[ORAL ARGUMENT NOT YET SCHEDULED]
No. 11-5092

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

MORRIS D. DAVIS,
Appellee,

v.

JAMES H. BILLINGTON, in his official capacity as the Library of Congress,
Appellee,

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

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

JOINT APPENDIX

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

THOMAS M. BONDY
(202) 514-4825
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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APPEAL, TYPE-D

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:10-cv-00036-RBW

DAVIS v. BILLINGTON et al
Assigned to: Judge Reggie B. Walton
Case in other court: 11-05092
Cause: 42:1983 Civil Rights Act

Date Filed: 01/08/2010
Jury Demand: None
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: U.S. Government Defendant

Plaintiff

MORRIS D. DAVIS represented by **Aden J. Fine**
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
17th Floor
New York, NY 10004
(212) 549-2693
Fax: (212) 549-2651
Email: afine@aclu.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Alexander Abdo
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
17th Floor
New York, NY 10004
(212) 549-2517
Fax: (212) 549-2654
Email: aabdo@aclu.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
(202) 457-0800 x113
Fax: (202) 452-1868
Email: artspitzer@aol.com
ATTORNEY TO BE NOTICED

Benjamin T. Siracusa Hillman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
17th Floor
New York, NY 10004
Email: bsiracusahillman@aclu.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

Frederick V. Mulhauser
AMERICAN CIVIL LIBERTIES UNION
1400 20th Street, NW
Suite 119
Washington, DC 20036
(202) 457-0800
Fax: (202) 452-1868
Email: fmulhauser@aol.com
ATTORNEY TO BE NOTICED

Mariko Hirose
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
17th Floor
New York, NY 10004
(212) 549-2604
Fax: (212) 549-2651
TERMINATED: 09/10/2010
PRO HAC VICE

V.

Defendant

JAMES H. BILLINGTON
in his official capacity as the Librarian of Congress

represented by

Christopher R. Hall
U.S. DEPARTMENT OF JUSTICE
FEDERAL PROGRAMS BRANCH, CIVIL DIVISION
20 Massachusetts Avenue, NW
Room 7224
Washington, DC 20530
(202) 514-4778
Fax: (202) 616-8202
Email: christopher.hall@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Deanna Lynn Durrett
U.S. DEPARTMENT OF JUSTICE

Civil Division, Federal Program Branch

P.O. Box 883
Washington, DC 20044
(202) 305-7589
Email: deanna.l.durrett@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

DANIEL P. MULHOLLAN
in his individual capacity

represented by **Christopher R. Hall**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Deanna Lynn Durrett
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/08/2010	1	COMPLAINT against JAMES H. BILLINGTON, DANIEL P. MULHOLLAN (Filing fee $ 350, receipt number 4616026680) filed by MORRIS D. DAVIS. (Attachments: # 1 Civil Cover Sheet)(rdj) (Entered: 01/11/2010)
01/08/2010		SUMMONS Not Issued as to JAMES H. BILLINGTON, DANIEL P. MULHOLLAN (rdj) (Entered: 01/11/2010)
01/08/2010	2	MOTION for Temporary Restraining Order, or in the Alternative, MOTION for Preliminary Injunction by MORRIS D. DAVIS (Attachments: # 1 Memorandum in Support, # 2 Declaration Morris D. Davis, # 3 Exhibit A - G, # 4 Exhibit H - Z)(rdj) (Entered: 01/11/2010)
01/12/2010		Set/Reset Hearings: Motion Hearing (TRO) set for 1/19/2010 09:30 AM in Courtroom 16 before Judge Reggie B. Walton. (mpt,) (Entered: 01/12/2010)
01/12/2010	3	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Aden J. Fine, :Firm- American Civil Liberties Union Foundation, :Address- 125 Broad St., New York, NY 10004. Phone No. - 212-549-2693. Fax No. - 212-549-2651 by MORRIS D. DAVIS (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Mulhauser, Frederick) (Entered: 01/12/2010)
01/12/2010	4	NOTICE *of Errata (adding Exhibit omitted in error)* by MORRIS D. DAVIS re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction (Attachments: # 1 Roth Declaration Exhibit A)(Mulhauser, Frederick) (Entered: 01/12/2010)
01/12/2010		SUMMONS (1) Issued as to, U.S. Attorney (td,) (Entered: 01/12/2010)
01/13/2010	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the US Attorney. MORRIS D. DAVIS served on 1/13/2010, answer due 3/15/2010 (Attachments: # 1 Declaration)(Mulhauser, Frederick) (Entered: 01/13/2010)

01/14/2010		SUMMONS (3) Issued as to JAMES H. BILLINGTON, DANIEL P. MULHOLLAN, and U.S. Attorney General. (kb) (Entered: 01/14/2010)
01/15/2010	6	Memorandum in opposition to re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by JAMES H. BILLINGTON. (Attachments: # 1 Declaration)(Hall, Christopher) (Entered: 01/15/2010)
01/15/2010	7	ERRATA *Attaching Table of Authorities and Exhibits to Declaration of Daniel Mulhollan, January 15, 2010* by JAMES H. BILLINGTON 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MORRIS D. DAVIS. (Attachments: # 1 Table of Authorities, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24, # 26 Exhibit 25, # 27 Exhibit 26)(Hall, Christopher) (Entered: 01/15/2010)
01/17/2010	8	REPLY to opposition to motion re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MORRIS D. DAVIS. (Attachments: # 1 Declaration Attorney Declaration Attaching Online Cases) (Mulhauser, Frederick) (Entered: 01/17/2010)
01/17/2010	9	MOTION for Leave to File *Supplemental Declaration in Support of Plaintiff's Reply in Support of Plaintiff's Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction* by MORRIS D. DAVIS (Attachments: # 1 Exhibit Supplemental Declaration)(Mulhauser, Frederick) (Entered: 01/17/2010)
01/19/2010		MINUTE ORDER granting 3 Motion for Leave to Appear Pro Hac Vice. Upon consideration of the motion for leave to appear pro hac vice by Aden J. Fine, and finding good cause to grant the motion, the motion is hereby granted. Aden J. Fine may appear and be heard in the above-captioned matter. Signed by Judge Reggie B. Walton on 01/19/10. (lcrbw2) (Entered: 01/19/2010)
01/19/2010		Minute Entry for proceedings held before Judge Reggie B. Walton: Motion Hearing held on 1/19/2010 re 2 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by MORRIS D. DAVIS. (Court Reporter Cathryn Jones.) (mpt,) (Entered: 01/19/2010)
01/19/2010	10	NOTICE of Appearance by Arthur B. Spitzer on behalf of MORRIS D. DAVIS (Spitzer, Arthur) (Entered: 01/19/2010)
01/20/2010	11	ORDER denying 2 Motion for TRO; denying 2 Motion for Preliminary Injunction; granting 9 Motion for Leave to File. For the reasons set forth in this order, the plaintiff's motion for injunctive relief is denied. Signed by Judge Reggie B. Walton on 01/20/10. (lcrbw2) (Entered: 01/20/2010)
01/20/2010	12	SUPPLEMENTAL Declaration to re 8 Reply to opposition to Motion filed by MORRIS D. DAVIS. (td,) (Entered: 01/21/2010)
01/27/2010	13	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to DANIEL P. MULHOLLAN served on 1/27/2010, answer due 3/29/2010.

		(Attachments: # 1 Declaration)(Mulhauser, Frederick) (Entered: 01/27/2010)
02/04/2010	14	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on Attorney General. Date of Service Upon Attorney General 1/21/2010. (Attachments: # 1 Certificate of Service)(Mulhauser, Frederick) (Entered: 02/04/2010)
02/05/2010	15	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to JAMES H. BILLINGTON served on 1/21/2010, answer due 3/22/2010. (Attachments: # 1 Certificate of Service)(Mulhauser, Frederick) (Entered: 02/05/2010)
03/15/2010	16	MOTION to Stay *Litigation Except as to the Individual Capacity Claims of Daniel P. Mulhollan* by JAMES H. BILLINGTON, DANIEL P. MULHOLLAN (Attachments: # 1 Text of Proposed Order)(Hall, Christopher) (Entered: 03/15/2010)
03/29/2010	17	Memorandum in opposition to re 16 MOTION to Stay *Litigation Except as to the Individual Capacity Claims of Daniel P. Mulhollan* filed by MORRIS D. DAVIS. (Attachments: # 1 Text of Proposed Order)(Fine, Aden) (Entered: 03/29/2010)
03/29/2010	18	MOTION to Dismiss *on Behalf of Defendant Daniel P. Mulhollan* by DANIEL P. MULHOLLAN (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Text of Proposed Order)(Hall, Christopher) (Entered: 03/29/2010)
03/30/2010	19	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Alexander Abdo, :Firm- ACLU Foundation, :Address- 125 Broad Street, 17th Floor, New York, NY 10004. Phone No. - 212-549-2517. Fax No. - 212-549-2654 by MORRIS D. DAVIS (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Mulhauser, Frederick) (Entered: 03/30/2010)
03/30/2010	20	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Mariko Hirose, :Firm- ACLU Foundation, :Address- 125 Broad Street, 17th Floor, New York, NY 10004. Phone No. - 212-549-2604. Fax No. - 212-549-2651 by MORRIS D. DAVIS (Attachments: # 1 Declaration, # 2 Text of Proposed Order) (Mulhauser, Frederick) (Entered: 03/30/2010)
04/02/2010	21	NOTICE of Appearance by Deanna Lynn Durrett on behalf of JAMES H. BILLINGTON, DANIEL P. MULHOLLAN (Durrett, Deanna) (Entered: 04/02/2010)
04/07/2010		MINUTE ORDER granting 19 20 Motions for Leave to Appear Pro Hac Vice. Upon consideration of the motions and the applicable legal authority, and finding good cause to grant the relief requested, the motions are granted. Alexander Abdo and Mariko Hirose shall be admitted pro hac vice to appear and be heard in this case. Signed by Judge Reggie B. Walton on 04/07/10. (lcrbw2) (Entered: 04/07/2010)
04/08/2010	22	REPLY to opposition to motion re 16 MOTION to Stay *Litigation Except as to the Individual Capacity Claims of Daniel P. Mulhollan* filed by JAMES H. BILLINGTON, DANIEL P. MULHOLLAN. (Durrett, Deanna) (Entered:

		04/08/2010)
04/15/2010	23	Memorandum in opposition to re 18 MOTION to Dismiss *on Behalf of Defendant Daniel P. Mulhollan* filed by MORRIS D. DAVIS. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order)(Fine, Aden) (Entered: 04/15/2010)
04/26/2010	24	REPLY to opposition to motion re 18 MOTION to Dismiss *on Behalf of Defendant Daniel P. Mulhollan* filed by DANIEL P. MULHOLLAN. (Hall, Christopher) (Entered: 04/26/2010)
09/02/2010	25	MOTION to Withdraw as Attorney *by Mariko Hirose* by MORRIS D. DAVIS (Attachments: # 1 Text of Proposed Order)(Fine, Aden) (Entered: 09/02/2010)
09/10/2010		MINUTE ORDER granting 25 Motion to Withdraw Appearance of Mariko Hirose. In light of the movant's compliance with LCvR 83.6(c) and the number of attorneys who remain as the plaintiff's counsel, the Court hereby GRANTS the motion. Attorney Mariko Hirose terminated. Signed by Judge Reggie B. Walton on 9/10/10. (lcrbw2) (Entered: 09/10/2010)
10/14/2010	26	ORDER denying 16 Defendants' Motion to Stay Litigation Except as to the Individual Capacity Defenses of Daniel P. Mulhollan. Defendant Library of Congress is hereby ORDERED to file an answer or other responsive pleading on or before October 19, 2010. Signed by Judge Reggie B. Walton on 10/14/10. (lcrbw2) (Entered: 10/14/2010)
10/14/2010		Set/Reset Deadlines: Defendant Library of Congress is ordered to file an answer or other responsive pleading on or before 10/19/2010. (ad) (Entered: 10/14/2010)
10/19/2010	27	MOTION to Dismiss by JAMES H. BILLINGTON (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order, # 3 Exhibit Exhibit 1, # 4 Exhibit Exhibit 2, # 5 Exhibit Exhibit 3, # 6 Exhibit Exhibit 4, # 7 Exhibit Exhibit 5)(Hall, Christopher) (Entered: 10/19/2010)
10/27/2010	28	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Benjamin T. Siracusa Hillman, :Firm- American Civil Liberties Union Foundation, :Address- 125 Broad Street, New York, NY 10004. Phone No. - (212) 549-2604. Fax No. - (212) 549-2651 by MORRIS D. DAVIS (Attachments: # 1 Declaration of Benjamin T. Siracusa Hillman, # 2 Text of Proposed Order) (Spitzer, Arthur) (Entered: 10/27/2010)
10/28/2010		MINUTE ORDER granting 28 Motion for Leave to Appear Pro Hac Vice. Upon consideration of the motion and its satisfaction of LCvR 83.2(d), and finding good cause to grant the relief requested, the motion is granted. Benjamin T. Siracusa Hillman shall be admitted pro hac vice to appear and be heard in this case. Signed by Judge Reggie B. Walton on 10/28/2010. (lcrbw2) (Entered: 10/28/2010)
11/05/2010	29	Memorandum in opposition to re 27 MOTION to Dismiss filed by MORRIS D. DAVIS. (Attachments: # 1 Exhibit Exhibits A-F, # 2 Text of Proposed Order)(Fine, Aden) (Entered: 11/05/2010)
11/08/2010	30	MOTION for Extension of Time to File Response/Reply as to 27 MOTION to

		Dismiss by JAMES H. BILLINGTON (Attachments: # 1 Text of Proposed Order)(Hall, Christopher) (Entered: 11/08/2010)
11/09/2010		MINUTE ORDER granting 30 Defendant Billington's Motion for Extension of Time to File Reply. For good cause shown, the motion is granted. It is hereby ORDERED that the defendant shall file his reply in support of the Motion to Dismiss on or before December 3, 2010. Signed by Judge Reggie B. Walton on 11/9/2010. (lcrbw2) (Entered: 11/09/2010)
11/10/2010		Set/Reset Deadlines: Reply in Support of Motion to Dismiss due by 12/3/2010. (mpt,) (Entered: 11/10/2010)
12/03/2010	31	REPLY to opposition to motion re 27 MOTION to Dismiss *on Behalf of Defendant James Billington* filed by JAMES H. BILLINGTON. (Hall, Christopher) (Entered: 12/03/2010)
03/10/2011	32	NOTICE OF SUPPLEMENTAL AUTHORITY by MORRIS D. DAVIS (Attachments: # 1 Exhibit A)(Fine, Aden) (Entered: 03/10/2011)
03/23/2011	33	RESPONSE re 32 NOTICE OF SUPPLEMENTAL AUTHORITY filed by JAMES H. BILLINGTON, DANIEL P. MULHOLLAN. (Hall, Christopher) (Entered: 03/23/2011)
03/30/2011	34	ORDER denying 27 Motion to Dismiss; denying 18 Motion to Dismiss. For the reasons explained in the Court's Memorandum Opinion issued on this same date, it is hereby ORDERED that the Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan is DENIED. It is further ORDERED that the Motion to Dismiss on Behalf of James Billington is DENIED. Signed by Judge Reggie B. Walton on 3/30/2011. (lcrbw2) (Entered: 03/30/2011)
03/30/2011	35	MEMORANDUM AND OPINION. This Memorandum Opinion accompanies the Court's Order denying the defendants' motions to dismiss. Signed by Judge Reggie B. Walton on 3/30/2011. (lcrbw2) (Entered: 03/30/2011)
04/13/2011	36	ANSWER to 1 Complaint by JAMES H. BILLINGTON.(Hall, Christopher) (Entered: 04/13/2011)
04/13/2011	37	ANSWER to 1 Complaint by DANIEL P. MULHOLLAN.(Hall, Christopher) (Entered: 04/13/2011)
04/13/2011	38	NOTICE OF APPEAL as to 34 Order on Motion to Dismiss,,, 35 Memorandum & Opinion by DANIEL P. MULHOLLAN. Fee Status: No Fee Paid. Parties have been notified. (Hall, Christopher) (Entered: 04/13/2011)
04/14/2011	39	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Fee remains to be paid and another notice will be transmitted when the fee has been paid in the District Court re 38 Notice of Appeal. (td,) (Entered: 04/14/2011)
04/18/2011		USCA Case Number 11-5092 for 38 Notice of Appeal filed by DANIEL P. MULHOLLAN. (td,) (Entered: 04/18/2011)
04/29/2011	40	MOTION for Order *Setting a Scheduling Conference* by MORRIS D. DAVIS (Fine, Aden) (Entered: 04/29/2011)

05/16/2011	41	Memorandum in opposition to re 40 MOTION for Order *Setting a Scheduling Conference* filed by JAMES H. BILLINGTON. (Attachments: # 1 Text of Proposed Order)(Hall, Christopher) (Entered: 05/16/2011)
05/26/2011	42	REPLY to opposition to motion re 40 MOTION for Order *Setting a Scheduling Conference* filed by MORRIS D. DAVIS. (Fine, Aden) (Entered: 05/26/2011)
07/06/2011	43	ORDER granting 40 Motion for Order. As explained in the attached Order, it is hereby ORDERED that the Plaintiff's Motion for an Order Setting a Scheduling Conference is GRANTED. It is further ORDERED that the parties, with the exception of defendant Mulhollan, shall prepare and submit to the Court a joint statement pursuant to Federal Rule of Civil Procedure 26(f) within fourteen days of the entry of this Order. It is further ORDERED that the parties, again with the exception of defendant Mulhollan, shall appear before the Court for a scheduling conference on July 22, 2011, at 3:00 p.m. in Courtroom 16 of the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001. Signed by Judge Reggie B. Walton on 7/6/2011. (lcrbw2) (Entered: 07/06/2011)
07/06/2011		Set/Reset Hearings: Initial Scheduling Conference set for 7/22/2011 03:00 PM in Courtroom 16 before Judge Reggie B. Walton. (mpt,) (Entered: 07/06/2011)
07/20/2011	44	MEET AND CONFER STATEMENT. (Attachments: # 1 Text of Proposed Order (Plaintiff), # 2 Text of Proposed Order (Defendant Billington))(Siracusa Hillman, Benjamin) (Entered: 07/20/2011)
07/21/2011		Set/Reset Hearings: Initial Scheduling Conference set for 7/26/2011 11:00 AM in Courtroom 16 before Judge Reggie B. Walton. (mpt) (Entered: 07/21/2011)
07/21/2011		Set/Reset Hearings: Initial Scheduling Conference set for 7/26/11 was reset for 7/28/2011 02:00 PM in Courtroom 16 before Judge Reggie B. Walton. (mpt,) (Entered: 07/21/2011)
07/21/2011	45	MOTION for Protective Order by DANIEL P. MULHOLLAN (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Durrett, Deanna) (Entered: 07/21/2011)
07/26/2011	46	GENERAL ORDER AND GUIDELINES FOR CIVIL CASES. (mpt,) (Entered: 07/26/2011)
07/28/2011		Minute Entry for proceedings held before Judge Reggie B. Walton: Initial Scheduling Conference held on 7/28/2011. Plaintiff's response to 45 MOTION for Protective Order filed by DANIEL P. MULHOLLAN due 8/10/2011. Defendant MULHOLLAN's reply in support of his motion due by 8/19/2011. The Court temporarily stays discovery. (Court Reporter Chantal Geneus) (tg,) (Entered: 07/28/2011)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS,
14954 Alpine Bay Loop
Gainesville, VA 20155

Plaintiff,

v.

JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress,
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20540-1400

and DANIEL P. MULHOLLAN, in his individual capacity,
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20540-1400

Defendants.

Case No. _____

COMPLAINT

NATURE OF THE ACTION

1. This case involves the constitutionality of Defendants' decision to terminate Plaintiff Colonel Morris D. Davis from his position as Assistant Director at the Congressional Research Service because of an op-ed and a letter to the editor that he wrote, respectively, in the *Wall Street Journal* and the *Washington Post* concerning the Obama Administration's recent decision to prosecute some Guantánamo detainees in federal court and some in military commissions.

2. Between September 2005 and October 2007, Colonel Davis, a twenty-five-year veteran of the United States Air Force, served as the Chief Prosecutor for the Department of Defense's Office of Military Commissions. In that role, he was responsible for the prosecution of suspected terrorists held at Guantánamo Bay. He resigned from that position in October 2007 because of his belief that the military commissions system had become fundamentally flawed. He subsequently became a vocal and highly public critic of the system, speaking, writing and testifying to Congress about his personal views and first-hand experiences.

