

Weaponizing the Office of Legal Counsel

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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.

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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.

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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."

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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

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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.

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