

OLC MEMO AS TIME MACHINE

I'm going to have more to say about the Libya memo the Administration released yesterday. But I just wanted to point out something about the structure of it.

Here's the first paragraph:

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President's legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration. [my emphasis]

This is not the advice authorizing the Libyan engagement. Rather, it is a document written the day after—the memo notes—the Administration turned over control to NATO, claiming to memorialize the advice given before the Libyan engagement (therefore, presumably, before March 19).

Is this all the advice OLC gave the President? Did OLC authorize further activities? Did Obama's description of why bombing Libya was in the national interest before March 19 match what appears in this memo, written after the fact?

This fundamental structural reality is all the more striking given the role of Section I of the memo: it provides a narrative of the Libyan engagement starting in mid-February and leading right up to the March 31 turnover of control to

NATO. In other words, a key function of this memo is to provide the Administration's own mini-history of the Libyan engagement, written the day after an artificial "end date" for the engagement, which it uses to lay out the national interest of bombing Libya and the limits to our engagement in it that the memo says justify the engagement. Two key elements in this history—Obama's address to Congress on March 21 and his address to the nation on March 28—took place after the real advice OLC offered Obama to authorize this engagement.

But the memo claims to have offered its advice before the start of the bombing. It is basically using Presidential statements made up to 9 days after the advice it gave to "memorialize" the advice it gave 9 days earlier. The memo uses limits Obama described after the advice was actually given to claim the advice itself had limits.

I'm envisioning a discussion like this:

Bob Bauer: Caroline, can you give us a verbal okay for this engagement?

Caroline Krass: Do you want a written memo?

Bauer: Not yet. Let's wait until it's all done so we can tailor the legal authorization of it to what we really end up doing. It'll make it easier for us to thread the needle between authorizing what we do while still claiming to believe Executive Power is limited.

Krass: Okay, Bob.

Pretty remarkable, isn't it, the way a memo written after the fact authorizes precisely the engagement that Obama ultimately used, all the while highlighting limits to the use of unilateral presidential power?