U.S. Department of Justice

Acknowledgment of Conditions
of Department Representation

Name of Case	) District
	)
	) Court Number
DOJ Contact Attorney At Main Justice	) DOJ Number
	)
	) Date Filed
	)
Name and Address of Person To Be Represented	)

This acknowledgment must be executed as part of your request for legal representation by the Department of Justice. The acknowledgment is designed to advise you of the extent and nature of legal representation that can be provided you by Department of Justice attorneys. Your signature at the end of the acknowledgment indicates your understanding of and agreement to such representation.

The acknowledgment may be submitted either at the time you request representation or immediately after you have been notified that the Department has approved your pending request.

If you agree to accept Justice Department representation pursuant to the provisions set forth below, please execute the signature block at the end of the acknowledgment and return to the person furnishing you the acknowledgment. If the Department has advised that it will provide you with representation, the Department's representation will be considered to have taken effect on the date it was first authorized provided that you have signed and returned this acknowledgment. If this acknowledgment is being submitted as part of your request for representation, you will be advised of the Department's decision promptly after it has been made.

Your representation will be governed by the Attorney General's Representation Guidelines set forth in 28 C.F.R. §§ 50.15 and 50.16. A copy will be furnished upon request.

Representation is provided under the Guidelines upon a determination that it is in the interest of the United States to do so. Additionally, if you are being sued for conduct in your capacity as a current or former federal employee or official, representation is provided if it reasonably appears that such conduct was taken within the scope of your federal employment. The following representation provisions constitute the more significant features of the Representation Guidelines.

(1) *Attorney-Client Communication Privilege*

All written or oral communications between yourself and your assigned Justice Department lawyer will be protected by the traditional attorney-client privilege.

(2) *Claims Against The United States*

Your Justice Department attorney will not assert on your behalf any claim you may have against the United States in this case; nor will he or she assert any claim you might have against other federal employees.

(3) *Counterclaims*

As a general policy, your Department of Justice attorney can only undertake to defend you. He or she will not assert an affirmative claim on your behalf against the plaintiff or anyone else. If you strongly believe that such a claim should be asserted, your normal recourse would be for you to hire a private attorney at your personal expense to press that claim. In the rare instance when an affirmative claim would further not only your defense, but also the interests of the United States, the Department will consider pressing the claim.

(4) *Conflicts With The United States*

If there is a legal argument which should be made in your defense, but which conflicts with a legal position taken by the United States, or any of its agencies, in this or another case, your Department of Justice attorney will not make the argument. You will be advised of this fact so that you may assess available options. Correspondingly, should you ever have questions in this regard, you should take the opportunity to discuss them with your assigned Justice Department attorney.

(5) *Conflicts With Co-Defendants*

If there is a material conflict of interest between you and one of your individually-sued co-defendants, whether factual or legal in nature, your Department of Justice attorney will advise you of this fact so that you may assess

available options. Correspondingly, should you ever become aware of such conflicts, you should immediately bring them to the attention of your Justice Department attorney. Normally, in such cases, it will not be possible for your Justice Department lawyer to continue representing you and other co-defendants having mutually conflicting interests.

(6) *Defending Co-Defendants*

If your Justice Department attorney is representing other defendants in your case in addition to yourself, including the United States or an agency, the Department attorney may elect to press available defenses that could result in the dismissal of a co-defendant before yourself.

(7) *Appeals*

If the judgment of the court is in your favor and the losing plaintiff appeals, representation will continue throughout the appellate stage in this case. In the event of an adverse judgment against you, the Solicitor General of the United States will determine whether an appeal by your Justice Department attorney would be in the interest of the United States. If not, you will be promptly advised in order to discuss available options.

(8) *Retention of Private Counsel*

In certain limited circumstances where a Department of Justice attorney can no longer represent you, such as those circumstances discussed in paragraphs (4), (5) and (7), the Department may elect in its discretion to provide you with a private attorney at government expense. You will be so advised if such circumstances arise.

(9) *Paying Adverse Judgments*

In the event of an adverse money judgment entered against you in this matter, or against you and other individually-sued employees, you may be personally responsible for the payment of the judgment; there is no general right to indemnification from the United States. However, if the United States is a proper defendant and there is a final judgment entered jointly against you and the United States, the United States would pay the judgment. By statute, the United States cannot be held liable for punitive damages (damages awarded to punish a defendant). Therefore, you would be personally responsible in the unlikely event punitive damages are assessed.

I have read the foregoing conditions of Justice Department representation and accept their terms.

_____ (Signature)

_____ (Date)

U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys'

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Civil Issues

You Mean I Can Be Sued? An Overview of Defending Federal Employees in Individual Capacity Civil Suits

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Constitutional and Specialized Torts Section
Civil Division

I. Introduction

When a process server arrives at their home, many federal employees are surprised to learn for the first time that they can be personally sued for doing their jobs. They are even more surprised to learn that the Federal Government does not automatically defend cases arising from employment-related actions, nor does their employing agency necessarily indemnify them in the event the case is lost – even if the agency believes that no wrongdoing occurred. Although personal capacity civil suits against federal employees arise in all agencies and from all types of activity, suits against law enforcement officers are perhaps most familiar to government attorneys. Plaintiffs, moreover, challenge governmental conduct at all levels of authority, from the President of the United States to a federal court file clerk. In addition, suits naming Assistant United States Attorneys and other government counsel are not uncommon.

