

No. 09-16478

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSE PADILLA, *et al.*,
Plaintiffs-Appellees,
v.

JOHN YOO
Defendant-Appellant.

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

**BRIEF OF AMICI CURIAE LEGAL ETHICS SCHOLARS
IN SUPPORT OF PLAINTIFFS-APPELLEES
AND AFFIRMANCE**

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INTERESTS OF *AMICI CURIAE*¹

Amici are professors of law whose areas of expertise include lawyers' professional responsibilities and the regulation of lawyers. *Amici* are united in their belief that lawyers must represent their clients only within the bounds of the law, that adherence to rules of professional conduct serves to inform and respect the rule of law, that judicial review is essential to determining whether constitutional rights have been abridged by official attorney misconduct, and that these principles apply when government lawyers engage in legal matters related to national security. *Amici* submit this brief to enrich the Court's understanding of these concepts and to ensure that national security does not become a license to degrade lawyers' professional obligations or to thereby subvert the rule of law.

Amici names and their institutional affiliations, which are listed for identification reasons only, are as follows:

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SUMMARY OF ARGUMENT

In urging this Court to reverse the district court's denial of his motion to dismiss, Defendant John Yoo contends that: as a government lawyer acting in the national security context he is insulated from a judicial inquiry into whether he violated Plaintiffs Jose Padilla and Estela Lebron's constitutional rights, that this case boils down to a dispute over "bad lawyering," and that it would be impractical for this Court to hold that he crossed "the line" from non-actionable to actionable conduct under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Amici disagree. Defendant Yoo, as with all private and government attorneys, must abide by certain professional responsibilities, including the duty to provide candid, honest, objective and perhaps unfavorable counsel to one's client. Plaintiffs assert that Defendant Yoo did not merely give "wrong" advice in performing customary legal duties, but that he acted outside of his legal role altogether by participating directly in the formulation of policy that gave rise to the deprivation of Plaintiffs' constitutional rights and by creating legal cover for unlawful detention and interrogation policies. These allegations, taken as true, indicate that Defendant Yoo clearly violated these responsibilities such that *Bivens* liability is appropriate.

Defendant Yoo's alleged misconduct is actionable, as the Supreme Court, this Court, and other circuit courts have recognized that government attorneys

providing legal advice may be held liable for allegedly depriving plaintiffs of their constitutional rights. While Defendant Yoo envisions a nation in which the courts abstain from reviewing Government legal issues implicating national security, the courts have made clear that their robust evaluation of Government and Government lawyers' conduct in wartime is essential to safeguarding liberty. Further, internal agency investigations and bar sanctions are an inadequate substitute for a suit filed under *Bivens*.

Defendant Yoo characterizes Plaintiffs' suit as an improvident attempt to second-guess the Government's response to an unprecedented threat to the homeland that triggered novel legal issues. More appropriately, this case concerns time-honored, fundamental aspects of the rule of law – that lawyers are obligated to provide professionally sound and ethical representation, that the courts are to serve as a check on unconstitutional actions of the coordinate branches, and that this is a nation of laws even when it is confronted with stresses and uncertainties. The district court's order is a modest tribute to these well-established legal principles. For these reasons and those that follow, the district court's opinion should be affirmed.

ARGUMENT

DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS *BIVENS* ALLEGATIONS OF SIGNIFICANT ATTORNEY MISCONDUCT

I. DEFENDANT YOO CLEARLY VIOLATED HIS PROFESSIONAL RESPONSIBILITIES SUCH THAT *BIVENS* LIABILITY IS APPROPRIATE

Defendant Yoo claims that Plaintiffs are simply complaining about the propriety of the legal advice that he gave in the course of his duties as an OLC lawyer. *See* Br. for Appellant at 15 (Plaintiffs' suit is an attempt to hold him liable "for legal advice given to the President about the detention of enemy combatants."); *id.* at 19 (framing this case as a "lawsuit against a government lawyer for allegedly erroneous legal advice provided to the President in a national-security matter[.]"); *id.* at 21 (Plaintiffs are "[t]hreatening Executive Branch lawyers with personal liability for reaching allegedly incorrect legal conclusions regarding the constitutionality of a President's wartime actions[.]").

