No. 09-16478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE PADILLA AND ESTELA LEBRON,
Plaintiffs-Appellees,

v.

JOHN YOO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF BRUCE FEIN, ROBERTS B. OWEN, AND MICHAEL P. SCHARF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST[1]

Amici are former government attorneys who have served in the United States Departments of Justice ("DOJ") and State ("State"), including the DOJ's Office of Legal Counsel ("OLC") and the State's Office of the Legal Adviser. They have a significant interest in the outcome of this litigation, as it is likely to affect the quality and nature of legal advice provided within the Executive Branch and, ultimately, the President's ability to take care that the laws be faithfully executed. The position articulated by *amici* is reflective of their decades of experience and accomplishment as government attorneys as highlighted below.

Bruce Fein served as an attorney with the DOJ as Special Assistant to the Assistant Attorney General for OLC and as an Associate Deputy Attorney General under President Reagan. He served for over thirteen years as a government attorney in positions including Assistant Director of the Office of Legal Policy and General Counsel for the Federal Communications Commission.

Roberts B. Owen served as Legal Adviser to the State Department during President Carter's Administration and is currently senior counsel to the law firm of Covington & Burling LLP in Washington, D.C.

Michael P. Scharf served in the Office of the Legal Adviser at the State Department as Attorney-Adviser for U.N. Affairs and as Attorney Adviser for Law Enforcement and Intelligence under Presidents George H.W. Bush and Clinton. He was also a member of the U.S. delegations to the U.N. General Assembly and the U.N. Human Rights Commission.

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[1] *Amici* file this brief with the consent of the parties pursuant to Federal Rule of Appellate Procedure Rule 29.

SUMMARY OF ARGUMENT

As former government attorneys, *amici* understand and believe that it is essential for government attorneys to provide objective, balanced advice in accordance with accepted professional standards and that breaches of that obligation prejudice public administration and erode respect for the law. Government attorneys—and OLC attorneys in particular—occupy a unique position of public trust and take an oath to support and defend the Constitution. It is precisely this special role that demands strict adherence to professional standards when providing legal guidance within the Executive Branch.

Amici recognize the unusual circumstances of this case and the significance of calling into question the legal advice of a government attorney. The need for government attorneys to provide honest, impartial legal advice on difficult or controversial issues is beyond dispute. But this case is *not* about the liability of a government attorney who has allegedly rendered "erroneous" or "incorrect" legal advice, nor is it about a government attorney who was simply "too aggressive" or went "too far." On the contrary, the Complaint alleges that a former Deputy Assistant Attorney General *intentionally* violated professional standards reflected in OLC practice and *willfully* disregarded the obligations attendant on his office. Such conduct, if proven, would strike at the very heart

of OLC's mission and seriously compromise the ability of the executive to make informed, even lawful, decisions.

An attorney's intentional or willful disregard of his professional obligations must not be overlooked in any context, especially where such conduct constitutes a breach of the attorney's oath of office to uphold the Constitution. For these reasons, *amici* submit that the district court correctly recognized plaintiffs' right to maintain a damages action under *Bivens*.[2]

ARGUMENT

I. OLC's Primary Obligation is to Provide Legal Guidance to the President in Accordance with the Rule of Law

Since the founding of this nation, Presidents have recognized that their obligation to "take Care that the Laws be faithfully executed" and to "preserve, protect and defend the Constitution" requires sound legal advice. *See* U.S. Const. art I, § 1; art. II, § 3. Presidents have sought trusted legal counsel from the Attorneys General, whose duty it is to provide "advice and opinion upon questions of law when required by the President of the United States." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1845) (codified as amended at 28 U.S.C. §§ 511-13). The Attorney General's opinions were principally

[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

drafted by the Solicitor General or the Assistant Solicitor General until 1950, when this function was transferred to the Office of Legal Counsel, a component of the Justice Department. *See* 28 U.S.C. § 510.[3] OLC now advises the President and the Executive Branch on a vast array of legal issues, from war powers to school prayer. OLC issues legal opinions in place of opinions of the Attorney General and does so under the signature of the Assistant Attorney General or a Deputy Assistant Attorney General.[4] They take the form of written opinions or oral advice in response to requests from White House Counsel and various executive branch agencies. *See* 28 C.F.R. § 0.25(a) (OLC is responsible for "rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President").

Within the Executive Branch, legal opinions and interpretations with OLC's imprimatur are uniquely authoritative, albeit subject to being overruled

[3] *See* Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049, 1064 (1978).

