Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts

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INTRODUCTION

A decade ago, in Morrison v. Olson, Justice Scalia was so certain in his lone dissent that the Office of Independent Counsel ("OIC") was a patently unconstitutional institution that he chastised his colleagues:

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.\(^2\)

Ten years later, his cry of wolf was no longer so lonesome. After Independent Counsel Kenneth Starr has spent over $40 million investigating President Clinton, revealed numerous embarrassing details about the President, and expressly urged to the House Judiciary Committee that there were grounds for im-

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2 Id. at 699 (Scalia, J., dissenting).
peaching the President (which the full House eventually did), a bipartisan chorus grew hoarse crying "Wolf!" Liberals and Democrats in particular uncharacteristically offered praise to Justice Scalia for his "prescience" and wise "prophecy." Noting this strange bedfellows phenomenon, veteran New York Times correspondent Linda Greenhouse remarked that during the impeachment proceedings: "[t]he Scalia dissent in Morrison v. Olson is being cited and passed around in liberal circles like samizdat." To some extent, in this article we join the chorus of those who cry "wolf." However, we do not blame the wolf for fulfilling its nature and being a wolf: i.e., proceeding without accountability, expanding its prosecutorial scope, employing aggressive prosecutorial methods, feasting on a virtually unlimited budget, and tending toward political jihad. Rather, this article focuses on the one way in which the wolf has even today sometimes hidden


4 Linda Greenhouse, Blank Check; Ethics in Government: The Price of Good Intentions, N.Y. TIMES, Feb. 1, 1998, at 1. To the 0.17% of the population that knows the meaning of "samizdat," or to those who take the time to look it up, Greenhouse turned a great phrase. Samizdat refers to suppressed materials that were secretly circulated among Russian intellectuals in the former Soviet Union. See Charles Alan Wright & Kenneth W. Graham, Jr., 30 FED. PRAC. & PROC. EVID. §6343 n.15. "For those who have forgotten, 'samizdat' is a Russian word that came to refer to unpublished manuscripts.


6 The sound and fury of Democrats in this regard merely echoes the howls of protest by Republicans in the Reagan era. Independent Counsel Kenneth Starr has yet to break the records for the longest or most expensive OIC reign, both of which were set investigating officials in the Reagan administration. Laurence Walsh, who investigated the "Iran-Contra" scandal for six years, spent the most - $48.5 million. See Marc Lacey & Eric Lichtblau, Independent Counsel Law Faces Reform - or demise, L.A. TIMES, Feb. 24, 1999, at A1. The eight-year investigation of Reagan administration Housing Secretary Samuel Pierce was the longest. Id. See also Susan Page, Are Independent Counsels Out of Control?, USA TODAY, Nov. 14, 1997, at A1. Starr's investigation, however, is not yet complete. Id.
its nature and pretended to be a sheep: namely, when it submits that questions of presidential power and behavior are as suitable for resolution by the courts. The source of the problem, and its wooly disguise, is best described in the words of Independent Counsel Kenneth Starr in his testimony to the House Judiciary Committee:

[The OIC has] been forced to go to court time and again to seek information from the Executive Branch and to fight a multitude of privilege claims asserted by the administration, every single one of which we have won. . . . We go to court and not on the talk show circuit. And our record shows that there is a bright line between law and politics, between courts and polls. It leaves the polls to the politicians and spin doctors. We are officers of the court who live in the world of the law. We have presented our cases in court, and with very rare exception, we have won.7

This article does not dispute that the OIC has been victorious in the legal challenges it has brought; rather, we contend that by using its license to operate outside the normal rules of legislative-executive relations, the OIC forced battles that should never have been fought.

Even if, as his critics claim, President Clinton has had a "habit" of invoking privileges,8 Independent Counsel Starr has appeared at least equally addicted to not taking "no" for an answer. Starr took it upon himself to force disclosures from the President through litigation,9 rather than leave this task to the political branches. The price of such showdowns has been to place before the judicial branch, as opposed to the legislative branch, basically political questions regarding executive immu-

7 Testimony of Kenneth W. Starr, House Judiciary Committee, Nov. 19, 1998 (commenting on efforts of OIC since he assumed control).
8 See William Safire, Privilege Proliferation, N.Y. TIMES, March 5, 1998, A29 (stating President Clinton has not been as reluctant to invoke executive privilege as previous presidents); John C. Yoo, A Privileged Executive?, WALL ST. J., March 2, 1998, at A19 (indicating President Clinton has invoked executive privilege at least six times).
nity and privilege, which can and should be answered only through a delicate balancing of interests. As we will argue, such a political balancing act should, for the most part, be undertaken by Congress, not the judiciary. By forcing a decision in the courts on executive privilege issues, the OIC has destabilized relations between the President and the Congress and altered the relative balance of powers.

This article considers specifically how the OIC has effectively enlisted the judiciary to overstep its role in resolving issues of executive privilege and immunity. Section I summarizes the societal interests that are generally offered to support extending executive privilege and executive immunity. Section II surveys the law of executive privilege and executive immunity, and describes how the interests of the Executive Branch have generally been treated. It concludes that while courts have created a mixture of bright line rules and balancing tests that do not adhere to any unifying doctrine, the touchstone of all parties formerly was one of caution. In any case of first impression, the parties and the courts tend to favor some sort of balancing between, on the one hand, the needs of Congress, the OIC, the criminal justice system, or the civil justice system, and on the other hand, the needs of the President. Section III critiques this balancing act from two perspectives, first, from the traditional view about the flaws of any ad hoc balancing system, and second, from the point of view of advocating judicial restraint when political questions are at issue. Section IV considers how to fulfill the constitutional objectives of "the people," particularly, how the system should address difficult questions of democracy and constitutional definition rather than shuttling these matters off to the most politically unaccountable institutions we have: Article III courts and politically independent prosecutors.

We conclude that in order to maintain a healthy dialogue between the President and Congress, Congress must accede to, and the judiciary should recede from, the balancing of important governmental interests involved in issues of executive privilege and immunity. Critical questions, on which the public should weigh in, involve what the public wants to know from the President, how badly the public wants to know it, and whether the public wants its elected leader reconciled with the law. This may not require courts actually to refrain from deciding constitutional is-
sues when they are presented in a concrete case. Rather, the institutions responsible for investigating presidential misconduct should be reconfigured so as to diminish recourse to the judiciary and to force recourse to more politically accountable actors.

I. THE JUSTIFICATIONS FOR EXECUTIVE PRIVILEGES AND IMMUNITIES

Although courts and commentators have often reflected on the sources and contours of executive power, in the end, there is a noticeable lack of any real authority on the subject. As Justice Jackson put it in a related context:

A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.10

Three decades later, the Court could quote Justice Jackson without the need to make any qualifications.11 Nevertheless, surveying the authority that does exist suggests at least the principal interests that exist for recognizing some form of executive privilege and executive immunity in certain contexts. First, the presidential function is so important to the public interest that it may require insulating Presidents from harassing or distracting litigation burdens, at least while in office. Second, the President, by virtue of his office, may be uniquely vulnerable to collateral litigation, politically inspired attacks, and opportunistic media embarrassment. Third, excusing the President from disclosing information may be necessary because even certain truthful information in the possession of the President, if revealed, may compromise national interests or the stature of the presidency. And fourth, the prospect that information communicated to the President might some day become public may chill advisors and the President from having candid and useful exchanges. We consider each of these inter-

10 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
ests in turn.

