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The United States Capitol Police Board
S-151 The Capitol
Washington, D.C. 20510

Subject: *Capitol Police—Inspector General Deputation by U.S. Marshals Service*

In a letter dated January 14, 2009, the Board requested our opinion on two questions arising from the deputations by the U.S. Marshals Service (USMS) of the Inspector General (IG) of the U.S. Capitol Police (USCP) and one of his staff to serve as Special Deputy U.S. Marshals. Specifically, you asked whether these deputations (1) are precluded by the constitutional principle of separation of powers; and (2) could lead to liability on the part of any federal agency, entity, or individual for damages caused by the IG or a member of his staff in the event that a court found the deputation to be invalid.

As explained below, these deputations are not precluded by the principle of separation of powers. The deputations neither aggrandize the powers of either the legislative or executive branches at the expense of the other, nor hinder or impermissibly entangle the operations of either branch with the other. Although we see no constitutional infirmity under the circumstances presented here, USMS retains the statutory discretion to choose whom to deputize as well as what terms apply to such deputations. As to the question of liability, we examine three possible types of federal party liability that could result from actions of the USCP OIG taken under the auspices of deputations that are found by a court to be constitutionally infirm—individual liability for violations of constitutional rights, individual liability for torts under state laws, and federal government liability for torts based on state laws.

Our practice when issuing opinions is to obtain the views of the relevant agencies to establish a factual record and to establish the agencies' legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The letter from the Board requesting this decision provided the Board's legal views along with the factual background. Additionally, we contacted both the USCP IG and USMS for their perspectives on the matter. The USCP IG provided further factual background, Letter from Carl W. Hoecker, Inspector General, U.S. Capitol Police, to Susan A. Poling, Associate General Counsel, GAO, Mar. 2, 2009 (Hoecker Letter), and the USMS General Counsel

provided his legal views. Letter from Gerald M. Auerbach, General Counsel, USMS, to Susan A. Poling, Associate General Counsel, GAO, Mar. 11, 2009 (Auerbach Letter).

BACKGROUND

USCP is a police force charged with the enforcement of the law, the protection of members of Congress, and other similar duties generally within and around the U.S. Capitol buildings and grounds, and its members may carry firearms in carrying out these duties. *See* 2 U.S.C. §§ 1941, 1961, 1966, and 1967. The Capitol Police Board (Board), which consists of the Sergeant at Arms of the Senate, the Sergeant at Arms of the House of Representatives, the Architect of the Capitol, and the Chief of USCP (ex-officio and nonvoting member), oversees and supports USCP. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. H, title I, § 1014, 117 Stat. 11, 361 (Feb. 20, 2003); 2 U.S.C. § 1901 note. In 2005, Congress established within USCP an Office of the Inspector General (OIG) to perform audits, conduct investigations, and report on problems, abuses, and deficiencies in USCP's programs and operations, similar in function to OIGs operating under the Inspector General Act of 1978, as amended (IG Act).¹ Legislative Branch Appropriations Act, 2006, Pub. L. No. 104-55, title I, § 1004, 119 Stat. 565, 572 (Aug. 2, 2005), *codified at* 2 U.S.C. § 1909. However, unlike the presidentially appointed IGs who are directly subject to the IG Act,² the USCP IG statute incorporates only select duties, powers, and authorities enumerated in the IG Act. *Id.* One IG Act provision, enacted in 2002, which is not incorporated into the USCP IG statute, provides that executive branch IGs, their Assistant IGs for Investigation, and their special agents may be authorized by the Attorney General to carry firearms, make arrests without a warrant in specified circumstances, and seek and execute arrest, search, and seizure warrants.³

Upon assuming the newly created USCP IG position, the IG felt that federal law enforcement authority would be a “critical tool” in establishing an effective OIG

¹ Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978), *codified, as amended, at* 5 U.S.C. App.

² Section 8G of the IG Act, 5 U.S.C. App. § 8G, also calls for heads of designated federal entities to appoint an IG, who is subject to the IG Act to the extent specified by that section.