When a federal employee is named in an individual capacity, that employee is the target of the lawsuit. Recovery is sought from the employee's personal assets rather than from the United States. Although these cases are often referred to as "*Bivens*" actions, they are frequently based on alleged violations of federal statutes or state law, as well as federal constitutional provisions. *See Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Pursuant to 28 U.S.C. §§ 516-519, the Attorney General is responsible for attending to the interests of the United States in litigation. The Justice Department has long recognized that it is in the United States' interest to defend the propriety of governmental action and to protect the morale (and, indeed, solvency) of both its current and former employees by defending suits arising from actions taken within the scope of federal employment.

In most cases, the authorization of personal capacity representation is the responsibility of the Constitutional Torts Section of the Department of Justice's Civil Division. The Constitutional Torts Staff handles a number of cases directly. In addition to its primary cases, the Civil Division monitors certain cases of national interest. However, the vast majority of federal employees facing damages liability are defended by the office of the United States Attorney in the district in which suit is filed. Of course, whether a case is monitored or delegated, the Constitutional Torts Staff is always available to discuss issues that arise in defending federal employees. See Paragraph VI. (A). In addition, the Torts Branch has prepared an extensive Monograph, referenced herein, on defending individual capacity claims. Information on that Monograph is provided at the end of this article. The following discussion highlights some of the unique aspects of defending federal employees in civil damage actions. This edition of the USA BULLETIN also contains an article on various considerations in addressing the doctrine of qualified immunity through motion practice, and an article on emerging issues in individual capacity cases arising out of failed criminal prosecutions.

II. The representation process

Of course, a case typically begins when the plaintiff files suit either in state or federal court. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION D, REMOVING THE PERSONAL CAPACITY SUIT (discussing whether and when cases filed in state court can be removed to an appropriate federal forum). Where a federal employee, rather than the United States, is the named defendant, individual capacity representation must first be authorized by the Department of Justice in accordance with the regulations found at 28 C.F.R. §§ 50.15-50.16. Representation will be authorized where the employee acted in the scope of his federal employment and representation is otherwise in the interest of the United States. 28 C.F.R. § 50.15(a)(2). Broadly speaking, a representation request should contain three categories of material: (1) the summons, complaint and other relevant pleadings; (2) a written request by the employee seeking representation; and (3) a recommendation by the employing agency explaining the scope and interest inquiries as they relate to the facts of the particular case. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION B, REPRESENTATION AND THE ATTORNEY-CLIENT RELATIONSHIP. Applicable regulations also require that all "available factual information" necessary to reach a decision accompany that request, which, of course, will vary and must be determined on a case-by-case basis. 28 C.F.R. § 50.15(a)(1).

In the interests of uniformity, the "scope of employment" inquiry for purposes of Department of Justice representation under Section 50.15, unlike the scope inquiry governing claims against the United States under the Federal Tort Claims Act, is governed by federal law. Accordingly, while state law may be considered in reaching a scope determination, it is not controlling for representation purposes. Both the employing agency and the United States Attorney's office are informed by letter once a decision either to authorize or deny representation is made. If representation is authorized, the assigned attorney should be familiar with the requirements set out in form DOJ-399, Acknowledgment of Conditions of Department Representation, and maintain a copy of that form signed by the client.

Where time constraints preclude submitting a written request, representation may be authorized by telephone by the Constitutional Torts Director or certain Senior Trial Counsel. This approval is conditional and must be supplemented by a formal written request. United States Attorneys have the automatic authority to request an extension of time in any case for the limited purpose of securing representation without prior approval from Main Justice. Accordingly, emergency requests for conditional representation are the exception rather than the rule.

Seeking conditional representation authority should not be confused with Emergency, Interim Legal Representation for Federal Law Enforcement Officials. The Civil Division has procedures in place for providing interim representation for federal agents by private counsel in federal, state, county, or municipal criminal proceedings in the immediate aftermath of a shooting or other use of force involving serious bodily injury. Representation is provided only on a temporary basis — absent exceptional circumstances, for no more than one week — while the Constitutional Torts Staff processes a representation request. Moreover, various conditions may apply. In these critical incident cases, personnel designated by the involved agency should contact the designated attorney of the Constitutional Torts Staff who will make an initial determination of scope of employment based upon the facts presented by the agency. See Paragraph VI.

III. The role of government counsel

Defending damages claims against federal employees who are sued in their individual capacity differs in significant respects from handling civil claims against the United States under the Federal Tort Claims Act. Legal arguments and defense tactics vary greatly and relations with clients become both more important and far more burdensome. In addition, a number of concerns seldom present in more traditional lawsuits involving the United States can play an important role. Suits threatening personal liability not only distract federal employees from the

principal duties of their office, but also take a psychological toll and can disrupt the lives of clients and their families. The litigation may have collateral consequences, such as hampering the ability to secure home mortgages or similar personal obligations. Sensitivity to these concerns, as well as to defense counsel's unique role as a counselor and advocate, are areas in which the government lawyer may not be experienced or attuned.

