[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MORRIS D. DAVIS,
Plaintiff-Appellee,

v.

JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress,
Defendant-Appellee,

DANIEL P. MULHOLLAN, in his individual capacity,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(1), appellant Daniel P. Mulhollan respectfully submits this certificate as to parties, rulings and related cases:

(A) Parties:

Plaintiff in the district court, who is appellee in this Court, is Morris D. Davis.

Defendants in the district court were Daniel P. Mulhollan, in his individual capacity, who is the appellant in this Court; and James H. Billington, in his official capacity as the Librarian of Congress, who is an appellee in this Court and not participating in this appeal.

There were no other parties or amici curiae in the district court.

(B) Ruling Under Review

The ruling under review is the March 30, 2011 order of the district court (Judge Reggie B. Walton) denying the appellant's motion to dismiss on qualified immunity grounds claims brought against him in his individual capacity under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

(C) Related Cases

There are no related cases within the meaning of D.C. Circuit Rule 28(1) of which I am aware.

/s/ Sharon Swingle
Sharon Swingle
Counsel for the United States

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

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* Authorities upon which we chiefly rely are marked with asterisks.

Constitution:

Statutes:

Legislative Materials:

Miscellaneous:

GLOSSARY

CAA. . . . . Congressional Accountability Act of 1995

CRS. . . . . Congressional Research Service

CSRA. . . . . Civil Service Reform Act

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the plaintiff's claims under 28 U.S.C. § 1331. On March 30, 2011, the district court refused to dismiss on qualified immunity grounds the claims against individual defendant Daniel P. Mulhollan. Opinion 41; JA 146; Order, JA 105. Mulhollan filed a timely notice of appeal on April 13, 2011. Notice of Appeal, JA 174-175. This Court has jurisdiction under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 529-530 (1985).

STATEMENT OF THE ISSUES PRESENTED

The plaintiff, Morris Davis, was hired as an Assistant Director in charge of the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service (CRS), a department of the Library of Congress that is charged with providing objective and nonpartisan analysis and research to Congress. Davis's employment was terminated during his probationary period after he published an op-ed and letter to the editor in the national press sharply criticizing the current Attorney General's decision to try some Guantanamo detainees before military commissions and condemning the views of a former Attorney General as "fear-mongering worthy of former Vice President Cheney." The plaintiff brought claims against his supervisor, Daniel Mulhollan, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that his termination violated the First and Fifth Amendments. The questions presented on appeal are:

1. Whether the district court erred in holding that no reasonable government official could have concluded that Davis's public statements compromised his appearance of impartiality and objectivity and justified his termination as head of the Foreign Affairs, Defense, and Trade Division of CRS.

2. Whether the district court erred in recognizing an implied cause of action under *Bivens* for money damages for the allegedly unconstitutional termination of Davis during his probationary period of employment with the Library of Congress.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory provisions are set out in an addendum to this brief.

STATEMENT OF THE CASE

The plaintiff filed a complaint against Daniel Mulhollan in his individual capacity and the Librarian of Congress, James Billington, in his official capacity, alleging that the termination of the plaintiff's probationary employment with CRS violated the First and Fifth Amendments. Complaint, JA 10-31. The defendants moved to dismiss the claims against them. Motion to Dismiss, Dkt. 18-1, JA 40-41; Motion to Dismiss, Dkt. 27. The district court denied the motions, holding in relevant part that the plaintiff stated valid claims against Mulhollan under *Bivens* and that disputed questions of fact precluded dismissal of those claims on qualified immunity grounds. Opinion, JA 106-146; Order, JA 105. Mulhollan filed this interlocutory appeal from the denial of qualified immunity. Notice of Appeal, JA 174-175.

STATEMENT OF FACTS

A. Factual Background.[1]

1. Appellant Daniel Mulhollan was the Director of CRS during the events giving rise to this lawsuit. *See* Complaint 4, JA 13. CRS is a department of the Library of Congress that exists to "advise and assist" Congress through the provision of research and analytical support, "without partisan bias." 2 U.S.C. § 166(d). CRS is charged by statute with evaluating legislative proposals pending before Congress to determine their advisability, the probable results of the proposals and any alternatives, and other methods for producing the desired results. *Id.* § 166(d)(1). CRS is also tasked with providing research and analytic services to Congress, including the provision of any policy analysis or other information that might have a bearing on legislation. *Id.* § 166(d).

In performing its functions, CRS is expected to provide objective, unbiased, and nonpartisan services. *See* H.R. Rep. No. 91-1215, at 17 (1970) ("CRS will

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[1] Solely for purposes of this appeal, Mulhollan assumes the truth of the factual allegations of the complaint. However, the obligation to accept the truth of factual allegations does not extend to "a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-1950 (2009) (internal quotation marks and citation omitted). Furthermore, Mulhollan notes that many of the plaintiff's factual allegations are not accurate, as is evident from even the limited evidentiary record submitted to the district court in connection with the plaintiff's motion for preliminary injunctive relief. *See* Dkt. 6-1, 7-2 through 7-27.

supply committees with experts capable of preparing or assisting in preparing, objective, nonpartisan, in-depth analyses and appraisals of any subject matter."). As this Court recognized in *Keeffe v. Library of Congress*, 777 F.2d 1573, 1580-1581 (D.C. Cir. 1985), "[n]onpartisanship on the part of CRS Analysts enables them to serve all Members of Congress effectively and to carry out Congress' mandate that the Service render advice 'without partisan bias.'"

2. Both CRS and the Library of Congress have policies governing outside speaking and writing by employees. The relevant Library of Congress Regulation provides in relevant part that, "[i]n speaking and writing on controversial matters, staff members are expected to dissociate themselves explicitly from the Library and from their official positions." Library of Congress Regulation 2023-3, § 4(B).[2] Furthermore, where the subject of outside speaking or writing pertains to "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 status, staff members

[2] Library of Congress Regulation 2023-3 was incorporated by reference in the plaintiff's complaint, Complaint ¶¶ 65-67, JA 26, *see World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1157 n.2 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003), and was attached as an exhibit to the plaintiff's opposition to Mulhollan's motion to dismiss. *See* Dkt. 23-1, JA 94-99.

shall * * * avoid sources of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner." *Id.* § 3(B).

CRS also has a policy on speaking and writing.[3] The CRS policy recognizes that the agency's unique statutory mission to provide "balanced, objective, and non-partisan support to Congress places a challenging responsibility on all CRS staff that is of critical importance." CRS Policy 2, JA 102. The CRS policy notes that CRS employees have an obligation under the Library of Congress regulation to provide an explicit disclaimer that their views represent the official policy of the agency, and also that employees have an "obligation to avoid 'the appearance of conflict of interest,' especially when speaking or writing on controversial matters." CRS Policy 1, JA 101 (quoting Library of Congress Regulation 2023-3). In engaging in outside speaking and writing, CRS employees must "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

[3] The CRS policy on outside speaking and writing was also incorporated by reference in the plaintiff's complaint, Complaint ¶¶ 68-71, JA 26-27, and was attached as an exhibit to the plaintiff's opposition to Mulhollan's motion to dismiss. *See* Dkt. 23-2, JA 100-103.

position on an issue to the extent that CRS is rendered 'suspect' to those of a different viewpoint." CRS Policy 2, JA 102.

Because "almost everything that [CRS] staff say or write has the potential to be 'controversial,'" the CRS policy explains, it is "important to err on the side of caution, especially when addressing issues for which the individual has responsibility for the Service." CRS Policy 1, JA 101. CRS employees are "strongly encourage[d]" to submit draft writings to the CRS Review Office prior to their publication. *Ibid.* CRS employees are directed to give the greatest care to protecting the appearance of objectivity when they address issues relating to their area of official specialization, which "is the subject most likely to be the basis of a suspicion of failure to meet the obligatory standards of objectivity and balance." CRS Policy 2, JA 102.

3. The plaintiff in this action, Morris Davis, was hired and began working in December 2008 as the Assistant Director at CRS in charge of the Foreign Affairs, Defense, and Trade Division. Complaint 2, JA 11. Mr. Davis's employment was subject to a mandatory, one-year probationary period. Complaint 15, JA 24.

As the head of one of the five research divisions of CRS, Davis was responsible for leading, planning, directing, and evaluating the research and

analytic activities of that division. Complaint 8, JA 17. Davis supervised and managed approximately 95 employees in the Foreign Affairs, Defense, and Trade Division. Complaint 8, JA 17. Davis's supervisory and managerial responsibilities included counseling employees in his division on compliance with the CRS policy on outside speaking and writing. Memorandum of admonishment 2, JA 89.[4] Davis was a member of CRS's senior management team, and reported directly to the Director of CRS. *Ibid.*

The Foreign Affairs, Defense, and Trade Division of CRS includes seven research sections, including Foreign Policy Management and Global Issues; Defense Policy and Arms Control; and Defense Budget, Manpower, and Management. Complaint 9, JA 18. The division provides research and analytical services to the Congressional committees responsible for those areas, including committee Members and their staff, Complaint 8, JA 17, and is charged by statute with maintaining a "continuous liaison" with those committees. *See* 2 U.S.C. § 166(d). Although the division is responsible for Defense Policy, the plaintiff

[4] The memorandum of admonishment, which was filed as an exhibit to Mulhollan's motion to dismiss, Dkt. 18-5, was incorporated by reference in the plaintiff's complaint, Complaint ¶¶ 56-57, JA 24, and reviewed by the district court in denying the motion to dismiss. Opinion 27-28, JA 132-133.

alleges that it does not have direct responsibility with respect to military commissions or the prosecution of Guantanamo detainees. Complaint 9, JA 18.