³ Homeland Security Act of 2002, Pub. L. No. 107-296, title VIII, § 812, 115 Stat. 2135, 2222 (Nov. 25, 2002); *see* 5 U.S.C. App. § 6(e)(1)-(8). In 2008, Congress extended this authority to designated federal entity IGs under the IG Act. Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 11, 122 Stat. 4302, 4315 (Oct. 14, 2008); *see* 5 U.S.C. App. § 6(e)(9). Prior to these enactments, executive branch IGs obtained law enforcement authority through special deputation by USMS. *See generally*, GAO, *Inspectors General—Comparison of Ways Law Enforcement Authority is Granted*, GAO-02-437 (Washington, D.C.: May 22, 2002).

within USCP, particularly given that approximately 1,600 of USCP's employees are sworn police officers. Hoecker Letter at 1. Unable to invoke the specific authority available to executive branch IGs under the IG Act, USCP IG and one member of his staff applied for deputation from USMS on August 14, 2007. *Id.* This deputation provides the appointee with the law enforcement authority of a Deputy U.S. Marshal, including the power to carry firearms,⁴ to execute court orders and other writs, and to make arrests. USMS may deputize "federal ... law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require," as well as other persons approved by the Associate Attorney General. 28 C.F.R. §§ 19(a)(3), 0.112(b), (d). USMS approved these applications and deputized both individuals on November 27, 2007.

The USMS form used for the deputation appointments in question calls for the deputized individual to swear or affirm that he or she will "faithfully execute all lawful orders issued under the authority of the United States directed to [USMS], or to an appropriate Federal Official." U.S. Department of Justice, USMS, *Special Deputation Appointment*, Form USM-3, 3A (revised Aug. 18, 1999) (Deputation Appointment Form). The Deputation Appointment Form also stipulates that "the authorities vested in [the deputized individual] can only be exercised in furtherance of the mission for which he or she has been deputized and extend only so far as may be necessary to faithfully complete that mission." Specific to the USCP OIG deputations, the forms list the current USCP IG as the "designated Federal Official," and enumerate the "Limits of Special Deputation Authority" as including: "To seek and execute arrest and search warrants supporting a federal task force"; "To monitor Title III intercepts";⁵ and "To serve as a special agent of an Inspector General's Office." Deputation Appointment Form, dated Nov. 27, 2007.

These USMS deputations are made under the authority of the Director of USMS, upon delegation from the Associate Attorney General, to whom authority has been delegated by the Attorney General. 28 C.F.R. §§ 19(a)(3), 0.112(b), (d). All three of these officers are appointed by the President, by and with the advice and consent of the Senate, and removable at will by the President. 28 U.S.C. §§ 503, 504a, and 561(a). The USCP IG, on the other hand, is appointed by, under the general supervision of, and removable by, the Board, 2 U.S.C. § 1909, and all three voting members of the Board are statutory officers of Congress. 2 U.S.C. § 60-1. The Supreme Court has referred to the ability to remove a public official as "the critical factor" in determining to which branch of government that official owes allegiance. *Bowsher v. Synar*, 478

⁴ The authority to carry firearms incident to deputation is provided by statute. *See* 28 U.S.C. § 566(d). The Board's request did not ask for our opinion on whether the USCP IG could carry firearms under existing statutory authorities, so we take no position on this.

⁵ "Title III intercepts" refers to court-ordered law enforcement interception of wire, oral, or electronic communications. *See* 18 U.S.C. §§ 2510-2522.

U.S. 714, 727 (1986). Applying this test, USMS is an agency of the executive branch, while the USCP OIG is an entity of the legislative branch.⁶

SEPARATION OF POWERS

The U.S. Constitution reflects, according to the U.S. Supreme Court, a “central judgment” of the framers “that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Constitution enumerates the powers and duties of each branch of government, primarily in its first three articles. *See* U.S. Const. arts. I, II, and III. Yet, the Supreme Court also has recognized that “our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence.” *Mistretta*, 488 U.S. at 380; *see also Morrison v. Olson*, 487 U.S. 654, 685–86 (1988); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850–51 (1986). Within this framework, the Court has struck down laws that reflect an attempt by one branch of government to usurp or accrete to itself a power of one of the other coequal branches, as well as laws that impermissibly interfere with the exercise by another branch of its powers. *See Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919, 958 (1983). Thus, the issues presented are whether the exercise of law enforcement powers by an employee of the legislative branch aggrandizes power to either Congress or the executive branch and whether the delegation of such powers by an officer of the executive branch to an officer of the legislative branch impermissibly interferes with either branch’s ability to exercise its powers.

