testimony into a Circus*, HILL (July 22, 2019, 4:00 PM), <https://thehill.com/opinion/judiciary/454153-lawmakers-should-not-turn-the-mueller-testimony-into-a-circus> [<https://perma.cc/2DN9-EXHD>].

14. Dahlia Lithwick, *Robert Mueller's Testimony Before House Democrats Is a Game of Chicken Between Chickens*, SLATE (July 23, 2019, 8:07 PM), <https://slate.com/news-and-politics/2019/07/robert-mueller-testimony-house-democrat-chickens.html> [<https://perma.cc/K2BD-264R>].

15. Rick Hasen (@rickhasen), TWITTER (July 6, 2019, 6:53 PM), <https://twitter.com/rickhasen/status/1147639630700769280> [<https://perma.cc/YL7L-4UHA>].

aftermath of the hearings, Lithwick's *Slate* colleague Jeremy Stahl characterized them as "banal political theater that revealed no new facts."<sup>16</sup>

Nor did the disparaging use of the language of performativity end with Mueller's testimony. When it later came to light that Trump had threatened to withhold appropriated military aid from Ukraine unless its government opened an investigation into alleged corruption involving the son of former Vice President Joe Biden—a Democrat then vying for his party's nomination to run against Trump in 2020—House Democrats opened a new round of investigations. These included closed and open hearings before the Intelligence Committee,<sup>17</sup> hearings before the Judiciary Committee,<sup>18</sup> and finally the adoption of articles of impeachment.<sup>19</sup>

From the moment that the Ukraine revelations became public, Democrats supporting impeachment insisted that their party not succumb to the temptations of theatricality. Joe Lockhart, who had served as press secretary to President Bill Clinton, argued that the questioning in impeachment hearings should be primarily conducted by counsel, not by members, and that "[t]he investigators' guiding principle should be just the facts, not the theater."<sup>20</sup> In announcing her support for impeachment, Representative Tulsi Gabbard (D-HI) (a long-shot contender for the Democratic presidential nomination at the time) insisted that the process "cannot be turned into a long, protracted partisan circus."<sup>21</sup> Like Lockhart, liberal commentator Margaret Carlson argued that Democrats should turn over questioning to counsel, who could act as "grown-up finders of fact . . . . The best thing that could happen is that the hearings are so tediously legal, only C-Span covers them."<sup>22</sup>

The Intelligence Committee began by holding closed hearings in a Sensitive Compartmented Information Facility (SCIF) to allow for the taking of classified testimony. At one point in the hearings, Republican House members who were not on the Intelligence Committee gathered outside the

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16. Jeremy Stahl, *Top CBP Officer Testifies He's Unsure If 3-Year-Old Is "a Criminal or a National Security Threat,"* SLATE (July 26, 2019, 2:30 PM), <https://slate.com/news-and-politics/2019/07/cbp-chief-brian-hastings-family-separation-judiciary-hearing-not-mueller.html> [https://perma.cc/W8RR-374L].

17. See Nicholas Fandos, *An Inquiry Is out of Public View, but That's Not out of the Ordinary*, N.Y. TIMES, Oct. 25, 2019, at A18 (closed hearings); Nicholas Fandos & Michael D. Shear, *Envoys Reveal Scope of Trump Ukraine Push*, N.Y. TIMES, Nov. 14, 2019, at A1 (open hearings).

18. See Adam Liptak, *A Divide Over Whether the Evidence Is There*, N.Y. TIMES, Dec. 5, 2019, at A20.

19. H.R. Res. 755, 116th Cong. (2019) (as agreed to in House of Representatives, Dec. 18, 2019).

20. Joe Lockhart, Opinion, *Why I Was Wrong to Oppose Impeachment*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/opinion/impeachment-whistleblower-complaint.html> [https://perma.cc/93ZS-WL8M].

21. Maggie Astor, *Tulsi Gabbard, Last 2020 Holdout, Supports Impeachment Inquiry*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/politics/tulsi-gabbard-impeachment.html> [https://perma.cc/SZR3-SW3Q].

22. Margaret Carlson, *Do You Want to Preen on Camera, Democrats, or Do You Want to Take Down Trump?*, DAILY BEAST (Oct. 4, 2019, 5:00 AM), <https://www.thedailybeast.com/do-you-want-to-preen-on-camera-democrats-or-do-you-want-to-take-down-trump> [https://perma.cc/AA75-MKXF].

SCIF loudly demanding access, and some of them barged into the room. Ultimately, the House sergeant at arms was called to restore order.<sup>23</sup> Democrats and liberal commentators referred to the “storming of the SCIF”—which garnered significant media attention—as a “stunt,” “circus-like,”<sup>24</sup> and “guerrilla street theater.”<sup>25</sup>

After the closed-door hearings wrapped up, the Intelligence Committee moved into two weeks of public hearings. Republican Representative Louie Gohmert (R-TX) predicted that the hearings would be “a sham circus.”<sup>26</sup> Trump’s former attorney general Jeff Sessions called the hearings a Soviet-style “show trial” and “political theater.”<sup>27</sup> On the other side of the aisle, Democratic Representative David Cicilline (D-RI) urged his colleagues to eschew such descriptions: “This is not a circus, it is a solemn moment.”<sup>28</sup> Commentators on both sides threw around accusations of theatricality as well. Liberal Caroline Frederickson accused Republicans of trying to turn the hearings into “just another version of reality TV,”<sup>29</sup> while conservative Kyle Smith referred to the hearings as “MasterTroll Theater. The Democrats know they’re engaged in a futile exercise that exists only to draw attention.”<sup>30</sup>

After the Intelligence Committee hearings ended, impeachment moved to the Judiciary Committee, which the *New York Times*’s television critic referred to as a move “from foreign-intrigue thriller to constitutional documentary,” with four law professors testifying on the constitutional standards and processes of impeachment.<sup>31</sup> Ultimately, the Judiciary Committee reported out two articles of impeachment: one asserting that Trump abused his power in pressuring Ukraine to investigate Biden and the other asserting that he had obstructed the congressional investigation into his

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23. Sheryl Gay Stolberg & Nicholas Fandos, *Turmoil as G.O.P. Disrupts Inquiry on Impeachment*, N.Y. TIMES, Oct. 24, 2019, at A1.

24. Robert P. Baird, *The Circus Comes to the House Impeachment Inquiry*, NEW YORKER (Oct. 29, 2019), <https://www.newyorker.com/news/dispatch/the-circus-comes-to-the-house-impeachment-inquiry> [<https://perma.cc/MT2E-NAF9>].

25. Ed Kilgore, *Republicans Storm Closed Meeting, Demanding Transparency for Their Stonewalling POTUS*, N.Y. MAG. (Oct. 23, 2019), <http://nymag.com/intelligencer/2019/10/republicans-bust-into-closed-meeting-to-protest-impeachment.html> [<https://perma.cc/F4SX-ADTQ>].

26. Mark Leibovich, *A Return of Old Washington in Defiance of a Raucous Era*, N.Y. TIMES, Nov. 14, 2019, at A1.

27. Jeff Sessions, Opinion, *Ex-AG Jeff Sessions: Trump Impeachment Hearings Are Desperate Democratic Attack on Him—No Reason to Impeach*, FOX NEWS (Nov. 13, 2019), <https://www.foxnews.com/opinion/jeff-sessions-on-impeachment> [<https://perma.cc/N5XL-3XS2>].

28. Leibovich, *supra* note 26.

29. Caroline Frederickson, Opinion, *Republicans Want to Turn the Impeachment Hearings into ‘Judge Judy,’* N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/opinion/trump-impeachment-hearing.html> [<https://perma.cc/CE82-E2RN>].

30. Kyle Smith, *Impeachment Theater of Trolls*, NAT’L REV. (Nov. 14, 2019, 5:23 PM), <https://www.nationalreview.com/2019/11/impeachment-hearings-day-one-voters-uninterested/> [<https://perma.cc/WYA2-XJMX>].

31. James Poniewozik, *Shifting from Drama to a Documentary*, N.Y. TIMES, Dec. 5, 2019, at A23.

wrongdoing.<sup>32</sup> Trump's 2020 campaign manager responded that "Democrats are putting on this political theater because they don't have a viable candidate for 2020 and they know it."<sup>33</sup> On a near-party-line vote, the House impeached President Trump on December 18, 2019.<sup>34</sup>

When it came time for the Senate trial, many Republicans were dismissive of the House's process. Senator Shelley Moore Capito (R-WV) described it as "nothing but political theater";<sup>35</sup> Senator Rand Paul (R-KY) described it as a "charade";<sup>36</sup> and Senator Lamar Alexander (R-TN) referred to it as a "circus."<sup>37</sup> Conservative commentators referred to the process as "a political puppet show"<sup>38</sup> and "'Resistance' theatrics."<sup>39</sup> After it became clear that the Senate would not hear new testimony, it became Democrats' turn to reach for the pejorative language of performativity. Commentators called the Senate trial a "show trial"<sup>40</sup> and a "sham."<sup>41</sup> On February 5, 2020, Trump was acquitted on near-party-line votes.<sup>42</sup>

These descriptions throughout the impeachment saga from participants and observers both left and right reveal some widely (albeit certainly not universally) shared assumptions about what it means to do congressional oversight properly. Most prominently, they convey an almost overwhelming sense of anti-theatricality:<sup>43</sup> whatever good oversight is, it isn't a "spectacle," a "circus," or "political theater." Lying behind that palpable

32. H.R. Res. 755, 116th Cong. (2019) (as agreed to in House of Representatives, Dec. 18, 2019).

33. Rebecca Klar, *Trump Campaign: Democrats Pursuing Impeachment Because They Don't Have 'Viable' 2020 Candidate*, HILL (Dec. 10, 2019, 10:08 AM), <https://thehill.com/homenews/campaign/473829-trump-campaign-democrats-impeaching-trump-because-they-dont-have-viable> [<https://perma.cc/2ADR-B5XD>].

34. Nicholas Fandos & Michael D. Shear, *Trump Impeached*, N.Y. TIMES, Dec. 19, 2019, at A1.

35. Lauren Leatherby et al., *What Senators Have Said About Impeachment*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/us/politics/senators-impeachment-reactions.html> [<https://perma.cc/V9U2-G6RF>].

36. *Id.*

37. Matthew Daly, *Dispute Over Rules Erupts on Impeachment's First Full Day*, ASSOCIATED PRESS (Jan. 22, 2020), <https://apnews.com/32e6ac935103430dd8ccb7ba6a088334> [<https://perma.cc/U2BK-LYZZ>].

38. John Kass, *Dems Desperate to Protect Their Source of Power*, CHI. TRIB., Jan. 22, 2020, at 2, ProQuest Doc. No. 2342988978.

39. Guy Benson, *Analysis: With Insults and Hyperbole, Schiff and Nadler Choose Resistance Theater over Persuasion*, TOWNHALL (Jan. 27, 2020, 10:05 AM), <https://townhall.com/tipsheet/guybenson/2020/01/27/analysis-by-insulting-jurors-schiff-and-nadler-prioritize-resistance-theater-over-persuasion-n2560139> [<https://perma.cc/XQ9P-Y5PC>].

40. Maureen Dowd, Opinion, *Trump, Unrepentant and Unleashed*, N.Y. TIMES, Feb. 2, 2020, at SR9; Jeremy Stahl, *Begging the Questions*, SLATE (Jan. 29, 2020, 9:40 PM), <https://slate.com/news-and-politics/2020/01/no-impeachment-witnesses-mitch-mcconnell-senate-dershowitz-bolton.html> [<https://perma.cc/G444-MKKN>].

41. Michael D. Shear & Nicholas Fandos, *Senate Republicans Block Witnesses, 51 to 49, Clearing a Path for the President's Acquittal*, N.Y. TIMES, Feb. 1, 2020, at A1.

42. Nicholas Fandos, *Split Senate Clears Trump on Each Count in Finale of Bitter Impeachment Battle*, N.Y. TIMES, Feb. 6, 2020, at A1.

43. The classic text on the anti-theatrical bias remains JONAS BARISH, *THE ANTITHEATRICAL PREJUDICE* (1981). For a more recent revisionist account, see LISA A. FREEMAN, *ANTITHEATRICALITY AND THE BODY PUBLIC* (2017).

sense of what good oversight isn't is a cluster of ideas about what it is: good oversight is understood to be more about listening than talking, more about fact-finding than perspective-proclaiming. It is also understood to be bipartisan and, above all, civil. And indeed, much important and useful oversight *does* involve bipartisan attempts to collect information and use that information to craft policy.<sup>44</sup>

But that is not the only way of using the tools of congressional oversight effectively. This Article proposes that some congressional oversight activity is better characterized as *congressional overspeech*. The defining characteristic of overspeech is the use of oversight mechanisms to communicate with the broader public. As such, it emphasizes the performative and divisive aspects of oversight. Attention to congressional overspeech, and the ways in which it serves political goals distinct from those put forward by the consensus view of oversight, gives us a significantly fuller picture of Congress's role in our constitutional system. Like all tools, overspeech does not specify its own goals, and it can accordingly be used in the service of either good or bad ends. But if one hopes to understand how political actors pursue their goals in the American federal system, it is a mistake to view overspeech as simply a degraded form of oversight—as “mere” political theater. In particular, if one hopes to understand the full range of powers that congressional chambers and members can and do make use of to push back against an imperial executive, it is a mistake to overlook overspeech.

Part I of this Article provides an overview of congressional oversight, introducing both the sources of authority for oversight and the tools used in conducting it. This part also discusses in more detail the consensus view of oversight—that is, the understanding we saw at work in the debates over Mueller's testimony and the impeachment proceedings. Part II then turns to an analysis of overspeech, or the use of those same tools, pursuant to those same sources of authority, but for ends other than those recognized by the consensus view. This part identifies three main characteristics of overspeech: its communicativity, its performativity, and its divisiveness. These are presented in increasing order of controversiality—almost no one wholly denies a communicative role for oversight, although the consensus view requires that it take a back seat to fact-finding. But making a case for performativity, and especially divisiveness, as anything other than indicia of oversight failure or degradation is significantly more controversial. Finally, Part III offers two detailed case studies of overspeech from different periods in American history—and therefore different media environments—in order to examine overspeech in action. These case studies also partake of an array of normative valences. The point is to demonstrate that congressional overspeech is an important mechanism of constitutional politics, not that its use inevitably produces good outcomes.

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44. See *infra* text accompanying notes 159–62.



## I. A BRIEF OVERVIEW OF CONGRESSIONAL OVERSIGHT

Although tracing the history of legislative oversight is well beyond the scope of this Article, it has been a feature of our federal government since at least the 1792 House investigation into the defeat of an army force under the command of General Arthur St. Clair by a confederacy of Native American tribes at the Battle of the Wabash.<sup>45</sup> Indeed, that investigation was authorized after the House of Representatives rejected an earlier proposal to “request[]” that President George Washington initiate an investigation into the defeat.<sup>46</sup> The resulting House investigation, conducted by a special committee, involved the testimony of St. Clair himself and Secretary of War Henry Knox, as well as an examination of St. Clair’s personal papers and papers from the War Department and the Treasury Department (personally delivered by Treasury Secretary Alexander Hamilton).<sup>47</sup> The committee exonerated St. Clair and placed much of the blame for the defeat on Knox. The House then ordered the committee to reopen the investigation in order to hear further from Knox and others. The committee’s second report was perhaps even more damning of Knox, but it did not recommend any specific action, and ultimately no action was taken by the entire House in direct consequence of the report.<sup>48</sup> However, while the committee was deliberating, Congress passed a law taking authority for procuring army supplies away from the secretary of war and locating it in the Treasury Department,<sup>49</sup> an act characterized by historian George Chalou as “a slap at Knox.”<sup>50</sup> The investigation as a whole also “embarrassed and politically damaged the Federalists” and emboldened the Jeffersonian faction in nascent partisan competition.<sup>51</sup>

In conducting the St. Clair hearings, the House was calling on a long history of legislative oversight in the Anglo-American tradition. By the mid-sixteenth century, the House of Commons was impaneling committees and taking evidence for the purpose of determining contested elections (a function it had wrested from the Crown).<sup>52</sup> In the seventeenth century, this investigatory power was central to many of the House’s clashes with the

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45. For detailed accounts of the St. Clair investigation and the events giving rise to it, see ERNEST J. EBERLING, *CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT* 36–37 (1928); DOUGLAS L. KRINER & ERIC SCHICKLER, *INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER* 9–12 (2016); George C. Chalou, *St. Clair’s Defeat, 1792*, in 1 *CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974*, at 3 (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975).

46. H.R. JOURNAL, 2d. Cong., 1st Sess. 551 (1792).

47. Chalou, *supra* note 45, at 10–11.

48. *Id.* at 12–17.

49. An Act Making Alterations in the Treasury and War Departments, ch. 37, § 2, 1 Stat. 279, 280 (1792).

50. Chalou, *supra* note 45, at 13.

51. KRINER & SCHICKLER, *supra* note 45, at 12.

52. Josh Chafetz, “*In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation*”: *Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 *YALE J.L. & HUMAN.* 181, 188–91, 195–97 (2013).

Stuart monarchs.<sup>53</sup> Indeed, by the late 1660s, some parliamentary grants of funds to the Crown came with provisions specifying record-keeping procedures, requiring that the records be open for public inspection, and even creating what we might anachronistically call an independent auditing board, with the authority to take testimony under oath and a requirement to report to both the King and Parliament.<sup>54</sup>

By the middle of the eighteenth century, it was commonplace—naturally, primarily among opposition politicians—to refer to the House of Commons as the “grand inquest of the nation.” Bolingbroke used the phrase in 1730,<sup>55</sup> and the following year the formulation was used in a speech in the House of Lords in support of a bill that would make pensioners of the Crown ineligible to sit in the House of Commons.<sup>56</sup> In 1734, this conception of the lower house’s role was urged in debates in the Commons as a point in favor of more frequent parliamentary elections,<sup>57</sup> and upon the opening of Parliament in 1735, Speaker Arthur Onslow told his colleagues that,

[t]his House is the grand inquest of the nation, appointed to inquire diligently, and to represent faithfully to the king, all the grievances of his people, and all the crimes and mismanagement of his servants; and therefore it must always be a breach of our fidelity to our sovereign, as well as a breach of our duty to his people, to approve blindly of the conduct of his servants [i.e., the government].<sup>58</sup>

Perhaps most famously, the formulation was repeatedly invoked in the 1741 debates over appointing a committee to inquire into the conduct of Robert Walpole, Earl of Orford, as prime minister.<sup>59</sup> After James Hamilton, Viscount Limerick, moved for the appointment of a committee to investigate the previous twenty years of Walpole’s tenure,<sup>60</sup> William Pitt the Elder responded to claims that the inquiry was, to borrow a phrase, a witch hunt:

I have no great Occasion to answer what has been said, that no Parliamentary Inquiry ought ever to be set up, unless we are convinced that something has been done amiss. Sir, the very Name given to this House of Parliament shews the contrary. We are called the Grand Inquest of the

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53. JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 157–63, 268 (2017); Chafetz, *supra* note 52, at 197–99.

54. CHAFETZ, *supra* note 53, at 48–49. For the auditing board specifically, see *Accounts of Public Moneys Act 1667*, 19 & 20 Car. 2 c. 1 (Eng.).

55. HENRY ST. JOHN, VISCOUNT BOLINGBROKE, *REMARKS ON THE HISTORY OF ENGLAND* (1730), in 1 *THE WORKS OF LORD BOLINGBROKE* 292, 332 (Philadelphia, Carey & Hart 1841).

56. 8 WILLIAM COBBETT, *COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND* 848 (London, Hansard 1811). On the history of these statutory incompatibility provisions, see Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 *DUKE L.J.* 177, 188–90 (2008).

57. 9 COBBETT, *supra* note 56, at 421.

58. *Id.* at 673–74.

59. Admittedly, applying the title of “prime minister” to Walpole is somewhat anachronistic. On the informality of the office of the prime minister until the twentieth century and therefore the contingency of identifying the “first” prime minister, see CHAFETZ, *supra* note 53, at 91–92.

60. As Hamilton’s peerage was Irish, it was at the time no bar to his sitting in the British House of Commons.

Nation, and as such it is our Duty to inquire into every Step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss.<sup>61</sup>

Those who suggested otherwise “seem[ed] to mistake . . . the Difference between a Motion for an Impeachment, and a Motion for an Inquiry.”<sup>62</sup> Limerick’s motion failed by two votes,<sup>63</sup> but he immediately introduced a second motion calling for an investigation that would only go back a decade.<sup>64</sup> In support of this motion, Edward Digby noted reports that the Crown was “greatly in Debt” and unable to pay its bills: “[T]his Report alone obliges us to inquire into it, if we have a Mind to act up to our Character as the Grand Inquest of the Nation.”<sup>65</sup> Pitt spoke again, arguing that widespread public outrage was sufficient, albeit not necessary, to justify opening a parliamentary inquiry.<sup>66</sup> Moreover, the state of public affairs could justify an inquiry even without any accusation of malfeasance: “[T]he ill Posture of our Affairs both abroad and at home: The melancholy Situation we are in: The Distress we are now reduced to, is of itself a sufficient Cause for an Inquiry, even supposing [Walpole] were accused of no particular Crime or Misconduct.”<sup>67</sup> Pitt and his colleagues were successful on their second try: the House narrowly authorized the inquiry.<sup>68</sup> While the investigation itself produced no further consequences for Walpole, the same pressure that prompted the inquiry also led him to resign from the King’s service.<sup>69</sup>

Later in the eighteenth century, William Blackstone would explicitly tie the “grand inquest” formulation to the House of Commons’ role in impeachment,<sup>70</sup> and no doubt it has important substantive ties to impeachment. But the remarks surrounding the Walpole investigation make it clear that the formulation was understood in mid-eighteenth-century London to refer to a much more expansive power of investigation in the public interest.<sup>71</sup> What’s more, colonial American legislatures were especially attentive students of seventeenth- and eighteenth-century Crown-Parliament relations,<sup>72</sup> and they seized on investigation as a form of pushback

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61. 13 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 172 (London, Richard Chandler 1743).

62. *Id.* at 170.

63. *Id.* at 182.

64. *Id.* at 188–91.

65. *Id.* at 201.

66. *Id.* at 210–11.

67. *Id.* at 211.

68. *Id.* at 216.

69. Stephen Taylor, *Walpole, Robert, First Earl of Orford (1676–1745)*, OXFORD DICTIONARY OF NAT’L BIOGRAPHY (Jan. 3, 2008), <https://doi.org/10.1093/ref:odnb/28601> [<https://perma.cc/44QM-JPZ9>].

70. 4 WILLIAM BLACKSTONE, COMMENTARIES \*259.

71. For a broader caution against taking Blackstone as fully representative of the common-law tradition—and against taking Blackstone to be the sole source of American knowledge about that tradition—see generally Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

72. CHAFETZ, *supra* note 53, at 4–5.

against royal officials.<sup>73</sup> As a result of American frustrations with colonial governors, early American state constitutions were dominated by the legislatures.<sup>74</sup> But even though these state executives were relatively toothless and generally appointed by state legislatures,<sup>75</sup> those legislatures nevertheless maintained a number of independent checks on the executive, including the power of investigation.<sup>76</sup> Two early republican state constitutions—the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784, which was patterned on its Massachusetts predecessor—both referred to the lower chamber of the legislature as “the grand inquest” of the state, specifically in the context of impeachment.<sup>77</sup>

#### A. Authority for Congressional Oversight

Early discussions of the new American Constitution picked up on the “grand inquest” language. At the Philadelphia Convention, a draft from the Committee of Detail specified that “[t]he House of Representatives shall be the grand Inquest of this Nation; and all Impeachments shall be made by them.”<sup>78</sup> This link was echoed by Hamilton, writing as Publius, who extended the description to both chambers. Rather than labeling the House itself as the grand inquest, he described impeachment as “a method of NATIONAL INQUEST into the conduct of public men” and inquired, “If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves?”<sup>79</sup> And other early American politicians evinced an understanding, similar to that expressed by Pitt earlier in the century, that the idea of a legislative house as a “grand inquest” extends well beyond impeachment. George Mason argued at the Philadelphia Convention that Congress should be required to meet once a year because “the Legislature, besides *legislative*, is to have *inquisitorial* powers, which

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73. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 208 (1943) (noting that colonial assemblies “tended to hold many local officials to a large measure of responsibility, and to call them to account when they failed in the performance of their duty”); EBERLING, *supra* note 45, at 17–21; TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 10–11 (1955).

74. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 149 (rev. ed. 1998) (“Americans’ emasculation of their governors lay at the heart of their constitutional reforms of 1776.”).

75. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 266–67, 270 (Rita & Robert Kimber trans., expanded ed. 2001).

76. See CHAFETZ, *supra* note 53, at 170–71; TAYLOR, *supra* note 73, at 12.

77. MASS. CONST. of 1780, pt. II, ch. I, § 3, art. 6; N.H. CONST. of 1784, pt. II, art. 17.

78. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 154 (Max Farrand ed., rev. ed. 1966) [hereinafter *FARRAND’S RECORDS*]. This connection was remarked upon in at least one state ratifying convention as well. See 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 44 (Jonathan Elliot ed., 1907) [hereinafter *ELLIOT’S DEBATES*] (Archibald Maclaine in the North Carolina ratifying convention: “[The impeachment] clause empowers the House of Representatives, which is the grand inquest of the Union at large, to bring great offenders to justice.”).