This view of the complaint misses the mark. Plaintiffs' suit is not predicated on Defendant Yoo sending "good" or "bad" legal advice up the chain of command, but rather acting outside of his responsibilities as a lawyer altogether by developing policies with top-level Executive officials and sanitizing relevant policies through his legal office, which led to the infringement of Plaintiffs' constitutional rights. *See* First Amended Compl. at ¶ 3. To properly appreciate

these allegations and differentiate them from Defendant Yoo's understanding of Plaintiffs' allegations, it is necessary to review applicable professional responsibilities and ethical principles.

This overview will enable us to address Defendant Yoo's contention that it will be impracticable to distinguish between actionable professional misconduct and misconduct that may not serve as the basis for *Bivens* liability. See Br. for Appellant at 32 (it is "virtually impossible" to draw the line as to when an attorney may go "too far"). Comparing the governing rules of professional conduct with Defendant Yoo's alleged behavior demonstrates that Defendant Yoo so clearly deviated from the realm of proper attorney conduct that Plaintiffs' allegations give rise to a viable cause of action under *Bivens*.

1. Defendant Yoo is Bound By Rules of Professional Conduct.

Ethical rules are designed to preserve the integrity of the legal profession and to ensure that client interests are advanced within the bounds of the law. To the extent that these rules are not observed, the legal practice and the rule of law are undermined. See, e.g., *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1171 (9th Cir. 1984) ("we believe that lawyers have a special obligation to obey the law; lawyers who act illegally diminish the stature of the legal profession and reduce public confidence in the rule of law.").

a. Ethical Rules Demand Impartial, Candid Counsel from Lawyers and Prohibit Any Assistance in Legal Wrongdoing.

Perhaps chief among the ethical prescriptions is the requirement that lawyers provide honest and objective advice to clients. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *id.* R. 2.1 cmt. 1 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment."). The Model Rules emphasize that this duty requires lawyers to discuss facts or law that the lawyer may not want to disclose because doing so may not please the client. *See id.* ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

In addition, lawyers are prohibited from advising clients as to how the clients may engage in criminal or fraudulent conduct. *See id.* 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[.]"); *id.* R. 1.2(d) cmt. 9 (this Rule "prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud."). This prohibition does not preclude lawyers from discussing the consequences of a client's intended actions. *See id.* R. 1.2(d) ("a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”); *see id.* R. 1.2(d) cmt. 9 (lawyers may give “an honest opinion about the actual consequences that appear likely to result from a client’s conduct.”). The Model Rules make clear that lawyers may not “recommend[] the means by which a crime or fraud might be committed with impunity,” but may “present[] an analysis of legal aspects of questionable conduct[.]” *See id.*

If lawyers are aware of the possibility that their clients may violate the law or otherwise incur substantial injury, the lawyers generally are required to notify and remonstrate with superiors. *See id.* R. 1.13 (b) (“If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization,” the lawyer generally “shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.”). Government lawyers must abide by this Rule. *See* R. 1.13 cmt. 9 (“The duty defined in this Rule applies to governmental organizations.”).

b. By Nature of their Unique Role, OLC Lawyers Retain Special Obligations to Ethical Principles and the Rule of Law.

These bedrock rules of professional responsibility and ethical conduct may be considered to apply with greater force to OLC lawyers in light of the specialized role such lawyers undertake to help the President uphold and defend the Constitution and the laws of the United States, and in light of the fact that the OLC provides binding explications of the law to the Executive.