Exercise of Law Enforcement Powers by the USCP IG

The Supreme Court has long recognized that the Sergeants at Arms of the two houses of Congress may permissibly arrest and imprison a person for contempt and disruption of the legislative process. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *Jurney v. McCracken*, 294 U.S. 125 (1935). As the legislative function has expanded in size and scope, so has Congress’s protection of it. To this effect, Congress formally established in 1851 a Capitol Police, which exercises law enforcement powers within the Capitol building, its grounds, and the associated surrounding land and offices. *See* 2 U.S.C. § 1967; U.S. Senate, *The Capitol Police*, at www.senate.gov/artandhistory/history/common/briefing/Capitol_Police.htm (last visited Apr. 21, 2009). This legislative exercise of law enforcement power, related to the Capitol complex and its personnel, is consistent with the earlier cases on the powers of the Sergeants at Arms. Indeed, absent the inherent authority to enforce order on its own premises or in the presence of members of Congress, the legislature would be forced to rely on one of the other branches to safeguard its employees and

⁶ *See, e.g., District of Columbia v. United States*, 67 Fed. Cl. 292, 326–27 (Fed. Cl. 2005) (“the Capitol Police is part of the legislative branch”).

operations, an arrangement that could pose a great threat to the independence of the legislative branch.

There is a “narrow principle of necessity . . . that the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative, nonexecutive, or nonjudicial, respectively.”

Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 821 (Scalia, J., concurring); *see also Mistretta*, 488 U.S. at 386–87 (rulemaking to implement the law is not exclusively an executive function). As Justice Stevens pointed out in his concurring opinion in *Bowsher*,

“Congress regularly delegates responsibility to a number of agents who provide important support for its legislative activities. Many perform functions that could be characterized as “executive” in most contexts—the Capitol Police can arrest and press charges against lawbreakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the buildings and grounds, and its Librarian has custody of a vast number of books and records.”

Bowsher, 478 U.S. at 753 (Stevens, J., concurring). Thus, although USCP’s law enforcement authorities extend to crimes beyond the contempt of a house of Congress, USCP’s role in guarding legislative functions, officials, and employees from criminal activities is well within the range of powers necessary to protect the functioning of the Congress.

As suggested by Justice Stevens’ concurring opinion in *Bowsher*, 478 U.S. at 753, this legislative exercise of law enforcement power is far removed and independent of the majority opinion’s blanket statement that “[t]he structure of the Constitution does not permit Congress to execute the laws.” *Bowsher*, 478 U.S. at 726. In the case of the Capitol Police, the Congress has a continuing interest in enforcing the laws in furtherance of its existence and operations.⁷ In exercising such law enforcement powers, Congress does not usurp power that it does not already possess; it simply has not delegated such powers directly to the USCP IG. Accordingly, the deputation does not result in a legislative aggrandizement of power at the expense of the executive branch.

Although the activities of the USCP OIG are independent of the command structure of USCP, it is nonetheless part of the overall USCP. 2 U.S.C. § 1909(a); *cf.* B-317022, Sept. 25, 2008 (U.S. Postal Service IG is considered part of the Postal Service for the purpose of laws applying to the overall organization). Further, the IG’s authority to