79. *THE FEDERALIST* No. 65, at 395 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It should be noted that Hamilton was discussing the powers of the Senate in this essay, so there is no doubt that he means to refer to both chambers.

can not safely be long kept in a State of suspension.”<sup>80</sup> In his famous 1790–1791 “Lectures on Law,” James Wilson likewise used the term in a more capacious sense: “The house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.”<sup>81</sup> And in the House itself in 1794, Massachusetts Federalist Fisher Ames, who had been a delegate to the Massachusetts ratifying convention, defended the House’s authority to inquire into and criticize the proliferation of Democratic-Republican clubs,<sup>82</sup> referring to “the character of this House as the grand inquest of the Nation, as those who are not only to impeach those who perpetrate offence, but to watch and give the alarm for the prevention of such attempts.”<sup>83</sup>

The “grand inquest” formulation served a powerful justificatory role because there is no explicit constitutional authorization for congressional oversight. As we have seen, the formulation was tied to the impeachment power<sup>84</sup> but not limited to it. Other constitutional powers have also long been understood to give rise to attendant investigatory powers, including the power to legislate,<sup>85</sup> the power to appropriate,<sup>86</sup> the power to structure the other two branches of government,<sup>87</sup> and the Senate’s power to confirm principal officers<sup>88</sup> and ratify treaties.<sup>89</sup> Most expansively of all, each chamber has the authority to propose constitutional amendments;<sup>90</sup> even information-gathering activities aimed at currently unconstitutional purposes could therefore be constitutionally justified as an ancillary of this congressional power. The reasonable exercise of any of these powers requires the ability to acquire information—as James Landis put it in 1926, “To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness.”<sup>91</sup> The Supreme Court has reasoned structurally to a similar conclusion: in *McGrain v. Daugherty*,<sup>92</sup> a

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80. 2 FARRAND’S RECORDS, *supra* note 78, at 199 (Madison’s recounting); *accord id.* at 206 (King’s recounting).

81. JAMES WILSON, *Lectures on Law, Part II, Chapter 1: Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, in 2 COLLECTED WORKS OF JAMES WILSON 829, 848 (Kermit L. Hall & Mark David Hall eds., 2007).

82. On the growth of Democratic-Republican clubs and the fear they inspired in the Federalists, see Matthew Schoenbachler, *Republicanism in the Age of Democratic Revolution: The Democratic-Republican Societies of the 1790s*, 18 J. EARLY REPUBLIC 237, 237–38 (1998).

83. 4 ANNALS OF CONG. 930 (1794).

84. U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6–7; *id.* art. II, § 4.

85. *Id.* art. I, §§ 7–8.

86. *Id.* § 9, cl. 7.

87. *Id.* § 8, cl. 18; *id.* art. II, § 2; *id.* art. III, § 1.

88. *Id.* art. II, § 2, cl. 2.

89. *Id.*

90. *Id.* art. V.

91. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 209 (1926); see also J. W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) (“The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function.”).

92. 273 U.S. 135 (1927).

1927 case arising out of the Teapot Dome scandal, Justice Willis Van Devanter, for a unanimous Court (with Justice Harlan Stone recused), held that, “[w]e are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”<sup>93</sup> Van Devanter’s reasoning sounded in the same structural logic that Landis had appealed to only a year earlier:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed . . . . Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>94</sup>

This holding has been reaffirmed in subsequent cases.<sup>95</sup> Crucially, this power to investigate as an ancillary of Congress’s other powers must be understood capaciously. Before a chamber can have a specific piece of legislation—or the appropriation of specific funds or the impeachment of a specific officer—in mind, it must already have basic familiarity with the existing state of the world.<sup>96</sup> What’s more, oversight can often *deter* undesirable conduct, thereby obviating the need for some further remedy.<sup>97</sup>

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93. *Id.* at 174.

94. *Id.* at 175.

95. *See, e.g.*, *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that the power to investigate is inherent in the power to make laws . . . . Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.”); *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain* and *Watkins* to similar effect).

96. *See Watkins*, 354 U.S. at 187.

97. *See* William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 799 (“Congress’s power to investigate plays a critical role in the checks and balances of U.S. democracy. Congressional investigations serve as a deterrent to wrongdoing. Without some outside check on the Executive Branch, there would be little to discourage unscrupulous officials from acting in their own, and not in the nation’s, best interests.”); Marty Lederman, *Can Congress Investigate Whether the President Has Conflicts of Interest, Is Compromised by Russia, or Has Violated the Law?*, BALKINIZATION (July 29, 2019), <https://balkin.blogspot.com/2019/07/can-congress-investigate-whether.html> [<https://perma.cc/2U4Z-Y6PZ>] (“[C]ongressional inquiry and oversight is an absolutely critical deterrent to executive wrongdoing and maladministration . . . . As virtually anyone who’s worked in the executive branch will attest, the prospect (or threat) of having to explain one’s self, and one’s decisions, to a congressional chair or staff, or in congressional hearings under the harsh glare of network lights, has a significant impact on how one performs her work

So long as such a remedy would be within Congress's power, so too is the investigation.<sup>98</sup>

In addition to oversight's basis in constitutional structure, there are a number of statutory provisions that offer explicit or implicit authority for congressional oversight. Most prominent is the Legislative Reorganization Act of 1946,<sup>99</sup> which created an oversight *obligation* on the part of the standing committees in both chambers:

To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee . . . .<sup>100</sup>

The Legislative Reorganization Act of 1970<sup>101</sup> modified that language to require each standing committee to “review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee.”<sup>102</sup>

In addition to statuting not just a right but a duty to engage in oversight, the 1946 and 1970 acts also created a number of mechanisms and processes for facilitating and structuring that oversight. These included the regularization and professionalization of both committee and member staffing;<sup>103</sup> the direction of increased staff and resources to nonpartisan institutions, including the Legislative Reference Service (renamed the Congressional Research Service in the 1970 Act), the Offices of Legislative Counsel, and the General Accounting Office (later renamed the Government Accountability Office);<sup>104</sup> and requirements that committees issue biennial oversight reports<sup>105</sup> and ensure that, to the greatest extent possible, programs

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as an official—it tempers any impulses to overstep, cut corners, or disregard norms designed to protect the public interest.”)

98. In 2020, the Supreme Court added a series of side constraints on the enforceability of congressional subpoenas for the president's personal information. *Mazars*, 140 S. Ct. at 2035–36. Although this decision was lamentable, see Josh Chafetz, *Don't Be Fooled, Trump Is a Winner in the Supreme Court Tax Case*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court-.html> [<https://perma.cc/9QHB-FLAA>], it did not affect oversight of the president's official conduct, nor did it extend to persons beyond the president.

99. Pub. L. No. 79-601, 60 Stat. 812. For discussions of the 1946 Act more generally, see CHAFETZ, *supra* note 53, at 292–95; ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 140–50* (2001); Roger H. Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357 (1990).

100. Legislative Reorganization Act of 1946, § 136, 60 Stat. at 832.

101. Pub. L. No. 91-510, 84 Stat. 1140. For discussions of the 1970 Act more generally, see CHAFETZ, *supra* note 53, at 294–95; SCHICKLER, *supra* note 99, at 213–17; Walter Kravitz, *The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375 (1990).

102. Legislative Reorganization Act of 1970, § 118, 84 Stat. at 1156.

103. See CHAFETZ, *supra* note 53, at 292–94; Davidson, *supra* note 99, at 367–69; Kravitz, *supra* note 101, at 379, 383, 388.

104. See CHAFETZ, *supra* note 53, at 293–94.

105. Legislative Reorganization Act of 1970, § 118, 84 Stat. at 1156.

within their jurisdictions were subject to annual appropriations.<sup>106</sup> Moreover, myriad other statutes contain provisions meant to encourage or facilitate oversight, ranging from protections for whistleblowers,<sup>107</sup> to the creation of the Congressional Budget Office,<sup>108</sup> to requiring departments and agencies to have inspectors general and chief financial officers.<sup>109</sup>

In addition to constitutional and statutory authorizations for oversight, each chamber also authorizes oversight in its cameral rules, promulgated pursuant to the Rules of Proceedings Clause.<sup>110</sup> In the House, the rules provide each standing committee with “general oversight responsibilities” for laws and programs within its jurisdiction.<sup>111</sup> These responsibilities include a requirement that each committee “review and study on a continuing basis” laws, programs, agencies, and subject matters within its jurisdiction.<sup>112</sup> The various standing committees are also required to submit oversight plans for a Congress by March 1 of the first session of that Congress,<sup>113</sup> and they are required to include a summary of their oversight activities in their required report at the end of each Congress.<sup>114</sup> The rules also provide for the payment of costs associated with conducting oversight investigations and producing bound copies of testimony and other evidence taken at oversight hearings.<sup>115</sup> A number of committees are also given “special oversight functions”—that is, jurisdiction to conduct oversight into matters that fall within the legislative jurisdiction of another committee.<sup>116</sup> (For instance, the Armed Services Committee has special oversight jurisdiction over matters “relating to international arms control and disarmament and the education of military dependents in schools,”<sup>117</sup> matters falling within the legislative jurisdictions of the Foreign Affairs Committee and the Education and Labor Committee, respectively.<sup>118</sup>) Perhaps most

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106. *Id.* § 253(a)–(b), 84 Stat. at 1174–75. On the ways in which annual appropriations facilitate congressional control over the executive, see CHAFETZ, *supra* note 53, at 61–66.

107. *E.g.*, Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 539, 555 (1912); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116–17; Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, §§ 701–02, 112 Stat. 2396, 2413–17.

108. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. II, 88 Stat. 297, 302–05.

109. Inspector General Act of 1978, Pub. L. No. 95-452, § 5(b), 92 Stat. 1101, 1103; Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 102(b)(3), 104 Stat. 2838, 2839; *id.* § 202, 104 Stat. at 2840; *id.* § 205, 104 Stat. at 2844; *id.* § 301, 104 Stat. at 2847–48; *id.* § 303(e), 104 Stat. at 2852.

110. U.S. CONST. art. I, § 5, cl. 2.

111. RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., R. X(2)(a) (2019), <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf> [<https://perma.cc/EH6T-R3HQ>]. The jurisdiction of each standing committee is specified in Rule X(1).

112. *Id.* R. X(2)(b)(1).

113. *Id.* R. X(2)(d).

114. *Id.* R. XI(1)(d).

115. *Id.* R. XI(1)(b)(1), XI(1)(c).

116. *Id.* R. X(3).

117. *Id.* R. X(3)(b).

118. *See id.* R. X(1)(i), X(1)(e).



importantly, the House Committee on Oversight and Reform is given roving authority to “conduct investigations of any matter without regard to [any rules provision] conferring jurisdiction over the matter to another standing committee.”<sup>119</sup> Finally, the rules provide that the Speaker, with the approval of the House, can appoint an ad hoc oversight committee to review matters falling within the jurisdiction of multiple standing committees.<sup>120</sup>

Oversight in the Senate is structured along relatively similar lines. The standing committees are required to conduct oversight into matters within their legislative jurisdiction;<sup>121</sup> they have similar reporting requirements to those in the House;<sup>122</sup> and various committees are given “comprehensive” authority to study certain matters, akin to “special oversight functions” in the House.<sup>123</sup> The Senate Homeland Security and Governmental Affairs Committee has a general oversight duty akin to that of the House Oversight Committee,<sup>124</sup> a function that in large part is carried out by its Permanent Subcommittee on Investigations.<sup>125</sup>

### B. Tools and Methods of Oversight

Although, as the previous section suggested, committees are the primary engines of congressional oversight, individual entrepreneurial members<sup>126</sup> can also play a key role. Members can send information requests to agency officials (or to private persons or entities), although the requestees are under no legal obligation to respond.<sup>127</sup> Still, agency officials in particular tend to be quite alive to the wisdom of not unnecessarily angering members of

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119. *Id.* R. X(4)(c)(2).

120. *Id.* R. X(2)(e).

121. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXVI(8)(a) (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/YTM3-78GC>]. Committee jurisdiction is specified in Rule XXV. Because the Senate regards itself as a “continuing body,” its rules continue in effect from Congress to Congress unless changed, which explains why the most recent version of its rules was published several Congresses ago. See Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1410–18 (2010).

122. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXVI(8)(b).

123. See, e.g., *id.* R. XXV(1)(a)(2), XXV(1)(c)(2), XXV(1)(d)(2).

124. *Id.* R. XXV(1)(k)(2).

125. The Permanent Subcommittee on Investigations grew out of the Truman committee, chaired by Harry S. Truman (D-MO) during World War II and given jurisdiction to “expos[e] waste, fraud, and abuse in the war effort and war profiteering.” *Historical Background*, PERMANENT SUBCOMM. ON INVESTIGATIONS 1, [https://www.hsgac.senate.gov/imo/media/doc/PSI%20Historical%20Background%20\(for%20website\)%20Jan%202015%20update.pdf](https://www.hsgac.senate.gov/imo/media/doc/PSI%20Historical%20Background%20(for%20website)%20Jan%202015%20update.pdf) [<https://perma.cc/CH2U-JX2J>] (last visited Oct. 3, 2020). Indeed, as Kriner and Schickler note, “Truman built his public reputation not through legislating, but by investigating.” KRINER & SCHICKLER, *supra* note 45, at 1. In 1948, the committee that Truman had chaired until 1944 became a permanent subcommittee of the Committee on Expenditures in the Executive Departments, the precursor to today’s Committee on Homeland Security and Governmental Affairs. Most infamously, the subcommittee was chaired by Joseph McCarthy (R-WI) from 1953 to 1954. *Historical Background*, *supra*, at 1; see also *infra* Part III(B).

126. On “entrepreneurship” by members of Congress, see SCHICKLER, *supra* note 99, at 14–15, 250–52.

127. See ALISSA M. DOLAN ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 65 (2014).

Congress<sup>128</sup> and are therefore generally responsive to such inquiries.<sup>129</sup> Moreover, members can on their own initiative travel to observe conditions around the country (or indeed internationally). Recently, for example, a number of Democratic members traveled to migrant detention facilities along the U.S.-Mexico border.<sup>130</sup> In an illuminating example of the interaction between oversight by individual members and oversight by committees, several of those members subsequently testified before the House Oversight Committee regarding what they had observed—including one member who did not serve on the Oversight Committee.<sup>131</sup> At the other end of the spectrum from individual members, the entire House of Representatives can also conduct oversight via a “resolution of inquiry.” These are privileged simple (i.e., single-chamber) resolutions, addressed to the head of any executive department; if the resolution is passed by the entire House, then the department head is “directed” to supply information to the House.<sup>132</sup>

However, the vast majority of oversight is conducted by committees,<sup>133</sup> which have a variety of tools available for that purpose. They generally begin

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128. See CHAFETZ, *supra* note 53, at 71–73 (discussing the research on agency responsiveness to Congress).

129. The Trump administration has proven less responsive to requests from individual members than have previous administrations (just as it has proven less responsive to requests and even subpoenas from committees). This has provoked a bipartisan backlash. See Kevin Freking, *Grassley Tells Trump He Can't Ignore Requests for Information from Congress*, PBS NEWS HOUR (June 9, 2017, 6:09 AM), <https://www.pbs.org/newshour/politics/grassley-tells-trump-cant-ignore-requests-information-congress> [<https://perma.cc/A9P6-WTZG>].

130. Priscilla Alvarez, *Lawmakers, Including Ocasio-Cortez, Lash out Over Conditions Following Border Facility Tours*, CNN (July 2, 2019, 8:33 AM), <https://www.cnn.com/2019/07/01/politics/alexandria-ocasio-cortez-clint-texas-facility/index.html> [<https://perma.cc/XPA9-ZT3K>].

131. Representatives Veronica Escobar (D-TX), Alexandria Ocasio-Cortez (D-NY), Ayanna Pressley (D-MA), and Rashida Tlaib (D-MI) testified before the committee about their border visits. Grace Segers, *Ocasio-Cortez Condemns “Manufactured” Cruelty by White House Immigration Policies*, CBS NEWS (July 12, 2019, 5:56 AM), <https://www.cbsnews.com/news/house-oversight-committee-holds-hearing-on-treatment-of-migrants-at-the-border/> [<https://perma.cc/KG9Z-CGUN>]. Representative Escobar does not sit on the Oversight Committee. See *Oversight and Reform Members*, HOUSE COMM. ON OVERSIGHT & REFORM, <https://oversight.house.gov/members> [<https://perma.cc/AP6D-6R52>] (last visited Oct. 3, 2020).

132. RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., R. XIII(7) (2019). For a recent example of an introduced resolution of inquiry, see H.R. Res. 243, 116th Cong. (as reported by H.R. Comm. on the Judiciary, Apr. 4, 2019) (resolving “[t]hat the Attorney General of the United States is directed to transmit, to the House of Representatives, not later than 14 days after the date of the adoption of this resolution, copies of any document, record, audio recording, memorandum, correspondence, or other communication in his possession, or any portion thereof, that refers or relates to” various actions taken by former FBI Director Andrew McCabe with regard to investigations into President Trump).

133. In the discussion that follows, “a committee” generally means a majority of the members of the committee, although in some cases chairs are authorized to act unilaterally or with the consent of the ranking member. However, federal law also provides that any seven members of the House Oversight Committee or any five members of the Senate Committee on Homeland Security and Governmental Affairs can request information from any executive agency, which “shall submit any information requested of it relating to any matter within the jurisdiction of the committee,” a provision sometimes referred to as the “rule of seven.” 5 U.S.C. § 2954. The rule of seven provides the *minority* party memberships of these

with staffers collecting publicly available information, often aided by information provided by one or more of the statutorily created support agencies discussed above (the Congressional Research Service, the Government Accountability Office, the Congressional Budget Office, and agencies' inspectors general).<sup>134</sup> Committees can also make use of staff-conducted sworn depositions: in the House, the Oversight Committee is expressly authorized to take depositions;<sup>135</sup> in the Senate, a number of committees have similar authority.<sup>136</sup> After the initial information-gathering phase is complete (or at least underway), hearings themselves are a key tool of oversight, allowing members of Congress and staffers to obtain testimony from witnesses, to press them to explain inconsistencies or omissions, and to begin working out framings for the information that they have received. For the most part, testimony and supporting information is voluntarily provided to the committees, especially by federal agencies, which both understand themselves to have a duty to provide information to Congress and understand that it is in their interest to stay on members' good sides.<sup>137</sup> Should information not be provided voluntarily, committees in both chambers have the power to issue subpoenas for documents and testimony, with the procedures for doing so specified in the committees' own rules.<sup>138</sup> The

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committees with a legal right to demand information from executive agencies. While agencies have generally been responsive to rule of seven requests, the statute provides no explicit enforcement mechanism, and federal district courts have twice held that members of Congress lack standing to sue agencies that refuse to provide information pursuant to a rule of seven demand. *Cummings v. Murphy*, 321 F. Supp. 3d 92 (D.D.C. 2018); *Waxman v. Thompson*, No. CV04-3467, 2006 WL 8432224 (C.D. Cal. July 24, 2006).

134. See *supra* text accompanying notes 103–09; see also Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1, 11–14 (2018); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1143–44 (2017).

135. RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., R. X(4)(c)(3)(A).

136. See S. COMM. ON RULES & ADMIN., AUTHORITY AND RULES OF SENATE COMMITTEES, 2017–2018, S. DOC. NO. 115-4, at 4, 15, 44, 63, 114, 137, 160, 178, 188 (2017), [https://www.senate.gov/general/resources/pdf/authority\\_and\\_rules\\_of\\_senate\\_committees.pdf](https://www.senate.gov/general/resources/pdf/authority_and_rules_of_senate_committees.pdf) [<https://perma.cc/84EL-RWNW>] (committee rules allowing the taking of depositions for the Select Committee on Intelligence, Special Committee on Aging, and the Committees on Agriculture, Nutrition, and Forestry; Commerce, Science, and Transportation; Ethics; Foreign Relations; Homeland Security and Governmental Affairs; Indian Affairs; and the Judiciary).

137. In this regard, the Trump administration's large-scale stonewalling of congressional information requests is a significant outlier. See Pema Levy & Marisa Endicott, *6 Things the White House Won't Give Congress—and How Democrats Can Fight Back*, MOTHER JONES (May 13, 2019, 8:58 AM), <https://www.motherjones.com/politics/2019/05/6-things-the-white-house-wont-give-congress-and-how-democrats-can-fight-back/> [<https://perma.cc/6NS2-9EFL>]; see also Jonathan H. Adler, *McConnell and Chafetz on Trump's Resistance to Congressional Oversight*, THE VOLOKH CONSPIRACY (May 3, 2019, 8:58 AM), <https://reason.com/2019/05/03/mcconnell-and-chafetz-on-trumps-resistance-to-congressional-oversight/> [<https://perma.cc/C5TN-JC4S>] (collecting in one place a debate between Michael McConnell and me on how the Trump administration has responded to oversight attempts in the 116th Congress).

138. See 2 U.S.C. § 190m; RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., R. XI(2)(m)(1)(B); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXVI(1) (2013).

Supreme Court has repeatedly upheld the congressional subpoena power,<sup>139</sup> and it has suggested that the standard for legal sufficiency of a congressional subpoena is easily met. In *Wilkinson v. United States*,<sup>140</sup> the Court announced a five-part test: (1) Was the committee's investigation authorized by Congress?; (2) Was the investigation pursuant to a valid legislative purpose?; (3) Was the specific inquiry pertinent to the subject matter of the investigation?; (4) Was the subpoena's target contemporaneously apprised of the pertinency of the inquiry?; and (5) Did the investigation violate any of the target's constitutional rights (e.g., First Amendment rights of free association and free speech, the Fifth Amendment right against self-incrimination, etc.)?<sup>141</sup> As for the "valid legislative purpose" prong, the Court has long indicated both that any of Congress's constitutional powers suffices to furnish such a purpose and that the authorization for the investigation need not specify the constitutional power on its face.<sup>142</sup>

Information demands are backed by several mechanisms for forcing compliance. Defiance of a valid subpoena constitutes contempt of Congress, which can be either criminally prosecuted<sup>143</sup> or enforced by the congressional chamber itself via civil suit, arrest, or use of other congressional tools such as the power of the purse.<sup>144</sup> A witness who lies under oath (whether in a hearing or in an authorized staff deposition) can be prosecuted for perjury,<sup>145</sup> and even when not sworn, a willfully false statement given in the course of "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate" is criminally punishable.<sup>146</sup> (False statements, like refusing to comply with a subpoena, would also constitute contempt of Congress.)

### C. Oversight Done "Right": The Consensus View

To what end are members, committees, and chambers of Congress meant to use these oversight tools? Recall the language used by participants and commentators across the political spectrum to describe what the hearings investigating President Trump should and should not be. Any suggestion that the hearings were intended to be showy or theatrical came with a clear negative connotation. Instead, they should be primarily receptive in nature: they should be aimed at drawing out new facts or at least new implications

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139. See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

140. 365 U.S. 399 (1961).

141. *Id.* at 408–09. As previously noted, in 2020 the Court added several new factors to be taken into account when a subpoena targets the personal papers of the president. See *supra* note 98.

142. See *In re Chapman*, 166 U.S. 661, 669–70 (1897).

143. See 2 U.S.C. §§ 192, 194.

144. For a discussion of contempt of Congress generally and each chamber's options for addressing it, see CHAFETZ, *supra* note 53, at 152–98.

145. 18 U.S.C. § 1621.

146. *Id.* § 1001(c)(2).

of old facts. If there were no new facts to be uncovered, that suggested that the hearings would be mere “theater” at best, a “circus” at worst. This way of thinking about congressional hearings was certainly not new in 2019—it reflects a long-standing, cross-partisan, and cross-ideological consensus<sup>147</sup> about what it means to do oversight right.

Consider the Congressional Research Service’s *Oversight Manual*, which defines oversight as “the review, monitoring, and supervision of the implementation of public policy,”<sup>148</sup> a definition wholly focused on the receipt of information, not the dissemination of it. Indeed, the *Manual* goes on to list ten purposes of oversight, none of which involves public communication in any way.<sup>149</sup> Likewise, one of the canonical studies of congressional investigations describes their purpose as being “to obtain information, so that [the chamber’s] legislative functions may be discharged on an enlightened rather than a benighted basis.”<sup>150</sup> It is therefore a perversion when this function is overtaken by a base desire for “publicity,” in which “[c]harge and counter-charge, the breath of scandal and the clash of personalities, make a better show than knotty problems of public policy.”<sup>151</sup> More recently, Maya Kornberg lamented that some recent hearings “have seemed more circus than serious investigation” but insisted that “congressional hearings are not just theater”—that is, they “can bring lawmakers diverse and analytical information.”<sup>152</sup>

The idea that oversight is, above all, about finding facts has further implications: if everyone is engaging in the enterprise in good faith, it should

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147. Two caveats are in order here: first, to describe this as a consensus view is not to suggest by any means that it is unanimously held (as the next part will indicate). Rather, it is meant to suggest that it is widely held, especially by the sorts of political elites most likely to garner cross-partisan and cross-ideological respect. And second, the claim that there is a cross-partisan consensus about what constitutes good oversight does *not* mean that members of both parties don’t attempt to use oversight in other ways. But the fact that they perceive the need to deny that this is what they are doing, even as they do it, suggests that there is indeed some level of consensus that such behavior is wrong.