The Attorney General, charged with giving advice and opinion on questions of law to the President, *see* 28 U.S.C. § 511, has, pursuant to statutory authority, *see* 28 U.S.C. § 510, delegated to the OLC the power to assist the Attorney General in advising the President on all matters legal, 28 C.F.R. § 0.25(a). The President is bound by oath to defend the Constitution and laws of the United States. *See* U.S. CONST. art. II, §1, cl. 8 (the Presidential oath to “preserve, protect and defend the Constitution of the United States.”); *id.* at §3 (the President “shall take Care that the Laws be faithfully executed”). Accordingly, OLC lawyers themselves are under unique obligations, in preparing legal advice for the President, to remain faithful to the Constitution and laws of the United States. *See* George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SECURITY L. & POL’Y 409, 430 (2005) (“In advising the President . . . and declaring the limits of the President’s authority under the Constitution and laws of the United States, OLC

lawyers had a special duty to the rule of law.”); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1315-16 (2000) (“Those who hold government office do so based exclusively on the constitutional and statutory provisions that give rise to that office and that defines its authorities and responsibilities. They are empowered to act only to the extent the Constitution or laws of the United States provide that authority; any other act, taken without such authority, is, by definition, *ultra vires*.”).

This enhanced responsibility is reinforced by the fact that OLC legal advice is thought to be binding on the Executive, including the President – a fact confirmed by scholars and former OLC senior attorneys. *See, e.g.*, Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4 (2006) (“OLC opinions are generally regarded as binding through the executive branch.”); Moss, *supra* at 1305 (“When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch.”); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993)

(calling the Attorney General and the OLC the “executive branch’s most authoritative legal voice[.]”).

2. Plaintiffs’ Allegations Indicate Clear Violations of Ethical Rules.

Plaintiffs assert that Defendant Yoo did not act consistently with these applicable ethical rules. *See* First Amended Compl. at ¶ 3. Specifically:

First, Plaintiffs allege that Defendant Yoo violated Plaintiffs’ constitutional rights by “formulating unlawful policies,” in other words by abdicating his duties as a lawyer and instead serving as a policymaker in the Executive. First Amended Compl. at ¶ 3; *see id.* at ¶ 15 (“Defendant stepped beyond his role as a lawyer to participate directly in developing policy in the war on terrorism. He shaped government policy in his role as key member of a small, secretive, and highly-influential group of senior administration officials[.]”) *id.* at ¶ 23 (“illegal policy choices [were] made – sometimes by virtue of his own participation in the War Council.”). Accordingly, Defendant Yoo’s alleged conduct cannot be couched as simply offering legal advice – Plaintiffs assert that he had a direct hand in generating illegal wartime policies. *See id.* at ¶ 24 (“the policies outlined in the Memos were plainly illegal[.]”); *see also* Jack Goldsmith, *TERROR PRESIDENCY* 22 (2007) (describing Yoo as “one of the most important lawyers in the government, a member of a secretive five-person group with enormous influence over the administration’s antiterrorism policies.”).

Second, Plaintiffs allege that Defendant Yoo violated Plaintiffs' constitutional rights by "issuing legal memoranda designed to evade all legal constraints on those policies and to immunize those who implemented them," that is by disregarding his responsibility to offer impartial, honest, and candid advice, some of which may be unpleasant to the client, and instead providing legal cover to otherwise illegal policies. *Id.* at ¶ 3; *see id.* at ¶ 21 (Defendant Yoo 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. According to Defendant, 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. Likewise, the memoranda instructed that the Geneva Conventions were inapplicable to detention and interrogation of terrorism suspects."); *id.* at ¶ 23 (Defendant did not "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[.]"); *id.* at ¶ 26 (Defendant "provide[d] legal justification for pre-formulated policies[.]"); *id.* at ¶ 28 (following policy meetings which he attended, Defendant Yoo "discussed in great detail how to legally justify" "pressure techniques proposed by the CIA," and "wrote his August 1, 2002 memo, which stated that acts of interrogation would not constitute torture" absent certain