A. The Importance of the President’s Time and Attention:

If nothing else, lawsuits accomplish one thing: a vast exchange of information that would otherwise be confidential, embarrassing, guarded, or just numbingly trivial. One of the prices of the rule of law is that any individual, no matter how important his or her responsibilities, may be hurled into this information pit if a colorable legal claim is made against that person.

Courts have found limited ways to show some respect for the time of people whose work-presence is in great demand and is required for important things. As a practical matter, for example, discovery referees and judges will tend to place greater limits on the taking of a deposition of a chief executive—denying discovery if the information sought is too tangential, or at least imposing strict limits on deposition scope and length. 12

Arguably, the need for accommodations afforded to, say, the mayor of a city or the CEO of a company pale in comparison to the accommodations needed when the object of the request for information is the President. President Johnson used to complain that during the time he was in the White House, he never went to bed before 1:00 or 2:00 a.m. and never got up after 6:00 or 6:30 a.m. 13 The President is tugged into virtually every world event from representing the U.S. in important foreign policy summits to attending funerals as the United States’ head of state. Because of the demands on their time, Presidents may be more vulnerable to litigation burdens than ordinary litigants, and this could harm the public interest. As the Supreme Court has observed, “[b]ecause of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.” 14

The burden on the Executive, moreover, is not simply on the President’s time but also upon the time of dozens of people whose accomplishment or non-accomplishment of their function

12 District courts have broad discretionary powers and may even issue stays “if the public welfare or convenience will thereby be promoted.” See Landis v. North American Co., 299 U.S. 248, 256 (1936).
goes largely unseen by the public. Because a President's activities are monitored constantly through various means and by countless people, a President and his staff are particularly susceptible to onerous discovery demands. The entire office — security guards, secretaries, heads of state, photographers, etc. — may have relevant information and be forced to surrender it in litigations. The volume of material responsive to any request may be substantial. The imposition on a President's time thus may go far beyond the President.

B. Vulnerability:

A concern related to the risk to the President's time and attention is that a President is uniquely susceptible to opportunistic "journalism," and being drawn into politically-motivated or collateral litigation. As a general matter, colorable legal claims tend to migrate toward defendants with deep pockets, high public profiles, and/or vast potential enemies. The President meets all of these criteria. As the Supreme Court noted in giving the President immunity from civil suit for actions taken as President:

As is the case with prosecutors and judges — for whom absolute immunity now is established — a President must concern himself with matters likely to 'arouse the most intense feelings.' [In] view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the [Nation].\footnote{Fitzgerald, 457 U.S. at 751.} Of course, the vulnerability of presidents to civil suits for unofficial actions, or actions taken before becoming President, was at the heart of the scandal involving President Clinton.

 Aside from vulnerability ultimately manifested in a civil lawsuit, presidents must endure a more general vulnerability that could lead to the distraction of a lawsuit or an impeachment inquiry, but usually just involves embarrassing opportunistic "journalism." President Johnson's adage that the higher the
monkey climbs up the tree the more you see of his back-side has been proven true time and again. Some media, particularly in the last few years, may be justly criticized for upping the stakes by taking a telephoto lens to the President's "back-side."16

While presidents should not, and could not, be given immunity from having to disclose anything that they would find embarrassing, there may be some legitimate interest in placing limits on what a President is forced to reveal given the unique vulnerability of the President to the distractions of opportunistic "journalism."

A related concern is that if a sitting President is readily susceptible to civil and criminal litigation, a significant premium is placed on every word, action, and disclosure made by the President. This type of disclosure may have an avalanche effect that occasionally warrants allowing a President to remain silent (and suffer its consequences) rather than open his mouth or files and have his entire administration haled before a grand jury. Sometimes any truthful testimony is damaging and may invite collateral litigation; for example, when President Reagan attempted to explain that he was unable to recall events relating to the Iran-Contra controversy, he was accused of being either untruthful or, if truthful, then senile and incompetent. Without immunity or privileges, candor can have civil and criminal implications, as can any perceived lack of candor. Inadvertent failures to produce documents, contradictory testimony, or other snafus — while common in litigation — are particularly damaging to a President. Once forced into civil litigation or criminal litigation, the President may find that the political costs of exercising the rights of an ordinary litigant — to settle a lawsuit to acknowledge failures of memory, or to assert Fifth Amendment privilege — make such rights illusory.

16 Former President Carter used to tell the story of a reporter from a New York paper whose entire task during the 1976 presidential election was to document every instance in his life when Carter had lied. Frustrated that she wasn't able to unearth any instances of lying even from grade school classmates, political rivals, and former employees, the reporter finally turned to Carter's mother, Ms. Lillian, and asked whether Carter had ever told a lie in his entire life. Carter took particular glee in recounting that his mother was willing to concede that he had lied, saying that she was sure he told some white lies. When the reporter demanded to know what Ms. Lillian meant by "white lies," Ms. Lillian explained: "well, you know, how when I greeted you I told you how nice it was to meet you and how pretty you looked . . . "
C. Sensitive Information:

Presidents, by their position, know things that should not be made public because the information is damaging to important national interests or the stature of the presidency. When considering executive privilege, the Supreme Court rejected an "undifferentiated claim of public interest," but was keenly aware of the need for a privilege with respect to "military, diplomatic, or sensitive national security secrets."17

Apart from "sensitive" policy areas is a concern about requiring Presidents to disclose "intimate" information that, although not about substantive policy, would diminish the office of the Presidency if revealed. In this respect a litigation privilege may allow a President to be, for lack of a better term, more presidential. This category of information that hurts the President's stature may include things as varied as the President's choice of underwear,18 sexual activities, or private views about other world leaders. Lawsuits, unfortunately, are uncompromising in their demands. A President who lacks special protections may have to answer questions about private acts or views that, when answered honestly, do real damage to the institution, and when answered elliptically (or dishonestly), do much worse.

D. Chilling Effect:

Perhaps the most common reason offered for giving the President latitude to withhold information is that candor will be compromised, and decision-making will be impaired, if the President and his advisers feel that they will be confronted by their words some time later in some unknown context. As the Supreme Court noted when establishing executive privilege, "[t]he meetings of the constitutional Convention in 1787 were conducted in complete privacy [and] all records of those meetings were sealed for more than 30 years... . . . Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written."19 When the United States Sen-

18 See David M. Stoloff, 'Boxers or Briefs' girl recalls fleeting fame; Question to President now seems tame, WASH. TIMES, Jan. 17, 1999, at A11 (discussing MTV program where Clinton was asked to state his favorite type of undergarment).
ate itself dealt with President Clinton’s impeachment trial for lack of candor, many members commented on the candor and comradery engendered by closed sessions.20

A President, or presidential aide, who believes his or her private statements and actions will be flushed out into public proceedings will likely hold back those statements out of a concern either for appearances or some other self-interest, and ultimately this may undermine the decision-making process. The Supreme Court recognized the “valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.”21 Taking this cue, we offer no further discussion on this point.

E. Summary:

In sum, at least four interests exist that would justify — to some degree or other — granting the President some special privilege or immunity: (1) the time and attention of the President as a unique power in the government, (2) the unique vulnerability of the President to attacks through litigation and media abuses, (3) the need to restrict access to sensitive information held by the President, and (4) the need for candid conversations within the Executive Branch. Our point is not that these interests, as we have described them, compel a legal privilege or immunity of any particular dimension, but rather, that these interests are all important and serious enough that when determining whether such a privilege or immunity exists, these interests deserve thoughtful consideration. The next step is to review how, as a matter of method and doctrine, the other branches of government, primarily the judiciary, have dealt with these interests.