148. DOLAN ET AL., *supra* note 127, at 1; *see also* MORTON ROSENBERG, THE CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 1 (2017), <https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf> [<https://perma.cc/PX9U-YDKT>] (a former Congressional Research Service staffer using the same definition).

149. DOLAN ET AL., *supra* note 127, at 1–3. The ten purposes listed in the *Manual* are: to ensure executive compliance with legislative intent; improve the efficiency, effectiveness, and economy of governmental operations; evaluate program performance; prevent executive encroachment on legislative prerogatives and powers; investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, dishonesty, and fraud; assess agency or officials’ ability to manage and carry out program objectives; review and determine federal financial priorities; ensure that executive policies reflect the public interest; protect individual rights and liberties; and other specific purposes. *Id.* The final, catchall category contains another ten subpurposes—none of which involves public communication.

150. TAYLOR, *supra* note 73, at 6.

151. *Id.* at xiii–xiv.

152. Maya Kornberg, *Plenty of Congressional Hearings Are Not Circuses. Here’s How We Know*, WASH. POST (Aug. 14, 2018, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/14/plenty-of-congressional-hearings-are-not-circuses-heres-how-we-know/> [<https://perma.cc/EEP4-TAGE>].

be both bipartisan and civil. After all, if the facts don't care about your feelings, then finding the facts shouldn't be contingent on your ideology or partisanship. Of course, few are so naïve as to deny that good faith differences of interpretation will arise, but so long as finding and collating those facts remains at the heart of the enterprise, those differences can be cabined. Crystalizing this view, retired Senators Carl Levin (D-MI) and Richard Lugar (R-IN), who served a combined seventy-two years in the Senate, wrote in 2018 that, "[w]hen oversight hearings were held more for political purposes than for real fact-finding purposes, they didn't work. Hearings like these may have been the exception rather than the rule, but they damaged Congress' reputation. They didn't uncover the facts, and they didn't have the confidence of the American people."<sup>153</sup> Likewise, one scholar of oversight has lamented that "some hearings—ones that could have addressed problems constructively—were used to promote partisan goals."<sup>154</sup> He went on to contrast the pursuit of partisan ends, on the one hand, with "constructive endeavors," on the other.<sup>155</sup> In this spirit, in honor of Senator Levin's eight years chairing the Senate Permanent Subcommittee on Investigations,<sup>156</sup> the Levin Center at Wayne Law awards an annual Carl Levin Award for Effective Oversight. The selection criteria include that the oversight activities led by the winner "must have been conducted on a bipartisan basis and the candidate must have played a significant role in ensuring the bipartisan nature of the investigation," and "[t]he oversight investigation must have been focused on obtaining the facts underlying the subject of the investigation."<sup>157</sup>

To be clear, there are plenty of oversight activities in Congress that would qualify for this award.<sup>158</sup> A recent study by Jason MacDonald noted that "much oversight is conducted on a bipartisan basis . . . during both divided and unified government,"<sup>159</sup> and that "Democrats and Republicans . . . continued to work together in recent years on some oversight endeavors

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153. Carl Levin & Richard Lugar, Opinion, *Democrats Can't Check the White House Alone. Neither Can Republicans*, ROLL CALL (Nov. 12, 2018, 5:02 AM), <https://www.rollcall.com/news/opinion/democrats-republicans-congress-oversight> [<https://perma.cc/B58T-NTNX>].

154. Jason MacDonald, *Partisan Trends in Congressional Oversight, 1987–2016*, EXTENSIONS, Winter 2019, at 16, 21.

155. *Id.*

156. See *Historical Background*, *supra* note 125, at 1.

157. *Nominations for Carl Levin Award for Effective Oversight*, LEVIN CTR. AT WAYNE L., <https://law.wayne.edu/levin-center/oversightaward> [<https://perma.cc/J2NE-LSPH>] (last visited Oct. 3, 2020); see also Press Release, Levin Ctr. at Wayne L., Senators Richard Burr and Mark Warner Receive the Carl Levin Award for Effective Oversight (Jan. 29, 2020), [https://law.wayne.edu/levin-center/pdfs/accessible\\_2020-01-29\\_press\\_release\\_carl\\_levin\\_award\\_2019.pdf](https://law.wayne.edu/levin-center/pdfs/accessible_2020-01-29_press_release_carl_levin_award_2019.pdf) [<https://perma.cc/7ZQY-C7MT>] (awarding the 2020 prize to Senator Richard Burr (R-NC) and Mark Warner (D-VA) for their leadership of the Senate Intelligence Committee's "bipartisan, fact-based investigation into Russian interference in the 2016 election").

158. Indeed, the 2020 award was given to two senators. See Press Release, Levin Ctr. at Wayne L., *supra* note 157.

159. MacDonald, *supra* note 154, at 16.

while opposing one another on other oversight matters.”<sup>160</sup> In addition, Maya Kornberg’s work analyzed hearings in several committees in both chambers in the 114th Congress (2015–2016) and found that witness testimony at these hearings tended to be at a high analytical level and ideologically balanced.<sup>161</sup> Moreover, she found that, although some hearings were “theatrical,” others were “more ‘educational’ hearings on technical, uncontentious topics with nonpartisan experts” or “‘deliberative hearings’ . . . offer[ing] an opportunity to learn from and legitimize the perspectives of witnesses and fellow committee members with whom a member of Congress might ordinarily disagree.”<sup>162</sup> In other words, even in a time of high partisan polarization, a great many congressional hearings live up to the consensus ideal.

But what about the rest of it? What about the hearings that Kornberg, reflecting the consensus view, dismisses as “theatrical”?

## II. OVERSPEECH

A few observers—perhaps not coincidentally, from the world of entertainment—have insisted on the value of the performative element of congressional hearings. The *New York Times*’s chief television critic, for instance, argued that Robert Mueller should testify publicly because “there’s a power to images and voices on a screen . . . . TV events concentrate attention and focus.”<sup>163</sup> At the same time, Academy Award-winning actor Robert De Niro wrote in an open letter to Mueller, “[Y]ou said that your investigation’s work ‘speaks for itself.’ It doesn’t . . . . [T]he country needs to hear your voice. Your actual voice.”<sup>164</sup> Rejecting the anti-theatricality of the consensus view of oversight, the critic and the actor were making the case for congressional oversight as congressional *overspeech*.

Overspeech is best understood not as something *distinct* from congressional oversight but rather as the use of the tools of oversight in ways that the consensus view regards as illegitimate. It thus makes sense to speak in terms of the degree to which oversight hearings are best characterized as overspeech, rather than in terms of a binary. So what are the indicia of overspeech? In order of increasing controversiality, they are communicativity, performativity, and divisiveness. Each will be addressed in turn below.

### A. Communicativity

On the consensus view, oversight is supposed to be about receiving facts. If a special counsel has already written a detailed report containing all the

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160. *Id.* at 17.

161. Kornberg, *supra* note 152.

162. *Id.*

163. James Poniewozik, *Reluctant Witness for Capitol Hearings Might Be the Perfect One for Television*, N.Y. TIMES, May 31, 2019, at A17.

164. Robert De Niro, Opinion, *Robert Mueller, We Need to Hear More*, N.Y. TIMES, May 30, 2019, at A27.

relevant facts, then having him testify can serve no legitimate purpose.<sup>165</sup> Scholars<sup>166</sup> and members of Congress<sup>167</sup> alike have largely agreed that, in the words of Senators Levin and Lugar, oversight should be aimed at “real fact-finding.”<sup>168</sup>

Of course, the proponents of the consensus view recognize that hearings communicate facts to the public. But they are insistent that this communication is a by-product of public fact-finding, rather than a legitimate object to be pursued in its own right. So, for example, the CRS *Oversight Manual*, which does not list any form of public communication as one of the *purposes* of oversight,<sup>169</sup> nevertheless devotes several pages to “Communicating with the Media.”<sup>170</sup> Likewise, Senator Levin and Elise Bean suggest ten metrics for measuring the quality of an investigation, the last of which is, “[w]as the investigation able to attract attention from policymakers and the public?”<sup>171</sup> In other words, the consensus view understands the purpose of oversight to be the discovery of facts; communication of those facts to the public is distinctly secondary.

But there has long been another view of oversight. In 1885, a doctoral candidate at Johns Hopkins University named Woodrow Wilson argued that Congress failed in its oversight responsibilities precisely because its oversight involved too little overspech:

An effective representative body . . . ought, it would seem, not only to speak the will of the nation, which Congress does, but also to lead it to its conclusions, to utter the voice of its opinions, and to serve as its eyes in superintending all matters of government,—which Congress does not do.<sup>172</sup>

He went on to declare that “[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees . . . . The informing function of Congress should be preferred even to its legislative function.”<sup>173</sup> Here is a full-throated argument for public communication, not simply as a by-product of oversight, but rather as its animating purpose. And, importantly, Wilson is making an argument for the *argumentative* use of oversight tools: “[W]hen earnestly and purposefully conducted, [congressional speech] clears the public mind and shapes the demands of public opinion.”<sup>174</sup> Wilson is not here claiming that investigations can simply uncover facts and publicize them. Facts on their own are inert: they neither *do* anything nor do they *require* any particular

165. See *supra* text accompanying notes 1, 5, 6, 14.

166. See *supra* text accompanying notes 150–52, 154–55.

167. See *supra* text accompanying notes 153, 156–57.

168. See *supra* text accompanying note 153.

169. See *supra* note 149 and accompanying text.

170. DOLAN ET AL., *supra* note 127, at 76–79.

171. Levin & Bean, *supra* note 134, at 19.

172. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 195 (Dover Publ’ns 2006) (1885).

173. *Id.* at 198.

174. *Id.*



response. Facts, as Wilson recognized, have motivating power only when they are presented (explicitly or implicitly) as part of a larger narrative.<sup>175</sup> Thus, the congressional “informing function” is necessarily an attempt to *shape* public views.

In this, Wilson was evincing a sophisticated view of the relationship between institutional politics and mass politics. As David Mayhew has more recently emphasized, “political activity takes place before the eyes of an appraising public—not in a Washington, D.C., realm that can be theoretically or empirically isolated.”<sup>176</sup> Rather, politics within and between institutions takes place in the public sphere<sup>177</sup>—and, indeed, in interbranch conflicts, it will generally be the institution that wins the public over to its side that emerges stronger.<sup>178</sup> And this is not simply about crude electoral ties. We are accustomed to seeing even second-term presidents publicly campaign for their positions in interbranch conflicts, and we are accustomed as well to thinking about the ways in which reservoirs of public support empower the judiciary to stand up to the other branches or the ways in which concern about maintaining public support pushes judges towards reticence. In short, we get a descriptively much richer (albeit less parsimonious) understanding of national politics if we think in terms of continuous feedback effects between institutional politics, electoral politics, interest group politics, and all of the other parts of the political universe. But the consensus view of oversight implicitly rests on a much less robustly interactive model: it presupposes that the behaviors and interactions of political institutions can fruitfully be discussed in isolation from the interaction between political elites and their publics. Recall, in this regard, Telford Taylor’s distinction between the salutary and enlightening discussion of “knotty problems of public policy,” on the one hand, and the base desire for “publicity” on the other.<sup>179</sup>

Thinking in terms of overspeech helps to foreground the communicative use of oversight as a legitimate tool of constitutional politics. In facing a question like whether a particular witness should be called to testify (for example, Robert Mueller in the House investigation or John Bolton in the Senate impeachment trial), it counsels us to focus, not primarily on whether his testimony would be likely to produce any new facts or even new interpretations of facts, but rather on whether the hearing at which he testified

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175. Cf. CHAFETZ, *supra* note 53, at 224 (“Facts in isolation do not cry out for secrecy; facts within a specific political context do.”); KRINER & SCHICKLER, *supra* note 45, at 78 (“[S]candals are politically constructed events.”).

176. DAVID R. MAYHEW, *PARTISAN BALANCE: WHY POLITICAL PARTIES DON’T KILL THE U.S. CONSTITUTIONAL SYSTEM* xviii (2011).

177. See DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* 1–28 (2000).

178. For an elaboration of this account of interbranch conflict, including some important caveats, see CHAFETZ, *supra* note 53, at 15–26.

179. See *supra* text accompanying note 151.

would be likely to shape public views—including, perhaps, the views of some particular subsets of the public—in a meaningful way.<sup>180</sup>

It also, of course, directs our attention to the media of communication through which public views of congressional activity are shaped. Effective overspeakers will necessarily pay attention to the media environment in which they operate and will shape their behavior so as to increase the likelihood of favorable coverage.<sup>181</sup> This means that, while overspeech occurs in all media environments—indeed, the two case studies in Part III are deliberately situated in circumstances very different from today and from one another—the particular forms and techniques that characterize effective overspeech will change over time.<sup>182</sup>

It may be difficult to render any confident judgments on the long-term effects of the congressional investigations into President Trump,<sup>183</sup> but we do have significant evidence that congressional overspeech moves public opinion. As Mayhew noted in 2005, “a [congressional] probe can sometimes gain the attention of the public, weigh down the White House, trigger resignations of leading officials, and register a long-term impact on public opinion and government policy.”<sup>184</sup> He identified thirty-one “congressional committee ‘exposure probes’ of the executive branch that dr[e]w

180. For a recent explicit acknowledgment of the communicative uses of overspeech, consider Washington, D.C., Mayor Muriel Bowser’s description of her and her congressional allies’ preparations for upcoming House Oversight Committee hearings on D.C. statehood:

We . . . go into this hearing knowing that when our fellow Americans see us and when they know the full story of local Washington, DC, the real DC, not the federal district—they support us. So our plan is to use the upcoming hearing to speak directly to the American people.

*Mayor Bowser Delivers Georgetown Law’s 2019 Philip A. Hart Memorial Lecture: The Opening Argument for DC Statehood*, GOV’T OF D.C.: MURIEL BOWSER, MAYOR (Sept. 4, 2019), <https://mayor.dc.gov/release/mayor-bowser-delivers-georgetown-law%E2%80%99s-2019-philip-hart-memorial-lecture-opening-argument-dc> [<https://perma.cc/VS8S-UD24>].

181. Overspeech thus partakes of what Jarol Manheim termed “strategic political communication,” which involves “the use of . . . such relevant organizational behaviors as how news organizations make decisions regarding news content . . . to shape and target messages so as to maximize their desired impact while minimizing undesired collateral effects.” Jarol Manheim, *The News Shapers: Strategic Communication as a Third Force in Newsmaking*, in *THE POLITICS OF NEWS, THE NEWS OF POLITICS* 94, 100–01 (Doris Graber et al. eds., 1998); see also PATRICK SELLERS, *CYCLES OF SPIN: STRATEGIC COMMUNICATION IN THE U.S. CONGRESS* (2010) (discussing feedback effects between legislators’ behavior and media behavior in shaping the public political agenda).

182. See C. DANIELLE VINSON, *CONGRESS AND THE MEDIA: BEYOND INSTITUTIONAL POWER* 4–5 (2017) (noting that the efficacy of efforts at public political persuasion has been a topic of interest since at least Plato and that changes in the media environment merely alter the forms of that engagement); see also DANIEL DAYAN & ELIHU KATZ, *MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY* 27 (1992) (“Television uses these formulas to tell its stories, but television obviously did not invent them. Neither did literature. They are on view in myth, in children’s games, in history books.”).

183. The political consequences of the worldwide COVID-19 pandemic that arose nearly contemporaneously with the Senate impeachment trial may well have swamped any effect arising from the impeachment proceedings themselves.

184. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 8 (2d ed. 2005).

considerable publicity” between 1946 and 1990,<sup>185</sup> and he found that each of them “gave a president some real trouble.”<sup>186</sup> This “trouble” ranged from the resignation of administration officials (including, of course, President Richard Nixon himself) to bad press during election campaigns.<sup>187</sup> More recently, Doug Kriner and Eric Schickler have conducted a more systematic survey of investigations into the executive branch and have come to a similar conclusion regarding their effect on the administration. Analyzing both decades of public opinion survey data and original survey experiments, they found that congressional investigations of the president “systematically depress presidential job approval ratings.”<sup>188</sup> This, in turn, can “reduce [the president’s] political leverage, and thereby provide at least a partial counterweight to presidential power.”<sup>189</sup> More specifically, looking at all congressional committee investigations of alleged executive branch misconduct between 1953 and 2014, they found that “increasing the number of days of investigative hearings in a month from 0 to 20, slightly less than a two standard deviation shift, decreases presidential approval by approximately 2.5%.”<sup>190</sup> These results were essentially the same regardless of whether the investigation was conducted in the House or the Senate<sup>191</sup> and regardless of whether there was unified or divided government.<sup>192</sup> Additional survey experiments strengthened the conclusion that the publicity surrounding the congressional investigation itself, not simply publicity around the alleged executive misconduct, drove a significant amount of this shift in public opinion.<sup>193</sup>

These shifts in public opinion, in turn, drive not only election outcomes but also the behavior of institutionally sited actors in between elections.<sup>194</sup> This can happen in several ways. For one, the public reaction to legislative overspeech may in turn make it politically easier for Congress to pass executive-curtailling legislation,<sup>195</sup> refuse to confirm executive branch nominees,<sup>196</sup> trim or restructure executive branch appropriations,<sup>197</sup> or even impeach.<sup>198</sup> Moreover, presidents, anticipating these reactions from Congress, may preemptively alter their behavior in light of the public’s response to some instance of overspeech, in an attempt to stave off a more severe congressional response.<sup>199</sup> Finally, and most broadly, overspeech

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185. *Id.* For definitions of each of those criteria, see *id.* at 8–11, and for each of the thirty-one probes, see *id.* at 13 tbl.2.1.

186. *Id.* at 27.

187. *Id.* at 27–28.

188. KRINER & SCHICKLER, *supra* note 45, at 8.

189. *Id.* at 75.

190. *Id.* at 88.

191. *Id.* at 90.

192. *Id.* at 93.

193. *Id.* at 96–103.

194. See CHAFETZ, *supra* note 53, at 15–26.

195. KRINER & SCHICKLER, *supra* note 45, at 124–26.

196. See CHAFETZ, *supra* note 53, at 119–34.

197. See *id.* at 61–77.

198. See *id.* at 148–51.

199. KRINER & SCHICKLER, *supra* note 45, at 126–27.

may have collateral consequences in reallocating power across the branches, even in policy areas unrelated to the overspeech itself, by sapping the political capital a president relies on and by enhancing the political capital of congressional actors.<sup>200</sup> As an example, consider that President Ronald Reagan's nomination of Robert Bork to the Supreme Court was hampered by Reagan's unpopularity at the time, which, in turn, was in no small part a function of the Iran-Contra hearings that had recently concluded.<sup>201</sup>

In short, the communicative use of oversight tools has often served as a significant driving force in American constitutional politics.

### B. Performativity

It would be a strange account of oversight—or, indeed, of any political activity—to acknowledge that it was centrally concerned with public communication and yet require it to be indifferent as to the effectiveness of that communication. Humans are seldom moved by logos alone. Ethos and pathos are at least as significant in changing both minds and behavior.<sup>202</sup> Much of what political actors do in their public communication—at least, if they're any good at it—is make appeals both to their own authority (i.e., ethical arguments) and to their audience's emotions (i.e., pathetic arguments).<sup>203</sup>

But the consensus view of oversight is almost entirely logocentric. If the lodestar of good oversight is the finding of facts, then the nature of their presentation should be largely irrelevant. Facts are facts, regardless of whether they're written in a report or spoken in a gravelly baritone. Appeals to emotion only get in the way of facts—that has been the essence of the critique of poetics since at least Plato.<sup>204</sup> And of course this idea is at the core of the uniformly pejorative use of performance-based descriptions of oversight. Even Kriner and Schickler, who have written the definitive recent work on the communicative uses of oversight, presented their findings as evidence that oversight hearings are not “mere political theater.”<sup>205</sup>

And yet, theatricality is inevitably enmeshed with politics. As sociologist Jeffrey Alexander has written in the context of presidential elections, “Candidates work to present compelling performances of civil competence to citizen audiences at a remove not only geographically but also emotionally and morally . . . . [I]n a democratic society it is the attribution of

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200. *Id.* at 172–205.

201. CHAFETZ, *supra* note 53, at 22–24; KRINER & SCHICKLER, *supra* note 45, at 172–73.

202. Cf. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013) (bringing an analysis of pathos into a domain that had long been dominated by logocentric and ethocentric discourses).

203. 2 ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE bk. I, pt. 2, at 2152, 2155 (Jonathan Barnes ed., W. Rhys Roberts trans., Princeton Univ. Press 1984).

204. PLATO, THE REPUBLIC bk. III, at 82 (Richard W. Sterling & William C. Scott trans., 1985); see also Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1841–59 (2005).

205. KRINER & SCHICKLER, *supra* note 45, at 7.

meaningfulness that determines who will exercise power.”<sup>206</sup> What shapes a campaign’s success is not whether the candidate *is* the embodiment of attractive ideals but rather whether she is *perceived* as such: “Being truthful, honest, and fair are discursive *claims*; whether these claims take root is a matter of performative success.”<sup>207</sup> Or, more expansively, candidates succeed if their performances are “structured in a manner that evokes our concerns, builds pictures in our minds, and allows us to share their worldly visions.”<sup>208</sup> Importantly, the fact that something is theatrical does not make it untrue—even the truth needs to be performed to be believed. Or, as veteran political journalist Jodi Kantor told Alexander about the 2008 presidential campaign, “It’s theatrical even when it’s incredibly authentic.”<sup>209</sup>

What is true of presidential electoral politics is equally true of interbranch politics. Performativity is both central to the practice and not necessarily in conflict with authenticity or veracity.<sup>210</sup> Consider the constitutive elements of a theatrical performance.<sup>211</sup> First, there are the *actors* themselves. There’s a reason Mueller’s testimony was carried live on network television, while plenty of other oversight hearings vie for space on one of the C-SPAN channels. Casting a famous actor is often the best way to ensure an audience. Sometimes committees take this quite literally: “Committee leaders have learned that celebrity witnesses at committee hearings draw more press (and sometimes more committee members) than experts and bureaucrats. So actor Ben Affleck is invited to speak at a hearing on the Congo, and comedian Stephen Colbert testifies at a hearing on immigration reform.”<sup>212</sup> But even without entertainment industry professionals, some actors are clearly a bigger draw than others, and good casting is an important part of any production. Moreover, the question of casting goes beyond simply the actors’ fame; their

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206. JEFFREY C. ALEXANDER, *THE PERFORMANCE OF POLITICS: OBAMA’S VICTORY AND THE DEMOCRATIC STRUGGLE FOR POWER* 9 (2010).

207. *Id.* at 12.

208. *Id.* at 286.

209. *Id.* at 15.

210. This is an essential insight of performance studies, which takes as a starting point that “[a]ny event, action, or behavior may be examined ‘as’ performance.” RICHARD SCHECHNER, *PERFORMANCE STUDIES: AN INTRODUCTION* 48 (3d ed. 2013). Or, as Erving Goffman put it, the term “performance” can be applied to “all the activity of an individual which occurs during a period marked by his continuous presence before a particular set of observers and which has some influence on the observers.” ERVING GOFFMAN, *THE PRESENTATION OF THE SELF IN EVERYDAY LIFE* 22 (1959). In Schechner’s terminology, political elites are often engaged in “make-belief” performances, which are characterized by their “enacting the effects they want the receivers of their performances to accept ‘for real.’” Using the example of a presidential address to the nation, Schechner notes that

[e]ach detail is choreographed, from how the president makes eye contact (with the camera, with the selected audience at a town meeting), to how he uses his hands, dresses, and is made up. The goal of all this is to ‘make belief’—first, to build the public’s confidence in the president, and second, to sustain the president’s belief in himself. His performances convince himself even as he strives to convince others.

SCHECHNER, *supra*, at 43.

211. As Schechner notes, analyzing an event as performance necessarily leads to certain questions about location, costuming, props, roles and scripts, etc. SCHECHNER, *supra* note 210, at 48–49.