circumstances); *id.* at ¶ 29 (“the August 1, 2002 memo was designed to remove legal restraints on interrogators[.]”); *id.* at ¶ 31 (“the August 1, 2002 and March 14, 2003 memoranda [were created] with the specific intent of immunizing government officials from criminal liability for participating in practices that Defendant Yoo knew to be unlawful.”); *id.* at ¶ 47 (Defendant’s memos “proximately and foreseeably gave interrogators and custodians a green light for abusive interrogation and detention, thereby setting in motion the abuses suffered by Mr. Padilla.”). Such attorney conduct is clearly impermissible. *See* David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 200 (2007) (with legal cover, a client “can insist that he cleared it with lawyers first, and that way he can duck responsibility. That appears to be the project of [Defendant Yoo’s] memos.”); *see also Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006) (noting, in a *Bivens* action, that individuals should not be allowed to “cloak themselves in immunity” from suit merely by “first seeking self-serving legal memoranda before taking action that may violate a constitutional right.”); *Molloy v. Blanchard*, 907 F. Supp. 46, 50-51 (D.R.I. 1995) (“[a]dvice of counsel’ would be reduced to an empty shibboleth -- a password to immunity -- if used knowingly to disregard the law.”), *aff’d*, 115 F.3d 86 (1st Cir. 1997). From this, there can be no doubt that the allegations may not be construed as complaints about giving “poor” or “incorrect” legal advice.

Defendant Yoo relatedly contends that determining what actions crossed the line would be impractical. *See* Br. for Appellant at 31-32 (citing *Wilkie v. Robbins*, 551 U.S. 537, 561 (2007)). As the above discussion demonstrates, the contested conduct, taken as true, does not exist in a gray area of reasonable differences, but far exceeds the point at which lawyers' conduct becomes actionable. The Court's role is not to define that point, which Defendant Yoo suggests would be necessary, *see id.*, but rather to recognize that Plaintiffs' allegations, accepted as true, identify unquestionably problematic attorney misconduct resulting in constitutional violations.

II. DEFENDANT YOO, AS A GOVERNMENT LAWYER OPERATING IN THE NATIONAL SECURITY CONTEXT, IS AMENABLE TO SUIT

Defendant Yoo's arguments are permeated by the notion that he need not answer for his alleged wrongdoing because he was an attorney providing legal advice in the national security arena. Though Defendant Yoo characterizes this suit as treading new ground, in truth it is well-established that lawyers, including government lawyers, may be regulated by law when transgressing their professional responsibilities and that the courts are to play a meaningful role in checking unconstitutional government behavior, even when committed by government lawyers. This section recounts these basic, entrenched principles as a

contrast to Defendant Yoo's attempt to define this case as an attempt to invent doctrine with respect to *Bivens* liability for attorneys.

1. In Various Contexts, Lawyers Have Been Regulated by Law for Violating Legal and Ethical Duties.

The privilege of practicing law carries with it legal duties to which all lawyers are subject, including the obligation to conform their conduct to the ethical standards of the profession. As a natural corollary, lawyers who breach their legal and ethical duties have been subject to civil and criminal liability. For example, lawyers who advise their clients in the commission of illegal acts have been held civilly liable. *See, e.g., FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990) (finding that general counsel who advised client to make loans in violation of federal regulations was amenable to suit for legal malpractice and breach of fiduciary duty). In addition, lawyers have been criminally prosecuted for facilitating illegal conduct under the auspices of legal advice. *See United States v. Sarantos*, 455 F.2d 877 (2nd Cir. 1972) (lawyer may be convicted of conspiracy charges based on client's false statements to INS in order to obtain permanent residence for an alien through a sham marriage with a citizen); *SEC v. Nat'l Student Marketing Corp.*, 457 F.Supp. 682 (D.D.C. 1978) (lawyers could be charged with aiding and abetting a fraudulent transaction by failing to interfere with its closing).