Before accepting a position as Assistant Director at CRS, Davis served in a variety of high-level leadership positions in the military. Complaint 5-6, JA 14-15. Davis was the former Director of the Air Force Judiciary, as well as the Chief Prosecutor for the Department of Defense's Office of Military Commissions. Complaint 4-5, JA 13-14. As he explained in his application for the CRS Assistant Director position, Davis had command responsibility for over 250 people in his prior position, and had frequent contact with senior officials from the Department of Defense and other federal agencies, as well as direct contact with members of Congress and their staff. Job Application 2, JA 43.[5] Davis holds a Juris Doctor degree and two Masters Degrees in law. Complaint 6, JA 15. He retired from the Air Force with the rank of colonel, and was the recipient of numerous awards and honors. Complaint 4, JA 13.

Davis served as Chief Prosecutor for the Department of Defense's Office of Military Commissions between 2005 and 2007, when he resigned. Complaint 4, JA 13. Following his resignation, Davis spoke publicly about what he perceived

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[5] Davis's application for the position of Assistant Director was also filed as an exhibit to Mulhollan's motion to dismiss, *see* Dkt. 18-2, JA 42-84, and incorporated by reference in the plaintiff's complaint, Complaint ¶ 25, JA 16.

to be the flaws in the military commissions system for Guantanamo detainees. Complaint 6-7, JA 15-16. He published articles in newspapers and a law review, gave speeches, and testified before Congress. *Ibid.* Davis "generally supported the use of military commissions to try suspected terrorists held at Guantanamo, but he criticized the military commissions system as it then existed." Complaint 7, JA 16.

Davis alleges that, in his application and interview for the position as CRS Assistant Director, he referenced his public speaking and writing about the military commissions system. Complaint 7, JA 16. He asserts that neither Mulhollan, who interviewed him, nor any other CRS or Library of Congress employee, told him that engaging in public speaking or writing about military commissions and Guantanamo would harm his ability to serve as Assistant Director of CRS. Complaint 8, JA 17.

As noted, Davis started working for CRS in December 2008. Complaint 8, JA 17. In February 2009, Davis sought and was granted advance approval by the Deputy Director of CRS to attend and speak about military commissions at a Human Rights Watch dinner. Complaint 9, JA 18. Davis alleges that, in August 2009, he sought advance permission from CRS Director Mulhollan and the CRS Office of Communication to be interviewed for a BBC documentary about

Guantanamo. Complaint 10, JA 19. In September 2009, Davis participated in a law school conference on military commissions and submitted a law review article in connection with the conference. *Ibid.* Davis again sought and was granted advance approval for his participation in the conference, on the condition that he attend in his private time. *Ibid.* Davis also alleges that he sought and received advance approval from Mulhollan to attend a November 5, 2009 meeting of the Lawyers Association of Kansas City to accept an award for speaking out against the politicization of the military commissions system. Complaint 11, JA 20.

4. Davis emailed Director Mulhollan the evening of November 10, 2009, to inform him that an op-ed and letter to the editor written by Davis were going to be published the next day in the Wall Street Journal and the Washington Post. Complaint 12-14, JA 21-23. Although Davis had met with Mulhollan in person earlier that day, Complaint 12, JA 21, he had not notified Mulhollan that he had submitted the pieces for publication. Davis did not seek advance permission from CRS before submitting the pieces for publication, nor did he submit them for pre-publication review by the CRS Review Office. Neither of the pieces provided an explicit disclaimer that the pieces represented the personal views of Davis, and not of CRS or the Library of Congress.

Davis's op-ed criticized Attorney General Eric Holder's announcement that some Guantanamo detainees would be tried before military commissions and others in federal court. Op-ed, JA 85-86. Davis characterized the use of both types of proceedings as "a mistake" that "will establish a dangerous legal double standard" and "perpetuate the perception that Guantanamo and justice are mutually exclusive." *Ibid.* Davis's op-ed also asserted that "double-standard justice" is not required to keep suspected terrorists detained and that "[t]he administration must choose" a single forum to try detainees or instead face international criticism. Op-ed 2, JA 86.

Davis's letter to the editor sharply criticized a statement by former Attorney General Michael Mukasey that the decision whether to try Guantanamo detainees in federal courts was "a choice between protecting American people and showcasing American justice." Letter to the editor, JA 87. Davis condemned Mr. Mukasey's statement that federal trials would pose serious security concerns as "fear-mongering worthy of former vice president Dick Cheney." *Ibid.*

After being alerted to the imminent publication of the two pieces, Director Mulhollan sent an email to Davis questioning his judgment and his ability to continue to serve as Assistant Director. Complaint 14, JA 23. Mulhollan subsequently issued a memorandum of admonishment, which stated that Davis's

op-ed and letter to the editor damaged his ability to lead his division in providing objective, non-partisan analysis to the Congress. *See* Memorandum of admonishment 1, JA 88. Mulhollan questioned Davis's ability to objectively help Members of Congress analyze Attorney General Holder's policy, and the ability of clients of CRS to trust Davis's "leadership on this key policy issue facing Congress even though you are publicly opposed to the option being pursued." Memorandum of admonishment 1-2, JA 88-89. Mulhollan also queried how Republican Members of Congress would view Davis's "objectivity after your thinly-veiled criticism of the former vice president." Memorandum of admonishment 2, JA 89. And Mulhollan questioned Davis's ability to counsel employees in his division who failed to comply with the CRS policy on outside speaking and writing. *Ibid.*

On November 20, 2009, Davis was notified that he would be removed from his probationary appointment as Assistant Director as of December 21, 2009. Complaint 15, JA 24. Davis was given a temporary, 30-day position as Mulhollan's Special Advisor, to permit him to look for other employment. *Ibid.*

B. District Court Proceedings.

1. Davis brought suit against CRS Director Daniel Mulhollan in his individual capacity, and the Librarian of Congress, James Billington, in his official

capacity, alleging that the termination of his probationary employment following the publication of his newspaper pieces violated the First and Fifth Amendments. Complaint 4-5, 19-20, JA 13-14, 28-29. Davis also alleged that the Library of Congress regulation and CRS policy on outside speaking and writing were unconstitutionally vague both on their face and as applied to him, in violation of the First and Fifth Amendments. Complaint 20, JA 29. He sought reinstatement to his former position, an injunction barring enforcement of the CRS policy, and compensatory and punitive damages. Complaint 21, JA 30.

On the same day he filed the complaint, Davis also moved for injunctive relief to prevent the termination of his employment following the expiration of his temporary position, which the district court denied. Motion for TRO, Dkt. 2; 1/20/10 Order 1-2, JA 32-33. The district court reasoned that the plaintiff's employment appeared to have been terminated because he took a public position on the prosecution of Guantanamo detainees that CRS "felt would call into question its impartial[ity] as to any policy recommendation it would make and any research it would conduct on that issue." 1/20/10 Order 3, JA 34. The district court also acknowledged that the plaintiff's publications may have "fractured" the "working relationship between the plaintiff and his immediate supervisor," and that this might "compromise the mission" of CRS. *Ibid.* However, the district

court suggested that the plaintiff had shown a likelihood of success on the merits, denying the motion on the alternative ground that the plaintiff failed to show irreparable injury. 1/20/10 Order 3, 6-8, JA 34, 37-39.

2. Both Mulhollan in his individual capacity and the Librarian of Congress in his official capacity filed motions to dismiss the claims against them, which the district court denied. Order, JA 105; Opinion, JA 106-146. In relevant part, the district court concluded that, under the facts as pled in the complaint, Davis had alleged the violation of clearly established rights under the First and Fifth Amendments, and no reasonable officer could have believed that the termination of the plaintiff's probationary employment was lawful. Opinion 23-41, JA 128-146. The district court also held that no special factors counseled hesitation in implying a damages remedy here under *Bivens*. Opinion 14-21, JA 119-126.

a. The district court's opinion first addressed the question whether to imply a damages remedy under *Bivens* for Mulhollan's alleged violation of Davis's rights under the First and Fifth Amendments. Opinion 14-21, JA 119-126. The court reasoned that damages have historically been available for the violation of constitutionally protected rights, and that courts have been particularly likely to

recognize a damages remedy under *Bivens* where no alternative forms of judicial relief are available. Opinion 14-16, JA 119-121.

The district court rejected the argument that the comprehensive scheme for adjudicating federal employment disputes established by the Civil Service Reform Act constitutes a special factor barring an implied *Bivens* remedy. Opinion 16-21, JA 121-126. The court reasoned that probationary employees such as Davis are not entitled to challenge their removal under the CSRA, and also that the remedial provisions of the CSRA do not include the Library of Congress in the group of agencies whose employees are entitled to seek relief. Opinion 17, JA 122. The district court thus concluded that an implied *Bivens* remedy is appropriate. Opinion 18-21, JA 123-126. In reaching this conclusion, the district court did not address the relevance of the government's concession in district court that, regardless of the availability of a *Bivens* remedy, the plaintiff could seek the equitable remedy of reinstatement by bringing suit against the Librarian of Congress for injunctive relief.

b. On the merits, the district court held that the plaintiff's complaint stated valid claims under the First and Fifth Amendments. The court noted that the plaintiff's First Amendment claim is evaluated under the balancing test set out in *Pickering v. Board of Education of Township High*, 391 U.S. 563 (1968), which

weighs the interest of a government employee as a citizen in commenting on a matter of public interest against the interest of the government in promoting the efficiency of the public services it performs through its employees. Opinion 21-23, JA 126-128.