II. DETERMINING EXECUTIVE PRIVILEGE AND IMMUNITY

There are several privileges that executive branch officials

may invoke, and it is important to define precisely what we mean when we use the terms "presidential privilege" and "presidential immunity" in this article. Privileges that may be invoked by executive officials include qualified rights to withhold information regarding state secrets, government informers, pending investigations, and deliberative processes. Executive officials also have qualified immunity for official actions. In this article, however, we are concerned solely with the executive privilege and immunity of the President. A more apt description of this privilege is "presidential communications privilege." Although the privileges of executive officials are "in general no stranger to the courtroom," the "presidential communications privilege" arises relatively rarely, and the same is true for presidential immunity. Thus, the bad news is, whatever the merits of our analysis, there is not likely to be a great deal of opportunity for practical application in this area. The good news is the same.

The leading cases, and there are only a few, involve President Nixon and President Clinton. In each instance, the judiciary performed a rather ad hoc balancing test of executive branch interests versus the interests of Congress, the criminal justice system, or the civil justice system. In general, the resulting standard for executive privilege requires ad hoc balancing in every instance outside of highly sensitive national information. As for executive immunity, the balance tipped so sharply in the President's favor regarding civil immunity for official actions that the Supreme Court formulated a rule of absolute immunity. However, with respect to civil suits while the President is in office but based on unofficial actions outside the "perimeter" of his office, the Supreme Court instructed district courts to perform ad hoc balancing. No case to date has decided the issue of criminal immunity. The relevant cases will be discussed in categories of bright line rules, balancing tests, and no rules at all.

22 See In re Sealed Case, 116 F.3d 550, 557 (D.C. Cir. 1997) [hereinafter "The Espy Case"] (compiling cases of privileges allowed to executive officials). White House counsels have claimed attorney-client privilege for discussions with executive branch officials, including the President, but these claims were rejected. See In re Bruce R. Lindsey, 148 F.3d 1100, 1114 (D.C. Cir. 1998); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 925 (8th Cir. 1997).


24 The Espy Case, 116 F.3d at 573.

25 Id. at 558-59.
A. Bright Line Rules:

As a panel of the D.C. Circuit remarked as recently as 1997, the cases involving President Nixon remain "the leading – if not the only – decisions on the scope of the presidential communications privilege." The basic doctrine of the presidential communications privilege is a case-by-case balancing test. But when the Supreme Court initially established this framework, certain highly sensitive presidential communications were excluded from the balance. The holding of United States v. Nixon is that when a "generalized interest in confidentiality" is asserted, that interest can be overcome by an adequate showing of need for use in a criminal trial. The Court expressly distinguished more particularized claims of privilege, such as for "military, diplomatic, or sensitive national security secrets." The D.C. Circuit interprets this reservation as implying that "claims of privilege for military and state secrets would be close to absolute." The public interest in the confidentiality of such information so greatly outweighs most needs that no ad hoc case-by-case balancing would really be necessary.

For presidential immunity, there is absolute immunity from civil suit for official actions taken as President. This immunity is grounded in the "unique position in the constitutional scheme" occupied by the President, as well as a weighing of the potential detriment to the public interest in having a President distracted or fearful of civil lawsuits, which the Court believed were very much possible given the President's "sheer prominence" as an "identifiable target for suits for civil damages." The perceived threat to the public interest goes beyond mere distraction, however, because the Court concluded that "[a]mong the most persuasive reasons supporting official immunity" was concern that the President might be excessively cautious in the discharge

26 Id. at 562-63.
28 The Espy Case, 121 F.3d at 743 n.12. See also MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 6.01[1] (1998) "To the extent that the material sought to be protected extends to military, diplomatic, or sensitive national security interests, it is absolutely protected under an executive privilege that covers such matters." Id.
30 See id. at 749.
31 Id. at 752-53.
of official duties out of fear of civil damages. After balancing the interests, the balance tipped so sharply in favor of the President that the Court was able to lay down a bright line rule.

B. Ad Hoc Balancing Tests:

The core of the presidential communications privilege involves generalized interests in confidentiality, rather than specific claims relating to national security. For such claims, the Supreme Court has held that case-by-case balancing, usually including in camera inspection of the evidence by a trial judge, is the proper approach to resolving these disputes. The doctrine is succinctly stated as follows:

The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents in camera to excise non-relevant material.

What is an "adequate showing of need?" In United States v. Nixon, the Court stated that the presidential communications privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial," the material must be "essential to the justice of the [pending criminal] case," and the material must be "shown to have some bearing on the pending criminal cases." In The Espy Case, the D.C. Circuit could not makes heads or tails of these cryptic assertions, whether the evidence need only be "relevant" to a criminal case, or whether it must be "critical to an accurate judicial determination."

32 See id. at 752 n.32.
33 The Espy Case, 121 F.3d at 744-45.
35 The Espy Case, 121 F.3d at 753-54. Compounding the confusion was that the Court in Nixon stated that "on the basis of our examination of the record," the Court was satisfied that a sufficient showing of need was made, but the Court never elaborated on what it saw in the record that it found so satisfying. Id. For an interesting deciphering of what the Court meant by "need" in United States v. Nixon, see Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L. J. 2133, 2169-70 (1998). Kavanaugh
D.C. Circuit set forth a two-part test for adequate need: “first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.” The ad hoc balancing of United States v. Nixon has also been held to apply in three civil cases, but none of these decisions reached the Supreme Court.

The ad hoc balancing of the presidential communications privilege has also been applied in contexts not involving requests for information in criminal and civil cases. Congress can require by law that the President (or a former President) disclose information, and the Court looks to whether the request is “unduly disruptive of the Executive Branch.” When former-President Nixon refused to turn over materials from his presidential papers to government archivists acting under the authority of the Presidential Recordings and Materials Preservation Act of 1974, the Court held that this “limited intrusion into executive confidentiality” was warranted given the “substantial public interest” in a “desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to [Nixon’s] resignation.”

With respect to presidential immunity, the President has no immunity from civil suits for unofficial action. Thus, the Supreme Court held that Paula Jones’ sexual harassment lawsuit was allowed to proceed against President Clinton while he was in office. However, the Supreme Court found “there is no reason to assume that the District Courts will be either unable to ac-

concluded that no showing beyond relevance is necessary to defeat a generalized claim of executive privilege. Id. The author, who worked with the Independent Counsel, argued that Judge Silberman had the proper analysis in United States v. North, even though his colleagues on the D.C. Circuit did not agree in the Espy case. See also United States v. North, 910 F.2d 843, 950-53 (D.C. Cir. 1990) (Silberman, J., concurring in part, dissenting in part). Judge Silberman argued that only a showing of relevance was required. Id.; The Espy Case, 121 F.3d at 753-54. This case took exception to Judge Silberman’s position and required a showing beyond mere relevance. Id.

36 Id. at 754.


39 Id. at 453.

commodate the President's needs or unfaithful to tradition – especially in matters involving national security – of giving 'the utmost deference to Presidential responsibilities.' The district courts were thus directed to balance the competing needs of the civil plaintiff, the President, and the public interests the President embodies.

There have been other instances when a President's testimony or evidence is necessary in a legal proceeding that is not directed at the President, and the courts have made accommodations without incident. Presidents have preferred to give testimony voluntarily and can use the threat of executive privilege as a way of dictating the terms of their participation. In fact, no sitting President has ever testified, or been ordered to testify, in open court. President Jefferson, for example, was excused as a witness in Marbury v. Madison, based apparently on an accommodation between the parties and the Court. President Grant voluntarily gave a written deposition in a criminal case instead of appearing in person, President Carter gave videotaped (as opposed to live) testimony at a criminal trial, and President Ford agreed to appear by deposition in a criminal trial (rather than give live testimony) against his would-be assassin, Squeaky Fromme. Even President Clinton twice gave videotaped testimony in criminal proceedings involving defendants in the Whitewater case without raising any fuss. In practice, therefore, Courts generally accept limited compliance from the President when the President is not the focus of the proceeding.