Perhaps the most obvious departure in defending *Bivens* claims from typical government practice is the availability of defenses that may dispose of the action, where a case on the same facts against the United States would go to trial. Service of process and personal jurisdiction requirements vary in suits against individuals, and the applicable statute of limitations is often not the normal two years prescribed in 28 U.S.C. § 2401(b). *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION E, PRELIMINARY DEFENSES. In some circumstances, motions attacking the specificity of the complaint or other pleading irregularities may be successful, although this must be done with care to avoid reversal on appeal. *See* TORTS SECTION DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION A, PRACTICAL OVERVIEW; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION H, QUALIFIED IMMUNITY. In other cases, plaintiff seeks to challenge acts, either as unconstitutional or in violation of various federal statutes, which simply cannot serve as the basis for a cognizable claim. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, ADDITIONAL DEFENSES (discussing "special factors counseling hesitation" that preclude a *Bivens* remedy); TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, FEDERAL STATUTORY CAUSES OF ACTION (discussing implied rights of action under federal statutes). Clearly though, the key pretrial defense in tort actions against individual federal officials is immunity — statutory, qualified, or absolute. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION F, ABSOLUTE IMMUNITY FOR COMMON LAW TORTS: THE WESTFALL ACT; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION G, OTHER TYPES OF ABSOLUTE IMMUNITY; TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION H, QUALIFIED IMMUNITY.

IV. Caveat on ethics

Individual capacity representation of federal employees can raise thorny ethical issues. *See* TORTS SECTION, DEP'T OF JUSTICE, TORTS BRANCH MONOGRAPH, SECTION C, ETHICAL CONSIDERATIONS IN INDIVIDUAL CAPACITY REPRESENTATION. Once representation is undertaken, Department attorneys undertake a "full and traditional attorney-client relationship with respect to the application of the attorney-client privilege." 28 C.F.R. § 50.15(a)(3). The existence of an attorney-client relationship has a number of consequences. For instance, adverse information communicated by the employee client to a Department attorney may not be disclosed to anyone either inside or outside the Department, even if representation is denied or discontinued, unless the employee waives the privilege. *Id.* In addition, and unlike cases in which the United States is the sole defendant, the attorney-client relationship does *not* automatically extend to agency counsel. Rather, the extent to which an agency attorney undertakes a full and traditional attorney-client relationship with respect to the attorney-client privilege is determined by the agency employing the attorney. Maintaining an attorney-client relationship imposes practical burdens as well. Department attorneys must establish a file system that separates and identifies attorney-client material so that it is not reviewed routinely by others when the case is closed and the file placed in storage.

Most significantly, in any given case, tensions can develop between the interests of the United States, the interests of the employee client, and even between multiple clients. Regulations provide guidance for the resolution of actual conflicts. 28 C.F.R. § 50.15(a)(10). However, their application in a given circumstance may be difficult. Because it has the potential to effect representation authority, whenever Department attorneys discover that raising a position or defense necessary to the adequate representation of an individual federal defendant is contrary to the interests of the United States, they *must* immediately consult with the Torts Branch.

The problems inherent in reconciling these ethical tangles are compounded by the so-called McDade Amendment, which provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. It is not unusual for individual capacity defendants to live or work in different jurisdictions than one another or than the district in which suit is filed. Government counsel then may be bound by the ethical constraints of a number of different jurisdictions in a single case. Therefore, when ethical concerns arise, in addition to contacting the Torts Branch, attorneys may wish to consult their Professional Responsibility Officer or the Professional Responsibility Advisory Office as well.

V. Defending your clients in court

In defending *Bivens* cases, the attorney must understand at the outset what claims the complaint is really trying to assert, against whom, and in what capacity. At times this can be a daunting task, depending on the draftsmanship of the pleading. As challenging as defending a federal employee sued in his individual capacity can be, filing a cognizable claim is at least as complex, not only for pro se litigants, but for seasoned plaintiffs' counsel as well. Many complaints jumble personal and official capacity claims and confuse the source of the substantive right for which they seek redress. If the complaint can be read in any way to expose an individual defendant to liability, the matter should be treated as a personal capacity lawsuit. In other words, unless it is clear that damages are only sought from the United States under the FTCA, assume that personal exposure is a risk and take all measures necessary to protect the individual interests of the named defendants.

Traditionally, personal capacity suits against federal officers were almost universally resolved on motion. In recent years, however, while the Supreme Court has narrowed the types of *Bivens* cases it is permissible to bring, those complaints that allege a valid cause of action are less likely to be disposed of on early motion. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (outlining some of the limits on implied rights of action challenging the allegedly unconstitutional conduct of federal officials); *Crawford-El v. Britton*, 523 U.S. 574 (1998)(discussing pleading requirements in constitutional tort cases). These cases proceed into discovery, and not infrequently, to trial. At the outset then, determining whether or not your case is likely to be resolved on a preliminary motion is important. One good indicator that a case may be susceptible to a motion to dismiss or prediscovery motion for summary judgment, is where plaintiff challenges some broad, systemic action by the United States that is not really attributable to an individual or discrete group of government actors. For instance, challenges to the implementation of federal programs like Social Security or Medicare, or suits that target the taxation regulatory role of government officials, are often good candidates for dismissal on a preliminary motion. On the other hand, cases alleging excessive force or other "hands-on" encounters between government actors and the citizenry may be somewhat less likely to be disposed of by a motion to dismiss.

Regardless of the likelihood of early dismissal, the fact that the case involves individual rather than governmental defendants should be an operating theme throughout the litigation. This point can be made in both direct and subtle ways. For instance, although there are rare cases in which filing a single pleading on behalf of the United States and any individual defendants may be the strategy of choice, filing separate pleadings is generally preferred. In fact, circumstances may dictate that a separate pleading be filed on behalf of any individual with unique defenses, or on behalf of classes of individuals, such as supervisors and subordinates, who have common defenses.