The district court characterized as minimal the government's interest as an employer in restricting Davis's speech. Opinion 26-29, 31, JA 131-134, 136. The court acknowledged that Mulhollan's communications to Davis expressed the view that the newspaper pieces compromised Davis's ability to lead his division in providing impartial and objective advice, but the court characterized these communications as "typical, everyday employer/employee interactions." Opinion 27-28, JA 132-133. The court also pointed to Davis's temporary assignment as special advisor to Mulhollan as evidence that Davis "still had a good working relationship with his superior." Opinion 28, JA 133 (quotation marks and citation omitted).

The district court reasoned that Davis's pieces did not undermine CRS's reputation for impartiality and objectivity because they did not criticize directly any particular political party or member of Congress, nor refer to Davis's position at CRS. Opinion 29, JA 134. The court also relied on the fact that Davis was not an analyst who himself authored reports for Congress, but instead was head of a

CRS division. Opinion 29-30, JA 134-135. And the court emphasized Davis's allegations that he did not set policy, have significant contact with the public, or hold official responsibility for Guantanamo or military detentions. Opinion 25-26, JA 130-131.

The district court viewed Davis's interest in speaking out about Guantanamo and military commissions, on the other hand, as significant, and concluded that "the *Pickering* balance tips decidedly in the plaintiff's favor." Opinion 26-27, 29-31, JA 131-132, 134-136.

The district court dismissed the plaintiff's facial vagueness challenge to the Library of Congress regulation and CRS policy on outside speaking and writing, holding that they provided "reasonably clear notice that * * * employees must take efforts to ensure that the views expressed in outside speech concerning controversial matters are solely the employee's personal views." Opinion 31-35, JA 136-140.

However, the court upheld the as-applied vagueness challenge, on the ground that the plaintiff lacked "fair warning that he would be punished for his publication of his opinion articles." Opinion 35-36, JA 140-141 (quotation marks and citation omitted). The court emphasized the plaintiff's allegations that he had previously engaged in similar speech with the approval of his superiors at CRS,

and that he had never been notified that his speech might threaten CRS's work. *Ibid.* The court rejected the defendants' argument that the government's "lax enforcement of an otherwise clear regulation cannot sustain a vagueness challenge," invoking this Court's decision in *Keeffe v. Library of Congress*, 777 F.2d 1573, 1579-1580 (D.C. Cir. 1985), for the proposition that the Fifth Amendment is violated if, "due to prior interpretation or enforcement" of the employer's policy, an employee lacks notice that his conduct could have adverse consequences. Opinion 37, JA 142.

Finally, the district court held that Mulhollan was not entitled to dismissal of the claims against him on the basis of qualified immunity. Opinion 37-41, JA 142-146. The district court reasoned that Mulhollan was on notice that his conduct might violate the Constitution, pointing to allegations that Mulhollan asked Davis to acknowledge that the op-ed and letter to the editor were not protected under the First Amendment. Opinion 39-40, JA 144-145. The court also reasoned that the plaintiff's Fifth Amendment claim was factually similar to the claim in *Keeffe*, where a Library of Congress employee was held not to have adequate notice that her attendance at a political convention could subject her to disciplinary action. Opinion 40-41, JA 145-146. The district court concluded that

the constitutional rights at stake were sufficiently clearly established to preclude dismissal at this stage of proceedings. *Ibid.*

SUMMARY OF ARGUMENT

I. The district court erred in refusing to dismiss the claims against Mulhollan on the ground of qualified immunity.

A. At the time Mulhollan terminated Davis's employment as the head of a CRS research division, it was not clearly established that a high-level government official, at an agency charged with providing Congress with objective and impartial research and analysis, had a First Amendment right to publish opinion pieces criticizing the Attorney General's policy on prosecuting Guantanamo detainees, and accusing the former Attorney General and Vice President of the United States of "fear-mongering," without any consequence for his employment.

The district court relied on the fact that Davis was not a "policy-level" employee," but there is no categorical rule that only policymaking officials may be terminated based on their speech. In addition, Davis's own allegations establish that he was a high-level CRS official. Although Davis alleges that he did not have direct responsibility with respect to Guantanamo prosecutions, his publications were clearly related to his official areas of responsibility, defense policy and

foreign affairs. Furthermore, Davis had an obligation to protect his appearance of objectivity and impartiality. Members of Congress and their staff could readily have identified Davis as the author of those pieces. And it is clear that the publications fractured the relationship between Davis and his direct supervisor, Director Mulhollan.

A reasonable official in Mulhollan's position could have concluded that Davis's termination was permissible because the newspaper pieces compromised Davis's appearance of objectivity, as well as that of his division and CRS as a whole; called into question Davis's professional judgment and his ability to serve as an example for his subordinates on compliance with CRS policies; and harmed his working relationship with his direct supervisor. Mulhollan was therefore entitled to qualified immunity on the First Amendment claim.

B. Davis also had no clearly established Fifth Amendment right not to be terminated from his probationary appointment for violating the CRS and Library of Congress policies on outside speaking and writing.

Davis claims that the Fifth Amendment was violated by the application of CRS and Library of Congress policies to him, because he lacked fair notice that he could be terminated because of his speech in light of CRS officials' approval of similar prior speech and/or the agency's failure previously to sanction him. In

order to bring a valid due process claim for lack of prior notice, however, Davis must show that he had a protected interest in continued employment. Probationary employees have no property interest in their jobs. The district court relied on *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985), but that case is distinguishable, because it involved a long-term employee with a protected property interest in her position.

The district court also relied on the alleged failure of CRS officials on prior occasions to enforce CRS and Library of Congress policies, but an agency's broad enforcement discretion is not itself unlawful. Relatedly, even assuming that equitable estoppel could apply against the government, it would not apply here, because Davis does not allege that he was told he could speak about Guantanamo without consequences for his employment, or that he could disregard the disclaimer requirement in the CRS and Library of Congress policies.

Finally, dismissal of Davis's Fifth Amendment claim against Mulhollan would be required in any event, because Mulhollan may only be held personally liable for his own conduct under *Bivens*, and the allegations in support of the claim principally involve other CRS officials. At a minimum, Mulhollan's own alleged conduct does not violate any clearly established Fifth Amendment rights.

II. The district also erred in recognizing a claim against Mulhollan under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the termination of Davis's probationary employment at CRS.

The Civil Service Reform Act (CSRA) establishes a comprehensive scheme for challenging federal employment decisions, but provides no right of judicial review for employees, like Davis, who are terminated in their first year of employment. Although Congress has given Library of Congress employees certain additional rights to challenge adverse employment actions that are claimed to be unlawful, it has not provided a remedy to challenge a termination in alleged retaliation for an employee's speech. Although the plaintiff may bring a claim for equitable relief against the Library of Congress directly under the First Amendment — and has in fact sought that relief — Congress has not created any money damages remedy for employees in the plaintiff's position. In light of the comprehensive remedial scheme established by Congress, and the indications that Davis's lack of additional remedies is not inadvertent, a federal court should not create a *Bivens* claim for money damages against Mulhollan.

STANDARD OF REVIEW

This Court reviews de novo a district court's determination whether a defendant is entitled to qualified immunity. *See Bame v. Dillard*, 637 F.3d 380,

384 (D.C. Cir. 2011); *Broudy v. Mathers*, 460 F.3d 106, 116 (D.C. Cir. 2006). Review of the question whether the district court should have dismissed a case on qualified immunity grounds includes the antecedent legal question whether the district court properly recognized an implied remedy under *Bivens*. *See Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). The question whether the plaintiff has an implied claim for money damages under *Bivens* is also reviewed de novo. *See Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO DISMISS THE CLAIMS AGAINST MULHOLLAN ON THE BASIS OF QUALIFIED IMMUNITY.

Qualified immunity shields government officials from personal liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is intended "to mitigate the social costs of exposing government officials to personal liability," *Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998), by giving officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting

Malley v. Briggs, 475 U.S. 335, 341 (1986)). Properly applied, the doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Ibid.*

The determination whether a right alleged to have been violated is so clearly established that any reasonable officer would have known of it "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *see also Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001) (recognizing that defining "the relevant constitutional right in overly general terms" would "strip the qualified immunity defense of all meaning"). In order for the official to lose the protections of qualified immunity, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Al-Kidd*, 131 S. Ct. at 2083 (emphasis added); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (government official is entitled to qualified immunity unless the unlawfulness of his conduct is "apparent" under pre-existing law).

The Supreme Court has repeatedly "stressed the importance of resolving [qualified] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Qualified immunity provides not only a defense to liability, but also "an entitlement not to stand trial or face the other

burdens of litigation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). District courts should move "expeditiously to weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232.

Under these principles, the district court erred in refusing to dismiss the claims against Mulhollan on the basis of qualified immunity. It was not clearly established at the time Davis's employment was terminated that the head of a division responsible for Defense Policy and Foreign Affairs, in a government agency charged with providing Congress with objective and impartial advice, had a constitutionally protected right to criticize publicly the Attorney General's policy on prosecuting Guantanamo detainees, and to accuse the former Attorney General and former Vice President of "fear-mongering," without any consequence for his employment. Nor was it clearly established that any prior failure by the government agency to enforce its policy on outside speaking and writing erected a constitutional barrier to the future termination of a probationary employee who committed a particularly egregious violation of the policy. This is not a situation in which only a plainly incompetent official or a knowing wrongdoer could have

acted as Mulhollan did. Qualified immunity should protect Mulhollan from the prospect of personal liability and the burdens of defending against this litigation.