C. No Doctrine:

There are two significant areas of presidential communications privilege and presidential immunity that are almost completely without doctrine. First, courts have formulated very little doctrine regarding congressional requests for information as part of congressional oversight and investigations. Second, courts have

41 Id. at 709.
42 See id. at 692 n.14.
43 See id. at 705 (collecting examples of presidential testimony in judicial proceedings).
never been called upon to decide whether a sitting President has immunity from criminal proceedings, in particular, a criminal indictment.

As of 1974, thirteen presidents had resisted twenty requests for documents that Congress sought regardless of the President's private opinion. The basis presidents asserted for withholding documents included concerns that disclosure would not be in the public interest, that the information relates to matters falling outside the legislatures' competence, or that disclosing the information would unfairly injure innocent persons' reputations. Historically, Presidents did not obtain judicial determinations, because the only means of doing so would be to refuse to produce the information, accept a citation for contempt of Congress, and then either challenge the citation or wait for Congress to try to enforce it. Accordingly, "[t]o avoid extreme 'brinksmanship' on the part of both branches, most disputes over requested information were resolved through negotiation, without a formal privilege claim." Presidents Lincoln and Roosevelt voluntarily appeared before congressional committees. President Grant voluntarily sent a deposition in a congressional investigation. In response to a committee summons, ex-president John Tyler testified, and former president John Quincy Adams also sent a deposition.

In those rare instances where Presidents have not complied with subpoenas, Congress has tended to back down. These, included, for example, President Truman's decision to ignore a subpoena from the House Un-American Activities Committee.

45 See Archibald Cox, Executive Privilege, 122 U. PA. L. REV. 1383, 1395-1405 (1974) (indicating past presidents bespoke of a broad discretion). Compare The Espy Case, 121 F.3d at 739 n.9 ("Although scholars dispute how often Presidents have actually refused to provide Congress with information on grounds of executive privilege, debate over the President's ability to withhold confidential information from Congress has occurred since the early years of our nation . . . .").

46 Among others, President Washington gave Congress information on General St. Clair's military expeditions, but did so only after taking "an affirmative position on the right of the executive branch to withhold information." See MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 34 (1994). Washington in fact later invoked executive privilege and refused to comply with the Senate's request for the correspondence of French Minister Morris and the House's request for information relating to negotiation of the Jay Treaty. Id. at 35. President Adams asserted his right to withhold information during the XYZ Affair in 1798. Id. at 36.


48 Id.

49 See Cox, supra note 45, at 1395-1405 (acknowledging that there is no common practice in Executive Branch for responding to Congressional requests).
and give no direct response or explanation to Congress.\textsuperscript{50} In each instance, Congress did not invoke its contempt powers, despite threats to the contrary. For example, when the Senate threatened to imprison an executive in the Theodore Roosevelt administration for not producing certain data, President Roosevelt reportedly "with great relish ordered the papers to the White House and challenged the Senate to come and get them." It never did.\textsuperscript{51}

More recently, Presidents have developed specific protocols for when they will not comply with congressional requests for information, and the principles supporting any claim of privilege.\textsuperscript{52} The Reagan White House determined that it would not disclose "national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities."\textsuperscript{53}

Surveying the actual case law in this area, the D.C. Circuit recently acknowledged that judicial intervention has been reluctant and mercifully rare. "[T]he courts have been drawn into executive-congressional disputes over access to information on only three recent occasions."\textsuperscript{54} In those instances, the courts have tended to favor requiring the political branches to work out some sort of compromise. For example, in AT&T, the D.C. Circuit was confronted with a request by a House Committee for materials relating to warrantless wiretaps allegedly authorized by the Executive Branch. Rather than resolve the dispute on its merits, the Court of Appeals remanded the dispute, suggesting the parties settle: "This dispute between the legislative and executive

\textsuperscript{50} See ROZELL, supra note 46, at 43. Truman responded through an executive order insuring the confidentiality of loyalty files, and he even directed members of his staff not to appear before the committee after they had been subpoenaed to appear. \textit{Id}.

\textsuperscript{51} See ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 84 (1973); ROZELL, supra note 46, at 42. Roosevelt told Congress it would have to impeach him to obtain the documents. \textit{Id}.


\textsuperscript{53} \textit{Id}.

\textsuperscript{54} The Espy Case, 121 F.3d at 739 n.10. See United States v. AT&T, 551 F.2d 384, 395 (D.C.Cir. 1976) (court encouraged settlement); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (holding that subpoenaed materials were not "critical to the performance" of the committee's legislative functioning, therefore it was not necessary to disclose them); United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (stating that while settlement of intra-governmental constitutional disputes is favored, judicial intervention should be avoided until it is necessary).
branches has a least some elements of the political-question doctrine. A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance."  

When the Department of Justice and the House still were not able to hammer out a resolution, the Court imposed a compromise on the parties, applying relatively pliant standards of review in an approach the D.C. Circuit dubbed "gradualism," as in a gradual move toward settlement.  

Similarly, in a 1983 case, the House of Representatives cited EPA Administrator Anne Gorsuch with contempt for failure to produce documents to Congress. The U.S. Attorney who received the contempt referral refused to prosecute, and the Department of Justice sought a declaratory judgment to invalidate the House subpoena, which was the occasion for judicial involvement. The court dismissed the suit and urged the parties to "settle their differences without further judicial involvement," basically counseling that "[c]ompromise and cooperation, rather than confrontation, should be the aim of the parties."  

With respect to the judicial role, the court stated that in such a dispute, "judicial intervention should be delayed until all possibilities for settlement have been exhausted."  

Unlike confrontations over information between the President and Congress, the courts have not even had the opportunity to abstain from deciding whether or not a sitting President is immune from a criminal indictment. It has been widely reported that the Whitewater Independent Counsel Kenneth Starr believes a sitting president can be indicted. Others, most notably

55 United States v. AT&T, 551 F.2d at 394.
58 Id. at 152. Compare Senate Select Committee, 498 F.2d at 731 (preceding United States v. Nixon and holding that President did not have to turn over tapes to Senate committee because Senate committee had not demonstrated that tapes were "demonstrably critical to the responsible fulfillment of the Committee's functions," mainly because tapes were already in possession of another congressional committee).
59 See Linda Greenhouse, Indicting a President, N.Y. Times, Feb. 1, 1999, at Al (noting general consensus that presidential immunity from criminal prosecution is not explicitly provided by Constitution and has not been challenged).
60 See Don Van Atta, Jr., Starr is Weighing Whether To Indict Sitting President, N.Y. Times, Jan. 31, 1999, at 1.
Robert Bork, believe an indictment of a sitting President would be unconstitutional. Justice Departments under both Democrats and Republicans have taken the position that a sitting President cannot be indicted. At the time of this writing, there remains speculation that Independent Counsel Starr will test his constitutional hypothesis. Such testing of constitutional limits by the OIC is at the heart of this article's concerns.

D. Summary:

The only method that the judiciary has developed for resolving disputes over the presidential communications privilege and presidential immunity is to balance the competing interests of the various branches of government and the public, or at least such balancing appears to be the driving force behind the decisions. In some cases, the balance so clearly tips in favor of the President that a bright-line rule is formulated. More often, however, the judiciary can offer nothing more than ad hoc case-by-case balancing of interests.