212. VINSON, *supra* note 182, at 26.

suitability for the role is also an important consideration. Commentators noted, for example, that the career diplomats who testified before the House Intelligence Committee in the Trump impeachment proceedings “resembled a prep-school headmaster, tough but fair and near impossible to discredit” with an “anchorman voice,”<sup>213</sup> or a “badass woman of the world, who chose to serve her country in the more remote and dangerous corners of the planet” and was “calm and measured, firm but not angry, as she delivered her devastating account.”<sup>214</sup>

Next, there is the *scenery*. Where the action takes place matters, because a performance that comes across as sublime in one setting can come across as farcical in another. The physical trappings of Congress—both the chambers themselves and the committee rooms—are meant to project a sense of seriousness, purpose, and power. The coat of arms of the United States is generally somewhere on the walls, American flags are sprinkled liberally about, and the décor is generally dark woods and leather furniture. The gravitas of the scenery alone has significant power—and can be arranged to have even more. In 1805, Aaron Burr—then in his final days as vice president and president of the Senate—sought to use the impeachment trial of Federalist Justice Samuel Chase to rehabilitate his own reputation. Burr needed the good publicity: his fellow Democratic-Republicans remained irate that he had refused to step aside when he and Thomas Jefferson tied in the Electoral College in 1800, and Federalists remained irked that he had killed Alexander Hamilton in a duel the previous year. Scene-setting at the Chase impeachment trial was a big part of Burr’s public relations effort. As Richard Ellis noted, Burr arranged the Senate to “look[] more like a theater than a court room,” including by building additional galleries for the occasion.<sup>215</sup> Connecticut Federalist Senator Uriah Tracy described the chamber as “now fitted up in a style beyond anything which has ever appeared in this country.”<sup>216</sup> Over a thousand spectators watched the drama of Chase’s acquittal,<sup>217</sup> and Burr’s scenery may well have contributed to the “dignified and impartial” air that won Burr the respect of even some of the Federalists.<sup>218</sup>

For a more recent example of scene-setting, consider President Trump’s 2019 State of the Union address: it was scheduled to take place on January 29 of that year. However, as the date approached, the federal government was in the middle of a lengthy shutdown, largely occasioned by disagreement between the White House and the Democratic-controlled House over funding

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213. Leibovich, *supra* note 26 (describing William Taylor).

214. Susan B. Glasser, *In Trump’s Jaded Capital, Marie Yovanovitch’s Uncynical Outrage*, NEW YORKER (Nov. 16, 2019), <https://www.newyorker.com/news/letter-from-trumps-washington/in-trumps-jaded-capital-marie-yovanovitchs-uncynical-outrage> [<https://perma.cc/8XPK-BULW>] (describing Marie Yovanovitch).

215. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 96 (1971). I am grateful to Farah Peterson for bringing Burr’s scene-setting to my attention.

216. *Id.*

217. *Id.*

218. *Id.* at 105–06.

for a wall on the Mexican border. In the context of the shutdown, Speaker Nancy Pelosi (D-CA) rescinded the invitation for Trump to deliver the speech in the House chamber on the previously appointed date. Trump was upset and pressed Pelosi to reverse course once again, but when she held firm, he agreed to postpone the address until after the shutdown.<sup>219</sup> Importantly for our purposes here, Trump could have chosen to give the speech in the Republican-controlled (but physically smaller and less imposing) Senate chamber or from the White House (or, for that matter, not at all). But he did not, tweeting that “there is no venue that can compete with the history, tradition and importance of the House Chamber.”<sup>220</sup> In other words, scenery matters.

Consider next the *costuming*. Before characters open their mouths, their attire can tell you a great deal about them. In the arena of institutional politics, there tends to be a fairly conservative dress code. For male politicians, dark business suits and ties are the norm. Female politicians face a more fraught sartorial landscape, defined by the simultaneous pressure to appear both stereotypically feminine and powerful,<sup>221</sup> a gendered double standard that leads to significantly more discussion of women’s costuming choices than men’s.<sup>222</sup> Certain types of political actors also have more elaborate dress codes: most prominently, judges are expected to wear robes. And some costuming fads can become nearly irresistible at times. For example, for several years after the terrorist attacks of September 11, 2001, nearly all political actors were expected to wear American flag lapel pins.<sup>223</sup> Deviations from the sartorial norm often draw notice,<sup>224</sup> which makes them a potentially powerful way to send a message. At the (delayed)<sup>225</sup> 2019 State of the Union address, nearly all of the eighty-nine Democratic women wore

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219. See Emily Stewart, *What the Hell Is Going on with the State of the Union, Explained*, VOX (Jan. 24, 2019, 8:05 AM), <https://www.vox.com/2019/1/23/18194898/trump-state-of-union-constitution-pelosi> [<https://perma.cc/SU6U-C5Q3>].

220. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 23, 2019, 11:18 PM), <https://twitter.com/realDonaldTrump/status/1088289916826648577> [<https://perma.cc/AL2X-7KXM>].

221. See Amelia Thomson-DeVeaux, *Americans Say They Would Vote for a Woman, But . . .*, FIVETHIRTYEIGHT (July 15, 2019), <https://fivethirtyeight.com/features/americans-say-they-would-vote-for-a-woman-but/> [<https://perma.cc/ZH6C-YW2P>].

222. See, e.g., Megan Garber, *Why the Pantsuit?*, ATLANTIC (Aug. 2, 2016), <https://www.theatlantic.com/entertainment/archive/2016/08/youre-fashionable-enough-hillary/493877/> [<https://perma.cc/QY8D-CUJM>].

223. See Anne E. Kornblut, *O’er the Lapels of the Free, Fewer Star-Spangled Pins*, N.Y. TIMES, July 3, 2005, § 9, at 1 (noting that the flag lapel pin “became de rigueur as a sign of patriotism after the Sept. 11 attacks”).

224. See, e.g., Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, N.Y. TIMES, May 28, 1991, at B5; *Why Did Obama Drop His Flag Pin?*, CHI. TRIB., Oct. 5, 2007, at 20; Jake Wolf, *Barack Obama’s Tan Suit “Controversy” Is Now Three Years Old*, GQ (Aug. 29, 2017), <https://www.gq.com/story/barack-obama-tan-suit-anniversary> [<https://perma.cc/8A5J-RCWP>]; Jim Yardley, *On Tour, Greek Leaders Wear No Ties and Aim for Looser Belts*, N.Y. TIMES, Feb. 4, 2015, at A4.

225. See *supra* text accompanying notes 219–20.

white, in a nod to the early twentieth-century suffrage movement.<sup>226</sup> The effect was striking: a concentrated sea of white every time cameras panned the chamber, with the effect that it was almost impossible for commentators not to talk about why the members had dressed the way they had. The *New York Times*'s chief fashion critic declared admiringly that, "[a]s a piece of political theater, the white was strikingly effective. On a night when the role of the audience in the chamber was to listen and, maybe, stand and applaud (or sit and look disappointed), the women still managed to make themselves heard."<sup>227</sup> In that context, being heard required first being seen, and it was their costuming choices that ensured that the Democratic representatives were seen. (In an attempt to override the Democratic women's message, Donald Trump Jr. appealed to an alternative costuming tradition, tweeting that there was "not one American flag pin among" the members wearing white.<sup>228</sup> Observers quickly pointed out that photos of the Trump family at the speech did not show them wearing the pins either.)<sup>229</sup>

The communicative use of attire is on occasion noticeable in the departure from the business attire norm in committee hearings as well. When former Turing Pharmaceuticals CEO Martin Shkreli was subpoenaed to appear before the House Oversight Committee in 2016, he did not wear a tie—a fact widely noted in the press as being of a piece with his generally dismissive attitude toward the hearing.<sup>230</sup> In the opposite direction, when Facebook CEO Mark Zuckerberg, a notoriously casual dresser, testified before the Senate Commerce and Judiciary Committees in the aftermath of revelations about his platform's sloppy handling of users' data and its role in foreign meddling in the 2016 presidential election, it was widely noted that he wore an "I'm Sorry Suit."<sup>231</sup> And when Lieutenant Colonel Alexander Vindman

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226. Marisa Itai, *Why Did Women in Congress Wear White for Trump's State of the Union Address?*, WASH. POST (Feb. 6, 2019), <https://www.washingtonpost.com/history/2019/02/05/why-are-women-lawmakers-wearing-white-state-union/> [https://perma.cc/U8A6-M32K].

227. Vanessa Friedman, *A Sea of White, Lit by History*, N.Y. TIMES, Feb. 7, 2019, at D5.

228. Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Feb. 6, 2019, 2:18 PM), <https://twitter.com/DonaldJTrumpJr/status/1093227370285334534> [https://perma.cc/QJ4S-KXUN].

229. See Callum Paton, *Trump Jr. Criticizes Congresswomen for Not Wearing American Flag Pin—His Brother Tweeted Pic of 'Team Trump' Doing Same Thing*, NEWSWEEK (Feb. 7, 2019), <https://www.newsweek.com/donald-trump-jr-twitter-state-union-congress-congress-women-white-suffragettes-1321530> [https://perma.cc/372L-6HYF].

230. See, e.g., Sarah Karlin, *Martin Shkreli Calls Lawmakers 'Imbeciles'*, POLITICO (Feb. 4, 2016, 8:18 AM), <https://www.politico.com/story/2016/02/martin-shkreli-congress-hearing-218725> [https://perma.cc/R8UT-DCST]; Linette Lopez, *Martin Shkreli Could Not Stop Laughing During His Testimony to Congress*, BUS. INSIDER (Feb. 4, 2016, 9:28 AM), <https://www.businessinsider.com/live-martin-shkreli-the-ceo-of-valeant-and-others-face-congress-2016-2> [https://perma.cc/28DY-GN5G].

231. Vanessa Friedman, *Shedding T-shirt for a Suit and Tie*, N.Y. TIMES, Apr. 11, 2018, at A17; see also Christina Cauterucci, *Mark Zuckerberg's Congressional Hearing Suit, Reviewed*, SLATE (Apr. 10, 2018, 4:07 PM), <https://slate.com/technology/2018/04/mark-zuckerbergs-congressional-hearing-suit-and-tie-reviewed.html> [https://perma.cc/M8L8-MPLZ]; Robin Givhan, *Mark Zuckerberg Is One of the Suits Now. He'd Better Learn to Get Comfortable in One*, WASH. POST (Apr. 10, 2018), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/04/10/mark-zuckerberg-wore-a-suit-to-washington->



testified in the Trump impeachment inquiry, it was notable that he did so in his Army dress uniform, despite the fact that he did not wear a uniform in his day job at the National Security Council.<sup>232</sup> As one commentator noted, the uniform was meant to convey that Vindman “stood aside from partisan politics, . . . prized country above self, . . . [and] understood testifying as a duty.”<sup>233</sup>

Members, too, make costuming decisions. For instance, a number of members regularly wear cowboy boots in an effort to signal both regional identity and a certain affinity for rugged individualism.<sup>234</sup> Other members have made costuming choices on especially high-profile occasions to make a statement about diversity and inclusiveness. At the opening of the 116th Congress in 2019, Representative Debra Haaland (D-NM), a Native American, wore turquoise jewelry and traditional Pueblo attire to her swearing in, and Representative Rashida Tlaib (D-MI), a Palestinian-American, chose to be sworn in wearing a thobe.<sup>235</sup>

In addition to witnesses and members, the audience for hearings occasionally comes on stage through the medium of costume. For instance, the anti-war group Code Pink made their attire such an effective part of their message that, on at least one occasion, activists were kicked out of a committee hearing based solely on their pink clothing, before they even had a chance to engage in any disruptive behavior.<sup>236</sup> And in a stunt that has garnered significant media attention since 2017, Ian Madrigal has repeatedly dressed up as Rich Uncle Pennybags (the mascot of the Monopoly board game) and sat behind CEOs and Trump administration officials as they testified, frequently in the same television frame as the witness, “adjusting a monocle or brandishing a faux \$100 bill.”<sup>237</sup> Madrigal’s costuming choice

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theres-no-going-back-to-hoodies/ [https://perma.cc/C2AW-U9EN]; Doreen St. Félix, *The Suit Wears Mark Zuckerberg*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/culture/annals-of-appearances/the-suit-wears-mark-zuckerberg> [https://perma.cc/FRW6-KGUN].

232. Vanessa Friedman, *Sartorial Rules of Combat (No Jacket Required)*, N.Y. TIMES, Nov. 22, 2019, at A16.

233. *Id.*

234. See Anne C. Mulkern, *The Boot, a Symbol of the West, Makes a Powerful Statement in Washington*, DENVER POST, June 5, 2007, at 1A.

235. See Cady Lang, *How Women in Congress Are Using Fashion to Send a Message*, TIME (Feb. 6, 2019), <https://time.com/5520372/2019-state-of-the-union-fashion/> [https://perma.cc/FL85-3HJQ]; Rashida Tlaib, *Rashida Tlaib on Why She’s Wearing a Palestinian Gown to Be Sworn into Congress*, ELLE (Jan. 3, 2019), <https://www.elle.com/culture/career-politics/a25714487/rashida-tlaib-thobe-sworn-into-congress/> [https://perma.cc/A9VV-EDZP].

236. CAMI ROWE, *THE POLITICS OF PROTEST AND US FOREIGN POLICY: PERFORMATIVE CONSTRUCTION OF THE WAR ON TERROR* 68 (2013).

237. Harrison Smith, *Monopoly Man: How an Elaborate Act of Protest Stole the Show on Capitol Hill*, WASH. POST (Jan 14, 2019), [https://www.washingtonpost.com/lifestyle/magazine/monopoly-man-how-an-elaborate-act-of-protest-stole-the-show-on-capitol-hill/2019/01/11/983e73be-0d40-11e9-84fc-d58c33d6c8c7\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/monopoly-man-how-an-elaborate-act-of-protest-stole-the-show-on-capitol-hill/2019/01/11/983e73be-0d40-11e9-84fc-d58c33d6c8c7_story.html) [https://perma.cc/BLE9-EWEX]. For a small sampling of Madrigal’s prominence, see, for example, Emily Birnbaum, *‘Monopoly Man’ Returns for Google CEO Hearing*, HILL (Dec. 11, 2018, 10:34 AM), <https://thehill.com/policy/technology/420749-monopoly-man-returns-for-google-ceo-hearing> [https://perma.cc/JQ4L-2Q26]; Liz Moyer, *Someone Dressed Like the Monopoly Guy Is Photobombing the Senate’s Equifax Hearing*, CNBC (Oct. 4, 2017, 12:28 PM),

almost certainly made more of an impact on more people than anything said by either the witnesses or the committee members at those hearings.

Next, consider *props*. A well-utilized prop can reinforce an argument that is being made verbally, hint at something not said, or even substitute for words entirely. And it can do so in a way that communicates more effectively than words alone. When Attorney General Barr refused to testify before the House Judiciary Committee about his handling of Mueller's report, Representative Steve Cohen (D-TN) brought a bucket of (cold) Kentucky Fried Chicken to the early morning hearing and began eating it. As *The Washington Post* noted, "The clicks of cameras suddenly echoed throughout the room as watchers chuckled at his insinuation that Barr was too afraid to show up for questioning."<sup>238</sup> Indeed, Cohen's creative use of a prop earned him two mentions on that week's episode of *Saturday Night Live*<sup>239</sup>—a level of publicity that would have been unlikely without the chicken. And when President Trump chose to use his 2020 State of the Union address—delivered the day before his acquittal in the Senate impeachment trial—as an argument for reelection, Speaker Pelosi made a point of tearing up her copy of his remarks in full view of the cameras.<sup>240</sup> That use of a prop garnered far more attention in the speech's aftermath than the Democrats' official response.

Finally, of course, there is the *script* itself. This includes the logos-heavy material that is so central to the consensus account of oversight, but it also includes more than that. It includes emotional (i.e., pathetic) appeals—bringing forward witnesses with heartrending (or, alternatively, joyful and inspiring) stories to help “put a human face” on facts that might otherwise be dry, dull, and unmotivating. It can include ethical appeals as well. Although members of Congress are usually not sworn in when they testify before congressional committees, Representative Alexandria Ocasio-Cortez (D-NY) did request to be sworn in when she testified before the House Oversight Committee (on which she sits) about conditions she had observed at the southern border.<sup>241</sup> When asked why she had chosen to be sworn, Ocasio-

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<https://www.cnn.com/2017/10/04/someone-dressed-like-the-monopoly-guy-is-photobombing-the-senates-equifax-hearing.html> [<https://perma.cc/44R7-X457>]; Christianna Silva, *Meet the 'Monopoly' Man Who Has Been Photobombing CEOs in Congress This Week*, NEWSWEEK (Oct. 4, 2017), <https://www.newsweek.com/monopoly-man-made-appearance-equifax-and-wells-fargo-hearings-heres-why-677984> [<https://perma.cc/DN7K-QDVS>].

238. Rachel Bade et al., *Barr's No-Show Triggers Contempt Threats, Nixon Comparison and More Impeachment Talk*, WASH. POST (May 2, 2019), [https://www.washingtonpost.com/powerpost/barr-is-a-no-show-at-house-hearing-on-mueller-report-as-democrats-warn-of-threat-to-democracy/2019/05/02/005c0ab2-6cda-11e9-a66d-a82d3f3d96d5\\_story.html](https://www.washingtonpost.com/powerpost/barr-is-a-no-show-at-house-hearing-on-mueller-report-as-democrats-warn-of-threat-to-democracy/2019/05/02/005c0ab2-6cda-11e9-a66d-a82d3f3d96d5_story.html) [<https://perma.cc/6GHZ-QTKC>].

239. Tamar Auber, *Rep. Cohen Responds to SNL Mocking His 'Cold' Chicken Stunt: We Got It 'the Night Before,'* MEDIAITE (May 5, 2019, 6:06 PM), <https://www.mediaite.com/tv/rep-cohen-responds-to-snl-mocking-his-cold-chicken-stunt-we-got-it-the-night-before/> [<https://perma.cc/56JW-JT2Q>].

240. Sheryl Gay Stolberg, *Showdown Turns Brittle on Floor of the House*, N.Y. TIMES, Feb. 5, 2020, at A15.

241. On that testimony, see *supra* text accompanying notes 130–31. On her desire to be sworn, see Marina Pitofsky, *Ocasio-Cortez Defends Being Sworn in at Hearings on Conditions for Migrants*, HILL (July 12, 2019, 2:32 PM), <https://thehill.com/blogs/blog->

Cortez tweeted that it was because the “GOP has been stating that I am lying about the translated accounts of migrants at the border.”<sup>242</sup> In other words, asking to be sworn was a dramatic gesture intended to inspire a sense in the audience that this character is trustworthy—a classical form of ethical argumentation.

The scripting of overspeech can also include dramatically timed plot twists, as when Senator Chuck Schumer (D-NY) in 2007 elicited surprising (to everyone but Schumer and his then chief counsel, Preet Bharara) testimony from former Deputy Attorney General James Comey. Comey recounted a story that had taken place when he was serving as acting attorney general during Attorney General John Ashcroft’s 2004 convalescence from gallbladder surgery. White House Counsel Alberto Gonzales and Chief of Staff Andy Card went to Ashcroft’s hospital room to try to pressure him to sign off on reauthorizing a wiretapping program that Comey had refused to support.<sup>243</sup> Ashcroft refused, and the next day the White House renewed the program against the Department of Justice’s advice. After Ashcroft, Comey, and several other DOJ officials (including FBI Director Robert Mueller) threatened to resign, the White House backed down and restructured the program.<sup>244</sup> Although the broad outlines of that story had been previously published, Comey’s was the first public eyewitness account.<sup>245</sup> Six years later, *The Washington Post*’s senior congressional correspondent recalled that, during Comey’s testimony, “[y]ou could hear a pin drop in the Dirksen hearing room, and in fact we did, when one reporter—stunned at what he was hearing—literally just dropped his pen onto the press table.”<sup>246</sup> The testimony had the effect of reviving the flagging congressional investigations into the politically motivated firing of a number of U.S. attorneys,<sup>247</sup> and Alberto Gonzales, who had by then become attorney general, resigned a little over three months later.<sup>248</sup> Senator Chuck Hagel (R-NE) said publicly that Comey’s testimony marked the moment that he believed Gonzales had to resign,<sup>249</sup> and a large number of news stories on Gonzales’s resignation

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briefing-room/news/452835-ocasio-cortez-defends-swearing-in-at-hearing-amid-criticism [https://perma.cc/P25Q-6AA3].

242. Alexandria Ocasio-Cortez (@AOC), TWITTER (July 12, 2019, 12:18 PM), <https://twitter.com/AOC/status/1149714706413817856> [https://perma.cc/9BZV-XJFK].

243. Richard B. Schmitt, *Panel Told of a Sickbed Face-Off*, L.A. TIMES, May 16, 2007, at 1.

244. *Id.*

245. *Id.*

246. Paul Kane, *James Comey and the Most Riveting 20 Minutes of Congressional Testimony. Maybe Ever.*, WASH. POST (May 30, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/05/30/james-comey-and-the-most-watchable-20-minutes-of-congressional-testimony-maybe-ever/> [https://perma.cc/94HP-USZC].

247. See Evan Perez, *10 Years Ago: Comey Testifies About Confrontation with Bush White House*, CNN (May 15, 2017, 6:32 AM), <https://www.cnn.com/2017/05/15/politics/comey-gonzalez-surveillance-showdown/index.html> [https://perma.cc/NUM9-5LH4]. On the U.S. attorneys firings generally, see John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 265–92 (2008).

248. Perez, *supra* note 247.

249. Susan Page & Kevin Johnson, *As Gonzales Exits, Battle Looming for White House*, USA TODAY, Aug. 28, 2007, at 1A.

prominently mentioned the testimony.<sup>250</sup> To be sure, Comey's testimony had added some new facts to the public record. But far more importantly, it gave those facts a face and a voice. And by not telegraphing the contents of the testimony in advance, Schumer and Bharara managed to orchestrate that most attention-grabbing of dramatic devices, the sudden plot twist. Making the revelation in real time, to an unexpecting audience, almost certainly heightened the breathlessness and drama with which Comey's testimony was reported in the media. Indeed, *The Washington Post's* media critic described the sickbed scene as something "right out of a Hollywood movie."<sup>251</sup> Nor was he the only one to reach for the metaphor of the cinema<sup>252</sup> or the stage.<sup>253</sup> Readers and viewers at home were invited to be riveted in precisely the way that the few pen-dropping reporters in physical attendance had been. And that dramatic pacing had real consequences for Gonzales and for the George W. Bush administration more generally.<sup>254</sup>

Overspeech is thus shot through with performative elements, ranging from casting to scripting, from scenery to costuming, all of it aimed at more effectively communicating a public message.

### C. Divisiveness

A third and final distinguishing feature of overspeech is its divisiveness. This can mean that it tends to divide along partisan lines or ideological ones. (The link between partisanship and ideology has, of course, changed significantly over time.)<sup>255</sup>

On the consensus view, divisiveness is something to be deeply lamented. This makes a certain amount of sense on its own premises: If the goal is simply the discovery of facts and if everyone is engaging in good faith, then the investigators should not divide along preexisting lines. Of course, sophisticated proponents of the consensus view are not unaware that cognitive biases will color how people receive and process facts and that those biases will correlate with their partisan and ideological leanings. But

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250. See, e.g., Michael Kranish & Susan Milligan, *Gonzales Resigns; Probes Will Continue*, BOS. GLOBE, Aug. 28, 2007, at 1A; Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies*, N.Y. TIMES, Aug. 28, 2007, at A1; James Gordon Meek, *Gonzo Gone—& Not a Moment Too Soon!*, N.Y. DAILY NEWS, Aug. 28, 2007, at 19; Josh Meyer & Tom Hamburger, *The Resignation of Alberto Gonzales: What He Leaves Behind*, L.A. TIMES, Aug. 28, 2007, at 1.

251. Howard Kurtz, *When Justice Is Hospitalized*, WASH. POST, May 18, 2007, 2007 WLNR 28533216.

252. See, e.g., Editorial, *A Telling Hospital Visit*, LAS VEGAS SUN, May 16, 2007, at A4, ProQuest Doc. No. 388932766; Editorial, *No Moral Authority*, BALT. SUN, May 17, 2007, at 12A; Eugene Robinson, *Lights out for this Attorney General*, NEW ORLEANS TIMES PICAYUNE, July 28, 2007, at 7, 2007 WLNR 14500323.

253. Editorial, *Gonzales' Gall*, L.A. TIMES, May 18, 2007, at A22, ProQuest Doc. No. 422175889; Editorial, *In the Dark*, HOUS. CHRON., May 20, 2007, 2007 WLNR 9472236; Editorial, *Unfit to Be Attorney General*, NEWARK STAR-LEDGER, May 17, 2007, at 16, 2007 WLNR 9306478.

254. See CHAFETZ, *supra* note 53, at 125–26 (noting that the scandal surrounding Gonzales's departure significantly limited Bush's options in picking a replacement).

255. See generally NOLAN MCCARTY, *POLARIZATION* (2019).

those preexisting commitments should be understood in precisely that way: as potential sources of bias, to be cabined as effectively as possible in the investigatory process. It shouldn't matter whether the police officer investigating a homicide is a Republican or a Democrat, a liberal or a conservative; nor, on the consensus view, should it matter whether the member of Congress investigating accusations of executive branch malfeasance is. So thoroughly ingrained is this idea of consensus in the consensus view that one of the four criteria Levin and Bean propose for oversight effectiveness is simply "the extent to which the investigation was conducted in a bipartisan manner."<sup>256</sup>

This consensus view rests on the idea that oversight can be divorced from politics. Expressing this view, Neal Katyal criticized congressional Democrats for

myopically view[ing] the [Mueller] report in political terms . . . . That is the wrong way to look at it. The right way is to look at it in law enforcement terms—a president who takes grave steps to undermine the rule of law in the very way the report describes is not fit for office.<sup>257</sup>

But note that Katyal has smuggled an irreducibly political consideration—fitness for office—into what he insists is an apolitical realm.<sup>258</sup> Insisting that the (political) position one holds is apolitical, natural, simply flowing from the facts themselves, can often be an effective form of political script writing, but an analysis of such claims should not simply take them at face value.

Thinking instead in terms of the interactions between institutionally sited actors and their publics gives us a window onto the divisive uses of congressional overspeech. In some cases, the goal of the overspeech may be to appeal to only part of the population, trying to move it in a particular direction—perhaps with the expectation that the rest of the public can be moved in time. Consider again the Mueller testimony: early polling showed that it had no measurable impact on overall support for impeaching President

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256. Levin & Bean, *supra* note 134, at 19. The other three criteria of effectiveness are the "quality"—see *supra* text accompanying note 171—the "credibility," and the "policy impacts" of the investigation. Levin & Bean, *supra* note 134, at 17–22.

257. Neal K. Katyal, Opinion, *Three Questions for Mueller*, N.Y. TIMES, July 23, 2019, at A27.

258. The concept of the political is of course a highly contested one, and different demarcations of the realm of the political may make sense in different contexts. In some work, I have defined the political capaciously, as anything involving "the processes and institutions of collective self-government." CHAFETZ, *supra* note 53, at 16. On that view, the police officer investigating the homicide is just as irreducibly political as the member of Congress deciding on policy—however, there may well be sufficient cross-ideological and cross-partisan consensus on what it means to do police work well that the political nature of the police work would be obscured from everyday view. In other work, I have defined the realm of the political in narrower, Weberian terms, as one who gives direction to state policy, which direction is then carried out by bureaucrats who are not understood as politicians. See Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 CONST. COMMENT. 17, 19–24 (2019). Each of these conceptions of the political may be helpful in thinking through different sorts of problems. See *id.* at 19 n.9. For our purposes here, note that on either conception, Katyal is mistaken to think that questions of fitness for office can be hived off as "law enforcement" and therefore treated as apolitical.

Trump.<sup>259</sup> However, this is not because it failed to move voters—it simply further polarized the electorate. Nearly half of Democrats said the hearings made them more supportive of impeachment, while fewer than 10 percent said it made them less supportive.<sup>260</sup> This was counterbalanced by a shift of similar magnitude, but in the opposite direction, among Republicans, with roughly equal numbers of independents saying that it made them more and less supportive of impeachment.<sup>261</sup> If one thinks the Democrats' goal in staging the Mueller hearings was to immediately move the views of the public at large, then the hearings were a bust. However, if one thinks of them as one part of a larger communicative strategy—one act in the dramatic performance—then the outcome is not so clear. Prior to Mueller's testimony, eighty-six Democratic members of the House had come out in favor of opening an impeachment inquiry into Trump (37 percent of the House Democratic caucus).<sup>262</sup> By the end of the week of Mueller's testimony, that number had grown to ninety-nine,<sup>263</sup> and in less than a month it had grown to 123 (52 percent of the caucus).<sup>264</sup> (No Republicans publicly supported opening an impeachment inquiry, while one independent—former Republican Justin Amash of Michigan—supported it.) Importantly, the immediate aftermath of the Mueller testimony also saw the highest-ranking Democrat to that point, caucus vice chair Representative Katherine Clark (D-

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259. See, e.g., Kendall Karson, *Partisan Differences on Impeachment Remain After Mueller Testimony, as Nearly Half of Americans Show Little Movement*, ABC NEWS (July 28, 2019, 8:54 AM), <https://abcnews.go.com/Politics/partisan-differences-impeachment-remain-mueller-testimony-half-americans/story?id=64587293> [https://perma.cc/6SPF-BAU8]; Eli Yokley, *41% of Voters Say Mueller Didn't Exonerate Trump; 35% Say He Did*, MORNING CONSULT (July 26, 2019, 4:00 PM), <https://morningconsult.com/2019/07/26/41-of-voters-say-mueller-didnt-exonerate-trump-35-say-he-did/> [https://perma.cc/EE2A-6RHB].

260. Karson, *supra* note 259.

261. *Id.*

262. The *New York Times* maintained a running list of Democratic House members who announced support for an impeachment inquiry. Alicia Parlapano et al., *Full List: Who Supports an Impeachment Inquiry Against Trump?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/05/31/us/politics/trump-impeachment-congress-list.html> [https://perma.cc/CV2F-CF56] (Oct. 10, 2019 3:30 PM). The list did not specify *when* members announced their support for such an inquiry. I used the Wayback Machine to find a cached version of the *Times* list from the morning of July 24, 2019, the day of Mueller's testimony, which provided the figure cited in the text. *Full List: Who Supports an Impeachment Inquiry Against Trump?*, N.Y. TIMES, <http://web.archive.org/web/20190724074035/https://www.nytimes.com/interactive/2019/05/31/us/politics/trump-impeachment-congress-list.html> [https://perma.cc/34GV-NCQ2] (Internet Archive Wayback Machine reproduction of the *New York Times* on July 24, 2019).

263. This figure is derived from the Wayback Machine's cache of the *New York Times* list for the afternoon of July 27, 2019. *Full List: Who Supports an Impeachment Inquiry Against Trump?*, N.Y. TIMES, <http://web.archive.org/web/20190727041024/https://www.nytimes.com/interactive/2019/05/31/us/politics/trump-impeachment-congress-list.html> [https://perma.cc/N9GP-PW74] (Internet Archive Wayback Machine reproduction of the *New York Times* on July 27, 2019).

264. *Full List: Who Supports an Impeachment Inquiry Against Trump?*, N.Y. TIMES, <http://web.archive.org/web/20190818113453/https://www.nytimes.com/interactive/2019/05/31/us/politics/trump-impeachment-congress-list.html> [https://perma.cc/VBC9-FGCM] (Internet Archive Wayback Machine reproduction of the *New York Times* on August 18, 2019).

MA), publicly announce support for an impeachment inquiry.<sup>265</sup> Within a couple of weeks, Judiciary Committee Chair Jerry Nadler (D-NY) began publicly characterizing his committee's ongoing investigation as "formal impeachment proceedings,"<sup>266</sup> and in less than two months, the committee approved (on a party-line vote) a resolution establishing procedures to govern "the Committee's investigation to determine whether to recommend articles of impeachment with respect to President Donald J. Trump."<sup>267</sup> One should be careful not to attribute all of those shifts directly to the Mueller testimony, but it is clear that it had an impact on the Democratic segment of the public that, in turn, paved the way for—or in some cases, pushed toward—more aggressive support for impeachment among congressional Democrats. These developments set the stage for the subsequent revelations of presidential misconduct,<sup>268</sup> which convinced enough additional Democrats to support impeachment that Speaker Pelosi threw the weight of party leadership behind it in late September 2019,<sup>269</sup> and the cameral resolution structuring the impeachment inquiry passed by a vote of 232 to 196: all but two Democrats voted for it (as did independent Justin Amash), and all Republicans voted against it.<sup>270</sup>

And once such proceedings are underway, they hold the possibility—although by no means the certainty<sup>271</sup>—of moving the public at large. How do we know? Because it has happened before. In June of 1973, only 19 percent of Americans thought President Nixon should be impeached, including only 6 percent of Republicans.<sup>272</sup> By early August of 1974—mere days before his resignation—support for Nixon's removal from office<sup>273</sup> had

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265. Nicholas Fandos et al., *After Mueller, Divide Persists for Democrats*, N.Y. TIMES, July 26, 2019, at A1.

266. Andrew Desiderio, *Nadler: 'This Is Formal Impeachment Proceedings'*, POLITICO (Aug. 8, 2019), <https://www.politico.com/story/2019/08/08/nadler-this-is-formal-impeachment-proceedings-1454360> [<https://perma.cc/3D95-SDBP>].

267. For the committee resolution, see *Resolution for Investigative Procedures*, H. COMM. ON THE JUDICIARY, 116TH CONG., (2019), <https://docs.house.gov/meetings/JU/JU00/20190912/109921/BILLS-116pih-ResolutionforInvestigativeProcedures.pdf> [<https://perma.cc/4QM8-A6QK>]. For the vote tally, see *Final Passage on Resolution for Investigative Procedures*, H. COMM. ON THE JUDICIARY, 116TH CONG. (Sept. 12, 2019), <https://docs.house.gov/meetings/JU/JU00/20190912/109921/CRPT-116-JU00-Vote002-20190912.pdf> [<https://perma.cc/Z2H4-XY5N>].

268. See *supra* text accompanying notes 17–41.

269. Nicholas Fandos, *Pelosi Will Open Formal Impeachment Inquiry, Accusing President of 'Betrayal' of the Nation*, N.Y. TIMES, Sept. 25, 2019, at A1.

270. Nicholas Fandos & Sheryl Gay Stolberg, *Fractured House Backs Impeachment Inquiry*, N.Y. TIMES, Nov. 1, 2019, at A1.

271. There is some reason for skepticism that the Trump impeachment proceedings in particular will prove to have had lasting political consequences. See *supra* note 183.

272. Greg Sargent, Opinion, *Will Support Grow for Impeaching Trump?: Data on Nixon Offers a Clue*, WASH. POST (June 3, 2019), <https://www.washingtonpost.com/opinions/2019/06/03/will-support-grow-impeaching-trump-data-nixon-offers-clue/> [<https://perma.cc/U4M7-9JS8>].

273. Gallup changed its wording over a series of polls, asking in June 1973 and February 1974 whether Nixon should be "impeached" and asking in July and August 1974 whether he should be "removed." *Id.* To whatever extent the change in wording makes a difference, it probably *understates* the shift in public opinion, since impeachment is a precursor to removal.

reached 58 percent of adults, including 31 percent of Republicans.<sup>274</sup> (Over the same time, support for impeachment/removal among independents rose from 18 percent to 55 percent and among Democrats from 27 percent to 71 percent.)<sup>275</sup> As historian Julian Zelizer noted, two of the events that seem to have precipitated significant pro-impeachment/removal shifts in public opinion were the beginning of House Judiciary Committee impeachment hearings in May 1974 and the reporting out of articles of impeachment in July 1974: “This wasn’t Congress waiting on the public . . . . It was the other way around—Congress provided guidance to the public.”<sup>276</sup> Moreover, the shift in public opinion seems at least to have been correlated with a shift in some members’ voting. In October 1973, the first votes in the House Judiciary Committee on matters related to impeachment—votes on procedural matters about how the subpoena power would be exercised in the course of the investigation—were straight party-line votes.<sup>277</sup> Nine months later, six of the committee’s seventeen Republicans voted for the first article of impeachment, alleging obstruction of justice in connection with the cover-up of the Watergate break-in and other illegal activities.<sup>278</sup> Two things are worth noting here. First, partisanship was still hugely important in the Judiciary Committee votes: every Democrat on the committee voted to impeach, and only about a third of Republicans did. But second, what started as an almost purely partisan issue—almost no Republicans in the public at large supported impeachment, and the earliest Judiciary Committee votes were straight party-line—became something else over time. Overspeech that began as partisan managed to persuade a significant number of members of the other party.

In addition to affecting the behavior of elected officials, the public politics shaped in part by the overspeech surrounding Watergate also had electoral ramifications. The 1974 midterm elections were a landslide for the Democrats, who gained a net of fifty House seats. The new Ninety-Fourth Congress included seventy-six freshman Democrats who would become the vaunted “Class of ‘74”—frequently referred to as the “Watergate babies.”<sup>279</sup>

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274. *Id.*

275. *Id.*

276. *Id.* There should be little doubt that committee activity was capable of driving this sort of shift in public opinion:

The Hearings and deliberations of the Senate Select Watergate Committee and the House Judiciary Committee lasted for more than a year. Media coverage was intense, with more than half of the front pages of major American newspapers concerned with Watergate stories during days when the Senate Select Committee was in session, and more than one-third of major network news programming was devoted to the Watergate affair.

Brian R. Fry & John S. Stolarek, *The Impeachment Process: Predispositions and Votes*, 42 J. POL. 1118, 1119 (1980).

277. James M. Naughton, *House Panel Starts Inquiry on Impeachment Question*, N.Y. TIMES, Oct. 31, 1973, at 1.

278. Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11*, WASH. POST, July 28, 1974, at A1.

279. The most comprehensive treatment of these members of Congress eschews the term “Watergate babies,” on the grounds that it “suggest[s] immaturity and self-centeredness that



Partisan congressional overspeech may thus have the effect of convincing more of the public to become the overspeakers' co-partisans (and/or of increasing electoral turnout among those who already are).

In short, thinking in terms of overspeech helps us see that there are a number of public-facing goals that may very effectively be pursued through proceedings that divide along partisan or ideological lines.

### III. CASE STUDIES

This Article has already discussed a number of recent examples of congressional overspeech, ranging from the Mueller hearings to Comey's testimony about the hospital-bed meeting to Ocasio-Cortez's testimony about migrant detention facilities. These most recent instances of overspeech have been disseminated to their audiences by twenty-first-century technologies of communication, prominently including the internet. But while effective overspeech is necessarily calibrated to take advantage of the media of the day, it is by no means a new phenomenon, as the following two case studies from earlier media environments will demonstrate.

It should also be noted that these case studies will not strike readers as uniformly ennobling. That, too, was part of the logic behind their selection. Just as a hammer can be used to build a bookcase or commit an assault, so too the tool of congressional overspeech can be used for purposes that we come to see in retrospect as both good and bad. The goal here is not to convince the reader of the normative valence of the goals pursued by various overspeakers but rather to give two thick accounts of overspeech in practice, demonstrating the ways in which it empowers congressional actors.

#### A. *The Senate Munitions Inquiry, 1934–1936*

On February 8, 1934, Senator Gerald Nye, a progressive Republican from North Dakota, introduced a resolution calling on the Foreign Relations Committee to “investigate the activities of individuals and of corporations in the United States engaged in the manufacture, sale, distribution, import, or export of arms, munitions, or other implements of war.”<sup>280</sup> The resolution was the brainchild of peace activist Dorothy Detzer, and she and Nye drafted it together.<sup>281</sup> Detzer and Nye were both capitalizing on and furthering a surge of interest in the “merchants of death” thesis, which held that American munitions manufacturers had played a significant role in pressing for

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few [of those members] appreciated.” JOHN A. LAWRENCE, *THE CLASS OF '74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP* 4–5 (2018). Lawrence also dislikes the label because “[s]urprisingly, few members of the Class of 1974 credit Watergate as a central motivation in their decision to run for Congress, since many had made the decision before the full dimensions of the scandal were known.” *Id.* at 52. But of course a candidate's motivation for running and the explanations for that candidate's victory are two different things.

280. S. Res. 179, 73d Cong. (1934) (referred to S. Comm. on Foreign Rels.; discharged and referred to S. Comm. on Mil. Affs.).

281. MATTHEW WARE COULTER, *THE SENATE MUNITIONS INQUIRY OF THE 1930S: BEYOND THE MERCHANTS OF DEATH* 11, 20–21 (1997); DOROTHY DETZER, *APPOINTMENT ON THE HILL* 156–58 (1948).

American entry into World War I. The month after Nye introduced his resolution, *Fortune* magazine—which generally took a conservative, pro-business line—published a lengthy exposé of the European armaments industry (broadly construed to include “mines, smelters, armament works, holding companies, and banks”), accusing it of “working inevitably for the destruction of such little internationalism as the world has achieved so far.”<sup>282</sup> *Reader’s Digest*, then the most widely read magazine in America, excerpted the article two months later.<sup>283</sup> In the same year, two books were published on the topic, one of which (Helmuth C. Engelbrecht and Frank C. Hanighen’s *Merchants of Death: A Study of the International Armament Industry*) was a Book-of-the-Month Club selection.<sup>284</sup> This large-scale revival of interest in how America got into World War I would come to have significant consequences for the terms on which it entered the next World War—and the congressional overspech touched off by Detzer and Nye’s resolution would play a significant role in the process.

The chair of the Senate Foreign Relations Committee, Key Pittman (D-NV), wanted little to do with Nye’s resolution when it was referred to his committee, and he transferred it to the Military Affairs Committee. Detzer and her allies in the peace movement were alarmed by this, seeing the Military Affairs Committee as “predominantly and vigorously military minded.”<sup>285</sup> They accordingly worked out a two-pronged plan. First, they would seek to combine Nye’s resolution with one by his fellow Republican Arthur Vandenberg of Michigan. The Vandenberg resolution, which was backed by the American Legion and had also been referred to the Military Affairs Committee, called for both an investigation of the findings of the War Policies Commission, which had been created to “take the profit out of war,” and also an inquiry into the possibility of creating a government monopoly on munitions manufacturing.<sup>286</sup> Combining Nye’s resolution with Vandenberg’s would ensure “a double-barreled support from two diametrically opposed wings of public opinion—the peace movement and the Legion.”<sup>287</sup> Second, Detzer sought to secure a more congenial venue for the hearings: she proposed that, rather than have either the Foreign Relations Committee or the Military Affairs Committee conduct the investigation, a special committee be impaneled to do so.<sup>288</sup> The ultimate resolution, cosponsored by Nye and Vandenberg and reported out favorably by the Military Affairs Committee, combined their proposals and called for the

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282. *Arms and the Men*, FORTUNE, Mar. 1934, at 53, 53.

283. *Arms and the Men*, READER’S DIG., May 1934, at 49. On the twentieth-century influence of *Reader’s Digest*, see JOANNE P. SHARP, CONDENSING THE COLD WAR: *READER’S DIGEST* AND AMERICAN IDENTITY xiii–xiv (2000).

284. H. C. ENGELBRECHT & F. C. HANIGHEN, *MERCHANTS OF DEATH: A STUDY OF THE INTERNATIONAL ARMAMENTS INDUSTRY* (1934); GEORGE SELDES, *IRON, BLOOD AND PROFITS: AN EXPOSURE OF THE WORLD-WIDE MUNITIONS RACKET* (1934). On the Book-of-the-Month Club selection of *Merchants of Death*, see COULTER, *supra* note 281, at 22.

285. DETZER, *supra* note 281, at 158.

286. S. Con. Res. 9, 73d Cong. (1934) (referred to S. Comm. on Mil. Affs.).

287. DETZER, *supra* note 281, at 159.

288. *Id.*

creation of a seven-member select committee, appointed by the vice president, to investigate the munitions industry and the role of profit in war-making.<sup>289</sup>

The Roosevelt administration announced support for the investigation, at least partly because it anticipated that the committee would generate negative publicity for a number of industrialists who were staunch New Deal opponents. It also assumed that the special committee would be chaired by Morris Sheppard, a Democrat from Texas and member of the Military Affairs Committee.<sup>290</sup> When the measure came to the floor, Nye, Vandenberg, and several other pacifist senators effectively began a filibuster, speaking in favor of pacifist measures and thereby holding up the passage of a revenue bill. Finally, Pat Harrison (D-MS), the chairman of the Finance Committee, agreed to support the immediate adoption of the Nye-Vandenberg resolution in exchange for a chance to vote on the revenue bill. The resolution accordingly passed without a recorded vote and with no senator voicing opposition.<sup>291</sup>

Vice President John Nance Garner asked Nye and Vandenberg to suggest four Democrats and three Republicans to make up the committee, and he accepted their recommendations (which included themselves).<sup>292</sup> Crucially, Garner also allowed the committee to select its own chair, presumably on the impression that one of the majority Democrats would be chosen. Instead, the committee unanimously chose Nye.<sup>293</sup> Secretary of State Cordell Hull was outraged by the choice—even in his memoirs, written over a decade later, the sense of frustration that this “isolationist of the deepest dye” was chosen comes through clearly.<sup>294</sup> He described it as a “blunder of major proportions” and insisted that, “[h]ad I dreamed that an isolationist Republican would be appointed I promptly would have opposed it, but I expected that a member of the majority party would be named under the usual practice and that he would keep the investigation within legitimate and reasonable bounds . . . .”<sup>295</sup>

At Detzer’s suggestion, Nye hired Stephen Raushenbush as chief investigator.<sup>296</sup> Raushenbush was the son of a prominent Social Gospel minister and was himself inclined to believe the “merchants of death” thesis.<sup>297</sup> (The staff that Raushenbush assembled briefly included Alger Hiss, on loan from Jerome Frank’s staff at the Agricultural Adjustment Administration.)<sup>298</sup> As the behind-the-scenes investigation ramped up in the summer of 1934, major players already began taking their cases to the press.

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289. S. Res. 206, 73d Cong. (1934) (enacted).

290. COULTER, *supra* note 281, at 24–25.

291. WAYNE S. COLE, ROOSEVELT AND THE ISOLATIONISTS, 1932–45, at 145–46 (1983).

292. COULTER, *supra* note 281, at 26.

293. *Id.* at 28.

294. 1 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 398 (1948).

295. *Id.*

296. DETZER, *supra* note 281, at 164–68.

297. COULTER, *supra* note 281, at 8–9, 29–30.

298. *Id.* at 30–31; WAYNE S. COLE, SENATOR GERALD P. NYE AND AMERICAN FOREIGN RELATIONS 73 (1962).

The *New York Times* reprinted excerpts from a letter in which Irénée du Pont, the former president and then vice chairman of the board of DuPont, the largest munitions manufacturer in the United States, insisted that the attack on armaments manufacturers was led by a “subservient force instigated by the Third International and allied interests to weaken the defensive powers of capitalistic countries.”<sup>299</sup> A few weeks later, Nye told the *Times* that munitions makers were trying to sabotage the investigation, but it would not only proceed as planned, it would reveal “startling facts” to the American public.<sup>300</sup> Roosevelt was thrilled with the discomfort being caused the du Ponts, who were among the founders and chief funders of the American Liberty League, a conservative anti–New Deal group.<sup>301</sup> So pleased was FDR with Nye’s investigation that, when the president made a campaign swing through North Dakota in August 1934, he invited the Republican Nye to introduce him and Eleanor Roosevelt before a crowd of 35,000 people.<sup>302</sup>

Even before they opened, the Nye committee hearings were getting breathless previews in the press. A multipage spread in *The Washington Post* began, “What promises to be the most comprehensive and revealing inquiry ever conducted into the business of making and selling death-dealing machines and implements—and, also, one of the Senate’s most sensational investigations—will get underway this week . . . .”<sup>303</sup> The *Post* noted that such industrial titans as the du Pont family and John Pierpont Morgan were expected to be witnesses and that a “shadowy” European arms dealer named Sir Basil Zaharoff would feature in the inquiry as well.<sup>304</sup> With advance billing like that, it is perhaps unsurprising that, when the hearings opened later that week, NBC radio microphones were prominently arrayed on the witness table.<sup>305</sup> The committee from the beginning made use of props to send a message both about the thoroughness of its investigation and about the import of what was uncovered: the *Times* report on the first day of the hearings noted that “[s]cores of letters and other documents taken from the files of [munitions manufacturers] were piled high on the big table behind which . . . members of the committee sat. These were said by Senator Nye to be ‘only samples’ of what is to follow in the weeks ahead.”<sup>306</sup> The committee also clearly understood that it had a compelling figure in Zaharoff, who seems to have served as a middleman for deals between American

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299. *Du Pont Holds Reds Inspire Arms Fight*, N.Y. TIMES, July 8, 1934, at 21 (available through ProQuest Historical Newspapers).

300. *Eighty Agents Push Inquiry on Munitions*, N.Y. TIMES, July 26, 1934, at 11 (available through ProQuest Historical Newspapers).

301. See Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19, 20–21 (1950).

302. COULTER, *supra* note 281, at 33.

303. Franklyn Waltman Jr., *Senate Investigators Train Their Big Guns on Munitions Makers*, WASH. POST, Sept. 2, 1934, at B1 (available through ProQuest Historical Newspapers).

304. *Id.*

305. The microphones are visible in the picture accompanying *Submarine Sales Split by American and British Firms*, N.Y. TIMES, Sept. 5, 1934, at 1.

306. *Id.*

munitions makers and European clients. The leading historical account of the Munitions Inquiry mentions Zaharoff on only a single page,<sup>307</sup> but the press at the time couldn't get enough of the octogenarian polyglot "man of mystery" who "looks like Cardinal Richelieu" and whose national allegiances appeared to be both indeterminate and constantly in flux.<sup>308</sup> The *Times* devoted a substantial percentage of its lengthy write-up of the first day of the hearings to Zaharoff, including reprinting his photograph and two letters by him that had been introduced into evidence.<sup>309</sup> Nor was the *Times* an outlier in its Zaharoff mania:<sup>310</sup> the committee had found a vivid character to help focus public attention on its work.

A big part of the committee's task in the subsequent months would be to take the public interest generated by a singular compelling character and turn it into interest in the committee's project as a whole. Nye was well-suited to the task: before entering politics, he had spent fifteen years as a newspaper editor (which was also his father's career),<sup>311</sup> on top of which he had a reputation as "an unusually effective [public] speaker."<sup>312</sup> He was thus well-suited to both direct and perform in the committee's overspeech. The sensational hits were to keep coming in the hearings' early days, as members of the du Pont family testified,<sup>313</sup> and King George V was named—much to London's dismay—as a promoter of British arms sales abroad.<sup>314</sup> As the correspondent for *The Christian Century* noted, the press corps turned out and remained out in full force, sending "up-to-the-minute" dispatches by telegraph back to their outlets.<sup>315</sup> At the conclusion of the first set of

307. COULTER, *supra* note 281, at 38.

308. *Submarine Sales Split by American and British Firms*, *supra* note 305.

309. *Id.*

310. See, e.g., *Arms Inquiry Links Zaharoff with U.S. Firm*, N.Y. HERALD TRIB., Sept. 2, 1934, at 3; Osgood Nichols, *Mystery Man Leads World to War*, WASH. POST, Sept. 9, 1934, at SM18 (available through *ProQuest Historical Newspapers*); *Submarine Grip Told: Zaharoff Linked to Monopoly*, L.A. TIMES, Sept. 5, 1934, at 1 (available through *ProQuest Historical Newspapers*); P. W. Wilson, *Zaharoff Thrust into the Spotlight*, N.Y. TIMES, Sept. 9, 1934, at XX2 (available through *ProQuest Historical Newspapers*). Two years later, fascination remained. See *Zaharoff Is Dead; Still a 'Mystery'*, N.Y. TIMES, Nov. 28, 1936, at 1 (available through *ProQuest Historical Newspapers*). For a more recent evaluation, see Mike Dash, *The Mysterious Mr. Zedzed: The Wickedest Man in the World*, SMITHSONIAN MAG. (Feb. 16, 2012), <https://www.smithsonianmag.com/history/the-mysterious-mr-zedzed-the-wickedest-man-in-the-world-97435790/> [<https://perma.cc/8LE8-PC32>].

311. See COLE, *supra* note 298, at 19–41.

312. *Id.* at 76.

313. COULTER, *supra* note 281, at 42–45.

314. See Robert C. Albright, *King of England Gave Arms Aid, Senators Hear*, WASH. POST, Sept. 8, 1934, at 1 (available through *ProQuest Historical Newspapers*); *British Indignant at Linking of King*, N.Y. TIMES, Sept. 8, 1934, at 4 (available through *ProQuest Historical Newspapers*).

315. Russell J. Clinchy, *The Plight of the Du Ponts*, CHRISTIAN CENTURY, Oct. 3, 1934, at 1234 ("The visitor to the senate caucus room senses at once that this is an investigation which has drama and reality about it. There have not been so many newspaper men and women gathered around the press tables, which reach in all directions, since J.P. Morgan was testifying before the finance committee. The best and most alert of the newspaper corps are here . . . . The foreign correspondents are present . . . . Every minute or so a hand, filled with

hearings, *The New Republic* wrote that, “[i]n this generation, there has been nothing else like the Senate munitions inquiry. Here are people talking in public, for the first time, about international affairs as they are.”<sup>316</sup> The veracity of that claim was open to debate—Secretary of State Hull, for one, decried the hearings as “propaganda” and claimed that they “gave the American people a wholly erroneous view as to the reasons why we had gone to war in 1917.”<sup>317</sup> But as both *The New Republic* and Hull had to acknowledge, the hearings *were* affecting the American people. For the former, it was the embodied nature of the testimony that was most compelling: “Here they sit, in the flesh, the merchants of death.”<sup>318</sup> *The Christian Century*, too, focused on the physical appearance of the munitions executives:

From reading the stories one expects to meet a cordon of rampant jingoists, breathing blood and thunder, veritable Wotans of might and power who hold nations within their grasp and start wars on a moment’s notice. One is disturbed when one sees instead men who could pass the plate at any church service without anyone looking at them twice.<sup>319</sup>

After the first set of hearings wrapped up, Nye and Raushenbush consulted on how they might maintain public interest. One set of strategies involved enlisting allies: the Women’s International League for Peace and Freedom (of which Detzer was the executive secretary) “used the committee’s findings to mobilize peace-minded voters.”<sup>320</sup> Another set of strategies involved taking advantage of Nye’s own oratorical abilities: his announcement of an extensive speaking tour in the fall of 1934 (including a national radio address) was itself covered in the press.<sup>321</sup>

When the hearings resumed in December, the du Ponts were back in the hot seats.<sup>322</sup> The committee produced evidence of the outsized profits that many American corporations and individuals had made during the First World War,<sup>323</sup> evidence that both grabbed headlines and prompted a vigorous response from the du Pont family.<sup>324</sup> At the same time, the *Times* reported that the hearings had “exciting moments” when munitions company executives were presented with correspondence from their own files and

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yellow paper, shoots up, and a telegraph boy races for it. They are handling up-to-the-minute news.”).

316. Jonathan Mitchell, *Mass Murderers, in Person*, NEW REPUBLIC, Sept. 26, 1934, at 178.

317. 1 HULL, *supra* note 294, at 398, 399.

318. Mitchell, *supra* note 316, at 178.

319. Clinchy, *supra* note 315, at 1234.

320. COULTER, *supra* note 281, at 48.

321. *Nye Plans Wide Tour for Munitions Talks*, N.Y. TIMES, Sept. 30, 1934, at 24 (available through ProQuest Historical Newspapers).

322. See COULTER, *supra* note 281, at 51–65.

323. *War Profits up to 800% Shown at Senate Inquiry; 181 Had Million Incomes*, N.Y. TIMES, Dec. 14, 1934, at 1 (available through ProQuest Historical Newspapers).

324. *Senators’ Charges of 39,231% Profit Stir Du Ponts’ Ire*, N.Y. TIMES, Dec. 15, 1934, at 1 (available through ProQuest Historical Newspapers).

asked to explain it.<sup>325</sup> The overall impression produced by the hearings was a sense that, even if the munitions makers had not deliberately maneuvered the nation into World War I, at least “money and profit dominated their thinking about war.”<sup>326</sup>

Around the same time, the focus of the inquiry began to broaden to include not simply the munitions manufacturers and their surrounding private infrastructure but also American government officials who had industry ties.<sup>327</sup> In other words, the committee began groping its way toward identifying what would later be termed the military-industrial complex.<sup>328</sup> (One can see this in *The Christian Century*'s account of the first round of hearings, which, after noting the shockingly ordinary appearance of the munitions makers,<sup>329</sup> pivoted to claiming that their very ordinariness demonstrated the need for deeper structural reform of both capitalism and the political economy of war.)<sup>330</sup> This turn made the committee's work less hospitable to the Roosevelt administration than when it was simply going after industrialist opponents of the New Deal.<sup>331</sup> FDR accordingly tried to co-opt the committee's work by naming an executive-branch-based commission to inquire into taking the profit out of war.<sup>332</sup> This new commission was to be chaired by Wall Street financier Bernard Baruch, whose conclusions were almost certain to be less sweeping than Nye's.<sup>333</sup> Nye and Vandenberg immediately went public, chastising the president for attempting to undermine the congressional committee's work.<sup>334</sup> Nye quipped to the press that, “[w]hen I view, in part, the personnel of the [Baruch commission], I cannot but think how unfortunate it is that [notorious gangster

325. *Sought to Prevent Arms Ban in Chaco*, N.Y. TIMES, Dec. 7, 1934, at 6 (available through *ProQuest Historical Newspapers*).

326. COULTER, *supra* note 281, at 59.

327. See, e.g., *Nye Hears Army and Navy Backed Powder to Japan*, N.Y. TIMES, Dec. 12, 1934, at 1 (available through *ProQuest Historical Newspapers*); *‘Winking’ at Graft in Arms Declared Once Our Policy*, N.Y. TIMES, Dec. 11, 1934, at 1 (available through *ProQuest Historical Newspapers*).

328. See MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 190 (2013) (“One of the most important positions [the Nye committee] developed concerned the problem of military-industrial links.”); Paul A. C. Koistinen, *The “Industrial-Military Complex” in Historical Perspective: The InterWar Years*, 56 J. AM. HIST. 819, 831 (1970) (“In a fragmentary manner, the Committee disclosed the dynamics of an emerging ‘industrial-military complex.’”).

329. See *supra* text accompanying note 319.

330. Clinchy, *supra* note 315, at 1235 (“This munitions investigation is much like the glimpse a surgeon gets when he operates for a specific malady. He not only reaches that malady, but he is able to discover whether or not it is due to deeper causes. We are now discovering in this operation that there are much graver conditions with which we must not fail to deal.”).

331. See COULTER, *supra* note 281, at 60 (noting that the investigation was increasingly “becoming a liability for the president”).

332. COLE, *supra* note 291, at 152.

333. Indeed, Baruch had recently spoken against attempting to eliminate the profit motive for warmaking. *War Profits*, NEWS-WEEK, Dec. 22, 1934, at 1; see also COLE, *supra* note 298, at 82.

334. *President’s Move Stirs Committee*, N.Y. TIMES, Dec. 13, 1934, at 1 (available through *ProQuest Historical Newspapers*).

John] Dillinger is dead. He was the logical person to write anti-crime laws.”<sup>335</sup> Nye’s allies in the press likewise recognized and decried Roosevelt’s gambit as an attempt to sideline the Senate investigation. *The Nation*, noting the “startling disclosures” made by the Nye committee, insisted that “[i]f public opinion has been even partially awakened to the menace of the arms traffic, the credit belongs almost exclusively to Senator Nye and his committee.”<sup>336</sup> The Baruch investigation, it argued, was a wholly inadequate substitute.<sup>337</sup> The committee continued its work with the Senate’s support: a month after Roosevelt announced the Baruch commission, the Senate appropriated an additional \$50,000 for the Nye committee,<sup>338</sup> and the Nye committee published a preliminary report and its first full report in the spring and early summer of 1935.<sup>339</sup> As its split with the administration developed, Roosevelt increasingly publicly branded the committee as “isolationist”<sup>340</sup> and privately fumed that it was intended to embarrass his administration.<sup>341</sup>

“Isolationist” was a loaded term, but the broader fight in American foreign policy was over whether the United States would remain neutral in what seemed to be the increasingly likely event of another large-scale international conflagration.<sup>342</sup> In this dispute, the Nye committee was slowly helping pro-neutrality forces gain the upper hand against opposition from the Roosevelt administration, which wanted to maintain freedom to set its own, significantly more internationalist, course. Although neutrality remained within the jurisdiction of the Foreign Relations Committee, Nye and the other members of his committee were among its leading proponents. In April and May 1935, Nye and his committee colleague Bennett Clark (D-MO) introduced or cosponsored four resolutions on various aspects of neutrality (including, inter alia, withholding passports from Americans traveling in war zones or on belligerent ships, prohibiting private loans and credit to belligerents, and prohibiting the export of all American armaments to belligerents).<sup>343</sup> The Roosevelt administration lobbied the Foreign Relations

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335. *Id.*

336. *Nationalize the Arms Industry!*, 139 NATION 726, 726 (1934); see also *Roosevelt and the Munitions Inquiry*, NEW REPUBLIC, Dec. 26, 1934, at 178.

337. *Nationalize the Arms Industry!*, *supra* note 336. Subsequently, the Baruch commission bore out this prediction: after FDR’s initial meeting with the group at the White House, “[i]t is not evident that the Baruch committee ever met again.” JORDAN A. SCHWARZ, *THE SPECULATOR: BERNARD M. BARUCH IN WASHINGTON, 1917–1965*, at 339 (1981).

338. COULTER, *supra* note 281, at 61.

339. *Id.* at 84, 94.

340. *Id.* at 63. In his memoirs, Hull repeatedly uses the “isolationist” epithet to refer to the Nye committee. See, e.g., 1 HULL, *supra* note 294, at 398, 399, 400, 404, 406, etc.

341. COULTER, *supra* note 281, at 79.

342. The outlines of such a conflict came increasingly into view with the Italian invasion of Ethiopia in 1935, the outbreak of the Spanish Civil War in 1936, and the Japanese invasion of China in 1937.

343. S. 2998, 74th Cong. (1935) (introduced by Senators Pope, Nye, Bone, George, and Clark; reported out of S. Foreign Rels. Comm.); S.J. Res. 120, 74th Cong. (1935) (introduced by Senators Clark and Nye; referred to S. Foreign Rels. Comm.); S.J. Res. 99, 74th Cong. (1935) (introduced by Senators Nye and Clark; reported out of S. Foreign Rels. Comm.); S.J.



Committee against these proposals, offering instead its own alternative that would give the president discretion to decide whether (and to whom) to prohibit arms shipments.<sup>344</sup> The Foreign Relations Committee reported out a “compromise” resolution that was, in fact, significantly closer to the various Nye-Clark versions than to the administration’s version.<sup>345</sup> As one historian has noted, the compromise “resolution was intended partly to appease public opinion on the issue but probably both [Foreign Relations Committee Chairman] Pittman and the administration hoped Congress would adjourn without adopting it.”<sup>346</sup> Nye and his colleagues filibustered to ensure that would not happen, and eventually the resolution passed the Senate by unanimous consent. The House almost immediately passed it as well—but added an administration sponsored amendment that sunset the arms embargo provisions in six months. Nye reluctantly signed on to the amendment, and the bill went to FDR, who reluctantly signed it, fearing that he could not win a battle with Congress over the issue.<sup>347</sup> The *New York Times*’s Arthur Krock noted that Nye and his colleagues “did not get all of [what they wanted], but they got a good deal” and that the end result “tie[d] the hands of the executive department.”<sup>348</sup> Secretary of State Hull was furious: “[t]he Nye Committee hearings furnished the isolationist springboard for the first Neutrality Act” by “arous[ing] an isolationist sentiment that was to tie the hands of the Administration . . . [i]t confused the minds of our own people.”<sup>349</sup> Hull would have preferred no neutrality legislation at all,<sup>350</sup> but with “[p]ublic opinion . . . swayed . . . by the spectacular conclusions of the Nye Committee,” as well as the specter of impending war, “it was now evident that the movement in Congress, spurred by isolationist agitation, was too strong.”<sup>351</sup> At least on the view of Hull and other administration allies, then, the Nye committee had moved public opinion, which in turn had shaped congressional views, to such an extent that the president was essentially forced to sign legislation tying his own hands.<sup>352</sup>

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Res. 100, 74th Cong. (1935) (introduced by Senators Nye and Clark; reported out of S. Foreign Rels. Comm.); see also COLE, *supra* note 298, at 101–02.

344. COLE, *supra* note 298, at 103.

345. S.J. Res. 173, 74th Cong. (1935) (reported out of S. Foreign Rels. Comm.). For a comparison of the various resolutions, see COLE, *supra* note 298, at 105–06.

346. COLE, *supra* note 298, at 105.

347. Neutrality Act, ch. 837, 49 Stat. 1081 (1935); see also COLE, *supra* note 298, at 106.

348. Arthur Krock, *In Washington: Neutrality Resolution Viewed as Administration Handicap*, N.Y. TIMES, Aug. 24, 1935, at 14 (available through *ProQuest Historical Newspapers*).

349. 1 HULL, *supra* note 294, at 404.

350. *Id.* at 406.

351. *Id.* at 410.

352. A number of historians have concluded that Hull was correct in this, even as they disagree about what precisely FDR’s true preferences were. Compare, e.g., COLE, *supra* note 291, at 170 (“Given the prevailing public attitudes and political patterns, President Roosevelt and Secretary Hull would have preferred no neutrality legislation except for the registration and licensing of munitions makers and shippers. Without the Nye committee, Congress probably would not have adopted neutrality legislation.”), with ROBERT A. DIVINE, THE ILLUSION OF NEUTRALITY 121 (1962) (“[Roosevelt’s] real compromise in 1935 was not in accepting neutrality legislation but in accepting the mandatory features that the Nye group

Meanwhile, the committee was continuing to hold hearings, including asking Baruch to testify about the administration's position on wartime profiteering and then—in a move that it is hard to see as anything other than payback for the Baruch commission—demanding his tax returns and information about his investments to see if he had any conflicts of interest.<sup>353</sup> Beginning in January 1936, Nye began simultaneously pushing for new, permanent neutrality legislation and presiding over hearings probing the wartime role of Wall Street bankers.<sup>354</sup> The public was especially interested in John Pierpont Morgan's testimony: the hearings were moved to a larger room to accommodate the demand for seats,<sup>355</sup> but even so, "[s]cores of latecomers were turned back by the doorkeepers."<sup>356</sup> Competing props were used to demonstrate both the committee's and the bankers' seriousness: the committee had before it "more than 2,000,000 cablegrams, telegrams, letters and other documents,"<sup>357</sup> while Morgan and his associates brought "more than fifty giant-sized ledgers . . . for reference."<sup>358</sup> Morgan attempted to steer the hearings toward his preferred narrative with a lengthy opening statement—which the *Times* reprinted in full—but was "stunned" when Senator Clark accused him of reading a "stump speech" and said that it would not be allowed to happen again.<sup>359</sup> The *Times*'s report on the first day of Morgan's testimony began on the front page and then took the entirety of another page.<sup>360</sup> The story previewing his testimony from the previous day's paper ended by noting that Nye and Clark had just introduced a new neutrality bill.<sup>361</sup> *Time* magazine made the same connection, but rather more disdainfully, noting that "Nye, Clark and other members of the Congressional peace-by-isolation bloc . . . planned to bring the nation's peace passion once more to white heat and whoop Neutrality through Congress by haling J.P. Morgan & Co. before their Senate Munitions Investigating Committee."<sup>362</sup>

Once again, Nye and his colleagues' show was effective. The following month, Roosevelt signed the 1936 Neutrality Act,<sup>363</sup> which extended the mandatory embargo on arms sales to belligerents until May 1937 and banned loans to belligerents.<sup>364</sup> In other words, it extended the feature of the 1935

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forced upon him. Roosevelt desired a flexible policy which would leave him free, not necessarily to co-operate against aggressors as the State Department advocated, but to decide in each situation the most effective course of action for the nation to pursue.").

353. SCHWARZ, *supra* note 337, at 339–40.

354. COLE, *supra* note 298, at 107 (neutrality legislation push); COULTER, *supra* note 281, at 108 (Wall Street hearings).

355. *Morgan Defends Financing in War*, N.Y. TIMES, Jan. 7, 1936, at 8 (available through ProQuest Historical Newspapers).

356. *Morgan Testifies as Nye Bares Data on War Loan Curbs*, N.Y. TIMES, Jan. 8, 1936, at 1 (available through ProQuest Historical Newspapers).

357. *Id.*

358. *Morgan Defends Financing in War*, *supra* note 355.

359. *Morgan Testifies as Nye Bares Data on War Loan Curbs*, *supra* note 356.

360. *Id.*

361. *Morgan Defends Financing in War*, *supra* note 355.

362. *Peace Proposal*, TIME, Jan. 13, 1936, at 13.

363. ch. 106, 49 Stat. 1152.

364. COLE, *supra* note 298, at 110.

Act that FDR most disliked—the nondiscretionary arms embargo—and it added to it a nondiscretionary ban on loans. As the *Times* noted, the 1936 Act, like its predecessor, was a compromise:

No secret has been made of the fact that the new act is mutually unsatisfactory alike to the President and other groups. Mr. Roosevelt would like wider discretion given the President in administering the embargo provisions, while the extremist peace advocates have served notice they would continue work for a law that would lay down a blanket embargo against any and all belligerent countries.<sup>365</sup>

But once again, while neither side got everything it wanted, Nye and Clark came away having substantially limited the president's options.<sup>366</sup>

Right around the time that Nye and his allies were winning their second Neutrality Act battle, the committee was also sowing the seeds of its own precipitous downfall. On January 15, 1936, Clark introduced evidence into the committee record that President Woodrow Wilson (at this point, deceased for over a decade) had known by 1917 of the existence of “secret treaties” between Britain, France, and Russia creating postwar spheres of influence in the eastern Mediterranean. Wilson had denied that he knew of the treaties before the 1919 Paris Peace Conference.<sup>367</sup> After hearing Clark's evidence, Nye remarked that “both the President and Secretary [of State Robert] Lansing falsified concerning this matter.”<sup>368</sup> The reaction was explosive, with Nye's charge that Wilson had “falsified” leading nearly every major newspaper.<sup>369</sup> The reaction by a number of Democratic senators to the attack on Wilson was swift. Most dramatically, Senator Carter Glass (D-VA), who had been Wilson's secretary of the treasury, took to the Senate floor and “opened wide his noteworthy vocabulary.”<sup>370</sup> In remarks that were reprinted in their entirety in the *Times*, Glass thundered:

If it were permissible in the Senate to say that any man who would asperse the integrity and veracity of Woodrow Wilson is a coward, if it were

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365. *Roosevelt Renews Plea Against Profits in War; He Signs Neutrality Bill*, N.Y. TIMES, Mar. 1, 1936, at 1 (available through *ProQuest Historical Newspapers*).

366. See COULTER, *supra* note 281, at 124–25 (“[T]he 1936 Neutrality Act encompassed the three main points proposed by Nye and Clark in their resolutions of 1935. Civilian travel on belligerent's [sic] ships, arms shipments to belligerents, and loans to belligerents were all strictly regulated . . . [T]he 1936 act represented a victory for Nye and Clark.”).

367. *Id.* at 115; COLE, *supra* note 291, at 157.

368. COULTER, *supra* note 281, at 115.

369. See, e.g., *Nye States Wilson Falsified on Pacts*, N.Y. TIMES, Jan. 16, 1936, at 1 (available through *ProQuest Historical Newspapers*); *Reveal Wilson Knew of Secret Treaties*, DAILY BOS. GLOBE, Jan. 16, 1936, at 1 (available through *ProQuest Historical Newspapers*); *Says Wilson Falsified on War Record*, HARTFORD COURANT, Jan. 16, 1936, at 1 (available through *ProQuest Historical Newspapers*); *War Deals Secrecy Hit*, L.A. TIMES, Jan. 16, 1936, at 3 (available through *ProQuest Historical Newspapers*); *Wilson, Lansing Knew of Pacts, Inquiry Shows*, CHI. DAILY TRIB., Jan. 16, 1936, at 7 (available through *ProQuest Historical Newspapers*).

370. Turner Catledge, *Glass Assails Nye on Wilson Charge; May Block Inquiry*, N.Y. TIMES, Jan. 18, 1936, at 1 (available through *ProQuest Historical Newspapers*).

permissible to say that his charge is not only malicious but positively mendacious, that I would be glad to say [it] here and elsewhere . . .<sup>371</sup>

In the course of his speech, Glass pounded the desk with such force that his knuckles began to bleed, a fact that was breathlessly reported.<sup>372</sup>

The committee never recovered from the backlash to its attack on Wilson. It held eight more days of hearings, focused on “less sensational topics . . . that produced no confrontational episodes.”<sup>373</sup> In June of 1936, it released its final reports (seven in all)<sup>374</sup> and wrapped up its business. But even so, the committee continued to exert significant influence. Between July and December of 1936, Nye went on a thirty-eight-state speaking tour advocating neutrality, emphasizing many of the same themes the committee had emphasized.<sup>375</sup> In January 1937, he gave a nationwide radio broadcast on the topic.<sup>376</sup> And on May 1 of that year, Roosevelt signed the Neutrality Act of 1937,<sup>377</sup> which made permanent the mandatory embargoes on both armaments and loans to belligerents, as well as the ban on travel by Americans on belligerent ships. It also gave the president two-year discretionary authority to require “cash-and-carry” for the sale of non-embargoed goods to belligerents.<sup>378</sup>

Nye himself voted against the conference report on the 1937 Act, on the grounds that it did not go far enough.<sup>379</sup> But in his 1944 valedictory address, having lost his reelection campaign, Nye claimed the Neutrality Acts as the great success of the Senate Munitions Committee investigation.<sup>380</sup> For Nye, even though the Neutrality Acts were ultimately repealed (and “sabotaged” by the White House before that), they nevertheless succeeded in keeping the United States out of World War II “for more than 2 years,” despite powerful forces, including within the Roosevelt administration, doing their best to drag the country into the war.<sup>381</sup> Secretary of State Hull, as we have seen, agreed

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371. *Text of Senator Glass's Speech in Defense of Wilson*, N.Y. TIMES, Jan. 18, 1936, at 4 (available through *ProQuest Historical Newspapers*).

372. *See, e.g.*, Joseph Alsop Jr., *Glass Lashes at Nye for His Wilson Attack*, N.Y. HERALD TRIB., Jan. 18, 1936, at 1A (available through *ProQuest Historical Newspapers*); Felix Bruner, *Southerner Shakes with Rage as He Defends Chief in Senate*, WASH. POST, Jan. 18, 1936, at 1 (available through *ProQuest Historical Newspapers*); Catledge, *supra* note 370; *Glass Calls Nye "Coward": Hammers Desk Till Hand Bleeds as He Defends Wilson from Assailants*, DAILY BOS. GLOBE, Jan. 18, 1936, at 1 (available through *ProQuest Historical Newspapers*); *Nye Denounced as Coward for Wilson Attack*, CHI. DAILY TRIB., Jan. 18, 1936, at 1 (available through *ProQuest Historical Newspapers*).

373. COULTER, *supra* note 281, at 119.

374. *Id.* at 129, 132.

375. COLE, *supra* note 298, at 111.

376. *Id.* at 115.