3. In December 2008, Davis was hired by the Library of Congress (the "Library") to be the Assistant Director of the Foreign Affairs, Defense and Trade ("FDT") Division of the Congressional Research Service ("CRS"). In that role, Davis did not have any official responsibilities or duties over issues relating to the military commissions, and he continued to express his opinions publicly on those issues with the approval and knowledge of CRS. Official responsibility for issues relating to the military commissions fell to a separate division within CRS, the American Law Division ("ALD").

4. In November 2009, United States Attorney General Eric Holder announced that some of the detainees held at Guantánamo would be tried in federal court in the United States while others would be prosecuted in military commissions. Relying on his expertise and experience in the military commissions system, Col. Davis wrote an op-ed and a letter to the editor (the "opinion pieces") expressing his reaction to the Attorney General's announcement. In the opinion pieces, Col. Davis did not purport to be expressing the views of CRS. The opinion pieces represented Col. Davis's personal views, informed by his unique experience and expertise, on a matter of immense public interest and concern.

5. On November 10, 2009, CRS Director Daniel P. Mulhollan told Col. Davis that he was very pleased with Col. Davis's job performance. The opinion pieces were published the next day. Immediately after the opinion pieces were published, Mr. Mulhollan admonished Col. Davis and formally disciplined him for writing them. One week later, Mr. Mulhollan notified Col. Davis that he would be terminated from his position at CRS.

6. Col. Davis now brings this Complaint for violation of his First and Fifth Amendment rights, seeking declaratory and injunctive relief, including reinstatement to his Assistant Director position, and damages. The public has an interest in a robust and fully informed debate about the military commissions and the treatment of prisoners held at Guantánamo Bay. Accordingly, Col. Davis brings these claims not only to vindicate his own constitutional rights but also the public's First Amendment right to receive his speech and hear his views.

JURISDICTION AND VENUE

7. This case arises under the Constitution of the United States and presents a federal question within this Court's jurisdiction under 28 U.S.C. § 1331. This Court also has jurisdiction under 28 U.S.C. § 1361.

8. The Court has authority to issue declaratory and injunctive relief under 28 U.S.C. § 2201 *et seq.*, Rules 57 and 65 of the Federal Rules of Civil Procedure, and its inherent equitable powers.

9. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and (e) because the Library of Congress is within this judicial district, the events or omissions giving rise to Col. Davis's claims for relief occurred in this judicial district, the unlawful acts are alleged to have

been committed in this judicial district, and the records relevant to such acts are maintained and administered in this judicial district.

10. Neither the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), nor any other statute or regulation affords Col. Davis an administrative remedy.

11. The Court has the authority to award attorneys' fees and expenses under 28 U.S.C. § 2412.

PARTIES

12. Plaintiff Morris Davis is a twenty-five-year veteran of the United States Air Force and the former Chief Prosecutor for the Department of Defense's Office of Military Commissions. He retired from military service in October 2007 with the rank of Colonel. He was subsequently hired as an Assistant Director of the Foreign Affairs, Defense and Trade Division of CRS in December 2008, and served in that capacity until his removal on December 21, 2009, at which point he was reassigned to a temporary thirty-day position with CRS pending termination on January 20, 2010. He currently resides in Gainesville, Virginia.

13. Defendant Dr. James H. Billington is the Librarian of Congress and heads the Library of Congress. Dr. Billington is responsible for the Library's personnel policies and practices and retains ultimate authority to hire or terminate employees. Dr. Billington is sued in his official capacity.

14. Defendant Daniel P. Mulhollan is the Director of CRS, which is the public policy research arm of the United States Congress and a service unit of the Library of Congress. Mr. Mulhollan is responsible for CRS's policies and practices with regard to outside speaking and writing by CRS employees, and it was Mr. Mulhollan who admonished and terminated Col.

Davis because of his constitutionally protected speech. Mr. Mulhollan is sued in his individual capacity.

FACTUAL ALLEGATIONS

Col. Davis's Professional Experience and Qualifications

15. Col. Davis served in a variety of important leadership and staff positions over the course of his twenty-five years of military service. Following his graduation from law school in 1983, Col. Davis was commissioned as an officer in the Judge Advocate General's Corps of the United States Air Force, eventually becoming Chief of Military Justice at Patrick Air Force Base in Cocoa Beach, Florida. He later served as a Staff Judge Advocate at various levels of command; an Appellate Government Counsel; the Deputy Commandant and Interim Commandant at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Montgomery, Alabama; the Director of Air Force Legal Information Services at Maxwell Air Force Base; and the Director of United States Air Force Judiciary at Bolling Air Force Base in Washington, D.C.

16. Col. Davis was promoted to the rank of Colonel in April 2001. Over the years, he has received numerous awards and honors, including: the Legion of Merit; the Meritorious Service Medal (6 awards); the Air Force Commendation Medal (2 awards); the Air Force Achievement Medal (2 awards); the Air Force Outstanding Unit Award (2 awards); the Air Force Organizational Excellence Award (2 awards); the National Defense Service Medal (with service star); the Southwest Asia Service Medal; the Global War on Terrorism Expeditionary Medal; the Global War on Terrorism Service Medal; the Air Force Longevity Service Medal (6 awards); the Air Force Training Ribbon; and recognition as the 1990 Headquarters Air Force Outstanding Judge Advocate of the Year.

17. Col. Davis holds Masters Degrees in Law from both the George Washington University School of Law and the U.S. Army Judge Advocate General School.

18. Col. Davis's successful career, including his extensive experience and expertise, led to his selection as the Chief Prosecutor for the Department of Defense's Office of Military Commissions in September 2005. In that position, Col. Davis was entrusted by the Department of Defense with primary responsibility for overseeing the military commissions created to prosecute suspected terrorists being held at Guantánamo, a position that carried enormous responsibility and that was the subject of intense public scrutiny. Col. Davis received praise for his performance, and even critics of the military commissions acknowledged that Col. Davis had performed admirably.

Col. Davis's Public Speaking and Writing Prior to His Hiring at CRS

19. Col. Davis resigned from his position as Chief Prosecutor for the military commissions in October 2007 because he came to believe that the military commissions system had become fundamentally flawed.

20. After his resignation, Col. Davis became a vocal critic of the system, speaking, writing, and testifying before Congress about what he saw as the system's flaws.

21. His published pieces include op-eds in the *New York Times*, the *L.A. Times*, and the *Toronto Star*, and a law review article in a journal housed at Northwestern.

22. Col. Davis's public speaking included presentations at, among other places, Yale Law School, the Thomas M. Cooley Law School, the Fordham University School of Law, George Mason University School of Law, Duke University School of Law, American University School of Law, Syracuse University School of Law, the annual meeting of the American Society

of International Law, the Pennsylvania Bar Association's Law Policy Forum, and to a variety of military audiences.

23. Col. Davis testified to Congress on July 30, 2008 about his experience as Chief Prosecutor and his personal views concerning the military commissions system. He also testified at a hearing on those subjects at the Organization of American States' Inter-American Commission on Human Rights in October 2008.

24. In his writings, public speeches, and testimony, Col. Davis generally supported the use of military commissions to try suspected terrorists held at Guantánamo, but he criticized the military commissions system as it then existed. For example, he argued that the system's lack of procedural protections rendered it suspect in the eyes of the world, and that interference by political appointees was compromising the integrity of the system.

Col. Davis's Hiring by the Congressional Research Service

25. Col. Davis applied for the position of Assistant Director of the Foreign Affairs, Defense and Trade ("FDT") Division at CRS in September 2008. His application referenced his publications and presentations on military commissions and Guantánamo, and it included a writing sample focused on the same topic. During his interview by Mr. Mulhollan and others, Col. Davis discussed his experience as Chief Prosecutor and his decision to resign and to publicly criticize the military commission system. Neither Mr. Mulhollan nor any other Library or CRS employee told him during the interview that the job with CRS would require him to cease speaking and writing about the military commissions, or that his continued speaking and writing about the military commissions would compromise the mission of CRS.

26. Col. Davis was offered the position of Assistant Director in December 2008. He accepted it the same day, turning down another offer of employment with the federal government.

27. The Library, CRS, and Mr. Mulhollan were aware of Col. Davis's background and his prior public writing and speaking about Guantánamo and the military commissions when they hired him to serve as an Assistant Director. They did not tell him that continuing to engage in public speaking or writing in the future would imperil his ability to serve as a CRS employee and/or harm CRS or the Library. Nor did anyone tell him that his employment was conditioned on his willingness to forego engaging in any further outside speaking or writing about these or other issues of personal interest and public concern.

28. Had Col. Davis been so informed, it is likely that he would not have accepted the position.

Col. Davis's Work for the Congressional Research Service

29. Col. Davis began working for CRS on December 22, 2008. As the Assistant Director for the FDT Division, Col. Davis was responsible for supervising and managing approximately 95 employees. Col. Davis's primary responsibilities were to lead, plan, direct, and evaluate the research and analytical activities in the policy areas assigned to his division, which included matters relating to foreign affairs, the Defense Department, and international trade and finance, but not issues related to military commissions. Col. Davis had no authority to establish policy, and he had little opportunity for significant contact with the public. Like other Assistant Directors, Col. Davis was not expected to and did not author written reports or analyses on behalf of CRS. His name has not appeared on any reports distributed to Congress. Nor have any congressional inquiries or requests for information been directed to him.

30. The FDT Division has seven research sections: Foreign Policy Management and Global Issues; International Trade and Finance; Defense Policy and Arms Control; Defense Budget, Manpower, and Management; Asia; Europe and the Americas; and Middle East and Africa. The FDT Division's mandate does not encompass the military commissions system or the prosecution of individuals held at Guantánamo. Accordingly, Col. Davis's work for CRS is not related to the military commissions system about which he has frequently spoken in his private capacity.

31. Within CRS, sole responsibility for topics relating to the military commissions system and the prosecution of the individuals held at Guantánamo belongs to the American Law Division ("ALD"). The legislative attorneys in ALD author reports on those issues and respond to requests for information relating to their reports. All inquiries on those issues are and have been assigned to ALD. Since 2001, CRS has conducted several seminars and workshops for congressional staff on issues relating to the military commissions, all of which were conducted by legislative attorneys from ALD.

32. Members of Congress and their staffs know that ALD is the division responsible for military-commission-related issues. Among other things, the reports on these issues contain the contact information of the legislative attorneys in ALD, and the CRS subject-matter directory shows that ALD is the entity with subject-matter expertise on the military commissions.