III. CRITIQUING DECISIONS ON EXECUTIVE PRIVILEGE AND IMMUNITY

Contemporary commentators speaking of United States v. Nixon made the following appraisal, which, with modifications, fits all of the presidential privilege and immunity cases: "the principal argument for limiting [or accepting] presidential discretion—for drawing the boundaries of law so as to include a presidential duty to disclose [or privilege not to disclose] evi-

62 See David A. Strauss, Indicting the President, N.Y. TIMES, Feb. 2, 1992, at A19 (cautioning that indicting sitting president would be extraordinary act).
63 Although the constitutionality of indicting a sitting President remains an open question, a small step toward a judicial decision in this regard came when Judge Susan Webber Wright cited President Clinton for civil contempt, under Federal Rule of Civil Procedure 37 and the inherent authority of the district court, for impeding discovery with false and misleading answers in this civil deposition. See Jones v. Clinton, 1999 U.S. Dist. LEXIS 4515 (E.D. Ark. April 12, 1999). Judge Wright's contempt citation, which consisted of a rebuke, monetary sanctions, and referral to the Arkansas Supreme Court for disciplinary proceedings, avoided the serious constitutional objections to jailing a sitting president; Judge Wright recognized that "significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties." Id. at *21. Nevertheless, Judge Wright acknowledged that she was committing a significant first: no court had ever held a President in contempt of court. Id. at *18.
dence – was an appeal to the importance of the interests that would be harmed if the claim of presidential discretion were upheld [or defeated].”

Simply put, the decisions on presidential privilege and immunity are driven not so much by constitutional text, history, or structure, but by a balancing of primarily public interests. In this respect, it has been said that the Court’s decision on the “generalized constitutionally-based privilege” emerged “full-blown from the head of the Court.” The same can be said for the decisions regarding presidential immunity. In *Nixon v. Fitzgerald*, the Court felt that there would be more public harm than good in allowing civil suits based on the official actions of a President – *i.e.* too distracting, might make the President overly cautious, the President is too vulnerable. However, in *Clinton v. Jones*, the Court thought that the balance was different – the President will likely not be as vulnerable to suits based on unofficial action, a respectful district judge should be able to keep the litigation from being overly distracting.

Such ad hoc balancing is frequently criticized, and we will briefly visit the standard criticisms below. However, in many cases, the Court simply has no better way of dealing with a case or an issue that requires constitutional interpretation. The problem with the presidential privilege and immunity cases is that the issues before the Court, although constitutional and “legal,” are also profoundly political and capable of resolution by the political branches. The Court dismissed the notion that the issues in *United States v. Nixon* were “political questions.” After all, the Court protested it is “emphatically the duty and province of the courts to say what the law is,” and who were they to question the wisdom of *Marbury v. Madison*? At the time, however, and now over twenty years later, there remain serious questions about the participation of the judicial branch in resolving issues of presidential privilege and immunity. This section considers both the impact of (1) the absence of a more concrete method than ad hoc balancing for resolution of presidential privilege and immunity questions, and (2) the structural effects of seeking recourse for privilege and immunity disputes in the judiciary (par-

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particularly in light of the OIC's gravitation toward judicial resolution). Our conclusion is that given the lack of manageable standards and the structural harm caused by courts, their use should be minimized.

A. The Problem with Ad Hoc Balancing:

Professor Sullivan describes balancing as a "standard-like" framing of doctrine which "explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake."66 Professor Aleinikoff hews more closely to the traditional image of weights on a scale, describing balancing tests as "based on the identification, valuation, and comparison of competing interests."67 There are some scholars who find balancing a preferable way to frame doctrine. Balancing tests embody a "civic republican commitment to 'resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving.'"68 And, balancing could be praised as judicial "minimalism," a narrow and shallow case-by-case approach capable of adjusting to incomplete information and changing circumstances.69 The Supreme Court's resolution of presidential privilege and immunity cases may indeed have some of these attributes.70

However, balancing tests can at times look less than judicial. As Professor Fallon puts it: "[B]y what right does a court substitute its judgment for the reasonable view of politically accountable institutions concerning a disputable issue?"71 In fact, it is legislatures and other politically accountable institutions that

68 Sullivan, supra note 66, at 68 (quoting Frank I. Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 34-35 (1986)).
69 See Cass R. Sunstein, Foreword, Leaving Things Undecided, 110 HARV. L. REV. 6, 8 n.8 (1996) (suggesting a more modest and cautious judicial role); See also Christopher J. Peters, Adjudication as Representation, 97 COLUM. L. REV. 312, 412 (1997) (proposing that judicial minimalism in constitutional review could increase democratic legitimacy of constitutional adjudication).
70 Consider, in this regard, the following appraisal of United States v. Nixon: "In United States v. Nixon, the Supreme Court offered no apology for its legislative weighing of interests. That candor in itself merits our applause." See Karst & Horowitz, supra note 64, at 65.
are supposed to make appraisals of the public good and weigh various policy options. Justice Scalia echoes such concerns over the misallocation of political power in balancing tests and adds the serious conundrum of "weighing" various values and interests that are incommensurable. Justice Scalia's now classic formulation of this critique is that some balancing tests call for measuring whether a particular line is as long as a particular rock is heavy.72

Indeed, there is something a bit surreal and incommensurable in weighing the President's need for candid conversation in the White House against the demands of the criminal justice system; or, the vulnerability of the President to civil lawsuits against the principle that no person is above the law. Judge Leventhal of the D.C. Circuit referred to the "unseemliness of a judicial exploration of the needs and motives of the other two branches."73 In what way does the Supreme Court, or any court, have a superior knowledge or basis for resolving this balance? A court must act as John Dewey's farmer did in weighing a pig: it puts the pig on one side of a scale, puts rocks on the other side, and — once it is balanced — guesses the weight of the rocks.74 It has been observed that the balancing undertaken in United States v. Nixon is truly "supported far more by the fiat of the Justices' commissions than by the weight of either learning or reasoning."75 The balancing itself was based on "the Justices' perception of social good" and has been characterized as a "legislative" or "super-legislative" "weighing of interests."76 In fact, Justice Scalia said much the same about the Court's rejection of the constitutional challenge to the OIC: "Taking all things into account, we conclude that the power taken away from the President here is not really too much.... This is not analysis; it is ad hoc judgment.... The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a

73 United States v. AT&T, 567 F.2d 121, 126 (D.C. Cir. 1979).
74 See M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA 29 (1981) (comparing this system of measurement to judicial efforts to calculate prison capacity).
75 See Mishkin, supra note 65, at 76.
76 See Karst & Horowitz, supra note 64, at 65.
majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be.”\textsuperscript{77}

No one, including Justice Scalia, believes that ad hoc balancing tests can be rendered extinct. As Justice Scalia laments, “[w]e will have totality of the circumstances tests and balancing modes of analysis with us forever – and for my sins, I will probably write some of the opinions that use them.”\textsuperscript{78} However, before courts rush into weighing grand values on a grand scale and resolving issues of the utmost importance to the allocation of power between the branches, with a method no more sophisticated than what the political branches typically utilize, serious reflection should be given to judicial restraint. This is not merely for the courts to consider, but also for those who frame institutions like the OIC, which inevitably diverts many questions regarding presidential privilege and immunity to the courts, rather than the political branches.