377. ch. 146, 50 Stat. 121 (1937).

378. COLE, *supra* note 298, at 118.

379. *Id.*

380. 90 CONG. REC. 9686 (1944) (“[O]ne immediate result of that investigation was the enactment of the neutrality law.”).

381. *Id.* at 9686–87.

with Nye's descriptive claim,<sup>382</sup> as have historians of the period.<sup>383</sup> Of course, historians have also agreed with Nye that Roosevelt's compliance with the Acts was only partial.<sup>384</sup> Nevertheless, there is widespread agreement that the isolationist bloc in Congress hemmed Roosevelt in and that the Nye committee served as a focal point for that bloc.

Moreover, the *way* in which the committee served as a focal point was by making use of overspeech. The newspaper editor turned Senator Nye ensured from the beginning that the hearings would be communicative, going out of his way to cultivate newspaper and radio coverage throughout the committee's lifespan. He made compelling use of actors, whether by invoking distant and mysterious figures like Sir Basil Zaharoff or by haling in and grilling commercial titans like the du Ponts or J. P. Morgan. When a witness like Morgan attempted to seize control of the hearings' script, the members of the committee quickly insisted on reasserting control. The members even used props, as when they piled up documents on the hearing room tables to convey a sense of overwhelming evidence. Moreover, the hearings were deeply divisive, although in ways that cut across party lines. In particular, by helping to deepen preexisting cleavages between internationalists and isolationists, the hearings sharpened the terms of the debate and helped push more Americans into the latter camp. And the cumulative effect of all of this was a change in the public mood, one that—as even Secretary Hull realized much to his chagrin—filtered back to Congress and required FDR to deal with the isolationist bloc, ultimately by agreeing to a series of Neutrality Acts that were far more constraining than he would have liked.

#### *B. McCarthy and the Army-McCarthy Hearings, 1950–1954*

Alger Hiss, who had played a small role in the Nye committee,<sup>385</sup> was to play a somewhat larger one in the rise of Senator Joseph McCarthy (R-WI) as a national force. In the aftermath of the allied victory in World War II, the advent of the Cold War brought with it the Second Red Scare, the hunt for Communist infiltration into American government and society that was, for a time, synonymous with McCarthy's name. Hiss, who in 1946 had become president of the Carnegie Endowment for International Peace, was identified as a Communist by Whittaker Chambers before the House Committee on Un-American Activities in 1948. Chambers subsequently produced evidence that, not only had Hiss been a Communist, he had also spied for the Soviet Union in the 1930s. Hiss's subsequent denials before a federal grand jury led to his indictment for perjury, the statute of limitations on espionage having run. After a hung jury in his first trial, he was convicted in January

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382. See *supra* text accompanying notes 349–51.

383. See, e.g., COLE, *supra* note 291, at 231; COLE, *supra* note 298, at 101; ZEISBERG, *supra* note 328, at 85–87, 185, 211, 250; John C. Donovan, *Congressional Isolationists and the Roosevelt Foreign Policy*, 3 *WORLD POL.* 299, 302–03 (1951).

384. ZEISBERG, *supra* note 328, at 62–63.

385. See *supra* text accompanying note 298.

1950.<sup>386</sup> The previous year, the Soviets had successfully tested an atomic bomb for the first time, and the Communists had taken over China. To an American public trying to figure out how the Cold War could be going so awry, espionage seemed like an obvious answer, and revelations of espionage by Hiss—and, in 1950, by Klaus Fuchs, Julius Rosenberg, and others—provided enough evidence to make the thesis compelling. In the years to come, McCarthy would make repeated use of overspeech, in both effective and ineffective ways, to put his version of this thesis before the American people. In the end, it would also be the effective use of overspeech by his opponents that would bring his career crashing down.

Just over two weeks after Hiss's conviction, McCarthy, a freshman Republican senator, was set to give a speech to the Ohio County Women's Republican Club in Wheeling, West Virginia. He was not new to Red-baiting—it had been a significant component of his 1946 campaign<sup>387</sup>—but he also was not yet particularly known for it. The Wheeling speech would change that. It was there that he infamously held up a piece of paper and claimed to have a list of 205 “members of the Communist Party and members of a spy ring” working in the State Department.<sup>388</sup> The exact numbers changed over his next few speeches, but McCarthy's press savviness<sup>389</sup> meant that the charges got increasing attention in subsequent days. Two days after the Wheeling speech, the *New York Times* ran an article on McCarthy's claims.<sup>390</sup> The extent of McCarthy's success in driving the national conversation was evident two days later when the *Times* carried another story noting that the State Department had asked McCarthy to release the names of the alleged subversives.<sup>391</sup> Five days after that, a *Times* headline read, “Broader Loyalty Tests Proposed for U.S. Jobs,” crediting McCarthy's allegations with “reviv[ing] some discussion in Washington” about broadening the scope of loyalty investigations.<sup>392</sup>

Eleven days after the Wheeling speech, McCarthy took to the Senate floor for nearly eight hours to speak on the dangers of Communist infiltration of the State Department. Again, the media paid attention, with the speech making the front page of *The Washington Post*.<sup>393</sup> Indeed, the floor speech was enough to draw the attention of the *Times*'s editorial board, which wrote

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386. DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 97–100, 104 (rev. ed. 2005).

387. *See id.* at 50.

388. *Id.* at 109.

389. *See id.* at 59 (noting McCarthy's cultivation of the press from his first day in Washington).

390. *M'Carthy Insists Truman Oust Reds*, N.Y. TIMES, Feb. 12, 1950, at 5 (available through *ProQuest Historical Newspapers*).

391. Jay Walz, *Acheson Aide Asks '57 Reds' Be Named*, N.Y. TIMES, Feb. 14, 1950, at 16 (available through *ProQuest Historical Newspapers*).

392. Cabell Phillips, *Broader Loyalty Tests Proposed for U.S. Jobs*, N.Y. TIMES, Feb. 19, 1950, at E7 (available through *ProQuest Historical Newspapers*).

393. *Still Gives No Names: McCarthy Says Red-Fronter Is White House Speech Writer*, WASH. POST, Feb. 21, 1950, at 1 (available through *ProQuest Historical Newspapers*); *see also* Harold B. Hinton, *M'Carthy Charges Spy for Russia Has a High State Department Post*, N.Y. TIMES, Feb. 21, 1950, at 13 (available through *ProQuest Historical Newspapers*).

that McCarthy “has been giving a good imitation of a hit-and-run driver” by engaging in a “campaign of indiscriminate character-assassination.”<sup>394</sup> But by this point it was impossible to ignore McCarthy’s charges or brush them aside. His overspeech pushed Senate leadership—which was then controlled by the Democrats—to impanel a special subcommittee (albeit one packed with Truman administration loyalists) to look into Communist subversion in the State Department.<sup>395</sup> The subcommittee was chaired by Millard Tydings (D-MD);<sup>396</sup> McCarthy participated as a witness, rather than as a member of the subcommittee.

The first meeting of the Tydings committee was standing-room-only,<sup>397</sup> and McCarthy’s accusation that Dorothy Kenyon, a former U.S. delegate to the United Nations Commission on the Status of Women, was affiliated with a number of Communist front organizations received multiple columns above the fold in the next day’s *Times* and *Post*.<sup>398</sup> The most sustained target of McCarthy’s attack was Owen Lattimore, an Asia specialist at Johns Hopkins and sometime outside adviser to the State Department,<sup>399</sup> whom McCarthy described to the committee as “the top Russian agent” and Hiss’s “boss.”<sup>400</sup> When Lattimore appeared before the Tydings committee—represented by Abe Fortas—the room was “packed to capacity.”<sup>401</sup> Lattimore’s performance before the committee was effective, both defending himself and attacking McCarthy’s methods.<sup>402</sup> *Time* magazine noted approvingly that he “spoke with the smooth assurance of the experienced lecturer and he had the crowd with him.”<sup>403</sup> Four members of the subcommittee, including one Republican, all announced that they had looked at Lattimore’s FBI file and found nothing in it to substantiate McCarthy’s charge.<sup>404</sup> But McCarthy had another card to play: a prominent ex-Communist of questionable truthfulness named Louis Budenz testified that Lattimore was a member of a Communist cell.<sup>405</sup> McCarthy had sufficiently hyped Budenz’s testimony<sup>406</sup> that the hearing room’s gallery was again packed.<sup>407</sup> Suddenly, *Time* was not so sure: Budenz was “a man whose

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394. Editorial, *Mr. M’Carthy’s Campaign*, N.Y. TIMES, Feb. 22, 1950, at 28 (available through *ProQuest Historical Newspapers*).

395. OSHINSKY, *supra* note 386, at 115.

396. *Id.* at 116.

397. *Id.* at 119.

398. Alfred Friendly, *Former Woman Judge Linked to Communists Calls McCarthy a Liar*, WASH. POST, Mar. 9, 1950, at 1 (available through *ProQuest Historical Newspapers*); William S. White, *McCarthy Says Miss Kenyon Helped 28 Red Front Groups*, N.Y. TIMES, Mar. 9, 1950, at 1 (available through *ProQuest Historical Newspapers*).

399. OSHINSKY, *supra* note 386, at 136–38, 144–53.

400. *Id.* at 136.

401. “A Fool or a Knave,” TIME, Apr. 17, 1950, at 21.

402. OSHINSKY, *supra* note 386, at 148.

403. “A Fool or a Knave,” *supra* note 401, at 21.

404. *Id.*

405. OSHINSKY, *supra* note 386, at 149–50.

406. See, e.g., William S. White, *Budenz Testimony Awaited Intently*, N.Y. TIMES, Apr. 20, 1950, at 3 (available through *ProQuest Historical Newspapers*).

407. OSHINSKY, *supra* note 386, at 150.

testimony could not lightly be dismissed . . . . And so the matter stood: Owen Lattimore had not been proved a Communist, but he had not proved that he was not one.”<sup>408</sup> Nor was *Time* alone: the *New York Times* led with Budenz’s accusations on the front page, continuing across all of page two,<sup>409</sup> and *The Washington Post*’s coverage was equally expansive.<sup>410</sup> Indeed, the favorable publicity from the Budenz testimony was largely “responsible for keeping [McCarthy] in business.”<sup>411</sup>

In July 1950, the Tydings committee produced its report,<sup>412</sup> which was almost entirely hostile to McCarthy. It flatly concluded that his accusations of disloyalty in the State Department were “false” and “irresponsible” and that they constituted a “fraud and a hoax perpetrated on the Senate of the United States and the American people” and “perhaps the most nefarious campaign of half-truths and untruth in the history of this Republic.”<sup>413</sup> Only the Democrats on the committee signed the report.<sup>414</sup> *The New Republic* turned to the language of popular entertainment to describe the subsequent debate on the Senate floor: it was “as good a show as we have ever watched.”<sup>415</sup> Indeed, the magazine noted Senator Tydings’s use of both props and sound effects:

Tydings had a five-foot pointer and eight big charts of blow-up quotations from McCarthy’s preposterous speeches. These were put up in turn on a wooden frame for Senate inspection. Carried away by fury, real or assumed, Tydings at one point put every ounce of energy into his arm and brought his ruler down “whack” on one offending quotation. There was a crack like a pistol shot. It seemed to this columnist that it wrote a punctuation point to a chapter of hysteria such as America has rarely known.<sup>416</sup>

If Tydings’s gesture was a punctuation point, it was certainly not anything like a full stop. The Senate voted to accept the Tydings committee’s report on a straight party-line vote, and media accounts too were divided along party lines.<sup>417</sup> Both McCarthy and his antagonists had used overspeech to real, and divisive, effect.

By the middle of 1950, McCarthy was a political celebrity, routinely gracing the covers of newsmagazines and the front pages of newspapers, and having contributed “McCarthyism” to the political vernacular.<sup>418</sup> Polls

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408. *Of Cells & Onionskins*, TIME, May 1, 1950, at 19.

409. William S. White, *Lattimore Accused by Budenz as a Red; Backed by General*, N.Y. TIMES, Apr. 21, 1950, at 1 (available through *ProQuest Historical Newspapers*).

410. Alfred Friendly, *Budenz Says Reds Told Him Lattimore Was a Communist; McCarthy Defends Crusade*, WASH. POST, Apr. 21, 1950, at 1 (available through *ProQuest Historical Newspapers*).

411. OSHINSKY, *supra* note 386, at 153.

412. S. REP. NO. 81-2108 (1950).

413. *Id.* at 166–67.

414. *Id.* at 170.

415. *Washington Wire*, NEW REPUBLIC, July 31, 1950, at 3.

416. *Id.* at 4.

417. See OSHINSKY, *supra* note 386, at 171–72.

418. *Id.* at 158.



showed that significantly more Americans thought his charges were good for the country than thought they were harmful.<sup>419</sup> And, although he was not up for reelection until 1952, he was in high demand on the campaign trail.<sup>420</sup> He spent a great deal of time in Maryland in particular, waging a successful underhanded campaign for Tydings's opponent.<sup>421</sup> Overall, Democrats maintained control of both congressional chambers, although Republicans gained a significant number of seats in each.

The real shift would come two years later, when Republicans took control of both chambers of Congress and the presidency, and McCarthy himself was reelected. It was "common knowledge" that President Dwight Eisenhower "despised" McCarthy,<sup>422</sup> but he refrained from criticizing the senator by name on the campaign trail—a reticence that largely continued from the White House. In the new Eighty-Second Congress, McCarthy was given the chairmanship of the Committee on Government Operations, from which the new majority leader, Robert Taft (R-OH), thought that McCarthy "can't do any harm."<sup>423</sup> Taft was mistaken. McCarthy appointed himself chair of the Permanent Subcommittee on Investigations and set out to make the most aggressive possible use of its expansive oversight powers.<sup>424</sup> To help him out, he hired a number of staffers, including Roy Cohn as chief counsel and Robert F. Kennedy—whose father, Joseph, was a significant McCarthy donor—as assistant to the general counsel.<sup>425</sup>

Over the next nine months, McCarthy's subcommittee would hold hearings on alleged Communist subversion at the Voice of America, the Overseas Library Program, the Government Printing Office, and elsewhere.<sup>426</sup> McCarthy was careful to stage-manage the hearings. For example, the VOA hearings, in February and March 1953, were televised to an audience of "millions"<sup>427</sup>—but only *after* a week of closed hearings at which McCarthy screened witnesses and "chose some, friendly or otherwise, who he thought would most help his cause at open hearings before television cameras."<sup>428</sup> His subsequent hearings likewise generated significant media attention, even as they uncovered almost no new facts.<sup>429</sup> McCarthy was engaged in classic overspeech, using the tools of oversight for primarily communicative and argumentative purposes. This did not go over well with the three Democrats on the subcommittee: in July 1953, in a dispute over

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419. *Id.*

420. See THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* 334–46 (1982).

421. *Id.* at 335–43.

422. OSHINSKY, *supra* note 386, at 234.

423. *Id.* at 251.

424. *Id.* at 251–52. On the Permanent Subcommittee on Investigations' powers, see *supra* notes 124–25 and accompanying text.

425. REEVES, *supra* note 420, at 462–65.

426. OSHINSKY, *supra* note 386, at 266–85, 326–28; REEVES, *supra* note 420, at 477–512.

427. OSHINSKY, *supra* note 386, at 275.

428. ROBERT SHOGAN, *NO SENSE OF DECENCY: THE ARMY-MCCARTHY HEARINGS: A DEMAGOGUE FALLS AND TELEVISION TAKES CHARGE OF AMERICAN POLITICS* 79 (2009).

429. See, e.g., OSHINSKY, *supra* note 386, at 279.

McCarthy's high-handed management of the subcommittee's staffing and procedures, they stormed out and began a boycott of subcommittee proceedings that would last more than six months.<sup>430</sup> The result was to leave subcommittee proceedings entirely in McCarthy's hands, without even the opportunity to engage in counter-overspeech.

But in the fall of 1953, McCarthy made what would prove to be a serious miscalculation, when he went after the Army: although initially successful in garnering attention, this line of inquiry would ultimately lead to his downfall. McCarthy's office had been receiving reports of Communist infiltration of the Army Signal Corps at Fort Monmouth, New Jersey, for months. The Signal Corps was an important locus of cutting-edge military research and development and was therefore regarded as a highly sensitive site.<sup>431</sup> In October, Roy Cohn got ahold of a list the FBI had compiled two years earlier of thirty-five "possible security risks" at Fort Monmouth. He and McCarthy regarded the information as so potentially explosive that the senator cut short his honeymoon—a fact that was made much of in the press<sup>432</sup>—to fly to New York and begin several weeks of hearings at the Foley Square federal courthouse. The location for the hearings made sense logistically; after all, if most of the witnesses were coming from northern New Jersey, then New York was a logical place to take their testimony. But it was also a smart piece of political staging. McCarthy worked mightily to connect the Monmouth "spy ring" to Julius Rosenberg, who had once worked there and had been executed for espionage in June 1953.<sup>433</sup> Images of the Foley Square courthouse would, for many Americans, call to mind Rosenberg's trial, which had been held in the same building.<sup>434</sup> Moreover, McCarthy maintained very tight control over the public script coming out of the Fort Monmouth hearings: for several weeks, the hearings were closed, with McCarthy then briefing reporters on what had happened.<sup>435</sup> Press accounts dutifully relayed McCarthy's version of what had transpired, often waiting several paragraphs to note that the testimony took place in "executive" or "closed" sessions.<sup>436</sup> Unsurprisingly, the narrative coming

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430. *Id.* at 321, 361.

431. *Id.* at 330–32.

432. See *McCarthy Returns for Army Inquiry*, N.Y. TIMES, Oct. 10, 1953, at 9 (available through *ProQuest Historical Newspapers*).

433. See, e.g., Arthur Everett, *McCarthy Names Rosenberg as 'Brain' of Radar Spy Ring*, WASH. POST, Oct. 16, 1953, at 1 (available through *ProQuest Historical Newspapers*); Edward Ranzal, *Rosenberg Called Radar Spy Leader*, N.Y. TIMES, Oct. 16, 1953, at 1 (available through *ProQuest Historical Newspapers*).

434. The *New York Herald Tribune* made the connection explicit: "Julius Rosenberg and his wife, Ethel, were arrested on July 17, 1950 and charged with war-time espionage for Russia. After trial and conviction in the same court house where the subcommittee held its hearing they were sentenced to death . . ." Walter Arm, *Man, Linked to Rosenbergs, Is Recalled but Won't Talk*, N.Y. HERALD TRIB., Oct. 18, 1953, at 1 (available through *ProQuest Historical Newspapers*).

435. OSHINSKY, *supra* note 386, at 335.

436. See, e.g., Everett, *supra* note 433; Edward Ranzal, *Army Radar Data Reported Missing*, N.Y. TIMES, Oct. 14, 1953, at 1 (available through *ProQuest Historical Newspapers*); Ranzal, *supra* note 433; *Red Scientists Got Secrets, McCarthy Told*, WASH. POST, Oct. 23,

out of these closed sessions painted a dire picture of a Signal Corps rife with Communist subversion. As an indication of how well McCarthy had sold the closed hearings, even the vehemently anti-McCarthyite Drew Pearson, in a column headlined “Pearson Agrees with McCarthy,” wrote that “Joe McCarthy will almost drop dead when he reads this, but in my opinion he is absolutely right in probing the leak of Signal Corps radar secrets at Fort Monmouth.”<sup>437</sup>

But McCarthy also promised that there would be open hearings to come, so that the American people could see the problem for themselves. Those hearings began in late November and, while they certainly had negative personal consequences for a number of the witnesses,<sup>438</sup> they proved somewhat anticlimactic, as McCarthy could adduce no evidence of current subversive activities at Fort Monmouth.<sup>439</sup> The hearings continued to make news, but while his reports of the closed Fort Monmouth hearings frequently got top billing, only twice in the six weeks after the public hearings began did they make the front page of the *New York Times*, and they never graced the front page of *The Washington Post*.<sup>440</sup> The lack of sensational new revelations did not seem to hurt McCarthy’s standing with the broader public, however: he and his hunt for Communist subversives continued to poll well.<sup>441</sup>

In January 1954, Democrats returned to the subcommittee, having won a few concessions from McCarthy. One of those concessions was the right to hire minority counsel—and they promptly hired Robert Kennedy, who had left McCarthy’s staff at the end of July 1953 to go into private practice.<sup>442</sup> Meanwhile, the committee continued to investigate the Army, including how individuals with Communist affiliations were allowed to remain in the service or be honorably discharged therefrom. In February, in a closed session, McCarthy tore into General Ralph Zwicker, the commanding general at Camp Kilmer in New Jersey, saying that he was “not fit to wear that uniform.”<sup>443</sup> Increasingly, the Army was convinced that it had to stop playing defense and hit McCarthy back.<sup>444</sup> At about the same time, and spurred by the same causes, Republican congressional leadership was beginning at last to publicly express unease with McCarthy.<sup>445</sup> Eisenhower,

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1953, at 25 (available through *ProQuest Historical Newspapers*); *Spying Is Charged at Fort Monmouth*, N.Y. TIMES, Oct. 13, 1953, at 10 (available through *ProQuest Historical Newspapers*).

437. Drew Pearson, *Pearson Agrees with McCarthy*, WASH. POST, Oct. 23, 1953, at 55 (available through *ProQuest Historical Newspapers*).

438. See OSHINSKY, *supra* note 386, at 339–44.

439. *Id.* at 339.

440. Peter Kihss, *Columbia Professor Gets McCarthy Contempt Threat*, N.Y. TIMES, Nov. 26, 1953, at 1 (available through *ProQuest Historical Newspapers*); *McCarthy Says State Radar Base Suspended 12 on Loyalty Charges*, N.Y. TIMES, Dec. 15, 1953, at 1 (available through *ProQuest Historical Newspapers*).

441. OSHINSKY, *supra* note 386, at 356.

442. REEVES, *supra* note 420, at 498.

443. OSHINSKY, *supra* note 386, at 377.

444. *Id.* at 378.

445. *Id.* at 390.

too, let it be known that he was “ripping mad” at McCarthy’s attack on an Army colleague,<sup>446</sup> although he refrained from attacking the senator directly.<sup>447</sup> But even the hint of criticism from the White House was too much for McCarthy, who lambasted the president and insisted that he would continue exposing Communists in positions of power. James Reston, no fan of McCarthy, couldn’t help but admire his performance: to Eisenhower’s bland and indirect criticism, McCarthy “answered back, not with a polite aide-memoire, but with a television show . . . a perfect illustration of his mastery of mass communication techniques . . . . As a result, the McCarthy image and melody lingered on the TV screens tonight, long after the President had gone to bed.”<sup>448</sup> But Reston also recognized that McCarthy’s behavior had the potential to exacerbate the split in the Republican coalition,<sup>449</sup> and he was not wrong. Many formerly McCarthy-sympathetic Republicans regarded his attack on Eisenhower as a bridge too far.<sup>450</sup>

Two figures who had never been sympathetic to McCarthy took the opportunity to pile on. Less than a week after McCarthy’s attack on Eisenhower, Senator Ralph Flanders (R-VT) took to the Senate floor to blast McCarthy. Flanders had nothing to lose—he was immensely popular in his home state and had already announced that he would not seek reelection in 1958.<sup>451</sup> Flanders insisted that McCarthy was “doing his best to shatter the party whose label he wears.”<sup>452</sup> Even more noteworthy, however, was Flanders’s tone of folksy—and racist—mockery. After describing the current state of international affairs, he asked:

In this battle of the agelong war, what is the part played by the junior Senator from Wisconsin? He dons his war paint. He goes into his war dance. He emits his war whoops. He goes forth to battle and proudly returns with the scalp of a pink Army dentist.<sup>453</sup>

The press took notice: the *Post* reprinted Flanders’s entire speech beginning on the front page, and it also ran an article about it on the front page.<sup>454</sup> The *Times* also discussed Flanders’s speech on the front page and described it as part of a coordinated move by Senate Republican leadership to rein in McCarthy’s attacks on the Eisenhower administration.<sup>455</sup> That same

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446. SHOGAN, *supra* note 428, at 84.

447. *Id.* at 84–85.

448. James Reston, *Other Cheek Is Struck*, N.Y. TIMES, Mar. 4, 1954, at 14 (available through *ProQuest Historical Newspapers*).

449. *See id.* (“The main result of all this, to date, has been the outspoken disillusion of the Republican liberals who led the fight for General Eisenhower’s nomination, and argued during the campaign that his election would result in the decline of Senator McCarthy.”).

450. OSHINSKY, *supra* note 386, at 393.

451. *Id.* at 396.

452. 100 CONG. REC. 2886 (1954).

453. *Id.*

454. *Flander’s Address*, WASH. POST, Mar. 10, 1954, at 1 (available through *ProQuest Historical Newspapers*); Lee Garrett, *McCarthy Hit by Flanders as Wrecker*, WASH. POST, Mar. 10, 1954, at 1 (available through *ProQuest Historical Newspapers*).