Similarly, lawyers have been held both civilly and criminally liable for drafting opinion letters. *See, e.g., Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir.

1967) (holding lawyer liable to non-client who was injured after relying on opinion letter drafted at the request of the lawyer's client); *United States v. Benjamin*, 328 F.2d 854 (2nd Cir. 1964) (convicting lawyer along with client and CPA for using interstate commerce to sell unregistered securities and mail fraud).

In addition, lawyers have been held liable for trying to "game" the system. For example, in *United States v. Cueto*, the Seventh Circuit upheld criminal obstruction-of-justice convictions against a lawyer who, while representing an alleged racketeer, filed a lawsuit against an FBI agent working the case and various motions to hinder a grand jury investigation. *See* 151 F.3d 620 (7th Cir. 1996). Although the lawyer's actions in *Cueto* appeared to be lawyerly, the Seventh Circuit upheld the convictions noting that "an individual's status as a lawyer engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct." *Cueto*, 151 F.3d at 631 (citing *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

Also, courts frequently have held lawyers liable for conduct transgressing applicable legal standards in areas where the public interest is at stake. *See, e.g., Koehler v. Pulvers*, 614 F.Supp. 829 (S.D. Cal. 1985) (in the securities context, holding that an lawyer's failure to conduct a reasonable investigation of the offering documents he drafted, and his later failure to correct the inaccurate statements he made, could constitute a primary violation of federal securities

laws); *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir. 1966) (stating that a lawyer “mak[ing] policy decisions for the corporation” may “subject himself to liability” for conspiracy to violate antitrust laws).

2. Government Lawyers May Be Regulated by Law for Professional Misconduct.

As with other lawyers, government lawyers are obligated to abide by traditional rules of professional responsibility and may be sued for conduct stemming from their legal functions. The Supreme Court has held that a prosecutor is entitled to absolute immunity for functions that are “intimately associated” with the judicial process, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), but is not absolutely immune from suit under 42 U.S.C. § 1983, the counterpart to *Bivens*, for simply giving “legal advice,” *Burns v. Reed*, 500 U.S. 478, 492-96 (1991).

This Court has followed this distinction, recognizing that government lawyers providing legal advice that leads to constitutional violations are amenable to suit. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 959 (9th Cir. 2009); *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir. 2005); *KRL v. Moore*, 384 F.3d 1105, 1112 (9th Cir. 2004); *Milstein v. Cooley*, 257 F.3d 1004, 1009 (9th Cir. 2001); *Fletcher v. Kalina*, 93 F.3d 653, 655 (9th Cir. 1996). In *Ewing v. City of Stockton*, for example, this Court held that absolute immunity from suit under 42 U.S.C.

§ 1983 was available to a district attorney for the charging decision, but absolute immunity did not reach the attorney's advice to police. --- F.3d ----, 2009 WL 4641736 at *14 (9th Cir. Dec. 9, 2009). Even prior to *Burns*, this Court held that city attorneys furnishing legal advice that allegedly resulted in constitutional violations were not totally immune from Section 1983 claims. See *Donovan v. Reinbold*, 433 F.2d 738, 744-45 (9th Cir. 1970).

Other circuit courts similarly have concluded that government attorneys giving legal advice are entitled to qualified, not absolute, immunity from suit. See *Harris v. Bornhorst*, 513 F.3d 503, 510 (6th Cir. 2008) (denying absolute immunity to a prosecutor who advised police that probable cause existed to arrest a suspect), *cert. denied*, --- U.S. ----, 128 S.Ct. 2938 (2008); *Mink v. Suthers*, 482 F.3d 1244, 1260 (10th Cir. 2007) (“Advising police on interrogation methods or ‘the existence of probable cause’ does not qualify” for absolute immunity) (quoting *Burns*, 500 U.S. at 487), *cert. denied*, --- U.S. ----, 128 S.Ct. 1122 (2008); *Kijonka v. Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (“The absolute immunity of a prosecutor does not extend to his giving legal advice to the police when they are investigating whether a crime has occurred.”); *Hill v. City of New York*, 45 F.3d 653, 661 (2nd Cir. 1995) (“Nor is advising the police during the investigative stage of a case that they have probable cause to arrest an advocacy function” triggering absolute immunity); *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006) (assistant

