UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress, and DANIEL P. MULHOLLAN, in his individual capacity, Defendants.	Case No. 1:10-cv-00036-RBW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO DISMISS OF
DEFENDANT JAMES BILLINGTON

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INTRODUCTION

Defendant James H. Billington, sued in his official capacity as the Librarian of Congress (the "Library"), does not dispute that Plaintiff Col. Morris Davis was terminated from his employment at the Congressional Research Service ("CRS") for writing an Op-Ed in the *Wall Street Journal* and a Letter to the Editor in the *Washington Post* regarding the Obama Administration's decision to prosecute some Guantánamo detainees in federal court and some in military commissions—a topic of immense public concern related solely to Col. Davis's former career as the Chief Prosecutor of the military commissions at Guantánamo. Nor does the Library contend that Col. Davis's speech caused the Library to suffer any actual harm or that Col. Davis would have been terminated regardless of this speech. Instead, in its motion to dismiss, the Library repeatedly asserts—without any analysis of the actual allegations in the Complaint—that Col. Davis's First Amendment and due process claims should be dismissed because they are allegedly based on "bare assertions" and are not "plausible." That argument should be rejected; the Complaint pleads specific, concrete facts more than adequately establishing that the Library terminated Col. Davis in violation of his First and Fifth Amendment rights.

The Library argues that Col. Davis has not stated a viable First Amendment claim, ignoring the Court's prior holding that Col. Davis has already satisfied a higher standard in demonstrating a "likelihood of success" on that claim. Order, Jan. 20, 2010, Docket No. 11, at 3. The principal legal argument made by the Library in its motion—that Col. Davis could constitutionally be dismissed for his speech because he was a policy-level employee—is identical to the one previously made by the Library and implicitly rejected by the Court. The Court should reject it again. Viewing the allegations in the Complaint in the light most favorable to Col. Davis—as the Court must do on a motion to dismiss—Col. Davis has more than

adequately pleaded violations of his First Amendment right not to be retaliated against for speech of significant public concern that causes no harm to the government employer. As an initial matter, based on the specific, factual allegations in the Complaint, Col. Davis was not a policy-level employee with respect to the speech for which he was fired. Even if he were, policy-level status is not dispositive where, as here, the speech was on a matter of significant public concern, it did not criticize or even relate to the employer, and it did not harm or even potentially harm the employer.

To the extent the Library contends that its actions were justified because Col. Davis's speech violated the Library's policies and practices (1) prohibiting speech on a matter on the Congressional agenda, (2) forbidding the public expression of personal—i.e., non-objective—views, or (3) requiring prior approval for certain types of speech, Col. Davis has also stated a valid claim that such policies are facially unconstitutional as a matter of law because they would be unconstitutional prior restraints on speech. Although the Library attempts to avoid this facial challenge by claiming that it does not have such policies, the Library's own statements, including ones made in its motion, make clear that the Library believes its actions were permissible because Col. Davis expressed his personal—i.e., non-objective—views in a public forum, on a subject on the congressional agenda, without receiving prior approval from CRS.

Finally, Col. Davis has also stated a claim for the violation of his due process right not to be dismissed without fair notice that his speech was prohibited and not to be dismissed pursuant to a facially vague policy governing expressive activities. The allegations in the Complaint make clear that Col. Davis had no fair warning that his opinion pieces violated the Library's or CRS's policies on outside speaking: the Library's written policy on public speaking actually encourages employees to engage in outside speaking, and Col. Davis and scores of other CRS

employees had previously been expressly permitted to speak on similar topics without suffering any repercussions. The lack of fair warning stems, in large part, from the fact that the policies rely on inherently vague and ambiguous terms, such as "sound judgment," "caution," and "objectivity," and do not contain any clear standards or definitions to provide clarity to employees such as Col. Davis about what speech is or is not permissible.

There is a central and irreconcilable tension in the Library's motion. For *Pickering* purposes, the Library claims that it was permissible to fire Col. Davis because he expressed his personal, non-objective views in public on a matter on the congressional agenda and because he did not seek prior approval before doing so. In addressing Col. Davis's facial First Amendment challenge, however, the Library makes the opposite claim: that its policies are constitutional because they do *not* prohibit any speech or impose a preapproval requirement. Then, in responding to Col. Davis's vagueness claim, the Library presents both of these two conflicting interpretations: that its policies do not prohibit any speech, but that Col. Davis nevertheless had fair warning because he should have understood the policies' requirement of "sound judgment" to prohibit his opinion pieces. The Library cannot have it all ways. If CRS employees are permitted to speak publicly about their personal views on issues on the congressional agenda and do not need to obtain prior approval to do so, Col. Davis should not have been fired. If, on the other hand, Library policies and practices forbid such speech by Col. Davis, those policies and practices would be facially unconstitutional, and Col. Davis's termination would be unconstitutional in any case because he did not have fair notice of those policies or practices. Either way, the Library's termination of Col. Davis was unconstitutional, and the Court should deny the motion to dismiss.

FACTUAL BACKGROUND

On December 21, 2009, the Library terminated Col. Davis from his position as the Assistant Director of the Foreign Affairs, Defense, and Trade ("FDT") Division of CRS. Compl. ¶¶ 1, 58-60. The Library terminated him for writing an Op-Ed in the *Wall Street Journal* and a Letter to the Editor in the *Washington Post* (the "opinion pieces") regarding the Obama Administration's decision to prosecute some Guantánamo detainees in federal court and some in military commissions—a topic of great public concern related solely to Col. Davis's former career as the Chief Prosecutor of the military commissions at Guantánamo. *Id.* ¶¶ 1-5, 43-59; *see* Morris Davis, Opinion, *Justice and Guantanamo Bay: It Is a Mistake to Try Some Detainees in Federal Courts and Others by Military Commissions*, Wall St. J., Nov. 11, 2009, attached as Ex. A; Morris Davis, Letter to the Editor, Wash. Post, Nov. 11, 2009, attached as Ex. B.

Col. Davis is a twenty-five year veteran of the United States Air Force and the former Chief Prosecutor for the Department of Defense's Office of Military Commissions, which was created to prosecute the suspected terrorists being held at Guantánamo. Compl. ¶¶ 12, 16, 18. Col. Davis resigned from that position in October 2007 because he came to believe that the military commissions had become fundamentally flawed. *Id.* ¶ 19. After his resignation, he became a vocal critic of the system, speaking, writing, and testifying before Congress about what he saw as the system's flaws. *Id.* ¶¶ 20-22.

Col. Davis was subsequently hired as the Assistant Director of the FDT Division of CRS in December 2008. *Id.* ¶¶ 25-26. Although the Library and Defendant Daniel P. Mulhollan, the Director of CRS, were aware of Col. Davis's background and his prior public writing and speaking about Guantánamo and the military commissions, at no time did they tell him that he

could not continue such public speaking or writing or that doing so in the future could imperil his ability to serve as a CRS employee and/or harm CRS or the Library. *Id.* ¶¶ 25, 27.

Col. Davis began working for CRS on December 22, 2008. *Id.* ¶ 29. His primary responsibility was to supervise the research and analytical work of the approximately 95 employees within the FDT Division. *Id.* He had no authority to establish substantive policy and had little opportunity for significant contact with the public through his position. *Id.* He was also not expected to and did not author any written reports or analyses on behalf of CRS, and he did not have any congressional inquiries or requests for information directed to him. *Id.*

The FDT Division has responsibilities and duties for subject matters relating to foreign affairs, the Defense Department, and international trade and finance, but not for issues related to Guantánamo and the military commissions. *Id.* ¶ 30. Legislative attorneys within a separate division of CRS, the American Law Division ("ALD"), which has a separate Assistant Director, have sole responsibility for military commissions issues. *Id.* ¶ 31. Every congressional inquiry and all CRS reports and analyses on the military commissions have been handled by ALD, not by FDT, and have been supervised by the ALD Assistant Director, not by the FDT Assistant Director. *Id.* In addition, ALD staff—not FDT employees or Col. Davis—have conducted CRS's seminars and workshops for congressional staff on the military commissions and related issues since 2001. *Id.*

During his tenure at CRS, Col. Davis often spoke publicly about his views on policy issues relating to the military commissions. *Id.* ¶¶ 33-39, 46. That outside speaking was consistent with Library policies, which "encourage" Library employees to engage in outside speaking and writing. *Id.* ¶ 65. In fact, because of the nature of their jobs and their expertise, Library and CRS employees regularly express their personal opinions in public on policy

matters, including controversial and high-profile issues. *Id.* ¶ 77. This outside writing and speaking has been occurring for decades and has not compromised the mission of the Library or CRS. *Id.*

The Library and Mr. Mulhollan knew about and routinely approved of Col. Davis's outside speaking engagements regarding the military commissions while he was Assistant Director. *Id.* ¶¶ 33-39. For example, Col. Davis spoke at a Human Rights Watch dinner, participated in an interview for a BBC documentary, spoke at a conference at Case Western Reserve University Law School, published a law review article in connection with that conference, and gave a speech at the Lawyers Association of Kansas City when accepting an award for opposing torture and the politicization of the military commissions. *Id.* ¶¶ 33-38. All of these speech activities were permitted by the Library. Indeed, two months before the publication of the opinion pieces, a CRS attorney expressly informed Col. Davis that he could speak at the Case Western conference and publish the law review article without giving a formal express disclaimer stating that the opinions he was expressing were his own and not necessarily shared by CRS or the Library. *Id.* ¶ 35. Mr. Mulhollan also expressly approved his participation at the conference, so long as Col. Davis participated during his personal time, because the subject of the conference—Guantánamo and the military commissions—had nothing to do with his CRS responsibilities or duties. *Id.* Mr. Mulhollan similarly personally approved Col. Davis's participation at the Kansas City event. *Id.* ¶ 38.

Although Col. Davis expressed views consistent with those published in the opinion pieces during these and other outside speaking engagements, before the publication of the opinion pieces, he was never disciplined or even warned in any manner for writing or speaking publicly about Guantánamo or the military commissions. *Id.* ¶ 40. Indeed, at the Case Western

conference, Col. Davis made the same point that he later made in the opinion pieces—that there should be only one system of justice for all of the detainees. *Id.* ¶ 36. The Case Western conference and Col. Davis's comments there were published on the Internet via a webcast. *Id.* ¶ 37. Media coverage of the Kansas City event similarly made clear that Col. Davis had expressed views critical of both the Bush and the Obama Administrations' policies relating to military commissions at that event. *Id.* ¶ 38. CRS routinely monitors all public appearances and publications of its employees, but neither Mr. Mulhollan nor anyone else from CRS or the Library ever informed Col. Davis that his speech at the Case Western conference or Kansas City event compromised the work of CRS or undermined his effectiveness as a CRS employee. *Id.* ¶ 37-38.

In fact, on numerous occasions—including the day before the opinion pieces were published in print—Col. Davis was told by Mr. Mulhollan and others that he was doing a very good job, that he was well liked and respected by his CRS colleagues, and that he was a good fit for CRS. *Id.* ¶¶ 41-42. Consistent with that assessment, Mr. Mulhollan had assured Col. Davis that he was satisfactorily completing his mandatory one-year probationary period. *Id.* ¶ 41.

Col. Davis wrote the opinion pieces that triggered his termination after the Obama Administration announced its decision in November 2009 to try some of the individuals being held in Guantánamo in federal court and others in military commissions. *Id.* ¶¶ 43-44. He felt compelled to express his personal opinions because of his experience as the former Chief Prosecutor for the military commissions. *Id.* ¶ 49. He wrote the pieces in his personal capacity, on his home computer, during non-work hours, based on his pre-CRS experiences. *Id.* ¶ 48. Neither of the pieces singled out or criticized Congress, any Member of Congress, any political party, or positions associated with one party but not another. *Id.* ¶ 47. Nor did they denigrate or

criticize CRS, the Library, Mr. Mulhollan, or any of their employees or policies. *Id.* ¶ 50. In fact, the pieces did not even mention CRS, the Library, or Col. Davis's current employment; Col. Davis was identified only in his former capacity as Chief Prosecutor and as a private citizen from Gainesville, Virginia. *Id.* ¶¶ 50-51; Exs. A-B.

Col. Davis notified Mr. Mulhollan as soon as he learned that the pieces would be published. Compl. ¶¶ 52-53. After reviewing the opinion pieces, Mr. Mulhollan sent several emails to Col. Davis questioning his judgment and ability to continue serving as an Assistant Director. *Id.* ¶ 54. On November 12, the day after the pieces were published in print, Mr. Mulhollan summoned Col. Davis to a meeting and told him that he would not be converted to permanent status from his probationary status because the opinion pieces had caused Mr. Mulhollan to doubt Col. Davis's judgment and suitability to serve as an Assistant Director. *Id.* ¶ 55. The next day, Col. Davis was given a letter of admonishment that focused entirely on Col. Davis's writing of the opinion pieces. *Id.* ¶¶ 57-58; Daniel P. Mulhollan to Morris Davis, Memorandum of Admonishment: Failure of Judgment and Discretion, Nov. 13, 2009, attached as Ex. C. One week later, Mr. Mulhollan informed Col. Davis, by telephone and in writing, that Col. Davis would be removed from his position as of December 21 and that he would thereafter be given a thirty-day temporary position as Mr. Mulhollan's Special Advisor. Compl. ¶ 58; Letter from Daniel P. Mulhollan to Morris Davis, Nov. 20, 2009, attached as Ex. D. Like the letter of admonishment, the written notice of termination focused on Col. Davis's decision to publish the opinion pieces. Compl. ¶ 59; Ex. D. Shortly thereafter, on November 24, 2009, Mr. Mulhollan sent an email to every CRS employee informing them that Col. Davis was being removed from his position as the Assistant Director of the FDT Division. Compl. ¶ 50.