33. With the knowledge and, in some cases, express approval of CRS, Col. Davis continued to speak publicly about military commissions issues after commencing his employment with CRS. For example, in February 2009, Col. Davis gave an extemporaneous dinner speech at a Human Rights Watch dinner that reflected his oft-stated criticism of the Bush administration's policies relating to military commissions. The CRS Deputy Director had given

him approval to attend the dinner, and he reported to her what happened the next day. He was not told by anyone that this speech had threatened CRS or the Library's work, or that it had compromised his objectivity or non-partisanship.

34. In early August 2009, Col. Davis asked Mr. Mulhollan and the CRS Office of Communication for permission to be interviewed on tape by producers of a BBC documentary about Guantánamo. Mr. Mulhollan and the CRS Office of Communications gave Col. Davis permission to participate in the interview, and he did so, expressing his personal opinions about the military commissions.

35. On September 11, 2009, Col. Davis participated in a conference at Case Western Reserve University Law School concerning the military commissions system and submitted a law review article expressing his views in connection with the conference. Mr. Mulhollan approved his participation, with the only condition being that Col. Davis had to participate on his personal time by using a vacation day, because the subject of the conference—Guantánamo and the military commissions system—had nothing to do with his CRS job responsibilities or duties. Col. Davis was informed by a CRS attorney that he could speak at the conference and write his law review article without providing an express disclaimer indicating that the opinions he was expressing were his own and not necessarily shared by CRS or the Library.

36. Col. Davis's presentation and law review article at Case Western were consistent with his previously expressed public views and with the opinions he later published in the opinion pieces. In fact, during a question-and-answer session, Col. Davis made the exact same point that he later made in the opinion pieces—that there should only be one judicial system for all of the detainees.

37. The Case Western conference and Col. Davis's comments there were published on the Internet via a webcast. CRS routinely monitors all public speaking, writing, and media appearances of its employees. Neither Mr. Mulhollan nor anyone else from CRS or the Library ever informed Col. Davis that his presentation at the conference or his law review article had compromised the work of CRS or undermined Col. Davis's effectiveness as a CRS employee.

38. On November 5, 2009, Col. Davis received the Charles Whittaker Award from the Lawyers Association of Kansas City for speaking out against torture and the politicization of the military commissions. Col. Davis received express approval from Mr. Mulhollan to attend this event and accept the award. He spoke at the event about his experience as the former Chief Prosecutor and his views concerning Guantánamo and the military commissions system. His presentation was consistent with his previously expressed public views, and with the views that he later published in the opinion pieces, and media coverage of the event observed that Col. Davis was critical of both the Bush and the Obama administrations' policies relating to the military commissions. Neither Mr. Mulhollan nor anyone else from CRS or the Library ever informed Col. Davis that his appearance or presentation at the ceremony had compromised the work of CRS or undermined Col. Davis's effectiveness as a CRS employee.

39. Col. Davis also publicly expressed his views about the military commissions and the treatment of detainees on other occasions.

40. Col. Davis was not disciplined in any manner before publication of the opinion pieces on November 11, 2009 for writing or speaking publicly about Guantánamo or the military commissions.

41. In fact, during his tenure at CRS, Col. Davis was told on numerous occasions by Mr. Mulhollan and others that he was doing a very good job, that he was well-liked and

respected by his CRS colleagues, and that he was a good fit for CRS. Before he published the opinion pieces, no one at CRS or the Library questioned or criticized Col. Davis's job performance or indicated that he was doing anything other than highly satisfactory work. During their regular meetings, Mr. Mulhollan stated repeatedly that he was more than satisfied with Col. Davis's performance, and Mr. Mulhollan also stated that Col. Davis should rest assured that he was satisfactorily completing his mandatory one-year probationary period.

42. On November 10, 2009, the day before the opinion pieces were published, Mr. Mulhollan reaffirmed his previous views concerning Col. Davis's work performance, telling Col. Davis that he was very pleased with his job performance, and that others at CRS had stated that they respected and appreciated Col. Davis and thought that he was doing a very good job.

The *Wall Street Journal* Op-Ed, the *Washington Post* Letter to the Editor, and Mr. Mulhollan and the Library's Decision to Terminate Col. Davis

43. On November 11, 2009, the *Wall Street Journal* published an op-ed written by Col. Davis about the Obama Administration's decision to try some of the individuals being held at Guantánamo in federal court and others in military commissions.

44. On the same day, the *Washington Post* published a letter to the editor from Col. Davis on the subject of using federal courts to try some of the individuals being held at Guantánamo.

45. The opinion pieces relate to subjects of immense public concern—Guantánamo and the military commissions process, and the decision to try certain detainees in federal court in the United States. These subjects will continue to be matters of public concern for the foreseeable future, as President Obama and Attorney General Holder will undoubtedly announce additional decisions with respect to the military-commission or federal-court trial of other Guantánamo detainees, and critics and supporters of these decisions will voice their opinions.

46. The views expressed by Col. Davis in the opinion pieces were similar to those he had already expressed publicly both before and after the commencement of his employment with CRS. The language used by Col. Davis in the opinion pieces was also similar to the language he had used in his prior publications and presentations. The principal argument of the opinion pieces was that there should only be one judicial system for all of the Guantánamo detainees who will face criminal prosecution, rather than two separate systems, because having two separate systems would inevitably lead many to believe that one system (the federal courts) was fair while the other (the military commissions) was not.

47. Neither of the opinion pieces singled out or criticized Congress, any Member of Congress, any political party, or positions associated with one party but not another. They criticized the decisions and positions of officials from both major parties. The opinion pieces are well-reasoned and supported and make substantive arguments about a matter of immense public concern.

48. The opinion pieces were written by Col. Davis in his personal capacity, on his home computer, during non-work hours over the weekend of November 7-8, 2009. Col. Davis submitted the pieces over the Internet from his home computer.

49. Col. Davis did not receive any payment for writing the opinion pieces. Nor did any organization or individual ask him to write them. Col. Davis chose to write them because of his personal experience with the military commissions system and his deeply felt views about the system, which he believes the public is entitled to know.

50. The opinion pieces do not denigrate or criticize CRS, the Library, or any of their employees or policies in any manner. Indeed, neither of the opinion pieces mentions CRS, the Library, or Col. Davis's work for CRS and the Library, as CRS and the Library had nothing to

do with the personal views or experiences Col. Davis acquired as the former Chief Prosecutor. The opinion pieces rely exclusively on Col. Davis's professional experience prior to his working for CRS, and they reflect his personal views regarding Guantánamo and the military commissions process.

51. Neither of the opinion pieces indicates, or even suggests, that Col. Davis was writing in anything but his personal capacity. Both bylines and pieces make clear that the author was an individual writing solely in his individual capacity based on his experience as the former Chief Prosecutor at Guantánamo. Col. Davis reasonably believed, based on CRS's prior approval of his and others' speech without express disclaimers and on conversations with newspaper editors, that his articles and bylines were sufficient to make any reader understand that the pieces were written by him in his individual capacity.

52. On November 10, 2009, Col. Davis was informed by the *Wall Street Journal* and the *Washington Post* that his opinion pieces would be published the next day.

53. Shortly thereafter that same day, Col. Davis notified Mr. Mulhollan that the opinion pieces were going to be published the next day. Mr. Mulhollan requested that Col. Davis forward the pieces to him. Col. Davis did so.

54. After he reviewed the opinion pieces, Mr. Mulhollan sent several emails to Col. Davis questioning Col. Davis's judgment and ability to continue serving as an Assistant Director.

55. On November 12, the day after the opinion pieces appeared in the papers, Mr. Mulhollan called Col. Davis into a meeting. Richard Ehlke, the acting Deputy Director of CRS was present as well. During this meeting, Mr. Mulhollan told Col. Davis that he could not believe that Col. Davis had written these pieces and that Col. Davis's actions had caused him to doubt Col. Davis's judgment and suitability to serve as an Assistant Director. When Col. Davis

declined to acknowledge that he was wrong to publish the articles and that First Amendment protections did not apply, Mr. Mulhollan informed Col. Davis that he would not be converted to permanent status from his probationary status despite his previous statements that Col. Davis would be so converted, and that, instead, Col. Davis's mandatory one-year probationary period would be extended for 90 additional days.

56. The next day, Mr. Mulhollan called Col. Davis into another meeting. Mr. Ehlke was present for this meeting as well. When Col. Davis again refused to acknowledge that it was impermissible for him to have written the opinion pieces and that the First Amendment right of free speech did not apply, Mr. Mulhollan provided him with a pre-written letter of admonishment. As Col. Davis stood to leave the room, Mr. Mulhollan told Col. Davis that he was a likeable person and that he had done a good job, but that Mr. Mulhollan could not accept his bad judgment.

57. The letter of admonishment focuses entirely on Col. Davis's writing of the opinion pieces.

58. One week later, on November 20, Mr. Mulhollan informed Col. Davis by telephone that he would be removed from his position as of December 21, 2009, and that he would thereafter be given a thirty-day temporary position as Mr. Mulhollan's Special Advisor, during which time Col. Davis could look for a different job. Mr. Mulhollan had his assistant deliver a written notice of termination to Col. Davis immediately after that call.

59. Like the letter of admonishment, the notice of termination focuses on Col. Davis's decision to publish the opinion pieces. But for the opinion pieces, Defendants would not have terminated Col. Davis from his position as an Assistant Director of CRS and he would have become a permanent employee.

60. On November 24, 2009, Mr. Mulhollan sent an email to every CRS employee informing them that Col. Davis was being removed from his position as the Assistant Director of the FDT Division as of December 21, 2009, and that he would be replaced.

61. Col. Davis is presently serving in a temporary position for thirty days as Mr. Mulhollan's Special Advisor. Unless extended, that position will expire on January 20, 2010.

62. Because of his former position as the Chief Prosecutor for the military commissions, Col. Davis is regularly asked to comment on Guantánamo and the military commissions system. Col. Davis believes he has a unique perspective to add to this debate, and he would like to convey his insights and opinions to the public. Since he was informed that he was being terminated by CRS, however, Col. Davis has declined numerous opportunities to speak publicly about military commissions issues out of fear that he could be subject to further retaliation by the Library and Mr. Mulhollan.

63. The decision to terminate Col. Davis for his speech has intimidated and chilled other CRS employees from speaking and writing in public. CRS employees are confused, uncertain, and fearful about what outside speaking and writing is permissible.

64. As a result of the Library's and Mr. Mulhollan's actions, Col. Davis has suffered, and/or will suffer, both economic and non-economic losses, emotional distress, and other compensable damages.