⁷ *Bowsher* involved a legislative official with “the ultimate authority to determine” budget cuts that were binding on “the President himself to carry out.” 478 U.S. at 733. Relying on the case of *INS v. Chadha*, the majority opinion reasoned that once Congress exercises its constitutional power to legislate, “its participation ends.” *Id.*

audit, report, and investigate is limited to the programs, activities, and employees of USCP. 2 U.S.C. §§ 1909(c)(1), (c)(2), (d)(1). The deputations that USMS has granted to USCP OIG personnel give law enforcement power that “can only be exercised in furtherance of the mission for which [the special deputy] has been deputized and extend only so far as may be necessary to faithfully complete that mission.” Deputation Appointment Form, dated Nov. 27, 2007. As set out in the USCP OIG Deputation Appointment Forms, the mission of the IG and his deputized staff member is to support a federal task force, monitor title III intercepts, and serve as a special agent of “an Inspector General’s office.” When we read the USCP IG’s deputation and enabling statute together, the USCP IG may carry out the law enforcement powers delegated to him by the executive branch only to the extent that doing so is consistent with his statutory authorities to audit, report on, and investigate matters related to USCP. Therefore, through such a complementary arrangement, the executive branch has not aggrandized legislative powers to itself because the USCP IG continues to carry out his statutory duties in support of the Congress.

Conflicts in Accountability between the Legislative and Executive Branches

Had this law enforcement authority been provided to the USCP IG via statute instead of USMS deputation, our separation of powers analysis would be at an end. However, the present arrangement between USMS and the USCP IG raises questions of accountability among the separate branches of the government. An official of one branch of government granting authority to an official of a different branch may give rise to situations where the accountability for the exercise of power is unclear, resulting in instances where the powers of one branch impermissibly interfere with the exercise of the powers of the other. *See Morrison*, 488 U.S. at 694–95; *Schor*, 478 U.S. at 850–51.

Under the present arrangement, the *sine qua non* of USCP OIG’s law enforcement powers is the USMS deputation—the USCP IG may investigate violations of laws, administer oaths, and issue subpoenas, but he otherwise would have no law enforcement authority comparable to that of a deputy appointed by USMS. *See* 2 U.S.C. § 1909; IG Act §§ 4, 5, 6(a). Likewise, a USMS deputy who is not also an employee of the USCP OIG has no authority to audit, report on, or investigate USCP. In this respect, the IG powers and the deputy U.S. Marshal powers of the USCP IG are complementary, but do not overlap. This structure is significant in that the USCP IG, as a legislative branch official, controls the manner in which he carries out his IG duties. Equally important is that USMS controls the manner in which the IG carries out his duties as a Deputy U.S. Marshal. The legislative branch conceptually gains an increased effectiveness in OIG oversight over its internal police force, while the executive branch gains additional resources to assist with enforcement of the federal criminal laws that otherwise apply to the legislative branch. If the arrangement ceases to satisfy the needs of both branches, either branch may terminate the arrangement whenever it sees fit.

The Office of Legal Counsel (OLC) of the U.S. Department of Justice has previously opined on requests for USMS deputation of legislative officials, and OLC's analysis, in our view, is consistent with ours. In these opinions, OLC disapproved of the deputation of a member of Congress, *Deputization of Members of Congress as Special Deputy U.S. Marshals*, 18 Op. Off. Legal Counsel 125 (1994), and of the Sergeant at Arms of the House of Representatives, *Impermissibility of Deputizing the House Sergeant at Arms as a Special Deputy U.S. Marshal*, 19 Op. Off. Legal Counsel 99 (1995), but approved of the deputation of the Chief of Staff to a sitting Senator. Department of Justice, Memorandum from Eduardo Gonzalez, Director, USMS, for the Deputy Attorney General, *Continued Deputuation [sic] for R.J. Short*, Jan. 26, 1995 (Congressional Staff Memo).⁸ In approving the one deputation, OLC found significant the fact that the congressional staff member with USMS deputation "exercises law enforcement powers at the complete sufferance of executive branch authorities, and his deputation could be revoked by them at any time." Congressional Staff Memo at 2.