Filing separate papers will immediately alert the judge to the fact that, although it is being defended by a "government" attorney, this case is different. Nonetheless, getting the court to really appreciate that difference is perhaps one of the most formidable challenges that government lawyers face in defending their fellow federal employees. Understanding the distinction between individual and official capacity suits is not

academic. It has a number of significant consequences, both legal and practical. Among them, plaintiffs are entitled to a jury trial, and, if their suit is successful, they may collect punitive damages from the individual federal officer. In order to protect the substance of the individual federal employee's immunity defense, government counsel may also need to move immediately to suspend preliminary disclosures under FED. R. CIV. P. 26 or other discovery obligations. Once a case is in discovery, the production of documents and the assertion of governmental privileges may be complicated by the fact that the United States is not a defendant to the action.

The import of defending these cases, both to the individual as well as to the overall effectiveness of government functions, cannot be overstated. We have seen constitutional tort suits filed against federal employees in every significant law enforcement mission in recent memory, including the seizure of the Branch Davidian compound in Waco, Texas, the stand-off at Ruby Ridge, and now the investigation of terrorist activities in the wake of 9/11. Even personal capacity litigation challenging more innocuous government action drains the United States' fiscal and other resources, and saps the time and energies of the federal workforce. Yet, whether particular cases are of national importance or have more limited reach, each has vital significance to the lives of the individual clients we represent. Ultimately, providing effective and compassionate counsel to coworkers sued for doing their job can be one of the most rewarding of the many "hats" that government attorneys wear.

VI. References

A. The office's main number is (202) 616-4140. The facsimile number is (202) 616-4314. To find out the attorney assigned to an individual case within the Constitutional Tort Section, you may call case control officer Mildred Carroll at (202) 616-4327.

B. The Torts Branch contact for Emergency, Interim Legal Representation for Federal Law Enforcement Officials is Sal D'Alessio (Sal.D'Alessio@usdoj.gov). Mr. D'Alessio may be contacted at his office, (202) 616-4168, by cellular telephone, (202) 353-5329 or by pager (800) 759-8888 **[PIN 1742555]**. This contact information is to be used *solely* for authorizing representation in critical incidents.

C. To further assist AUSAs defending federal employees against individual capacity claims, a Torts Branch Monograph is available in the DOJBRIEFS database of WESTLAW and on-line at USABook, http://10.173.2.12/usao/eousa/ole/usabook/liab/index.htm. That Monograph contains the following chapters:

Chapter A - Practical Overview: Defending the Individual Capacity Claim

Chapter B - Representation and the Attorney Client Relationship

Chapter C -Ethical Considerations in Individual Capacity Representation

Chapter D- Removing the Personal Liability Case

Chapter E - Preliminary Defenses: Personal Jurisdiction, Venue, Service and Timeliness

Chapter F - Absolute Immunity for Common Law Torts: The Westfall Act

Chapter G - Other Types of Absolute Immunity

Chapter H - Qualified Immunity

Chapter I - Additional Defenses

Chapter J - Federal Statutory Causes of Action

Chapter K - Trial and Damages

Chapter L - Appellate Issues and Interlocutory Appeal❖

ABOUT THE AUTHOR

❑**Ms. Mason** is a Trial Attorney with the Constitutional and Specialized Tort Section of the United States Department of Justice. When she began with the Department in 1990, Ms. Mason handled litigation and supervised attorneys under the National Vaccine Injury Compensation Program — one of Congress's most sweeping attempts at nationalizing tort reform. For the last

six years, Ms. Mason has practiced exclusively in the constitutional tort arena. She has been the lead attorney in a number of high profile *Bivens* cases, including civil suits arising out of the Olympic bombing in Atlanta, Georgia, as well as the transborder arrest of Mexican doctor Humberto Alvarez-Machain, charged with the torture and murder of DEA Agent Enrique Camarena.

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Asserting Qualified Immunity And Avoiding Discovery: Thoughts on Motions Practice and Discovery

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I. Introduction

Qualified immunity from suit under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is the principal defense of government officials sued in their individual capacities. Although a personal defense, immunity is grounded in important public policy considerations. Quoting Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), the Supreme Court in *Harlow* emphasized that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 (footnote omitted). In addition to the general costs of personal liability litigation, which the *Harlow* court identified as the distraction of public officials from their duties, and the concern that the prospects of personal liability will deter able people from serving in government as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties,'" *id.*, (quoting *Gregoire*, 177 F.2d at 581), there are also special costs to permitting discovery into discretionary government decision making. *See Harlow*, 457 U.S. at 816. "Inquiries of this kind," the Court observed, "can be peculiarly disruptive of effective government." *Id.* at 817 (footnote omitted).

The *Harlow* court responded to this problem in two ways. First, it reformulated the qualified immunity defense along wholly objective lines such that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citation omitted). Second, the Court admonished that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.*

The problem for practitioners defending constitutional tort cases is effectively asserting this "immunity from suit," *see Mitchell v. Forsyth*,

B. Representation in Personal Liability Cases
The Process and Role of Government Counsel

I.
Representation Process
A. Persons Covered
B. Criteria
C. Procedure for Requesting Representation
D. Private Counsel
E. Indemnification
II.
The Attorney-Client Relationship
A. Roles of the Department Attorney and Agency Counsel
B. The Attorney-Client Privilege
III.
Ethical and Professional Considerations
A. The Standard of Conduct
B. Conflicts With the United States
C. Conflicts With Other Defendants
IV.
Representation of Judges: Special Concerns
A. Representation Policy and Procedure
B. Ethical Considerations and Recusal

Pursuant to 28 U.S.C. §§ 516-519, the Attorney General and the Department of Justice are responsible for attending to the interests of the United States in litigation. The Department of Justice has long recognized that it is in the United States' interest to defend the propriety of governmental actions and to protect the morale (and, indeed, solvency) of its employees by defending present and former federal employees in suits arising from actions taken within the scope of their employment.