[4] *See* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Prescriptive and Historical Prolegomenon*, 15 Cardozo L. Rev. 375, 424-25 (1993).

by the Attorney General and disagreed with by the President.[5] Given the far-reaching consequences of its legal advice, OLC has long followed certain basic institutional principles—consistent with the highest standards of the legal profession and the rule of law—in rendering its opinions. The fact that these principles have stood the test of time, changes in administration, and changes in political parties reflects the uncompromising dedication of the Office to the rule of law.

II. Long-standing OLC Practice Requires Attorneys to Provide Impartial, Thorough and Balanced Analysis Consistent with Legal Precedent

OLC has traditionally dispensed legal advice based on principled deliberation[6] and thorough, objective, and balanced legal analysis, rather than

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[5] *See* Dawn E. Johnsen, et al., *Guidelines for the President's Legal Advisors*, 81 Ind. L. J. 1345 (2006) ("OLC's legal interpretations are controlling and executive branch action must conform to it (unless overridden by the Attorney General or President, a rare event).").

[6] *See* Dawn E. Johnsen, *Functional Departmentalism and NonJudicial Interpretation: Who Determines Constitutional Meaning?*, 67 Duke L. Rev. 105, 131 (2004) ("OLC often has followed a tradition of deliberativeness that transcends politics, fostered by 'informal procedural norms designed specifically to protect its legal judgments from the winds of political pressure and expediency that buffet its executive branch clients.'") (quoting Harold Hongju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 Cardozo L. Rev. 513, 514 (1993)); *see also* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1351 ("Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used

on considerations of political expediency or mere legal advocacy. Indeed, an advocacy approach is fundamentally inconsistent with OLC's duty to impartially advise the President and other executive branch departments. Simply articulating legal justifications for a proposed course of action would—regardless of the accuracy of the advice—deprive the President of important information critical to his or her ability to faithfully execute the law.[7]

The legal profession recognizes that the rendering of a legal opinion is fundamentally different from mere advocacy. *See, e.g.*, Model Code of Prof'l Responsibility EC 7-3 (1969) (distinguishing between advocates and advisors and noting that "While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.").[8] The hallmarks of a professionally rendered legal opinion include

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effectively at times is a 'two deputy rule' that requires at least two supervising deputies to review and clear all OLC advice.").

[7] *See* Model Rules of Prof'l Conduct R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[8] The current Model Rules now folds the distinction between advocate and advisor into the requirement that "a lawyer shall exercise independent

balance, thoroughness, and candor. Facts, arguments, and legal authorities supporting alternative conclusions must be fully and fairly addressed. If there is no controlling authority on point, that fact must be forthrightly acknowledged, together with the legal risks attendant on the absence of such authority. The opinion writer must not pretend to a level of legal certainty beyond that which is justifiable in the light of existing authority. Moreover, where legal certainty (or a reasonable approximation thereof) does not exist, he or she must be candid in expressing the reasons for the lack of certainty.

While OLC may from time to time take on the role of advocate, such circumstances are rare.[9] In some cases, OLC may assist other Justice Department lawyers in preparing arguments to be used in court. In those situations, however, OLC makes clear that it is acting outside its typical role and that its advice should be not viewed as authoritative.[10] By contrast, OLC's primary role is to provide legal guidance in accordance with what the law

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professional judgment and render candid advice." Model Rules of Prof'l Conduct R. 2.1.

[9] *See* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1351 (noting that the advocacy model is an "appropriate activity for some components of the Department of Justice but not usually for OLC").

[10] *See id.* at 1352.

requires, notwithstanding the fact that this guidance may at times constrain the President's desired course of action.[11]

In providing its best view of what the law requires, OLC's advice reflects *all* potentially pertinent legal constraints.[12] It provides legal analysis that candidly and impartially addresses the full range of legal sources and arguments on all sides of a given question. Indeed, because OLC advice is rarely reviewed by the courts, or reviewed only under a standard of extreme deference—as in cases that involve national security interests—the need for objective, thorough, and balanced analysis is especially acute.

OLC's respect for the rule of law is also characterized by its careful adherence to judicial precedent.[13] Additionally, OLC applies the principle of *stare decisis* to executive branch practice, including prior OLC opinions.[14]

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[11] The Model Rules similarly incorporate this principle. *See* Model Rules of Prof'l Conduct R. 2.1 cmt. 1 ("a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

[12] *See* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1349 ("OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.").

[13] *See id*. at 1349-50.

[14] *See id.* at 1350 ("OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous

OLC advice must either adhere to precedent or, where such precedent is lacking or unclear or a departure from precedent is being considered, must clearly and fully explicate why this is so and the legal rationale for the advice being given.[15]

Transparency is another hallmark of OLC tradition.[16] One way this tradition is reflected in OLC practice is through shared dialogue and information exchange with administrative agencies, or "administrative coordination," whereby OLC seeks out the views of other agencies that may be affected by its opinions.[17] This consultation process serves as another check on

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Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch.").

[15] *See id.* ("At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action.").

[16] *See* Johnsen, *Functional Departmentalism and NonJudicial Interpretation*, *supra*, at 131 ("[W]hen Presidents seek to promote their constitutional views and actively participate in the development of constitutional meaning…the other branches of government and the public should know of their general approach and of any official actions they take premised on independent views.").

[17] *See* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1351 ("Administrative coordination allows OLC to avail itself of the

the objectivity and balance of OLC's legal analysis by ensuring that all relevant expertise and viewpoints are taken into account before the President is advised on a particular course of action.

OLC's intellectual honesty and faithfulness to the law is critical to its role as legal advisor to the President and to other executive branch departments. OLC's pledged constitutional fidelity requires that it interpret the law "without stretching it and without looking for loopholes."[18] Indeed the rules of professional ethics forbid all attorneys from misrepresenting the law[19] and, without doubt, from advising or assisting clients in illegal conduct.[20] To willfully disregard or grossly deviate from the standards discussed above would not only constitute institutional degradation and professional misconduct, but

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substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice.").

[18] Testimony of Professor David Luban, Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, Hearing: *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration* (May 13, 2009).

[19] *See* Model Rules of Prof'l Conduct R. 8.4(c) (lawyers are prohibited from all "conduct involving dishonesty, fraud, deceit or misrepresentation").

[20] *See* Model Rules of Prof'l Conduct R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent").

would deprive recipients of reliable legal advice and ultimately interfere with the President's ability to carry out his obligations under the law.

III. The Complaint Alleges that Defendant Yoo Knowingly Repudiated or Disregarded OLC Practice

The allegations in this case, if proven, demonstrate the serious harm that may be caused when officials at OLC act outside the bounds of the above-mentioned professional standards in providing legal advice. The First Amended Complaint ("FAC") alleges that Jose Padilla is a United States citizen who was detained as an "enemy combatant" in a military brig in Charleston, South Carolina for three years and eight months, without charge and without the ability to defend himself or to challenge the conditions of his confinement. FAC, ¶ 1. Mr. Padilla alleges he was unlawfully held as an "enemy combatant" and was given no opportunity to review this designation. *Id*. at ¶¶ 4-5. He further alleges that he suffered abusive and unlawful interrogations and conditions of confinement (including extreme isolation, sleep deprivation, and sensory deprivation). *See id*. at ¶¶ 45-75. He alleges that these abuses are directly traceable to a series of legal opinions authored by Deputy Assistant Attorney General John Yoo on behalf of OLC, *id.* at ¶ 47, and that those opinions resulted directly in violation of his rights, including denial of access to counsel, denial of access to court, unconstitutional military detention,

unconstitutional conditions of confinement and interrogation, and denial of due process. *Id*. at ¶ 82.

While these allegations are serious in their own right, *amici*'s concerns stem from the allegations that Defendant Yoo *intentionally* drafted legal memoranda "to evade well-established legal constraints and to justify illegal policy choices that he knew had already been made" or, in the alternative, "was deliberately indifferent to the fact that the policies outlined in the memoranda were plainly illegal and carried a substantial risk of serious harm to Mr. Padilla…." *Id.* at ¶¶ 23-24. If these allegations are accurate, Mr. Yoo has violated his oath of office and professional responsibilities, has disregarded OLC's obligation to provide balanced and impartial legal guidance to the President and others, and has seriously compromised OLC's stature and reputation for rendering principled legal advice.[21]

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[21] *See* Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1311 (2000) ("Objectivity and balance in providing legal advice are the currency of the Attorney General and the Office of Legal Counsel. That is, the legal opinions of the Attorney General and the Office of Legal Counsel 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. It is less likely, for example, that an Office of Legal Counsel opinion will conclusively resolve a long-standing interagency dispute if that opinion, or the typical approach of the Office, is seen as unobjective or tilted. Likewise, Congress is less likely to take seriously a constitutional objection to proposed legislation if that objection, or

As an example of Mr. Yoo's alleged intentional misconduct, the Complaint points to his January 9, 2002 draft memorandum regarding the inapplicability of the Geneva Conventions to suspected members of the Taliban and al-Qaeda, alleging that the document "was *designed* to justify the Executive's already concluded policy decision to employ unlawfully harsh interrogation tactics." FAC, ¶27 (emphasis added). It also cites Mr. Yoo's August 1, 2002 memo—the so-called "OLC Torture Opinion"—as having been specifically "*designed* to remove legal restraints on interrogators so as to justify the Executive's already concluded policy decision." *Id.* at ¶29 (emphasis added). It further alleges that Mr. Yoo's August 1 Memo was crafted "with the *specific intent* of immunizing government officials from criminal liability for participating in practices that Defendant Yoo knew to be unlawful." *Id.* at ¶ 31 (emphasis added); *see generally id.* at ¶¶ 26-34. These allegations, if true, are inconsistent with OLC's duty and practice of providing impartial legal advice prior to executive branch action, as opposed to a post-hoc rationale for a

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the general approach of the Office, is seen as policy—as opposed to legally—driven. For similar reasons, there is little reason for clients of the Office of Legal Counsel to ask whether a proposed action is legally colorable, as opposed to whether the action is authorized under the best view of the law.").

predetermined or politically-favored policy objective.[22] The alleged conduct is also inconsistent with OLC's mission of providing a thorough, balanced and candid appraisal of the relevant law, regardless of the ultimate policy outcome.

A. Mr. Yoo failed to provide a thorough, objective analysis of all relevant legal constraints

In support of the claim that Mr. Yoo intentionally provided legal "cover" for the Executive Branch's pre-formulated policies, the Complaint alleges that his memoranda advised that there were no legal constraints—"either domestic or international—on the Executive's policies with respect to the detention and interrogation of suspected terrorists." FAC, ¶ 21. The Complaint further alleges that Mr. Yoo advised that "neither the Fourth nor Fifth Amendments placed any limitations on the President's power to capture, interrogate or detain terrorism suspects, inside the United States or outside it." *Id.* at ¶ 21.

[22] *See* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1351 (OLC "should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal 'advice' after the fact is subject to strong pressures to follow an advocacy model"); Koh, *Protecting the Office of Legal Counsel From Itself*, *supra*, at 515 ("OLC has sought to be consulted before the United States government irrevocably commits itself to an action so that the Office can impartially evaluate the legality of the proposed action ex ante, rather than being locked into a position by its client's action and then being forced to issue a legal opinion justifying that action after the fact.").

Mr. Yoo's August 1 Memo, for example, failed to apply the analysis of or even cite to *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952)—a seminal Supreme Court decision which limited the commander-in-chief power—in its discussion of the President's executive authority.[23] It would certainly constitute legal malpractice if a lawyer submitted a brief on the issue of whether the torture statute impinges on the President's commander-in-chief powers without reference to *Youngstown*; here, where Mr. Yoo was providing a legal opinion on behalf of OLC, such an omission is "a fortiori unacceptable"[24]

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[23] Professor David Luban stated in his testimony before the Senate Judiciary Committee that although Mr. Yoo explained that he did not discuss *Youngstown* "because of a long-standing OLC tradition of upholding the President's commander-in-chief powers…nothing in either U.S. law or U.S. military tradition suggest that authority to torture captives belongs among the commander-in-chief's historical powers, any more than the authority to execute captives as a way of inducing other captives to reveal information is part of the traditional commander-in-chief power." Testimony of Professor David Luban, *"What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"*, *supra*.

[24] *Id.* Another glaring omission from the August 1 Memo was the failure to cite to *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), in which the Court of Appeals repeatedly referred to the technique of waterboarding as "torture." In fact, the August 1 Memo includes an appendix claiming to list all "[c]ases in which U.S. courts have concluded the defendant tortured the plaintiff," yet *Lee* does not appear on this list. "Perhaps it is because *Lee* was criminal, not civil, and therefore had no plaintiff; or perhaps it is because the court calls the technique 'torture' without formally 'concluding' that it is torture. Even if these are the rationalizations for omitting Lee from the list, such hypertechnicality is wholly inappropriate for an opinion offering legal advice to a client." *Id.*

and represents, in the words of former OLC attorney and current Legal Adviser to the State Department Harold Hongju Koh, "a stunning failure of lawyerly craft."[25]