city attorney can be sued in constitutional tort for legal advice given to city police who relying on advice cause injury). Accordingly, even accepting Defendant Yoo's contention that this suits concerns inadequate legal opinions, *see* Br. for Appellant at 15, 19, 21, rulings of the Supreme Court, this Court, and other federal courts indicate that he still may be reached for liability purposes as an OLC lawyer engaged in the advice-giving function.

That liability generally attaches to government lawyers who participate in constitutional violations is reinforced by the fact that the United States Government prosecuted German government lawyers as part of the Nuremberg trials. *See United States v. Altstoetter*, 4 Law Reports of Trials of War Criminals Case No. 35 (U.N. War Crimes Comm'n, 1948). In particular, German lawyers had rendered legal opinions that stripped Geneva Convention protections from Russian troops. Two of these government lawyers were tried by the United States and convicted for their roles in drafting the opinions that led to the denial of wartime rights. While some contend that there are meaningful similarities between the conduct at issue in *Altstoetter* and the alleged conduct of Defendant Yoo, *see, e.g.,* Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1545 (2009) (prosecuting the government officials responsible for the torture memoranda would stand on "firm ground" in light of *Altstoetter*), it is sufficient for our purposes to note from

Altstoetter that there can be no dispute that, as the United States Government has prosecuted government lawyers, government lawyers generally may be held liable for their conduct as lawyers, *see* Telford Taylor, Opening Statement for the Prosecution, Justice Case (“Men of law . . . can no more escape . . . responsibility by virtue of their judicial robes than the general by his uniform.”).

3. Defendant Yoo is Amenable to Suit for Alleged Constitutional Infringements Arising in National Security Context.

In denying absolute immunity to government lawyers providing legal advice, the Supreme Court in *Burns* added that it has been “quite sparing” in conferring absolute immunity, *Burns*, 500 U.S. at 486 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)), and has refused to extend it any “further than its justification would warrant,” *id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982)). Defendant Yoo contends nonetheless that OLC lawyers operating in the national security arena are effectively exempted from suits in which constitutional violations are alleged. *See, e.g.*, Br. for Appellant at 17 (*Bivens* liability is “particularly inappropriate here, where the legal advice at issue concerned issues of national security and foreign policy of the utmost sensitivity and importance.”); Br. Amicus United States at 3 (*Bivens* remedy should not be found where the claims “directly implicate matters of national security and war powers.”).

The Supreme Court has expressly rejected the notion that the Government is insulated from judicial review of alleged constitutional violations in wartime. *See*

Ex parte Milligan 71 U.S. (4 Wall.) 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”); *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (“The laws and Constitution are designed to survive, and remain in force, in extraordinary times.”). Moreover, the Court specifically responded to a circuit court’s view that the federal courts, lacking designated war powers, were without authority to look into the Executive’s wartime actions implicating individual rights. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); *see id.* (dismissing the “assertion that separation of powers principles mandate a heavily circumscribed role for the courts” in a state of war). Indeed, it may be reasonably advanced that the courts’ checking function is heightened when reviewing the coordinate branches’ post-9/11 national security activities. *See* National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report 394 (2004) (a “shift of power and authority to the government [after 9/11] calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.”) (emphasis added).