There were no administrative procedures available to Col. Davis under the Civil Service Reform Act ("CSRA") or the Library of Congress regulations to challenge his dismissal. *Id.* ¶ 10. As a result, on January 8, 2010, Col. Davis filed suit against Dr. James H. Billington in his official capacity as the Librarian of Congress, and against Mr. Mulhollan in his individual capacity, for unlawfully terminating him in violation of his First and Fifth Amendment rights. The Complaint specifically alleges that Col. Davis's First Amendment rights as a public employee were violated and that his due process rights were violated because of the unconstitutionally vague nature of the Library's and CRS's policies and practices regarding outside speaking and writing. *Id.* ¶¶ 78-85. Col. Davis simultaneously filed a motion for a temporary restraining order or a preliminary injunction, which was supported by eight declarations and numerous exhibits substantiating the allegations in his Complaint. Mot. for Prelim. Relief, Docket No. 2; Docket Nos. 2-2 to -4 (containing the eight declarations filed in support of Col. Davis's motion for preliminary relief). The Court held that Col. Davis was likely to succeed on the merits based on the record before it, but denied the motion on the ground that Col. Davis had not shown that he was suffering irreparable injury. Order, Jan. 20, 2010, Docket No. 11 at 2-3, 7-8.[1]

Col. Davis's termination by the Library and Mr. Mulhollan has made CRS employees even more confused and uncertain about what outside speaking and writing is permissible under the Library's and CRS's policies. Compl. ¶¶ 63, 74. That is in great part because the Library's regulation on outside speaking, Library of Congress Regulation ("LCR") 2023-3, actually

[1] Col. Davis's last day at the Library was January 20, 2010. Compl. ¶ 61. He remained unemployed until August 2010, nine months after he was terminated, despite his best efforts to obtain other employment. During that time, Col. Davis applied for more than 50 positions, including dozens of positions within the federal government, and underwent numerous interviews, before finally being hired to be the Executive Director of a private non-profit organization, the "Crimes of War Project." His salary in that position is less than fifty percent of his former CRS salary, so the harm he has suffered from Defendants' actions is continuing.

"encourage[s]" Library employees to engage in outside speech and does not prohibit employees from speaking or writing about any issue. Compl. ¶ 65; LCR 2023-3, Outside Employment and Activities, Mar. 23, 1998, attached as Ex. E. The regulation likewise makes clear that personal writings are not subject to prior review. Compl. ¶ 66; Ex. E. In 2004, CRS issued a policy on outside speaking and writing purporting to clarify the Library's regulation. Compl. ¶ 68; CRS Policy on Outside Speaking and Writing, Jan. 23, 2004, attached as Ex. F. Like the Library's regulation, CRS's written policy does not expressly prohibit employees from engaging in any outside speaking or writing, and it does not require employees to obtain prior approval before such speech. Compl. ¶¶ 68-69; Ex. F. The policy does advise CRS employees to use "sound judgment" in outside speaking and writing, but it does not discuss or define that term (or other similarly ambiguous terms it uses). Compl. ¶ 71; Ex. F.[2]

On March 15, 2010, the Library filed a motion to stay litigation against it, arguing that all proceedings against it should await the resolution of Mr. Mulhollan's individual-capacity defenses. Docket No. 16. Col. Davis opposed that motion on the ground that Mr. Mulhollan's assertion of qualified immunity did not shield the Library from its obligation to respond to the Complaint against it. Docket No. 17. The Court denied the motion for a stay in an Order issued on October 14, 2010. Docket No. 26.

The Library then filed its motion to dismiss on October 19, 2010. Docket No. 27.[3]

[2] The Library's regulation and CRS's policy relating to outside speaking, along with the two opinion pieces and the letters of admonishment and termination, are attached to this opposition as Exhibits A-F. They can be considered by the Court on this motion to dismiss because they were discussed in detail in the Complaint and are central to Col. Davis's claims. *See, e.g.*, *Robinson v. D.C. Hous. Auth.*, 660 F. Supp. 2d 6, 10 n.5 (D.D.C. 2009) (Walton, J.).

[3] A separate motion to dismiss the individual capacity claims was previously filed by Defendant Mulhollan on March 29, 2010. Docket No. 18. Col. Davis filed an opposition to Mr. Mulhollan's motion on April 15**,** 2010, Docket No. 23, and Defendant Mulhollan filed his reply on April 26, 2010, Docket No. 24. That motion remains pending. Because the present motion is virtually identical to part of Mr. Mulhollan's motion to dismiss, this opposition includes many of the arguments Col. Davis previously made in opposition to the earlier motion to dismiss.

I. COL. DAVIS HAS STATED A CLAIM FOR THE VIOLATION OF HIS FIRST AMENDMENT RIGHT TO SPEAK ON A MATTER OF HIGH PUBLIC CONCERN.

The question presented by a Rule 12(b)(6) motion to dismiss is whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). As the Library acknowledges, "'[p]lausibility' represents something less than 'probability.'" Def.'s Br. at 5 (quoting *Iqbal*, 129 S. Ct. at 1949). Given that this Court has already found a likelihood of success on the merits of Col. Davis's First Amendment claim, *see* Order, Jan. 20, 2010, at 3, Docket No. 11, the Library cannot as a logical matter establish—based on the same arguments—that Col. Davis has not even made out a plausible First Amendment claim. *See, e.g.*, *Burritt v. N.Y. State Dep't of Transp.*, No. 08-CV-605, 2008 WL 5377752, at *1 (N.D.N.Y. Dec. 18, 2008) (concluding that because a preliminary injunction requires a higher showing, an action that satisfies the preliminary injunction standard "could not be dismissed *en toto* pursuant to Fed. R. Civ. P. 12(b)(6)").

Col. Davis has stated a First Amendment claim under *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny, because the Complaint's allegations establish all four prongs of the inquiry: (1) Col. Davis spoke on a matter of significant public concern; (2) the value of the speech outweighed any harm to the Library or CRS; (3) his speech was a substantial factor in his termination; and (4) Col. Davis would not have been terminated in the absence of his protected speech. *See O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998). The Library concedes that the Complaint adequately pleads prongs one, three, and four, and argues solely that the potential disruption to CRS outweighed the value of Col. Davis's speech, mostly because he was allegedly a policy-

level employee. Def.'s Br. at 7. That argument must fail in light of the Complaint's allegations, regardless of whether Col. Davis was a policy-level employee.

A. The Complaint's Allegations Establish That Col. Davis Was Terminated For Speech On A Matter Of Significant Public Concern That Caused No Harm To CRS.

Col. Davis has stated a First Amendment claim under *Pickering* as a matter of law because the Complaint's allegations establish that Col. Davis was terminated for speech on a matter of significant public concern that caused no harm to CRS.

The Library does not dispute that the speech was on a matter of significant public concern. Nor could it. Col. Davis sought to contribute as a citizen to one of the most important public issues of our time: the debate about the appropriate response of our constitutional democracy to the threat posed by international terrorism. Compl. ¶¶ 45-51. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983) (internal quotation marks omitted); *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (en banc) ("[C]urrent government policies" are "the paradigmatic 'matter[] of public concern.'").

The Library bears the burden of justifying Col. Davis's termination and demonstrating that the harm to it outweighs the First Amendment values underlying the speech. *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 2899 (1987). Where, as here, the challenged speech "more substantially involved matters of public concern," the government must make "a stronger showing" of disruption to its interests as an employer to overcome the employee's First Amendment rights. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692-93; *see Waters v. Churchill*, 511 U.S. 661, 674, 114 S. Ct. 1878, 1887 (1994) (plurality opinion) (where an employee has "a strong, legitimate interest in speaking out on public matters . . . the government may have to

make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished"); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994) (Posner, J.) ("The greater the potential social, as distinct from purely private, significance of the employee's speech, the less likely is the employer to be justified in seeking to punish or suppress it.").

Based on the allegations in the Complaint, the Library cannot make any showing of harm, much less this "stronger showing" of harm, sufficient to outweigh the significant First Amendment interests at stake. First, the Library cannot show harm because no actual or potential harm can be inferred from the Complaint. Second, the Library cannot show harm because Col. Davis's allegations, made on first-hand knowledge, establish that his opinion pieces had nothing to do with his work at CRS.

1. No Harm To CRS Can Be Inferred From the Complaint.

There is nothing in the Complaint that could reasonably support the conclusion that Col. Davis's speech caused or was likely to cause any harm to CRS or the Library. To the contrary, even though it is not Col. Davis's burden to disprove harm, the allegations in the Complaint establish that no such harm occurred and that any anticipation of harm was unfounded and unreasonable. Compl. ¶¶ 30-77.

Specifically, the Complaint alleges that:

- The opinion pieces did not single out or criticize Congress, any member of Congress, any political party, or any position associated with one party. *Id.* ¶ 47.
- The pieces did not denigrate or criticize CRS, the Library, Mr. Mulhollan, or any of their employees or policies in any manner. *Id.* ¶ 50.
- The opinion pieces were written in Col. Davis's personal capacity, on his own time, and with his own resources, based on his experience with the military commissions system, not based on his work at CRS. *Id.* ¶¶ 48-49, 51.

- The views expressed in the opinion pieces were similar to and consistent with views Col. Davis regularly offered publicly before coming to CRS. *Id.* ¶¶ 19-24, 46.

- The Library's regulation on speech encourages outside speech, and no Library or CRS policy prohibits any speech. *Id.* ¶¶ 65, 68-69; *see also* LCR 2023-3, § 3(A), Ex. E; CRS Policy at 2-3, Ex. F.

- Col. Davis had spoken publicly on this precise topic during his employment with CRS, without any repercussions or any indication that such speech was harming the Library or CRS, and with CRS and Mr. Mulhollan's express approval. Compl. ¶¶ 33-42, 46.

- Other CRS employees have regularly expressed their opinions on policy matters of public concern for decades, including on controversial and high-profile issues, without compromising the mission of the Library or of CRS. *Id.* ¶ 77.

- Although the Library and Mr. Mulhollan were aware of Col. Davis's prior public writing and speaking about the military commissions, they did not tell him during the application process or at any time that continuing such expression could imperil his ability to serve as a CRS employee or harm CRS or the Library. *Id.* ¶¶ 25, 27.

Accepting as true the factual allegations in the Complaint and drawing all reasonable inferences in Col. Davis's favor—as this Court must do on a motion to dismiss—the allegations more than adequately state a plausible First Amendment claim that the value of Col. Davis's speech outweighed any possible harm to CRS.[4]

The Library has not attempted to counter the Complaint's allegations by offering any evidence of harm or actual disruption—nor would such details be admissible on a motion to dismiss. Instead, the Library simply asserts that the Court should draw "reasonable inferences" of unidentified potential harm to CRS's principles of "objectivity, nonpartisanship and balance," without ever detailing how CRS would likely be harmed. Def.'s Br. at 19-20. The Library's

[4] The Library's claim that these factual allegations are "bare assertions" is especially unpersuasive and inapt given that these allegations have already been supported by numerous declarations filed in support of Col. Davis's motion for preliminary relief. *See* Docket Nos. 2-2 to -4. This is not, therefore, a situation akin to *Iqbal* or *Twombly*, where the Supreme Court feared the use of bare allegations that would never be substantiated as a key to "unlock the doors of discovery." *Iqbal*, 129 S. Ct. at 1950; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-59, 127 S. Ct. 1955, 1965-67 (2007).

non-specific, speculative assertion that its interests "would be harmed" is not adequate as a matter of law to meet the Library's heightened burden of making a "stronger showing" of disruption sufficient to outweigh the significant public interest in Col. Davis's speech, *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692-93—especially in view of the specific allegations in the Complaint demonstrating that no such harm could have occurred. *See, e.g., Am. Postal Workers Union v. U.S. Postal Serv.*, 830 F.2d 294, 303 (D.C. Cir. 1987) (rejecting claims of speculative harm to "public confidence" in government where there is "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest"); *Am. Fed'n of Gov't Employees v. Loy*, 332 F. Supp. 2d 218, 230-31 (D.D.C. 2004) (Walton, J.) (holding that a motion to dismiss should be denied where the government "speculatively assert[s] that [its] interest . . . [is] endangered" without showing that the speech actually interfered with the efficient functioning of the office or discredited the employer).

In prior cases where courts have drawn inferences about the potential harmful effects of the speech, the speech directly involved a work-related dispute and the likely harm was obvious. *See, e.g., Connick*, 461 U.S. at 141, 151-52, 103 S. Ct. at 1687, 1692-93 (disruption could be inferred because speech took place in the office, was directed at superior's actions, and was the equivalent of a "mini-insurrection"); *Waters*, 511 U.S. at 664-66, 680-81, 114 S. Ct. at 1882-83, 1890-91 (speech took place during work break and involved criticism of employer's practices). That is not the case here. Here, unlike in *Connick* or *Waters*, the speech at issue was not related to a work-related dispute, it was not critical of Col. Davis's superiors or his employer, it did not occur during the workday or at work, it was not directed to Col. Davis's co-workers, and it did not even concern Col. Davis's employment at CRS. Compl. ¶¶ 47-51. As a result, the alleged harm from Col. Davis's opinion pieces was not so obvious as to permit a reasonable inference of

significant disruption to CRS sufficient to overcome the high public interest in Col. Davis's speech.