The Library of Congress's Regulation on Outside Speaking and Writing and CRS's Policy and Practice Regarding Outside Speaking and Writing

65. The Library of Congress has a specific regulation that addresses outside speaking and writing by its employees. That regulation, LCR 2023-3, "encourage[s]" Library employees to engage in outside speaking and writing, and does not restrict employees from speaking or writing about issues that are not within their areas of specialty at CRS. LCR 2023-3, § 3(A).

66. LCR 2023-3 also makes clear that personal writings and prepared or extemporaneous speeches, including those on "controversial" matters, are not subject to prior review. LCR 2023-3, § 3(A), (B). The regulation does not contain any requirement that Library employees notify their supervisors in advance about their intention to engage in outside speaking or writing.

67. The regulation states that, when speaking or writing about "controversial matters," Library employees are expected to disassociate themselves explicitly from the Library and from their official positions. It also states that, where an employee's writing relates to library science, the administration or policies of the Library, matters relating to an employee's official duties or responsibilities, or matters specifically addressing Members of Congress, the employee is expected to, among other things, "assure, when appropriate, that staff members' opinions clearly differentiate from Library policy." LCR 2023-3, § 3(B).

68. In 2004, Mr. Mulhollan issued a "Director's Statement on Outside Activities." That statement has been edited and reformatted into a document that is now labeled as a policy. Like the Library regulation it purports to clarify, the CRS policy on outside speaking and writing, which was created, implemented, and is now enforced by Mr. Mulhollan, does not expressly prohibit employees from engaging in any outside speaking or writing.

69. The CRS policy does not require employees to obtain prior approval before engaging in outside speaking or writing. Unlike the Library regulation, however, the CRS policy "strongly encourages" employees to submit draft writings to the CRS Review Office for prior review, although the policy also states that prior review is not a "formal requirement."

70. Purporting to interpret the Library regulation, the CRS policy provides that employees "must make it clear that the views expressed [in outside speaking or writings] are theirs and do not represent the views" of CRS.

71. The CRS policy also provides that employees are responsible for "using sound judgment in deciding when engagement in an outside activity may place the reputation of CRS at risk." "Sound judgment" is not defined or discussed.

72. This CRS policy was originally issued on January 23, 2004 as a "Director's Statement" from Mr. Mulhollan to all CRS employees. The Director's Statement engendered confusion and anxiety among CRS employees concerning the permissibility of outside speaking and writing, and the ultimate effect of the Director's Statement was to discourage CRS employees from engaging in outside speech and writing, particularly on issues of broad public concern.

73. After the issuance of the Director's Statement, the union for CRS employees, the Congressional Research Employees Association ("CREA"), issued a memorandum to its members explaining that the Director's Statement did not deprive them of their First Amendment rights, and criticizing some of the more confusing and problematic language contained in the Director's Statement.

74. Since the issuance of the Director's Statement and CRS's policy, CRS employees have been confused as to which outside writing and speaking is permissible, and CRS's policy continues to discourage CRS employees from engaging in speech protected by the First Amendment. That confusion, uncertainty, and intimidation continues to this day.

75. Mr. Mulhollan is directly and personally involved in determining what speech or writing is permissible and what consequences will follow if, in his estimation, the guidelines have not been followed.

76. Neither the Library's regulations nor CRS's policy establishes a standard for determining which outside speaking and writing is permissible and which is not. The regulations and policy afford the Library and CRS unfettered discretion to determine which speech to punish.

77. Because of the nature of their jobs and their expertise, Library and CRS employees regularly write and speak and express their opinions in public on policy matters of public concern, including on controversial and high-profile issues. This outside writing and speaking has been occurring for decades and has not compromised the mission of the Library or CRS.

First Cause of Action

(First Amendment—unconstitutional termination)

78. Defendants' actions in terminating Col. Davis for engaging in constitutionally protected speech violated the First Amendment.

79. As a result of Defendants' actions, Col. Davis has suffered, and will continue to suffer, both economic and non-economic losses, emotional distress, and other compensable damages.

80. Defendant Mulhollan's actions were intentionally done with malice or with reckless indifference to Col. Davis's rights under law.

Second Cause of Action

(First Amendment—unconstitutional policy)

81. To the extent that Defendants' regulations or policies prohibit publication of the opinion pieces because of the controversial or highly contentious subject matter of the speech, those regulations and/or policies are unconstitutional on their face and as applied to Col. Davis, under the First Amendment.

82. To the extent that Defendants' regulations or policies require prior approval of speech for certain employees such as Col. Davis, they are unconstitutional on their face and as applied to Col. Davis, under the First Amendment, because they operate as a prior restraint that gives unfettered discretion to Defendants to suppress the speech of their employees.

Third Cause of Action

(First and Fifth Amendment—Due Process)

83. Defendants' regulations and/or policies on outside speaking and writing are unconstitutionally vague on their face and as applied to Col. Davis, under the First and Fifth Amendments.

84. As a result of Defendants' actions, Col. Davis has suffered, and will continue to suffer, both economic and non-economic losses, emotional distress, and other compensable damages.

85. Defendant Mulhollan's actions were intentionally done with malice or with reckless indifference to Col. Davis's rights under law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Col. Davis respectfully requests that the Court enter judgment in his favor and against Defendants, and award the following relief:

a. Declaratory relief, including, but not limited to, a declaration that Defendants' actions and/or the Library's and CRS's policies on outside speaking violate the First Amendment and the Fifth Amendment of the United States Constitution;

b. Appropriate injunctive relief, including, but not limited to, reinstatement, and an order restraining Defendants from engaging in further unconstitutional conduct of the types of which Col. Davis complains herein, including further enforcement of CRS's unconstitutional policy and practice regarding outside speaking and writing;

c. Back pay, in amounts to be determined at trial, along with credit for job seniority for any time after the Library ceases to pay Col. Davis's present salary;

d. Front pay, in the event reinstatement is not granted;

e. Compensatory and consequential damages against Defendant Mulhollan;

f. Punitive damages against Defendant Mulhollan;

g. Pre-judgment and post-judgment interest at the highest lawful rate;

h. Attorneys' fees and expenses; and

i. Any such further relief as justice allows.

Respectfully submitted,

Arthur B. Spitzer (D.C. Bar No. 235960)
Frederick V. Mulhauser (D.C. Bar No. 455377)
American Civil Liberties Union
of the Nation's Capital
1400 20th Street, N.W. #119
Washington, D.C. 20036
(202) 457-0800

Aden J. Fine (D.C. Bar No. 485703)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693

Jameel Jaffer
Alexander A. Abdo
National Security Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-7814

ATTORNEYS FOR PLAINTIFF

January 8, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress, and DANIEL P. MULHOLLAN, in his individual capacity, Defendants.	)	Civil Action No. 10-0036 (RBW)

ORDER

This matter came before the Court on January 19, 2010, for a hearing on the plaintiff's motion for a preliminary injunction to prevent the Congressional Research Service, a service unit of the Library of Congress, from terminating his employment. Plaintiff's Motion for a Temporary Retraining Order or, in the Alternative, a Preliminary Injunction; see also Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction ("Pl.'s Mem."). The defendants opposed the motion. Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction ("Defs.' Opp'n").[1] Upon consideration of the plaintiff's motion, the defendants' opposition, the applicable legal authority, and the oral arguments

[1] In resolving this motion, the Court also considered the Plaintiff's Reply in Support of Plaintiff's Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction.

Also pending before the Court is the Plaintiff's Motion for Leave to File a Supplemental Declaration in Support of Plaintiff's Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction. No opposition had yet been filed at the time of the Court's consideration of the plaintiff's motion for injunctive relief, and therefore, the Court finds good cause to grant this motion and consider the additional declaration of the plaintiff.

presented by the parties, the Court finds that the plaintiff has not met his burden to show that the extraordinary remedy of a preliminary injunction is warranted.

Temporary restraining orders and preliminary injunctions are "extraordinary remed[ies] that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks and citation omitted). To obtain emergency injunctive relief, the moving party must establish: (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. Id. at 297. While a particularly strong showing in one if these four areas might warrant injunctive relief despite weak showings in other areas, a movant must "demonstrate that irreparable injury is likely in the absence of an injunction," not just a "possibility" of such injury. Winter v. Nat. Res. Def. Council, __ U.S. __, __, 129 S. Ct. 365, 375 (2008) (emphasis omitted). And a movant's failure to show irreparable harm thus represents grounds for refusing to issue a preliminary injunction, even if the other three factors favor him. Id.; Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (citation omitted).

The Court is satisfied that the plaintiff has established, at least based on the record before the Court at this time, that the likelihood of success on the merits and public policy prongs of the preliminary injunction standard weigh in his favor. Essentially, the record before the Court suggests that the plaintiff was terminated immediately after two specific opinion editorials he authored were published in national newspapers. Pl.'s

Mem., Ex. L (Nov. 13, 2009 Memorandum of Admonishment), Ex. M (Nov. 20, 2009 Termination Letter). Regardless of the defendants' contention to the contrary, Defs.' Opp'n at 26, it appears that the content of the plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired, i.e., because the plaintiff took a position on the prosecution of detainees being housed at the United States military's Guantánamo Bay facility which the Congressional Research Service felt would call into question its impartially as to any policy recommendation it would make and any research it would conduct on that issue. This conclusion is supported by the fact that the opinion articles were specifically referenced in the plaintiff's termination letter, and also the timing of the letter, which was issued only several days after his writings were published. Id. at Ex. M (Nov. 20, 2009 Termination Letter) at 1. The plaintiff's likelihood of success position therefore is well-founded, at least with respect to the record the Court now has before it. And as to the public interest prong, it cannot be questioned that government employees retain First Amendment rights, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563, 574 (1968), even though the speech of higher level government employees can be curtailed without implicating a First Amendment violation, Hall v. Ford, 856 F.2d 255, 261, 263-65 (D.C. Cir. 1988).

As to the balance of the harms factor, this prong seems to be in equipoise. On the one hand, it would seem that the working relationship between the plaintiff and his immediate supervisor has been fractured by the publication of the plaintiff's opinion articles and that this could compromise the mission of the Congressional Research Service. While this factor alone cannot dissuade the Court from compelling the Congressional Research Service to return the plaintiff to his prior position and retain him

as an employee pending resolution of this case, on the other hand, the harm the plaintiff will sustain if he is not permitted to remain in his prior position pending a final resolution on this case does not seen sufficiently compelling to tip this factor in his favor.