A. Mulhollan's Termination Of Davis's Employment As Head Of A CRS Division Did Not Violate Any Clearly Established First Amendment Right.

1. The Supreme Court has recognized the government's interest as an employer in regulating employee speech that harms the "effective functioning of the public employer's enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). A government employee's speech can "[i]nterfere[] with work, personnel relationships, or the speaker's job performance." *Ibid.* Furthermore, public employees "often occupy trusted positions in society," and their public speech may "contravene governmental policies or impair the proper performance of governmental functions." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Borough of Duryea, Pennsylvania* v. *Guarnieri*, 131 S. Ct. 2488, 2494 (2011).

At the same time, government employees do not give up their First Amendment rights when they accept employment, and public employers may not use their "authority over employees to silence discourse, not because it harms

public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384. Accordingly, as the Supreme Court recognized in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the determination whether a public employer may lawfully discharge an employee for engaging in speech requires a balancing of the interests of the employee, as a citizen, in commenting upon a matter of public concern, and the interests of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *See id.* at 568; *see also Connick v. Myers*, 461 U.S. 138, 140 (1983); *Rankin*, 483 U.S. at 384.

This Court has repeatedly recognized that, under the *Pickering* balancing test, a government official may be terminated for public statements that cast doubt on his commitment to agency policies or undermine his relationship with superiors. In *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), the Court held that the First Amendment was not violated by the termination of employment of the Athletic Director of the University of District of Columbia, whose public statements about the university's athletic programs were at odds with the views of the administration and board of the university. As the Court emphasized, "[h]igh-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their

superiors' policies, and perceived by the public as sharing their superiors' aims." *Id.* at 263; *see also, e.g., Lewis v. Cowen*, 165 F.3d 154, 164-166 (2d Cir.), *cert. denied*, 528 U.S. 823(1999) (holding that dismissal of chief of the state lottery for refusing to support publicly a policy approved by his superiors did not violate the First Amendment).

Similarly, in *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998), the Court recognized that a police official in charge of the Investigative Services Bureau of the Metropolitan Police Department could be terminated for expressing policy views at odds with those of his superiors, and that a letter to the editor calling into question his supervisor's credibility, which was written after the official had been demoted to a lower-level position, might also be a lawful basis for termination. *Id.* at 1135-1136, 1138-1139. Although the Court was unable to conclude based on the plaintiff's complaint whether a letter to the editor sufficiently interfered with the police department's effective functioning and his working relationship with the supervisor to warrant termination under *Pickering*, the Court concluded that the individual defendant was nevertheless entitled to qualified immunity. *Id.* at 1138-1139, 1142.

2. The district court erred in holding that no competent, law-abiding government official in Mulhollan's position could have believed that the *Pickering*

balancing test permitted the termination of Davis's employment following the publication of his op-ed and letter to the editor.

At the time Davis's newspaper pieces were published, he was a high-level official at CRS, who reported directly to Director Mulhollan and had supervisory authority over 95 employees. Complaint 2, 8, JA 11, 17. As the head of one of CRS's five research divisions, Davis led, planned, directed, and evaluated the division's research and analysis. Complaint 8, JA 17. Davis's division was specifically responsible for defense policy and foreign affairs, *ibid.*, and worked closely with the Members and staff of the Congressional committees with jurisdiction over those areas. *See* 2 U.S.C. § 166(d).

Furthermore, Davis was employed by an agency, CRS, that has been tasked by Congress with providing objective, non-partisan analysis and research. As CRS's policy on outside speaking and writing emphasizes, CRS employees have a special responsibility to ensure that the agency's ability to function is not compromised by the appearance that CRS has its own agenda, or that its employees are so set in their personal views that they cannot be trusted to provide objective research and analysis. CRS Policy 2, JA 102. Davis was also responsible for counseling subordinate employees on complying with the CRS policy on outside speaking and writing. Memorandum of admonishment 2, JA 89.

A reasonable official in Mulhollan's position could have concluded that Davis's effectiveness as head of his division was compromised by his pieces, which conveyed to a large, international audience, Davis's strongly worded criticisms of the current Attorney General's policy on prosecution of Guantanamo detainees and the views of the former Attorney General on the risks posed by such detainees. The pieces made clear Davis's vehement opposition to a major policy option contemporaneously under consideration by Congress.[6] Although the specific issue of prosecution of Guantanamo detainees was not the direct responsibility of Davis's division, he was responsible for leading his division in providing analysis and advice on defense policy and foreign affairs, and in maintaining good relations with the relevant congressional committees with jurisdiction over those areas.

Furthermore, Davis's letter to the editor explicitly questioned the good faith of the former Attorney General and the former Vice President of the United States. The personal tone of this criticism called into question Davis's impartiality and objectivity generally. Davis's failure to seek advance approval from CRS before

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[6] A comprehensive description of legislative efforts relating to Guantanamo detainees and military commissions during this time period is available in Congressional Research Service, "Guantanamo Detention Center: Legislative Activity in the 111th Congress," Jun. 17, 2010, available at http://fpc.state.gov/documents/organization/145599.pdf.

submitting his writings for publication, or to acknowledge the potential harm to CRS that they could cause, also cast doubt on his professional judgment, as well as his ability to serve as an example to employees under his management and supervision.

A reasonable official here also could have concluded that Davis's publications caused substantial harm to his working relationship with his direct supervisor, Mulhollan. The complaint and the documents incorporated by reference make clear that Mulhollan believed that Davis's publications — and his failure to inform Mulhollan in advance that he had written the pieces and was submitting them for publication, or to acknowledge the harm they caused to CRS once they were published — demonstrated a lack of judgment and caused Mulhollan to lose trust in Davis. The plaintiff's complaint describes the communications between Mulhollan and Davis following the publication of the op-ed and letter to the editor, including a lengthy letter of admonishment, meetings and emails in which Mulhollan expressed his displeasure with the publications, and finally notice of Davis's termination. The fact that Davis's publications harmed his working relationship with his supervisor, in and of itself, weighs in favor of the constitutionality of his termination. *See, e.g., Rankin*, 483 U.S. at 388; *O'Donnell*, 148 F.3d at 1134, 1138.

Numerous courts have recognized that, given the fact-dependent nature of the *Pickering* balancing test, it is rare that the unlawfulness of a speech restriction will be so apparent that qualified immunity will not shield the decisionmaker from personal liability. *See, e.g., Jordan v. Carter*, 428 F.3d 67, 75 (1st Cir. 2005) (recognizing that First Amendment balancing test in this context is "subtle, yet difficult to apply, and not yet well defined, and that, consequently, only in the extraordinary case will it have been clearly established that a public employee's speech merited constitutional protection"); *Dible v. City of Chandler*, 515 F.3d 918, 930 (9th Cir. 2008) (because applicable First Amendment law requires a "context-intensive, case-by-case balancing analysis," it "will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity").

Here, the district court did not identify any factually similar case holding that the First Amendment is violated by a government official's termination of a key subordinate based on public statements by the subordinate calling into question the agency's impartiality and objectivity. More generally, the district court pointed to no case holding that the First Amendment protects a high-level government official's right to publish controversial statements about a policy matter pending before the agency. To the extent that existing caselaw demonstrated anything about the lawfulness of terminating Davis, it suggested that

this course of action was permissible. This is sufficient to entitle Mulhollan to qualified immunity from suit.

3. The district court identified several reasons why, in the court's view, qualified immunity on the First Amendment claim was not warranted. None of them survives examination.

First, the district court relied on Davis's allegations that he "was not a policy-level employee" to conclude that Davis "was not required to exercise any special degree of caution in the exercise of his speech." Opinion 25, JA 130. It is undisputed, however, that Davis led a CRS research division; supervised 95 people and planned and directed their analytical and research activities; and reported directly to the head of the agency. Complaint 8, JA 17. Although Davis did not independently establish policy — CRS is not a policymaking entity — his job duties are comparable to those of the "key deputies" and high-level officials discussed in *Hall*, *O'Donnell*, and similar cases.

Furthermore, there is no legal rule that only "key deputies" or policymaking officials of a government employer may be terminated on the basis of their speech. In *O'Donnell*, the Court recognized that a letter to the editor harming the working relationship between a lower-level police department official and the Chief of Police might be a lawful basis for termination. *See* 148 F.3d at 1135-1136, 1138-

1139. Similarly, in *Rankin*, the Supreme Court reasoned that even clerical employees might be subject to termination based on their private speech. *See* 483 U.S. at 391 n.18. Given Davis's high-level position, and the nature of his comments, a reasonable official could have concluded that his termination was permissible.

Second, the district court reasoned that qualified immunity was inappropriate because the plaintiff alleged that he had no official responsibility regarding issues relating to the prosecution of Guantanamo detainees. Opinion 26, JA 131. Even if Davis did not have direct responsibility with respect to that subject, however, his views would be indirectly relevant to his official areas of authority, defense policy and foreign affairs. Furthermore, Davis led his division in providing research and analysis to, and maintaining its close relations with, the relevant congressional committees with jurisdiction over Guantanamo-related issues, including Members and staff from both sides of the aisle. Davis was also responsible for counseling employees of the division on their compliance with the CRS policy on speaking and writing.

Furthermore, Davis's public statements on a highly controversial subject on which Congress had repeatedly considered and enacted legislation, using highly-charged rhetoric to criticize the current and former Attorney General of the United

States and the former Vice President, undermined his appearance of objectivity and impartiality, and that of his division and CRS as a whole. The district court gave *no* weight to the agency's interest in protecting its reputation, which was substantial. This Court recently recognized in *Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011), that a government agency charged with providing accurate and objective news broadcasting has a strong interest in preserving its journalistic reputation for neutrality. *Id.* at 316. CRS similarly has a strong interest in protecting its reputation for impartiality and objectivity. Although Davis did not himself personally author CRS analyses or reports, as the district court noted, that is because he was responsible as head of the division for managing *all* of the division's research and analytical activities. If anything, his greater responsibilities should weigh in favor of giving the government employer *greater* latitude to terminate his employment based on his harmful, public statements.

