

FRANKENSTEIN'S OLC: DOJ SAYS DOJ CAN'T DO WHAT DOJ DID IN THE BARR MEMO

DOJ's memo asking Amy Berman Jackson to stay her opinion releasing the OLC memo admits that DOJ is not permitted to do what DOJ did with the Barr memo it is trying to withhold from FOIA. And part of the memo itself, which DOJ unsealed last night, also shows DOJ is not permitted to do what DOJ did.

The memo itself admits, for example, that the OLC is not permitted to do what only other parts of DOJ – here, FBI – have the authority to do.

One relevant factor in determining whether a document is predecisional is whether the author possesses the legal authority to decide the matter at issue. See, e.g., *Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (“OLC is not authorized to make decisions about the FBI’s investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency’s policy.”).

That undoubtedly extends to prosecutorial decisions. And yet OLC did make a prosecutorial decision.

Rather, the declarations and briefs on the whole made clear that the decision in question was whether the facts articulated by Volume II of the Special Counsel’s Report were sufficient to establish that the President had committed obstruction of justice, i.e., whether the facts constituted prosecutable conduct under the Principles of Federal Prosecution.

DOJ found a way around that, of course, in Julie Straus Harris' flourish: the inclusion of Ed O'Callaghan in the deliberation. Except that's a problem, because every declaration in this litigation treats this as an OLC memo, not a prosecutorial memo.

Moreover, it means O'Callaghan made a decision he was not permitted to do by the OLC: make a decision about whether or not the President committed a crime.

In fact, the memo itself states that DOJ is limited in what it can do: either bring charges or not.

Although the Special Counsel has declined to reach a conclusion, we think that the Department should reach a judgement on this matter. Under traditional principles of prosecution, the Department either brings charges or it does not.

Except in this instance, Barr did something else (indeed, ABJ's memo makes it clear that was the entire point): he announced a decision on prosecution that was more than a declination. He chose to make a decision that OLC says he can't make.

OLC does not, as it would be required to, state that DOJ can make a prosecutorial decision that involves something other than bringing charges or not.

This is, ultimately, a Frankenstein monster, both a prosecutorial decision that, absent more analysis than appears here, OLC says neither O'Callaghan nor Barr were permitted to make, and an OLC memo engaged in a prosecutorial role that OLC says OLC can't do. Effectively, then, this memo engages in activities that defies the claim that OLC guidance governs the entirety of the Executive Branch, including OLC.