Therefore, whether the plaintiff is entitled to the injunction he seeks turns on whether he has established the requisite irreparable harm necessary to receive the extraordinary relief of an injunction. The defendants naturally claim that the plaintiff has not met his burden, Defs.' Opp'n at 18, while the plaintiff contends that he has sustained his burden because if the Congressional Research Service is not required to reinstate and retain him as its Assistant Director of Foreign Affairs, Defense and Trade Division, and should he ultimately prevail on his constitutional claims, his pursuit of monetary remedies could be forever foreclosed, thus precluding him from recovering the back pay he would otherwise have received had he not been unlawfully terminated. Pl.'s Mem. at 40. That loss, the plaintiff contends, combined with the fact that the alleged unconstitutional policy continues in force, establishes irreparable harm. Id. at 41. Alternatively, the plaintiff asks the Court to enjoin the Library of Congress from selecting a replacement for the position until this case is resolved on the merits.

First, as to the plaintiff's continuing enforcement point – that the defendants' ongoing enforcement of the Congressional Research Service policy "has already stopped [him] from taking advantage of numerous opportunities to publicly express his views on this administration's military commissions policy," id. at 41 – the reality is that the restrictions about which he complains will remain in effect while this case is litigated. Thus, the plaintiff's ability to express his views will only be unencumbered if he is freed from those policies pending the resolution of this case on the merits. In any event, the

resolution of this prong does not turn on this aspect of the plaintiff's irreparable injury argument.

The Court will therefore turn to the plaintiff's main argument on the question of irreparable harm – that monetary relief will be foreclosed to him by the United States Supreme Court's decision in United States v. Fausto, 484 U.S. 439 (1988). The defendants represented to the Court at the January 19, 2010 hearing that the plaintiff's reading of this case is incorrect. Defs.' Opp'n at 24. As neither party has convincingly established that the plaintiff's claims are, or are not, precluded by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 ("CSRA")[2] – in fact, the Court did not construe the defendants' position in its opposition filing or as represented orally to the Court that the plaintiff's claims should be governed by the CSRA, thus depriving the Court of subject-matter jurisdiction – the Court will also not reach this conclusion. And, neither party seems to dispute that the plaintiff has no meaningful opportunity to pursue any administrative remedies based on his allegations. Therefore, where the CSRA is not implicated, neither is the logic of Fausto. Worthington v. United States, 168 F.3d 24, 26-27 (Fed. Cir. 1999) ("The CSRA, by its terms, however, does not encompass every adverse personnel action against a federal employee. . . . Thus, because [the plaintiff's] claim is not within the coverage of the CSRA and because it otherwise falls within the jurisdictional grant of the Tucker Act, the Court of Federal Claims has jurisdiction to adjudicate this dispute."); Bosco v. United States, 931 F.2d 879, 883 (Fed. Cir. 1991) ("The Supreme Court did not rule that the CSRA provided the only means of judicial review of any actions affecting federal employees, but rather that it was the only means

[2] The CSRA has been codified at 5 U.S.C. §§ 1201-06, 2101a, 2301-05, 3111, 3112, 3131-36, 3327, 3391-97, 3591-94, 3596, 4311-15, 4507, 4701-06, 5361-66, 5381-85, 5752, 7101-06, 7111-23, 7131-35, 7211, 7501-04, 7511-14, 7521, 7541-43, 7702, 7703 (2006).

of review as to the types of adverse personnel action specifically covered by the CSRA . . . ."); cf. Graham v. Ashcroft, 358 F.3d 931, 934 (D.C. Cir. 2004) (discussing the "explicit assumption in Fausto" that the case arose from "a personnel action as to which the CSRA grants no right of review, even for employees who are otherwise granted such rights under the CSRA in other circumstances"). Indeed, there is "no reason for disabling [the plaintiff] from pursuing in federal court a constitutional claim that under First Amendment principles is as final, ripe and free from exhaustion difficulties as it need be, . . . [where]he has standing to pursue, merely because []he has also experienced a personnel action related to that claim." Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1434 (D.C. Cir. 1996); accord Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1037 (9th Cir. 2007) (Where a party "has no remedies available under the CSRA . . . judicial review [may be] the only means by which he can attempt to vindicate his constitutional rights."). Indeed, a "'serious constitutional question' . . . would arise if [the CRSA] were construed to deny any judicial forum for [the plaintiff's] colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988) (citation omitted). Simply, the fact that a personnel action is the basis alleged by the plaintiff as the means by which his First Amendment right was deprived does not somehow foreclose him from pursing judicial relief for that alleged constitutional deprivation.

This availability of judicial recourse, however, does not resolve the issue of whether the plaintiff will be deprived of a monetary remedy. It must be remembered that the burden of establishing entitlement to the extraordinary relief that the plaintiff seeks rests with him, and he has only speculated that such relief may be unavailable to him. Pl.'s Mem. at 40. True, the plaintiff is correct that he may not be able to maintain a

Bivens action to challenge the defendants' alleged constitutional transgressions. Pl.'s Mem. at 40; see Bush v. Lucas, 462 U.S. 367, 388-90 (1983); cf. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971). Moreover, the plaintiff may not be able to recover anything other than equitable relief if he ultimately prevails on the merits in this lawsuit. Cf. Spagnola v. Mathis, 859 F.2d 223, 230 (1988) (indicating that civil servants always have the right "to seek equitable relief against their supervisors, and the agency itself, [as] vindication [for violations] of their constitutional rights" even if other remedies are unavailable). But, the plaintiff has not made a sufficient showing that either is in fact the case.

Regardless, the Court will face the question of what is the appropriate relief due to the plaintiff when and if that question arises.[3] The plaintiff has chosen only to pursue his constitutional claims in this action. He is therefore limited to receiving only the remedies that those claims provide, and he cannot use a request for emergency injunctive relief to bypass any restrictions on the damages otherwise available to him for alleged constitutional violations.

Moreover, while the Court appreciates that the plaintiff's loss of employment income may temporarily be difficult for him, he also bears the burden of showing that the economic harm he will incur will be irreparable. And on the record currently before the Court, the plaintiff has failed to establish that level of economic hardship, given that he is a lawyer, he contends to be a renowned expert in his field, possesses special knowledge

[3] In fact, the Court is also not prepared at this time to find that the plaintiff's entitlement to back pay would be foreclosed were he successful on his claims. The District of Columbia Circuit has awarded reinstatement and back pay where a plaintiff was discharged in violation of the First Amendment, Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 830 F.2d 294, 312 (D.C. Cir. 1987), and although that decision was rendered pre-Fausto, the CSRA was in effect when that decision was rendered and the Court is, at this juncture, without the aid of the parties' positions as to what effect Fausto has on that decision.

and skills on matters of public importance, and has an impressive work experience. With this background, the Court presumes that the plaintiff can secure other employment, even in the current economic environment. In addition, the plaintiff is a retired Air Force Colonel, Complaint ("Compl.") ¶ 15, and presumably is receiving considerable retirement benefits due to his rank and twenty-five years of military service, Compl. ¶ 12. Therefore, even if the Court presumes, based on the evidence before it, that the plaintiff has satisfied the likelihood of success, balance of the harms, and the public interest prongs of the preliminary injunction standard, he has failed to satisfy the irreparable injury prong. Accordingly, it is hereby

ORDERED that the plaintiff's motion seeking to file a supplemental declaration is **GRANTED**; it is further

ORDERED that the plaintiff's motion seeking a preliminary injunction is **DENIED**.

SO ORDERED this 20th day of January, 2010.

_____/s/_____
REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS,

Plaintiff,

v. Civil Action No. 1:10-cv-00036-RBW

JAMES BILLINGTON, in his official capacity as the Librarian of Congress, and DANIEL P. MULHOLLAN, in his individual capacity,

Defendants.

MOTION TO DISMISS ON BEHALF OF DEFENDANT DANIEL P. MULHOLLAN

For the reasons set forth in the accompanying Memorandum of Points and Authorities, Defendant Daniel P. Mulhollan respectfully moves to dismiss Plaintiff's claims against him in his individual capacity.

Dated: March 29, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

JENNIFER R. RIVERA
Branch Director

SUSAN K. RUDY
Assistant Branch Director

/s/ Christopher R. Hall
CHRISTOPHER R. HALL
DEANNA L. DURRETT
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch

P.O. Box 883
Washington, D.C. 20530

(202) 514-4778

Assistant Director and Senior Specialist, SL-0130-01, 080271

PROFILE

Read Only - Cannot Be Updated

NAME Morris D Davis

COUNTRY United States of America

OTHER

CITY Gainesville

STATE / PROVINCE Virginia

OTHER (IF APPLICABLE)

ZIP 20155

DAYTIME PHONE NUMBER 7037535693

EVENING PHONE NUMBER 7037535693

CELL PHONE NUMBER 7035898603

PAGER NUMBER

INSTANT NOTIFICATION ADDRESS

FAX NUMBER

E-MAIL ADDRESS col.morris.davis@gmail.com

Submitted: 09/08/2008

WORK HISTORY

Work History

Job Title	Employer	Salary	Start Date	End Date	Federal Job (y/n)	Pay Plan	Series	Grade
Director, US Air Force Judiciary	US Air Force	$142,620.00	10/ 1/ 2007	6/1/2008	N			
		The promotion potential grade or full performance level of this position:						
		Location: (State, City, Country) Bolling AFB, Dist of Columbia, United States of America						
		Supervisor Name: Brig Gen Richard Harding Phone: (202) 404-8758 Email: MDDavis07 Permission to contact supervisor granted.						