OLC differentiated the Sergeant at Arms from the congressional staff member by pointing out that "[the staff member's] employment as a Senator's aide did not involve institutional duties to enforce order within the congressional sphere which could come into conflict with his accountability to the Attorney General as a [Deputy U.S. Marshal]."⁹ 19 Op. Off. Legal Counsel 99. Prior to requesting deputation, the Sergeant at Arms already had statutory authority to enforce the law under the direction of the Speaker of the House. 2 U.S.C. § 78. Thus, if deputized, he would be subject to both legislative and executive supervision while carrying out overlapping authorities. Such "inherent conflicts in accountability" were not an issue for the staff member, though, because he derived his law enforcement authority solely from the executive branch and was subject only to executive branch supervision when acting under that authority.¹⁰

The General Counsel to USMS suggested that the special deputation of the USCP IG is more analogous to that of the Sergeant at Arms of the House of Representatives than to that of the congressional staff member, because the IG, like the Sergeant at Arms, has specific statutory duties to the legislative branch. Auerbach Letter at 2-3.

⁸ OLC concurred with this memorandum. Congressional Staff Memo, at 3.

⁹ The deputation discussed in the Congressional Staff Memo was made with the intention of providing protection to the Senator in question from possible threats, assault, and assassination. Congressional Staff Memo, at 1.

¹⁰ Congressional Staff Memo, at 2. OLC disapproved the deputation of the sitting member because it considered the member's direct lawmaking authority as inconsistent with the executive functions of USMS, and also because the deputation would not serve a law enforcement purpose, as required by 28 U.S.C. § 561(f). 18 Op. Off. Legal Counsel 125. The situation of a sitting member is plainly distinguishable from the situation here.

We disagree. By statute, the IG must answer to officers of Congress, much in the same way that the Sergeant at Arms must answer to the Speaker and the congressional staff member must answer to the individual member of Congress employing him. Rather than focusing on the similarity of statutory legislative control of the USCP OIG and of the Sergeant at Arms, we believe that the focus is properly put on the duties ordinarily performed by the personnel in their OIG roles, and how they contrast with the duties attendant to USMS deputation under the separate USMS chain of supervision. In this vein, the IG is more akin to the staff member because, unlike the Sergeant at Arms, the IG's duties as an employee of the legislative branch do not involve any law enforcement authority similar to that granted under USMS deputation. The OIG personnel "exercise law enforcement powers at the complete sufferance of executive branch authorities." Congressional Staff Memo, at 2.

Accordingly, in our view, the deputations by USMS of the USCP IG and of one OIG staff member do not violate the principle of separation of powers. To the degree that USMS disagrees with our conclusion, it of course retains the authority to deny any application for deputation. USMS may also wish to request an opinion on this matter from OLC, as it has done with previous requests for deputation. 28 C.F.R. § 0.25(c). Further, if the arrangement is unsatisfactory to the Board, it may ask Congress to expressly provide the USCP IG with the authority to enforce the law or carry firearms.

POTENTIAL FOR FEDERAL LIABILITY

The principle of sovereign immunity shields the United States government and its component agencies from suit unless such suit is specifically authorized by law. *United States v. Sherwood*, 310 U.S. 584, 586 (1941). This immunity also extends to government employees acting in their official capacity. *State of Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). Thus, any party seeking to sue an agency, entity, or individual of the U.S. government must first establish either that the named defendant is not covered by the immunity, or that the government has consented under some statute to be sued. For the purpose of discussing possible liability for actions performed by the USCP OIG under the auspices of USMS deputations, we limit this discussion to civil actions sounding in tort. USMS deputation confers law enforcement authority, which, if exercised without proper authorization, could lead to tort liability under theories including trespass, negligence, assault, battery, false arrest, conversion, wrongful death, and violations of constitutional rights. This last category, constitutional violations, is one area where federal employees can be liable for tortious violations of constitutional rights, as held by the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Absent a violation of the plaintiff's constitutional rights, a suit for ordinary tort damages, under the appropriate circumstances, can proceed either against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, or against one or more individual federal employees under the common law of the jurisdiction where the tortious conduct took place.