It is important to distinguish between official and personal capacity suits. When a government employee is sued in an official capacity, the real defendant is the United States; any adverse judgment would be directed to the actions or the resources of the United States.[FN1] Department of Justice representation of federal officials sued in their official capacities is automatic and no formal request for representation is necessary.

When an employee is sued in his individual capacity, he is the personal target of the lawsuit. The plaintiff is seeking recovery from the personal assets of the employee as opposed (or in addition) to the assets of the United

States. If this is the case, personal representation may be appropriate.[FN2] Policy guidelines for Department of Justice representation of federal employees in civil cases seeking money damages and in criminal cases are published at 28 C.F.R. §§ 50.15, 50.16. Within the Department, the Civil Division is responsible for developing and overseeing representation policy. The Constitutional and Specialized Torts Staff of the Torts Branch processes the majority of representation requests in suits against individual federal employees, and is the principal point of contact within the Civil Division for issues relating to the representation of individuals.[FN3]

I. Representation Process

A. Persons Covered

Representation is available to present and former federal employees personally sued, subpoenaed or charged for actions taken within the scope of their federal employment. In addition, state and local law enforcement officers who are deputized by, or who cooperate with, a federal agency under a formal agreement pursuant to 5 U.S.C. § 3374 are considered to be federal employees for representation purposes. Department of Justice representation is also available to National Guard personnel where a federal function is involved, but generally not when the personnel are acting in their state capacity. All representation decisions are made on a case-by-case basis.

The Department of Justice may, on occasion, provide representation to individuals who are not federal employees if such representation is deemed necessary "to attend to the interests of the United States . . . ." 28 U.S.C. § 517. For example, private individuals sued for rendering assistance to the government -- such as FBI informants -- may be afforded Department representation.

B. Criteria

Ordinarily, two criteria must be satisfied for Department of Justice representation to be authorized:

(a) Scope of employment. The employee's actions giving rise to the suit must reasonably appear to have been performed within the scope of employment.

(b) Interest of the United States. It must also be in the interest of the United States to provide the requested representation.

28 C.F.R. § 50.15(a). The Department of Justice is responsible for making final determinations with respect to both the "scope" and "interest" criteria. The employing agency's views on each of these elements are considered in making a decision on a request for representation.[FN4]

The question of scope of employment is fairly straightforward; at the time the case arose, the employee was either involved in performing his duties, or he was not.[FN5] While the line separating acts in the scope of an individual's employment from those outside the scope may, on occasion, be somewhat blurred, most Bivens suits arise from acts that were squarely within the defendant's job description.

The question of the United States' interests is somewhat more complicated.[FN6] Under the doctrine of separation of powers, the Executive Branch has the sole responsibility for determining the litigation interests of the United States. Within the Executive Branch, this determination is made by the Attorney General. 28 U.S.C. §§ 516, 517.

Personal representation decisions are made as a function of this authority. Accordingly, they are not subject to judicial review. Falkowski v. Equal Employment Opportunity Commission, 764 F.2d 907 (D.C. Cir. 1985). The Attorney General's discretion with regard to such decisions is largely absolute, as "neither the statute, nor any regulation, nor any administrative practice cabins this discretion or furnishes any standard by which to review the Attorney General's determinations in this area." (citations omitted). Falkowski v. EEOC, 783 F.2d 252, 253 (D.C. Cir. 1986).

Not surprisingly, the question of the United States' interest is resolved on a case-by case basis. While few 'hard and fast' rules may be articulated, a number of general principles should be noted. First, representation will almost always be in the interest of the United States where the employee was carrying out his assigned duties with a reasonable degree of competence (a standard well below perfection). It is understood to be important for the morale of the federal work force for employees to know that their employer will stand behind them when they are acting in good faith; accordingly, representation of employees performing their duties to the best of their abilities is generally understood to be in the United States' interest.

Even where an employee erred, as long as his actions are not such as would fairly be described as "egregious," the Department will generally authorize representation as in the interest of the United States.[FN7] Ordinarily, assuming the scope of employment test to have been satisfied, it is only in cases where a federal employee's actions were clearly unreasonable

and inexcusable that representation will generally be denied.

There are a number of situations where, as a rule, representation will not be authorized. It is not considered in the interest of the United States to provide Department of Justice representation to an employee who is the subject or target of a federal criminal proceeding or investigation. 28 C.F.R. § 50.15(a)(4).[FN8]

Representation is never available in agency disciplinary proceedings or other agency investigations. It is generally not available in a civil case if the employee is the subject or target of a federal criminal investigation for the same acts, although the Department may provide a private attorney to the employee at federal expense. 28 C.F.R. § 50.15(a)(7).

C. Procedure for Requesting Representation

Department of Justice representation is neither automatic nor compulsory. An employee who desires Department of Justice representation must request it in writing. Should an employee not wish to request representation, he is, of course, free to retain counsel of his choice at his own expense.

If an employee does want Department of Justice representation, the ordinary procedure entails submitting a written request to the individual's employing agency (usually the Office of the General Counsel, Chief Counsel, Solicitor, etc.) along with a copy of the Summons and Complaint or other legal papers. Unless representation is "clearly unwarranted" (28 C.F.R. § 50.15(a)(1)), the agency should then forward the request and all available factual information to the Department of Justice with a recommendation as to whether representation should be provided based upon the criteria of "scope" and "interest." A copy of the papers should also be provided to the United States Attorney in the district where the suit is filed.

In the Civil Division, most representation requests are routed to the Torts Branch. The Assistant Branch Directors and Senior Trial Counsel may approve routine requests and they also are authorized to grant "conditional representation" where time is essential. Requests for representation in traffic cases and other small matters may be denied by the Director of the Torts Branch responsible for representation.

At times, a representation matter must be determined quickly; such is often the case where a law enforcement officer has been involved in a shooting incident and local authorities are considering bringing criminal charges.

If there is insufficient time to submit a written request and recommendation, representation may be authorized over the telephone from the

Director, Assistant Director or appropriate Senior Trial Counsel in the Torts Branch, so long as the person for whom representation is being sought has requested it. 28 C.F.R. § 50.15(a)(1). This approval is conditional and must be supplemented by the written request and the agency report. It should be noted that United States Attorneys have automatic authority to request an extension from the court in any case in order to secure representation authority. Thus (except, perhaps, in criminal matters), emergency requests should be the exception, rather than the rule.

Seeking conditional representation should not be confused with Emergency, Interim Legal Representation for Federal Law Enforcement Officials. The Civil Division has procedures in place for providing interim representation for federal agents in the immediate aftermath of a shooting or other use of force involving serious bodily injury.[FN9] The Attorney General has authorized representation by private counsel at Department expense in the immediate aftermath of line-of-duty critical incidents,[FN10] in federal, state, county or municipal criminal proceedings. It is not available in an internal agency investigation. Representation is provided only on a temporary basis, absent exceptional circumstances for no more than one week, while the Constitutional and Specialized Torts Staff process a request for representation. In addition, prior to accepting such representation, the agent must agree to turn over all non-testimonial evidence connected with the incident to the appropriate agency representative, including the employee's weapon, if appropriate.

At the time of the critical incident, personnel designated by the involved agency will contact the designated attorney of the Constitutional Torts Staff who will make an initial determination of scope of employment based upon the facts presented by the agency.[FN11] Whether a civil rights investigation has developed evidence, in the opinion of the Civil Rights Division, indicating there is potential prosecutorial merit will be considered. Once emergency representation is approved, the agency will contact an approved private attorney to represent the agent.

Ultimately, all novel and difficult representation questions and private counsel matters, as well as denials other than those described above, are forwarded to the Assistant Attorney General or a designated Deputy Assistant Attorney General for a determination. The DAAG who may request the review of the "Civil Division Representation Committee." This Committee, which meets informally when necessary and is open to presentation by the employee or his agency, is a purely advisory body which may make a recommendation to the Assistant Attorney General or Deputy Assistant Attorney General. All decisions on matters considered by the Committee are made by the Assistant Attorney General or Deputy Assistant Attorney General.

Upon formal approval of a request for representation, the litigating attorney should forward a Form 399 (see Appendix) to the client with a copy for signature and return. The form sets forth the limitations of Department of Justice representation so that the client fully understands and enters into the attorney-client relationship on a basis of informed consent.

D. Private Counsel

Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, the Assistant Attorney General or his designee may authorize the retention of private counsel at government expense.[FN12]

Private counsel may be retained only where the scope and interest criteria have been satisfied. Moreover, retention of private counsel is subject to the availability of funds. The procedures governing private counsel retention are set forth at 28 C.F.R. § 50.16. Special written agreements between the Department of Justice and the attorney are required. (See Appendix: Administrative Directive 2120A.)

E. Indemnification

Regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against the employee. The availability of indemnification depends upon the policy adopted by the employee's agency; federal employees have no inherent right to indemnification.

Department of Justice employees may be indemnified under a policy promulgated by the Attorney General. See 28 C.F.R. § 50.15(c).[FN13] It is important to note that indemnification is not automatic and not routinely authorized. Indemnification to satisfy a pre-judgment settlement will be authorized only in the most exceptional cases where the interests of the United States clearly warrant this result.

II. The Attorney-Client Relationship

A. Roles of the Department Attorney and Agency Counsel

Personal capacity suits place responsibilities on the Department of Justice attorney (usually an Assistant United States Attorney) that are not present when individual interests are not at stake. Department regulations

provide that the attorney who represents a federal employee in a personal capacity suit "also undertake[s] a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege." 28 C.F.R. § 50.15(a)(3). However, the agency attorney in a personal capacity suit stands in somewhat different shoes.

Attorneys of Department of Justice components who participate in any process of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. Attorneys in other agencies may not have this type of relationship. See 28 C.F.R. § 50.15(a)(3), which provides that:

> The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

Thus, in cases against employees of agencies other than the Department of Justice, it is imperative that the role of agency counsel be defined at the outset. If agency counsel is not covered by the attorney-client privilege, the individual client should be made aware of that fact immediately. In addition, when discussing the case with agency counsel, care should be taken to safeguard client confidences.

B. The Attorney-Client Privilege

The Department of Justice representation guidelines provide a starting point for analyzing the contours of the relationship between a Department attorney and individual government employees.[FN14] 28 C.F.R. § 50.15(a)(3) provides:

> Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is

provided, and even though representation may be denied or discontinued.

The attorney-client relationship commences with the request for representation and applies to communications made for the purpose of securing such representation. Privileged information may serve as the basis for determining whether representation is to be authorized or continued, but it cannot be used against the individual defendant in agency disciplinary or other proceedings. It has been the Department's consistent position that the confidentiality requirements embodied in the attorney-client privilege, and mandated by 28 C.F.R. § 50.15(a)(3), override the obligation to report information regarding criminal violations (see 28 U.S.C. § 535(b)) which a government lawyer might receive from his client.[FN15]

Underlying this conclusion is the Department's recognition that confidentiality of communications between client and lawyer is essential if Department attorneys are to be able to provide adequate legal representation; the client must feel free to divulge all of the pertinent facts to his lawyer. However, it must be stressed that the privilege against disclosure applies only to confidential communications between lawyer and client made in the course of their relationship.[FN16] Therefore, if the government attorney independently discovers information which suggests that a crime has been committed, it is the Department's position that § 535 requires disclosure.

Finally, it is important to remember that information subject to the attorney-client privilege must be protected, both while the case is active and after disposition. Attorney-client matter in the case file should be segregated and office procedures developed which will limit access to the information. Additionally, in dealing with agency counsel, a clear understanding should be reached regarding the agency attorney's receipt and handling of privileged information (where the agency attorney assists in the case) lest there be any inadvertent disclosures.

III. Ethical and Professional Considerations

Occasionally, questions are raised about the propriety of undertaking or continuing personal representation because of an ethical or professional concern. While the most common questions are addressed below, an attorney should not hesitate to call the Constitutional and Specialized Torts Staff for guidance on how to address a particular concern. In addition, help is available from the Department's Professional Responsibility Advisory Office.

A. The Standard of Conduct

The Department of Justice, of course, holds its attorneys to the highest ethical standards. In addition, pursuant to 28 U.S.C. § 530B, Department attorneys are now "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." As required by § 530B, the Attorney General has promulgated regulations implementing the statute. See 28 C.F.R. § 77.1 et seq.

As the regulations themselves show, a Department of Justice attorney must now be sensitive to the possibility of a conflict between the ethical rules applicable in his state of licensure and those applicable in the forum in which he is currently appearing. See 28 C.F.R. § 77.4(b).

Moreover, Department attorneys must be sensitive to potential conflicts in their representation of individual employees. Not only must attorneys follow applicable State Bar ethics rules and local Federal Court rules governing the attorney-client relationship, they must also abide by the Representation Guidelines. See 28 C.F.R. § 50.15.

The Constitutional and Specialized Torts Staff is available to provide guidance on the Representation Guidelines and conflict questions. In addition, each U.S. Attorney's Office has a designated Professional Responsibility Officer (PRO) who can provide guidance on difficult issues arising out of § 530B. Help with § 530B questions is also available from the PRAO. Attorneys are strongly encouraged to consult with a supervisor, in addition to the PRO or the PRAO, in the event ethical issues arise in the course of representing a client.

B. Conflicts With the United States

Department attorneys representing individual defendants must always be sensitive to the distinction between the interests of the United States and those of the individual, and the possibility that those interests may conflict. Representation, of course, only is appropriate when "in the interest of the United States." 28 C.F.R. § 50.15(a). At times, there may be cases where it is not in the interest of the United States to make an argument on behalf of an individual defendant (for example, an argument that a motion to dismiss the United States should be denied).

The guidelines contemplate two situations in which this can occur. In extreme situations, the government's overriding interest will prevent a Department attorney from "making all arguments necessary to the adequate

defense of the employee" (28 C.F.R. § 50.15(a)(8)(v)) and representation must be withdrawn. § 50.15(a)(11)(ii). In the second situation, the Department attorney is precluded from taking a position (or an appeal) which "is not necessary to the adequate representation of the employee." § 50.15(a)(11)(i). Representation can continue only "if the employee knowingly agrees to forego appeal or to waive the assertion of that position." Id. If not, representation must be terminated. § 50.15(a)(11)(ii).

It is imperative that any possible conflicts are communicated to and discussed with the client. The regulations are clear on this point -- the attorney "shall" advise the client of "the nature, extent, and potential consequences of the conflict" as well as any decision to forego appeal. § 50.15(a)(11). Because our individual clients typically lack legal training, it is important that they understand the issues so that they can make informed determinations as to their interests. Additionally, the attorney should take whatever steps are necessary to ensure that, in the event the client desires to change counsel in order to pursue an appeal or assert a position where, for whatever reason, the Department attorney is unable to assist.

C. Conflicts With Other Defendants

The Department of Justice routinely undertakes multiple representation when no actual conflict exists. Denial of representation is not mandated merely because of the potential that a conflict may eventually develop. However, in the event that an actual conflict arises between or among individual clients, the Department will withdraw representation. Subject to the availability of funds and the interest of the United States, private counsel may be retained pursuant to 28 C.F.R. § 50.16.[FN17]

A common situation where multiple representation is authorized occurs when a plaintiff asserts a claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671, et seq., as well as personal capacity claims against individual government employees. The government has an interest in seeking dismissal of the FTCA claim while the individual may not since a judgment under the FTCA would bar any recovery against the employee under § 2676.[FN18] This is not an actual conflict, however, for as long as the defense of the United States does not require the attorney to urge a legal or factual position contrary to that which would be urged on the employee's behalf, representation may continue.