The Supreme Court also has addressed whether national security effectively exempts individual government lawyers from claims of constitutional infringements. In *Mitchell v. Forsyth*, the Supreme Court was called upon to resolve whether the Attorney General is entitled to absolute immunity from liability for damages when attending to national security legal issues. The Court answered in the negative. *See* 472 U.S. 511, 523 (1985) (“despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.”). The Court reasoned that the prospect that the Attorney General may ignore Constitutional mandates in the name of national security compels courts to ensure that the Attorney General has remained within the bounds of the law. *See id.* (“The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.”); *id.* (“the label of ‘national security’ may cover a multitude of sins”) (citing *United States v. United States District Court*, 407 U.S. 297, 313-14 (1972) (*Keith*)).

The Court held that the Attorney General may claim qualified immunity, a degree of protection which:

will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may

on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: “Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . .” This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Id. at 524 (quoting *Harlow*, 457 U.S. at 819) (internal citations omitted).

This principle holds true in the post-9/11 context. In a *Bivens* suit brought against then-Attorney General John D. Ashcroft for allegedly using a federal statute pretextually, this Court acknowledged that it was “mindful of the pressures under which the Attorney General must operate,” but expressly relied on *Mitchell* for the proposition that the Attorney General must observe the rule of law when carrying out national security functions and may be liable to the extent he impermissibly deviates from the law. *al-Kidd*, 580 F.3d at 973.

It is difficult to square the settled fact that the Attorney General may be held to account in federal courts for possible unconstitutional conduct in the area of national security, but that a single lawyer in the OLC should be shielded entirely

from such legal challenges. *See* Motion to Dismiss at 14 (positing that a *Bivens* remedy should not be recognized against “government lawyers to whom [military] authorities go for candid legal analyses or advice in matters related to the prosecution of war.”). The district court therefore was correct to reject Defendant Yoo’s argument that the courts have no business in checking his conduct in wartime. *See Padilla v. Yoo*, 633 F.Supp.2d 1005, 1027-28 (N.D. Cal. 2009) (affirming that the courts are to review allegations of “possible constitutional trespass on a detained individual citizen’s liberties”).

4. Defendant Yoo’s Practical Considerations in Recognizing *Bivens* Liability Are Unfounded.

Defendant Yoo claims that holding him amenable to suit under the unique circumstances of this case would “open the floodgates” to bad faith lawsuits. *Br. for Appellant* at 33. The Supreme Court, however, has expressly considered and rejected such concerns regarding abusive litigation. The Court noted that “the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or ‘quasi-judicial’ tasks that have been the primary wellsprings of absolute immunities.” *Mitchell*, 472 U.S. 521. The Court emphasized that federal officials performing national security functions are not left “at the mercy of litigants with frivolous and vexatious complaints,” but rather are protected by qualified immunity, which balances the interest in ensuring federal officials adhere to the

law and the interest in escaping baseless claims. *Id.* at 524. Even acknowledging that an increase of litigation against the Attorney General had occurred in actuality, the Court remarked that this fact did not “seriously undermine our belief that the Attorney General’s national security duties will not tend to subject him to large numbers of frivolous lawsuits.” *Id.* at 522 n.6.

Whereas the *Mitchell* Court spoke to a situation in which litigation had increased, here there is no evidence of any rise in litigation against Defendant Yoo and the suggestion of any such rise is unsupported guesswork. Further, Defendant Yoo’s claim that that the circumstances in which he operated after 9/11 were unprecedented and unique cuts against the argument that the application of *Bivens* to him will give rise to a general flood of litigation.

Defendant Yoo similarly contends that holding him personally liable would “chill executive branch lawyers from offering candid legal advice to the President on issues of national security and foreign policy.” Br. for Appellant at 33. The same argument was raised by the Attorney General before the Supreme Court, which explicitly declined the invitation to confer total immunity on Attorney General with respect to national security functions. *See Mitchell*, 472 U.S. 520 (finding unconvincing the argument “that the national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation’s well-being, that we cannot tolerate any risk that in performing those functions he will be

chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens.”).

Defendant Yoo’s arguments regarding the adverse practical consequences of allowing the *Bivens* action to proceed are speculative and in any case ignore that he is effectively shielded by the qualified immunity standard.