Liability under *Bivens*

In 1971, the Supreme Court's *Bivens* decision established a cause of action under which federal employees could be held liable for their actions in the course of their employment, notwithstanding the limitations of sovereign immunity. The *Bivens* decision concluded that, if a federal employee violates the clearly established constitutional right of an individual, the individual can seek a remedy in the federal courts in the form of a damages award.¹¹ *Bivens*, 403 U.S. at 397; see *Davis v. Passman*, 442 U.S. 228, 233–34 (1979). *Bivens* claims may only be brought against federal employees in their individual capacities; they may not be used to sue agencies or other government entities. *FDIC v. Meyer*, 510 U.S. 471, 484–85 (1994). Supervisors may be liable for the actions of their subordinates under *Bivens* only to the extent that they had personally condoned, encouraged, or knowingly acquiesced in the allegedly unconstitutional conduct. See *Okoro v. Scibana*, 63 F. App'x. 182, 184 (6th Cir. 2003). In response to a suit under *Bivens*, a federal employee is entitled to qualified immunity if he or she can make an objectively reasonable case that his or her conduct was lawful, based on legal rules that were clearly established at the time of the allegedly wrongful action.¹² *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982); *Butz v. Economou*, 438 U.S. 478, 485–87 (1978); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1347 (2nd Cir. 1972) (the Second Circuit's decision on remand from the Supreme Court).

As with any other federal employee, a USMS-deputized USCP OIG employee can be sued under *Bivens* only to the extent that the employee's conduct violates a clearly established constitutional right of an individual. Such a case could arise were OIG staff to perform actions that would be illegal for any law enforcement official—for example, arresting a suspect without probable cause. See, e.g., *Richardson v. U.S. Department of the Interior*, 740 F. Supp. 15, 21 (D.D.C. 1990). If, notwithstanding our opinion, a USMS deputation of a USCP OIG employee were declared invalid due to separation of powers concerns, there is no firm judicial precedent as to whether the ordinary exercise of law enforcement authority under an invalid deputation would be

¹¹ *Bivens* directly addressed rights under the Fourth Amendment. *Bivens*, 403 U.S. at 389. Subsequent cases have recognized *Bivens* actions based on violations of the First Amendment, *Gibson v. United States*, 781 F.2d 1334, 1341–42 (9th Cir. 1986), the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 248 (1979), the Sixth Amendment, *Edmond v. U.S. Postal Service General Counsel*, 949 F.2d 415, 423–24 (D.C. Cir. 1991), and the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

¹² Certain federal employees, such as judges, prosecutors, legislators, and the President are afforded absolute immunity from private suits for damages arising from constitutional violations within the “outer perimeter” of their official responsibilities. *Nixon v. Fitzgerald*, 457 U.S. 731, 755–56 (1982). Federal law enforcement officials performing police duties are not entitled to absolute immunity. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1346 (2nd Cir. 1972).

sufficient grounds for a *Bivens* suit.¹³ However, even in the event that a court were to allow such a case to proceed, any individual named as a defendant in a *Bivens* suit would be entitled to qualified immunity if the defendant could establish that the belief that his or her conduct was objectively reasonable was based on clearly established rules and constitutional principles at the time of the incident giving rise to the suit. *Harlow*, 457 U.S. at 815–19. In our view, any USCP OIG personnel in possession of a duly executed and approved deputation from USMS, granting law enforcement power on the authority of the Director of USMS, would be entitled to qualified immunity for all activities within the limits described in the deputation appointment, even if underlying separation of powers problems were later found to render the deputation ineffective. *Cf. Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002) (striking a law on constitutional grounds, but granting the enforcing officers qualified immunity because the constitutional infirmity of the law was not clearly established at the time of their actions).