	Responsible for full spectrum supervision of military justice throughout the Air Force, including the trial level (senior trial counsel and defense counsel), the appellate level (government appellate counsel and defense appellate counsel), military justice policy development and implementation, and clemency and parole. There are more than 250 personnel at locations worldwide assigned to the Judiciary.							
Chief Prosecutor, Office of Military Commissions	US Air Force	$138,441.00	9/ 1/ 2005	10/1/2007	N			
		The promotion potential grade or full performance level of this position:						
		Location: (State, City, Country) Arlington, Virginia, United States of America						
		Supervisor Name: Brig Gen Thomas Hemingway Phone: (703) 863-2849 Email: vairish@cox.net Permission to contact supervisor granted.						
	Responsible for the prosecution of al Qaida and Taliban combatants detained at Guantanamo Bay, Cuba, in the first military commissions conducted by the United States since World War II. *Led a team of approximately 100 attorneys, paralegals, intelligence analysts, investigators and administrative support personnel from the Department of Defense, Department of Justice, Federal Bureau of Investigation, Central Intelligence Agency and other federal agencies in the preparation of cases for prosecution. Case review/preparation required daily access to highly classified information and a TS/SCI clearance with access to SAPs related to the GWOT. The duties required knowledge of international law and the law of war.* *Duties required frequent contact with senior officials from DoD and other federal agencies, as well as direct contact with members of Congress and their staff members, to address legislative and policy issues pertaining to the detention of unlawful enemy combatants and potential prosecution in military commissions. At the request of key senate supporters, drafted language that was incorporated in the Military Commissions Act of 2006. Testified before the House Armed Services Committee.* *Served as the principal spokesperson for the prosecution. Maintained active engagement with interested media representatives in the United States, Canada, Australia and Germany. Conducted interviews with print, radio and television news outlets. Defended the military commissions process in an article published by the Yale Law Journal and in an op-ed published by the New York Times. Lectured in a variety of forums; including talks at Duke, Syracuse, Case Western, George Mason and American universities.*							
Staff Judge Advocate, HQ 20th Air Force	US AIr Force	$96,000.00	1/ 1/ 2005	9/1/2005	N			
		The promotion potential grade or full performance level of this position:						
		Location: (State, City, Country) F.E. Warren Air Force Base, Wyoming, United States of America						

		Supervisor Name: Lieutenant General Frank Klotz Phone: (703) 695-7913 Email: Frank.Klotz@pentagon.af.mil Permission to contact supervisor granted.						
	Responsible for providing legal advice to the Commander of 20th Air Force on the full range of issues involved in his management of the nation's ICBM assets at bases within CONUS. This included legal issues associated with the transportation and storage of nuclear weapons, authorization for the use of deadly force to protect nuclear material, fiscal limitations on the use of appropriated funds, and the full range of personnel issues associated with the armed forces and the DoD civilian workforce.							
Director, Legal Information Services Directorate	US Air Force	$108,000.00	5/ 1/ 2003	1/1/2005	N			
		The promotion potential grade or full performance level of this position:						
		Location: (State, City, Country) Maxwell Air Force Base, Alabama, United States of America						
		Supervisor Name: Brig Gen David Ehrhart Phone: (937) 257-7142 Email: David.Ehrhart@wpafb.af.mil Permission to contact supervisor granted.						
	Served as executive agent for all on-line legal research capabilities for DoD and other federal agencies. Supervised a staff of approximately 50 personnel, including attorneys, paralegals, administrative specialists, computer programmers and network administrators. Managed a multi-million dollar IT budget. Developed and maintained IT solutions covering diverse areas of military legal practice. Developed distance learning capabilities to deliver on-line legal education worldwide on demand.							
Deputy Commandant	U.S. Air Force	$100,000.00	5/ 1/ 2001	3/1/2003	N			
		The promotion potential grade or full performance level of this position:						
		Location: (State, City, Country) Montgomery, Alabama, United States of America						
		Supervisor Name: Bruce Brown Phone: 703.697.5840 Email: bruce.brown@pentagon.af.mil Permission to contact supervisor granted.						
	Served in a senior leadership position at the Air Force's law school. Provided professional legal education to over 11,000 students annually. Course director for the highest rated elective at the Air War College and the Air Command and Staff College. Earned recognition from the Commandant of the Air War College for academic excellence.							

REFERENCES

References

Name	Relation to Applicant	Title	Company	City	State
The Honorable James R. Clapper, Jr.	Professional	Under Secretary of Defense for Intelligence	Department of Defense	Pentagon	Virginia
	Phone: (703) 695-0971 **Email:** James.Clapper@osd.mil				
F. Andrew Turley	professional	Deputy General Counsel	Executive Office of the President, Office of Administration	Washington	Dist of Columbia
	Phone: (202) 395-1267 **Email:** fturley@oa.eop.gov				
Major General John D. Altenburg, Jr.	Professioinal	Attorney	Greenberg Traurig	Washington	Dist of Columbia
	Phone: (202) 331-3136 **Email:** altenburgj@gtlaw.com				
Donald J. Guter	professional	Dean	Duquesne University School of Law	Pittsburg	Pennsylvania
	Phone: (412) 396-6280 **Email:** guterd@duq.edu				
Major General Jack L. Rives	Professional	The Judge Advocate General of the Air Force	US Air Force	Pentagon	Virginia
	Phone: (703) 614-5732 **Email:** Jack.Rives@pentagon.af.mil				

EDUCATION BACKGROUND

If the Accredited status reads 'Cannot Determine' please click the link to determine the status.

NAME OF SCHOOL	CITY	STATE	ACCREDITED	DEGREE (IF ANY)	MAJORS (IF ANY)	RECEIVE DATE	TOTAL CREDITS EARNED	CUMULATIVE GPA
GEORGE WASHINGTON	Washington	Dist of Columbia	Yes	LL.M	Government Procurement	09/1992	24	82.33

UNIVERSITY LAW SCHOOL					Law			
	Type of School: College, University, or Military College							
US Army Judge Advocate General School	Charlottesville	Virginia	Cannot Determine	LL.M	Military Law	05/1992	42	91.6
	Type of School: College, University, or Military College							
NORTH CAROLINA CENTRAL UNIVERSITY	Durham	North Carolina	Yes	J.D. or LL.B	Law	12/1982	86	2.93
	Type of School: College, University, or Military College							
APPALACHIAN STATE UNIVERSITY	Boone	North Carolina	Yes	Bachelor's	Criminal Justice	05/1980	122	2.73
	Type of School: College, University, or Military College							

ADDITIONAL INFORMATION

I will gladly provide a complete set of military performance appraisals for the 25 years I have served as an Air Force judge advocate if it would be helpful in the evaluation of my qualifications.

APPLICANT'S RESUME

Resume	Uploaded Document	View
Curriculum Vitae	Uploaded Document	View
Writing Samples : New York Times Op-Ed, Feb. 2008	Uploaded Document	View
Publications : Yale Law Journal Pocket Part, Aug. 2007	Uploaded Document	View

KSAs / COMPETENCIES

Assistant Director and Senior Specialist, SL-0130-01

The following statements are designed to measure your experience and training in relation to the requirements of the job. Typically this experience is in or related to the job to be filled.

Ability to manage public policy analysis.**

Led and organized the analysis of public policy issues at the national or international level. Ensured: 1) public policy problems were appropriately conceptualized and defined, 2) information and research were fully analyzed and synthesized, 3) the implications of data were identified and appropriate conclusions were drawn, 4) alternatives were generated and assessed, 5) the consequences of choosing each alternative were evaluated, 6) established requirements (e.g., objectivity and authoritativeness) were applied in the development, evaluation, and maintenance of products and services, and 7) the availability of the appropriate array and design of products and services to meet client needs.

- ○ Had overall and continuing responsibility for leading and managing public policy research and analysis ACROSS BROAD AREAS in foreign affairs, defense, and trade policies at the national or international level and, in doing so, exercised ALL of the research management responsibilities listed above. Examples include: Director/Deputy Director of a university public policy research institute, Legislative committee staff director, Executive Director of a public policy think tank, President or Research Director of a professional or trade association, Director/Deputy Director of a national or international governmental policy research organization, senior level manager for an executive agency or international organization dealing with foreign affairs, defense, and trade policy.
- ○ Routinely led and managed public policy research and analysis ACROSS BROAD AREAS in foreign affairs, defense, and trade policies at the national or international level and, in doing so, exercised ALL of the research management responsibilities listed above. For example, is/was a Research Manager in: a university public policy research institute, a public policy think tank, a professional or trade association, or a national or international governmental policy research organization.
- ◉ Routinely led and managed public policy research and analysis IN SPECIFIC AREAS OF foreign affairs, defense, or trade policies at the national or international level and, in doing so, exercised ALL of the research management responsibilities listed above.
- ○ None of the above.

SUPPORTING INFORMATION: During my tenure as the Chief Prosecutor for the Military Commissions at Guantanamo Bay, Cuba, I led a prosecution task force of more than 100 personnel (attorneys, paralegals, intelligence analysts, investigators, and support staff) from the Department of Defense, Department of Justice, the Central Intelligence Agency, the Federal Bureau of Investigation, and other federal agencies responsible for the development and prosecution of war crimes cases. These were the first military commissions conducted since the end of World War II, so there was no body of current black letter law to draw upon for answers to the questions presented by this highly contentious and politically charged effort. Most issues required research and analysis of domestic and international law, as well as common law of war precepts. Additionally, it often required comparison to international treaties and conventions that were not binding on the United States, or to comparable international tribunals in which the United States

may or may not participate, to assess the potential impact proposed positions might have on the United States in the eyes of the international community.

To describe this continuous effort as herculean is no exaggeration. With time constraints and a finite full-time staff, I was fortunate to enlist the support of several law schools who allowed their students to research designated topics under the supervision of law professors with an interest and expertise in terrorism and constitutional law matters. I was also able to obtain inter-agency cooperation when we needed outside assistance. For example, the legal staff at the State Department was helpful in providing guidance on how potential courses of action might affect allies providing overt or covert support to the United States in the global war on terrorism.

Some of the issues were limited to the specifics of a particular case while others had broad policy implications extending beyond the roughly 75 detainees we intended to prosecute. I ensured the full range of options and the consequences of each were addressed, and on broad policy questions ensured decision makers understood not just what legally could be done but also practically what should be done to advance our national interests.

Almost all of the work we did was classified, so I am unable to describe this effort in greater detail.

Ability to apply knowledge of foreign affairs, defense, and trade.**

Applied knowledge of the theories, relevant laws and regulations, concepts, processes, techniques, principles, and/or practices relevant to foreign affairs, defense, and trade policies. This includes knowledge of the history, trends, and current status of foreign affairs, defense, and trade policies and interrelationships with other key issue areas and disciplines.

- ○ Recognized as a national authority ACROSS BROAD AREAS in foreign affairs, defense, and trade policies. For example, served on a national or international commission analyzing controversial issues related to broad areas of foreign affairs, defense, and trade policies; regularly consulted and advised decision-makers at the highest levels of the private or public sector (e.g., Congressional Committee Leadership, agency heads, CEOs) on broad areas of foreign affairs, defense, and trade policies; or equivalent experience.
- ○ Provided expert advice ACROSS BROAD AREAS in foreign affairs, defense, and trade policies. For example, consulted on foreign affairs, defense, and trade policy issues with decision-makers in the public or private sector; developed, implemented, and evaluated programs across broad areas in foreign affairs, defense, and trade policies at the national or international level; invited to serve as a peer reviewer for a scholarly or professional journal or published extensively in peer-reviewed professional journals across broad areas in foreign affairs, defense, and trade policies; or equivalent experience.
- ◉ Recognized by decision-makers as a professional resource IN SPECIFIC AREAS OF foreign affairs, defense, or trade policies. For example, served on an inter-agency task force developing policies in specific areas of foreign affairs, defense, or trade policies; published articles in peer-reviewed professional journals on specific areas of foreign affairs, defense, or trade policies; worked as a journalist primarily in specific areas of foreign affairs, defense, or trade policies for a major newspaper or trade publication relied on by professionals in the field; served as a professional committee staff member covering foreign affairs, defense, or trade issues; or equivalent experience.