The only purported "evidence" of harm to which the Library even attempts to point is Mr. Mulhollan's self-serving assertion of potential harm in the letters of admonishment and termination. Def.'s Br. at 20; Exs. C-D. These letters do not demonstrate that any harm occurred or was reasonably likely to occur; they merely reflect Defendant Mulhollan's personal opinions and conjecture, and his *post hoc* attempt to justify the termination of Col. Davis. Moreover, the concerns articulated in the letters are contradicted by the Library's own regulations encouraging such speech, Compl. ¶¶ 65, 68-69, and by past Library and CRS practices. As the Complaint alleges, CRS employees have regularly engaged in high-profile outside speech on public policy matters, similar to Col. Davis's, for decades, without harming CRS or the Library. *Id.* ¶ 77. Indeed, Col. Davis himself had previously spoken and written about the same subject matter on several prior occasions while employed at CRS, without using an express disclaimer, and with CRS and Mr. Mulhollan's explicit approval—without any sign of harm to CRS. *Id.* ¶¶ 33-42, 46.

This previous approval and CRS's failure to object to past outside speaking by Col. Davis and other employees compels the conclusion that the Complaint adequately alleges that Col. Davis's speech did not cause harm to the Library or CRS and could not reasonably have made the Library fear such harm. *See O'Donnell*, 148 F.3d at 1138 (holding that government's claim that speech "could not safely be left unpunished" was weakened by fact that similar, prior statements by others had gone unpunished). At a minimum, the Library's past conduct establishes an inference—which must be drawn in Col. Davis's favor—that the Library would not suffer any harm from the opinion pieces.

The Library claims that Col. Davis is arguing that his pre-CRS speech gave him a free pass to speak his mind once he became a CRS employee. Def.'s Br. at 25. That is not accurate. Col. Davis contends that because the Library did not object to, and in fact expressly approved of, speech about the military commissions made *after* he became a CRS employee, the opinion pieces did not and could not have caused the Library any harm.[5]

The D.C. Circuit and this Court have previously rejected claims of speculative harm such as those the Library asserts here. *Am. Postal Workers Union*, 830 F.2d at 303; *Loy*, 332 F. Supp. 2d at 230-31. The Court should do so again.

2. Col. Davis's Allegations Establish That His Opinion Pieces Had Nothing To Do With His Work At CRS.

The Library also cannot show harm because Col. Davis's allegations, made on first-hand knowledge, specifically establish that his opinion pieces had nothing to do with his work at CRS. The Library therefore lacked justification to regulate this speech. *See, e.g.*, *Eberhardt*, 17 F.3d at 1027 ("The less [a public employee's] speech has to do with the office, the less justification the office is likely to have to regulate it."); *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 57-58 (D.D.C. 2009) (holding that where speech does not involve the subject matter of government employment and takes place outside the workplace, the government cannot justify an adverse action based upon potential disruption of the workplace).

The lack of a nexus between the opinion pieces and Col. Davis's job duties prevents the Library from demonstrating any actual or reasonably anticipated harm from his speech. The Library attempts to dispute Col. Davis's detailed allegations regarding the scope of his work at

[5] Col. Davis's high-profile speaking on the military commissions prior to his employment at CRS is separately relevant. Given that the Library was well aware of this prior speech, it is reasonable to infer that the Library would have told him that he could not continue to engage in such speech once he became a CRS employee if that speech were truly so incompatible with his CRS employment as to justify his termination. No one ever told Col. Davis that. Compl. ¶¶ 25-27. That leads to the inference—which must be drawn in Col. Davis's favor—that his speech on these same subjects did not render him unfit for his position.

FDT by ignoring their actual substance and broadly asserting that they are "conclusory." Def.'s Br. at 16. Even a cursory review of Col. Davis's allegations, however, makes clear that the Complaint provides sufficient factual detail to establish that the opinion pieces were not related to his work for CRS. For example, the Complaint specifically alleges, based on first-hand knowledge, that:

- The "FDT Division's mandate does not encompass the military commissions system or the prosecution of individuals held at Guantánamo." Compl. ¶ 30.
- "[L]egislative attorneys in ALD author [all] reports on . . . the military commissions system and the prosecution of the individuals held at Guantánamo." *Id.* ¶ 31.
- "All inquiries on those issues are and have been assigned to ALD." *Id.*
- ALD attorneys have conducted all "seminars and workshops for congressional staff on issues relating to the military commissions." *Id.*
- "[T]he reports on these issues contain the contact information of the legislative attorneys in ALD, and the CRS subject-matter directory shows that ALD is the entity with subject-matter expertise on the military commissions." *Id.* ¶ 32.
- Col. Davis and his former FDT colleagues did not have any official responsibilities related to the military commissions. *Id.* ¶ 30.

These are not "conclusory," "bare assertions." They are concrete facts. Nor is there anything "defy[ing] common sense" or not "plausible[]," Def.'s Br. at 16, about these specific, first-hand factual allegations which demonstrate that military commissions issues were not within Col. Davis's or FDT's province. Furthermore (although unnecessary to defeat a motion to dismiss), each of these allegations was amply supported by affirmative evidence in Col. Davis's motion for preliminary relief. That the Library disagrees with these allegations is irrelevant on a motion to dismiss.[6]

[6] The Library faults Col. Davis for focusing on his "official" responsibilities at CRS, Def.'s Br. at 27-28, but the Library's own policy concerning outside speech makes such a distinction. *See* LCR 2023-3, § 3, Ex. E ("Generally,

B. The Complaint States A Viable Claim Regardless Of Whether Col. Davis Was A Policy-Level Employee.

As the Library implicitly recognizes, there is no *per se* exception to *Pickering* balancing for the speech of policy-level employees, Def.'s Br. at 8; whether an employee occupies a policy-level position is just one of the relevant considerations. Although the law "gives employers considerable leeway to ensure that high-level officials toe the party line . . . it does not give them unchecked power to silence them." *O'Donnell*, 148 F.3d at 1137. "In some cases, the public interest in a high-level official's speech will outweigh any interest in that official's bureaucratic loyalty." *Id.*; *see also McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (holding that the policymaking status of a discharged employee is not conclusive in the *Pickering* balance). Thus, even if an employee occupies a policy-level position, he or she retains First Amendment rights, and courts must still apply the *Pickering* balancing test to determine whether the value of the employee's speech is outweighed by harm to the employer. *O'Donnell*, 148 F.3d at 1137; *see also Rankin*, 483 U.S. at 390, 107 S. Ct. at 2900 (stating that "the responsibilities of the employee within the agency" is only a part of the *Pickering* balance).

Where, as here, the Complaint adequately alleges that the speech is on a matter of significant public concern and did not harm or even potentially harm the Library's interests, *see supra* Part I.A.1-2, it follows as a matter of logic that the government cannot meet its burden of proving an interference with its interests that outweighs the value of the employee's speech, even with respect to speech by a policymaker. *See Connick*, 461 U.S. at 152, 103 S. Ct. at 1692-93 ("stronger showing" of disruption necessary where speech is of significant public concern); *Waters*, 511 U.S. at 674, 114 S. Ct. at 1887 ("substantial showing" of likely disruption required).

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personal writings and prepared or extemporaneous speeches that are on subjects unrelated to the Library and to staff members' *official duties* are not subject to review." (emphasis added)); Compl. ¶¶ 65, 67.

That is especially true when, as here, there is only unadorned speculation of harm and "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest." *Am. Postal Workers Union*, 830 F.2d at 303; *Loy*, 332 F. Supp. 2d at 230-31 (same). In other words, if there is no evidence or reasonable inference of harm from the facts alleged in the Complaint, then the balance cannot tip towards the government as a matter of law, even if the employee holds a policy-level position. *See, e.g.*, *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 231 (2d Cir. 2003) (reversing grant of summary judgment because "[e]ven if Catletti is considered a policymaker . . . [defendants] have presented no evidence of . . . potential disruption"); *Barker v. City of Del City*, 215 F.3d 1134, 1140 (10th Cir. 2000) (reversing grant of summary judgment against policy-making employee where defendant "never articulated any particular interests it had in . . . punishing [her] speech, nor . . . articulated how that speech actually, or even potentially, disrupted its governmental functions"); *see also Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995) ("[A] public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker.").

Resisting the conclusion of these cases that the government must show actual or potential disruption even when an employee is a policymaker, the Library argues that "Plaintiff's former position as a policy-level employee is virtually dispositive as to the ultimate legal question under *Pickering*," and that it "is aware of no decisions within the D.C. Circuit that have held in favor of a policy-level employee." Def.'s Br. at 17. In making these arguments, the Library implicitly suggests that the Court need look no further than Col. Davis's status and position to determine whether he has First Amendment rights—i.e., that where a policymaker's speech is at issue, *Pickering* balancing need not be conducted. Even putting aside the numerous other circuit cases

discussed above that have held to the contrary, in *O'Donnell*, a case not cited by the Library, the D.C. Circuit rejected the sort of categorical analysis proposed by the Library. 148 F.3d 1126. *O'Donnell* held that employers do not have "unchecked power to silence" a policymaking official merely because of the official's status. *Id.* at 1137. Having determined that a policymaker retains First Amendment rights, the D.C. Circuit engaged in an extensive *Pickering* analysis of the government's interests, considering the extent to which the plaintiff's various forms of speech threatened actual disruption and the extent to which the plaintiff's position at the time he made the speech required the appearance of loyalty. *Id.* at 1136-39. The court then balanced the strength of the public concern against the government's interests. *Id.* Were an employee's status as a policymaker dispositive of the *Pickering* balancing, the D.C. Circuit would not have needed to perform such an extensive analysis.

Because the court must accept the Complaint's well-pled allegations as true, given the allegations in Col. Davis's Complaint, the *Pickering* balancing in this case cannot be resolved in favor of the Library on this motion to dismiss as a matter of law. The policymaker cases relied upon by the Library to argue that Col. Davis's speech was disruptive enough to be dispositive of the *Pickering* balance, Def.'s Br. at 9, 17-18, are not to the contrary. The speech for which the employees were terminated in those cases was significantly different from Col. Davis's speech: it "reflected *a policy disagreement with his superiors* such that they could not expect him to carry out their policy choices vigorously." *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988) (emphasis added) (holding that an Athletic Director of a university could be dismissed for publicly criticizing the Athletic Department and commenting on possible violations of NCAA rules).[7] Adverse employment action was justified in those cases because the "tremendous

[7] *See also, e.g.*, *McEvoy*, 124 F.3d at 103 (holding that former Police Commissioner did not have First Amendment claim against city employer arising out of his discharge for actions publicly criticizing the city because of the

disruption to the public workplace likely to result from the *critical speech* of [a policy-level] employee would in most cases outweigh any First Amendment interests possessed by that employee." *McEvoy*, 124 F.3d at 103 (emphasis added); *see also Pickering*, 391 U.S. at 570 n.3, 88 S. Ct. at 1735 n.3 (contemplating situations in which "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of *public criticism of the superior by the subordinate* would seriously undermine the effectiveness of the working relationship between them" (emphasis added)); *O'Donnell*, 148 F.3d at 1135 (holding that "it is especially disruptive for the high-level employees of a governmental agency to express *public disagreement with the agency's policies*" (emphasis added)).

By contrast, where, as here, the employee's speech is not critical of the employer or its policies, Compl. ¶ 50, and the speech has nothing to do with the employer or the subject matter of the employee's employment, *id.* ¶¶ 30-32, 50-51, there is no reasonable inference of disruption to be drawn under these cases and no reason to permit an employee's termination, even with respect to a policy-level employee. *See, e.g.*, *Bonds v. Milwaukee County*, 207 F.3d 969, 973 (7th Cir. 2000) ("The policymaking employee exception does not cover a government entity's refusal to hire based on the prospective employee's criticism of a different governmental entity for whom he had worked."); *Watters v. City of Philadelphia*, 55 F.3d 886, 898 (3d Cir. 1995) (rejecting policymaker argument where nothing plaintiff said "impugn[ed] the integrity of his superiors" and there was no evidence that he engaged in "complaining and negative criticism

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"tremendous disruption to the public workplace likely to result from the critical speech" of a high level employee); *Caruso v. De Luca*, 81 F.3d 666, 671 (7th Cir. 1996) (holding that defendant's concern with disruption of its operations was reasonable given plaintiff's criticism of defendant's earlier decisions); *Bates v. Hunt*, 3 F.3d 374, 377-79 (11th Cir. 1993) (holding that the Governor could legally terminate an employee, whose job requires extensive public contact on the Governor's behalf, for voluntarily aiding a civil lawsuit against the Governor); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996 (5th Cir. 1992) (rejecting First Amendment claim by school district superintendent discharged from position after publicly opposing the views of members of the school board, stating that because of the plaintiff's position, "not much opposition to [defendants] was required in order to disrupt, and prevent, effective performance").

of his superiors" (internal quotation marks omitted)); *see also Hall*, 856 F.2d at 263 (creating the policy-level employee doctrine from political patronage-dismissal caselaw, and adopting the reasoning that if the President is allowed to terminate a Deputy Secretary of Defense for being a member of the opposition party, he should also be able to terminate him "for a public expression of policy *contrary to his own*" (emphasis added) (internal quotation marks omitted)).