In addition to these significant omissions, many legal scholars and government officials alike have denounced Mr. Yoo's dismissal of longstanding precedent and controlling authority in his opinions. Notably, Professor Ruth Wedgewood and former CIA director R. James Woolsey commented that Mr. Yoo's memoranda on the application of the Geneva Conventions gave "inadequate consideration of the ground-level standards that apply whenever combatants or criminals are captured, regardless of their personal legal status."[26] In particular, Mr. Yoo's draft memorandum of January 9, 2002, "dismiss[ed] Article 3 of the Geneva Conventions – a rock-bottom standard designed for armed conflicts 'not of an international character' that occur 'in the territory of one of the High Contracting Parties.'"[27] Furthermore, Professor Wedgewood and Mr. Woolsey found that Mr. Yoo reached a "captious

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[25] Statement of Harold Hongju Koh before the Senate Judiciary Committee regarding the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States (Jan. 7, 2005).

[26] Ruth Wedgwood & R. James Woolsey, *Law and Torture*, Wall St. J., June 28, 2004, at A10.

[27] *Id.*

conclusion" in "[s]purning the case law of the American-backed International Criminal Tribunal for the former Yugoslavia…assert[ing] that [Common] Article 3 could only have been intended for the Spanish or Chinese civil wars, not a struggle for control of Afghanistan."[28]

Mr. Yoo's minimum obligation, consistent with OLC practice, would have been to provide a thorough explanation with citation to relevant authority for his conclusions that certain statutory, constitutional, and international-law provisions did not apply, or in the absence of controlling authority, to point out that fact and the risks attendant on proceeding in the absence of authority. Therefore, the claim that "[t]he Memos did not provide the fair impartial evaluation of the law required by OLC tradition and the ethical obligation of an attorney to provide the client with an exposition of the law adequate to make an informed decision," *id.* at ¶ 22, is a plausible allegation that warrants fuller factual development below.

B. Mr. Yoo failed to solicit opinions from other affected agencies

As further evidence in support of the claim that Mr. Yoo drafted his memoranda to justify illegal policy objectives, the Complaint alleges that Mr.

[28] *Id*. Indeed, Professor Wedgewood and Mr. Woolsey noted that "common Article 3 is taken by most law or war experts to restate the minimum standards of the customary law traditionally applicable to armed conflicts of any kind."

Yoo's memoranda "*intentionally* were not circulated to other government agencies with relevant expertise, such as the State Department but…'*were deliberately withheld* from other agencies in order to control the outcome and minimize resistance.'" *Id.* at ¶ 25 (emphasis added). Remarkably, Mr. Yoo's draft memorandum dated January 9, 2002 did not take into consideration the "unambiguous views" of the State Department on the issue of torture, which were expressed in the official 1999 U.S. Report on the Convention Against Torture.[29] The State Department unequivocally denounced torture "as a matter of policy and as a tool of state authority" and added that "[n]o official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture."[30]

OLC is required to seek out the viewpoints of all affected government entities before issuing final advice.[31] If Mr. Yoo intentionally disregarded this

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[29] Statement of Harold Hongju Koh before the Senate Judiciary Committee regarding the Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States (Jan. 7, 2005).

[30] *Id.* (citing Initial Report of the United States of America to the UN Committee Against Torture, pp. 4-5 (Oct. 15, 1999)).

[31] *See* Johnsen et al., *Guidelines for the President's Legal Advisors*, *supra*, at 1351 ("The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered…It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand.").

practice, he not only violated longstanding OLC precedent, but also compromised the quality, rigor, and ultimately the lawfulness of the advice provided to the President.

IV. Liability Is Not Founded on Zeal or Aggressiveness, But Rather Intentionally Distorted Legal Analysis

Defendant Yoo attempts to frame Mr. Padilla's claims as a question of whether to impose liability on a government official who has merely gone "too far" or was "too aggressive in interpreting the law," or who "reached allegedly erroneous conclusions on unsettled questions of law." Appellant's Br. at 32. This assertion is misleading. The Complaint says nothing about Defendant Yoo's aggressiveness or zeal in interpreting the law, or even whether or not his analysis was on some level "reasonable." Rather, it squarely alleges that Mr. Yoo intentionally used the memoranda to evade legal constraints and justify policies and practices he either knew to be unlawful or could not reliably advise were lawful. *See e.g.*, FAC, ¶ 23 ("Defendant did not in the Memos attempt to provide fair legal analysis to guide the Executive's decision-making, but instead intentionally used the Memos to evade well-established legal constraints and to justify illegal policy choices that he knew had already been made"). Had Mr. Yoo acted in accordance with the well-established internal procedures and practices of OLC and provided a balanced, honest, and thorough assessment of the law, the resulting legal opinions would have met the minimum standards

required of the Office—but the allegations in the Complaint are distinctly to the contrary. For that reason alone, allegations that an OLC attorney *intentionally* supplied unlawful or ill-founded legal advice demand close attention.[32]

V. Plaintiffs' Cause of Action Will Not "Chill" Candid Discussions on Sensitive Legal Issues

As discussed above, OLC has a long institutional tradition of providing candid legal advice to the President, often on issues that may give rise to serious political controversy. The Office's performance of this duty would not be

[32] In a striking series of memos released after Mr. Yoo's departure from OLC, OLC modified or expressly repudiated a number of Mr. Yoo's memos—actions that reveal the breadth of Mr. Yoo's aberrations from traditional OLC practice. For example, on December 30, 2004, the DOJ issued a 17-page memorandum written by then-Acting Assistant Attorney General Daniel Levin, to officially replace the August 1, 2002 memo. The new memo purported to deflect criticism that the Bush administration condoned torture. Indeed, the very first sentence of the memo read, "Torture is abhorrent both to American law and values and to international norms." On January 15, 2009, Steven G. Bradbury, the outgoing Principal Deputy Assistant Attorney General, Office of Legal Counsel withdrew six additional opinions authored by Mr. Yoo or his superior, then-Assistant Attorney General Jay Bybee. *See* Steven G. Bradbury, Memorandum for the Files, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009). As some observers noted, the Bush Administration's course-corrections reflected the "Bush lawyers' last effort to reconcile their views with the wide rejection by legal scholars and some Supreme Court opinions of the sweeping assertions of presidential authority made earlier by the Justice Department." Neil A. Lewis, *Memos Reveal Scope of Power Bush Sought in Fighting Terror*, N.Y. Times, Mar. 3, 2009.

adversely affected if the Court affirms the decision below or if Defendant Yoo is eventually held personally liable for the conduct alleged.

Mr. Yoo's argument that personal liability would "chill" OLC attorneys' willingness to provide frank and honest guidance on controversial issues is overblown. First, it overlooks the fact that OLC attorneys are *obligated* in the first instance to provide an honest, balanced, and objective appraisal of the law— whether that appraisal be controversial or otherwise. Next, a finding of personal liability would not, as Mr. Yoo suggests, be based on mere legal error on the part of an OLC attorney, but rather from the attorney's *knowingly* rendering advice that is distorted or unbalanced, in order to serve political ends.[33] The further assertion that a decision adverse to Mr. Yoo could have adverse consequences for the Executive's war-making or foreign policy roles is flawed for the same reasons. Indeed, those arenas are so critical to our public life and national security that it is essential to enforce standards of legal conduct that value objectivity and candor over political expediency.

Amici express no opinion on the factual accuracy of the complaint. If, however, as the complaint alleges, an OLC attorney knowingly rendered legal

[33] Indeed, the district court did not rule that mere errors of judgment could be a sufficient basis for imposing personal liability; but rather that the level of conduct alleged in the complaint could, if proven, form a basis for *Bivens* liability.

advice that was unbalanced, distorted, or lacking in candor, or that pretended to a level of certainty where no such certainty existed, the individual responsible for giving that advice must be held to account. The critically important role of the Office demands no less.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision below.

Dated: January 22, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Usha-Kiran K. Ghia, certify pursuant to Federal Rule of Appellate Procedure R. 29 and R. 32(a)(7)(C) that the attached Brief of Bruce Fein, Roberts B. Owen, and Michael P. Scharf as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance is proportionally spaced, has a typeface of 14 points or more, and contains 4,375 words. This certificate was prepared in reliance on the word count feature of the word-processing system (Microsoft Word) used to prepare this brief.

Dated: January 22, 2010

/s/ Usha-Kiran K. Ghia
Usha-Kiran K. Ghia

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, an electronic copy of the foregoing Brief of Bruce Fein, Roberts B. Owen, and Michael P. Scharf as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following registered CM/ECF participants:

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