The district court emphasized that Davis's publications did not on their face identify him as a CRS official, Opinion 29, JA 134, but they expressly identified him as the former Chief Prosecutor at Guantanamo. Complaint 14, JA 23. Davis had previously testified before Congress about his experience in that role, and had also had direct contact with members of Congress and their staff in his capacity as

head of the Air Force Judiciary. Complaint 7, JA 16; Job Application 2, JA 43. Davis's position at CRS gave him responsibility for one of the five research divisions of the agency, the sole function of which was to interact with Congress. In the face of this record, it is reasonable to infer that constituents of CRS, Members of Congress and their staff, would readily have identified Davis as the author of the newspaper pieces.

In sum, a reasonable official in Mulhollan's position could have concluded that Davis's publications had inherently compromised his reputation for objectivity and impartiality, as well as that of his division and CRS as a whole, with the constituents of CRS, *i.e.*, Members of Congress and their staffs.

Third, the district court reasoned that Davis's speech must not have caused any harm to CRS because Davis alleged that he "had previously engaged in similar speech without any detrimental impact on his working relationship with defendant Mulhollan or anyone else." Opinion 28, JA 133. Significantly, however, Davis did *not* allege that Mulhollan was aware that Davis had previously engaged in similar public speech. The specific allegations in the complaint are that Davis had previously sought and received permission from Mulhollan to be interviewed for a BBC documentary about Guantanamo; to participate in a law review conference about the military commissions system; and to receive an award from a regional

bar association. Davis does not allege that Mulhollan gave him approval to express his views about the wisdom of past or current administrations' positions on prosecuting Guantanamo detainees in military commissions, much less to engage in inflammatory criticisms of high-level government officials.

Furthermore, the fact that Davis had repeatedly sought advance approval before speaking publicly on issues related to military commissions and Guantanamo demonstrates that Davis was aware that his private speech could affect his official duties — and also that he had a responsibility to seek permission before speaking about these topics. Notably, he did not seek advance approval before submitting his op-ed and letter to the editor to the newspapers for publication, notwithstanding that CRS policy strongly encouraged CRS employees to submit outside writings for pre-clearance and despite the highly charged tone of those publications. A reasonable official in Mulhollan's position could conclude that Davis's actions raised serious questions about his judgment and intrinsically impaired his effectiveness as Assistant Director.

Somewhat puzzlingly, the district court also reasoned that the plaintiff's publications must not have damaged his relationship with Mulhollan because Davis was subsequently appointed as Mulhollan's special advisor. Opinion 28, JA 133. It is undisputed, however, that this appointment was temporary, post-dated

Davis's removal as Assistant Director, and was intended to allow Davis on a transitional basis to seek other employment. Complaint 4, 15-16, JA 13, 24-25. In the face of the allegations in the complaint as a whole, this temporary appointment supports no reasonable inference that the publications did not harm Davis's working relationship with Mulhollan.

Fourth, and finally, the district court pointed to the fact that Mulhollan allegedly asked Davis to acknowledge that his publications were not protected by the First Amendment as supposed evidence that a reasonable official in Mulhollan's position would have understood that terminating Davis's employment violated a clearly established constitutional right. Opinion 40, JA 145. Even apart from the fact that Mulhollan's subjective motivation is legally irrelevant to whether he is protected by qualified immunity, *see Anderson*, 483 U.S. at 645, Mulhollan's statements reflect the view that Davis's pieces were *not* constitutionally protected, because they interfered with CRS's ability to carry out its statutory mandate and with Davis's own job performance and working relationships. There was no basis in existing precedent to conclude that Davis had a clearly established right to publish strident criticisms of current and former government officials and their decision to prosecute some Guantanamo detainees before military commissions, at the same time that he led the CRS division

responsible for defense policy and foreign affairs. From any objective standpoint, a reasonable official in Mulhollan's position plainly could have concluded that Davis's termination was permitted.

B. Mulhollan's Termination Of Davis's Probationary Employment Also Did Not Violate Any Clearly Established Fifth Amendment Right.

A reasonable government official also could have concluded that, at a minimum, the Fifth Amendment was not violated by applying the CRS and Library of Congress policies on outside speaking and writing to sanction Davis for his op-ed and letter to the editor. The district court held that the CRS and Library of Congress policies gave fair warning on their face about what they required, but that they were unconstitutionally applied to Davis because the agency's decision to discipline Davis following the publication of the op-ed and letter to the editor "was a departure from what previously had been the norm." Opinion 35-36, JA 140-141. That ruling is unsupported by precedent, which establishes that Davis had no protected interest in his employment and that any inconsistent past application by CRS officials of policies on outside speaking and writing did not bar the government from sanctioning a particularly egregious subsequent violation of those policies.

1. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). Under the Due Process Clause, Davis had a right to prior notice of the risk of termination only if he had a property interest in continued employment. *See, e.g., Piroglu v. Coleman*, 25 F.3d 1098, 1104 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1147 (1994); *Hall*, 856 F.2d at 265; *Garrow v. Gramm*, 856 F.2d 203, 206-209 (D.C. Cir. 1988). Crucially, Davis was terminated in his probationary period of employment. Complaint 15, JA 24. It is well-established that probationary employees have no protected interest in employment, and hence no constitutional right to prior notice or an opportunity to be heard before being terminated. *See, e.g., Piroglu*, 25 F.3d at 1104; *Batra v. Board of Regents of Univ. of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996); *Kyle v. Morton High Sch.*, 144 F.3d 448, 453-454 (7th Cir. 1998).

The district court reasoned that Davis had a Fifth Amendment right under *Keeffe v. Library of Congress*, 777 F.2d 1573, 1579-1580 (D.C. Cir. 1985). Opinion 40-41, JA 145-146. In *Keefe*, this Court held that a CRS analyst lacked fair notice that service as a delegate to a political convention would violate Library of Congress regulations, where the regulations explicitly provided that Library of Congress employees retained the right to "[s]erve as * * * delegate[s] to * * *

political * * * convention[s]"; the employee in question had previously been permitted to serve as a delegate to a political convention, as had all other employees who had sought similar clearance; and the employee was not given fair notice before attending the convention that the agency's interpretation of its regulations had changed. *See Keefe*, 777 F.2d at 1582. The *Keeffe* Court concluded that the employee, who was a long-term employee of CRS, was not given a "reasonable opportunity to know what is prohibited." *Ibid. (quoting Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

But in *Keeffe*, as well as in *Grayned*, cited and quoted in *Keeffe*, there was a constitutionally protected interest at stake that was the basis for the claim of lack of adequate notice. The plaintiff in *Keeffe* was a long-term Library of Congress employee, who was held to have a constitutionally protected property interest in her job position. *See Keeffe v. Library of Congress*, 588 F. Supp. 778, 789 (D.D.C. 1984). Likewise, in *Grayned*, an individual had been arrested, charged, and convicted of violations of two municipal ordinances that were challenged on vagueness grounds, thereby implicating his constitutionally protected liberty interests. 408 U.S. at 105-106. Here, in contrast, Davis had no analogous protected interest in his probationary employment that would require CRS to provide advance notice that public speech could result in termination.

2. The district court also appeared to believe that, because Davis had allegedly engaged in similar prior speech without sanction by CRS, and CRS officials had previously given Davis advance approval to speak and write publicly about Guantanamo military commissions at specific events, CRS officials had a heightened obligation to notify Davis that future speaking and writing on this topic could lead to termination. But if CRS had no constitutional obligation to notify Davis at the outset of his employment that he could be terminated for making controversial or inflammatory public statements, and if, as the district court held, the CRS and Library of Congress policies gave fair notice on their face of what they prohibited, then it is difficult to understand why any past failure by the agency to enforce those policies against Davis would erect a constitutional barrier to their future enforcement.

The Supreme Court has repeatedly recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also Oyler v. Boles*, 368 U.S. 448, 456 (1962) (government "selectivity in enforcement [of criminal statute] is not in itself a federal constitutional violation"); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *cf. District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-114

(1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal.").

The district court's rationale might be understood as a form of equitable estoppel, but even assuming that the government could be subject to estoppel, *but see Heckler v. Community Health Servs.*, 467 U.S. 51, 59-60 (1984), that doctrine would not apply here. At a minimum, for equitable estoppel to be implicated, a CRS official would have had to make a factual misrepresentation to Davis having reason to believe that he would rely on it, and Davis would have had to reasonably rely on the misrepresentation. *See ibid.*; *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Davis does not allege that any CRS official told him that he was free to speak publicly on Guantanamo detainees and military commissions without any possible consequences for his employment at CRS, or that he could publish on the topic in the future without providing the explicit disclaimer required by the CRS and Library policies. Mere silence or failure to warn does not constitute a misrepresentation that could give rise to estoppel. *See Wiser v. Lawler*, 189 U.S. 260, 271 (1903) (recognizing the distinction for purposes of estoppel between "mere silence and a deceptive silence accompanied by an intention to defraud"). At the very least, a reasonable government official in Mulhollan's position could have concluded that any inconsistency in the prior application of the CRS policy

on outside speaking and writing did not prohibit CRS from responding to a particularly egregious violation of that policy by terminating Davis's probationary employment.

3. Finally, even if the allegations in the complaint were sufficient to allege a violation of the Fifth Amendment by CRS, they would not be sufficient to state a valid *Bivens* claim against Mulhollan. A government official may be held personally liable under *Bivens* only "for his or her own misconduct"; he is not subject to liability "for the unconstitutional conduct of [his] subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009). Davis's Fifth Amendment claim was predicated on the theory that he had previously engaged in outside speaking and writing that was similar to his op-ed and letter to the editor, with the knowledge and approval of CRS officials. Virtually all of the allegations he makes in support of this claim, however, involve CRS officials other than Mulhollan.

The district court relied on the plaintiff's allegations that the CRS Deputy Director approved Davis's attendance at a Human Rights Watch dinner, where he gave a speech, and that he reported back to the Deputy Director after the event. Complaint 9-10, JA 18-19; Opinion 36, JA 141. But Davis does *not* allege that Mulhollan approved of, or was even aware of, his attendance or speech at the

dinner. Davis also alleges that he was informed by "a CRS attorney" that he could speak at a law school conference and publish a law review article without providing an express disclaimer that the views expressed were his own and not those of the Library of Congress or CRS. Complaint 10, JA 19. He alleges that CRS monitored all public speaking, writing, and media appearances of his employees, but that no CRS official informed him after his appearance at the conference that his public expression of his views had undermined his effectiveness as an employee. Complaint 11, JA 20. Again, however, these allegations do not show that Mulhollan was personally involved in the challenged conduct or had any knowledge of Davis's public speaking. Personal involvement is the *sina qua non* of individual liability under *Bivens*.

Ultimately, the plaintiff makes only two sets of allegations in support of his Fifth Amendment claim that involve Mulhollan personally. First, he alleges that Mulhollan gave advance approval for the plaintiff to be interviewed for a BBC documentary about Guantanamo, to attend a law review conference, and to accept an award from a bar association. Complaint 10-11, JA 19-20. Yet the plaintiff does not allege that Mulhollan was aware of the content of his speech at the events in question, nor does he allege facts from which such knowledge on the part of Mulhollan could reasonably be inferred. It would be wholly speculative based on

the allegations in this complaint to assume that Mulhollan knew that Davis had previously engaged in speech similar to that in his op-ed and letter to the editor. *See Iqbal*, 129 S. Ct. at 1952.

The plaintiff also alleges that Mulhollan was aware of the plaintiff's past public speaking and writing when the plaintiff was hired, yet did not warn him that public speaking and writing could pose a problem to his employment. Complaint 8, JA 17. It is undisputed, however, that the plaintiff knew that his outside speaking and writing as an employee of CRS were governed by the CRS and Library of Congress policies. Those policies, as the district court properly held, gave fair notice to employees of their requirements. Opinion 32-35, JA 137-140. It would make no sense to conclude that Davis was misled by Mulhollan's failure to restate orally the same restrictions set out in the written policies. At the very least, Mulhollan's alleged silence in the face of clear written policies on outside speaking and writing did not constitute a violation of such clearly established rights under the Fifth Amendment as to warrant a denial of the entitlement to qualified immunity.

II. THE DISTRICT COURT ERRED IN CREATING A *BIVENS* REMEDY TO CHALLENGE THE TERMINATION OF DAVIS'S PROBATIONARY EMPLOYMENT.

Regardless of the application of qualified immunity, the district court erred by recognizing an implied claim under *Bivens* to challenge the termination of the plaintiff's probationary period of employment as an Assistant Director of CRS. The Civil Service Reform Act (CSRA) establishes a comprehensive scheme for challenging federal employment decisions, but it does not give any remedy to an employee terminated in his initial one-year period of employment. Furthermore, although Congress has applied certain federal anti-discrimination and employment statutes to the Library of Congress, it has not afforded any right of review to an employee who is terminated in alleged retaliation for his speech. Where Congress has considered what remedies should be available to Library of Congress and other federal employees to challenge adverse employment actions, but has chosen not to provide the remedy that the plaintiff seeks — and where it is undisputed that the plaintiff may obtain injunctive relief directly against the Library of Congress for any unlawful termination — it is inappropriate for a court to supplement that remedial scheme by creating a claim for money damages under *Bivens*.

1. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court — "proceeding on the theory that a right suggests a

remedy * * * 'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.'" *Iqbal*, 129 S. Ct. at 1947 (quoting *Correctional Servs., Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). However, "[b]ecause implied causes of action are disfavored," the Supreme Court has been reluctant to extend *Bivens* liability to new contexts, and has specifically declined to recognize a *Bivens* claim "sounding in the First Amendment." *Iqbal*, 129 S. Ct. at 1948 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)).

In *Bush v. Lucas*, 462 U.S. 367, the Court held that a federal employee has no implied cause of action under *Bivens* to challenge his demotion, allegedly in retaliation for public criticism of his agency. Although the employee was entitled to challenge the demotion under regulations in effect at that time, the civil service remedies available to him "were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered." *Id.* at 372-373, 386-387 & nn.30-32. Nevertheless, the Court refused to imply an additional remedy, holding that any new judicial remedy to challenge the employee's demotion should be created by Congress. *Id.* at 388-390.

In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Supreme Court likewise refused to recognize a *Bivens* claim for the allegedly unconstitutional denial of

Social Security benefits. *Id.* at 416-418. The Court reasoned that a *Bivens* remedy is not appropriate where special factors counsel hesitation, and emphasized that the "absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible." *Id.* at 421-422. Where there are "indications that congressional inaction has not been inadvertent," the Court reasoned, such as where litigation implicates "policy questions in an area that ha[s] received careful attention from Congress," a *Bivens* remedy should not be recognized. *Id.* at 423. Emphasizing that Congress had repeatedly enacted legislation in this area but had not provided the type of remedy sought by the plaintiffs, the Court declined to create a *Bivens* claim for the allegedly unconstitutional termination of benefits. *Id.* at 426.

In *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988), this Court sitting en banc similarly refused to imply a *Bivens* claim to challenge a federal agency's failure to hire an applicant and to promote another employee in alleged retaliation for their speech. The Court recognized that the plaintiffs had no right to judicial review of the merits of their claims under the CSRA, nor to invoke the administrative remedies in the statute for certain adverse personnel actions. *Id.* at 225. Nevertheless, this Court held that the unavailability of a remedy did not

support an implied cause of action under *Bivens*, given the comprehensiveness of the CSRA and the indications that the omission of remedies for the types of harms alleged by the plaintiffs was not inadvertent. *Id.* at 228.

Critically, the en banc Court held in *Spagnola* that, in determining whether to recognize an implied *Bivens* claim, "a case-by-case examination of the particular administrative remedies available to a given plaintiff [is] unnecessary." 859 F.2d at 228. Where Congress has established a comprehensive statutory scheme, but "has not inadvertently omitted damage remedies for certain claimants," the Court held, "it is not for the judiciary to question" whether those claimants should nevertheless have a right to sue. *Id.* at 228 (internal quotation marks omitted).

Finally, in *United States v. Fausto*, 484 U.S. 439 (1988), the Supreme Court held that a federal employee could not challenge a 30-day suspension from employment by bringing suit under the Back Pay Act. Although the plaintiff in *Fausto* had no right under the CSRA and agency regulations to administrative or judicial review of his 30-day suspension, the Court nevertheless held that the Bay Pay Act claim was barred. *Id.* at 447-448. In reaching this conclusion, the Court held that the limitations on remedies to certain employees and categories of harms

in the CSRA reflected Congress' intent that no additional remedies should be available. *Id.* at 447.

2. Congress has enacted a comprehensive remedial scheme for federal employees subject to adverse employment actions. In addition, Congress has given additional rights to Library of Congress employees to challenge certain adverse employment actions. However, Congress has elected not to provide a money damages remedy for the type of alleged wrong that is the basis for the plaintiff's claim — although it is undisputed that the plaintiff has an equitable remedy available against the Library of Congress directly to challenge his termination. The existence of this remedial scheme, and the clear evidence that Congress did not act inadvertently in failing to provide a money damages remedy for employees of the Library of Congress or other federal agencies who challenge a termination within the first year of their employment, should preclude an implied remedy under *Bivens*.

The plaintiff in this case, like the plaintiffs in *Fausto* and *Spagnola*, is within the definition of "excepted service" employees governed by the CSRA. He is in the "civil service," *i.e.*, he holds an "appointive position[] in the executive, judicial, [or] legislative branches of the Government of the United States, except positions in the uniformed services," 5 U.S.C. § 2101(1), but is not in the "Senior

Executive Service" or in the "competitive service." *See Id.* §§ 2103(a), 2102(a). In addition, because Davis served in active duty with the U.S. Air Force for several years following September 11, 2001, and preceding his retirement in 2007, he falls within the definition of "preference eligible" individuals for purposes of chapters 43 and 75 of Title 5. *See* 5 U.S.C. § 2108(1)(D), (4).

The CSRA gives rights and remedies to certain categories of excepted service and preference eligible employees. Under Chapter 43, an employee who is subject to removal for unacceptable job performance has a right to advance notice, an opportunity to be heard, and certain rights of appeal to the Merit Systems Protection Board (MSPB) and the Federal Circuit. *See* 5 U.S.C. § 4303(b)(1), (e). However, those rights do not apply to employees who are removed within their initial one-year period of appointment. *See* 5 U.S.C. § 4303(f)(3). In addition, the rights apply only to employees of an "agency" as defined in the statute, *id.* § 4301(1), which excludes the Library of Congress. *Cf.* 5 U.S.C. § 7103(a)(3) (referring separately to "Executive agency" and "Library of Congress").

Chapter 75 accords similar rights of review to employees who face adverse personnel actions for the "efficiency of the service." 5 U.S.C. §§ 7501-04, 7511-14. However, review of the termination of employment of an individual in the "excepted service" is available only to employees who have been employed for a

year or more in an "Executive agency," or the U.S. Postal Service or Postal Regulatory Commission. 5 U.S.C. §§ 7512,(1), 7511(a). Davis was still within his one-year probationary period at the time his employment was terminated, and the Library of Congress is not an "Executive agency" for purposes of this Chapter.[7]

Since enacting the CSRA, Congress has further considered the specific remedies that should be available to Library of Congress employees to challenge adverse employment actions. The Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (CAA), applies certain federal anti-discrimination and employment statutes to the Library of Congress. *See id.* §§ 201(c), 202(a)(c), 205(a)(2), 206(a)(2)(B)-(C). The CAA also provides certain rights to review of complaints of alleged violations of those statutes, including the right to a hearing before a neutral hearing officer and an appeal to a Board made up of Members of Congress, with a subsequent right of judicial review of the Board's decision. *See id.* §§ 301(b), 401(3). However, Congress did not create any mechanism to

[7] Chapter 23 of the CSRA permits a federal employee who has been subject to discrimination on the basis of race, gender, or "political affiliation" to petition the Office of Special Counsel, which can recommend that the agency make corrective action. *See* 5 U.S.C. §§ 2302(b)(1)(E), 1212(a), 1214. However, that remedy is only available to employees of "an Executive agency" and the "Government Printing Office." *See* 5 U.S.C. § 2302(a)(C).

challenge an adverse employment action against a Library of Congress employee in alleged violation of the First Amendment. And although the CAA directs the Administrative Conference of the United States to study the application of specified federal laws to the Library of Congress and several other entities, *see* Pub. L. No. 104-1, Title II, part F, § 230, to evaluate whether the rights, protections, and procedures applicable to their employees "are comprehensive and effective" or new legislation is warranted, S. Rep. No. 103-397, at 26-27 (1994), Congress has not to date enacted subsequent legislation. Accordingly, the remedy available to an employee of the Library of Congress who challenges the termination of his probationary employment in alleged violation of the First Amendment is a suit against the Library of Congress brought directly under the First Amendment, and seeking injunctive relief.

3. In this case, as in *Spagnola*, *Schweiker*, and *Bush*, the existence of a comprehensive remedial scheme should foreclose a court from creating an implied remedy under *Bivens* for Davis to challenge the termination of his probationary employment by the Library of Congress. The CSRA and the CAA were intended by Congress to provide a comprehensive scheme for federal employees, including employees of the Library of Congress, to challenge adverse employment actions. In enacting these statutes, Congress chose not to permit employees of any agency

in their initial one-year period of employment to challenge their termination. Furthermore, Congress elected not to create a remedy for Library of Congress employees to challenge their termination in alleged retaliation for constitutionally protected speech. In light of the nature of the statutory schemes, it is evident that Congress' decision was not inadvertent.

In holding that Davis's *Bivens* claim could nevertheless proceed, the district court relied heavily on the fact that Davis has no right to judicial review of the termination of his probationary employment under the CSRA, the CAA, or administrative regulations. Opinion 17-18, JA 122-123; *see also* Opinion 20, JA 124 ("[T]he Court cannot accept the proposition that a system affording absolutely no review for the plaintiff's constitutional violations can fairly or accurately be deemed 'comprehensive.'"). As the en banc Court made clear in *Spagnola*, however, that type of "case-by-case evaluation of the particular administrative remedies available to a given plaintiff" is "unnecessary" and unhelpful in determining whether a *Bivens* remedy exists. 859 F.2d at 228.

In *Spagnola*, the plaintiffs had no right under the CSRA to judicial review of the merits of their challenge to their failure to be hired and promoted in alleged retaliation for their protected speech, yet this Court held that they had no implied remedy under *Bivens*. 859 F.2d at 225, 228-229. Similarly, in *Fausto*, the

Supreme Court recognized that the plaintiff had no right to compensatory back pay under the CSRA for his allegedly wrongful suspension, yet refused to permit a suit under the Back Pay Act. 484 U.S. at 454-455. As this Court explained in *Wilson*, "[t]he special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue." 535 F.3d at 709-710.

Notably, in refusing to recognize a *Bivens* remedy in *Spagnola*, this Court relied on the Supreme Court's suggestion that the CSRA would preclude an implied *Bivens* remedy even where, in the specific case of "adverse personnel actions against probationary employees," no judicial remedy existed. 859 F.2d at 228 n.8 (citing *Schweiker v. Chilicky*, 487 U.S. at 421-423). The *Spagnola* Court also emphasized that the Supreme Court had vacated and remanded for further consideration a Ninth Circuit decision permitting a federal employee whose supervisory position was terminated during his probationary period to bring a *Bivens* claim. 859 F.2d at 228 (discussing *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986)). On remand, the Ninth Circuit reversed its earlier decision, holding that the fact the probationary employee had no right to judicial review of his demotion did not justify an implied *Bivens* remedy. *Kotarski v. Cooper*, 866 F.3d 311, 312 (9th Cir. 1989). No sound basis exists to permit probationary employees

in the Library of Congress to challenge the termination of their probationary employment through a suit for money damages under *Bivens*, while employees at other federal agencies terminated during their first year of employment have no right of judicial review under the CSRA.

4. Furthermore, in choosing not to create additional remedies for Library of Congress employees to challenge adverse employment actions beyond those available under the CSRA and the CAA, Congress was presumably aware of the scheme of administrative review provided under Library of Congress regulations. The Library of Congress has established a remedial scheme under which employees may challenge various adverse employment actions, including the termination of their employment, before a neutral hearing officer with a right of further review. *See* Library of Congress Regulation 2020-3.1, §§ 2(1), 4(2), 10-11. Like the appeal rights available under the CSRA, however, these administrative remedies are not available to challenge a removal from office during an employee's probationary period. *See* Library of Congress Regulation 2020-3.1, § 3(1)(1).

The facts of this case are thus similar to *Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005), *cert. denied*, 547 U.S. 1191 (2006), where the court of appeals refused to recognize a *Bivens* claim to challenge the termination of a federal probation

officer's employment, which was allegedly motivated by racial discrimination. In *Dotson*, as here, various provisions of the CSRA applied to the plaintiff employee, but he had no right to administrative or judicial review of the adverse employment action under the CSRA's remedial provisions. 398 F.3d at 163-165. The employee in *Dotson* also had certain administrative appeal rights available to him within the judicial branch. *Id.* at 174-176. After exhaustively tracing the legislative history of the CSRA, the court concluded that the exclusion of judicial branch employees from the CSRA's remedial provisions was not inadvertent but deliberate, and that it was intended in part to protect the independence of the judicial branch. *Id.* at 170-176. The court held that an implied *Bivens* remedy was foreclosed by the existing remedial scheme. *Id.* at 176.

Here, as in *Dotson*, Congress specifically considered and determined what rights of review should be given to federal employees, including employees of the Library of Congress, to challenge adverse employment actions. Given the carefully crafted limitations in the CSRA and the CAA on rights of review, it would improperly circumvent Congress' intent to recognize an implied right of action under *Bivens* to challenge the termination of Davis's probationary employment as a CRS Assistant Director.

5. Although the district court did not specifically discuss or analyze the holding in *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court ruled in that case that a former congressional employee could pursue a *Bivens* claim against a former Member of Congress for firing her because of her sex. *Id.* at 245-248. In reaching that conclusion, however, the Court emphasized that, because the former employer was no longer a Member of Congress, "equitable relief in the form of reinstatement would be unavailing" and no other remedy was available. *Id.* at 245. In this case, it is undisputed that the plaintiff can bring an equitable claim for reinstatement against the Library of Congress directly under the First Amendment. The *Davis* Court also reasoned that there was no evidence that, in enacting federal civil rights legislation, Congress intended to foreclose any remedy for employees not governed by the statute. *Id.* at 247. Here, in contrast, the CSRA and the CAA provide clear evidence of Congress' intent to foreclose other remedies for adverse employment actions.

This Court also ruled in *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985), that Title VII did not preclude constitutional claims brought by an organization of Library of Congress employees alleging that the Library of Congress had withdrawn its recognition of the organization as an official employee organization, and had punished the

organization and its members for their constitutionally protected criticisms of Library policies. *Id.* at 1415. In that case, however, the plaintiffs brought no *Bivens* action, and the ruling was limited to determining the preclusive effect of Title VII. Neither *Davis* nor *Ethnic Employees of Library of Congress* evaluated whether special factors counseled hesitation in implying a damages remedy under *Bivens*.

In sum, neither *Davis* nor *Ethnic Employees of Library of Congress* supports the judicial creation of a *Bivens* claim for money damages against Mulhollan. Davis challenges an adverse employment action — the termination of his probationary employment — for which Congress has intentionally declined to provide a remedy under the CSRA or the CAA. Given the clear indication that Congress' omission of a right to judicial review was not inadvertent, it was inappropriate for the district court to supplement the congressional remedial scheme with an implied claim for money damages against Mulhollan personally.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of the district court and should remand the case with instructions to dismiss the claims against the individual defendant, Daniel P. Mulhollan.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,199 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Defendant-Appellant were filed on the following counsel by electronic service through the CM/ECF system and by regular mail, postage prepaid, on August 1, 2011:

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ADDENDUM

2 U.S.C.A. § 166. Congressional Research Service

(a) Redesignation of Legislative Reference Service
The Legislative Reference Service in the Library of Congress is hereby continued as a separate department in the Library of Congress and is redesignated the "Congressional Research Service".

(b) Functions and objectives
It is the policy of Congress that--

(1) the Librarian of Congress shall, in every possible way, encourage, assist, and promote the Congressional Research Service in--

(A) rendering to Congress the most effective and efficient service,

(B) responding most expeditiously, effectively, and efficiently to the special needs of Congress, and

(C) discharging its responsibilities to Congress;

and

(2) the Librarian of Congress shall grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence consistent with these objectives.

(c) Appointment and compensation of Director, Deputy Director, and other necessary personnel; minimum grade for Senior Specialists; placement in grades GS-16, 17, and 18 of Specialists and Senior Specialists; appointment without regard to civil service laws and political affiliation and on basis of fitness to perform duties

(1) After consultation with the Joint Committee on the Library, the Librarian of Congress shall appoint the Director of the Congressional Research Service. The basic pay of the Director shall be at a per annum rate equal to the rate of basic pay provided for level III of the Executive Schedule under section 5314 of Title 5.

(2) The Librarian of Congress, upon the recommendation of the Director, shall appoint a Deputy Director of the Congressional Research Service and all other necessary personnel thereof. The basic pay of the Deputy Director shall be fixed in accordance with chapter 51 (relating to classification) and subchapter III (relating to General Schedule pay rates) of chapter 53 of Title 5, but without regard to section 5108(a) of such title. The basic pay of all other necessary personnel of the Congressional Research Service shall be fixed in accordance with chapter 51 (relating to classification) and subchapter III (relating to General Schedule pay rates) of chapter 53 of Title 5, except that--

(A) the grade of Senior Specialist in each field within the purview of subsection (e) of this section shall not be less than the highest grade in the executive branch of the Government to which research analysts and consultants, without supervisory responsibility, are currently assigned; and

(B) the positions of Specialist and Senior Specialist in the Congressional Research Service may be placed in GS-16, 17, and 18 of the General Schedule of section 5332 of Title 5, without regard to section 5108(a) of such title, subject to the prior approval of the Joint Committee on the Library, of the placement of each such position in any of such grades.

(3) Each appointment made under paragraphs (1) and (2) of this subsection and subsection (e) of this section shall be without regard to the civil service laws, without regard to political affiliation, and solely on the basis of fitness to perform the duties of the position.

(d) Duties of Service; assistance to Congressional committees; list of terminating programs and subjects for analysis; legislative data, studies, etc.; information research; digest of bills, preparation; legislation, purpose and effect, and preparation of memoranda; information and research capability, development

It shall be the duty of the Congressional Research Service, without partisan bias--

(1) upon request, to advise and assist any committee of the Senate or House of Representatives and any joint committee of Congress in the analysis, appraisal, and evaluation of legislative proposals within that committee's jurisdiction, or of recommendations submitted to Congress, by the President or any executive

agency, so as to assist the committee in--

(A) determining the advisability of enacting such proposals;

(B) estimating the probable results of such proposals and alternatives thereto; and

(C) evaluating alternative methods for accomplishing those results;

and, by providing such other research and analytical services as the committee considers appropriate for these purposes, otherwise to assist in furnishing a basis for the proper evaluation and determination of legislative proposals and recommendations generally; and in the performance of this duty the Service shall have authority, when so authorized by a committee and acting as the agent of that committee, to request of any department or agency of the United States the production of such books, records, correspondence, memoranda, papers, and documents as the Service considers necessary, and such department or agency of the United States shall comply with such request; and further, in the performance of this and any other relevant duty, the Service shall maintain continuous liaison with all committees;

(2) to make available to each committee of the Senate and House of Representatives and each joint committee of the two Houses, at the opening of a new Congress, a list of programs and activities being carried out under existing law scheduled to terminate during the current Congress, which are within the jurisdiction of the committee;

(3) to make available to each committee of the Senate and House of Representatives and each joint committee of the two Houses, at the opening of a new Congress, a list of subjects and policy areas which the committee might profitably analyze in depth;

(4) upon request, or upon its own initiative in anticipation of requests, to collect, classify, and analyze in the form of studies, reports, compilations, digests, bulletins, indexes, translations, and otherwise, data having a bearing on legislation, and to make such data available and serviceable to committees and Members of the Senate and House of Representatives and joint committees of Congress;

(5) upon request, or upon its own initiative in anticipation of requests, to prepare and provide information, research, and reference materials and services to committees and Members of the Senate and House of Representatives and joint committees of Congress to assist them in their legislative and representative functions;

(6) to prepare summaries and digests of bills and resolutions of a public general nature introduced in the Senate or House of Representatives;

(7) upon request made by any committee or Member of the Congress, to prepare and transmit to such committee or Member a concise memorandum with respect to one or more legislative measures upon which hearings by any committee of the Congress have been announced, which memorandum shall contain a statement of the purpose and effect of each such measure, a description of other relevant measures of similar purpose or effect previously introduced in the Congress, and a recitation of all action taken theretofore by or within the Congress with respect to each such other measure; and

(8) to develop and maintain an information and research capability, to include Senior Specialists, Specialists, other employees, and consultants, as necessary, to perform the functions provided for in this subsection.

(e) Specialists and Senior Specialists; appointment; fields of appointment

The Librarian of Congress is authorized to appoint in the Congressional Research Service, upon the recommendation of the Director, Specialists and Senior Specialists in the following broad fields:

(1) agriculture;

(2) American government and public administration;

(3) American public law;

(4) conservation;

(5) education;

(6) engineering and public works;

(7) housing;

(8) industrial organization and corporation finance;

(9) international affairs;

(10) international trade and economic geography;

(11) labor and employment;

(12) mineral economics;

(13) money and banking;

(14) national defense;

(15) price economics;

(16) science;

(17) social welfare;

(18) taxation and fiscal policy;

(19) technology;

(20) transportation and communications;

(21) urban affairs;

(22) veterans' affairs; and

(23) such other broad fields as the Director may consider appropriate.

Such Specialists and Senior Specialists, together with such other employees of the Congressional Research Service as may be necessary, shall be available for special

work with the committees and Members of the Senate and House of Representatives and the joint committees of Congress for any of the purposes of subsection (d) of this section.

(f) Duties of Director; establishment and change of research and reference divisions or other organizational units, or both

The Director is authorized--

(1) to classify, organize, arrange, group, and divide, from time to time, as he considers advisable, the requests for advice, assistance, and other services submitted to the Congressional Research Service by committees and Members of the Senate and House of Representatives and joint committees of Congress, into such classes and categories as he considers necessary to--

(A) expedite and facilitate the handling of the individual requests submitted by Members of the Senate and House of Representatives,

(B) promote efficiency in the performance of services for committees of the Senate and House of Representatives and joint committees of Congress, and

(C) provide a basis for the efficient performance by the Congressional Research Service of its legislative research and related functions generally,

and

(2) to establish and change, from time to time, as he considers advisable, within the Congressional Research Service, such research and reference divisions or other organizational units, or both, as he considers necessary to accomplish the purposes of this section.

(g) Budget estimates

The Director of the Congressional Research Service will submit to the Librarian of Congress for review, consideration, evaluation, and approval, the budget estimates of the Congressional Research Service for inclusion in the Budget of the United States Government.

(h) Experts or consultants, individual or organizational, and persons and organizations with specialized knowledge; procurement of temporary or intermittent assistance; contracts, nonpersonal and personal service; advertisement requirements inapplicable; end product; pay; travel time

(1) The Director of the Congressional Research Service may procure the temporary or intermittent assistance of individual experts or consultants (including stenographic reporters) and of persons learned in particular or specialized fields of knowledge--

(A) by nonpersonal service contract, without regard to any provision of law requiring advertising for contract bids, with the individual expert, consultant, or other person concerned, as an independent contractor, for the furnishing by him to the Congressional Research Service of a written study, treatise, theme, discourse, dissertation, thesis, summary, advisory opinion, or other end product; or

(B) by employment (for a period of not more than one year) in the Congressional Research Service of the individual expert, consultant, or other person concerned, by personal service contract or otherwise, without regard to the position classification laws, at a rate of pay not in excess of the per diem equivalent of the highest rate of basic pay then currently in effect for the General Schedule of section 5332 of Title 5, including payment of such rate for necessary travel time.

(2) The Director of the Congressional Research Service may procure by contract, without regard to any provision of law requiring advertising for contract bids, the temporary (for respective periods not in excess of one year) or intermittent assistance of educational, research, or other organizations of experts and consultants (including stenographic reporters) and of educational, research, and other organizations of persons learned in particular or specialized fields of knowledge.

(i) Special report to Joint Committee on the Library

The Director of the Congressional Research Service shall prepare and file with the Joint Committee on the Library at the beginning of each regular session of Congress a separate and special report covering, in summary and in detail, all phases of activity of the Congressional Research Service for the immediately

preceding fiscal year.

(j) Authorization of appropriations

There are hereby authorized to be appropriated to the Congressional Research Service each fiscal year such sums as may be necessary to carry on the work of the Service.

CREDIT(S)

(Aug. 2, 1946, c. 753, Title II, § 203, 60 Stat. 836; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972; Oct. 26, 1970, Pub.L. 91-510, Title III, § 321(a), 84 Stat. 1181; Dec. 19, 1985, Pub.L. 99-190, § 133, 99 Stat. 1322; Sept. 29, 1999, Pub.L. 106-57, Title II, § 209(b), 113 Stat. 424.)