Indeed, *Hall* makes clear that that an employee's policy-level status matters only if "the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech." *Id.* at 264. This requirement is met only if, "[a]t a minimum, the employee's speech . . . relate[s] to policy areas for which he is responsible." *Id.* That is not the case here. Unlike in *Hall*, Col. Davis did not "express[] views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors." *Id.* at 265. As discussed earlier, *see supra* Part I.A.2, the allegations in the Complaint establish that Col. Davis's speech had nothing to do with his job responsibilities or the purported policy areas for which the Library asserts that Col. Davis was responsible: policies relating to leading, planning, directing, and evaluating the research and analytical activities of the FDT division. Def.'s Br. at 11. Col. Davis's opinion pieces did not criticize, or even comment on, CRS's priorities or other policies with regard to how to lead, plan, and direct CRS research. Compl. ¶ 50. Col. Davis's opinion pieces related solely to Guantánamo and the military commissions—an issue on which CRS (and Mr. Mulhollan) do not have a policy direction, and that, in any event, did not fall under FDT's scope of work. *Id.* ¶¶ 30-32. Grounded in his personal knowledge, Col. Davis's factual allegations that he had no responsibilities, let alone policy responsibilities, for detainee treatment issues at CRS must be credited on a motion to

dismiss. Col. Davis's speech on military commissions policy, thus, does not even implicate the caselaw regarding policy-level employees. *Hall*, 856 F.2d at 264.

The Library seeks to avoid these limits on the policymaker exception by characterizing Col. Davis's opinion pieces as an "implicit criticism" of his superiors and of CRS's "guiding policy of objectivity."[8] Def.'s Br. at 21. Yet under that bootstrapping rationale, any expression of opinion on any subject could be labeled "non-objective," and, thus, an "implicit criticism" of CRS and a basis for termination. The Library's assertion should be rejected. Col. Davis's knowledge of issues surrounding detainee treatment came entirely from his prior career, and the speech concerned a subject unrelated to Col. Davis's work at CRS. Compl. ¶¶ 50-51. The opinion pieces expressed no disagreement with CRS's or his superiors' policy choices. *Id.* ¶ 50. In fact, they had nothing to do with CRS's asserted "policy of objectivity" or with any other CRS policy; they dealt with Guantánamo and the treatment of military detainees.[9]

The Library's argument essentially boils down to the sweeping assertion that high-level officials at CRS can never publicly opine on policy or criticize even a former public official on any issue potentially on the congressional agenda, even if it has nothing to do with their job and is not critical of CRS or their superiors. *See* Def.'s Br. at 16. Not only does this assertion contradict the Library's own regulation encouraging outside speech by its employees, which does not draw any distinctions based on the status-level of the employee, LCR 2023-3, § 3(A), Ex. E, but it must be rejected if there is any meaning to the well-settled principle that "public

[8] The Library claims that CRS's purported "guiding policy of objectivity" is of statutory origin. *See, e.g.*, Def.'s Br. at 22 ("Here, the policy of objectivity is statutory in origin, *see* 2 U.S.C. § 166(d)."). CRS's organic statute, however, specifies only that CRS must perform its statutory duties "without partisan bias"; it does not mention "objectivity," which is something quite different from "non-partisan." *See* 2 U.S.C. § 166(d).

[9] The Library also attempts to overcome the differences between this case and *Hall* and the other policymaker decisions by claiming that the "same dissonance" that arose in *Hall* "between [the plaintiff's] views and those of his superiors," "justified Plaintiff's separation here." Def.'s Br. at 21. As detailed earlier, the decision in *Hall* makes clear that the dissonance there was caused by the plaintiff's public and direct criticism of the practices of his employer, *see Hall*, 856 F.2d at 265, a situation not even remotely present here.

employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957 (2006). As discussed below, even if it existed, such a policy prohibiting speech by policymakers would be facially unconstitutional as an improper prior restraint, *see infra* Part II, and as applied to Col. Davis because he did not have any fair warning of it, *see infra* Part III.

C. Col. Davis's Position Did Not Relate To A Policy Area, And He Was Not At A Policy Level, With Regard To The Matters About Which He Spoke.

The Library's reliance on the policymaker exception is flawed for a separate reason: viewing the Complaint and all reasonable inferences in the light most favorable to Col. Davis, Col. Davis was not a policymaker. As *Hall* makes clear, an employee is a policymaker for purposes of the policymaker exception only when, "[a]t a minimum, the employee's speech . . . relate[s] to policy areas for which he is responsible." *Hall*, 856 F.2d at 264. The determination of whether Col. Davis's position related to a "policy area" and whether he was at a "policy level" cannot, therefore, be divorced from an examination of his specific responsibilities in relation to the speech in question. As already discussed, the Complaint establishes that Col. Davis's speech was not about the Library, CRS, or Mr. Mulhollan, and did not relate to policy areas for which Col. Davis was responsible. *Supra* Part I.A.2. As a result, Col. Davis cannot be considered a policymaker for purposes of the policymaker exception. Moreover, even though Col. Davis had the responsibility to lead, plan, direct, and evaluate the research and analytical activities within FDT, Col. Davis had no authority over the organization beyond the FDT division. Compl. ¶ 29. Because detainee issues were not under FDT's scope of work, he did not have any policy responsibilities for those issues and cannot, thus, be considered a policymaker.

Even if *Hall* did not make the subject matter of Col. Davis's speech relevant to the determination of whether he was a policymaker, the Library's argument would still fail because

Col. Davis does not fall into the "narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Hall*, 856 F.2d at 264. Contrary to the Library's contentions, the well-pled allegations in the Complaint, taken as true, establish that Col. Davis did not have a policy-making position and that he was not a policy-level employee for policymaker exception purposes.

The Complaint alleges that Col. Davis had no authority to establish substantive policy, that he had little opportunity for significant contact with the public, that he was not expected to and did not author any written reports or analyses setting forth policy views on behalf of CRS, and that he did not have any congressional inquiries or requests for information directed to him. Compl. ¶ 29. Thus, because he did not have "broad responsibilities with respect to policy formulation, implementation, or enunciation," and he was not "a highly visible spokesman" for CRS, he was not a "policymaker" for these purposes. *Hall*, 856 F.2d at 264-65; *see also O'Donnell*, 148 F.3d at 1136 & n.1 (requiring a "functional analysis of the employee's responsibilities," rather than an examination of rank, practical influence, or length of service). The Complaint does allege that Col. Davis supervised approximately 95 employees and led, directed, and evaluated their research and analytical activities. Compl. ¶ 29. That allegation alone does not support the conclusion that Col. Davis was a substantive policymaker; it simply suggests that he was a manager and that he supervised numerous individuals. That he had "some policy responsibilities" and was in charge of some issues relating to "policies" is not enough to include him as part of the "narrow band" of policymakers. *O'Donnell*, 148 F.3d at 1136 (holding that plaintiff was not a policymaker for *Pickering* purposes even though he was in charge of a number of Police Department facilities and instituted several reforms in their

operations). Accepting the Complaint's allegations as true, therefore, Col. Davis did not fall within the required "narrow band."

The Library relies on Col. Davis's job application to CRS in an attempt to refute the Complaint's allegations. *See* Def.'s Br. Ex. 1, Docket No. 27-3. That extraneous material should not be considered on the Library's motion to dismiss because it is not central to Col. Davis's claims, and is mentioned only in passing in the Complaint. *See Robinson v. D.C. Hous. Auth.*, 660 F. Supp. 2d 6, 10 n.5 (D.D.C. 2009) (permitting exhibits to motion to dismiss where they are central to the claims and referenced in the Complaint). In any event, "the KSAs/Competencies" on which the Library relies merely state the desired "general qualifications" for the job applicants that CRS seeks. Whether Col. Davis possesses such qualifications or previously held positions with policymaking authority—which is all his application responses reveal—is irrelevant to whether he was a substantive policymaker at the Library.

II. IF COL. DAVIS'S OPINION PIECES WERE PROHIBITED BY POLICY, THE POLICY VIOLATES THE FIRST AMENDMENT.

The Library appears to concede that Col. Davis's opinion pieces did not violate the Library's regulations or CRS's policy on outside speaking and writing in its argument concerning Col. Davis's facial First Amendment claim, as the Library contends that its policies do not prohibit speech on any subjects or require prior approval. *See* Def.'s Br. at 26-28. As in the letter of admonishment and other correspondence, however, the Library's brief separately—and in seeming contradiction—contends that it was appropriate to fire Col. Davis because he (1) expressed his personal "opinion" in public, (2) spoke about an issue "on the congressional agenda," and (3) failed to abide by his purported responsibility to inform Mr. Mulhollan in advance about any such speech. Def.'s Br. at 1, 17. The Library cannot have it both ways.

Either these items are prohibited by policy or practice, or they are not, in which case it was not permissible to admonish and terminate Col. Davis for his writings.

To the extent that there is a new interpretation of the rules or new policy prohibiting speech like Col. Davis's, it is unconstitutional as a matter of law. The political speech that the Library apparently seeks to prohibit—speech on any issue "on the Congressional agenda"—is at the core of the First Amendment. *See, e.g.*, *Connick*, 461 U.S. at 145, 103 S. Ct. at 1689. It deserves more, not less, protection. The Library's position, apparently, is that the more important the speech, and the more visible it is, the less it is permissible for CRS employees. That turns the law on its head. All lawful speech is protected by the First Amendment. Speech concerning matters that are of critical import to the public, such as issues on the congressional agenda, "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," not less. *Id.* (internal quotation marks omitted).

Moreover, because virtually every public issue is "on the congressional agenda," this new rule or interpretation would effectively impose a prior restraint on a vast range of expression, not only encouraging review, but mandating it on pain of termination. CRS employees have in fact interpreted Mr. Mulhollan's letters to Col. Davis, and Col. Davis's termination, as *de facto* creating such a policy, and the letters and Col. Davis's termination have had a chilling effect on the willingness of CRS employees to engage in outside speech on matters of public concern. Compl. ¶ 63, *see also id.* ¶¶ 72-74.[10] This fear is reasonable, as the new interpretation or rule would seem to prohibit every CRS employee from commenting on any current public policy matter unless the CRS leadership previously approved his or her comments.

[10] The Library contends that CRS's policy does not chill or deter potential speech. Def.'s Br. at 28. That is not accurate. The Complaint contains a specific factual allegation that CRS employees have become confused, fearful, and chilled as a result of the termination of Col. Davis. Compl. ¶ 63. That allegation was substantiated by several declarations submitted at the preliminary relief stage. *See* Docket Nos. 2-2 to -4.

The prior restraint policy that the Library now seems to espouse is unconstitutional under *Pickering* and *United States v. National Treasury Employees Union* (*NTEU*), 513 U.S. 454, 115 S. Ct. 1003 (1995). In *NTEU*, the Supreme Court held that the *Pickering* balancing test applies to challenges to regulations that suppress the prospective speech of a broad category of public employees, *id.* at 467, 115 S. Ct. at 1013, and that in such challenges, the "Government's burden is greater . . . than with respect to an isolated disciplinary action," *id.* at 468, 115 S. Ct. at 1014. "[T]he detriments of [such] prior restraints"—including chilling of speech, the specter of viewpoint discrimination, and the danger of self-censorship—are weighed in the *Pickering* balancing test against the employer. *Am. Fed'n of Gov't Employees v. Dist. of Columbia*, No. 05-CV-0472, 2005 WL 1017877, at *8 (D.D.C. May 2, 2005). Given that CRS's "isolated disciplinary action" with respect to Col. Davis cannot withstand the normal *Pickering* balancing, the Library *a fortiori* cannot meet its heavier burden of justifying a policy that prohibits all CRS employees from engaging in future outside speaking or writing on certain subjects without pre-approval. Such a prior restraint would significantly burden CRS employees' expressive activity on "paradigmatic 'matter[s] of public concern,'" *Sanjour*, 56 F.3d at 91, without sufficient justification, and would therefore be unconstitutional.

Moreover, because no applicable regulation or policy establishes a standard for what type of writing would be considered appropriate for publication, if prior approval is required, the CRS leadership would have unfettered discretion over which speech is permitted and which is not. That is constitutionally impermissible. *See Sanjour*, 56 F.3d at 96-97 (holding that regulation permitting official approval only for speech "within the mission of the agency" gives the agency unbridled discretion); *Fire Fighters Ass'n v. Barry*, 742 F. Supp. 1182, 1194 (D.D.C. 1990) (holding that where a policy requires employees to receive pre-approval for interviews, but does

not contain standards to guide the decision to grant or deny the request, the vesting of the unbridled discretion constitutes an unconstitutional prior restraint). Such unbridled discretion raises the "specter of viewpoint discrimination" and "pose[s] a real and substantial threat of . . . censorship," which, "in the context of *Pickering* balancing . . . justifies an additional thumb on the employees' side of our scales." *Sanjour*, 56 F.3d at 97 (internal quotation marks omitted). For these reasons, any such policy would violate the First Amendment.[11]

III. COL. DAVIS HAS STATED A CLAIM FOR THE VIOLATION OF HIS RIGHT TO DUE PROCESS.

The Complaint also adequately pleads that the Library terminated Col. Davis in violation of his due process rights. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). The requirement of clarity is especially stringent where the law interferes with the right of free speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 1193-94 (1982). Here, the Complaint sufficiently pleads as a matter of law that the application of the Library's and CRS's policies on outside speaking and writing to Col. Davis was unconstitutionally vague for two reasons: First, none of the relevant policies or past practices with respect to those policies gave Col. Davis "fair warning" that he could not express a public opinion on a controversial public policy matter or that he needed to obtain prior approval to do so, *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2299; *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1582 (D.C. Cir. 1985); and second, CRS's policy requiring the exercise of "caution" and "sound judgment" to avoid "an appearance of conflict"

[11] As discussed in Part III, such a policy also could not constitutionally have been applied to Col. Davis because he lacked fair warning of its existence.

even when speaking on matters outside one's official responsibilities is facially unconstitutional because it is impermissibly vague and lacks any discernible standards.

The fundamental flaw in the Library's defense of its policies on outside speaking is its failure to explain how its multiple interpretations of what the policies purportedly prohibit—speech on anything on "the Congressional agenda," Def.'s Br. at 17; "issue advocacy," Defs.' Opp'n to Pl.'s Mot. for a TRO at 10, Docket No. 6; "prospective" speech, Decl. of Daniel Mulhollan ¶¶ 31, 35, 37; and "inflammatory or provocative rhetoric," Def.'s Br. at 1—derive from either the text or past application of the policies. They do not, and the policies are vague on their face and as applied precisely because they provide no standard for determining what speech is prohibited and may result in termination, thereby permitting and encouraging arbitrary decisionmaking.

The Library makes two preliminary arguments before addressing the substance of Col. Davis's due process claims, neither of which has any merit. First, the Library asserts that Col. Davis's due process vagueness claim lacks "doctrinal clarity." Def.'s Br. at 29. Col. Davis's claim, however, is precisely the same type of claim that the D.C. Circuit found meritorious in *Keeffe*: that CRS failed to provide fair notice of the contours of its policy on outside speaking and writing before it applied the policy in a wholly unprecedented manner. The claim rests upon the Fifth Amendment's due process clause, *see, e.g.*, *Keeffe*, 777 F.2d at 1581-82, and it triggers the heightened scrutiny applicable to government restrictions that interfere with the rights protected by the First Amendment, *see Vill. of Hoffman Estates*, 455 U.S. at 499, 102 S. Ct. at 1193-94.

Second, the Library argues that Col. Davis's vagueness claim fails because he cannot demonstrate the existence of a "property or liberty interest" in his employment. Def.'s Br. at 29.

The Library misapplies the very case it relies upon. In *Toms v. Office of the Architect of the Capitol*, this Court noted that plaintiffs must ground substantive due process claims on "a fundamental right or liberty or property interest," 650 F. Supp. 2d 11, 25 n.11 (D.D.C. 2009) (Walton, J.). The Library argues that Col. Davis's vagueness claim fails because he has no property interest in his employment. Def.'s Br. at 29-30. That ignores that Col. Davis's claim is grounded on "a fundamental right" or "liberty interest": his right to free speech. Because the Library's policies regulate the speech of federal employees, their prohibitions must be clear, regardless of whether Col. Davis has a separate property interest in his employment. *See Rankin*, 483 U.S. at 383-84, 107 S. Ct. at 2896 (holding that even probationary employees may not be terminated for unconstitutional reasons); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604, 87 S. Ct. 675, 684 (1967) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963))); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288, 82 S. Ct. 275, 281 (1961) ("A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of ['free political discussion'] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." (quoting *Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 536 (1931)) (internal quotation marks omitted)).

It is of note that the Library attempts to locate Col. Davis's vagueness claim in substantive due process. Def.'s Br. at 29. Whether vagueness claims derive from procedural or substantive due process or are, instead, a separate species of Fifth Amendment right, is of no moment. Whatever the technical source of the right to fair warning, Col. Davis has a due process right, as in *Keeffe*, not to be terminated on the basis of an unconstitutionally vague policy regulating First Amendment rights. Col. Davis does not premise that due process claim, as the

Library suggests, on a substantive due process right to employment. It is founded, instead, on his First Amendment rights. *See Rankin*, 483 U.S. at 383-84, 107 S. Ct. at 2896. Moreover, the Library's assertion that the vagueness challenge is essentially a substantive due process claim to employment is irreconcilable with *Keeffe*. If the Library were correct that "substantive due process does not apply in the employment context as a matter of law," Def.'s Br. at 29, and that vagueness claims by government employees are substantive due process claims to employment, then *Keeffe* was wrongly decided because a federal employee—probationary or non-probationary—could never bring a vagueness claim.

A. Col. Davis Did Not Have Fair Warning That His Outside Speech Might Violate The Library's Policies.

The Complaint adequately pleads that the Library terminated Col. Davis in violation of his right to fair notice because nothing in the Library's or CRS's written policies or their past enforcement warned Col. Davis that Defendants might newly interpret the policies to apply to his outside writing or speaking on Guantánamo and the military commissions, matters on which he had previously been permitted to speak with no repercussions. Col. Davis's claim is virtually identical to the "fair warning" claim that prevailed in *Keeffe*. Thus, the facts of *Keeffe* bear emphasis here, especially given the Library's conspicuous refusal to acknowledge the similarities or the existence of a *Keeffe* claim for lack of fair warning.

In *Keeffe*, a longtime CRS employee, Mary Ann Keeffe, sought to become a delegate-at-large to the 1980 Democratic National Convention, an activity that had not previously been expressly prohibited by CRS's or the Library's regulations. 777 F.2d at 1575-76. When the Library learned of Keeffe's intentions, it advised her that the conduct would violate the Library's regulations by presenting "a potential conflict of interest with her official duty to render non-partisan advice." *Id.* at 1576. Keeffe challenged that advice. In the days leading up to her

departure to attend the convention, the Library's General Counsel rejected her challenge and upheld the original advice, but his decision was not timely relayed to Keeffe prior to her departure. *Id.* at 1576, 1582. In the suit over Keeffe's subsequent discipline, the D.C. Circuit concluded that the Library's general policy about conflicts of interest had not given Keeffe fair warning of the new interpretation embodied in the General Counsel's advice. *Id.* at 1582. The Court noted, moreover, that CRS had previously countenanced nearly identical political participation by Keeffe, as well as similar partisan political activity by other employees. *Id.* As a result, Keeffe "knew only of the Library's permissiveness toward employee political activities, including her own." *Id.* Focusing on this past practice by Keeffe and other employees, the D.C. Circuit concluded that the Library's "course of dealing with [Keeffe] . . . was insufficient to place Keeffe on notice that the prior interpretation [of its conflict-of-interest policy] had changed." *Id.* Accordingly, the D.C. Circuit held that the Library and CRS's adverse action against Keeffe was unconstitutional, and it rebuked their conduct with these prescient words:

> We do not require that CRS announce in advance, for every conceivable set of facts, whether permission will be granted or denied. The Library, of course, *may* spell out its interpretations in advance. What the Library *must* do is give loud and clear advance notice when it does decide to interpret a particular regulation as a prohibition or limitation on an employee's outside activity. Without this notice, an employee is entitled to read the Library's overly long silence as assent.

Id. at 1583 (emphasis in original);[12] *see also Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 59 (D.D.C. 2000) (holding that "an unwritten interpretation of [a] regulation . . . so clearly fails to give fair notice as to what conduct is prohibited").

Col. Davis has pleaded a virtually identical claim here. As set out in the Complaint, the Library's and CRS's policies do not expressly prohibit any speech, much less Col. Davis's

[12] The D.C. Circuit held that *prospective* application of the General Counsel's advice, which was subsequently incorporated into CRS's policies, was constitutional, because employees would thereafter have the requisite fair warning. *See Keeffe*, 777 F.2d at 1581.

publication of the opinion pieces. Compl. ¶¶ 65-69. The Library's regulation "encourage[s]" all outside speaking and writing, LCR 2023-3, § 3(A), Ex. E; Compl. ¶ 65, and CRS's policy very generally advises CRS employees only to "think carefully," exercise "sound judgment" and "caution," and maintain "objectivity" when engaging in outside speaking and writing, CRS Policy at 2-3, Ex. F; Compl. ¶ 71.[13] CRS's past practice confirms that the Library never interpreted its regulation or CRS's policy to prohibit speech like Col. Davis's speech on the military commissions. The Complaint specifically alleges that Mr. Mulhollan expressly approved Col. Davis's outside speaking and writing on the subject of the military commissions on two occasions and that CRS either expressly or implicitly approved of such speech on at least five occasions. On at least one of those occasions, Col. Davis made precisely the same argument he made in the opinion pieces. Col. Davis was never told prior to his termination that his speech on the subject of the military commissions would compromise the mission of CRS or that it was not permissible. Compl. ¶¶ 25, 27, 33-42. Nor was Col. Davis ever disciplined or warned for such speech until he wrote the opinion pieces. *Id.* ¶ 40. Moreover, the Complaint alleges that other Library and CRS employees "regularly write and speak and express their opinions in public on policy matters of public concern, including on controversial and high-profile issues." *Id.* ¶ 77. Finally, the chill, confusion, and uncertainty that CRS's policy, Defendants' new interpretation of their policies, and Col. Davis's termination pursuant to them have engendered among CRS employees, *see id.* ¶¶ 63, 72-74, evidence the policy's inherent vagueness to those governed by it.

[13] The Library inaccurately claims that its regulation states that "personal writings and speeches 'on subjects unrelated to the Library and to staff members' official duties' are 'encouraged.'" Def.'s Br. at 33. In fact, the Library's regulation contains no such limitation: it encourages *all* "teaching, lecturing, or writing that is not prohibited by law," LCR 2023-3, § 3(A), Ex. E, not merely outside speaking and writing unrelated to "official duties." The Library attempts to import that limitation from a subsequent sentence in the regulation pertaining to official review of outside writing. This attempt to distort the plain meaning of even the clear portion of the Library's regulation only highlights the overall vagueness of the Library's policies on outside speaking and writing.

In short, the Library seeks to apply a novel reinterpretation of its policies on outside speaking and writing, despite its prior approval of virtually identical speech by Col. Davis on numerous occasions and the decades-long practice of permitting other employees to engage in similar outside speech. These allegations are sufficient as a matter of law to state a claim that the Library deprived Col. Davis of the constitutionally required fair warning that he could be terminated for publicly expressing his personal views on the military commissions. As in *Keeffe*, "[s]urprise, in this instance, was unpleasant, unfair, and unconstitutional." 777 F.2d at 1583; *see also Wolfel v. Morris*, 972 F.2d 712, 717 (6th Cir. 1992) (finding no fair notice where plaintiffs were punished for circulating petitions even though they had previously been allowed to do so, as the "conduct . . . was 'virtually identical to conduct previously tolerated'" (quoting *Waters v. Peterson*, 495 F.2d 91, 100 (D.C. Cir. 1973))); *Adams v. Gunnell*, 729 F.2d 362, 369 (5th Cir. 1984) (holding that there was no fair notice where "[t]here is no evidence that any inmate had ever before been punished in connection with a petition; quite to the contrary, Dancy testified that he had signed two petitions before at Texarkana without sanction or other adverse consequence").

The Library's primary response to Col. Davis's fair-warning claim is its contention that he was terminated not for the content of his speech, but for violating its disclaimer policy. Def.'s Br. at 32-33. The Court rejected this argument before, and it should do so again. As the Court recognized, the inference fairly implied from the Complaint and apparent from the facts of this case is that the Library terminated Col. Davis based on the content of the opinion pieces, not for his alleged failure to comply with the Library's policies, including the disclaimer policy. *Compare* Compl. ¶¶ 35-37, *with id.* ¶¶ 55-59; Order, Jan. 20, 2010, at 3 ("Regardless of the defendants' contention to the contrary, Defs.' Opp'n at 26, it appears that the content of the

plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired . . . ."). That inference is substantiated by the letters of admonishment and termination, which focus on the content of the opinion pieces as allegedly compromising Col. Davis's objectivity and standing with Congress, *see* Exs. C-D, and by the Library's various pleadings in this case. *See* Def.'s Br. at 16 ("When one of CRS's highest level employees publicly and in conclusory terms criticizes policy decisions as to a subject high on Congress' legislative agenda . . . such expressive conduct directly threatens CRS's interest in ensuring . . . objectivity and non-partisanship."); Mulhollan Mot. to Dismiss at 36, Docket No. 18-1 (focusing on Col. Davis's allegedly "inflammatory language" as "warrant[ing] [his] separation").

Moreover, whatever the actual language of the disclaimer policies, Col. Davis had no fair warning that the Library would now interpret them to prohibit the opinion pieces given that a CRS attorney had—just two months earlier—expressly approved of two of Col. Davis's speech activities related to the same topic of the military commissions *without* the use of an express disclaimer. Compl. ¶ 35; *Keeffe*, 777 F.2d at 1582 (holding that CRS's past practice permitting the speech at issue with respect to the plaintiff demonstrated a lack of fair warning); *Wolfel*, 972 F.2d at 717 (same); *Adams*, 729 F.2d at 369 (same).[14]

The Library also argues that it did not need to give fair warning of the meaning of the ambiguous terms "sound judgment," "caution," and "objectivity" because Col. Davis is an experienced attorney and allegedly ought to know their precise meaning. Def.'s Br. at 34. This argument fundamentally misunderstands the vagueness doctrine. The terms used in the Library's

[14] In any event, the allegations in the Complaint establish that Col. Davis dissociated himself from his employment at CRS in the opinion pieces. Col. Davis did what CRS previously instructed him he needed to do to be in compliance with the Library's rules: he signed the opinion pieces in his own name, without any CRS title; he identified his location as Gainesville (Virginia), his personal residence, not Washington, D.C., his work address; he omitted any mention of the Library or CRS or his employment there; and he referred solely to his prior employment as the Chief Prosecutor for the Guantánamo military commissions. Compl. ¶¶ 50-51. A reasonable inference from those facts is that Col. Davis adequately dissociated himself from CRS in the opinion pieces. *Id.*

policies are inherently vague, subject to multiple, divergent interpretations. The interpretation that matters is not Col. Davis's, however educated that interpretation may be; it is Defendants' interpretation that matters. But before they may enforce their interpretation, they must provide fair warning of it, which they failed to do before they fired Col. Davis.

B. The Library's Policies On Outside Speech Are Facially Vague.

The Complaint also states a claim that the Library's policies on outside speaking and writing are facially vague. As alleged in the Complaint, CRS's policy relies upon inherently vague terminology—like "sound judgment," "caution," and "objectivity"—that fails to give notice of its reach or to meaningfully cabin the discretion it affords the Library in determining which speech violates the policy. Compl. ¶¶ 65-77. The Library's past practice with respect to the policy—which directly contradicts the Library's application of the policy to Col. Davis here—evidences the inherent vagueness of the policy. *Id.* ¶¶ 33-42, 77.

Although the government enjoys certain leeway in crafting codes of conduct for its employees, *Arnett v. Kennedy*, 416 U.S. 134, 159-61, 94 S. Ct. 1633, 1646-48 (1974) (plurality opinion), prohibitions, especially those directed at protected speech, must still be clear, *see, e.g.*, *Keeffe*, 777 F.2d at 1582. In *Keeffe*, for example, the Library's general policy against creating potential conflicts of interest failed to put the plaintiff on notice that she could not participate in a political convention, and was thus held to be unconstitutionally vague. *Keeffe*, 777 F.2d at 1576, 1581-82. Similarly, a school's policy against "criticism" by employees was held to be unconstitutionally vague because "the term 'criticism' is indefinite, fluid, and contingent," and because no interpretive guidance clarified or narrowed its application. *Westbrook v. Teton County Sch. Dist. No. 1*, 918 F. Supp. 1475, 1490-91 (D. Wyo. 1996).

By contrast, limitations on governmental speech that have been upheld have either been sufficiently precise or have been informed by (1) statutory or regulatory clarification, (2) past practice and interpretive guidance, and (3) the availability of administrative clarification. *See, e.g.*, *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 550, 575-76, 580, 93 S. Ct. 2880, 2883, 2895-98 (1973); *Arnett*, 416 U.S. at 160, 224 n.24, 94 S. Ct. at 1647, 1679 n.24 (plurality opinion). CRS's policy lacks these characteristics. First, the criteria used in the policy are inherently vague. The policy states, for example, that "sound judgment" should be used and that "[e]veryone must make every effort to avoid presenting even the appearance that [CRS] is not true to the mandates given it to be objective, non-partisan, and confidential." CRS Policy at 3, Ex. F. Like the word "criticism," "sound judgment" and "objective" are "complex and variable word[s]. [They] can mean many things to many people. In fact, [they] can mean so many things to so many people that [they are] too vague for use in an enactment that regulates speech." *Westbrook*, 918 F. Supp. at 1490; *see also Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 127 (D. Mass. 2003) (holding that "responsible" and "good judgment" are inherently vague terms). Indeed, the very nature of terms like "judgment" is flexible: different people will, by definition, reach different judgments. Fundamentally, the language in CRS's policy fails to provide standards to guide its application by CRS's management or to provide any fair warning of what is prohibited. *See Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99; *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394-95 (D.C. Cir.

1990) (holding that a restriction on speech activities to those conducted in a "conversational tone" is unconstitutionally vague because it "would likely chill legitimate exercises of free speech"); *Bynum*, 93 F. Supp. 2d at 58-59 (holding facially vague a regulation that permits the suppression of speech that "conveys a message" because "[t]he determination of what conduct is prohibited by such a regulation . . . necessarily will vary depending on the subjective judgment of the particular officer"); *Stolte v. Laird*, 353 F. Supp. 1392, 1396-99 (D.D.C. 1972) (invalidating prohibition of "disloyal" conduct as unconstitutionally vague because it is "inherently ambiguous and ill-suited to proscriptive use, especially where First Amendment rights are involved," and because it "is not a word of easily defined meaning and common understanding such that no further standard is necessary").

Second, CRS's broad policy statement on outside speech lacks any interpretive guidance or clarification, Compl. ¶¶ 73-74, 76, and has been applied here in a manner directly contradicting past practice with respect to both Col. Davis and other CRS employees, *id.* ¶¶ 33-42, 77. *See, e.g.*, *Letter Carriers*, 413 U.S. at 576-77 & n.21 (upholding statute against vagueness challenge, in part due to prior interpretations and adjudications of its meaning that had been restated in the form of regulations specifying prohibited conduct); *Keeffe*, 777 F.2d at 1582 (holding an employee's termination to be an unconstitutionally vague application of a policy, in part due to prior acceptance of similar conduct).

Finally, although CRS allows employees to submit proposed writings for review prior to publication, there are no discernible standards or criteria that would allow consistent and non-arbitrary review, even if the requirement were mandatory. *Id.* ¶ 76. Unlike the statute at issue in *Letter Carriers*, where a significant statutory, regulatory, and interpretive framework informed the process of administrative pre-clearance, here, administrative pre-clearance would be an

exercise in arbitrary and subjective enforcement, as there are no clear standards to guide such a review. That is a primary vice of vague and standardless laws. *See Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99 ("A vague law impermissibly delegates basic policy matters" to the executive "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); *Coates*, 402 U.S. at 614, 91 S. Ct. at 1688. Indeed, no court has ever suggested that administrative clarification or pre-publication approval on its own can cure an otherwise vague policy on speech by public employees. The reason is simple: the fundamental vice of a vague law is that it encourages subjective and discriminatory enforcement by failing to provide clear standards that guide its application. *Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99. That danger is particularly acute here: Col. Davis did in fact seek and receive administrative approval to speak at a conference and write a law review article about the very same subject of military commissions, without using an express disclaimer, and yet the Library now defends his termination on the basis of nearly identical conduct. *See* Compl. ¶¶ 35-37. That reversal and other past practice by CRS are powerful evidence of the vagueness of CRS's policy. Indeed, the reversal makes clear that not even CRS's own attorney and Defendants agree about whether express disclaimers are always necessary. *Compare id.* ¶ 35 (CRS attorney approved of Col. Davis's speech and writing on the military commissions without an express disclaimer), *with* Def.'s Br. at 33 (stating that express disclaimers must always be used). In these circumstances, it is unreasonable to expect Col. Davis (or any other CRS employee) to know what the rules are. Accordingly, CRS's policy on outside speech is

unconstitutionally vague on its face.[15]

The Library defends its policies with a series of unpersuasive arguments. Initially, it claims that Col. Davis's vagueness claim is one merely of "arbitrary enforcement." Def.'s Br. at 30-31. That is not what Col. Davis argues. The core deficiency of the Library's policies is not that enforcement has been arbitrary or inconsistent, but that the policies rely on inherently vague terms that have never before been interpreted to apply to speech similar to Col. Davis's. *See* Compl. ¶¶ 33-40. In this respect, Col. Davis's claim closely resembles the vagueness claims in *Keeffe* and *Bynum*, where the government failed to provide fair warning of wholly unprecedented applications of the prohibitions at issue. *Keeffe*, 777 F.2d at 1582; *Bynum*, 93 F. Supp. 2d at 59.

Next, the Library argues that Col. Davis's allegation of "chill" is conclusory. Def.'s Br. at 32. As discussed earlier, that is untrue. The Complaint specifically alleges that the termination of Col. Davis "has intimidated and chilled other CRS employees from speaking and writing in public. CRS employees are confused, uncertain, and fearful about what outside speaking and writing is permissible." Compl. ¶ 63; *see also id.* at ¶¶ 72-74. These are factual allegations supportable by evidence, not bare assertions of legal elements, and the Complaint need go no further. In any event, Col. Davis supported these factual allegations with numerous declarations in support of his motion for preliminary relief. This is not, therefore, a situation as in *Iqbal* or *Twombly* where the Supreme Court feared the use of bare allegations of tortious conduct to engage in far-reaching and unsupported discovery.

The Library also claims that Col. Davis cannot challenge the facial vagueness of the policies because they "clearly" apply to Col. Davis. Def.'s Br. at 32 n.8. As explained above, the policies on outside speaking and writing do *not* bar Col. Davis's speech, and, to the extent the

[15] The Library broadly asserts that Col. Davis has "fail[ed] to point to any term or phrase in the Library's regulation or in CRS's policy" that is vague. Def.'s Br. at 32. That is simply not true: the Complaint focuses on the policies' vagueness as a whole, drawing particular attention to the phrase "sound judgment" in CRS's policy. Compl. ¶ 71.

Library now claims they do, they do so only because of a novel reinterpretation of the policies of which Col. Davis had no fair warning. The Library has not explained, and cannot explain, how the terms "sound judgment," "caution," and "objectivity"—the touchstones of CRS's policy—"clearly" apply to Col. Davis's opinion pieces.

For these reasons, the policies are unconstitutionally vague, and the Library's motion to dismiss should be denied.[16]

CONCLUSION

For the foregoing reasons, the Library's Motion to Dismiss should be denied.

Dated: November 5, 2010

Respectfully submitted,

/s/ *Aden J. Fine*

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[16] The Library confusingly argues that Col. Davis's vagueness claim should also be rejected because this case is "a fairly textbook employment dispute." Def.'s Br. at 34-35. Whether this is a common or uncommon employment dispute is irrelevant. *See, e.g.*, *Keeffe*, 777 F.2d at 1582. Because the Complaint states valid claims based on the violation of Col. Davis's constitutional rights, the motion to dismiss should be denied, regardless of whether this is a "textbook" dispute.

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ATTORNEYS FOR PLAINTIFF

EXHIBIT A

THE WALL STREET JOURNAL.
WSJ.com

OPINION | NOVEMBER 10, 2009, 8:51 P.M. ET

Justice and Guantanamo Bay

It is a mistake to try some detainees in federal courts and others by military commissions.

By MORRIS DAVIS

This past Sunday, Attorney General Eric Holder announced that the administration will decide by Nov. 16 which Guantanamo detainees will be tried in military commissions trials, and which of them will stand trial in federal courts. But a decision to use both legal settings is a mistake. It will establish a dangerous legal double standard that gives some detainees superior rights and protections, and relegates others to the inferior rights and protections of military commissions. This will only perpetuate the perception that Guantanamo and justice are mutually exclusive.

President George W. Bush authorized military commissions in November 2001, and President Barack Obama ordered them stopped in January 2009. In the intervening seven years—which included a period from September 2005 until October 2007 when I served as chief prosecutor at Guantanamo—only three military commissions trials were completed.

Two of the three detainees convicted of war crimes have served their sentences and today they are free men back in their home countries. But the more than 200 that remain inside the detention center have never been convicted, or in most cases even faced charges.

The day after his inauguration, Mr. Obama ordered an evaluation of all the detainees to determine who should face criminal prosecution. Administration officials estimate that roughly a quarter of the remaining detainees will be recommended for trial in criminal courts.

In a preliminary report submitted to Mr. Obama in July, the Detention Policy Task Force recommended the approval of evaluation criteria developed by the Department of Defense and the Department of Justice. The task force stated its preference for trials in the federal courts, but added the decision would be based in part on "evidentiary issues" and "the extent to which the forum would permit a full presentation of the accused's wrongful conduct." A Washington Post editorial endorsed the proposal, arguing that there should be an alternative forum when a trial in federal court is "not an option because the evidence against the accused is strong but not admissible."

Stop and think about that for a moment. In effect, it means that the standard of justice for each detainee will depend in large part upon the government's assessment of how high the prosecution's evidence can jump and which evidentiary bar it can clear.

The evidence likely to clear the high bar gets gold medal justice: a traditional trial in our federal courts. The evidence unable to clear the federal court standard is forced to settle for a military commission trial, a specially created forum that has faltered repeatedly for more than seven years. That is a double standard I suspect we would condemn if it was applied to us.

Military commissions satisfy the requirements of the Geneva Conventions, which are the source of the detainees' rights. The rights in federal courts surpass the Geneva Conventions requirements and give detainees more than their status and the law demand.

The Obama administration could legitimately choose to prosecute detainees in either forum—federal courts or military commissions—and satisfy its legal obligations. The problem is trying to have it both ways: the credibility that comes from using federal courts with admissible evidence under the very strict rules of civilian tribunals, and military commissions for cases that are often comparable except for the fact that they depend on evidence (such as hearsay testimony) that is not normally admissible in civilian courts. What if Iran proposed the same for the three American hikers it is currently holding? We would surely condemn what we now stand ready to condone.

It is not as if double-standard justice is required to keep suspected terrorists off our streets. Those detainees who cannot be prosecuted can still be detained under rules the administration approves—likely in the next several months—for the indefinite detention of those who pose a threat to us during this ongoing armed conflict.

The administration must choose. Either federal courts or military commissions, but not both, for the detainees that deserve to be prosecuted and punished for their past conduct.

Double standards don't play well in Peoria. They won't play well in Peshawar or Palembang either. We need to work to change the negative perceptions that exist about Guantanamo and our commitment to the law. Formally establishing a legal double standard will only reinforce them.

Mr. Davis is the former chief prosecutor for the military commissions. He retired from the military in 2008.

EXHIBIT B

The Washington Post

Justice indeed worth showcasing

Wednesday, November 11, 2009

In his Oct. 6 op-ed, "The right place to try terrorists," former attorney general Michael B. Mukasey asked whether the main purpose of prosecuting suspected terrorists in federal courts "is to protect the citizens of this country or to showcase the country's criminal justice system, which has been done before and which failed to impress Khalid Sheik Mohammed, [Ali Saleh Kahlah al-Marri] or any of their associates."

Prosecutions are not about impressing the Khalid Sheik Mohammeds of the world. Showcasing our criminal justice system can, however, undermine the twisted propaganda of those terrorists and reduce their ability to attract recruits. Upholding the rule of law also makes it easier for other governments to cooperate in efforts to defeat this global threat.

Suzanne E. Spaulding, McLean

The writer was executive director of the National Commission on Terrorism from January to June 2000. Her law firm, Bingham McCutchen, represents Uighur detainees at Guantanamo Bay.

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Michael B. Mukasey had his premise wrong when he contended that the decision to try Guantanamo detainees in federal courts comes down to a choice between protecting the American people and showcasing American justice.

First, his belief that a military commission would have given Ali Saleh Kahlah al-Marri a longer sentence than the eight years-plus that a federal judge gave him is suspect. Two of the three military commissions completed at Guantanamo resulted in effective sentences of nine months or less, and today David Hicks and Salim Ahmed Hamdan are free.

Second, his "serious security concerns for any person or place" near where detainees are to be held or tried are fear-mongering worthy of former vice president Dick Cheney. In many terrorism trials in recent years -- Omar Abdel-Rahman, Richard Reid and Ramzi Yousef, among others -- we managed to do justice in significant cases in the United States without compromising our security.

Finally, military commissions are not, as Mr. Mukasey implied, essential to keep detainees from returning to terrorism. The Geneva Conventions permit detaining the enemy during armed conflicts to prevent them from causing future harm. Criminal trials punish past misconduct. Suggesting that the choice is either criminal prosecution or freedom is false.

Morris Davis, Gainesville

The writer was chief prosecutor for the military commissions from 2005 to 2007.

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EXHIBIT C

Congressional Research Service

MEMORANDUM November 13, 2009

To: Morris Davis
Assistant Director
Foreign Affairs, Defense and Trade Division

From: Daniel P. Mulhollan
Director

Subject: **Memorandum of Admonishment: Failure of Judgment and Discretion**

On November 10, 2009, at 7:34 p.m., you informed me via electronic mail (email) that you had submitted two articles related to military commissions to national newspapers. One was an opinion piece for the Wall Street Journal, and the second was a letter to the editor of the Washington Post. You added that the two pieces were accepted for publication, and could "run as early as tomorrow" (November 11). You closed by saying that "neither has any connection to CRS."

Before I received your communication, the CRS Office of Communications was notified through an alert at 7:12 p.m. on November 10, 2009, that your piece for the Wall Street Journal was posted on WSJ.com. (The November 11, 2009, written edition of the Journal published your submission on page A21.) Your opinion piece criticized Attorney General Eric Holder and the Obama Administration for its decision to use both military commission trials and trials in U.S. federal courts for the Guantanamo detainees.

The Washington Post on November 11, 2009, carried your letter to the editor criticizing former Attorney General Michael Mukasey on the same issue of trials for the Guantanamo detainees. In the course of that letter, you refer to Mr. Mukasey's arguments as "fear-mongering worthy of former vice president Dick Cheney."

I find your assertion that neither of your written works "has any connection to CRS" to be troubling, as well as a serious indication of a lack of judgment and discretion on your part. Your statement and your actions appear to be a rejection of CRS core values. As an Assistant Director and a senior leader in this organization, I rely upon you to uphold and maintain the Service's core mission of providing objective and non-partisan analysis to the Congress. As I said to you in my email response on November 10, 2009, how do you begin to explain to a Member of Congress that you can objectively help them analyze Attorney General Holder's policy after you have publicly criticized his policy direction? How can our clients rely on your leadership on this key policy issue facing Congress even though you are publicly opposed to the option being pursued

at present? How will members of the minority party in Congress view your objectivity after your thinly-veiled criticism of the former vice president?

In your position as Assistant Director and Senior Specialist in Foreign Affairs, the Foreign Affairs, Defense and Trade Division, you lead, plan, direct and evaluate the research and analytical activities of the division and ensure that the research and analysis produced is of the highest quality and consistently meets the Service's standards of objectivity, nonpartisanship, balance, timeliness, legislative relevance, authoritativeness, and accessibility. You are expected to demonstrate personal intellectual leadership in monitoring congressional needs in the policy areas of Foreign Affairs, Defense and Trade, and assure the availability of the intellectual capacity needed to meet the current and changing needs of the Congress at a sustained level. As an Assistant Director, you serve as a chief advisor to the Director, counseling him on all aspects of the research and management and operations of CRS. You are a member of CRS' senior management team. As such, "exercising the highest level of judgment and discretion, the [Assistant Director] demonstrates awareness of the likely consequences or implications of his/her actions, responds appropriately to situations that require discretion and confidentiality and consistently advances CRS values." Keeping the Director informed on a timely basis of matters "with implications for the successful conduct of CRS functions and activities and its service to the Congress" is also an important element of the position description and the performance standards governing Assistant Directors.

I seriously question the model you are setting for the analysts and managers in your division (and throughout the Service) by your conduct. You have directly counseled analysts in your division for failure to adhere to CRS standards on interacting with the media, and on outside activities. Ironically, in a memorandum to a subordinate in June of this year, you helped craft language that told this individual that while he "did not forfeit [his] First Amendment rights as a CRS employee" that he could not conduct himself in "a manner that impairs, in fact or in perception, the high professional standards for objectivity which are essential to CRS." Foreign Affairs, Defense and Trade Division analysts have frequent opportunity to engage with the media, or take part in outside speaking and writing activities. I fear that you have seriously eroded your position of authority and leadership within your division on these issues as a result of your recent conduct.

Furthermore, you failed to adhere to CRS policy on Outside Speaking and Writing. The disclaimer provision of the policy calls for staff members to explicitly disassociate themselves from the Library and from their official positions. You appear to believe that by identifying yourself simply as "Morris Davis, Gainesville," or "chief prosecutor for the military commissions from 2005 to 2007" that you are disassociating yourself from CRS. However, it would take very little effort for readers of your opinion pieces, including congressional clients, to identify the current position you hold in the Service, and to consequently doubt your ability to lead the provision of objective, non-partisan analysis for the Congress as a result of your outside writing. In fact, one quick search of Wikipedia using your name clearly shows, under the heading of "post military career," the fact that you were named as head of the Foreign Affairs, Defense and Trade Division of CRS, along with the November 10 opinion piece for the Wall Street Journal which it characterizes as critical of the review team President Obama authorized.

You also appear to believe, based on comments made in your emails to me, that LCR 2023-3 (Outside Employment and Activities) which speaks of the obligation to avoid "the appearance of conflict of interest," especially when speaking or writing on controversial matters, does not apply to you because prosecution of the Guantanamo detainees does not fall strictly within the purview of your division. You stated (in your email of November 11) that the "fact of the matter is that for as long as where to prosecute terrorism suspects has been an issue it has been an issue within the purview of ALD." However, I seriously question whether Congress understands that the Assistant Director for Foreign Affairs, Defense and Trade has little to do with military commissions. Furthermore, you have been regularly consulted by the American Law Division on this issue and have been a collegial resource for the lawyers who have prepared legal analyses of these issues.

The CRS policy on Outside Speaking and Writing states that when employees contemplate engaging in outside activities that involve any type of advocacy, "they should strive to avoid even the appearance of a conflict of interest or engaging in an activity that would compromise one's ability to perform their responsibilities for CRS." It goes on to strongly urge individuals to make an inquiry before embarking on conduct that may present these issues. Although you and I met for an hour in-person on November 10, 2009, you said nothing to me about your advocacy. You waited until 7:34 p.m. to inform me by email that these writings were to appear. You had a responsibility to inform me, as well as ample opportunity, and you failed to do so in a timely and responsible manner. This further reflects poorly on your judgment and candor.

As stated in the CRS policy on Outside Speaking and Writing:

> The CRS mission of providing balanced, objective, and non-partisan support to the Congress places a challenging responsibility on all CRS staff that is of critical importance to this agency. It is incumbent on everyone to ensure that the ability of CRS to serve the Congress is not compromised by even the appearance that the Service has its own agenda; that one or more analysts might be seen as so set in their personal views that they are no longer to be trusted to provide objective research and analysis; or that some have developed a reputation for supporting a position on an issue to the extent that CRS is rendered "suspect" to those of a different viewpoint.

Let me remind you of the Library of Congress regulations and CRS policies that you have the responsibility to be familiar with as a senior manager in the organization. LCR 2023-3 (Outside Employment and Activities) speaks to the obligation to avoid "the appearance of a conflict of interest," especially when speaking or writing on controversial matters. CRS policy on Outside Speaking and Writing advises that it is important to err on the side of caution so as to avoid the potential for controversy and to adhere to the standard set for the review of CRS written products. LCR 2023-1 (Personal Conduct and Personal Activities of the Staff of the Library of Congress) goes on to counsel that staff members shall avoid any action which might result in or create the appearance of compromising independence or impartiality. And, finally, CRS Policy on Interacting with the Media states that the standards for CRS writing — objectivity, nonpartisanship and non-advocacy of policies or arguments — must guide all media interactions.

Additionally, LCR 2023-1 (Personal Conduct and Personal Activities of the Staff of the Library of Congress: Purpose, Policy, and General) states that:

> The maintenance of high standards of honesty, integrity, impartiality, and conduct by staff members is essential to assure the proper performance of the Library's business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of staff members through **informed judgment** is indispensable to the maintenance of these standards. (Emphasis added.)

Your conduct and judgment were also called into question by the unprofessional manner in which you responded to my email on November 11, 2009. After stating that you "have no desire to get into a back and forth email debate," you went on to state that you believe you knew what I would like the policy on outside writing to be, "no one from CRS expresses an opinion in public." Again, in our meeting on Thursday, November 12, 2009, you expressed no remorse for your actions, nor awareness that your poor judgment could do serious harm to the trust and confidence Congress reposes in CRS. Your concern was focused on your rights. This is not about the content of your writings, nor about your ability to exercise your rights. Rather, this is about your judgment and discretion in pursuing activities that could cause real harm to CRS by impairing, in fact or in perception, the high professional standards for objectivity which are essential to CRS. I will not tolerate unprofessional conduct by the senior managers I have entrusted to lead this organization.

When you were interviewed for your current position as Assistant Director, we discussed the mission of CRS and the need for its senior leaders to be able to make reasonable and necessary compromises to fulfill our obligations to the United States Congress to provide them with our best work in an objective and non-partisan manner. You expressed to me at that time that you would be able to do so. These recent events have caused me to lose confidence in your judgment and discretion. Nothing you said in our meeting on November 12 caused me to reconsider my loss of faith. Let me remind you that as a probationary employee judgment and discretion are critical components of the position description for an Assistant Director and key performance indicators on which you are being judged. You are hereby admonished for failing to exercise judgment and discretion in accordance with the professional standards expected of Senior Level executives in CRS.

EXHIBIT D

Congressional Research Service

November 20, 2009

Mr. Morris Davis
Assistant Director
Foreign Affairs, Defense and Trade Division
Congressional Research Service

Dear Mr. Davis,

Pursuant to LCR 2017-2.1, *Senior Level Executive System*, and applicable provisions of LCR 2010-11, *Personnel Appointments, Assignments, Qualifying/Probationary Periods, and Terminations,* I am hereby notifying you that your separation (disqualification) from your position as Assistant Director, Foreign Affairs, Defense and Trade Division (FDT), Congressional Research Service (CRS), will be effective at the close of business on December 21, 2009. You are being separated during your qualifying period based on the conclusion that you have not adequately demonstrated the requisite general fitness characteristics relating to judgment and discretion as a Senior Level Executive, characteristics that are necessary for conversion to permanent status.

Based on an overall assessment of your general fitness, which includes your actions and conduct during your qualifying period, I have concluded that you have not adequately demonstrated the Senior Level Executive qualities and characteristics necessary to serve effectively as Assistant Director in the Foreign Affairs, Defense and Trade Division of the Congressional Research Service.

On November 13, 2009, you were admonished in writing for your poor judgment and lack of discretion with respect to a letter to the editor and an opinion piece you authored for publication that appeared separately in The Wall Street Journal and The Washington Post. During a meeting on November 12, 2009, in which your conduct leading to the admonishment was discussed, you neither expressed remorse for your actions nor awareness that your poor judgment could do serious harm to the trust and confidence Congress reposes in CRS. In addition, you failed to adhere to the CRS policy on Outside Speaking and Writing. Among other things, the policy calls for staff members to explicitly disassociate themselves from the Library and from their official positions when speaking or writing on controversial matters. You failed to effectively do so. Furthermore, you have impaired your ability to lead the analysts and managers in FDT (and throughout the Service) as a result of your conduct. Part of that leadership includes the responsibility to ensure that staff adheres

to the core principles of objectivity, nonpartisanship and balance in CRS' service to the Congress.

You have also been verbally counseled in recent months on your judgment and discretion in matters involving (1) the attribution of authorship on an FDT report (*DOD Contractors in Iraq and Afghanistan)* and (2) an inappropriate email to another senior manager in CRS. In the attribution of authorship case, FDT had a CRS report published with an intern listed as the co-author contrary to the CRS policy at the time. Then, in an email on October 20, 2009, you used inappropriate and disrespectful language toward an Associate Director of long tenure on a substantive policy matter and disseminated it to the Research Policy Council.

Pursuant to LCR 2017-2.1, and applicable provisions of LCR 2010-11, it is apparent that your actions and conduct have shown poor judgment and discretion and are not consistent with "acceptable service" and therefore serve as the basis for the determination to separate you during your probationary period.

Under the provisions of LCR 2017-2.1, Section 10, and LCR 2010-11, Section 5, you do not have the right to a formal appeal of this decision. However, as provided for in LCR 2010-11, Section 5.A., you do have the right to request an informal hearing with an appropriate supervisory or management official in CRS for the purpose of discussing the basis for the Library's action. I have designated Ms. Lynne McCay, Senior Advisor to the Director, for this purpose. You can reach Ms. McCay at 202-707-1415. I am enclosing a copy of LCR 2017-2.1 and a copy of LCR 2010-11 for your information.

Sincerely,

Daniel P. Mulhollan
Director
Congressional Research Service

Enclosures:

LCR 2017-2.1 and LCR 2010-11

cc:

Richard Ehlke, Acting Deputy Director, CRS
Ms. Bessie Alkisswani, Associate Director, WRK, CRS
HRS/WLSC/TSG (w/PAR)
HRS/WFM/ERT

EXHIBIT E

Important Notice: **To ensure that you are viewing the most recent version of a Library regulation or other material on the OGC Web site, Internet Explorer users should click the "Refresh" button. Netscape, Firefox, and Safari users should click the "Reload" button.**

LIBRARY OF CONGRESS REGULATIONS

THE LIBRARY OF CONGRESS

LCR 2023-3

SUBJECT: Outside Employment and Activities

SERIES: 2023 Personal Conduct and Personal Activities of Staff	STATUTORY AUTHORITY: 2 U.S.C. §136	RESPONSIBLE OFFICE: Office of the Librarian
ISSUE DATE: March 23, 1998	REVIEW DATE:	SUPERSEDES: April 3, 1991, issuance of LCR 2023-3

Contents:

Section 1. Purpose

This policy concerns the outside employment and other outside activities of staff members, including outside activities that draw upon staff members' skills that reflect Library training or experience, that make use of knowledge or information gained on the job, or that are the result of work performed in whole or in part during official duty hours.

Section 2. Outside Employment

A. Generally, staff members shall not engage in outside employment or other outside activities not compatible with the full and proper discharge of the duties and responsibilities of their Library employment. Incompatible activities of staff members include, but are not limited to,

1. acceptance of a fee, compensation, gift, payment of expense, or any other thing of substantial monetary value in circumstances in which acceptance may result in or create the appearance of conflict of interest;

2. outside employment of such a nature as to impair their mental or physical capacity to perform their Library duties and responsibilities in an acceptable manner;

3. activities that may reasonably be construed by the public to be official acts of the Library of Congress;

4. activities that establish relationships or property interests that may result in a conflict between their private interests and their official duties;

5. employment that may involve the use of information, secured as a result of employment by the Library, to the detriment of the Library or the public interest or to the preferential advantage of any person, corporation, public agency, or group; or

6. employment with any person, firm, or other private organization having business either directly or indirectly with the Library, when such employment might result in or give the appearance of a conflict of interest or otherwise be incompatible with law.

B. Except as provided by 2 U.S.C. §162 and 162a, staff members shall not receive any salary or anything of monetary value from a private source as compensation for their services to the Library. See also 18 U.S.C. §§201(c), 209.

C. Staff members may

1. engage in outside employment or other outside activities that are unrelated to their specific Library functions and that do not affect their ability to discharge the duties and responsibilities of their Library employment, but shall not carry on such outside activities during their official duty hours;

2. participate in the activities of national or state political parties not proscribed by law; and

3. participate in the affairs of or accept an award for a meritorious public contribution or achievement from a charitable, religious, professional, social, fraternal, nonprofit educational or recreational, public service, or civic organization.

D. Staff attorneys are encouraged, in off-duty hours and consistent with local court rules and official responsibilities, to participate in programs that provide legal assistance and representation to indigent persons. Such participation, however, shall not include representation precluded by the provisions of 18 U.S.C. §205.

E. The provisions of 18 U.S.C. §205 do not, nor shall this policy preclude staff attorneys, if consistent with the faithful performance of their Library duties, from acting without compensation as representatives or attorneys for staff members who are subjects of disciplinary, personnel security, or other personnel administrative proceedings within the Library. Staff attorneys who do perform in this capacity are subject to the limitations on the use of official time set out in LCR 2020-1, *Grievances, Adverse Actions, Appeals: Policy and General Provisions*; LCR 2010-3.1, *Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Relations under the Equal Employment Opportunity Program*; and the various collective bargaining agreements. Staff attorneys who are managers or supervisors or who are on the staff of the Office of the General Counsel, the Office of Counsel for Personnel, the Office of the Director of Personnel, or the Equal Employment Opportunity Complaints Office are excluded from

performing in this capacity.

Section 3. Teaching, Writing, and Lecturing

A. Staff members are encouraged to engage in teaching, lecturing, or writing that is not prohibited by law. Generally, personal writings and prepared or extemporaneous speeches that are on subjects unrelated to the Library and to staff members' official duties are not subject to review.

B. In speaking and writing on controversial matters, staff members are expected to disassociate themselves explicitly from the Library and from their official positions. Personal writings as well as prepared or extemporaneous speeches by staff members shall not be subject to prior review. Where, however, the subject matter of such writing relates to library science or the history, organization, administration, practices, policies, collections, buildings, or staff of the Library as well as matters relating to a field of a staff member's official specialization or the special clientele which a staff member serves, and where some association may be made with a staff member's official status, staff members shall: (1) assure accurate presentation of facts about the Library and Library-related matters; (2) avoid the misrepresentation of Library policies; (3) avoid sources of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner; and (4) assure, when appropriate, that staff members' opinions clearly differentiate from Library policy.

Section 4. Copyright Claims

Staff members are advised that no copyright subsists in any work prepared by Federal employees pursuant to their employment. Accordingly, it is improper for staff members to claim copyright in any material prepared by them within the requirements of their duties or to authorize a publisher to do so.

Section 5. Book Endorsements

A. Staff members shall not endorse books. In rare instances in which staff members' opinions are requested for a special purpose because of their unusual competence in a particular field, an exception to this general policy may be requested. Such exceptions shall be made solely in the interest of the Library and shall be approved by the Librarian or his or her designee for this purpose.

B. Endorsement, as used herein, is defined as a statement prepared for use in the promotion of a publication. The term is not to be confused with book review, which is a statement prepared for publication in a recognized medium for the evaluation of publications.

Section 6. Evaluations of Library Materials

Requests for private evaluations of library material may be accepted by staff members as outside employment provided staff members do not undertake any part of this work during their duty hours and provided further that the results of their work are not associated directly or indirectly with their official duties or with the Library of Congress.

Section 7. Intermediaries and Product Recommendations

Except as required by their official duties, staff members shall not recommend or suggest the use of any particular or identified nongovernmental intermediary to deal with the Library nor shall they recommend

any device or product tested by or for or used by the Library.

Section 8. Memberships in Organizations

A. Staff members shall not, **in their official Library capacity**, serve as members of a business organization except where express statutory authority exists, where statutory language necessarily implies such authority, or where the Librarian of Congress has determined that such service would be beneficial to the Library and consistent with such staff members' service as Library employees. However, staff members may serve **in an individual capacity** as members of such an organization, provided that (1) such membership does not violate restrictions set out in this policy; and (2) their official titles or organizational connections are not shown on any listing or presented in any activity of the organization in such a manner as to imply that they are acting in their official Library capacity.

B. Staff members may be designated to serve as liaison representatives of the Library to a business organization provided that (1) the activity relates to the work of the Library; (2) the staff members do not participate in the policy determinations of the organization; and (3) the Library is in no way bound by any vote or action taken by the organization.

Section 9. Service as Officers or on Boards or Committees of Professional Associations

A. It is the policy of the Library to encourage staff members to participate actively in the work of professional groups when such activities will contribute to staff members' professional interests or to Library programs and when such participation will not materially interfere with staff members' official duties or involve extensive travel expense to the Library (see also LCR 2022-3, Attendance at Professional Meetings).

B. Staff members, invited or nominated to serve as officers or on boards or committees of professional groups, shall notify their immediate supervisor before accepting such nominations or making commitments to serve. Where circumstances do not permit an advance notification, the staff member shall report the matter to his or her supervisor as soon as possible.

Section 10. Post-Employment Restrictions

A. These restrictions only apply to acts by a former staff member who, for at least 60 days, in the aggregate, during the one-year period before that former staff member's service as such staff member terminated, was in a position for which the rate of basic pay, exclusive of any locality base pay adjustment, is equal to or greater than the basic rate of pay payable for Level 5 of the Senior Executive Service. 18 U.S.C. §207(e)(6).

B. For one year following termination of Library employment (retirement, resignation, or otherwise), affected staff members shall not (1) knowingly make, on behalf of any other person (except the United States) a communication or appearance before any Library staff member with the intent to influence him or her on any official matter; or (2) knowingly represent, aid, or advise any foreign entity (foreign government) on any U.S. Government matter before any U.S. Government department or agency. 18 U.S.C. §207(e)(5), (f).

C. The Director of Personnel shall take such steps as may be necessary to assure that affected staff members leaving Library employment are reminded of these restrictions.

Next ➤ ◀ Prev

Comments: lcweb@loc.gov

EXHIBIT F

Policy

Outside Speaking and Writing

Effective date: Jan. 23, 2004. This policy, originally issued on Jan. 23, 2004, as Director's Statement, Outside Activities: Preserving Objectivity and Non-Partisanship, *has been edited and reformatted for the staff site.*

Statement

This statement outlines the policy for writing and speaking outside of work, including teaching or lecturing. For situations relating to the media, see the policy statement on Interacting with the Media.

Disclaimer

The obligation, set out in Library regulation, is to present a formal disclaimer regarding any personal views. Employees must make it clear that the views expressed are theirs and do not represent the views of the Service. Specifically, LCR 2023-3, Outside Employment and Activities, provides that when speaking and writing on "controversial" matters, "staff members are expected to disassociate themselves explicitly from the Library and from their official positions." In outside writings this is most commonly done by ensuring that a footnote appears at the outset making that clear. When speaking, the staff member may make the point on introduction to the audience, or before commencing substantive remarks. The obligation falls on the employee, whether as a presenter, as an author, or as a contributor in whatever form, to ensure that such a disclaimer is actually presented. A sample disclaimer for writings might read: "The views expressed herein are those of the author and are not presented as those of the Congressional Research Service or the Library of Congress." For in-person remarks, it is advisable to add "the speaker [I] am not here representing the Congressional Research Service, and the views expressed..."

Conflict of Interest

Library regulation 2023-3 also speaks to the obligation to avoid "the appearance of conflict of interest," especially when speaking or writing on controversial matters. For CRS, almost everything that staff say or write has the potential to be "controversial." It is therefore important to err on the side of caution, especially when addressing issues for which the individual has responsibility for the Service. It is therefore advisable, when writing or speaking on the subject for which the individual has responsibility at the Service, that the standard set for review of CRS written products be observed. While it is not a formal requirement, the Service strongly encourages all staff to submit draft outside writings to the Review Office, which welcomes the opportunity to provide input and advice.

Advocacy v. Research

When employees contemplate engaging in outside activities that involve any type of advocacy (e.g., associational affiliations and organization membership, political activities, and endorsements) or activities potentially compromising the appearance of independence or impartiality, they should strive to avoid even the appearance of a conflict of interest or engaging in an activity that would compromise one's ability to perform their responsibilities for CRS. See LCR 2023-1 and 2023-3. CRS examines such activities on a case-by-case basis to determine whether the conduct is problematic, and strongly urges individuals to make an inquiry before embarking on conduct that may present these issues.

Background

The CRS mission of providing balanced, objective, and non-partisan support to the Congress places a challenging responsibility on all CRS staff that is of critical importance to this agency. It is incumbent on everyone to ensure that the ability of CRS to serve the Congress is not compromised by even the appearance that the Service has its own agenda; that one or more analysts might be seen as so set in their personal views that they are no longer to be trusted to provide objective research and analysis; or that some have developed a reputation for supporting a position on an issue to the extent that CRS is rendered "suspect" to those of a different viewpoint.

When staff speak or write for the Congress within the scope of their duties here, the lines are very clear. CRS has designed all layers of review in the divisions, the Review Office, and elsewhere so that the work adheres to CRS obligations and congressional expectations. While CRS staff, like all citizens, are entitled to hold their own views on all matters of public policy, when staff speak or write in their private capacities they continue to carry with them related responsibilities.

Employees must exercise the greatest level of care for preserving the appearance of objectivity when addressing the very issues for which they have responsibility at CRS. LCR 2023-3 also provides that "[w]here...the subject matter of [personal writings as well as prepared or extemporaneous speeches by staff members] relates to... a field of a staff member's official specialization or the special clientele which a staff member serves, staff members shall ...avoid sources of potential damage to their ability to perform official Library duties in an objective and non-partisan manner..." Staff will likely have acquired much of their knowledge of this subject matter in the course of performing their duties as a public servant for the Congress and it may be seen as inappropriate for them to profit from that knowledge elsewhere. In addition, this is also the subject area that the individual will continue to be writing about for CRS and is the subject most likely to be the basis of a suspicion of failure to meet the obligatory standards of objectivity and balance.

Congress created CRS to provide an objective resource for the National Legislature, and it is frequently touted as the only agency in town that holds to that charge. And, failure to

do so carries the severe consequence of rendering the Service ineffective at best, and useless at worst. More importantly, to do so violates the trust that has been placed in CRS by the Congress to meet its statutory mission. Preserving that trust is the responsibility of all CRS staff.

Expectations

When considering engaging in outside activities, employees should think carefully before taking a public position on subject matters for which they are responsible at CRS. They are responsible at a minimum for providing a formal disclaimer, and for using sound judgment in deciding when engagement in an outside activity may place the reputation of CRS at risk. CRS has painstakingly built a reputation for excellence over the years, much of it tied to its unique role in the provision of objective, non-partisan, and confidential research and analysis to the Congress. CRS staff, both individually and collectively, must avoid engaging in activities that have a high risk of tarnishing that reputation. Everyone must make every effort to avoid presenting even the appearance that the Service is not true to the mandates given it to be objective, non-partisan, and confidential.

Contact:

Address questions regarding application of this policy to division or office management. Division and office heads should direct their questions to the Office of Congressional Affairs and Counselor to the Director.

Last reviewed July 2008