Similarly, if there is a jurisdictional defense available to the United States, the Department attorney must seek its dismissal even though it would be in the interest of the individual client for the United States to remain a

co-defendant due to the provisions of 28 U.S.C. § 2676. Rather than a conflict of interest, this must be viewed as a limitation upon the representation which the Department can afford to federal employees; in accepting Department representation, they agree to be represented by an attorney who also represents the interests of another client, the United States.

FN 1. As the Supreme Court has pointed out, "official capacity" lawsuits are "'only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165 (1985), citing Monell v. Department of Social Services, 436 U.S. 658, 690 n. 55 (1978).

FN 2. On occasion, a federal employee may seek personal representation for a deposition or trial testimony. Such requests are routinely denied. If the employee is testifying in an official capacity, then the Department attorney will represent him in that capacity. If the employee is testifying as a fact witness, the Department attorney represents the United States and assists the witness, who is an employee of the client. As a rule, the employee's testimony is given subject to the limitations imposed by his agency's Touhy regulations, which will be enforced by the government attorney through appropriate invocations of the United States' privileges. See generally, the Federal Programs Branch monograph Touhy Regulations And Other Procedural Considerations In Defending Third-Party Subpoenas Against Federal Agencies And Employees (1994).

In limited circumstances, representation by private counsel at Department of Justice expense may be provided to employees who are subpoenaed to give testimony in federal criminal proceedings, so long as the employee is not identified as a target or subject of the investigation (as those terms are defined in the United States Attorneys Manual) and so long as the information available to the Department of Justice indicates that providing such representation would not conflict with the interests of the United States. See 28 C.F.R. § 50.15(a)(4).

FN 3. 28 C.F.R. § 50.15(a)(1) provides that a representation request should be submitted to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Environment & Natural Resources, or the Tax Division).

FN 4. If the agency concludes that representation is "clearly unwarranted," representation may be denied by the agency without forwarding the request to the Department of Justice. 28 C.F.R. § 50.15(a)(1).

FN 5. The "scope of employment" test is similar, but not identical, to the

test employed under the Federal Tort Claims Act. See 28 U.S.C. § 2679. As a practical matter, the Torts Branch will give an employee the benefit of the doubt with regard to scope of employment, where such is possible.

FN 6. The authority to represent individuals comes from the Attorney General's power "to attend to the interests of the United States . . . ." See 28 U.S.C. § 517. Thus, the scope of employment test is virtually a subcategory of the United States' interest; as a rule, if a federal employee is sued for doing something that had nothing to do with his job, it would not be in the interest of the United States to provide him with representation (e.g., if the Curator of Minerals and Gemstones at the Smithsonian Museum of Natural History were to be sued for punching his next door neighbor in a bar fight, the interests of the United States would not be implicated).

FN 7. Thus, representation requests are routinely approved where a federal employee is given a traffic citation while operating a government vehicle, even where it appears that the employee may well have been negligent.

FN 8. If, however, the investigation does not result in the employee's indictment, reimbursement of private counsel fees may be available in compelling circumstances. See June 3, 1998, Memorandum for the Deputy Attorney General (Appendix).

FN 9. The phrase "serious bodily injury" generally means an injury which is so severe as to require the hospitalization of the alleged victim.

FN 10. The term "critical incident" is strictly defined as one in which there has been the use of force by a federal employee in the line of duty which results in death or serious bodily injury.

FN 11. The Torts Branch contact is Sal D'Alessio. E*MAIL: Sal.D'Alessio@usdoj.gov. For purposes of authorizing representation in critical incidents, Mr. D'Alessio may be contacted at his office, (202) 616-4168, or via cellular telephone, (202) 353-5329 or pager (800) 759-8888 {PIN 1742555}.

FN 12. Private counsel authorizations are subject to budgetary considerations. For this reason, among others, in cases in which a conflict may be found to exist, the guidelines permit the defendants to be divided into groups with compatible positions, and provided with separate Government attorneys to represent each group. 28 C.F.R. § 50.15(a)(10).

FN 13. Other agencies have adopted similar policies. See, e.g., 13 C.F.R. § 114.112 Small Business Administration) and the Department of Health and

Human Services (45 C.F.R. § 36.1) have adopted similar policies.

FN 14. Applicable State Bar ethical rules and local Federal Court rules should also be consulted. See 28 U.S.C. § 530B.

FN 15. See April 3, 1979 OLC to Civil Mem; Aug. 30, 1978 OLC to Tax Mem; Oct. 8, 1981 OLC to DAG Mem.

The rationale behind this policy is that information relating to violations of Title 18 is not "received in a department or agency" for purposes of § 535(b), when a legitimate, independent shield of confidentiality prohibits the flow of information obtained from the employee to the employee's agency. The conclusion that there is no obligation to report information relating to criminal violations received in the context of the attorney-client relationship finds further support in 28 U.S.C. § 535(b)(2). The reporting requirement is removed if:

> . . . as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

This language had been interpreted to be broad enough to permit the Attorney General to exempt privileged information from the disclosure requirement. 50 C.F.R. § 50.15(a)(3) may reasonably be read to constitute an exercise of the Attorney General's power in this regard.

FN 16. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981); Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977); McCormick on Evidence, § 88 (E. Cleary ed. 1972).

FN 17. 28 C.F.R. § 50.15(a)(10) provides that where the presence of conflicts among the parties requires retention of private counsel "the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem."

FN 18. See Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987); Serra v. Pichardo, 786 F.2d 237 (6th Cir.); see also Leaman v. Ohio Dept. of Mental Retardation, 825 F.2d 946 (6th Cir. 1987).