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Weaponizing the Office of Legal Counsel

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EMILY BERMAN

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WEAPONIZING THE OFFICE OF LEGAL COUNSEL

EMILY BERMAN*

Abstract: This Article argues that the Office of Legal Counsel (OLC)—an office within the Justice Department that issues legal opinions that govern executive branch actors—arms the executive branch with a powerful weapon to deploy in its conflicts with Congress. Despite its reputation as a neutral arbiter of constitutional questions, OLC’s separation-of-powers opinions do not simply describe the executive’s view of the law; they actually augment executive powers vis-à-vis Congress. This novel argument emerges from two descriptive claims laid out in this Article. The first is that OLC’s institutional design guarantees that its separation-of-powers opinions will articulate a decidedly pro-executive view of the law. The second is that these executive-friendly legal analyses not only guide the actions of executive officials, but also shape the legal landscape outside the executive branch. In other words, OLC makes its own legal reality: its separation-of-powers opinions first envision a world that values executive branch prerogatives over congressional interests, and then, by their very existence, help realize that vision. The result is that OLC provides the executive with a powerful weapon in its inter-branch disputes with Congress—a phenomenon that to date has gone unremarked. After identifying the mechanisms through which OLC places a thumb on the executive’s side of the scale in inter-branch disputes, this Article suggests several ways that Congress could level the playing field.

INTRODUCTION

“We’re fighting all the subpoenas.”¹ This statement encapsulates the Trump Administration’s approach to sharing information with Congress. Despite the legislative branch’s universally recognized oversight and impeachment authority, executive branch officials have denied legislators’ access to

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¹ Charlie Savage, *Trump Vows Stonewall of ‘All’ House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html> [https://perma.cc/J62K-BF7Y] (quoting President Donald Trump); see *id.* (“Mr. Trump has . . . abandon[ed] even the pretense of trying to negotiate accommodations and compromise . . .”).

documents and testimony related to the inquiry into President Donald Trump's relations with Ukraine, the President's tax returns, portions of Special Counsel Robert Mueller's report on Russian interference with the 2016 election, and more. Although President Trump's efforts to rebuff congressional inquiries are the most recent—and most aggressive—examples of executive recalcitrance, they are by no means the first. Indeed, congressional-executive disputes over access to information are literally as old as the Constitution.² Democratic and Republican administrations alike have chafed at Congress's demands for information. Whether it was Eric Holder's Justice Department's efforts to deny congressional access to information regarding the investigation into gun-running known as Operation Fast and Furious,³ the House Judiciary Committee's thwarted efforts to acquire evidence regarding George W. Bush's motivations for firing multiple United States Attorneys in 2007,⁴ or inter-branch wrangling in the course of the many investigations of Bill and Hillary Clinton,⁵ conflicts over access to executive branch information form the backdrop of many political battles. Despite the many instances in which these and similar disputes have arisen in the past, they are rarely submitted to the courts, leaving the legal rules that apply—and thus the rights and obligations of the political branches to one another—unarticulated by a third-party arbiter such as the judicial branch and therefore uncertain.⁶

Thanks to the Justice Department's powerful Office of Legal Counsel (OLC), however, the executive branch's legal position on issues related to congressional-executive information disputes is often quite certain and persuasively articulated. OLC, which provides legal advice that binds the executive branch unless overridden by the President or the Attorney General, has developed opinions offering legal analysis of many of the questions that touch on

² See generally LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 58 (2004) (reviewing the nature of disputes between the executive and legislative branches and how that comports with separation-of-powers concerns); MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 37–43 (2d ed. 2002) (analyzing the history of executive privilege and its effect on presidential authority); Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751, 751 (1982) (detailing instances where executive branch officials declined to provide information requested by Congress).

³ See Josh Gerstein, *Subpoena Fight Over Operation Fast and Furious Documents Finally Settled*, POLITICO (May 9, 2019), <https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120> [<https://perma.cc/3VPJ-L6Y8>] (describing the battle and its resolution).

⁴ See Sheryl Gay Stolberg, *Bush Asserts Executive Privilege on Subpoenas*, N.Y. TIMES (June 29, 2007), <https://www.nytimes.com/2007/06/29/washington/29bush.html> [<https://perma.cc/9T67-S47F>].

⁵ See, e.g., Megan Carpentier, *Travelgate to Furnituregate: A Guide to the Clinton Scandals of the 90s*, THE GUARDIAN (May 27, 2016), <https://www.theguardian.com/us-news/2016/may/27/hillary-clinton-bill-clinton-scandals> [<https://perma.cc/9589-BVXU>].

⁶ See *infra* notes 54–57 and accompanying text. But see *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (rare example of congressional litigation to enforce subpoenas).

executive information sharing with Congress.⁷ Existing commentary about OLC focuses on the extent to which it can effectively impose limits on presidential power.⁸ Professor Bruce Ackerman's answer to this question, for example, is essentially "not at all."⁹ Others come to OLC's defense, asserting that Ackerman fails to acknowledge meaningful, law-based constraints that OLC imposes on White House policy decisions.¹⁰ Whatever the outcome of this debate, however, everyone should agree that a critical structural constraint on presidential authority emanates from the separation of powers, yet there is little discussion of OLC's impact on that structural check.

As it turns out, this impact can be significant. This Article argues that OLC's separation-of-powers opinions amplify executive power when it comes to its relations with Congress, providing the executive with a potent weapon to resist complying with congressional information requests. This novel argument emerges from two descriptive claims. The first is that there are significant—and significantly underappreciated—implications that flow from the fact that OLC produces more than one type of written opinion.¹¹ Opinions that arise out of OLC's role "as, in effect, outside counsel" for executive branch agencies, resolve legal questions relating to executive agencies' execution of the law.¹² These opinions assess issues such as the limits of an agency's regulatory authority, the scope of an agency's jurisdiction, or legal disputes between agencies.¹³ But there is another type of OLC opinion as well: those that opine on the separation of powers and, more specifically, the executive branch's authori-

⁷ See *infra* Part II.A.

⁸ See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); Dawn E. Johnsen, *Faithfully Executing the Law: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1306 (2000) (outlining the role of OLC).

⁹ See ACKERMAN, *supra* note 8, at 95–110 (arguing that OLC is fully politicized and has many institutional incentives to empower, rather than limit, the President); see also Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why There's Nothing Wrong with Obama Ignoring Some of His Own Legal Advisers on Libya*, SLATE (June 27, 2011), <https://slate.com/news-and-politics/2011/06/u-s-intervention-in-libya-why-obama-doesn-t-need-the-approval-of-his-legal-advisers.html> [<https://perma.cc/6ZET-RZTJ>] (describing OLC as "Keeper of the Presidential Fig Leaf"—a source of legal *justification* but not *constraint*).

¹⁰ See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1708–31 (2011) (reviewing ACKERMAN, *supra* note 8).

¹¹ See *infra* notes 111–114 and accompanying text.

¹² *Office of Legal Counsel*, U.S. DEP'T OF JUST., <https://www.justice.gov/olc> [<https://perma.cc/WBA6-ND6G>].

¹³ See *infra* notes 110–114 and accompanying text.

ty vis-à-vis Congress.¹⁴ A close analysis of OLC's separation-of-powers opinions demonstrates that, when it comes to questions of executive power, OLC's reputation "for providing credible, authoritative, thorough and objective legal analysis,"¹⁵—rather than merely justifying executive branch policies—may not be fully warranted. Indeed, instead of simply calling balls and strikes, OLC's separation-of-powers opinions articulate a decidedly pro-executive vision of the law.

My second descriptive claim is that these pro-executive OLC opinions not only guide executive action, but actually confer a systemic advantage on the executive in its inter-branch information disputes with Congress—a phenomenon that to date has gone unremarked.¹⁶ In other words, OLC makes its own legal reality. Its opinions first envision a world that values executive branch prerogatives over congressional interests, and then, by their very existence, help create a reality that reflects that vision. By foregrounding these systemic effects of OLC's separation-of-powers opinions, this Article demonstrates that, in focusing solely on the *intra*-executive effects of OLC, existing debates about the Office overlook the significant effect that office's work has on actors *outside* the executive branch and on the political landscape more generally.

The pro-executive impact of these OLC opinions is a function of the nature of inter-branch information-access disputes and the way they are resolved. Most congressional requests for information are satisfied without acrimony.¹⁷ Disputes that do arise, however, historically have been resolved in the same way that other political conflicts are resolved—through negotiation and compromise.¹⁸ Just as a presidential veto threat can force Congress to rethink the contents of a bill, a presidential threat to assert executive privilege might cause a legislative committee to rethink the scope of its information request. Outcomes are therefore dictated by a combination of each branch's political capital and strength of political will. Those, in turn, are heavily influenced by public opinion.¹⁹ That same dynamic prevails when it comes to Congress's ability to

¹⁴ This point is closely akin to, though distinct from, Professor Bruce Ackerman's analysis of OLC's incentives when it is providing advice to the White House. See ACKERMAN, *supra* note 8, at 99–105 (arguing there are institutional incentives to justify the President's desired policy).

¹⁵ Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 (2011), https://harvardlawreview.org/wp-content/uploads/pdfs/vol124_forum_morrison.pdf [<https://perma.cc/DY8Q-EWZE>].

¹⁶ See *infra* notes 85–234 and accompanying text.

¹⁷ See *infra* notes 42–47 and accompanying text.

¹⁸ See *infra* Part I.B.

¹⁹ The operative "public opinion" for purposes of this Article is not merely the result of general public opinion polls. Rather, it is the product of complex interactions between the electorate and opinion elites whose views help shape the broader political environment—such as elected officials, legal elites, non-governmental organizations, and the media. See Ari Adut, *A Theory of the Public Sphere*, 30 SOCIO. THEORY 238, 241 (2012) (arguing that "civic discourse is produced by ambitious types in

secure information that the executive branch does not want to share. The branch that can most effectively spin the public narrative regarding a conflict in its favor will enjoy a decided advantage in negotiations.

This Article's central claim is that when the executive branch can point to an OLC opinion that supports its refusal to provide certain information to Congress—a memorandum about the scope of executive privilege or the enforceability of congressional subpoenas, for example—that memo provides the executive branch with an underappreciated structural advantage by bolstering its case in the court of public opinion. This advantage emerges through a number of different mechanisms. First, OLC opinions provide preexisting, clearly defined arguments that allow the President to frame the conflict's narrative and ensure that he and his supporters advance a consistent, unified message.²⁰ Second, they publicly articulate executive-friendly assessments of both law and historical practice relevant to the dispute.²¹ Third, in doing so, they lower the political costs of refusing to comply with congressional requests by allowing the executive branch to portray its recalcitrance as both compliance with preexisting law and consistent with past practice.²² Thus, OLC memos lend a veneer of neutrality to the executive's defenses against accusations of lawlessness. Fourth, they can discourage compromise. Always solicitous of executive branch prerogatives, executive officials often defend the legal principles embodied in OLC memos, even if a particular President would rather concede the point—to limit the amount of time the conflict remains in the headlines, for example.²³ Each of these effects places a thumb on the scale in favor of an executive seeking to resist congressional demands for information.

To be sure, the magnitude of these effects and thus the advantage they confer on the executive will depend on many factors—how long OLC has adhered to the position it advances in the memo, how consistently the executive has acted in accordance with that position, how effective the executive is in injecting the substance of the opinion into the public debate, the ability of OLC

front of nonparticipating audiences”); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006 (2008) (arguing that “the ‘public’ . . . is a stand-in for the complex process by which the views of elites, interest groups, ordinary citizens, and others ultimately determine the de facto lines of political authority”); see also *infra* note 67 and accompanying text (discussing how media, law, and history work to shape public opinion during inter-branch disputes).

²⁰ See *infra* notes 124–148 and accompanying text.

²¹ See *infra* notes 149–195 and accompanying text.

²² See *infra* notes 196–223 and accompanying text.

²³ See Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. of Legal Couns., to Edward C. Schmults, Deputy Att’y Gen. 2–3 (July 29, 1982) [hereinafter Olson Memorandum] (on file with author) (urging President H.W. Bush’s White House Counsel to refuse to comply with a congressional subpoena because it tends to weaken OLC’s position that the President’s close advisors enjoy immunity from testifying before Congress).

to maintain its reputation as a source of accurate, impartial legal analysis,²⁴ the preexisting political landscape, and sometimes the persuasiveness of the memo itself.²⁵ Thus, my claim is not that the existence of an OLC opinion regarding a particular issue will be outcome determinative. There are times when, despite OLC's view that the President is entitled to assert executive privilege over a document, Congress will succeed in securing that document nonetheless. Similarly, there will be times when the executive will successfully bar Congress's access to information even in the absence of a relevant OLC memo.

President Trump's success in withstanding congressional disclosure demands—including requests made in the context of impeachment—is illustrative. The unique political dynamics of the Trump presidency and the inelasticity of the public view of his actions have frequently enabled him to categorically reject the traditional negotiation model for resolving inter-branch disputes, even in the absence of a relevant OLC opinion.²⁶ At the same time, the administration has employed OLC opinions to legitimize its position on numerous occasions, and as in the past, opinions that have been on the books for years or even decades have been more successful in muting criticism than opinions drafted in the midst of an ongoing controversy.²⁷ Moreover, even President Trump has at times bowed to pressure to disclose—notable examples being Congress's successful acquisition of the whistleblower complaint that led to President Trump's impeachment and the release of the readout of the Presi-

²⁴ Some of the Trump Administration OLC's work product has arguably already done damage to this reputation. See *infra* note 208 and accompanying text. The extent and longevity of that damage remains to be seen.

²⁵ The absence or presence of divided government will obviously have immense implications for inter-branch disputes. Under unified government, any intra-branch information disputes that arise are likely to be addressed quietly under the radar. This Article's argument, therefore, is almost exclusively relevant in times of divided government. That said, of the twenty-seventh congressional sessions since 1969, there have been only seven during which the United States did *not* have a divided government. Democrats controlled both Houses of Congress and the White House in 1977–1981, 1993–1995, and 2009–2011; Republicans controlled all three institutions from 2003–2007 and 2017–2019.

²⁶ See Carl Hulse, *Trump's Stonewalling Takes Clash Between Branches to a New Level*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/politics/trump-white-house-democrats.html> [<https://perma.cc/KGT2-D39Z>].

²⁷ See, e.g., Devlin Barrett & Matt Zapposky, *Justice Dept. Issues Memo Backing Mnuchin's Refusal to Give Trump's Tax Returns to Congress*, WASH. POST (June 14, 2019), https://www.washingtonpost.com/world/national-security/justice-dept-issues-memo-backing-mnuchin-refusal-to-provide-trumps-tax-returns-to-congress/2019/06/14/3c8b3376-8ee7-11e9-b08e-cfd89bd36d4e_story.html [<https://perma.cc/H7Z9-MPED>] (quoting a tweet by Representative Don Beyer describing OLC's 2019 opinion defending the Treasury Secretary's refusal to provide the President's tax returns to congressional overseers as “OLC coming up with these flimsy, bogus excuses that won't stand up in court”); *infra* notes 210–214 and accompanying text. President Trump also cites twenty-eight OLC opinions in the legal brief submitted in his 2020 Senate trial, eight of which came from his own Justice Department. See Charlotte Butash & Hilary Hurd, *OLC on Presidential Power, According to Trump's Impeachment Defense*, LAWFARE (Feb. 11, 2020), <https://www.lawfareblog.com/olc-presidential-power-according-trumps-impeachment-defense> [<https://perma.cc/JQC6-S2WW>].

dent's phone call with the Ukrainian President.²⁸ The argument here is not that OLC's legal analysis can eliminate exogenous political dynamics. It is simply that OLC's separation-of-powers opinions benefit the executive during inter-branch disputes, that even the current administration has taken advantage of this effect, and that scholars have to date overlooked this phenomenon.

My argument will proceed in three parts. Part I will begin with the legislative branch, laying out the nature of Congress's oversight and investigative powers and then discussing the political economy of congressional-executive oversight conflicts.²⁹ Part II will then turn to the executive branch.³⁰ Section A briefly describes the role of OLC, with particular emphasis on how its location within the executive branch affects the substance of its separation-of-powers opinions.³¹ Section B will then lay out the argument regarding these opinions' systemic effects during inter-branch disputes.³² Part III will suggest reforms that could mitigate the advantage that OLC opinions provide the executive branch.³³

I. CONGRESSIONAL OVERSIGHT AND INVESTIGATIONS

All three branches of government recognize Congress's authority to conduct oversight of the executive branch. Nevertheless, the executive and Congress sometimes maintain conflicting views over where, exactly, the limits of Congress's oversight and investigative powers lie. The vast majority of these disputes are quietly resolved without significant acrimony. But when efforts at compromise break down—or when one side is unwilling to seek compromise—they can escalate into high-profile disputes that devolve into raw political contests. This Part will first explain how Congress's assertion of its investigative powers can lead to conflict with the executive branch, and then describe how the branches resolve those conflicts.³⁴

²⁸ See Devlin Barrett et al., *Whistleblower Claimed That Trump Abused His Office and That White House Officials Tried to Cover It Up*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/national-security/house-intelligence-committee-releases-whistleblowers-complaint-citing-trumps-call-with-ukraines-president/2019/09/26/402052ee-e056-11e9-be96-6adb81821e90_story.html [<https://perma.cc/K5YA-QSQN>].

²⁹ See *infra* Part I.

³⁰ See *infra* Part II.

³¹ See *infra* notes 85–119 and accompanying text.

³² See *infra* notes 120–234 and accompanying text.

³³ See *infra* Part III.

³⁴ See *infra* notes 35–53 and accompanying text.

A. Congress's Investigative Powers

Congress has engaged in oversight investigations since the earliest days of the Republic.³⁵ The Supreme Court has recognized that Congress's investigative authority is "inherent in the legislative process" and thus rooted in the Constitution,³⁶ and that: "[i]t encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes"; "[i]t surveys of defects in our social, economic or political system"; and it "probes into departments of the Federal Government to expose corruption, inefficiency or waste."³⁷ This investigative authority entails the right to issue and enforce subpoenas because "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."³⁸ Subsequent Supreme Court decisions have reaffirmed, and the executive branch has acknowledged, this capacious conception of congressional investigative authority and Congress's powers to compel cooperation with its investigations.³⁹ The House of Representatives also holds the "sole Power of Impeachment," which is another source of investigative authority.⁴⁰ The conventional wisdom is that Congress's investigative powers when conducting impeachment inquir-

³⁵ See, e.g., Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 897 (2014) ("Congress asserted . . . a right [to conduct investigations] shortly after the adoption of the Constitution." (quoting Scope of Cong. Oversight & Investigative Power with Respect to the Exec. Branch, 9 Op. O.L.C. 60, 60 (1985))).

³⁶ *Watkins v. United States*, 354 U.S. 178, 187 (1957); see also *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[A] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect . . .") (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

³⁷ *Watkins*, 354 U.S. at 187; see also *McGrain*, 273 U.S. at 177–78 (1927) (explaining that Congress's investigative authority facilitates legislating and assessing whether executive branch agencies are performing their duties); Frederick M. Kaiser, *Congressional Oversight of the Presidency*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1988, at 75, 81 (describing how Congress influences bureaucratic behavior through "review[s], monitoring, and supervision of past or ongoing executive activity"); Wright, *supra* note 35, at 907 (expounding that Congress investigates for "prospective legislation, present execution of law, and government misconduct" as well as baser political purposes).

³⁸ *McGrain*, 273 U.S. at 174; see also *id.* at 175 ("[M]ere requests for information [that Congress needs] are often unavailing . . .").

³⁹ See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (recognizing Congress's right to the President's personal information when it is "related to, and in furtherance of, a legitimate task of the Congress" (quoting *Watkins*, 354 U.S. at 187)); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("[Congress's investigative power is] as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *Assertion of Exec. Privilege in Response to a Cong. Subpoena*, 5 Op. O.L.C. 27, 30 (1981) (acknowledging Congress's legitimate interest in obtaining information to assist it in legislating as well as safeguarding against executive overreach or abuse).

⁴⁰ U.S. CONST. art. I, § 2, cl. 5.

ies exceed its powers in other oversight contexts, but whether and to what extent that is the case remains unsettled.⁴¹

When conflicts over what executive branch information and whose testimony Congress is entitled to secure arise,⁴² the legislative and executive branches traditionally negotiate resolutions that balance Congress's investigative needs with the executive's interest in non-disclosure.⁴³ In fact, the courts have insisted that the obligation to seek mutual accommodation is constitutionally mandated.⁴⁴ Such accommodation can take many forms. Congress might, for example, agree to narrow the scope of its request, or the executive might agree to share information with a limited number of legislators, or in a secure facility.⁴⁵ To cite a recent example, lawmakers originally insisted that

⁴¹ See, e.g., *Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong.*, 6 Op. O.L.C. 751 769 (1982) (noting President Theodore Roosevelt's position that "the only way the Senate could get [the documents it requested from him] was through his impeachment").

⁴² Grounds for resisting disclosure include claims that the request exceeds the scope of congressional authority. See, e.g., *Watkins*, 354 U.S. at 187 (stating that Congress may not investigate "solely for the personal aggrandizement of the investigators or to 'punish' those investigated"); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880) (noting that "neither [the House nor the Senate] possesses the general power of making inquiry into the private affairs of the citizen"). Or, an individual resisting disclosure may argue that the information is subject to some form of executive privilege. See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (stating that presidential communications are presumptively privileged); *Access to Classified Info.*, 20 Op. O.L.C. 402, 402–05 (1996) (discussing executive control over national security information); *Confidentiality of the Att'y Gen.'s Comm'ns in Counseling the President*, 6 Op. O.L.C. 481, 483 (1982) (noting the Attorney General's entitlement to a deliberative process privilege).

⁴³ See, e.g., Memorandum from Ronald Reagan, President of the U.S., to the Heads of Exec. Dep'ts & Agencies on Procs. Governing Responses to Cong. Requests for Info. (Nov. 4, 1982), reprinted in *Hearing on the Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 282 (1986) (noting that "good faith negotiations" between the branches historically "have minimized the need for invoking executive privilege" and instructing that conflicts between the branches should continue to rely on "this tradition of accommodation" for resolutions); *Cong. Requests for Confidential Exec. Branch Info.*, 13 Op. O.L.C. 153, 161–62 (1989) ("[T]he executive branch agency and the committee staff will typically negotiate . . . to see if the dispute [over requested information] can be settled in a manner acceptable to both sides. In most cases this accommodation process [succeeds] . . ."); EMILY BERMAN, *EXECUTIVE PRIVILEGE: A LEGISLATIVE REMEDY* 12–13 (2009) (reviewing post-Watergate political resolutions to executive privilege disputes); FISHER, *supra* note 2, at 258 (discussing common strategies adopted by the executive branch and Congress in during inter-branch disputes); ROZELL, *supra* note 2 (documenting assertions of executive privilege in the twentieth century); Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127 (1999); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 479 (1987).

⁴⁴ See, e.g., *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977) (holding that each branch has an "implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches" through a "spirit of dynamic compromise").

⁴⁵ E.g., Johnsen, *supra* note 43, at 1139 ("Typical accommodations include Congress substantially narrowing its initial request, or the executive branch briefing members of Congress on the subject matter of the requested documents, or the executive branch showing—but not relinquishing control

all 535 members of Congress have access to the entire, unredacted report prepared by Special Counsel Robert Mueller about Russian interference in the 2016 election (the Mueller Report), as well as the investigative files underlying the report.⁴⁶ When the Justice Department balked at this request, however, the investigating committees reached a deal with the Attorney General: a handful of lawmakers would have access to the information but would not be able to further disseminate what they learned.⁴⁷ This compromise is a typical example of congressional-executive mutual accommodation. Beyond the very broad strokes regarding the nature of congressional authority and executive privilege laid out by the courts, no rules dictate what sort of information Congress may seek or what information the executive must provide, and no guidelines limit the types of compromises that can be made. Resolutions of these information disputes are contingent on many different factors and vary from case to case.

When the parties cannot reach a compromise, negotiating tactics can take on a sharper edge. Congress might threaten to withhold appropriations,⁴⁸ delay confirmation votes for executive appointees,⁴⁹ or issue subpoenas to the executive branch.⁵⁰ In response, the executive might make a formal assertion of executive privilege⁵¹ or testimonial immunity.⁵² Congress might respond by holding executive branch officials in contempt of Congress for failing to comply with a subpoena or even sue to have the subpoena enforced.⁵³ It is to the dynamics of these more intractable disputes that I now turn.

of—the documents to particular members of Congress.”); Shane, *supra* note 43, at 515 (explaining that negotiations can include “the timing, form and conditions of disclosure”).

⁴⁶ Kyle Cheney & Andrew Desiderio, *These 3 Lawmakers Know the Secrets in Mueller’s Report*, POLITICO (June 24, 2019), <https://www.politico.com/story/2019/06/24/mueller-report-secrets-1376690> [<https://perma.cc/M2RN-P2EC>].

⁴⁷ *Id.* (describing agreement between congressional committees and the Justice Department to provide legislators access to Mueller’s files “so long as the lawmakers promise to keep a tight lid on what they see”).

⁴⁸ See, e.g., Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 326 (2002).

⁴⁹ See, e.g., *id.* at 336–39.

⁵⁰ See, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 108 (D.D.C. 2008) (allowing Congress to subpoena senior presidential aids for testimony); Fisher, *supra* note 48, at 339–47.

⁵¹ See generally Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751, 751–52 (1982) (cataloging executive branch refusals to provide information to Congress from the Washington Administration through the Reagan Administration).

⁵² See, e.g., Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *1 (O.L.C. May 20, 2019) (discussing the invocation of testimonial immunity by presidential advisors).

⁵³ See, e.g., Ed O’Keefe & Sari Horwitz, *Fast and Furious: Eric Holder Held in Contempt*, WASH. POST (June 20, 2012), https://www.washingtonpost.com/politics/fast-and-furious-eric-holder-held-in-contempt/2012/06/20/gJQAaEUArV_story.html [<https://perma.cc/W9U8-5677>] (reporting that Congress held Attorney General Eric Holder in contempt); Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. TIMES, Dec. 17, 1982, at A1 (reporting that Congress held Environmental Protection Agency Administrator Anne Burford in contempt).

B. Congressional-Executive Information Disputes

When the branches reach an impasse, there are two different fora that might serve as arbiter of the dispute: courts of law and the court of public opinion. The federal courts traditionally play a minimal role for at least two reasons. First, the courts are reluctant to become involved in inter-branch disputes and rarely will pronounce a definitive resolution.⁵⁴ Second, the parties shy away from judicial resolutions, though perhaps for different reasons. The executive branch prefers to avoid judicial pronouncements that “establish fixed rights for further interactions,” preferring to maintain flexibility in both current and future negotiations with Congress.⁵⁵ Congress, on the other hand, equates resorting to litigation with unacceptable delays.⁵⁶ Moreover, both branches recognize that the existing system of negotiation allows for compromise that serves the institutional interest of each, whereas litigation is a zero-sum proposition that only vindicates one branch’s interests.⁵⁷ Of course, the courts remain a resolution of last resort for a Congress, and there are those who prefer more predictable outcomes for inter-branch conflicts—something a body of judicial precedent could provide.⁵⁸ Indeed, it seems as if recourse to the courts has grown more common of late—after decades without such litigation, Congress

⁵⁴ See, e.g., *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (declining to set an expedited briefing schedule in hopes that the parties might reach a resolution that renders the case moot, which they ultimately did); *United States v. AT&T*, 567 F.2d 121, 133 (D.C. Cir. 1977) (holding that the congressional-executive information dispute was justiciable, but parties should return to the negotiating table); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 131 (1996) (“For better or worse, the courts are extremely hesitant to play a leading role in defining executive-legislative relations.”).

⁵⁵ Wright, *supra* note 35, at 921 (noting that the executive branch prefers negotiations to judicial decisions).

⁵⁶ See, e.g., Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 84 (1986) (“[E]ven with [expedited review], unacceptable delays are inherent in the civil process.”); Devins, *supra* note 54, at 131 (“Congressional committees are not well served by time-consuming and often ineffective court proceedings.”); Rishika Dugyala, *Schiff Says House Did Its Best to Get Trump Witnesses*, POLITICO (Jan. 19, 2020), <https://www.politico.com/news/2020/01/19/schiff-house-trump-witnesses-impeachment-100935> [<https://perma.cc/B3HR-ABGC>] (quoting House Impeachment Manager Representative Adam Schiff arguing that if “the House needed to go through endless months or even years of litigation” to enforce subpoenas, that would abrogate Congress’s oversight powers).

⁵⁷ See Devins, *supra* note 54, at 132 (explaining that resorting to the courts creates a risk “that political negotiations would be replaced by contentious winner-take-all battles”); *id.* at 132–33 (citing officials in both the executive and legislative branches to the same effect).

⁵⁸ See *id.* at 133 (citing former head of OLC Theodore Olson as opining that “a mechanism should be in place to allow principled, neutral mechanisms for dispute resolution”); Posner & Vermeule, *supra* note 19, at 993 (encouraging the branches to reject compromise when the benefits of clarifying a constitutional question outweigh the costs of the confrontation); Shane, *supra* note 43, at 488 (arguing that both branches “should consider the applicable legal reference” and “regard legal justification as an important factor” in developing their negotiating stance).

has brought subpoena-enforcement actions in each of the last three administrations.⁵⁹ Should the Trump Administration's categorical rejection of the accommodation process become the norm, perhaps the courts will begin to play a more prominent role.

On the other hand, the conventional view defends the accommodation process as an effective method of "balancing congressional need with executive branch interests."⁶⁰ Moreover, commentators from both sides of this normative divide agree that these conflicts are inherently political disputes that are nearly always resolved in the same way as any other political dispute.⁶¹ Consequently, public opinion ultimately plays a significant role in determining their outcome.⁶² When a dispute over the scope of Congress's authority or the reach of executive privilege arises, therefore, it is the people, rather than the courts, that serve as principal referee.⁶³ The critical role of public opinion would come as no surprise to our Constitution's Framers. It is axiomatic that the structural separation of powers was designed to prevent "a gradual concentration of the several powers in the same department" by "giving to those who administer each department, the necessary constitutional means, and personal

⁵⁹ See *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020) (Administration of President Trump); *Miers*, 542 F.3d at 909 (Administration of George W. Bush); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) (Administration of Barack Obama).

⁶⁰ FISHER, *supra* note 2, at 258 ("Untidy as they are, political battles between Congress and the executive branch are generally effective in resolving executive privilege disputes."); ROZELL, *supra* note 2, at 7 ("[D]isputes over the withholding of information can best be resolved by the political ebb and flow of the separation of powers system."); Devins, *supra* note 54, at 110 (judicial involvement "risks more harm than good"); Johnsen, *supra* note 43, at 1139 ("The accommodation process effectively takes account of the institutional, partisan and personal interests [of both branches] . . ."); Wright, *supra* note 35, at 943; see also *id.* (favoring "a thoroughly political mechanism . . . for resolution of disputes between the political branches" because it "allow[s] political will and leverage to resolve inherently political disputes").

⁶¹ See, e.g., Devins, *supra* note 54, at 126 (explaining that resolutions are "dependent on the skills of the negotiators and the political climate" as much as they are on the strengths of the parties' legal arguments); Fisher, *supra* note 48, at 324 (arguing that in inter-branch disputes, "both branches are at the mercy of political developments that can . . . tilt the advantage decisively to one side").

⁶² See, e.g., Adut, *supra* note 19, at 247–49 (describing public interpretation of alleged scandal as critical to political standing and describing the American presidency's power as reliant on the "incumbents' positive public image"); Scott J. Basinger & Brandon Rottinghaus, *Stonewalling and Suspicion During Presidential Scandals*, 65 POL. RSCH. Q. 290, 293 (2012) ("[C]ongressional investigations are sensitive to the media's and the public's initial and continuing interest in a scandal."); Posner & Vermeule, *supra* note 19 ("[T]hrough the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail."); Brandon Rottinghaus & Zlata Bereznikova, *Exorcising Scandal in the White House: Presidential Polling in Times of Crisis*, 36 PRESIDENTIAL STUD. Q. 493, 496–97 (2006) (noting that during scandal, Presidents calibrate their actions based on how concerned the public is about the issue).

⁶³ See Posner & Vermeule, *supra* note 19, at 1046 ("The populace at large exercises an indirect influence over constitutional development, but as a filter that rules out certain elite positions and as an ultimate court of appeal . . .").

motives, to resist encroachments of the others.”⁶⁴ But it is less commonly noted that Federalist 51 describes the separation of powers as “auxiliary precautions,” whereas “the primary control on the government” would be “[a] dependence on the people” themselves.⁶⁵

It can be helpful to think of inter-branch information disputes as an iterative game, where the playing field is constantly shifting under the participants’ feet while simultaneously being shifted by those participants.⁶⁶ Public opinion formation, and the political power it engenders, is part of a feedback loop, where public figures are both guided by and seek to influence how current debates and their response to them will be perceived.⁶⁷ When these public figures act—publishing an op-ed, issuing a subpoena, offering a compromise solution—public opinion will take account of that action and either change, or not, in response. At each stage of this iterative “game,” each side must make predictive judgments regarding how subsequent rounds of the game are likely to play out. Legislators must determine whether to issue a request for information or a subpoena, or hold an executive official in contempt of Congress. Similarly, the White House must decide whether to cooperate with or defy Congress. The calculations on both sides not only will consider preexisting levels of public support and political capital, but also will try to anticipate how the other branch’s, the media’s, and the public’s response will shape the future political environment. Each move will result in a new equilibrium that will influence the next move that politicians or other stakeholders make, which will, in turn, affect public opinion, and so on. Thus, public opinion is not static but adjusts over time to incorporate these developments.

The actual mechanisms through which public opinion regarding inter-branch disputes develops and operates are complex and elusive.⁶⁸ The species of “public opinion” that drives the outcome of congressional-executive information is not simply general public opinion that may be measured through

⁶⁴ THE FEDERALIST NO. 51, at 399 (James Madison) (John C. Hamilton ed., 1864).

⁶⁵ *Id.*; see also, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 959 (2005) (noting that “[s]eparation of powers jurisprudence” has lost “sight of Madison’s accompanying reminder that structural competition between self-aggrandizing branches is only meant to be an ‘auxiliary precaution[.]’” (alteration in original) (quoting *id.*); Adrian Vermeule, *Precautionary Principles in Constitutional Law*, 4 J. LEGAL ANALYSIS 181, 187 (2012) (identifying separation of powers as a precaution against abuse of power “auxiliary to elections”).

⁶⁶ Basinger & Rottinghaus, *supra* note 62.

⁶⁷ See George C. Edwards III & B. Dan Wood, *Who Influences Whom? The President, Congress, and the Media*, 93 AM. POL. SCI. REV. 327, 327 (1999) (noting the feedback loop between congressional attention, media attention, and enhanced political power); Stephanie Greco Larson, *The President and Congress in the Media*, ANNALS AM. ACAD. POL. & SOC. SCI. Sept. 1988, at 64, 71 (noting the interrelationship between politicians’ actions, media coverage, public attention, and elite responses).

⁶⁸ See Posner & Vermeule, *supra* note 19, at 1045–46 (“Public constitutional sentiment evolves in subterranean fashion, generally unperceived by those who exercise power.”).

polls. Rather, the relevant public opinion is the general sentiment that results from the interplay of actions and reactions in the public sphere taken by legal and political elites, interest groups, and other influential individuals and institutions, such as editorial boards and cable news pundits.⁶⁹

Although public opinion formation is unpredictable, it is clear that both historical precedent and law play a major role in its formation.⁷⁰ Arguments based on historical practice have force for at least two reasons. First, the Supreme Court itself treats historical precedent as legally relevant in inter-branch disputes.⁷¹ Second, such precedents affect public opinion in their own right. The public, like the Supreme Court, “generally give[s] weight to tradition and precedent,” and might view “the agent who resists the precedent” as the transgressor.⁷² A legislator or executive official might dismiss as irrelevant the examples set by his predecessors (or even by himself), but if those examples have traction in the public mind as relevant precedent, there will be a political cost for departing from them.⁷³

⁶⁹ See Adut, *supra* note 19, at 240–41; Posner & Vermeule, *supra* note 19, at 1000.

⁷⁰ Posner & Vermeule, *supra* note 19; see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1413 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) (“[A]n important feature of partisan politics going back to the 1790s is precisely the claim that the other side, including the President, is acting unlawfully or unconstitutionally; partisans would not invoke this argument and seek to manipulate popular perceptions about presidential legality if voters [did not care about it]” (footnote omitted)).

⁷¹ See *Raines v. Byrd*, 521 U.S. 811, 826 (1997) (considering not only judicial precedent but historical practice in the context of a separation of powers dispute); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (emphasizing that “[p]ast practice does not, by itself, create power,” but raises the presumption that a course of conduct is constitutional); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (acknowledging that although historical practice cannot displace the Constitution or legislation, it “give[s] meaning to the words of a text”); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012) (highlighting the important role that past practice plays in resolving inter-branch disputes).

⁷² Posner & Vermeule, *supra* note 19, at 1009. For example, Attorney General William Barr’s primary argument against acquiescing in a House Committee’s request that he submit during a hearing about the Mueller Report to questioning by the Committee’s staff attorneys—as opposed to its Members—was that such a procedure was “unprecedented.” *E.g.*, Olivia Beavers & Morgan Chalfant, *Barr, Dems Fail to Reach Deal on House Testimony*, THE HILL (May 1, 2019), <https://thehill.com/homenews/house/441698-second-day-of-barr-testimony-is-off> [<https://perma.cc/W7R4-S6AZ>]. Judiciary Committee Chairman Jerold Nadler responded in kind, arguing that “committee staff questioning has long been an important . . . aspect of congressional oversight that is in complete accordance with House rules and past precedent.” Susan Crabtree, *Lawmakers Dispute Precedent for Holding Barr in Contempt*, REALCLEARPOLITICS (May 3, 2019), https://www.realclearpolitics.com/articles/2019/05/03/lawmakers_dispute_precedent_for_holding_barr_in_contempt_140235.html [<https://perma.cc/FQ7N-4Q4F>].

⁷³ See Posner & Vermeule, *supra* note 19, at 999 (“The ‘civilizing force of hypocrisy’ makes it positively costly for decision makers to disavow a principle they relied on to their benefit at an earlier time” (footnote omitted)) (quoting JON ELSTER, *ALCHEMIES OF THE MIND* 341, 402 (1999)).

Legal arguments operate in similar fashion but play an even more significant role because allegations of lawlessness are politically salient in the media, with the public, and with opinion elites.⁷⁴ In fact, merely alleging unlawful conduct can transform a “debate” into a “controversy.”⁷⁵ And “the political cost of pursuing an ultimately unpopular policy initiative . . . goes up with the perceived illegality of the initiative.”⁷⁶ As a result, both the parties and the media often frame inter-branch battles in legal terms—meaning, whether Congress has a “right” to a particular piece of information or whether the President’s invocation of executive privilege is legally valid.⁷⁷

Note that the fact that the parties may be acting contrary to law or history, and that they may know they are doing so is not necessarily salient. Rather, the important thing for the conflicting parties is to *convey to their audience* that they are acting in compliance with law or precedent.⁷⁸ So the side that supplies

⁷⁴ See Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1138–39 (2013) (considering the effect of perceived illegality on already unpopular political stances and noting that the salience of legal arguments creates incentives for presidential opponents “to criticize executive actions in legal terms”); Pildes, *supra* note 70, at 1409 (arguing that “law (and the perceptions of legality) is not hermetically sealed off from politics and public opinion” but rather “perceptions about lawful authority . . . are inextricably intertwined with political and public responses to presidential action”).

⁷⁵ See Pildes, *supra* note 70, at 1412 (“[T]he allegation that the President has violated the law is often what *transforms* an event into a scandal.”).

⁷⁶ Bradley & Morrison, *supra* note 74.

⁷⁷ See, e.g., Rachael Bade et al., *White House Blocks Former Trump Aide from Answering House Panel’s Questions, Angering Democrats*, WASH. POST (June 19, 2019), https://www.washingtonpost.com/powerpost/former-trump-aide-faces-questions-from-house-panel-about-russia-contacts-hush-money-payments/2019/06/19/5f8b60da-9293-11e9-b570-6416efdc0803_story.html [<https://perma.cc/79WM-2ZZW>] (describing one lawmaker’s reaction to OLC’s theory of absolute immunity as “based on this very bogus immunity, sort of newly invented, very broad immunity, that you can never be asked anything about anything you ever did while you worked for the president”); Mary Clare Jalonic & Eric Tucker, *House Democrats, White House Spar in Hope Hicks Interview*, NBC N.Y. (June 20, 2019), <https://www.nbcnewyork.com/news/national-international/house-democrats-white-house-spar-in-hope-hicks-interview/1538569/> [<https://perma.cc/C63M-CA2E>] (describing both President Trump’s objection to permitting former White House aides Don McGahn and Hope Hicks to testify before congressional investigators—that as presidential advisors they are “absolutely immune” from congressional process as a legal matter—and Congressman Jerold Nadler’s response—that “the immunity assertion is ‘absolute nonsense as a matter of law’”—as legal ones); John Wagner et al., *White House Moves to Bar Counselor Kellyanne Conway from Testifying to Congress About Alleged Violations of Hatch Act*, WASH. POST (June 24, 2019), https://www.washingtonpost.com/politics/kellyanne-conway-says-democrats-seeking-testimony-on-hatch-act-violations-are-retaliating-against-her-politically/2019/06/24/9398d3ea-9689-11e9-830a-21b9b36b64ad_story.html [<https://perma.cc/7MCW-U3PK>] (referencing the House Democrats’ argument that “the White House has no right to claim executive privilege or immunity for [Kellyanne] Conway because the alleged violations deal with her personal actions—not her duties advising the president”).

⁷⁸ See Bradley & Morrison, *supra* note 74, at 1117 (“The *relative perceived strength* of a legal argument . . . might have a constraining effect.”).

the most convincing “performance of legality” will reap the benefits of the public’s desire to see public officials acting lawfully.⁷⁹

Congress and the President will therefore deploy law and precedent in an effort to shape political sentiment. Discussion of the means by which they do so takes center stage in the next Part, which will make the case that OLC memos award the executive branch an underappreciated structural advantage over Congress when it comes to information disputes.⁸⁰

II. INFORMATION CONFLICTS AND OLC SEPARATION-OF-POWERS OPINIONS

This Part turns to the role that OLC memos play in the political tug-of-war described above. Section A discusses OLC’s role, highlighting the institutional forces that press its separation-of-powers opinions in a pro-executive direction.⁸¹ Section B then turns to an analysis of the mechanisms through which OLC’s work product confers an advantage on the executive in inter-branch conflicts.⁸² To be sure, the extent to which OLC memos have this effect is an empirical question. What follows does not purport to be a statistical study. Nevertheless, it paints a dramatic descriptive picture of the beneficial impact for the executive that OLC’s opinions have on the political landscape.

My goal here is not to provide a comprehensive analysis of the relative assets and liabilities that the political branches bring to their confrontations with one another. After all, OLC memos are not the only structural advantage over Congress that the executive branch enjoys,⁸³ nor is Congress without its

⁷⁹ The legal argument perceived as most convincing will not necessarily win the day, if other political factors exert sufficient force. *See* Fisher, *supra* note 48, at 323 (“Efforts to resolve inter-branch disputes on purely legal grounds may have to give ground in the face of superior political muscle”); Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION 64, 71 (Neal Devins & Keith E. Whittington eds., 2005) (providing an example where the deciding factor was “unanimous, bipartisan support on the committee” generated by the flagrant misconduct being investigated).

⁸⁰ *See infra* notes 83–233 and accompanying text.

⁸¹ *See infra* notes 85–119 and accompanying text.

⁸² *See infra* notes 120–234 and accompanying text.

⁸³ Such advantages include a preference for the status quo, the agenda-setting power of the bully pulpit, and the hierarchical structure of the executive branch. *See, e.g.*, Bradley & Morrison, *supra* note 71, at 443 (“Presidents have both the will and the capacity to promote the power of their own institution . . . [whereas] individual legislators have neither”); George C. Edwards III, *The President and Congress: The Inevitability of Conflict*, 8 PRESIDENTIAL STUD. Q. 245, 250 (1978) (noting that the executive branch has structural advantages over Congress because it is “hierarchically organized” whereas “Congress is highly decentralized, with each member jealously guarding his or her independence and power”); Kaiser, *supra* note 37, at 79 (noting the “prestige and perquisites associated with the office of president; a nationwide electoral constituency and unequalled public visibility; and unparalleled ability to influence public opinion, to mobilize public support, and to set the policy agenda”).

own formidable tools to counteract these advantages.⁸⁴ Rather, I seek to call attention to an additional structural advantage for the executive that has to date been missing from these lists: OLC opinions.

A. *The OLC as an Executive Branch Institution*

This Section will first describe the salient characteristics of OLC—especially its influential role and its carefully cultivated reputation for independence—and then explain why that independence is subject to question when it comes to separation-of-powers opinions.

1. OLC's Role as an Independent Arbiter of Legal Questions

OLC is an office within the Department of Justice to which the Attorney General has delegated the authority to provide legal advice for the executive branch.⁸⁵ Run by a presidentially appointed Assistant Attorney General and staffed by about two dozen non-political-appointee attorneys, OLC's "core function . . . is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."⁸⁶ This role makes OLC "the most important centralized source" for such legal advice.⁸⁷

⁸⁴ These tools include making floor statements, introducing bills, holding oversight hearings, issuing contempt citations, initiating impeachment proceedings, withholding consent to presidential appointments and treaties, and strategic use of the appropriations power. *See, e.g.*, Bradley & Morrison, *supra* note 71, at 446 (pointing to "oversight hearings, nonbinding resolutions, the threat of contempt proceedings, and public disclosure of information" as "soft law" tools" that Congress can employ against the executive branch); Dino P. Christenson & Douglas L. Kriner, *Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action*, 61 AM. J. POL. SCI. 769, 783 (2017) (same); Fisher, *supra* note 48, at 325 ("Congress can win most of the time—if it has the will—because its political tools are formidable."); *see also* Charles M. Cameron & B. Peter Rosendorff, *A Signaling Theory of Congressional Oversight*, 5 GAMES & ECON. BEHAV. 44 (1993) (noting that holding hearings (and presumably contempt votes) can signal how committed Congress is to imposing its will on the executive).

⁸⁵ *See* Moss, *supra* note 8, at 1308 (discussing OLC's role).

⁸⁶ Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., Dep't of Justice, to Att'ys of the Off. of Legal Couns., Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) [hereinafter Barron Memorandum]; *Office of Legal Counsel*, *supra* note 12 (noting that OLC is responsible for: providing legal advice regarding "legal issues of particular complexity and importance or those about which two or more agencies are in disagreement"; "reviewing and commenting on the constitutionality of pending legislation" and executive orders; reviewing prospective orders and regulations; and performing "a variety of special assignments referred by the Attorney General or the Deputy Attorney General"); *see also* Morrison, *supra* note 10, at 1709 (identifying OLC's "core function [as providing] formal legal advice through written opinions").

⁸⁷ Morrison, *supra* note 10, at 1709.

Describing OLC’s output as “legal advice,” however—particularly when it takes the form of written memos—does not fully capture its significance.⁸⁸ The opinions that OLC supplies function more as the equivalent of binding judicial precedent than as traditional legal advice—they *are* the law of the executive branch “unless ‘overruled’ by the Attorney General or the President,” and they serve as binding precedent for OLC itself, which will depart from or overrule a previous opinion only rarely and for good reason.⁸⁹ Moreover, OLC memos frequently address questions that will never be presented to an Article III court.⁹⁰ This is particularly true when it comes to separation-of-powers questions, due to courts’ reluctance to rule on such questions.⁹¹ OLC’s view on certain issues will therefore be the only “legal opinion” ever produced.

A signature aspect of OLC’s operations is its self-described mission to provide “candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers.”⁹² Indeed, some of the earliest statements regarding the Attorney General’s role interpreting the law describe it as a “quasi-judicial” role.⁹³ Former OLC attorneys stress this aspect of the Office’s work product, which is driven by prudential concerns.⁹⁴ The value of the Office’s legal advice derives from its performance as—or its being perceived to perform as—a neutral arbiter of the law, rather than as an advocate.⁹⁵

⁸⁸ OLC’s advice is produced through formal memos, as well as oral and electronic communications. *See id.* at 1710. This Article is exclusively concerned with OLC’s function of producing written, public memos addressing separation-of-powers questions.

⁸⁹ *Id.* at 1711; *see also* Bradley & Morrison, *supra* note 74, at 1134 & n.130; Moss, *supra* note 8, at 1305 (“The legal advice of the Office . . . constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.”). Deviation from earlier precedent by subsequent OLC attorneys is atypical. Morrison, *supra* note 10, at 1714; *see also* Bradley & Morrison, *supra* note 74, at 1133 (“OLC has developed a range of practices and traditions—including a strong norm of adhering to its own precedents even across administrations”); Moss, *supra* note 8, at 1325 (“[T]he executive branch lawyer . . . should not lightly cast aside [prior executive branch positions] . . .”).

⁹⁰ *See* Morrison, *supra* note 10, at 1693 (“Much of the work done by offices like OLC arises in these areas of judicial non- or underenforcement.” (citing *The Const. Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124, 180 (1996))).

⁹¹ *See, e.g.*, Wright, *supra* note 35, at 890 (pointing out that “restraint is generally the hallmark of Article III tribunals presented with bickering political branches”).

⁹² Barron Memorandum, *supra* note 86.

⁹³ *See* Moss, *supra* note 8, at 1309 (citing *Off. & Duties of Att’y Gen.*, 6 Op. Att’y Gen. 326, 334 (1854)).

⁹⁴ *See* Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1212 (2019) (“OLC has a longstanding, nonpartisan tradition of giving accurate, untainted legal advice”); Morrison, *supra* note 15, at 63–65 (describing a “decades-long tradition[] of providing legal advice based on their best view of the law” and producing “credible, good-faith legal analysis”).

⁹⁵ *See* GOLDSMITH, *supra* note 8, at 170; John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 424 (1993) (“[I]t is useful for the Office to cultivate a reputation of applying the law scrupulously without regard to political or policy interest.”); Morrison, *supra* note 10, at 1722, 1730 (arguing that

Much like the Supreme Court, perception of OLC as principled, independent, and insulated from partisan political forces lends it legitimacy and, as a result, increases its power.⁹⁶ Should OLC's opinions cease to enjoy this positive reputation, their value would suffer, and client agencies might be less likely seek out the Office's advice.⁹⁷ To remain relevant and to retain its power as executive branch lawmaker, OLC thus relies upon its reputation as a straight shooter.

OLC has "a range of practices" and "[d]eeply rooted traditions" that help perpetuate this reputation.⁹⁸ The "'cultural norms' of the office—norms that prize independence and professional integrity"—are one mechanism.⁹⁹ There are also concrete policies designed to serve this goal. As an initial matter, OLC

OLC "has real, practical incentives to honor [its] norms" of "independence and professional integrity," in part because "the general belief that OLC honors these norms—give[s] credibility to OLC's legal analysis"); Moss, *supra* note 8, at 1311 ("[T]he legal opinions of the Attorney General and the [OLC] will likely be valued only to the extent they are viewed by others in the executive branch, the courts, the Congress, and the public as fair, neutral, and well-reasoned").

⁹⁶ See Bradley & Morrison, *supra* note 74, at 1142 (expressing that OLC opinions "are most valuable if they appear to take the law seriously"); David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 26 (2012), https://harvardlawreview.org/wp-content/uploads/pdfs/forvol126_fontana.pdf [<https://perma.cc/5NH5-FPQF>] (summarizing competing views of OLC's authority); see also Morrison, *supra* note 10, at 1722 (noting that executive actors "ha[ve] a great interest in being able to answer the questions that inevitably arise . . . by pointing to an OLC opinion upholding the action—and for the opinion to be taken seriously as a sober work of legal analysis by officials not precommitted to the outcome" (emphasis omitted)). Some commentators argue that OLC's reputation for independence is the result of institutional incentives that prompt OLC to "offer more cautious legal advice" than other executive branch entities. Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 494 (1993) (considering OLC's independence).

⁹⁷ One notable incident that undermined OLC's reputation for independence involved the so-called "torture memos" of the early 2000s, which opined on the lawfulness of the Central Intelligence Agency's interrogation program under George W. Bush and whose legal reasoning was vehemently criticized from both inside and outside the Department of Justice. See, e.g., OFF. OF PRO. RESP., DEP'T OF JUST., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 260 (2009) (concluding that OLC's memoranda had "major flaws" and that OLC "depart[ed] from [its] traditional practices" in drafting the memoranda); R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, WASH. POST (July 4, 2004), <https://www.washingtonpost.com/archive/politics/2004/07/04/slim-legal-grounds-for-torture-memos/f0756889-f426-44ea-beb6-dc4834babb52/> [<https://perma.cc/JG2X-QCMC>] (describing the "storm of criticism that erupted" when the memos were made public). OLC largely rehabilitated its reputation by, *inter alia*, rescinding the offending memos. See GOLDSMITH, *supra* note 8, at 158; Scott Shane et al., *Obama Reverses Key Bush Security Policies*, N.Y. TIMES (Jan. 22, 2009), <https://www.nytimes.com/2009/01/23/us/politics/23obama.html> [<https://perma.cc/A4SB-55U7>]. It also issued new guidance for "best practices" emphasizing OLC's role as a source of "honest appraisal[s] of [the] law." Barron Memorandum, *supra* note 86. *But see* ACKERMAN, *supra* note 8, at 95 (arguing that the "torture memos" were not anomalies). The incident may, however, have diminished OLC's role in national security decision making. See Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015), <https://www.lawfareblog.com/decline-olc> [<https://perma.cc/U5BH-CNXS>] (arguing that OLC has assumed a less prominent role concerning national security issues).

⁹⁸ See Bradley & Morrison, *supra* note 74, at 1133; Morrison, *supra* note 15.

⁹⁹ Morrison, *supra* note 10, at 1693 (footnote omitted).

attorneys are tasked with providing “[legal] advice based on [their] best understanding of what the law requires,” rather than merely seeking legal justifications for desired policy positions.¹⁰⁰ Their job is to “provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.”¹⁰¹ In other words, the Office seeks to produce memos more akin to judicial decisions than to advocates’ briefs.

OLC’s practice of “adhering to its own precedents even across administrations” is another means by which the Office seeks to establish “some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch.”¹⁰² OLC “maintains a comprehensive internal database of its legal advice,”¹⁰³ accords “great weight to any relevant past opinions,”¹⁰⁴ and thinks hard before overruling or deviating from past decisions of Attorneys General and the Office irrespective of the previous administrations’ political affiliations. The Office and those relying on its arguments to support their position frequently point to OLC’s consistency across administrations of both parties as evidence of its analysis’s impartiality.

A more intangible factor that burnishes OLC’s reputation is the quality of the attorneys that tend to work there. Jobs in that office are prestigious ones, and they tend to go to highly credentialed, effective attorneys. Alumni of OLC have gone on to become federal judges, including some Supreme Court Justices, United States Attorneys General, Solicitors General, deans and faculty members of some of the country’s best law schools, and some of the most effective practicing attorneys in the nation.¹⁰⁵ The quality of attorney reinforces OLC’s authoritative reputation in two ways. First, the work product itself tends to be exceptionally well written and persuasive. Second, because this is usually the case, consumers of OLC memos are predisposed to view them as thorough, accurate, and fair.

¹⁰⁰ Barron Memorandum, *supra* note 86.

¹⁰¹ *Id.*

¹⁰² Bradley & Morrison, *supra* note 74, at 1133.

¹⁰³ Morrison, *supra* note 10, at 1711.

¹⁰⁴ Barron Memorandum, *supra* note 86, at 2.

¹⁰⁵ Examples of former OLC attorneys include Chief Justices William Rehnquist and John Roberts, and Justice Antonin Scalia; former Dean of Yale Law School Harold Koh and Dean of N.Y.U. Law School Trevor Morrison, as well as professors at those and other top law schools, such as Harvard (Jack Goldsmith) and Georgetown (Marty Lederman); Solicitor General and noted litigator Theodore Olson; Attorneys General Nicholas Katzenbach and William Barr; multiple circuit court judges, such as the First Circuit’s David Barron and the Fourth Circuit’s Michael Luttig; and the list goes on.

2. Some OLC Opinions Are Not Like the Others

Even the staunchest defenders of OLC as an independent voice recognize, however, that what it produces is not the “best” view of the law in the same way that a judicial actor might perceive it. Rather, it seeks “*its* best view of the law.”¹⁰⁶ The difference between the two is that “OLC’s institutional location within the executive branch,”¹⁰⁷ means that its “analyses may . . . reflect the institutional traditions and competencies of that branch of the Government.”¹⁰⁸ As such, OLC’s “distinctive incentives and traditions” differ from those of truly neutral arbiters, such as federal judges.¹⁰⁹ The result is that, “at least on close questions, OLC’s views may . . . tilt in a more pro-executive direction” than those of courts or legal practitioners.¹¹⁰

This tilt, of course, has obvious implications for OLC’s separation-of-powers opinions. The Office might be relatively *independent* from a political standpoint, but that does not mean it is *impartial* when it comes to juxtaposing the institutional interests of the executive branch with those of Congress. Determining where the line between executive and legislative power lies is different from the work that OLC does with solely intra-executive implications. In its role “as, in effect, outside counsel” for executive branch agencies,¹¹¹ it is typically asked to answer questions such as, for example, the scope of an agency’s regulatory authority, or the proper interpretation of an agency’s organic statute.¹¹² In such disputes, individual executives might have different policy preferences, so it is hard to identify what would constitute a “pro-executive” opinion.

It is not so when it comes to separation-of-powers disputes. According to OLC’s own views, the Office has “a constitutional obligation . . . to assert and maintain the legitimate powers and privileges of the President against inad-

¹⁰⁶ Morrison, *supra* note 10, at 1714.

¹⁰⁷ *Id.*

¹⁰⁸ Barron Memorandum, *supra* note 86, at 2; *see also* GOLDSMITH, *supra* note 8, at 35 (quoting former head of OLC describing OLC’s legal advice to the President as being “something inevitably, and uncomfortably, in between” the kind of “advice from a private attorney” and “a politically neutral ruling from a court”); McGinnis, *supra* note 95, at 399 (arguing that executive branch separation-of-powers analysis should incorporate the executive branch’s institutional interests, on the assumption that other branches of government will incorporate their own interests).

¹⁰⁹ Fontana, *supra* note 96.

¹¹⁰ Morrison, *supra* note 10, at 1717. *But see* ACKERMAN, *supra* note 8, at 94 & n.27 (providing rare examples of OLC opinions that explicitly reject executive assertions of power).

¹¹¹ *Office of Legal Counsel*, *supra* note 12.

¹¹² *See, e.g.*, Whether the Food & Drug Admin. Has Jurisdiction Over Articles Intended for Use in Lawful Executions, 2019 WL 2235666, at *1 (O.L.C. May 3, 2019); Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 2018 WL 7080165, at *1 (O.L.C. Nov. 2, 2018); The Scope of State Crim. Jurisdiction Over Offenses Occurring on the Yakama Indian Rsr., 2018 WL 3800128, at *1 (July 27, 2018).

vertent or intentional congressional intrusion.”¹¹³ Moreover, OLC has acknowledged that it is often difficult to determine when Congress crosses the line to infringe on executive prerogatives.¹¹⁴ There is thus, by definition, a range of reasonable views, and OLC is institutionally predisposed to come down on the pro-executive side of the spectrum.

Nor is consistency across administrations of different parties evidence of impartiality in separation-of-powers analyses. Indeed, any other result would be unexpected. Precedents that defend robust views of executive power will benefit presidents regardless of party affiliation. Although they might use such powers for different ends, neither Democratic nor Republican executives will be ideologically disposed to promote Congress’s interests over that of the executive branch. So, adherence to OLC precedent by administrations of both parties might support characterizing the Office as “independent” when it comes to issues with a clear partisan valence. But when it comes to questions of the executive’s institutional power, consistently pro-executive positions from OLC say less about OLC’s independence than they do about its location within the executive branch.

The fact that most information conflicts are resolved through negotiations exacerbates OLC’s pro-executive predisposition. When its legal opinions form the basis of initial negotiating positions, OLC is incentivized to adopt a position that is extremely pro-executive, because it must leave room to concede some ground to Congress. And because judicial resolutions of these issues are so rare, OLC need not worry whether a court would endorse its initial position.¹¹⁵

Another OLC tradition tends to expand its view of presidential prerogatives. If an executive branch entity proposes a course of action that OLC determines to be unlawful, the Office will not memorialize that determination in writing, but instead will seek to find other lawful means of achieving that entity’s goals—a process that one scholar has labeled the “facilitative approach.”¹¹⁶ As a result, OLC’s written legal advice will discuss the lawfulness of the alternative policy, but it will make no mention of the actions it determined the executive *cannot* take. Indeed, it is OLC policy *not* to memorialize legal advice regarding actions that ultimately were not taken for fear of deter-

¹¹³ The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 126 (1996).

¹¹⁴ *Id.* at 132 (recognizing the difficulty of distinguishing “between minor (but unconstitutional) aggrandizement and (constitutional) exercises of Congress’s broad investigative and oversight powers”).

¹¹⁵ See *supra* notes 54–57 and accompanying text.

¹¹⁶ See Morrison, *supra* note 10, at 1719; see also Memorandum from David J. Barron, *supra* note 86, at 2 (“OLC’s analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law.”).

ring executive agencies from seeking OLC's counsel.¹¹⁷ This phenomenon is not limited, of course, to separation-of-powers questions, but it has significant implications in that context. As one commentator explains, the President "would neither need nor want a formal OLC opinion that concluded Congress *did* have the constitutional power" to act in ways contrary to the President's preferences; "[o]n the other hand, if OLC had concluded [Congress's actions] were unconstitutional and the President decided to press that view, . . . [OLC's views would] become public—because the White House would have relied on that opinion to make its case to Congress and the public."¹¹⁸ As a result, OLC's written opinions—and especially written opinions that are publicly released—"may tend to memorialize more of its yes's than its no's," resulting in a set of written precedents documenting what the President *may* do, while leaving unsaid what the President *may not* do.¹¹⁹

OLC's reputation as a neutral arbiter of the law is thus subject to question in the context of its separation-of-powers opinions. When the institutional bias inherent in these opinions combines with OLC's reputation as an independent, apolitical actor, the result is a powerful weapon in the executive's arsenal.

B. The Advantages OLC Memos Confer on the Executive

In this Section, I discuss the ways this weapon generates systemic inter-branch advantages for the executive—providing a first-mover advantage,¹²⁰ articulating executive-friendly characterizations of existing law and past practice,¹²¹ providing political cover,¹²² and discouraging compromise.¹²³

1. Creating a First-Mover Advantage

Simply as a matter of timing, having OLC's legal analysis handy provides the executive with the first-mover advantage.¹²⁴ The list of legal issues relevant to inter-branch information conflicts tends to be finite, with the same questions

¹¹⁷ Memorandum from David J. Barron, *supra* note 86, at 3 (noting that OLC's "practice is to issue [an] opinion only if [the relevant agency commits in writing] that it will conform its conduct to [OLC's] conclusion").

¹¹⁸ Pildes, *supra* note 70, at 1399.

¹¹⁹ Morrison, *supra* note 10, at 1719–20.

¹²⁰ See *infra* notes 124–148 and accompanying text.

¹²¹ See *infra* notes 149–195 and accompanying text.

¹²² See *infra* notes 196–223 and accompanying text.

¹²³ See *infra* notes 224–234 and accompanying text.

¹²⁴ See, e.g., Christenson & Kriner, *supra* note 84, at 773 (pointing out that the President's first-mover position gives the White House an advantage "in shaping the content of media coverage"); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L., ECON. & ORG. 132, 138 (1999) ("[P]residents are particularly well suited to be first-movers and to reap the agenda powers that go along with it.").

recurring again and again—the scope of congressional investigative authority, the amenability of executive branch officials to congressional subpoena, the availability of executive privilege, and the implications of congressional contempt citations being the most common. As a result, OLC is likely to have the relevant legal analysis on file. By simply surveying its archives for prior analyses of the issue and updating these analyses to address the factual circumstances of the ongoing dispute, OLC can provide a sophisticated legal defense of its position—one that emphasizes the fact that executives of both parties have invoked it over the years—in short order. Given the quality of the attorneys who tend to staff OLC, this legal analysis will be coherent and well crafted. And OLC’s reputation for political independence will lend its verdict gravitas.

The ability to present an erudite legal position produced by a highly respected office at the onset of a dispute confers on the executive significant power to control the narrative through which that dispute is viewed. As an initial matter, the President can use his bully pulpit to ensure that his preferred narrative is disseminated.¹²⁵ The fact that this narrative is based in a single legal opinion that is authoritative across the executive branch ensures that the President, as well as his surrogates and supporters, will coalesce around a consistent, unified message. Thus, from the outset, the executive articulates the idea that it is simply following valid, legitimately derived legal advice. The mainstream media will then accurately report this position as a statement of the executive’s view of the applicable law.¹²⁶ Even if neither the President nor subsequent media coverage mentions OLC or its memos specifically, they will often describe the executive’s view as one based on *Justice Department legal analysis*, or “long-standing executive policy,” or some other characterization supporting the President’s assertion that he is not acting lawlessly.¹²⁷

¹²⁵ See, e.g., Jeffrey S. Peake, *Presidential Agenda Setting in Foreign Policy*, 54 POL. RSCH. Q. 69, 69 (2001) (“The traditional model of agenda setting suggests Presidents are influential—indeed the most influential—agenda setters in national government.” (first citing FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); then citing JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); and then citing RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (1960)).

¹²⁶ E.g., Alan Rappeport, *Justice Dept. Backs Mnuchin’s Refusal to Release Trump’s Tax Returns*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/politics/trump-tax-returns-justice-department.html> [<https://perma.cc/VXX5-6E9C>] (describing an OLC memo as “cas[ting] doubt” on the “formal rationale” by Congress to obtain President Trump’s tax returns); Charlie Savage, *Justice Dept. Defends Legality of Trump’s Appointment of Acting Attorney General*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/matthew-whitaker-justice-dept-trump.html> [<https://perma.cc/N8HQ-VJXQ>] (stating that the Justice Department argued that President Trump’s appointment of Matt Whitaker as Acting Attorney General “complied with both federal statutes and the Constitution”).

¹²⁷ E.g., Associated Press, *Pelosi Asks Justice Dept. to Pursue 2 Bush Aides*, N.Y. TIMES (Feb. 29, 2008), <https://www.nytimes.com/2008/02/29/washington/29contempt.html> [<https://perma.cc/DAF3->

Once the executive's initial articulation of the issue is deployed, subsequent media coverage and commentary tend to entrench and amplify the President's framing. The pundit class—political and media elites, and perhaps most importantly legal elites—such as current and former government lawyers, law professors, and legal analysts in the media—will weigh in with their analyses.¹²⁸ They appear on cable news shows,¹²⁹ publish op-eds in traditional mainstream media outlets,¹³⁰ tweet their views out to all of their fellow legal-elite followers,¹³¹ and opine in one or more legal blogs or podcasts, thereby pervading the legal-elite echo chamber.¹³² These analyses will necessarily take the form of responding to the President's characterization of the situation, thereby reaffirming the President's initial framing. The legal experts likely to weigh in publicly are, moreover, likely to magnify the structural advantage that

EA39] (quoting the White House's invocation of "'longstanding department precedent' against letting a United States attorney refer a Congressional contempt citation to a grand jury or prosecute an executive branch" official); Peter Baker, *Mueller Delivered a Message. Washington Couldn't Agree on What It Was.*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mueller-resigns-special-counsel.html> [<https://perma.cc/7RW4-EV99>] (noting "longstanding Justice Department policy barring the indictment of a sitting president"); Charlie Savage, *Explaining Executive Privilege and Sessions's Refusal to Answer Questions*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html> [<https://perma.cc/5Z6E-J9S8>].

¹²⁸ See Susan Herbst, *Political Authority in a Mediated Age*, 32 THEORY & SOC. 481, 489 (2003) (noting that authority can derive from various sources—political power, issue expertise, or media exposure).

¹²⁹ Many of CNN's legal analysts, such as Jeffrey Toobin and Susan Hennessey, for example, are executive branch alumni.

¹³⁰ See, e.g., Bob Bauer, *Trump's Stonewalling of Congress Is Illegal. How Far Will He Push It?*, WASH. POST (Apr. 29, 2019), <https://www.washingtonpost.com/outlook/2019/04/29/trumps-stonewalling-congress-is-flatly-unconstitutional-how-far-will-he-push-it/> [<https://perma.cc/4A33-HKKU>] (former White House Counsel); Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [<https://perma.cc/HFA9-PPHD>] (former head of OLC); Neal Kumar Katyal, Opinion, *I Wrote the Special Counsel Rules. The Attorney General Can—and Should—Release the Mueller Report.*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/opinions/2019/03/23/i-wrote-special-counsel-rules-attorney-general-can-should-release-mueller-report/> [<https://perma.cc/W3JE-QVKN>] (former Acting Solicitor General and long-time Justice Department attorney).

¹³¹ See, e.g., Rob Barthelme, *Twitter List of Law Professors*, LEAST DANGEROUS BLOG (June 24, 2017), <https://leastdangerousblog.com/2017/06/24/twitter-list-of-law-professors/> [<https://perma.cc/R735-CUJZ>] (collecting all law professors' twitter handles).

¹³² See, for example, the blogs BALKINIZATION, <https://balkin.blogspot.com/> [<https://perma.cc/5226-MCHV>]; LAWFARE, <https://www.lawfareblog.com/> [<https://perma.cc/M7W6-F6X2>]; TAKE CARE, <https://takecareblog.com/> [<https://perma.cc/LL88-DGG9>], as well as podcasts like Amicus, SLATE, <https://slate.com/podcasts/amicus> [<https://perma.cc/G4ZT-NZLH>]; Lawfare Podcast, LAWFARE, <https://www.lawfareblog.com/topic/lawfare-podcast> [<https://perma.cc/2TJ4-F4DJ>]; Political Gabfest, SLATE, <https://slate.com/podcasts/political-gabfest> [<https://perma.cc/2M4M-KS7R>]; Stay Tuned with Preet Bharara, CAFÉ, <https://cafe.com/stay-tuned-podcast/> [<https://perma.cc/3RLJ-3P3Y>]. Most of these have lawyers as hosts as well as frequently hosting lawyers as guests to discuss the news of the day.

OLC provides to the President because most of them are veterans of executive branch lawyering generally, or of OLC in particular.¹³³ Lawyers with experience on congressional committees or in individual Members' offices are, by contrast, few and far between.¹³⁴ And although there is no empirical study measuring the effect of these types of statements, the public-opinion impact of elites' reaction to executive policy is well established.¹³⁵

This is not to say that these legal experts, political commentators, and media pundits always will support the executive branch's legal position as a substantive matter—often they do not. But their response to the President invoking OLC opinions will itself be newsworthy, thereby expanding both the salience of the memos and the breadth of the audience exposed to the executive's message. The legal experts in particular are, moreover, inclined to respect OLC's output, and by referencing its opinions, they amplify the authoritative nature of its pronouncements, even if they do so in the context of critiquing the specific analysis at issue.¹³⁶ This, in turn, lends credence to the argu-

¹³³ Examples of frequent public commentators are Bob Bauer, former White House Counsel; Jack Goldsmith, former head of OLC; Eric Posner, former OLC Attorney Advisor; Marty Lederman, former head of OLC; Neal Katyal, former Acting Solicitor General; Marc Thiessen, former speechwriter for President George W. Bush and Secretary of Defense Donald Rumsfeld; and Andrew McCarthy, former federal prosecutor. Indeed, the legal-pundit world is remarkably homogenous, made up of individuals who graduated from the same law schools, clerked for the same judges, worked at the same Justice Department or White House posts, and went on to join the same academic faculties. See Fontana, *supra* note 96, at 27 n.48 (“Every single head of OLC during its existence either attended a top-five law school, clerked on the lower courts or Supreme Court, or was a law professor.”); *id.* at 27 (“Many of the lawyers in OLC and [the White House Counsel’s office] were either before or will later become law professors, or have biographies similar to those of law professors.”). Parenthetically, the same can be said for most Supreme Court justices—some of whom also are alumni of OLC—and social science research has shown that justices with executive branch experience, are more likely to side with the executive in cases before them. See, e.g., Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 LAW & SOC. REV. 889 (2012).

¹³⁴ Preet Bharara, former United States Attorney for the Southern District of New York, might be the exception that proves the rule. Bharara, who hosts a successful podcast with wide listenership, worked for Senator Chuck Schumer on the Senate Judiciary Committee, but his public profile is largely based on his time as a federal prosecutor in the Justice Department (and his high-profile firing by Donald Trump). Jennifer Senior, *Preet Bharara’s Lessons on Crime and Punishment*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/books/review/preet-bharara-doing-justice.html> [<https://perma.cc/8ND8-AQR3>].

¹³⁵ See, e.g., Douglas L. Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, 76 J. POL. 521, 522 (2014) (“Public opinion scholars have long recognized that the reactions of other political elites often drive support for presidents and their policy initiatives.”); Matthew C. Woessner, *Scandal, Elites, and Presidential Popularity: Considering the Importance of Cues in Public Support of the President*, 35 PRESIDENTIAL STUD. Q. 94, 98 (2005) (noting that “average citizens rely on [elite] expertise” to contextualize accusations of misconduct).

¹³⁶ See, e.g., Bauer, *supra* note 130 (reporting that a former White House Counsel referenced OLC opinions on congressional oversight to critique the President’s response); Johnathan Schaub, *Executive Privilege and Compelled Testimony of Presidential Advisers: Don McGahn’s Dilemma*, LAWFARE (May 3, 2019), <https://www.lawfareblog.com/executive-privilege-and-compelled-testimony-presidential-advisers-don-mcghans-dilemma> [<https://perma.cc/B3ML-BGGX>] (reporting that a former OLC attor-

ment that the President is simply following legal advice—even if there are those who disagree with that legal advice. Because the intricacies of the legal arguments within the memos present more nuance than most contemporary public discussion can accommodate, the mere existence of the opinion supporting the executive’s behavior will be the story, and that can be enough—especially for that segment of the public predisposed to support the President in the first place.¹³⁷ In this way, the executive can reap the narrative-based benefits of OLC opinions regardless of what they actually say.

By contrast, Congress has no comparable depository of easily accessible, authoritative legal analysis.¹³⁸ There is no OLC-equivalent in the legislative branch.¹³⁹ Anyone that seeks to determine what legal positions Congress took on a similar issue in the past—even congressional staff¹⁴⁰—must dig out old legal briefs or scour committee reports in hopes of finding a definitive statement.¹⁴¹ Even if some members of Congress are able to quickly articulate their own view, Congress has no mechanism for developing legal positions common

ney provided legal analysis of OLC’s position regarding testimonial immunity and executive privilege with respect to testimony of former White House Counsel Don McGahn).

¹³⁷ See Thomas J. Leeper & Rune Slothuus, *Political Parties, Motivated Reasoning, and Public Opinion Formation*, 35 ADVANCES POL. PSYCH. 129, 142 (2014) (“[T]he interactions between parties and citizens are instrumental for how citizens connect their predispositions to political opinions.”).

¹³⁸ Nongovernmental groups have tried to fill this gap in the context of specific issues. See *Emerging Case Law on Congressional Oversight*, LEVIN CTR. WAYNE L., <https://oversightcases.org/> [<https://perma.cc/LBQ8-ED6H>] (collecting information related to congressional oversight-related litigation); *Public Document Clearinghouse: Congressional Russia Investigations*, JUST SEC. (Aug. 22, 2019), <https://www.justsecurity.org/62240/congressional-russia-investigations-document-clearinghouse/> [<https://perma.cc/WK9D-Z2HM>] (collecting all materials related to congressional investigations regarding Russia’s efforts to interfere in U.S. elections).

¹³⁹ See Bradley & Morrison, *supra* note 71, at 443 (“The fact that Congress lacks an institutional counterpart to the Office of Legal Counsel . . . is an illustration of the executive branch’s greater institutional focus.”); Shane, *supra* note 43, at 477 (“[O]ther than statutes, conventional formats for expressing congressional legal opinion are not well established.”).

¹⁴⁰ See BERMAN, *supra* note 43, at 68 n.111 (citing interview with former General Counsel to the United States House of Representatives, Stanley M. Brand).

¹⁴¹ As examples, some congressional legal arguments are articulated in memoranda from the House of Representatives’ General Counsel in response to letters from the Justice Department arguing that Congress is not lawfully entitled to the information it seeks. See, e.g., Memorandum from Stanley M. Brand, Gen. Couns. to the Clerk, U.S. House of Reps., to Hon. Elliott H. Levitas, Chair, Subcomm. on Investigations & Oversight, Attorney General’s Letter Concerning Subpoena for Documents to Administrator of Environmental Protection Agency (Dec. 8, 1982), *reprinted in* H.R. REP. NO. 97-89 (1982), at 39–47 [hereinafter Brand Memorandum 1]; Memorandum from Stanley M. Brand, Gen. Couns. to the Clerk, U.S. House of Reps., to Hon. John Dingell, Attorney General’s Letter Concerning Claim of Executive Privilege for Department of Interior Documents (Nov. 10, 1981), *reprinted in* SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, COMM. ON ENERGY & COM., 97TH CONG., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 5–14 (Comm. Print 1981) [hereinafter Brand Memorandum 2] (laying out arguments refuting the executive’s position regarding a claim of executive privilege). The only place these particular memoranda seem to be accessible to the public is as part of committee reports that run into the hundreds of pages.

to all members. There is, of course, plenty of constitutional analysis that goes on in the legislative branch.¹⁴² In the context of disputes with the executive, however, each member tends to develop (or decline to develop) her own legal views.¹⁴³ These views tend to reflect, at best, an individual Member's legal assessments, and at worst, political expedience, rather than a calculation of Congress's institutional interests.¹⁴⁴ To the extent Congress speaks with one voice on any given legal issue, that agreement is ad hoc, likely shaped by the views of the majority regarding ongoing disputes.¹⁴⁵ Even if the House or Senate Counsel issues a statement of its view of the law, that statement does not play the same role as OLC memos. As an initial matter, such a statement is not binding on legislators.¹⁴⁶ Moreover, there may be outspoken disagreement between the majority and minority parties, thereby undermining the force of the analysis.¹⁴⁷ And regardless of the unanimity or lack thereof, Congress's positions do not invoke preexisting legal analysis to support them.¹⁴⁸ Congress's atomized, ad hoc approach to legal reasoning is a barrier to the development of an institutional body of consistent precedent and the legal or political legitimacy that accompanies it. Lacking an effective means of articulating a unified

¹⁴² Much of it takes place on an ad hoc basis, with legislative staff, the Congressional Research Service (CRS), or the General Accounting Office (GAO) assessing the lawfulness of particular pieces of legislation. See Fisher, *supra* note 79, at 65–71. Both the House and the Senate have a Legal Counsel's office, which primarily handles litigation. See *id.* at 75–81.

¹⁴³ Shane, *supra* note 43, at 477 n.55 (“It could be argued that any search for constitutional interpretation by Congress is especially misguided because of doubts as to Congress’s institutional capacity to engage in constitutional interpretation meaningfully.”). But see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 747 (1985) (arguing that Congress has the resources and ability to provide strong constitutional analysis, in part because “[m]uch of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise”).

¹⁴⁴ See Levinson, *supra* note 65, at 955 (noting that congressional legal opinions, when they are articulated at all, are “mostly determined not by the institutional interest of Congress but by the views of their constituents (and, difficult to disaggregate, their own personal policy preferences)”; Moe & Howell, *supra* note 124, at 144 (noting that “all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency”).

¹⁴⁵ See Fisher, *supra* note 79, at 65–74 (describing the development of legal positions within congressional staff agencies, such as the CRS).

¹⁴⁶ See Shane, *supra* note 43, at 479 n.62 (“It is problematic whether the counsel to the clerk is viewed as an authoritative lawmaker even within Congress.”).

¹⁴⁷ See, e.g., Fisher, *supra* note 79, at 78 (describing conflict between the majority and minority regarding whether the Due Process Clause of the Fourteenth Amendment entitled the minority to more committee seats than the majority had allotted).

¹⁴⁸ For example, Congress often rejects executive branch claims of testimonial immunity for White House advisors. See, e.g., H.R. REP. NO. 110-423, at 6 (2007) (rejecting former White House Counsel’s claim to immunity from testifying before Congress). But those rejections tend to be conclusory statements, rather than full-fledged legal analysis, unless and until the matter is litigated. The hearing at which former White House Counsel Harriet Miers refused to appear took place on July 12, 2007, whereas the Judiciary Committee issued its report explaining the majority’s position four months later. *Id.* at 1, 6.

congressional position, the legislative branch is much less well suited to controlling the frame through which its conflicts with the executive are viewed.

2. Declaring “What the Law Is”

Because of OLC’s reputation as neutral, independent expositors of the best view of the law, the presence of an OLC memo enables the executive to make aggressive claims that the law is on his side. Recall, however, that OLC’s legal pronouncements represent OLC’s best view of the law *as an executive branch institution* that tilts in a pro-executive direction.¹⁴⁹ The opinions themselves, however, make no mention of this important distinction. They nearly always characterize their conclusions as “what the law is,” as Chief Justice John Marshall would say, rather than as an argument made by an advocate on one side of a disputed question of law.¹⁵⁰

A memorandum regarding how the Justice Department handles criminal referrals from Capitol Hill alleging contempt of Congress provides an example.¹⁵¹ Pursuant to 2 U.S.C. § 194, willful failure to comply with a congressional subpoena is a federal misdemeanor.¹⁵² Congress “shall . . . certify” this failure “to the appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action.”¹⁵³ OLC has analyzed how these statutes should apply to contempt certifications regarding executive officials whose defiance of congressional subpoenas results from executive-privilege assertions made at the President’s direction. The Office maintains that prosecution of such officials would “so inhibit the President’s ability to make such claims [of executive privilege] as to violate the separation of powers.”¹⁵⁴ The memorandum does not, however, present its conclusion as one interpretation of the constitutionality of applying section 194 to executive officials. Instead, the memorandum’s first sentence states unequivocally that “a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President’s instruction to invoke the President’s claim of executive privilege before a com-

¹⁴⁹ See *supra* notes 106–110 and accompanying text.

¹⁵⁰ Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). There are exceptions; some memos devote significant space to recognizing valid counterarguments, but this is not the norm. See, e.g., *The Const. Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124 (1996) (providing a thoughtful examination of many separation of powers issues).

¹⁵¹ *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101 (1984).

¹⁵² 2 U.S.C. § 192.

¹⁵³ *Id.* § 194.

¹⁵⁴ *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. at 129.

mittee of Congress.”¹⁵⁵ Because courts historically have been reluctant to intervene in congressional-executive conflicts over legislative oversight activity, OLC’s opinions are likely to stand as the only articulated position on this legal question indefinitely.¹⁵⁶ And although the statement may be true as a matter of *executive branch* interpretation of the law, Congress’s practice of holding executive officials in contempt of Congress as recently as 2012 reveals that it takes a different view.¹⁵⁷ But the memorandum fails to engage with Congress’s position. Rather, it offers its own views as a factual statement of the law. This creates the impression that the executive branch position is the only reasonable legal conclusion, not simply an assertion of executive branch opinion or an opening position in a negotiation.¹⁵⁸

This pattern is repeated in memorandum after memorandum. On multiple separation-of-powers questions, OLC memos purport to articulate the state of the law, but fail to indicate the ways that those conclusions reflect the Office’s pro-executive tilt.¹⁵⁹ Not only do the memos fail to acknowledge their institutional bias, they often amplify it over time. Once OLC has reached a particular conclusion regarding executive power, subsequent analyses tend to reinforce that conclusion, stating it more definitively as years pass, regardless of whether such increased certainty is warranted.¹⁶⁰ A given proposition might be supported by a string cite of impressive length, but because the Office treats past opinions as binding precedent,¹⁶¹ frequently this string cite will be made up of nothing but previous OLC memos on the same issue.¹⁶² OLC’s statement of its

¹⁵⁵ *Id.* at 101.

¹⁵⁶ See The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 180 (1996) (noting that many issues OLC addresses never go before the courts and therefore demand particularly careful analysis because the judiciary is restrained by constitutional and prudential considerations from intervening).

¹⁵⁷ See, e.g., H.R. Res. 711, 112th Cong. (2012) (holding Attorney General Eric Holder in contempt of Congress).

¹⁵⁸ One commentator has argued that whereas Congress views the relevant question as what it is entitled to, the executive views the matter as transactional, and its stated legal positions are essentially negotiating tactics. See Wright, *supra* note 35, at 920.

¹⁵⁹ See Morrison, *supra* note 8, at 1502 (noting the “pro-executive tenor” of OLC opinions that “defends its institutional prerogatives against incursions” by the legislative or judicial branch).

¹⁶⁰ Cf. ACKERMAN, *supra* note 8, at 105 (noting that over time, OLC passes on “increasingly presidentialist” memoranda, effectively operating as a “ratchet”).

¹⁶¹ Morrison, *supra* note 10, at 1714; see also Bradley & Morrison, *supra* note 74, at 1133 (“OLC has developed a range of practices and traditions—including a strong norm of adhering to its own precedents even across administrations.”); Moss, *supra* note 8, at 1325.

¹⁶² See, e.g., Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *1 (O.L.C. May 20, 2019) (pointing out that OLC “has endorsed [the principle that the President and his immediate advisors are absolutely immune from testimonial compulsion] on more than a dozen occasions, over the course of the last eight presidential administrations,” and providing references to about a dozen opinions reaching that conclusion). OLC will occasionally con-

position thus becomes more and more emphatic each time the issue arises, despite the absence of any additional corroborating authority beyond the consistency and longevity of the Office's own internal precedent.

The issue of testimonial immunity is illustrative. Then-Assistant Attorney General William Rehnquist's 1972 opinion (Rehnquist Memorandum) is the first available Justice-Department analysis of the issue.¹⁶³ In it, Rehnquist concludes that "[t]he President and his immediate advisers . . . should be deemed absolutely immune from testimonial compulsion by a congressional committee."¹⁶⁴ A decade later, then-Assistant Attorney General Ted Olson quoted this language in a memo recommending that the President's White House Counsel should not submit to a Senate Committee's subpoena.¹⁶⁵ And by May of 2019, the head of OLC was able to claim that "[t]he immunity of the President's immediate advisers from compelled congressional testimony . . . has long been recognized" (notably, he did not indicate by *whom* it had been recognized).¹⁶⁶ Yet as Judge John Bates of the District of Columbia District Court pointed out in 2008, "the only authority that the Executive can muster in support of its absolute immunity assertion are two OLC opinions" that are "for the most part conclusory and recursive" and therefore unpersuasive.¹⁶⁷ The subsequent OLC re-articulation of the testimonial immunity principal "respectfully disagree[s]" with Judge Bates and "adhere[s] to [OLC's] long-established position."¹⁶⁸ Recently, the U.S. Circuit Court of Appeals for the District of Columbia rejected OLC's testimonial immunity position.¹⁶⁹

Moreover, OLC's subsequent references to then-Assistant Attorney General Rehnquist's conclusion fail to indicate that he had included important caveats: he stressed that existing precedents were "obviously quite inconclusive" and that "any generalizations" drawn from the historical incidents he relied upon to inform his analysis "are necessarily tentative and sketchy."¹⁷⁰ Ten

sider longstanding views afresh. *See* Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 101 (1984).

¹⁶³ *See* Memorandum from William H. Rehnquist, Assistant Att'y Gen., Off. of Legal Couns. to Hon. John D. Ehrlichman, Assistant to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff" 7 (Feb. 5, 1972) [hereinafter Rehnquist Memorandum] (on file with author).

¹⁶⁴ *See id.*

¹⁶⁵ Olson Memorandum, *supra* note 23, at 2 (arguing that a President's advisers are not required to testify before Congress).

¹⁶⁶ *Testimonial Immunity*, 2019 WL 2315338, at *1, *15.

¹⁶⁷ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 104 (D.D.C. 2008). The other opinion, this one about former White House Counsel Don McGahn's claim of testimonial immunity, reached the same conclusion. *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020).

¹⁶⁸ *Testimonial Immunity*, 2019 WL 2315338, at *10.

¹⁶⁹ *See McGahn*, 968 F.3d at 778.

¹⁷⁰ *See* Rehnquist Memorandum, *supra* note 163, at 6–7. Rehnquist also emphasized that the precedents were particularly weak in supporting the claim of testimonial immunity for anyone not

years later, the OLC opinion finding that the White House Counsel need not submit to a congressional subpoena failed to include this qualifying language when quoting from the 1972 memo, simply asserting that, “[a]s Assistant Attorney General for the [OLC] William H. Rehnquist expressed it in 1972, ‘*The President and his immediate advisers, that is, those who customarily meet with him on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee.*’”¹⁷¹ Thus, a “tentative” and “sketchy” conclusion subject to exceptions is transformed solely by the passage of time and repetition into a long-recognized principle that now applies, according to OLC, even to former presidential advisors.¹⁷²

Aspects of OLC’s treatment of executive privilege follow a similar pattern. The Justice Department first articulated in writing “the doctrine of executive privilege as it relates to requests from Congressional committees for executive branch information” in 1977.¹⁷³ As in the Rehnquist Memorandum, here OLC characterized its conclusions as “tentative and sketchy,” and conceded that “materials properly subject to claims of [e]xecutive privilege may be disclosed to Congress in cases involving Senatorial confirmation of Presidential nominations or in impeachment proceedings.”¹⁷⁴ That same memorandum also included the concession that, if an assertion of executive privilege were litigated, it is possible that “the Court would hold that *any* demand from the Congress is sufficient . . . to overcome the privilege.”¹⁷⁵ Ignoring this sentiment, subsequent memoranda characterized Congress’s ability to overcome the privilege much more narrowly, asserting that courts would be likely to find that “the interest of Congress in obtaining information for oversight purposes” was

reporting directly to the President, *id.* at 6–8, and noted that the executive has an obligation to “furnish some knowledgeable witness in response to a congressional request for testimony” regarding the execution of the law. *Id.* at 8–9.

¹⁷¹ Olson Memorandum, *supra* note 23, at 1.

¹⁷² See Immunity of Former Couns. to the President from Compelled Cong. Testimony, 31 Op. O.L.C. 191, 192 n.2 (2007) (citing Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751, 771–72 (1982)) (justifying extending the immunity analysis to *former* advisors by pointing to former President Harry Truman’s refusal to comply with a subpoena from the House Committee on Un-American Activities). Note, however, that even if OLC is correct regarding testimonial immunity for *current* executive officials, this justification does not necessarily succeed. Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (conferring absolute immunity from civil suit on former Presidents for official acts they took while in office), with *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) (extending executive officials other than the President and prosecutors qualified, rather than absolute, immunity).

¹⁷³ See Memorandum from John M. Harmon, Acting Assistant Att’y Gen., Off. of Legal Couns., to All Heads of Offs., Divs., Bureaus & Bds. of the Dep’t of Just., Executive Privilege 1 (May 23, 1977) [hereinafter Harmon Memorandum] (on file with author) (outlining “in a general way the doctrine of [e]xecutive privilege as it relates to requests from Congressional committees for Executive branch information and documents”).

¹⁷⁴ *Id.* at 5, 7.

¹⁷⁵ *Id.* at 3 (emphasis added).

too generalized to overcome valid assertions of executive privilege,¹⁷⁶ despite the fact that Congress plausibly has argued that such a claim lacks any supporting authority and ignores evidence supporting Congress's arguments.¹⁷⁷

OLC's determination that Congress cannot require executive officials to be prosecuted for contempt of Congress was also originally tentative, emphasizing that the memorandum's conclusions "should be limited to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis."¹⁷⁸ Again, subsequent memoranda omit these caveats. First, in one paragraph in a 1995 memorandum addressing the applicability of a completely different statute to executive action, the Office stated in conclusory fashion that "the criminal contempt of Congress statute does not apply to the president or presidential subordinates who assert executive privilege."¹⁷⁹ Over a decade later, OLC reiterated this unequivocal conclusion, this time with respect to a former executive official: "[t]he Department of Justice has long taken the position, during administrations of both political parties, that 'the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.'"¹⁸⁰ In presenting its views as definitive statements of law despite these historical caveats, OLC's memoranda ensure that the dominant legal argument associated with the ongoing conflict will be one that favors the executive branch.

3. Characterizing History

OLC separation-of-powers opinions also allow the executive to harness the impact that narratives about historical practice can have on public opinion formation. The historical narratives about previous conflicts are often inextricably intertwined with the legal arguments. As OLC recognizes, past practice is integral to shaping constitutional understanding in the inter-branch context,

¹⁷⁶ See, e.g., *Assertion of Exec. Privilege in Response to a Cong. Subpoena*, 5 Op. O.L.C. 27, 27 (1981); see also *Assertion of Exec. Privilege Concerning the Dismissal & Replacement of U.S. Att'ys*, 2007 WL 5038036, at *2 (June 27, 2007) ("Broad, generalized assertions that the requested materials are of public import are simply insufficient under the 'demonstrably critical' standard [that the D.C. Circuit applied in 1974].") (quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)).

¹⁷⁷ Brand Memorandum 2, *supra* note 141, at 7.

¹⁷⁸ *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 103 (1984).

¹⁷⁹ *Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges*, 19 Op. O.L.C. 350, 356 (1995).

¹⁸⁰ *Whether the Dep't of Just. May Prosecute White House Offs. for Contempt of Cong.*, 32 Op. O.L.C. 65, 66 (2008) (quoting *id.*).

where judicial decisions are few and far between.¹⁸¹ OLC's internal guidelines stress the importance of historical precedent in deriving constitutional meaning,¹⁸² and the memoranda reflect this directive.¹⁸³ Thus, when it comes to constitutional analysis of where to draw the line between congressional and executive authority as a *legal* matter, OLC memos rely heavily on their characterization of past executive branch practices—a characterization with which other observers may or may not agree.¹⁸⁴ There are, for example, memoranda purporting to document the history of testimonial immunity for close presidential advisors¹⁸⁵ and assertions of executive privilege.¹⁸⁶ So the very legal positions reached in the memos often rest on an assessment of how the executive has responded to similar conflicts in the past.

As with its purely legal analyses, however, OLC's discussion of past practice displays a tendency to view the past through executive-branch-colored glasses. As an initial matter, such claims sometimes fail to acknowledge the existence of past *inconsistent* practice. Again, there is a recent example. A 2019 OLC memorandum asserts that the executive's "position on testimonial immunity reflects historical practices dating back nearly to the 1939 establishment of the Executive Office of the President" and that, "'at least since the Truman Administration,' presidential advisers 'have appeared before congressional committees only where the inquiry related to their own private affairs or where they had received Presidential permission.'"¹⁸⁷ The opinion does con-

¹⁸¹ See, e.g., *Raines v. Byrd*, 521 U.S. 811, 826 (1997) (incorporating evidence of historical practice into analysis whether legislators had standing to challenge the constitutionality of a statute); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (arguing that "[d]eeply embedded traditional ways of conducting government . . . give meaning to the words of a text"); Olson Memorandum, *supra* note 23, at 3 (noting that when "there are no clear, fully applicable judicial precedents" regarding inter-branch conflicts, "custom or practice tends to become a legal precedent"); Wright, *supra* note 35, at 891 ("[T]he views and historical practices of a branch as to its own power vis-à-vis coordinate branches have independent constitutional significance.").

¹⁸² See, e.g., Barron Memorandum, *supra* note 86, at 1, 2 (stating as a "[g]uiding [p]rinciple" that OLC's "analysis should focus on traditional sources of constitutional meaning," including "the historical record illuminating the text's meaning").

¹⁸³ See, e.g., Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. 782 (1983) (providing examples of refusals by executive officials to comply with congressional information requests); Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. 751 (1982).

¹⁸⁴ See *infra* notes 189–193 and accompanying text.

¹⁸⁵ Rehnquist Memorandum, *supra* note 163, at 5–6 (cataloguing assertions of testimonial immunity).

¹⁸⁶ See generally Hist. of Refusals by Exec. Branch Offs. to Provide Info. Demanded by Cong., 6 Op. O.L.C. at 751–52.

¹⁸⁷ Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *7 (O.L.C. May 20, 2019) (quoting Letter from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to Phillip E. Areeda, Couns. to the President (Sept. 25, 1974), <https://www.justice.gov/olc/page/file/1225976/download> [https://perma.cc/7TBR-844W]).

cede that presidents “have occasionally permitted such testimony,” but then reaffirms that “the long-standing policy has been to decline invitations for voluntary appearances and to resist congressional subpoenas for involuntary ones.”¹⁸⁸ But those statements are not supported by history.¹⁸⁹ Presidential advisors have appeared before Congress regularly. Former White House Counsels for Presidents Ronald Reagan, Bill Clinton, and George H.W. Bush all testified before Congress.¹⁹⁰ The same has been true of Special Assistants and Special Counsels to the President as well as presidential administrative assistants, physicians, military aides, personal secretaries, and more.¹⁹¹

Perhaps more importantly, however, the difference between a consistent past practice that reflects a shared understanding of the law between Congress and the executive, and a consistent executive branch position in which Congress has never acquiesced is a legally significant one.¹⁹² Even if the executive branch has maintained the same policy position over time, this consistency alone does not dictate constitutional meaning. Indeed, that Congress continues to subpoena executive officials and even to go to court to enforce such subpoenas on occasion indicates that it disagrees with this interpretation of what the separation of powers requires.¹⁹³ Yet OLC treats bipartisan *executive* adoption of a policy as evidence that it should be binding on Congress as well.¹⁹⁴

¹⁸⁸ *Id.*

¹⁸⁹ *E.g.*, Brand Memorandum 1, at 39–47 (contesting, with examples, then-Attorney Gen. William French Smith’s claim that the executive had consistently refused to share law enforcement files with Congress); CONG. RSCH. SERV., RL31351, PRESIDENTIAL ADVISERS’ TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW (2014) (collecting instances of presidential advisor testimony as well as instances of presidential advisors’ refusal to testify); Michael Stern, *OLC’s Law Office History of Testimonial Immunity*, POINT OF ORDER (June 5, 2019), <https://www.pointoforder.com/2019/06/05/olcs-law-office-history-of-testimonial-immunity/> [<https://perma.cc/W956-L9SC>] (noting instances when the executive branch deviated from its claims of testimonial immunity that are not mentioned in OLC’s memos).

¹⁹⁰ *See* CONG. RSCH. SERV., *supra* note 189; Mitchell Locin, *Clinton Staffers Maintain a Solid Whitewater Front*, CHI. TRIB. (July 29, 1994), <https://www.chicagotribune.com/news/ct-xpm-1994-07-29-9407290194-story.html> [<https://perma.cc/KTT4-S6KJ>] (describing testimony of former White House Counsel Bernard Nussbaum).

¹⁹¹ *See* CONG. RSCH. SERV., *supra* note 189; *Guide to Congressional Oversight Precedent*, CO-EQUAL, <https://www.co-equal.org/guide-to-congressional-oversight> [<https://perma.cc/J7TG-KK4N>].

¹⁹² *See* Bradley & Morrison, *supra* note 71, at 438 (pointing out that presidential practice should not alone dictate constitutional meaning in the absence of assurance that Congress’s acquiescence “reflects a mutually acceptable institutional bargain or achieves a desirable balance of power”); Bradley & Morrison, *supra* note 74, at 1106; Stern, *supra* note 189 (arguing that the force of OLC’s arguments regarding the significance of a consistent past practice is diminished “in the absence of . . . congressional acquiescence”).

¹⁹³ *See, e.g.*, Comm. on the Judiciary v. Miers, 575 F. Supp. 2d 201, 202 (D.D.C. 2008) (seeking to enforce subpoenas of White House Chief of Staff and former White House Counsel).

¹⁹⁴ *See, e.g.*, Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *2 (O.L.C. May 20, 2019) (“The Rehnquist Memorandum has been consistently reaffirmed by administrations of both political parties, most recently during the Obama Administra-

Courts would be unlikely to infer constitutional meaning from a consistent executive branch practice repeatedly rejected by Congress, yet OLC treats congressional objections as essentially irrelevant.¹⁹⁵

4. Generating Political Cover

Because of the salience of law and historical practice when it comes to inter-branch conflicts, the executive's ability to disseminate effectively the claim that law and history are on his side provides not only substantive talking points, but also valuable political cover. As an initial matter, allegations that the President is acting unlawfully are one of Congress's most powerful means of curbing public support for presidential action.¹⁹⁶ Because the media pays attention to such allegations,¹⁹⁷ Congressional characterization of the executive as uncooperative, intransigent, or infringing on congressional prerogatives rooted in the Constitution can draw (negative) attention to the President's actions,¹⁹⁸ damage the President's standing with the public, and sometimes even generate pressure sufficient to force executive compliance or compromise.¹⁹⁹ The existence of a legal memorandum affirming the President's course of ac-

tion."); Whether the Dep't of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65, 67 (2008) (citing to the Department of Justice's position under administrations of both parties, testimony offered by executive officials, and prior OLC memos for the proposition that refusal of executive officials "to produce documents or testimony over which the President has asserted executive privilege did not constitute a crime").

¹⁹⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power' vested in the President . . ." (emphasis added)).

¹⁹⁶ See Christenson & Kriner, *supra* note 84, at 770 (noting that when Congress supplies "a counter-narrative to that advanced by the White House," it can hinder "presidents' ability to rally the public to their side"); Kriner & Schickler, *supra* note 135, at 531 ("Congress can raise the political costs of certain executive actions by alleging abuses of power . . .").

¹⁹⁷ See, e.g., DINO P. CHRISTENSON & DOUGLAS L. KRINER, *THE MYTH OF THE IMPERIAL PRESIDENCY: HOW PUBLIC OPINION CHECKS THE UNILATERAL EXECUTIVE* 72 (2020) ("Because journalistic norms of newsworthiness increasingly value political conflict, the media plays a significant role in magnifying congressional challenges to presidential unilateral actions."); PROJECT ON GOV'T OVERSIGHT, *THE ART OF CONGRESSIONAL OVERSIGHT* 43 (2d ed. 2015) ("It's newsworthy when the executive branch does[] [not] comply with the legislative branch's duty to conduct oversight."); Basinger & Rottinghaus, *supra* note 62.

¹⁹⁸ See Rehnquist Memorandum, *supra* note 163 ("When the President claims [e]xecutive privilege and refuses either to divulge a document or to permit a witness to testify, he immediately draws to himself some criticism for 'withholding' relevant evidence from the Congress or from the public."); Wright, *supra* note 35, at 942 ("Congress has advantages in the political framing of oversight disputes because the Executive is in the position of resisting a congressional investigative process.").

¹⁹⁹ See PROJECT ON GOV'T OVERSIGHT, *supra* note 197, at 43 ("Attention garnered from news coverage can lead to pressure from the top that shakes down the information needed."); Wright, *supra* note 35, at 929 (noting that the executive branch damages public confidence in the government).

tion as lawful or consistent with past practice, however, dilutes the force of any allegations of lawlessness.²⁰⁰ It allows the President to invoke OLC—and its reputation for impartial legal analysis—as a shield, and to argue that instead it is *Congress* that is overstepping legal bounds.

A recent example is the White House's use of this tactic to defend President Trump's decision to instruct his former White House Counsel, Don McGahn, not to testify before Congress regarding allegations that the President had obstructed the Justice Department's investigation into Russian interference with the 2016 election.²⁰¹ As noted above, a series of OLC memoranda dating back to the early 1970s maintains that neither the President nor his "close advisors" can be compelled to testify before Congress,²⁰² and that this principle continues to apply even after those advisors have left office.²⁰³ When the White House Press Secretary can point to an OLC memorandum stating that, "based on long-standing, bipartisan, and Constitutional precedent, the former Counsel to the President cannot be forced to give such testimony," it blunts the impact of congressional allegations of executive wrongdoing.²⁰⁴ To the extent this shield is effective in muting criticism, it neutralizes Congress's ability to sell the narrative as one of presidential misconduct.²⁰⁵ If the President is, after

²⁰⁰ See ACKERMAN, *supra* note 8, at 96 ("When its authoritative-looking pronouncements appear at moments of crisis, the OLC can provide the president with crucial legal reinforcement . . ."); Bradley & Morrison, *supra* note 74, at 1125 ("[T]he president is in a better position to defend the action's legality if he can point to an OLC opinion upholding it.").

²⁰¹ See Sonam Sheth, *There's a Huge Loophole in a New DOJ Filing That Trump Cited to Block Don McGahn from Testifying Before Congress*, BUS. INSIDER (May 20, 2019), <https://www.businessinsider.com/justice-department-olc-memo-don-mcgahn-2019-5> [<https://perma.cc/J8XS-3A2Z>] (observing that White House Press Secretary Sarah Sanders pointed to a "memo from [OLC] 'stating that, based on long-standing, bipartisan, and Constitutional precedent, the former Counsel to the President cannot be forced to give such testimony'").

²⁰² *E.g.*, Immunity of the Couns. to the President from Compelled Cong. Testimony, 20 Op. O.L.C. 308, 308 (1996) ("It is the longstanding position of the executive branch that 'the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee.'" (quoting Harmon Memorandum, *supra* note 273, at 5)); see also CONG. RSCH. SERV., *supra* note 189, at 21 (discussing executive branch immunity arguments). OLC's position on this issue dates back to 1972. See Rehnquist Memorandum, *supra* note 163, at 7 ("The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee.").

²⁰³ Rachael Bade et al., *White House Blocks Former Counsel McGahn from Testifying to Congress*, WASH. POST (May 20, 2019), https://www.washingtonpost.com/politics/white-house-intends-to-block-former-counsel-mcgahn-from-testifying-to-congress/2019/05/20/47f61f94-7b1b-11e9-a5b3-34f3edf1351e_story.html [<https://perma.cc/66UA-8ASF>].

²⁰⁴ Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *1 (O.L.C. May 20, 2019). (noting that testimonial immunity "applies to former senior advisers such as the former White House Counsel").

²⁰⁵ Kriner & Schickler, *supra* note 135, at 528 (finding that "sustained media attention is needed for charges of wrongdoing to seep into the consciousness and political evaluations of a relatively inattentive public").

all, simply following the advice of his (widely respected) Justice Department advisors, Congress's assertions to the contrary can be characterized as hyperbolic or hysterical. Further, if the memorandum acknowledges that there are some contexts in which the President's discretion is constrained—limiting claims of executive privilege to communications that involve the President personally, for example—the memorandum's existence may actually bolster the executive's law-abiding image.²⁰⁶

This political shield becomes more powerful the longer the OLC opinion stands and the more well known it becomes. If the President had simply declared in response to Congress's subpoena of McGahn that he was asserting "testimonial immunity" for White House staff, he would be vulnerable to charges of violating the law by refusing to comply with duly issued subpoenas. Even an OLC opinion, if drafted during an ongoing conflict, remains susceptible to the charge that it was outcome-driven, and the usual presumption of OLC independence might be at least partially discounted.²⁰⁷

Indeed, some of the novel opinions emerging from President Trump's OLC have been met with significant skepticism. Both their contents and the timing of their production have been viewed as more the product of political expediency than lawyerly analysis.²⁰⁸ Whether these memoranda will become more convincing if OLC sustains those positions in subsequent administrations, only time can tell. It is also too soon to know whether the criticism of the

²⁰⁶ See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 912–13 (2007) (pointing out that by constraining his own power in some ways, the President can make himself appear trustworthy, thereby actually empowering him); Shirin Sinnar, Essay, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1572 (2016) (arguing that the executive seeks to project an image of an institution that "can responsibly police itself" by adopting legal standards that sound as if they constrain executive action (even if they do not)).

²⁰⁷ See, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 104 (D.D.C. 2008) (dismissing an OLC opinion as unpersuasive because, inter alia, it was "hastily issued on the same day that the President" told his advisor to invoke absolute immunity).

²⁰⁸ See Noah Feldman, Opinion, *Justice Department Independence? Not with Trump*, BLOOMBERG (Jan. 22, 2020), <https://www.bloomberg.com/opinion/articles/2020-01-22/trump-has-cowed-the-justice-department-s-office-of-legal-counsel> [<https://perma.cc/9CJG-LUCJ>] ("[T]he OLC memo was presented to the world as part of Trump's [impeachment] defense team's filing. That's stunning for an office of the Department of Justice that once prided itself on exercising independent judgment from the rest of the department and the executive branch. It's clear that today's OLC has been recruited wholesale into Trump's defense."); Kel McClanahan, *How One Secretive Justice Department Office Can Sway the Whole Government*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government/> [<https://perma.cc/YL8W-PGPE>] (criticizing an OLC memo "justifying the withholding from Congress of the whistleblower complaint about Trump's communications with Ukraine"); Shalev Roisman, *The Real Decline of OLC*, JUST SEC. (Oct. 8, 2019), <https://www.justsecurity.org/66495/the-real-decline-of-olc/> [<https://perma.cc/W446-QV67>] ("OLC's very public involvement in the most controversial policies of this White House has done great harm to the Office's legitimacy.").

output of the Trump OLC will more broadly undermine the value of OLC opinions from subsequent administrations.

If the assertion of testimonial immunity rests on decades-old OLC analysis, however, that presumption becomes likely to retain its full force, regardless of who invokes it. This is so despite the fact that OLC itself initially drafted the policy and repeatedly reaffirmed it amidst previous controversies.²⁰⁹ In effect, the administration who first adopts the policy pays much of its political costs. The passage of time then “launders” the argument, and what might have been seen at one time as political expediency eventually can be characterized as longstanding, independent legal analysis. This allows subsequent executives to take advantage of OLC’s pro-executive conclusions without the appearance of self-aggrandizement at Congress’s expense, allowing the President to cast his resistance not as a dramatic claim to unilateral executive power, but rather a simple restatement of familiar policy.

Consider in this respect the response to President Trump’s 2019 assertion that he would refuse to comply with any and all congressional subpoenas because Congress simply lacked oversight power.²¹⁰ This statement, which was a novel view of the constitutional balance of power, was met with a great deal of surprise, criticism, and outrage, with the strategy described variously as “remarkable,”²¹¹ unprecedented,²¹² “extreme,”²¹³ and infuriating,²¹⁴ to name a few. That the Justice Department would not prosecute anyone for contempt of Congress if they asserted executive privilege at the President’s instruction, however, was met with a collective shrug of the shoulders in comparison. The public debate simply took as a given that element of the legal landscape and focused not on rebutting the argument but rather on whether other consequenc-

²⁰⁹ For example, OLC’s opinions determining that sitting Presidents may not be indicted or prosecuted were drafted in 1973, during the Watergate investigation into President Nixon and the investigation into whether Vice President Spiro Agnew had accepted bribes, and in 2000, during Independent Counsel Kenneth Starr’s investigation into President Clinton. See Rosalind S. Helderman, *On Question of Obstruction, Mueller Hewed to Untested Justice Department Opinions and ‘Principles of Fairness,’* WASH. POST (May 29, 2019), https://www.washingtonpost.com/politics/on-question-of-obstruction-mueller-hewed-to-untested-justice-department-opinions-and-principles-of-fairness/2019/05/29/d21605e2-823a-11e9-bce7-40b4105f7ca0_story.html [<https://perma.cc/W2BW-6A9C>].

²¹⁰ See Savage, *supra* note 1 (“‘We’re fighting all the subpoenas,’ Mr. Trump told reporters outside the White House.”).

²¹¹ *Id.* (discussing the Trump Administration’s response to the investigation of Russian interference in the 2016 election).

²¹² *Id.* (quoting former House of Representatives lawyer Charles Tiefer’s assertion that “[t]he president is attempting to repeal a congressional power of oversight that goes back to the administration of George Washington”); see also Hulse, *supra* note 26 (“‘This is a massive, unprecedented and growing pattern of obstruction,’ said Representative Elijah E. Cummings . . .”).

²¹³ Hulse, *supra* note 26.

²¹⁴ *Id.* (describing Democrats as furious about the Trump Administration’s refusal to cooperate).

es might flow from a contempt vote.²¹⁵ Much was made of the novelty of the blanket refusal, with comparisons to the less combative positions taken by previous executives, whereas the problem of enforcing congressional subpoenas was largely ascribed to the existence of a longstanding policy.²¹⁶

In effect, the memos advancing positions based on either consistent past practice or a longstanding legal opinion provide yet another public-facing argument: “this is how we have always done it.”²¹⁷ Thus, to the extent that consistency strengthens the executive argument that its longstanding position is the right one, OLC seeks to provide evidence of that consistency.²¹⁸ As with the issue of

²¹⁵ See, e.g., Griffin Connolly, *Nadler Prepares Contempt Vote for McGahn—but What Are the Consequences?*, ROLL CALL (May 21, 2019), <https://www.rollcall.com/2019/05/21/nadler-prepares-contempt-vote-for-mcgahn-but-what-are-the-consequences/> [<https://perma.cc/P4JT-JZF3>] (discussing Representative Adam Schiff’s exploration of the idea that Congress could “levy fines against officials who flout congressional subpoenas”); Lisa Desjardins, *What Happens if Attorney General Barr Is Held in Contempt of Congress?*, PBS (May 8, 2019), <https://www.pbs.org/newshour/politics/what-happens-if-attorney-general-barr-is-held-in-contempt-of-congress> [<https://perma.cc/LT77-SFRK>] (noting that, for the past decade, contempt of Congress votes against executive officials have had no consequences); Nicholas Fandos, *House Plan Vote to Fight Barr in Court but Back Off Contempt*, N.Y. TIMES (June 6, 2019) <https://www.nytimes.com/2019/06/06/us/politics/house-contempt-resolution.html> [<https://perma.cc/Y8RZ-X4AR>] (pointing out that the practical impact of holding executive officials in contempt is negligible, because “there is almost no chance the department would ever prosecute them”).