455. W. H. Lawrence, *McCarthy Strives ‘to Shatter’ G.O.P., Flanders Asserts*, N.Y. TIMES, Mar. 10, 1954, at 1 (available through *ProQuest Historical Newspapers*).

evening, Edward R. Murrow, the most respected newscaster then working,<sup>456</sup> devoted his entire thirty-minute episode of *See It Now* on CBS to a uniformly condemnatory report on McCarthy and his tactics.<sup>457</sup> Much of the report simply consisted of edited clips of McCarthy, in speeches, press conferences, and committee hearings, bullying, sneering, and misleading his audiences.<sup>458</sup> The public reaction was intense: CBS received record numbers of calls, letters, and telegrams, which ran overwhelmingly against McCarthy.<sup>459</sup> A wide range of other media outlets, both broadcast and print, repeated and amplified Murrow's message.<sup>460</sup>

At roughly the same time that McCarthy was ramping up his war with both the Eisenhower administration and the Army, his subcommittee aide Roy Cohn was attempting to strong-arm the Army. Cohn had brought his close friend (and, perpetual rumors had it, lover) G. David Schine on as an "unpaid 'chief consultant'" to the subcommittee in 1953.<sup>461</sup> After "a series of questionable deferments," Schine had been drafted and inducted into the Army in November 1953.<sup>462</sup> Almost immediately, Cohn began a sustained campaign of pressuring Army leadership to give Schine special treatment, including in where he was stationed, the availability of leave, and the avoidance of particularly unpleasant duties.<sup>463</sup> Cohn strongly implied that the subcommittee's recent aggressive posture toward the Army was a result of the Army's refusal to accommodate Schine.<sup>464</sup>

On March 9, 1954—by coincidence, the same day as both Flanders's floor speech and the Murrow broadcast—Secretary of Defense Charles Wilson told McCarthy that the Army had compiled a report on Cohn's inappropriate pressure on Schine's behalf and would release it publicly unless Cohn resigned. McCarthy refused to ask for Cohn's resignation, and two days later, the Army released the thirty-four-page report.<sup>465</sup> A week later, the subcommittee met and determined that it would have to look into these allegations itself—as John McClellan (D-AR) told his colleagues, "it is before the public, and this committee cannot afford to do anything that would look like we are trying to hush things up."<sup>466</sup>

It was at this point that McCarthy lost his control over the staging of subcommittee hearings. His colleagues decided that he would have to stand down as both chair and a member of the subcommittee but that he (as well as the Army) would have the right to cross-examine witnesses.<sup>467</sup> The

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456. See EDWIN R. BAYLEY, *JOE MCCARTHY AND THE PRESS* 192, 195 (1981).

457. OSHINSKY, *supra* note 386, at 397–400; SHOGAN, *supra* note 428, at 104–14.

458. SHOGAN, *supra* note 428, at 105–07.

459. BAYLEY, *supra* note 456, at 195; OSHINSKY, *supra* note 386, at 399.

460. See BAYLEY, *supra* note 456, at 195; OSHINSKY, *supra* note 386, at 399–400; SHOGAN, *supra* note 428, at 107–14.

461. REEVES, *supra* note 420, at 465–66.

462. OSHINSKY, *supra* note 386, at 363.

463. *Id.* at 363–65; SHOGAN, *supra* note 428, at 117–18.

464. SHOGAN, *supra* note 428, at 117.

465. OSHINSKY, *supra* note 386, at 400–01, 403–04; SHOGAN, *supra* note 428, at 117.

466. SHOGAN, *supra* note 428, at 131.

467. OSHINSKY, *supra* note 386, at 406–07.

subcommittee would be chaired by Karl Mundt (R-SD).<sup>468</sup> To aid in making its case, the Army hired as outside counsel Joseph Welch, of the Hale and Dorr law firm.<sup>469</sup>

Most consequential, however, was the decision to televise the Army-McCarthy hearings, a decision on which Minority Leader Lyndon Johnson (D-TX)—who was not a member of the subcommittee—insisted.<sup>470</sup> The hearings began on April 22, 1954, in a “cavernous” committee room that was designed to hold 300 but into which over 800 spectators had been admitted.<sup>471</sup> In the back of the room was a custom-built, three-tiered platform for the “battery of television cameras,” which were supplemented by more scattered around the room. Floodlights were installed to make sure the proceedings were legible to the cameras.<sup>472</sup> Two of the four television networks—ABC and DuMont—would carry all 188 hours of the open hearings live; NBC and CBS would broadcast nightly summaries.<sup>473</sup> During the hearings’ first week, roughly two-thirds of American households with television sets watched the hearings. Perhaps most remarkably, stores reported an increase in TV sales during the hearings, even amid a drop in overall daytime shopping, as people stayed home to watch them.<sup>474</sup> An estimated forty-five million Americans, or over a quarter of the total population of the country, watched at least part of the live telecast.<sup>475</sup> Print media were no less invested, with major national newspapers devoting multipage spreads to the hearings every day, to such an extent that other national news was largely crowded out.<sup>476</sup>

The Army entered the hearings with a costuming advantage: all of those television viewers (and viewers of the photographs accompanying print articles) would have observed the Army’s civilian leadership “surrounded by generals and colonels” in uniform.<sup>477</sup> For a nation less than a decade

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468. *Id.* at 407–09.

469. SHOGAN, *supra* note 428, at 135.

470. *Id.* at 140.

471. *Id.* at 3.

472. *Id.* at 6. For a stunning photograph of the “chaos of cameras” set up in the hearing room, see *Chaos of Cameras* (photograph), in LIFE, July 26, 1954, at 106.

473. SHOGAN, *supra* note 428, at 11–12, 140–41.

474. OSHINSKY, *supra* note 386, at 416–17. On the theme of people staying home, see Dorothy McCardle, *Canasta Canceled: TV and McCarthy Keep ‘Em Home*, WASH. POST, May 6, 1954, at 53 (available through *ProQuest Historical Newspapers*) (“Washington hostesses, many of whom are usually out to luncheons and teas every day in the week, have been staying home . . . to watch the McCarthy-Army row.”).

475. SHOGAN, *supra* note 428, at 12 (providing the forty-five million estimate). The Census Bureau estimates that the American population in 1954 was just over 163 million. *Historical National Population Estimates, July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU (2000), <https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt> [<https://perma.cc/6MA5-KX9M>].

476. See OSHINSKY, *supra* note 386, at 417.

477. *Id.* at 421. For still photographs displaying the military uniform to full effect, see, for example, *Gives First-Hand Report* (photograph), in N.Y. TIMES, May 25, 1954, at 1; Murrey Marder, *McCarthy and Aides Perverted Power to Force Promotion of David Schine, Stevens Testifies in Army Inquiry*, WASH. POST, Apr. 23, 1954, at 1; Photographs of Secretary Robert T. Stevens and Major General Miles Reber, in N.Y. TIMES, Apr. 23, 1954, at 1.

removed from World War II and less than a year removed from the Korean armistice, a nation that had just elected the first military general to the presidency since Benjamin Harrison in 1888, the uniforms undoubtedly made a powerful statement.

The contending sides also made very different scripting choices, with significant consequences. McCarthy's style was to badger, bluster, and interrupt as much as possible. Before the first witness could be called, he had already raised a point of order,<sup>478</sup> and he was to raise countless more in the coming weeks. Indeed, one of the major biographies of McCarthy titled its chapter on the Army-McCarthy hearings "Point of Order"<sup>479</sup> and noted that such points were "a procedural subterfuge he would employ hundreds of times throughout the hearings to interject commentary."<sup>480</sup> Welch, on the other hand, was far more retiring and reluctant to interject himself into the proceedings—but he was also incredibly well prepared, which allowed him to engineer dramatic plot twists. McCarthy and Cohn claimed that any special treatment of Schine arose not from any pressure brought to bear by Cohn but rather from the Army's improper attempts to curry favor with the subcommittee and get it to back off its investigation. To this end, McCarthy-sympathetic subcommittee counsel Ray Jenkins introduced a photograph (that he had received from Cohn) of Schine with a smiling Secretary of the Army Robert Stevens.<sup>481</sup> Within a day, however, Welch was able to demonstrate that the photo was misleading. It was originally a group picture, cut down to make it appear as if Stevens and Schine had been alone.<sup>482</sup> Welch's revelation of the deception garnered a four-column headline in the next day's *Times*,<sup>483</sup> and the *Post*'s headline—running three lines across the entire front page—noted that both sides had been warned about the possibility of perjury charges being filed.<sup>484</sup> As David Oshinsky has noted, Welch's preparation allowed him "with enormous skill . . . to rekindle memories of the dishonest McCarthy"<sup>485</sup>—that is, to use the dramatic device of a plot twist in order to make an ethical argument about his antagonist. In *Time* magazine's estimation, this skill defined Welch as "easily the

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478. OSHINSKY, *supra* note 386, at 417.

479. REEVES, *supra* note 420, at 595–637.

480. *Id.* at 596; *see also* SHOGAN, *supra* note 428, at 170 (noting McCarthy's "inevitable points of order"). This was well-recognized at the time. *See, e.g.*, Editorial, *Mr. M'Carthy's Filibuster*, N.Y. TIMES, May 7, 1954, at 22 (available through *ProQuest Historical Newspapers*) (noting McCarthy's "constant use of 'points of order,' which anyone who saw or read the hearings would agree were to a large extent points of disorder"); *Trial By Television I: The Ordeal of Stevens*, NEW REPUBLIC, May 10, 1954, at 6 ("He broke up every line of argument with points of order.").

481. *See* OSHINSKY, *supra* note 386, at 422–24.

482. *Id.* at 424–25.

483. W. H. Lawrence, *Army Charges a 'Doctored' Picture Was Submitted by M'Carthy's Side; Cohn, in Wrangle, Admits It Was Cut*, N.Y. TIMES, Apr. 28, 1954, at 1 (available through *ProQuest Historical Newspapers*).

484. Murrey Marder, *Stevens Denies Charges Point by Point; Army, McCarthy Warned on Perjury; Quiz in Uproar Over 'Cropped' Photo*, WASH. POST, Apr. 28, 1954, at 1 (available through *ProQuest Historical Newspapers*).

485. OSHINSKY, *supra* note 386, at 427.

smoothest performer . . . in the McCarthy-Army hearings . . . a superb actor.”<sup>486</sup>

McCarthy tried to counter with the clever use of a prop. After teasing it once, he pulled out of his briefcase what he claimed was a “carbon copy” of a letter that FBI Director J. Edgar Hoover had written to the Army in 1951 containing a list of thirty-four possible subversives at Fort Monmouth.<sup>487</sup> If this letter were accurate, it would indeed suggest that the Army had deliberately ignored Communist infiltration of the Signal Corps. Again, Welch’s preparation paid off: he immediately questioned the letter’s authenticity, having not come across it in the weeks he had spent going through the Pentagon’s files on McCarthy and Communist subversion.<sup>488</sup> The next day, a subcommittee aide who had been sent to talk to Hoover reported that the letter did not come from the FBI’s files. The FBI had written a fifteen-page memo that it sent to the Army in 1951 on a similar topic containing some of the same language, but the actual FBI memo emphasized that the claims related therein were “unevaluated.”<sup>489</sup> Welch pointedly pressed the subcommittee aide: “So far as you know, this is a carbon copy of precisely nothing.” The aide replied: “So far as I know, it is, yes.”<sup>490</sup> McCarthy himself was then called to the stand, where he refused to answer Welch’s questions about where he got the “carbon copy.”<sup>491</sup> The *Post*’s headline—“McCarthy Won’t Name Informant”<sup>492</sup>—was striking, given how much hay McCarthy himself had made of other witnesses’ refusals to answer questions before his subcommittee. The *Post* also editorialized about this “second forgery” (after the cropped photograph) that constituted “a fraud and a hoax on the Senate and on the American people.”<sup>493</sup>

At this point, recognizing that the hearings were shaping up badly for McCarthy, subcommittee member and McCarthy ally Everett Dirksen (R-IL) proposed that the remaining hearings be truncated and—crucially—not televised.<sup>494</sup> Chairman Mundt, who desperately wanted to follow this course of action, was bound by an earlier promise not to end the hearings early if any of the principal parties objected. Secretary of the Army Robert Stevens, with Eisenhower’s support, objected, and the hearings continued.<sup>495</sup> In this context of an already wounded McCarthy, Flanders took to the Senate floor

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486. *The Other Joe*, TIME, May 17, 1954, at 29; see also SHOGAN, *supra* note 428, at 188 (calling Welch the hearings’ “star performer”).

487. OSHINSKY, *supra* note 386, at 429.

488. SHOGAN, *supra* note 428, at 191.

489. *Id.* at 192–93.

490. OSHINSKY, *supra* note 386, at 430.

491. *Id.* at 431–32.

492. Murrey Marder, *McCarthy Won’t Name Informant*, WASH. POST, May 6, 1954, at 1 (available through *ProQuest Historical Newspapers*).

493. Editorial, *Doctored Letter*, WASH. POST, May 6, 1954, at 14 (available through *ProQuest Historical Newspapers*); see also *The Terror of Tellico Plains*, TIME, May 17, 1954, at 28 (“McCarthy’s doctored picture, which [Jenkins] accepted at face value, should have made him wary of all McCarthy exhibits. Yet a week later he accepted McCarthy’s phony ‘FBI letter’ with the assumption that it was authentic.”).

494. OSHINSKY, *supra* note 386, at 436.

495. *Id.* at 436–38.



again to deliver “one of the meanest attacks on a fellow member in years.”<sup>496</sup> This speech contained some of the same folksiness of his earlier attack, referring to McCarthy as “Dennis the Menace” and noting that “[o]ur busy Senator does get us adults into all kinds of trouble.”<sup>497</sup> But it also contained more sober accusations, explicitly comparing McCarthy to Hitler<sup>498</sup> and suggesting that Moscow was not displeased with the Senator’s activities: “One of the characteristic elements of Communist and Fascist tyranny is at hand, as citizens are set to spy upon each other . . . . Were the junior Senator from Wisconsin in the pay of the Communists, he could not have done a better job for them.”<sup>499</sup> Flanders’s speech also contained thinly veiled homophobic references to the rumored relationship between Cohn and Schine, asking why Cohn “seems to have an almost passionate anxiety to retain [Schine].”<sup>500</sup> Once again, the press took note.<sup>501</sup>

The most immediately and enduringly famous moment of the Army-McCarthy hearings came a little over a week after Flanders’s speech. Welch and Cohn, with McCarthy’s blessing, had earlier struck a side deal: neither Cohn nor McCarthy would mention that an associate at Hale and Dorr named Fred Fisher had several years earlier belonged to the National Lawyers Guild, an organization deemed “subversive” by the House Un-American Activities Committee. Fisher had initially been tasked to help Welch represent the Army, but when he volunteered his previous affiliation to Welch, he was asked to step away from the matter. Fisher therefore did almost no work on the Army-McCarthy hearings. In exchange for agreeing not to bring up Fisher’s name, Welch agreed not to ask how it was that Cohn had never been drafted into the armed forces.<sup>502</sup> On June 9, while Cohn was testifying—and much to his dismay—McCarthy got frustrated with the questioning and broke the deal, interrupting the testimony to announce that Welch “has in his law firm a young man named Fisher whom he recommended, incidentally, to do work on this committee, who has been for a number of years a member of an organization which was named, oh, years and years ago, as the legal bulwark of the Communist Party.”<sup>503</sup> Again, Welch was prepared, having scripted his famous response in advance. After demanding that McCarthy stop speaking to an aide and pay attention to what he was saying, Welch continued: “Until this moment, Senator, I think I never really gauged your cruelty or your recklessness.”<sup>504</sup> He then recounted how Fisher had

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496. *Id.* at 451.

497. 100 CONG. REC. 7389 (1954).

498. *Id.*

499. *Id.* at 7390.

500. *Id.*

501. Robert C. Albright, *M’Carthy Hit as Menace by Flanders*, WASH. POST, June 2, 1954, at 1 (available through *ProQuest Historical Newspapers*); William S. White, *Flanders Likens M’Carthy, Hitler*, N.Y. TIMES, June 2, 1954, at 1 (available through *ProQuest Historical Newspapers*).

502. OSHINSKY, *supra* note 386, at 457–60; REEVES, *supra* note 420, at 589, 628–30; SHOGAN, *supra* note 428, at 222–23.

503. OSHINSKY, *supra* note 386, at 461.

504. *Id.* at 462.

volunteered the information of his previous Guild membership and been asked to step away from work on the hearings, and Welch reiterated his support for Fisher. “Little did I dream you could be so reckless and so cruel as to do an injury to that lad.”<sup>505</sup> When McCarthy persisted in talking about Fisher, Welch delivered his coup de grâce: “Have you no sense of decency, sir, at long last? Have you left no sense of decency?”<sup>506</sup> After another brief back-and-forth, Welch announced that he was done questioning Cohn.<sup>507</sup>

The hearing room erupted in applause; Chairman Mundt, who had previously kept a tight leash on disruptions from the gallery, made no attempt to silence it.<sup>508</sup> As Robert Shogan noted,

The impact of Welch’s rebuke was heightened by the dexterity of the TV camera crews. Three separate cameras were aimed at each of the principals in this climactic exchange—McCarthy, Cohn, and Welch, catching them not only as they spoke but as they reacted to the words of the others. As for McCarthy, he seemed in a state of shock.<sup>509</sup>

The press immediately recognized this as a crucial moment. The *Times* and the *Post* both splashed it across multiple columns of the front page; in the *Times*, it was accompanied by a photograph of Welch “near tears,” while the *Post* helped its readers know with whom to side by mentioning the audience applause in its headline.<sup>510</sup>

It would be a mistake to describe the exchange over Fisher as a turning point. It was more of a culmination or crystallization of the overall impression of the hearings to that point,<sup>511</sup> an impression that called on memories of overspeech going back to the Tydings committee. McCarthy’s net favorability rating in Gallup polls, which had stood at +21 in January 1954, stood at -11 by June, and it would never recover.<sup>512</sup> Two days after the Fisher exchange, Ralph Flanders engaged in a brilliant piece of overspeech. While McCarthy was on the stand testifying, Flanders—who was not a member of the subcommittee—walked up and handed him a note. The note, which McCarthy dutifully read aloud, informed him that Flanders intended that afternoon to make another floor speech about McCarthy. Chairman Mundt, obviously baffled, asked Flanders to withdraw, but

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505. *Id.*

506. *Id.* at 463.

507. *Id.* at 464.

508. *Id.*

509. SHOGAN, *supra* note 428, at 226–27.

510. W. H. Lawrence, *Welch Assails M’Carthy’s ‘Cruelty’ and ‘Recklessness’ in Attack on Aide; Senator, on Stand, Tells of Red Hunt*, N.Y. TIMES, June 10, 1954, at 1 (available through *ProQuest Historical Newspapers*); Murrey Marder, *Welch Excoriates McCarthy as ‘Cruel,’ Lacking ‘Decency’; Draws Audience Applause*, WASH. POST, June 10, 1954, at 1 (available through *ProQuest Historical Newspapers*); see also *The Gauge of Recklessness*, TIME, June 21, 1954, at 23 (noting contemporaneously that it “will probably be remembered as the most memorable scene of the McCarthy-Army hearings”).

511. See OSHINSKY, *supra* note 386, at 464 (noting the “cumulative impression of [McCarthy’s] day-to-day performance—his windy speeches, his endless interruptions, his frightening outbursts, his crude personal attacks”).

512. *Id.* at 464–65.

Flanders had already accomplished his goal: everyone watching the hearings on television and every newspaper editor planning the next day's front page had advance notice of Flanders's next move.<sup>513</sup> That next move was to introduce a resolution stripping McCarthy of his committee and subcommittee chairmanships.<sup>514</sup> Flanders's resolution was featured on the front page of the next day's *Times* and *Post*, both of which ran it alongside a photo of Flanders handing McCarthy the note.<sup>515</sup>

The next month, after the Army-McCarthy hearings had come to a close, Flanders withdrew that resolution and substituted one condemning McCarthy for "conduct . . . unbecoming a Member of the United States Senate . . . and tend[ing] to bring the Senate into disrepute."<sup>516</sup> The galleries were packed for Flanders's speech introducing the censure resolution.<sup>517</sup> After several days of debate, the Senate referred the resolution to a six-person special committee, made up of three members of each party, all of whom were long-standing and well-respected members of the chamber. Republican Arthur Watkins of Utah would be the chair.<sup>518</sup>

The Watkins committee hearings would perform calmness and solemnity as a form of rebuttal to the manner in which McCarthy himself held hearings, a fact not lost on observers. As anti-McCarthyite journalist Alan Barth put it, the Watkins committee was "in almost every important respect the antithesis" of the McCarthy-led Permanent Subcommittee on Investigations.<sup>519</sup> In marked contrast to the Army-McCarthy hearings, they barred television cameras from the proceedings.<sup>520</sup> The *New York Times*'s front-page report on the first day of Watkins committee hearings noted that, when McCarthy's continual raising of objections disturbed the "court-like calm" of the hearings, Watkins "silenced [him] as being out of order."<sup>521</sup>

The Watkins committee's report was released in late September, about five weeks before the midterm elections in which Democrats retook control of both houses of Congress, a result at least partially attributable to public disgust with McCarthyism.<sup>522</sup> Less than a month later, the full Senate voted to censure McCarthy by a lopsided 67 to 22 vote.<sup>523</sup> The *Times* editorialized

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513. *Id.* at 466–67.

514. 100 CONG. REC. 8033 (1954).

515. Robert C. Albright, *Flanders Demands McCarthy Answer Queries on Finances or Lose Key Chairmanships*, WASH. POST, June 12, 1954, at 1 (available through *ProQuest Historical Newspapers*); C. P. Trussell, *Flanders Moves in Senate to Strip McCarthy of Posts*, N.Y. TIMES, June 12, 1954, at 1 (available through *ProQuest Historical Newspapers*).

516. S. Res. 301, 83d Cong. (1954).

517. 100 CONG. REC. 12,729 (1954).

518. CHAFETZ, *supra* note 53, at 265; OSHINSKY, *supra* note 386, at 476–77.

519. ALAN BARTH, GOVERNMENT BY INVESTIGATION 201 (1955).

520. OSHINSKY, *supra* note 386, at 477.

521. Anthony Leviero, *New Inquiry Is on: McCarthy Gaveled Down as He Persists in Plea to Discredit Johnson*, N.Y. TIMES, Sept. 1, 1954, at 1 (available through *ProQuest Historical Newspapers*).

522. OSHINSKY, *supra* note 386, at 483; REEVES, *supra* note 420, at 652–54.

523. James Reston, *Final Vote Condemns M'Carthy, 67-22, for Abusing Senate and Committee; Zwicker Count Eliminated in Debate*, N.Y. TIMES, Dec. 3, 1954, at 1 (available through *ProQuest Historical Newspapers*).

that, by censuring McCarthy, “the Senate of the United States has done much to redeem itself in the eyes of the American people,” and noted that the Watkins committee “conducted a model inquiry.”<sup>524</sup> Four days later, an angry outburst against Eisenhower would earn McCarthy his last front-page story until his obituary.<sup>525</sup> He would remain in the Senate for two and a half years longer, “shunned by his political allies [and] ignored by the press.”<sup>526</sup> In May 1957, he died from alcoholism.<sup>527</sup>

Overspeech is central to the McCarthy story at every turn. His speeches on the Senate floor and his performance before the Tydings committee were vital to his building a national constituency. His careful stage management of Permanent Subcommittee on Investigations hearings—including his understanding of the potential of television as a medium of political communication—made him into one of the most powerful people in the nation. But overspeech was also essential to the pushback against McCarthy from the beginning, ranging from Millard Tydings’s use of props, to Joseph Welch and the Army’s uses of scripting and costuming, to Ralph Flanders’s combination of folksy mockery, insulting innuendo, and devious spotlight-stealing. Initially, by figuring the choice as being either with him or with the Communists, McCarthy was able to silence a lot of would-be critics. But the divisiveness that initially served him so well eventually turned on him, by ensuring that he had a dedicated cadre of enemies eager to see him fall. McCarthy, who rose to prominence through overspeech, was brought low by the same.

#### CONCLUSION

Oversight is one of Congress’s most important functions. It makes the “intelligent exercise” of all other congressional powers possible,<sup>528</sup> but it also makes it possible for Congress to shape the exercise of *public* intelligence and judgment. It is this second way of using the tools of oversight—not as a means for Congress to inform itself but rather as a means to communicate with the public—that I have referred to as overspeech. As the case studies above demonstrate, overspeech, like any political tool, is no better than the actor wielding it. But the purpose for which it is wielded notwithstanding, this Article has demonstrated both that overspeech is a common phenomenon and that it is an *institutionally* valuable one, providing Congress with important tools to compete with the other branches for public support and, therefore, for power.

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524. Editorial, *Censure*, N.Y. TIMES, Dec. 3, 1954, at 26 (available through *ProQuest Historical Newspapers*); see also Editorial, *Judgment of the Senate*, WASH. POST, Dec. 3, 1954, at 20 (available through *ProQuest Historical Newspapers*) (calling the censure “a vindication of the Senate’s honor”).

525. OSHINSKY, *supra* note 386, at 493.

526. SHOGAN, *supra* note 428, at 260.

527. REEVES, *supra* note 420, at 671–72.

528. Landis, *supra* note 91, at 205.