Liability under State Tort Law

Where there is no violation of constitutional rights, a plaintiff seeking relief from a federal employee who has caused harm in some manner must establish either that sovereign immunity does not apply, or that some waiver or exception should cover the case. There are two methods by which a tort claimant may do so, depending on whether or not the allegedly wrongful activity giving rise to the suit was carried out within the scope of the employee’s federal employment. This scope of duty determination is made based on the law regarding principals and agents in the jurisdiction where the incident occurred. *Aversa v. United States*, 99 F.3d 1200, 1208–09 (1st Cir. 1996). In the event that the relevant court in such a suit determines that the USMS deputations are invalid, it does not necessarily follow that actions performed pursuant to these deputations were beyond the scope of the individuals’ employment. Instead, the court would make this determination based on the individual facts of the case, under the law of agency in the relevant jurisdiction. *Id.*

If, under the applicable standard, the employee’s conduct is ruled to be within the scope of his or her federal employment, the only option that a plaintiff seeking tort damages may pursue is under the Federal Tort Claims Act (FTCA), a statute waiving the government’s sovereign immunity for certain “negligent or wrongful acts or omissions” of its employees. 28 U.S.C. § 1346(b). The conduct giving rise to the suit, though, must be valid grounds for a tort action in the jurisdiction where the conduct took place. 28 U.S.C. § 2672. FTCA cases involve a complex structure of restrictions, exclusions, and procedural requirements,¹⁴ but, for the purposes of determining which federal parties may be liable, the most important point is that, once the

¹³ The USMS General Counsel reported to us that he is unaware of any case wherein a court has ruled a USMS deputation to be invalid or illegal. Auerbach Letter at 3.

¹⁴ For a comprehensive treatment of the law of the FTCA, see Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* (Supp. 2008).

employee's conduct is determined to be within the scope of employment, the United States is substituted as the defendant. 28 U.S.C. § 2679(d). As such, if a court finds that a USCP OIG employee holding an invalid USMS deputation committed a tort within the scope of their employment, the U.S. government as a whole is the only party that can be found liable.¹⁵

Sovereign immunity, though, does not apply to the actions of employees that are beyond the scope of their federal employment. When tortious actions of federal employees are found to be outside the scope of their federal employment, these employees may be sued in their individual capacity under the same rules, standards, and procedures as any other private party. Thus, if USCP OIG personnel executing law enforcement authority under deputation from USMS were found to be acting clearly beyond the scope of their duty as OIG employees, a court could find them liable for any damages caused under state law torts such as negligence, trespass, false arrest, conversion, assault, and battery. The specific causes of action, defenses available, and the potential liability of other parties involved would be determined under the law of the jurisdiction where the conduct giving rise to the suit took place.

CONCLUSION

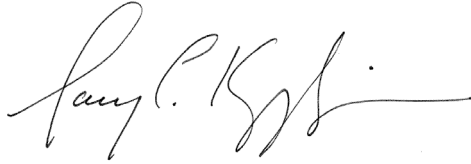
We see no constitutional impairment based on the principle of separation of powers to the USCP IG, as an employee of the legislative branch, executing USMS law enforcement powers to facilitate his oversight of the internal operations of the USCP because neither the executive nor legislative branch through this deputation are aggrandizing their powers at the expense of the other. Further, the USCP IG receiving these law enforcement authorities via deputation from the USMS is not problematic because neither branch is disadvantaged by the arrangement, and because the duties that deputized OIG personnel perform as part of their IG work and under the deputation from USMS are easily distinguishable. For these reasons, we would not raise any objection under the principle of separation of powers to the USMS deputations of the USCP IG and a member of his staff. The lack of a constitutional impairment, though, does not make the deputations mandatory. USMS retains the statutory discretion to deny applications for deputation as it sees fit. Also, if the arrangement is unsatisfactory to the Board, it may ask Congress to expressly provide the USCP IG with the law enforcement or other authorities the IG needs.

The conduct of deputized USCP OIG personnel can create liability for federal parties. A federal employee may be sued under *Bivens* for a violation of a person's constitutional rights, but we believe that any deputized USCP OIG personnel acting within the limits of their deputation would be entitled to qualified immunity. A suit may also be brought under the FTCA for any torts committed within scope of the federal employment, but the United States, rather than the individual or the employing agency, would be liable for any resulting damage award. Lastly, any

¹⁵ If any liability is found by a court, damages are paid out of the Judgment Fund, a permanent, indefinite appropriation within the U.S. Treasury. 31 U.S.C. § 1304(a).

federal employee can be personally liable for damages caused by conduct outside the scope of his or her federal employment.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel