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2 Top Lawyers Lost to Obama in Libya War Policy Debate

By **CHARLIE SAVAGE**

WASHINGTON — President Obama rejected the views of top lawyers at the Pentagon and the Justice Department when he decided that he had the legal authority to continue American military participation in the air war in Libya without Congressional authorization, according to officials familiar with internal administration deliberations.

Jeh C. Johnson, the Pentagon general counsel, and Caroline D. Krass, the acting head of the Justice Department's Office of Legal Counsel, had told the White House that they believed that the United States military's activities in the NATO-led air war amounted to "hostilities." Under the War Powers Resolution, that would have required Mr. Obama to terminate or scale back the mission after May 20.

But Mr. Obama decided instead to adopt the legal analysis of several other senior members of his legal team — including the White House counsel, Robert Bauer, and the State Department legal adviser, Harold H. Koh — who argued that the United States military's activities fell short of "hostilities." Under that view, Mr. Obama needed no permission from Congress to continue the mission unchanged.

Presidents have the legal authority to override the legal conclusions of the Office of Legal Counsel and to act in a manner that is contrary to its advice, but it is extraordinarily rare for that to happen. Under normal circumstances, the office's interpretation of the law is legally binding on the executive branch.

A White House spokesman, Eric Schultz, said there had been "a full airing of views within the administration and a robust process" that led Mr. Obama to his view that the Libya campaign was not covered by a provision of the War Powers Resolution that requires presidents to halt unauthorized hostilities after 60 days.

“It should come as no surprise that there would be some disagreements, even within an administration, regarding the application of a statute that is nearly 40 years old to a unique and evolving conflict,” Mr. Schultz said. “Those disagreements are ordinary and healthy.”

Still, the disclosure that key figures on the 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 the White House’s contention that the president could continue the Libya campaign without their authorization because the campaign was not “hostilities.”

The White House unveiled its interpretation of the War Powers Resolution in a package about Libya it sent to Congress late Wednesday. On Thursday, the House speaker, John A. Boehner, Republican of Ohio, demanded to know whether the Office of Legal Counsel had agreed.

“The administration gave its opinion on the War Powers Resolution, but it didn’t answer the questions in my letter as to whether the Office of Legal Counsel agrees with them,” he said. “The White House says there are no hostilities taking place. Yet we’ve got [drone attacks](#) under way. We’re spending \$10 million a day. We’re part of an effort to drop bombs on Qaddafi’s compounds. It just doesn’t pass the straight-face test, in my view, that we’re not in the midst of hostilities.”

A sticking point for some skeptics was whether any mission that included firing missiles from drone aircraft could be portrayed as not amounting to hostilities.

As the May 20 deadline approached, Mr. Johnson advocated stopping the drone strikes as a way to bolster the view that the remaining activities in support of NATO allies were not subject to the deadline, officials said. But Mr. Obama ultimately decided that there was no legal requirement to change anything about the military mission.

The administration followed an unusual process in developing its position. Traditionally, the Office of Legal Counsel solicits views from different agencies and then decides what the best interpretation of the law is. The attorney general or the president can overrule its views, but rarely do.

In this case, however, Ms. Krass was asked to submit the Office of Legal Counsel’s thoughts in a less formal way to the White House, along with the views of lawyers at other agencies. After several meetings and phone calls, the rival legal analyses were submitted to Mr. Obama, who is a constitutional lawyer, and he made the decision.

A senior administration official, who spoke on the condition of anonymity to talk about the internal deliberations, said the process was “legitimate” because “everyone knew at the end of the day this was a decision the president had to make” and the competing views were given a full airing before Mr. Obama.

The theory Mr. Obama embraced holds that American forces have not been in “hostilities” as envisioned by the War Powers Resolution at least since early April, when NATO took over the responsibility for the no-fly zone and the United States shifted to a supporting role providing refueling assistance and surveillance — although remotely piloted American drones are still periodically firing missiles.

The administration has also emphasized that there are no troops on the ground, that Libyan forces are unable to fire at them meaningfully and that the military mission is constrained from escalating by a United Nations Security Council resolution.

That position has attracted criticism. Jack L. Goldsmith, who led the Office of Legal Counsel during the Bush administration, has written that the administration’s interpretation is “aggressive” and unpersuasive, although he also acknowledged that there was no clear answer and little chance of a definitive court ruling, so the reaction of Congress would resolve it.

Walter Dellinger, who led the Office of Legal Counsel during the Clinton administration, said that while “this is not an easy question,” Mr. Obama’s position was “both defensible and consistent with the position of previous administrations.” Still, he criticized the administration’s decision-making process.

“Decisions about the lawfulness of major presidential actions should be made by the Department of Justice, and within the department by the Office of Legal Counsel, after consultation with affected agencies,” he said. “The president always has the power of final decision.”

Other high-level Justice lawyers were also involved in the deliberations, and Attorney General Eric H. Holder Jr. supported Ms. Krass’s view, officials said.

Matthew Miller, a Justice Department spokesman, said, “Our views were heard, as were other views, and the president then made the decision as was appropriate for him to do.”

This article has been revised to reflect the following correction:

Correction: June 17, 2011

An earlier version of this article misspelled in one reference the surname of the Pentagon general counsel. He is Jeh C. Johnson, not Johnsen.