The Office of Legal Counsel (OLC)

Two Spheres of OLC Opinions’ Influence

1) **Within the executive branch**: OLC opinions establish and govern the executive’s position on legal questions inside the executive branch.

2) **Outside the executive branch**: Some OLC opinions exert systemic effects on other relevant actors.
Thesis

- OLC opinions expressing executive-branch legal positions on the scope of Congress’s oversight powers—e.g., testimonial immunity for presidential aides—*place a thumb on the scale in favor of the executive branch* in congressional-executive conflicts.

My Argument

1) Congressional-executive oversight disputes are political in nature, and subject to the same forces as other political disputes.

2) OLC memos prioritize executive interests and give the executive a *political* advantage over Congress.

3) This structural effect demands structural remedies.
Congressional-Executive Oversight Disputes

• Congress and the executive sometime battle over Congress’s access to information.
• Strategy & outcome depend on the branches’ relative political capital.
• These battles are waged in the language of “law” & “precedent.”

The Office of Legal Counsel

• Issue legal opinions binding on the executive branch
• Reputation as principled, independent, apolitical
• Political independence ≠ impartiality
• Written opinions memorialize what the executive may do, leaving unsaid what it may not do
**OLC Memos’ Effects**

1) Generate first-mover advantage
2) Provide definitive statements of (largely unsettled) law & (frequently contested) historical practice
3) Lower political costs of executive non-cooperation
4) Discourage compromise

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**Possible Reforms**

**Executive-branch Reforms**
- Increase OLC’s independence
- Require dissenting opinions in memos touching on separation-of-powers questions.

**Legislative-branch Reforms**
- Create an Office of Congressional Counsel
- Develop a similar institution within an existing institution, like CRS
- Establish a clearing-house for Congress’s expressed legal positions

**Other Reforms:**
- Increase detailees from the executive to the legislative branch; courts.