²¹⁶ See, e.g., Hulse, *supra* note 26 (contrasting past cases exhibiting mutual recognition of Congress’s legitimate oversight power, which led both Republican and Democratic administrations to reach a negotiated accommodation, with the Trump White House’s “firm edict against cooperation”).

²¹⁷ See, e.g., Letter from Att’y Gen. William French Smith, to Congressman John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. REP. NO. 97-968, at 39 (Comm. Rep.) (“The policy [of not sharing confidential law enforcement files with congressional overseers] was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower.”); Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *1 (O.L.C. May 20, 2019) (“We provide the same answer that the Department of Justice has repeatedly provided for nearly five decades: Congress may not constitutionally compel the President’s senior advisers to testify about their official duties.”); Cong. Subpoenas of Dep’t of Just. Investigative Files, 8 Op. O.L.C. 252, 262 (1984) (“The policy of the Executive Branch throughout this Nation’s history has been generally to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances.”); Letter from Robert Raben, Assistant Att’y Gen., to Congressman John Linder (Jan. 27, 2000) (on file with author) (“The Department’s longstanding policy is to decline to provide Congressional committees with access to open law enforcement files.”).

²¹⁸ See, e.g., Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 2017 WL 5653624, at *1 (O.L.C. May 1, 2017) (asserting that “the Executive Branch’s longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight”); Whether the Dep’t of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65, 66 (2008) (“The Department of Justice has long taken the position, during administrations of both political parties, that ‘the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.’” (quoting Application of 28 U.S.C. § 458 to Presidential Appointments of Fed. Judges, 19 Op. O.L.C. 350, 356 (1995))); Auth. of Agency Offs. to Prohibit Emps. from Providing Info. to Cong., 28 Op. O.L.C. 79, 79 (2004) (“Consistent with longstanding Executive Branch positions, Department of Health and Human Services

testimonial immunity, OLC can often support its assertions regarding the longstanding nature of its position by pointing to an impressive string of opinions making the same claim across several decades.²¹⁹ Media reports and legal analyses then emerge based not on the *fact* of executive branch consistency (that may or may not actually exist), but on the fact of the executive branch's *claim* of consistency.²²⁰ In stories about the amenability of sitting presidents to indictment and prosecution²²¹ or claims of testimonial immunity,²²² for example, reporters and commentators repeatedly reference the historic provenance of the executive branch legal position, indirectly supporting the President's claim of consistency and thus legality. These opinions are, in other words, akin to a legal Potemkin

officials have the authority to prohibit officers or employees of the Department from providing information to Congress.”).

²¹⁹ See, e.g., Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 2014 WL 10788678, at *1 (O.L.C. July 15, 2014) (“The Executive Branch’s longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President’s immediate advisers are absolutely immune from congressional testimonial process.”); Rehnquist Memorandum, *supra* note 163. The Justice Department roots this immunity in the constitutional separation of powers and the President’s immunity from congressional compulsion to testify. Immunity of Former Couns. to the President from Compelled Cong. Testimony, 31 Op. O.L.C. 191, 192 (2007) (“If a congressional committee could force the President’s appearance” to testify before it, “fundamental separation of powers principles—including the President’s independence and autonomy from Congress—would be threatened.”); Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 4 (1999) (arguing that just as the President “may not compel congressmen to appear before him,” “[a]s a matter of separation of powers, Congress may not compel him to appear before it” (quoting Olson Memorandum, *supra* note 23, at 2)); Milton Bracker, *Truman Rejects Subpoena of House as His ‘Duty’ Under the Constitution; Committee Will Not Act Against Him*, N.Y. TIMES, Nov. 13, 1953, at A1 (summarizing President Truman’s argument in a letter to the Committee on Un-American Activities that the separation of powers doctrine “would fall . . . and the presidency shrink to a mere arm of the Legislative Branch . . . if the President should feel during his term that his ‘every act might be subject to official inquiry and possible distortion for political purposes’”).

²²⁰ E.g., Savage, *supra* note 126 (reporting that the Justice Department argued that President Trump’s appointment of Matt Whitaker as Acting Attorney General was not only lawful but also “that it fit within a history of similar designations dating back to the earliest days of the country”).

²²¹ See, e.g., Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, REUTERS (Feb. 26, 2019), <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-u-s-president-face-criminal-charges-idUSKCN1QF1D3> [<https://perma.cc/CPC2-N4FE>] (“The U.S. Justice Department has a decades-old policy that a sitting president cannot be indicted, indicating that criminal charges against Trump would be unlikely, according to legal experts.”).

²²² See, e.g., Elliot Hannon, *Trump Administration Formally Instructs Former White House Counsel to Disobey Congressional Subpoena to Testify*, SLATE (May 20, 2019), <https://slate.com/news-and-politics/2019/05/trump-administration-formally-instructs-former-white-house-counsel-to-disobey-congressional-subpoena-to-testify.html> [<https://perma.cc/D6TG-X4QW>] (noting that the White House Counsel argued that “[t]his long-standing principle [of testimonial immunity for White House advisers] is firmly rooted in the Constitution’s separation of powers and protects the core functions of the presidency, and we are adhering to this well-established precedent in order to ensure that future Presidents can effectively execute the responsibilities of the Office of the Presidency”).

village. They erect a convincing façade of legality, giving presidential action legitimacy, even if their contents cannot stand up to scrutiny.²²³

5. Discouraging Compromise

OLC memoranda create concrete impediments to congressional success as well. In some ways, OLC memoranda are pre-commitment devices for the executive. They set the executive's original bargaining position and discourage the President from compromising, even if he might prefer to do so in a given conflict—because the President believes the information Congress seeks will vindicate his position, or because a swift capitulation will remove an ongoing scandal from the headlines.²²⁴ Part of OLC's mandate is to preserve presidential prerogatives against congressional encroachment.²²⁵ As temporary “stewards” of the institution in which they work, political appointees are “‘often moved to preserve the values and reputation of that institution,’ even at the cost of compromising an administration's immediate policy goals.”²²⁶ OLC's policy of adhering to the Office's past precedents ensures that the prerogatives of the presidency as an institution are guarded across administrations and by appointees of either political party.²²⁷ One memorandum suggesting that President George H.W. Bush's White House Counsel decline to comply with a congressional subpoena to testify reflects the Office's solicitude for its role as the protector of presidential prerogatives. In it, OLC notes that allowing the President's close advisors to testify before Congress creates the impression “that such testimony is a matter of legislative right, not executive grace.” It further asserts that “yielding once tends to ultimately produce subsequent, more frequent, more vigorous demands” and warns that establishing a custom of submitting to subpoenas “would tend to create a damaging legal precedent.”²²⁸ So the memoranda themselves can serve as roadblocks to conflict resolution.

²²³ For a discussion of the flaws in OLC separation-of-powers memoranda as reliable statements of the law, see *supra* Part II.A.2.

²²⁴ See, e.g., Johnsen, *supra* note 43, at 1133 (noting that sometimes “the institutional interests of the presidency may require an assertion of executive privilege that conflicts with other of the President's short-term personal interests”).

²²⁵ See *supra* note 113 and accompanying text.

²²⁶ See David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 6–7 (2018) (quoting Jack Goldsmith, *Lawyerly Integrity in the Trump Administration*, LAWFARE (May 14, 2017), <https://www.lawfareblog.com/lawyerly-integrity-trump-administration> [<https://perma.cc/4STM-ZEZY>]); Wright, *supra* note 35, at 943 (“The executive branch agency head will have an incentive to produce all the requested materials in an effort to end the scrutiny, but [OLC] and the White House may want the agency to continue principled objections to the requests that implicate broader executive branch interests.”).

²²⁷ Barron Memorandum, *supra* note 86, at 2 (instructing that “[OLC] should not lightly depart from . . . past decisions”).

²²⁸ Olson Memorandum, *supra* note 23.

In stark contrast, Congress's incentive to compromise is particularly strong. All of the costs of delay fall on Congress—the executive's entire goal is to maintain the status quo and avoid sharing the information Congress has requested.²²⁹ This institutional distinction has implications for both ongoing and future disputes. In the context of ongoing disputes, it makes congressional compromise for the sake of political expediency more likely.²³⁰ With no single actor playing the role of guardian of institutional prerogatives, Members seeking executive branch information have no incentive to resist compromise for the sake of an abstract legal theory, even if doing so would strengthen the hand of future Congresses and public sentiment would ultimately vindicate their position.²³¹ As for future disputes, such compromises will provide additional fodder for executive arguments that past practice favors its position. For example, legislative committees often permit presidential advisors to testify before Congress on a "voluntary" basis—i.e., not in response to a subpoena.²³² This compromise allows the executive to maintain its position on testimonial immunity for presidential advisors, while simultaneously permitting Congress to access the information it seeks. At the same time, however, it both fails to establish the principle that such officials are obligated to testify even when their appearance is *not* voluntary and allows the executive to maintain its "longstanding" position regarding testimonial immunity.²³³

These are all reasons to believe that OLC's work product not only reflects a predisposition to expansive views of executive authority, but that OLC's codified articulation of those views operates to advantage executive branch efforts to resist congressional information requests. This is not to say that OLC's pronouncements should be deemed "maximally pro-executive positions."²³⁴ But it

²²⁹ See Rehnquist Memorandum, *supra* note 163, at 6–7 (noting that "[i]n a strictly tactical sense, the Executive Branch has a head start in any controversy with the Legislative Branch . . . [because] [a]ll the Executive has to do is maintain the *status quo*, and he prevails"); Wright, *supra* note 35, at 930 ("As the holder of the status quo, the Executive Branch does not benefit from rapid escalation.").

²³⁰ Posner & Vermeule, *supra* note 19, at 1034–35 (arguing that "[t]he divergence between the interests of individual legislators and the institutional interests of Congress" weakens Congress's negotiating leverage).

²³¹ *Id.* at 1026 ("Actors avoid confrontation when it is privately beneficial to do so, even if conflict would create precedents that would benefit future generations, all else equal, by clarifying the rules of the game.").

²³² See Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *7, *12 (O.L.C. May 20, 2019) (arguing that accommodating congressional requests to hear from senior presidential advisers does not "compromise the underlying immunity of the President or his senior presidential advisors").

²³³ *Id.* at *10. It is possible that Congress could stand on principle, challenge the executive's testimonial-immunity views in court, for example, and lose. This would, of course, weaken the bargaining power for future Congresses. But both courts to address the issue have found in Congress's favor. See *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 778 (D.C. Cir. 2020); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 108 (D.D.C. 2008).

²³⁴ Morrison, *supra* note 10, at 1717.

does mean that OLC's role in inter-branch disputes deserves more attention than it has received to date.

III. LEVELING THE LEGAL PLAYING FIELD

The tactical advantage that OLC provides to the executive is a function of institutional design. A nominally independent arbiter of legal rules, whose loyalty is to the executive branch itself, and whose pronouncements are presumptively binding across administrations regardless of party affiliation, translates into a powerful weapon in the executive's arsenal when fighting inter-branch conflicts. Congress simply lacks such a centralized, high-powered legal office producing sophisticated articulations of legal arguments from the legislative perspective.

On the one hand, these distinct institutional dynamics are unsurprising. The executive branch is a hierarchical body with a single President at the top, whereas Congress is a collective with a much flatter organizational structure. Moreover, congressional staffers are far less numerous than the career civil servants that perform the bulk of the executive branch's work. And whereas these executive officials tend to be dedicated subject-matter experts who spend extended periods of time—sometimes an entire career—in their positions,²³⁵ legislative staffers are devoted to the Member who hired them, rather than to Congress as an institution or to any particular substantive mission.²³⁶ For these and other reasons, it is much easier for the executive to develop and maintain over time a single position.

At the same time, the executive branch is a “they” rather than an “it,” as well.²³⁷ Each executive branch agency employs its own coterie of lawyers—the Department of Defense (DOD) alone employs over 10,000 attorneys—churning out legal analysis on a daily basis.²³⁸ And the President can choose at

²³⁵ See Fontana & Huq, *supra* note 226, at 45, 79 (noting that “officials who anticipate that their career will be entangled with a specific institution have a reason to advance the interests of that institution qua institution” and noting Congress’s “institutional-loyalty deficit”). Even when political appointees influence executive branch actions, they are far outnumbered by their non-politically appointed counterparts. *Id.* at 67.

²³⁶ See Edwards, *supra* note 83, at 253 (“[N]either house has a merit system, a tenured career service, or a central facility for recruiting the best available talent.”); Fontana & Huq, *supra* note 226, at 78–80. Even “professional staff,” who work for a congressional committee rather than a specific Member, tend to secure jobs through “partisan networks” rather than professional qualifications. Fontana & Huq, *supra* note 226, at 78.

²³⁷ Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (pointing out that because Congress is a collective body, there is no such thing as a single congressional intent).

²³⁸ Fontana, *supra* note 96, at 39–41 (describing legal offices within several different executive branch agencies and noting that DOD “employs about 10,000 part-time or full-time lawyers”).

any time to override OLC's pronouncements.²³⁹ Nevertheless, OLC demonstrates that it is possible for a collective body to coalesce around and treat one institutional position as authoritative.

To the extent that the structural advantages OLC provides the executive are normatively undesirable, reforms should seek to level the playing field. There are two primary ways to seek a redistribution of power: reduce OLC's ability to drive the legal conversation, or augment Congress's ability to do the same (or some combination of both). This Part will explore some possibilities, focusing first on potential modifications to executive branch institutional arrangements and then on possible legislative branch reforms. Finally, it will consider reforms that do not fit neatly within the scope of either political branch.

A. Executive Branch Reforms

The first set of potential reforms involves the operation of OLC itself. The Office could reimagine its role as one that sought the best view of the law independent of its executive branch institutional location. In other words, the Office itself could seek to lean more toward the judicial model of legal interpretation, rather than its current independent-but-executive-focused model. This would require a radical rethinking of what it means for OLC to be an independent legal arbiter and would involve insulating the Office in such a way as to render it truly independent from both the Attorney General and the President, at least when it comes to separation-of-powers issues.²⁴⁰ Recalibrating OLC's self-image would not be a panacea. Regardless of what legal positions it takes, neither the Attorney General nor the President is bound by its views. In a world where a truly independent OLC existed, however, presidential compliance with its positions would be a political safe harbor, allowing him to reap the same benefits that OLC offers today. Actions taken contrary to OLC's views, by contrast, would impose the political costs that OLC underwriting eliminates. Indeed, this dynamic played out in the context of United States military intervention in Libya in 2011. On the question whether the United States' involvement in Libya necessitated congressional authorization, OLC answered

²³⁹ See, e.g., Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/DDR7-CE6P>] (noting that President Obama overruled OLC's conclusions regarding the applicability of the War Powers Resolution to U.S. operations in Libya in 2011). Presidents, and attorneys general, "rarely do" overturn OLC opinions. *Id.*

²⁴⁰ Distancing OLC from the Attorney General and the President, however, is likely to reduce the President's confidence in the Office and thus undermine its authority within the executive branch. I am indebted to Walter Dellinger for pointing out this potential unintended consequence.

in the affirmative.²⁴¹ Rather than follow OLC's view, however, President Obama collected the legal views of not only the Justice Department but also DOD and the State Department.²⁴² When only the State Department's legal advisor concluded that Congress need not authorize the military action, the President adopted that legal theory.²⁴³ This selective use of legal advice was not well received in the legal community, and was described as "disturbing" by one former acting head of OLC.²⁴⁴

Another intra-executive modification would be to include in OLC's separation-of-powers analyses a dissenting opinion. Just as military and intelligence agencies employ "red teams" to play devil's advocate to test the agency's conclusions or preferred policies, OLC could institutionalize the practice of challenging its own opinions. OLC attorneys could include within their memoranda an exposition of any plausible arguments that run counter to their conclusion.²⁴⁵ They could, for example, flag issues on which the law is unsettled, explore what non-frivolous objections Congress could advance on those issues, and make note of inconsistent past practice. Establishing a rule or a tradition requiring such analysis to be included in written work product could generate powerful effects. Recall that in many of the foundational memoranda on these issues, the drafters took pains to note the preliminary and uncertain nature of their conclusions.²⁴⁶ Even modifying OLC practice to acknowledge the tentative nature of some of its legal conclusions rather than making definitive statements regarding unsettled law without acknowledging the existence of viable counterarguments could temper their opinions' public force. This would eliminate any narrative advantage such definitive statements give the President. The executive branch would still be free to advocate for its own conclusions and to treat OLC's legal advice as internally binding. It would simply also be required to acknowledge the unsettled nature of the question and the existence of colorable contrary claims, much as judges can publish dissenting opinions, and congressional reports can include minority views. On issues that implicate the separation of powers, OLC attorneys could acknowledge neither Congress nor the executive has a better claim to ultimate authority regarding what the constitution permits or requires.

²⁴¹ See, e.g., Michael Isikoff, *On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say*, NBC NEWS (June 21, 2011), <https://www.nbcnews.com/id/wbna43474045> [<https://perma.cc/FD3L-DUWL>].

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ There are some examples of OLC doing exactly this, but they are more the exception than the rule. See *supra* note 150.

²⁴⁶ See *supra* notes 171–180 and accompanying text.

A more radical extension of this quest for OLC independence would extricate it from the Justice Department altogether. Consider as a model the Privacy and Civil Liberties Oversight Board (PCLOB). The PCLOB is an independent agency created in accordance with the conclusions of the 9/11 Commission Report to serve as a civil liberties watchdog over counterterrorism policy.²⁴⁷ Its five members are selected by the President to staggered six-year terms and confirmed by the Senate.²⁴⁸ Board members must come from different political parties, and must “be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience.”²⁴⁹ The Board has issued reports on multiple National Security Agency surveillance programs that include sophisticated and highly respected legal analysis. Unlike OLC opinions, the PCLOB’s view has no binding effect on the executive branch, but its legal conclusions have been highly influential in the public debate surrounding government surveillance.²⁵⁰ It therefore provides a model for how the executive branch could arrive at more impartial legal conclusions regarding the separation of powers.

B. Legislative Branch Reforms

Congress also could adopt internal mechanisms to better serve its long-term institutional interests. The obvious suggestion is for Congress to create a legislative equivalent of OLC.²⁵¹ Indeed, a recent incident illustrates the possible impact of such an office. In January 2020, the General Accounting Office (GAO)²⁵² issued a finding that President Trump’s withholding of military aid

²⁴⁷ See 42 U.S.C. § 2000ee(a)–(c) (“establish[ing] as an independent agency within the executive branch a Privacy and Civil Liberties Oversight Board”).

²⁴⁸ *Id.* § 2000ee(h)(1) (outlining the composition of the PCLOB).

²⁴⁹ *Id.* § 2000ee(h)(2) (“[I]n no event shall more than [three] members of the Board be members of the same political party.”).