III. THE GOVERNMENT’S PROPOSED REMEDIAL ALTERNATIVES ARE INADEQUATE.

The Government contends that remedies alternative to *Bivens* – “possible state and federal bar sanctions, *see* 28 U.S.C. § 530B, investigation by both the Office of Professional Responsibility and the Office of the Inspector General, as well as criminal investigation and prosecution,” Br. Amicus United States at 21 – are more appropriate. *Amici* disagree. Contrary to the assertion of the Government, the availability of ethical sanctions within the legal profession and internally at the Department of Justice does not counsel against a *Bivens* remedy in the courts.

None of the Government’s proposed checks would serve a purpose of *Bivens*, which is to provide a “direct action” against the alleged government wrongdoers. *FDIC. v. Meyer*, 510 U.S. 471, 485 (1994). For example, bar complaints may affect the professional licensing status of lawyers in the United States, entail the power to suspend a lawyer’s privilege to practice law or strip a

lawyer of that privilege. Such action, however, would be between the state bar and the lawyer, and would not enable an aggrieved party to directly challenge a lawyer as an agent of the government. The same is true of criminal prosecution.

Further, the existence of the other remedies does not alter the availability of *Bivens*. For example, the McDade Amendment in no way precludes a tort lawsuit against Defendant Yoo; it simply does not create such a remedy. *See* 28 U.S.C. § 530B; *see also* 28 C.F.R. § 77.1(b) (“Section 530B requires Department lawyers to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law[.]”). Thus, Section 530B and its implementing regulation do not stand for the idea that non-*Bivens* remedies are to be the exclusive or preferred check against government attorney misconduct.

That a *Bivens* action is to be a “direct action” against the federal officials who deprived a plaintiff of constitutional rights is reason to view with skepticism Defendant Yoo’s suggestion that this action should have been brought against those “other government officials” who actually “implemented” the policies he approved. Br. for Appellant at 30. As support for passing the buck, Defendant Yoo cites to *Arar v. Ashcroft*, 585 F.3d 559 (2nd Cir. 2009). In *Arar*, however, the *Bivens* claim was rejected precisely because it was levied against the implementing officers – as Yoo argues Padilla should have done here. *See id.* at 574 (“A suit

seeking a damages remedy against senior officials who implement such a policy is in critical respects a suit against the government as to which the government has not waived sovereign immunity.”). Moreover, in *Arar*, the claimant was a foreign national complaining of the circumstances and legitimacy of his extraordinary rendition to, and subsequent torture in, Syria – decisions which the Second Circuit determined would touch on matters of national security. *See id.* at 575 (the suit would require the courts to revisit “the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.”). Here, by contrast, Yoo’s conduct as a lawyer may be judged against legal and ethical standards to which all lawyers are subject and evaluated according to pertinent legal authorities available in the public domain. *See Part I.1.a., supra.*

Defendant Yoo’s arguments that different causes of action – and different defendants – should form the basis for this suit are unpersuasive. Plaintiffs allege that their rights under the Constitution have been infringed upon by Defendant Yoo. An implied *Bivens* remedy is the proper means by which these transgressions may be remedied. *See Bivens*, 403 U.S. at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)); *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916)

(recognizing an implied cause of action, guided by the maxim, *Ubi jus ibi remedium*).

* * *

Plaintiffs' allegations of Defendant Yoo's attorney misconduct, taken as true, are sufficiently serious to warrant judicial review and are properly brought to the court under *Bivens*. *Amici* ask the Court to grant Plaintiffs the modest relief they seek – to move beyond the pleadings stage and be given an opportunity to prove that they have sufficient facts to support their claims. The integrity of the legal profession and the sanctity of the rule of law hang in the balance.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the district court's order should be affirmed.

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January 22, 2010

CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,509 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I electronically filed the foregoing BRIEF OF AMICI CURIAE LEGAL ETHICS SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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