\textbf{B. Political Questions:}

Shortly after the decision in \textit{United States v. Nixon} and President’s Nixon’s resignation, the UCLA Law Review held a symposium of prominent constitutional scholars who were asked to comment on the decision.\textsuperscript{79} While most scholars focused on the Court’s actual decision, Professors Paul Mishkin and Gerald Gunther presciently were troubled by the Court’s role in deciding the case at all. Although cautious in their opinions given that the events were still so raw at the time, Professor Mishkin asserted that the “fundamental question” of the case was “whether

\begin{itemize}
  \item[[78] See Scalia, Rule of Law as a Law of Rules, supra note 72, at 1187.
  \item[[79] See Akhil Amar, Should We Ditch the Independent Prosecutor Law?, Message #3, SLATE MAG., Feb. 17, 1999. In critiquing the OIC and related issues, Professor Akhil Amar has questioned the relevance of comments made by prominent constitutional scholars 25 years ago in the aftermath of Watergate: “If you want to play the name game, let’s look at who’s who in con law today, and where they stand.” \textit{Id.}; Akhil Amar, Should We Ditch the Independent Prosecutor Law?, Message #5, SLATE MAG., Feb. 18, 1999. In addition, Amar has shown skepticism regarding the supposedly stale comments of constitutional scholars who are now over the age of 70, and argued that “today’s best and most active scholars see things differently than did lawyers 25 years ago.” \textit{Id}. Putting aside Aside from looking forward with great relish to the day when these comments get shot back at a septuagenarian Amar, we respectfully disagree with Professor Amar. In fact, the reactions to Watergate and the accuracy of the forethought given at that time is extremely illuminating, as we will attempt to show, of present debates.
\end{itemize}
the Court should have taken the case in the first place," and Professor Gunther concluded that the case "tended to encourage reliance on courts" and "cast doubts on the capacity of other branches to resolve constitutional issues." A more harsh statement by Gunther of the same sentiment was that "some of the added strength of the Court has been achieved — unnecessarily, unfortunately and unwisely — at the expense of the most emaciated and deserving of the three branches, the legislature."

The concerns recognized 24 years ago in the Nixon case were superseded by a commitment to ethics in government, which led to the creation of the OIC and a diversion of the investigations of alleged executive misconduct to "independent" actors. Thus, justifying his investigation, Independent Counsel Kenneth Starr testified to Congress that questions of executive privilege were purely questions of law, suitable not for "polls" and the "talk show circuit," but for the courts. Speaking for the OIC, Starr stated: "We are officers of the court who live in the world of the law. We have presented our cases in court, and with very rare exception, we have won."

The Nixon White House, however, raised valid concerns about the assumption that a claim of privilege is really a "classic question[s] of law" and "appropriate for judicial resolution." Rather, the White House suggested that the use of subpoenas as a vehicle to test privileges was merely an effort to co-opt judicial processes into fundamentally political matters.

In effect, court process is being used as a discovery tool for the impeachment proceedings — proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular relationship which has evolved among the Special Prosecutor, the district court and the House Judiciary Committee . . . . [As] a result, there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the

80 See Mishkin, supra note 65, at 90.
82 Id. at 30.
President. The first lies in the courts; the second lies in the Congress.84

The "fusion" of court process and impeachment was institutionalized with the OIC, which has a statutory duty to refer to the House of Representatives "substantial and credible evidence" that "may constitute grounds for an impeachment."85 As an institution, the OIC will turn to the courts to demand information from the President, thrusting before the judiciary difficult issues of executive privilege and immunity, and if grave wrongdoing is found, the evidence is forwarded to the House.

However, as Professor Mishkin put it, it is "certain that the institution of our Government formally charged with the responsibility of dealing with a miscreant President is the Congress."86 Similarly, Gunther referred to the impeachment proceedings in the House Judiciary Committee as "preeminent" in comparison to the Court's hearing of United States v. Nixon.87 The political nature of deciding issues of presidential privilege and immunity arises from the Constitution's vesting of the "sole" power of impeachment and the "sole" power of trial in the House and the Senate respectively. Such delegation fits into the Court's doctrine of "political questions," which includes those situations where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."88 When an OIC or any other executive official is investigating presidential wrongdoing, that official is not merely investigating the potential criminal liability of the President; that official is gathering evidence that could possibly be used to impeach and convict the President. The "textually demonstrable constitutional commitment" of impeachment and removal to the political branches, will at some point, irreconcilably conflict with prosecutorial efforts to attain evidence of criminal wrongdoing in the White House through court processes. Even Kenneth Starr, who otherwise draws bright lines between law and politics, admits as much.89

84 Id. at 328.
86 See Mishkin, supra note 65, at 90.
87 See Gunther, supra note, 81 at 33.
89 In his testimony before the Senate Committee on Government Affairs on April 14,
Congressional pressure to compel presidential action is largely undervalued by commentators who have fixated only on Congress’s contempt and impeachment powers. Congress has many powers other than impeachment or citation to get an executive to comply with a subpoena that do not require any branch of government to say definitively “what the law is.” For example, Congress may stall legislation that the President favors, hold up his or her nominations, expand its investigations, cut back funding of favored projects, and then — only if it gets mad enough — impeach the President. In fact, the third article of impeachment against Richard Nixon was for contempt, defiance of subpoenas for materials “deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President.”

B. Forcing the Issues:

The shift in perspective over the role of courts in resolving politically charged issues owes to numerous changes in the past 25 years relating to the role of courts, distrust of government, and a general tendency towards litigiousness. However, it is also due in no small part to the creation of an Office of Independent Counsel. It is fair to ask where we would be if there had never been such an office as the Special Prosecutor or the OIC. What if the only investigations of presidential misbehavior were confined to Congress? Based on what little case law exists, the courts have shown great restraint when Congress demands evidence of presidential communications. As one court envisioned its role, “judicial intervention should be delayed until all possibilities for settlement have been exhausted.” If impeachment proceedings

1999, Kenneth Starr questioned the wisdom of 28 U.S.C. Section 595(c), which requires and OIC to report to Congress “any substantial and credible information for which such independent counsel receives...that may constitute grounds for an impeachment.” Starr remarked that “this responsibility further politicizes Independent Counsel investigations,” and “[m]ore important, impeachment is a central, nondelegable Congressional duty.”

90 See Gunther, supra note 81, at 35 (quoting third article of impeachment).
91 Id. at 152. Compare Senate Select Committee, 498 F.2d at 731, which preceded United States v. Nixon, and held that the President did not have to turn over tapes to a Senate committee because the Senate committee had not demonstrated that the tapes were “demonstrably critical to the responsible fulfillment of the Committee’s functions.”
were to commence, the courts would also have no role, as the "sole power" of impeachment and trial is vested in the House and the Senate.92 If the President were to resign or be removed, he or she may be criminally prosecuted, at which point questions of privilege and immunity would no longer intrude on the "sole power" of impeachment. Unless the courts were to take an expansive view of their role in brokering congressional requests for information from the executive, which so far they have not, the political branches would be largely responsible for negotiating the scope of any executive privilege and immunity. As will be argued shortly, there are many advantages to this arrangement.

The OIC alters the balance because it can force issues upon the courts, which under the authority of *United States v. Nixon*, the courts are compelled to decide. Once those decisions are reached, the scope of executive power is set as a matter of constitutional law. We will then know "what the law is," but that knowledge may do us more harm than good. The knowledge comes from imprecise balancing that — once fixed — cannot easily be undone. Contrast this with the alternative — a negotiated settlement between Congress and the Executive — which may provide an example for the future, but does not bear the force of law. Of course, the actual doctrine of presidential communications privilege is so amorphous and ad hoc that perhaps there is very little constitutional definition attained in any particular case. However, if the OIC persistently litigates the issues (and the White House persistently asserts the privilege), even the most ad hoc balancing test will begin to produce results that sharply define executive power. As Judge Leventhal noted in the D.C. Circuit's retreat from a dispute between the executive and the Congress over information, a court can apply the balance of *United States v. Nixon*, which "selects a victor, and tends thereafter to tilt the scales."93

In short, our concern is that the courts and political branches have been pressed into paying too little respect for Chief Justice Marshall's actual conclusion in *Marbury*. It may "emphatically be the province and duty of the courts to say what the law is,"94

92 See *Nixon v. United States*, 506 U.S. at 706.
93 United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976).
but it is also emphatically their duty to do so only when necessary. Courts have a duty to avoid unnecessarily deciding constitutional issues, because it is their duty to interpret — not make — law, and to do otherwise is counter-majoritarian.\(^9\) Even when forced to decide constitutional issues, the narrowest possible ground has properly been advocated as the best, particularly when the limits of presidential power are at stake.\(^9\)

Judicial "minimalism" is likewise urged "when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise)."\(^9\)

The institution of the OIC under Kenneth Starr may or may not have been at war with President Clinton, but its functioning was plainly at war with these principles.

**B. Summary**

The Court has resolved issues of presidential privilege and immunity through largely a legislative weighing of interests. This sub-optimal judicial method, while defensible, becomes much more suspect when the Court intrudes on the constitutional prerogatives of the political branches, in particular, the "sole power" of the House and the Senate to impeach and try the President. The consequences of the Court's arguably precipitous intrusion into this area in *United States v. Nixon*, has now been compounded by the OIC's vigorous pursuit of legal decisions. The OIC has stepped outside the bounds of constitutional accommodation by forcing courts to decide issues of presidential privilege and immunity that might not have been otherwise determined as matters of binding constitutional law. In doing so, one unaccountable institution, the OIC, has caused matters of fundamental constitutional interpretation to be decided by another unaccountable institution, the judiciary. This approach has had, and could have, profound effects upon the nation's accountable branches. If there are serious benefits to be achieved


\(^9\) See Sunstein, supra note 69, at 8.
by having politically accountable institutions weigh in on questions of presidential privilege and immunity, then this system must be altered.

IV. THE PUBLIC'S NEEDS

It is clear that presidential privilege and immunity are based on a balance of interests. So far, we have considered principally the interests of the Executive Branch and the President. In the decisions regarding presidential privilege and immunity, the judiciary has taken it upon itself to gauge public and other institutional interests in comparison with interests asserted by the President. Such interests, at the most general level, fall under the rubrics of truth and justice. As President Nixon so (in)famously acknowledged, the American people have a right to know if their President is a crook. In other words, the American people have a right to know the "truth" about the President, if there is reasonable suspicion that the President is a lawbreaker.

This section deals with precisely how a system for dealing with miscreant Presidents should go about representing peoples' desire for truth and justice with respect to the President. Again, Independent Counsel Starr has some unique ideas on this issue, as does one of President Clinton's lawyers. The best system, however, would minimize the role of lawyers and the judiciary so that "the people" can help inform their representatives of where the presidential privilege balance should be struck.

A. The Public's Interest in Divining Truth Through the Legal System:

In a speech intended to reflect his views as Independent Counsel, Kenneth Starr had harsh words for the current legal culture and urged a return to a more dignified past in which lawyers had a near spiritual sense of duty to the truth-seeking function. Starr invoked the image of Atticus Finch as someone who stood "very bravely in the pursuit of truth," and who "em-
bodied two of the most important, and indeed noble values of our system, loyalty to the client and yet respect for truth.” Starr coyly noted that “[f]or Atticus, these two values were not in conflict,” and Starr would later make similar observations that the same holds true for government lawyers.

As for lawyers who find themselves conflicted between truth and loyalty, Starr suggested that those who make the mistake of adopting a “hired gun” role for their clients are those most likely to “pay less than scrupulous regard for the truth.” When lawyers opt for too much loyalty and too little respect for truth, he explained, they are selling out the “moral foundation” and “primary goal” of our judicial system. For Starr, the only objective of the public in an investigation of an executive official was to know the truth, and thus the question for him regarding assertions of privilege or immunity was a simple one: “[A]t what point does a lawyer’s manipulation of the legal system become an obstruction of truth?” The answer, of course, is that any privilege that limits the flow of information will in some sense obstruct the truth. Accordingly, with respect to government attorneys, Starr’s position is absolute: “[T]he public servant lawyer owes a duty not to any individual, but to the people as a whole” to allow the truth to be discovered. Accordingly, he asserted that the government lawyer has a “special obligation,” that counsel to an individual or corporation does not have, to “the people and to the law.” That special obligation — not to mention what Starr calls the lawyer’s “conscience” — “requires disclosure; not hiding, disclosure.” Although Starr never explicitly linked the two, in many respects, his vision of the government lawyer is the same as his description of Atticus Finch: duty-bound to the client and to truth, and those duties do not conflict. Because “the people” are the client, no privilege should ever be asserted to obstruct their desire for truth-seeking.

Not surprisingly, the counsel for President Clinton, drew a far different conclusion about what best serves the public’s interest. Calling Starr’s evocation of Atticus Finch simply “too much,” the President’s counsel, David Kendall, offered his own lessons from To Kill a Mockingbird. Kendall emphasized that Atticus “de-

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100 David E. Kendall, To Distort a Mockingbird, N.Y. Times, June 4, 1998, at A25 (noting even most unpopular defendants are protected by bill or rights).
fended his client fearlessly, skillfully and energetically in the face of community hostility.” Perhaps more importantly, Atticus “knew that ‘truth’ was not the sole possession of the district attorney’s office, that the procedural protections of the Bill of Rights belong to even the most unpopular of defendants, and that it was his duty to defend his client against a hostile world.”

In Kendall’s view, resolving the truth of the question of whether Atticus Finch’s client was actually innocent, was only one value to be balanced against some equally important interests such as fairness, ethical treatment of individuals having information about the case, and protecting the system of truth-finding from abusive practices. To make his point, Kendall offered his suspicion of how the Office of Independent Counsel might have prosecuted the black rape defendant in To Kill A Mockingbird, concluding that “prosecutors and their apologists would have hectored Atticus at every turn for blocking the ‘truth’ by insisting on his client’s procedural rights.”

Kendall’s critique of Starr’s speech was not a systematic refutation of everything Starr had argued, but others rose to Kendall’s side, including Geoffrey Hazard:

Mr. Starr’s claim is not only ludicrous; it is pernicious.... Even though no lawyer should be party to perjury, defense counsels have a duty to impede the search for truth in other ways. They may advise their clients to invoke the constitution’s Fifth Amendment, which means they can refuse to testify. They may argue that incriminating evidence is inadmissible on technical grounds. Even if they know their client to be guilty, defense lawyers are supposed to pick holes in the prosecution’s arguments, and to get their clients

101 At least one commentator has noted Kendall’s peculiar, possibly Post Modern, use of quotation marks around “truth.” See Stuart Taylor, Jr., Is Starr Flouting Settled Practice?, NAT’L J., June 15, 1998, at 1 (noting that Kendall’s use of quotation marks “seems redolent of the comforting rationalization voiced by some in the defense bar that ultimate truth is so elusive as to be unknowable, and is thus of little concern to a defense lawyer”). It is all too ironic, two months after Kendall wrote his retort to Starr, that in President Clinton’s grand jury testimony he spoke of how two rational people could give conflicting descriptions of the same events and each be absolutely convinced they are telling the truth. His example of such an occurrence: Clarence Thomas and Anita Hill.