²⁵⁰ See PRIV. & C.L. OVERSIGHT BD., RECOMMENDATIONS ASSESSMENT REPORT (Feb. 5, 2016), <https://fas.org/irp/offdocs/pclob-assess-2016.pdf> [<https://perma.cc/7WX8-XCPK>] (noting that the USA Freedom Act, which ended the government’s bulk collection of call detail records, had addressed most of the Board’s recommendations, and “all of [the PCLOB’s] 22 recommendations ha[d] been implemented in full or in part”).

²⁵¹ Almost thirty years ago, Professor Harold Koh called for a similar reform, suggesting that Congress create a “congressional legal advisor” modeled on the State Department’s legal advisor. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 169–71 (1990); see also *Article One: Restoring Capacity and Equipping Congress to Better Serve the American People Before the H. Select Comm. on the Modernization of Cong.*, 116th Cong. 3–4 (2020) (statement of Elise J. Bean, Washington Co-Director, Levin Center at Wayne Law) (recommending that Congress devise a mechanism for issuing bipartisan legal opinions regarding oversight matters to rebut OLC’s views, that would “increase uniformity among Congressional committees, educate Members . . . and advance oversight effectiveness”).

²⁵² See Fisher, *supra* note 79, at 65 (“[L]awmakers rely on the GAO to conduct general oversight over the agencies,” including “all matters relating to the receipt, disbursement, and application of

from Ukraine violated the law.²⁵³ The GAO's legal position provided a significant legal argument in Congress's favor and had a meaningful impact on the public debate around this highly controversial incident.²⁵⁴ This example, however, is the exception rather than the rule.

The Senate sought to create a *legislative OLC* as part of the 1978 Ethics in Government Act but could not get the House to sign on to the plan.²⁵⁵ At first blush, it may seem that the individual House and Senate Legal Counsel positions might profitably be combined to play this role. After all, the Senate's Legal Counsel is statutorily charged with "defend[ing] vigorously" all "constitutional powers and responsibilities of the Senate or of Congress."²⁵⁶ In practice, however, these offices are devoted primarily to handling litigation. The executive branch equivalent would be the Justice Department's civil division, rather than OLC. In other words, there is a division of labor in the executive between litigators, who are appropriately zealous advocates for the executive's preferred outcome, and the relatively more independent OLC attorneys. Moreover, entrusting the job of producing definitive congressional positions on separation of powers question to two different offices would result in the possibility of disparate outcomes. If the Senate took one position on a legal issue and the House took another, Congress would fail to capture the advantages that OLC provides to the executive. What is needed is a coterie of legal advisors devoted to developing an official congressional position when legal questions arise. Providing such legal focal points that can unite Members of Congress could lower the collective action costs that usually impede congressional action.

A centralized legal office housed within the legislative branch is not as much of an anomaly as it may first appear. In addition to the GAO, the CRS²⁵⁷ and the Congressional Budget Office (CBO)²⁵⁸ are examples of existing statutorily created intra-legislative agencies that have successfully served Congress as a whole, rather than one party, or one committee, or one Member, for dec-

public funds." The GAO was responsible for first uncovering the irregularities that became the Iran-Contra scandal. *Id.* at 66.

²⁵³ See Emily Cochrane et al., *G.A.O. Report Says Trump Administration Broke Law in Withholding Ukraine Aid*, N.Y. TIMES, <https://www.nytimes.com/2020/01/16/us/politics/gao-trump-ukraine.html> [<https://perma.cc/YEQ4-BL2F>] (Jan. 16, 2020).

²⁵⁴ See *id.*

²⁵⁵ See, e.g., S. DOC. NO. 95-127 (1978) (noting that the House failed to agree to the Senate's proposal to establish such an office).

²⁵⁶ 2 U.S.C. § 288h.

²⁵⁷ See Fisher, *supra* note 79, at 68. CRS provides non-partisan research and analytical support for congressional Members, committees, and staff. *Id.*

²⁵⁸ See *id.* at 73. The CBO is a longstanding, nonpartisan institution tasked primarily with issuing estimates of the cost of proposed legislation. *Id.*

ades.²⁵⁹ An Office of Congressional Counsel (OCC) could be created as an entirely separate entity. Congress could, by statute or simply by the use of each House's own internal rules, over which they have complete control, establish an OCC and declare that its legal opinions represent the views of Congress as a whole. Over time, the office playing this role could develop a reputation for independence similar to the one enjoyed by OLC.

Or an OCC could be housed within an existing legislative office, just as OLC is located within the Justice Department. Although the GAO provides the recent illustration of the value such an office could have, that agency is not an ideal home for an OCC because of its limited mandate. The GAO focuses on how taxpayer money is spent, whereas an effective OCC would primarily focus on separation-of-powers questions.²⁶⁰ Indeed, there were some who argued that the GAO's finding about the President's delay of military assistance to Ukraine exceeded the GAO's mandate.²⁶¹

CRS might be a better fit. Lawyers in CRS already supply Congress with their analysis through: detailed, thoroughly researched reports; expert congressional testimony; confidential memoranda prepared for particular members; briefings; seminars; and responses to individual inquiries.²⁶² CRS is staffed with knowledgeable attorneys who must be hired "without regard to political affiliation, and solely on the basis of fitness to perform the duties of the position."²⁶³ It also already is dedicated to remaining authoritative, objective, and nonpartisan.²⁶⁴ CRS staff includes constitutional experts who regularly engage in analysis of and provide opinions regarding separation-of-powers questions.²⁶⁵ When President George W. Bush asserted a claim of privilege over rele-

²⁵⁹ OLC has opined that "legislative agencies" are "constitutionally harmless" from a separation-of-powers perspective, but that it is "highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons." The Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 172–73 (1996). Indeed, the Supreme Court "has been relatively strict in enforcing separation of powers limits" between the executive and legislative branches. See Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Executive and Legislative Powers*, 51 B.C. L. REV. 1, 9–11 (2010).

²⁶⁰ See *Overview*, GAO, www.GAO.gov/about/ [<https://perma.cc/U7WU-PM54>].

²⁶¹ See Jeff Stein et al., *White House Hold on Ukraine Aid Violated Federal Law, Congressional Watchdog Says*, WASH. POST (Jan. 16, 2020), https://www.washingtonpost.com/business/economy/white-house-hold-on-ukraine-aid-violated-federal-law-congressional-watchdog-says/2020/01/16/060ea7aa-37a3-11ea-9c01-d674772db96b_story.html [<https://perma.cc/XRA7-WVCT>] (citing the White House's criticism of the GAO finding as an "'overreach' and an attempt to insert itself into the 'media's controversy of the day'").

²⁶² *About CRS*, LIBR. OF CONG., <http://www.loc.gov/crsinfo/about/> [<https://perma.cc/VA6E-GS9N>].

²⁶³ 2 U.S.C. § 166(c)(3).

²⁶⁴ *Congressional Research Service Careers*, LIBR. OF CONG., <http://www.loc.gov/crsinfo> [<https://perma.cc/ACW2-VVUV>]; *Values*, LIBR. OF CONG., <http://www.loc.gov/crsinfo/about/values.html> [<https://perma.cc/3BDH-7JNK>].

²⁶⁵ See Fisher, *supra* note 79, at 68.

vant information in the course of a congressional inquiry into the use of informants by Federal Bureau of Investigation personnel in Boston, for example, a CRS attorney analyzed the executive-privilege claim and testified before Congress that it was “unprecedented.”²⁶⁶ It would be no great leap in such circumstances to institutionalize the practice of formalizing such legal conclusions.

Another advantage of delegating legal analysis to an intra-legislative agency is that their employees come and go with much less frequency than most congressional staff.²⁶⁷ Indeed, there are attorneys who have spent an entire career in one of these offices.²⁶⁸ One former CRS attorney in particular, Morten Rosenberg, has been described as a “one-person OLC” for Congress.²⁶⁹ Thus, although the rate of turnover among both Members and staff in Congress presents an obstacle to developing and memorializing institutional views in the same way that the executive branch civil service does, an OCC established within or in the image of the CRS could avoid that problem.

Should it desire to do so, Congress could even make CRS’s separation-of-powers opinions presumptively binding. Each House of Congress determines its own rules.²⁷⁰ There is no reason each House could not include a rule stating that CRS legal opinions on separation-of-powers questions reflect the official congressional position unless rejected, in any given instance, by a vote in one or both chambers. There is no guarantee, of course, that Members would abide by these positions. The same can be said about the President with respect to OLC—he need not comply with their opinion if he chooses not to. There is, however, a political cost for defecting.²⁷¹

Should Congress decline to establish a full-fledged office to develop institutional legal positions, another possibility is simply to create a repository of congressional legal arguments. *Just Security*’s clearinghouse sites for congressional documents related to the investigation into Russian election interference

²⁶⁶ See *id.* at 70–71.

²⁶⁷ See Fontana & Huq, *supra* note 226, at 78 (noting that CBO is “expressly modeled” on executive branch agencies and thus presents more opportunity for long-term employment and career advancement than most congressional staff positions).

²⁶⁸ See Fisher, *supra* note 79, at 68–73.

²⁶⁹ The Lawfare Podcast, *Austin Evers and Mike Stern on Congressional Oversight*, LAWFARE, at 27:01 (July 9, 2019), <https://www.lawfareblog.com/lawfare-podcast-austin-evers-and-mike-stern-congressional-oversight> [<https://perma.cc/8PVM-XJXD>] (statement of former Senior Counsel to the U.S. House of Representatives, Michael Stern).

²⁷⁰ U.S. CONST. art. I, § 5 (“Each House [of Congress] may determine the Rules of its proceedings . . .”).

²⁷¹ See Savage, *supra* note 239 (noting that “the disclosure that key figures on the [Obama] administration’s legal team disagreed with Mr. Obama’s legal view could fuel restiveness in Congress, where lawmakers from both parties this week strongly criticized [his decision]”).

could be a model.²⁷² If all of the memoranda, correspondence, legal briefs, and legislative history related to inter-branch information conflicts were collected in one place, legislators and their staff, journalists, and commentators would have easy access to the legal arguments Congress has made in the past. Such a repository would not guarantee consistent legislative branch positions. Indeed, it likely would highlight the ways that partisan interests drive legislators' legal arguments. But it would supply a source where congressional views regarding executive branch legal opinions are preserved, and when those views have been consistent over time, that consistency would constitute a strong institutional argument for Congress.

The greatest obstacle to implementing this proposal is congressional will itself.²⁷³ Perhaps legislators that prize the flexibility to take legal positions that advance their own or the constituents' interests do not want to lose it. Along with the benefits that flow from a consistent legal position arrived at through independent analysis come the constraints it might impose on Members. Recall, for example, the tendency of OLC to resist compromise on legal issues to protect the institution of the presidency, regardless of the preferences of the current holder of that office.²⁷⁴ But just as the President remains free to disregard OLC's conclusions when he so chooses, there is nothing that would stop Members or future Congresses from disregarding the views of the office. As with the presidential example, there might be a political cost to defecting, but if a Member concludes that the benefits of defection outweigh its costs, she may take that path.

C. Other Reform Possibilities

Then there are possible approaches that do not lie within the confines of either of the political branches alone. One potential path is greater use of "detailées," government employees who are temporarily assigned to a position different from the one for which they were initially hired.²⁷⁵ Currently, the most frequent use of detailées is within a single branch of government.²⁷⁶ A prosecutor at Main Justice might, for example, be temporarily detailed to a

²⁷² See Julia Brooks & William Dawley, *Public Document Clearinghouse: Ukraine Impeachment Inquiry*, JUST SEC. (Feb. 15, 2020), <https://www.justsecurity.org/67076/public-document-clearinghouse-ukraine-impeachment-inquiry/> [<https://perma.cc/9CC3-YV66>]; *supra* note 138 and accompanying text.

²⁷³ Devins, *supra* note 54, at 126–35 (considering solutions to the inter-branch information access disputes).

²⁷⁴ See *supra* notes 224–228 and accompanying text.

²⁷⁵ Fontana & Huq, *supra* note 226, at 67 (examining "the merits of expanding on the rotation system that authorizes executive-branch officials to work outside of their usual institutional setting for a period of time").

²⁷⁶ See *id.* at 72. Detailées typically go from the legislative to the executive branch. *Id.*

United States Attorney's office. Less common are inter-branch details; those that do exist are most likely to be "from the legislature (and sometimes the courts) to the executive—and rarely the other way around."²⁷⁷ This means that legislative branch employees, such as congressional committee staff, will frequently have the opportunity to serve in the executive branch, whereas executive branch employees are less likely to have the same opportunity to develop an appreciation for the institutional interests of Congress.²⁷⁸

Increasing the number of executive branch employees detailed to Congress and vice versa could yield benefits. Through spending time within a different institution, detailed employees acquire a better understanding of—and perhaps even internalize—that institution's norms, culture, and objectives.²⁷⁹ Based on this aspect of human nature, some scholars have called for use of specific details—such as detailing OLC lawyers to the State Department's Office of the Legal Advisor to provide them with a different perspective on the role of international law, or to a position outside of the executive branch to temper their loyalty to the power of the President.²⁸⁰ An OLC attorney detailed for a time to a legislative committee might develop a different perspective on the competing constitutional interests surrounding congressional access to executive branch information.²⁸¹ Or perhaps experience working in the legislative branch should be considered a highly desirable bullet point on the resume of an applicant to OLC.²⁸²

Finally, there are the courts. There are those who argue that the judiciary should play a larger role in resolving congressional-executive disputes.²⁸³ Resort to the courts should remain one mechanism available to resolve such dis-

²⁷⁷ *Id.*

²⁷⁸ See 2 U.S.C. § 4301(f) (permitting detailing of executive branch employees to congressional committees, but not to the personal staff of a Member).

²⁷⁹ Fontana & Huq, *supra* note 226, at 70 ("Scholars of employees in the public sector have often found that 'employees adapt their behavior consistent with the norms and expectations of people around them,' in 'profound' and persistent ways." (first quoting Donald P. Moynihan & Sanjay K. Pandey, *The Ties That Bind: Social Network*, J. PUB. ADMIN. RSCH. & THEORY 205, 210 (2007); and then quoting HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION, at xvi (3d ed. 1976)).

²⁸⁰ See *id.*

²⁸¹ See *id.* at 71 ("The OLC lawyer who spends several months working for [Congress] would have a different sense of presidential power than the OLC lawyer who never left the executive branch."). Interestingly, an attorney in the House General Counsel's office recently took a position at OLC. C. Ryan Barber, *DOJ's Legal Counsel Office Picks Up Former US House Lawyer*, NAT'L L.J. (Dec. 3, 2019), <https://www.law.com/nationallawjournal/2019/12/03/dojs-legal-counsel-office-picks-up-former-us-house-lawyer/?slreturn=20201021233822> [https://perma.cc/5TTT-JGQ4].

²⁸² Cf. Fontana & Huq, *supra* note 226, at 71 n.333 (suggesting that "[v]ariation in institutional experience . . . be made an informal criterion for hiring to the federal judiciary" to achieve a more balanced federal bench).

²⁸³ See, e.g., *supra* note 58.

putes.²⁸⁴ Judicial intervention cannot be, however, the only answer. As an initial matter, the courts do not want the job. Courts have been reluctant to issue definitive decisions in congressional-executive conflicts.²⁸⁵ In addition, the ability to go to courts is itself a function of the political state of play. Individual members likely lack standing to seek judicial enforcement of subpoenas.²⁸⁶ To bring such a suit, a congressional committee must authorize it. This requires the majority of a committee to vote in favor of such a suit. That vote, in turn, hinges on the individual legislators' belief that public opinion supports aggressive congressional enforcement action. And, of course, it is my contention that OLC's memoranda and Congress's lack of analogous materials influence the state of public opinion. So, although judicial enforcement may be a fruitful path for a congressional investigation with substantial political support, it is no remedy for the imbalance in public opinion that OLC memoranda create.

Moreover, Congress does not seem to want to give the courts this job. In the wake of each major battle between the branches, reforms have been proposed to ease Congress's way into judicial enforcement of subpoenas, but Congress has always declined to pass those bills.²⁸⁷ In addition, in many instances, even a judicial resolution will not provide a satisfactory conflict-resolution mechanism. If Congress sues a presidential advisor to enforce a legislative subpoena, a judicial rejection of the advisor's claim of absolute immunity will not end the conflict. That advisor may be required to testify, but in that testimony she may assert executive privilege on the President's behalf over certain information. If Congress does not agree that the material is privileged, it would have to return to court to litigate the applicability of the privilege. Moreover, judicial decisions regarding such questions are sufficiently fact-specific—based on the subject of the communication, who was involved in the communication, whether any subsequent acts waived the privilege, whether a particular congressional purpose outweighs the President's need for confidentiality, et cetera—that a resolution of one case might not be particularly helpful in resolving subsequent conflicts. Former National Security Advisor John Bolton argued during the House Intelligence Committee's impeachment investigation, for example, that any judicial decision regarding whether former White House Counsel Don McGahn was required to honor a congressional subpoena would not be binding on Bolton, because McGahn's case did not

²⁸⁴ See BERMAN, *supra* note 43, at 27 (suggesting, as part of a statutory remedy, that the courts should play a role in these disputes to prevent potentially harmful political brinkmanship).

²⁸⁵ See *supra* note 54 and accompanying text.

²⁸⁶ See *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that individual members of Congress lack the "personal stake" in a dispute necessary to establish Article III standing).

²⁸⁷ Devins, *supra* note 54, at 126–35.

address the question in the context of national security information.²⁸⁸ So although judicial resolution should remain an option for enforcement of congressional subpoenas, it cannot be enough alone.

CONCLUSION

President Trump's extreme and unprecedented rejection of Congress's powers to oversee executive branch activities has raised a host of novel questions, both political and legal. Yet President Trump's anomalous positions and the resulting outcry emphasize the outsize role that OLC memoranda usually play. The vigorous debates of today concern the unprecedented executive refusal to accommodate congressional needs. Meanwhile, longstanding OLC positions, such as the non-prosecution of executive branch recipients of congressional contempt citations, are taken as given. The Trump presidency has already prompted multiple calls for rethinking the mechanics of executive oversight.²⁸⁹ The role of OLC opinions and their impact on the effectiveness of legislative oversight should form part of this conversation.

²⁸⁸ See Peter Baker, *Ruling Will Not Lead John Bolton to Testify Soon, Lawyer Says*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/us/politics/bolton-testimony.html> [<https://perma.cc/L28T-A8MG>].

²⁸⁹ See generally, e.g., NAT'L TASK FORCE ON RULE OF L. & DEMOCRACY, BRENNAN CTR. FOR JUST., PROPOSALS FOR REFORM 2018 (detailing nonpartisan policy proposals to improve government ethics and legal recourse); Johnsen, *supra* note 8, at 1566 ("call[ing] for the Bush Administration and all subsequent administrations either to endorse . . . or develop their own" version of the Principles to Guide the Office of Legal Counsel, a statement promulgated by nineteen former OLC lawyers aiming to "set forth the best of longstanding practices in an effort to promote presidential fidelity to the rule of law").