102 See Kendall, supra note 100. Like Starr’s use of Atticus Finch, Kendall’s analogy may also be a bit “too much.” By Kendall’s account, President Clinton is an illiterate, disabled, and unjustly accused black rape defendant, and Starr is the racist Southern judicial system.
All of what Professor Hazard says is true, except it does not really address how this relates to inquiries about the holder of a nationally elected office in his representative capacity. Yes, Bill Clinton, as an individual, has a right to all procedural protections that protect any United States citizen, but Bill Clinton, as President of the United States, may also have duties to coordinate branches of government that regular citizens do not have. For all of the untrue statements that President Nixon may have made about his role in the Watergate scandal, one thing he said was correct: the American people have a right to know if their President is a crook.

B. Who's Representing "the People?":

Neither Starr nor Kendall offer any real insight into how the people have actually been represented in fights between the President and the OIC over privilege. Their views, appropriate to their roles, were partisan and law-based. Starr refers to the public as the "client" of a government lawyer, and as OIC, Starr would be representing the public. However, critiques of the lack of accountability, i.e. connection to the public, of the OIC are legion. As for Kendall, he operated as the President's private attorney. His loyalties run solely to William Jefferson Clinton. In defining the "public," both looked into a crowd, and saw only their friends. Neither attorney — again because of his institutional role — was obliged to consider the broader public's interest in keeping resolution of the matter away from the courts.

Once a matter gets to court the public's interest is already affected. The court, once seized with an issue, must assess the "need" for the subpoenaed information, and this "need," at base, is an estimation of the social good. On the one hand, it is no doubt true that "the people" deserve to know if their President is a crook. Arguably, this could mean that if any government official has information in this regard, disclosure is required. This includes the Secret Service\textsuperscript{104} and White House counsel.\textsuperscript{105}

\textsuperscript{103} Geoffrey Hazard, \textit{The Worrying Zeal of Ken Starr}, ECONOMIST, June 6, 1998, at 32.

\textsuperscript{104} See \textit{In re Sealed Case}, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (declining to create "protective function privilege" to prevent secret service officers from testifying before
"the people" really want such disclosure generally? Did "the people" want such disclosure for purposes of investigating President Clinton? Most importantly, did "the people" want a court to make this decision for them?

In fact, the real balance in the Clinton case appears to have been struck by the public despite the insistence of courts for full disclosure. The public ultimately was less concerned with getting the absolute truth about President Clinton's behavior than with protecting the office of the President from damage. The persistent refusal of the American people to get outraged over President Clinton's scandal resolved the question of political balance far better than a court could. While the OIC and the President's counsel arguably believed they were representing the interests of a theoretical "public" when urging their positions in court, the real public spoke through its political organs. It pressured the Congress to shorten and end President Clinton's impeachment without a conviction, regardless of the truth or falsity of the allegations, because in this instance its interest in protecting the presidency was paramount. In the Nixon case, the public struck a different balance. The real public, acting through Congress and opinion polls, was in the best position to resolve these questions of delicate political balancing without any definitive statement of "what the law is."

C. Building a Better System:

If the OIC vanishes with the expiration of the statute, as so many people have urged, an institution devoted to settling disputes over executive power in the courts will be gone. Congress will feel the loss, and rather than shouldering the burden of oversight and investigation itself, the people's representatives may simply produce OIC-lite. As Norman Ornstein explains,
Washington has a "numbingly familiar pattern" of conduct when it comes to political scandals:

There are press reports of alleged scandal, followed almost immediately by opposing partisans calling reflexively for appointment of an independent counsel to underscore the gravity of the alleged offenses. The press has not only increased its coverage of scandal but it has also joined the partisans by making reflexive calls for independent counsels in editorial pages. . . . Next come the network Sunday talk shows . . . showcasing the allegations of scandal and asking every guest, regardless of affiliation, whether he or she supports the appointment of an independent counsel. Shortly thereafter, a prominent member of the President's party states his or her support of the appointment of an independent counsel, making front-page news and generating further calls for an independent counsel by members of the other party and The New York Times. . . .

As Ornstein goes on to explain, calling for an independent counsel is the "clean hands" approach, "facially, a request for an independent counsel is not the same as a criminal accusation without any proof other than allegations in the press," yet it may have the same smearing effect.

In our view, Congress must be broken of this habit, or it is inevitable that power over presidential communications privilege and immunity will be completely ceded to the judiciary. If this happens, the people will have their demands for Presidential information and accountability mediated by the most unaccountable actors in government. The current passive role of Congress is, in our view, insufficient and far too dependent on institutions like the OIC. In many ways, the dilemma our government faces is little different from the dilemma poignantly described by Professor Mishkin shortly after United States v. Nixon:

Leaving the job to the Congress entailed the risk that it might not be done — or done right or soon enough. But the Court's stepping in meant a self-fulfillment of the prophecy that Congress would not succeed, and thus a further undermining of the already insufficient stature and strength of

108 Id. at 2192.
the Legislative Branch. It is a truth that responsibility can only be developed by running the risks of failure — or success.109

Because Congress is responsible to the people (unlike the OIC and unlike the judiciary), Congress should balance the interests at issue in presidential privilege and immunity. Congress can legislatively grant the President whatever privileges and immunities it so desires, as long as it does not intrude on the constitutional minimum that has been set by the judiciary. If Congress assumes these burdens, and does away with the OIC, the judiciary will no longer run the ever-present risk of applying the principles of United States v. Nixon, selecting winners and losers among the branches, and forever tilting the scales. Executive power will be left with an elasticity and malleability that best serves the many and varied problems it must address.110

CONCLUSION

If the Independent Counsel statute is not renewed this year, then perhaps the anxious cries of “Wolf!” can stop. However, this nation’s experience with the OIC has illuminated many fundamental concerns over how questions of presidential power should be addressed. The Office of Independent Counsel has urged development of a bright line between law and politics. In doing so, it has not hesitated to force the judiciary to decide issues of executive privilege and power, contemplated indicting a sitting President who survived impeachment, and may yet refer that constitutional question to the judiciary. While the judiciary can and has addressed questions of this nature, it brings to their resolution little more than a method of ad hoc balancing of presidential versus public needs. In the process, the judiciary usurps the powers, at times the “sole” powers, of a coordinate branch of government.

In our view, a healthier system would strive for more public accountability, given that so much generalized weighing of public interest is required, and would also strive to minimize constitu-

109 See Mishkin, supra note 65, at 91.
110 The President also bears responsibility for intrusions on his power. The OIC was established by laws, passed by Congress and signed by Presidents, including President Clinton
tional answers as to "what the law is." Traditionally, courts have exercised restraint when Congress demands information from the President and the President refuses, and traditionally, Congress and the President have negotiated solutions. When courts demand information from the President, it may not be easy to exercise restraint. The guiding principles of United States v. Nixon are not principles of restraint. However, if a system is in place that minimizes recourse to the judiciary (a system without an OIC), and instead encourages recourse to Congress, the judiciary will be restrained as a result.

When the OIC begs for courts to compel the President to disclose information so that the public can know whether or not the President is a crook, the OIC is a wolf in sheep's clothing: surely the people want to know if their President is a crook and so the demand seems appealing on its surface. But the people should turn to Congress, not to the courts, for this politically delicate task. Least of all, the people should not be led to the doorstep of the White House (or the President's private study) by a well-intended but politically disconnected OIC, unless the people realize they are not being led there by a sheep. Sheep, by their very nature, are not leaders.