○ None of the above.

SUPPORTING INFORMATION: I am recognized as an expert on war crimes, military commissions, and military law. I have consulted with a number of House and Senate members from both parties, as well as staff members from various committees. I have testified twice before House Armed Services Committee, most recently on July 30th. I provided advice and assistance to Senators Graham and McCain during the drafting of the Military Commissions Act of 2006 and I wrote some of the language included in the MCA. I have given presentations at a number of law schools, legal associations, and other special events, and I am scheduled to speak at the Yale, Georgetown, and Thomas Cooley law schools in the next few weeks. I have written op-ed pieces for two of the nation's largest newspapers and articles for several law journals (links are included in my resume and curriculum vitae). I have another article scheduled to be published on September 22nd by the Northwestern University Law Review Colloquy. I have done live and taped interviews on national radio and television news programs, and I am quoted often in major publications such as the Washington Post, Wall Street Journal, and Newsweek.

Ability to lead people and manage a workforce.**

Led and managed a highly professional, diverse workforce and, in so doing, performed all of the following activities: 1) assessed staffing requirements in relation to current and anticipated needs; 2) developed staffing plans, justifications, and requests; 3) made policy area assignments for staff; 4) developed and oversaw recruiting, hiring, mentoring, and training; 5) built and maintained exceptional staff performance by establishing performance standards and holding staff accountable for meeting or exceeding those standards; and 6) identified and implemented methods to improve manager and staff productivity.

○ Have extensive experience leading and managing a PUBLIC POLICY RESEARCH WORKFORCE and, in doing so, exercised ALL of the management responsibilities listed above. Direct reports consisted PRIMARILY OF SUBORDINATE MANAGERS. Examples include: Director/Deputy Director of a university public policy research institute, Legislative committee staff director, Executive Director of a public policy think tank, President or Research Director of a professional or trade association, Director/Deputy Director of a national or international governmental policy research organization, senior level manager for an executive agency or international organization dealing with foreign affairs, defense, and trade policy.

○ Led and managed a PUBLIC POLICY RESEARCH WORKFORCE and, in doing so, exercised ALL of the management responsibilities listed above. Direct reports consisted PRIMARILY OF PROFESSIONAL RESEARCH STAFF. For example, is/was a Research Manager in: a university public policy research institute, a public policy think tank, a professional or trade association, or a national or international governmental policy research organization.

◉ Led and managed PROFESSIONAL STAFF and, in so doing, exercised ALL of the management responsibilities listed above.

○ None of the above.

SUPPORTING INFORMATION: I have led a variety of diverse organizations, large and small, and achieved success in each one. I served as Staff Judge Advocate (senior military attorney) at large and small Air Force installations with missions ranging from pilot

training to maintaining and operating our nation's intercontinental ballistic missile assets. I was the Deputy Commandant and Acting Commandant at the Air Force Judge Advocate General's School, the Air Force's law school, where we educated more than 11,000 students per year. I was the Director of Legal Information Services, a diverse organization of military, civilian, and contractor personnel, serving as the Defense Department's executive agent for computer assisted legal research worldwide. I was Chief Prosecutor for the Military Commissions and led a multi-agency task force of more than 100 personnel. When the sexual assault scandal erupted at the Air Force Academy I was picked to lead the investigation. My performance evaluations attest to the leadership I provided and the success of my efforts. Comments by my superiors include:

"Dynamic leadership kept legal staff focused and motivated despite a tempo that exceeded all prior year"

"Master motivator - his out-front, positive leadership was invaluable in keeping the staff invigorated/focused"

"Leadership personified - most creative of all JAGs I've known in 28 year career"

"Spectacular leader...changed how the JAG Corps utilizes technology"

"Personable leadership style infused enthusiasm and focus despite political uncertainty, delays, and countless issues"

"Senator Graham made it clear in the Senate record: 'There is no finer officer in the military than Colonel Davis'"

Ability to instill a collaborative work environment.**

Created, promoted, and sustained collaborative approaches to the work of the organization. This included creating organizational protocols that constitute an environment in which collaboration is expected and ensuring an atmosphere in which input is sought from colleagues with diverse expertise, skills, and abilities and using that input to inform and enhance the work of the organization.

- ○ Acted as a leader in identifying, building, and maintaining extensive relationships and networks throughout the organization in support of its mission. Identified obstacles to an active and effective collaborative environment, recommended solutions, and implemented decisions for overcoming these obstacles. Identified and recommended creative new approaches to strengthen collaborative efforts across the organization. Proactively sought out opportunities to work across organizational structures and disciplines.
- ○ Built and maintained ongoing relationships and networks throughout the organization in support of its mission. Planned and coordinated activities with managers in other areas of the organization to promote integrated implementation of organizational goals. Planned and implemented activities that promote a sense of interdependency.
- ◉ Led an organization-wide collaborative effort or initiative. Collaborative effort involved working across multiple disciplines/fields and organizational levels and included decision-makers and their staffs, supervisors, other managers, specialists, experts, co-workers, and clients.
- ○ None of the above.

SUPPORTING INFORMATION: One of my former rating officials described me in a performance evaluation as "calm, cool, collected," which I believe is an accurate description. Successful leaders adopt leadership styles that match their individual personalities: General Colin Powell could not succeed if he tried to be General George Patton. I believe in setting clear expectations, instilling a shared vision of the mission, soliciting a broad range of opinions but expecting full support of my decisions, ensuring those that do the work get the credit for successes, accepting full blame when there are failures (unless they result from repeating mistakes over and over or from a half-hearted effort), and balancing the needs of each individual with the organization's interests. I have used that approach in a variety of organizational settings and the results we achieved indicate I was successful.

An example is when I lead the investigation of the sexual assault scandal at the Air Force Academy. A core group of about a dozen attorneys and paralegals from around the country were assembled to conduct the investigation. We were told to expect about two weeks to complete our work. In the end, we spent three and a half months conducting the investigation and preparing our report. We were augmented at times by as many 20 others who came in for a week at a time. We worked seven days a week for 12 to 14 hours a day, with one day off on Easter Sunday. It was a challenge to maintain morale and focus as the process was buffeted by political influences and stretched on from winter into spring, but we earned the thanks of the Secretary of the Air Force for our extraordinary effort. Our success was due to the collaborative and cohesive dynamic of our team. We clearly accomplished more by working together as a group than we could as individuals. More than five years later I still hear from some of the team members from time to time and they thank me for taking care of them and getting the job done.

I experienced similar challenges when I took over as the Director of Legal Information Services when the previous Director retired after eight years in the job. The organization had been down-sized and was under constant threat of being overtaken by the Department of Defense or Air Force communications communities who control defense information technology. The programmers did not get along with the network administrators. The civilians did not get along with the military personnel, and neither group got along with the contractors. There was a constant buzz of discontent that was unhealthy for the organization. I knew something about leadership, but very little about legal information technology. I brought in a group of experienced IT professionals and asked them to do a top to bottom review of the organization and suggest changes, if they thought changes were appropriate, to improve our effectiveness. I adopted many, but not all of their suggestions. I eliminated some links in the chain of command and rearranged the physical layout to enhance collaboration. In tackling long-range projects I teamed personnel from different branches and included military, civilian, and contractor personnel on the teams. A few were very protective of their stovepipes, but most supported the collaborative effort. My rating official said the "reorganization tested his mettle as manager/organizer—flawless execution and success a tribute to his skills." The Judge Advocate General of the Air Force wrote, "Extraordinary leader of my most diverse directorate—unusual mix of technical/legal folks—he made it look easy!"

Ability to design and utilize research frameworks and analytical methods and techniques.

Designed and utilized research and analytical methodologies and techniques pertinent to foreign affairs, defense, and trade policies. Applied these methodologies and techniques to the analysis, appraisal, and evaluation of complex public policy issues.

- Led the organization in the development of qualitative and/or quantitative research strategies to address complex public policy issues related to foreign affairs, defense, and trade policies with many unknowns. This required expert knowledge of variables

and their interrelationships; of the identification, selection, and evaluation of data; and of analytical options. The research involved innovative applications of cutting-edge, multidisciplinary techniques and methods. Interpreted results of research for use by decision-makers at the highest levels of the private or public sector (e.g., Congressional Committee Leadership, agency heads, CEOs).

- ○ Developed qualitative and/or quantitative research strategies to address complex public policy issues related to foreign affairs, defense, and trade policies. This required extensive knowledge of variables and their interrelationships; of the identification, selection, and evaluation of data; and of analytical options. This research involved the innovative application of a wide range of established, multidisciplinary analytical techniques and methods. Interpreted results of research for use by decision-makers in the public or private sector.
- ◉ Implemented qualitative and/or quantitative research strategies to address complex public policy issues related to foreign affairs, defense, or trade policies. This required knowledge of variables and their interrelationships; of the identification, selection, and evaluation of data; and of analytical options. The research involved the advanced application of a wide range of established analytical techniques and methods. Interpreted results of research for use by senior level audiences ranging from expert to layman.
- ○ None of the above.

SUPPORTING INFORMATION: Conducting research is the crux of what attorneys do on a day-to-day basis, but legal research is more art than science. Whether it was in courts-martial, military commissions, or government contract litigation I have always tried to anticipate the issues likely to arise in the future in order to have the time to conduct the research and analysis necessary for an informed response. Inevitably issues arise unexpectedly in the course of litigation and require a quick answer. There is no model for handling those situations and often you are required to response with less than complete information at your disposal. In the military commission context, to the extent time permitted and it did not require reference to classified information, I attempted to vet some of the positions we intended to take with outside agencies, academics, nongovernmental organizations, and representatives of the Muslim community. Our research may have led us to a particular legal conclusion on an issue, but the legally correct answer may have collateral consequences on the efforts of other agencies or unintended consequences with other audiences. In effect we could potentially win the battle and lose the war by taking a legal correct position on an issue with broader consequences.

With respect to the use of an analytical methodology, the best example I can offer is the use of the Automated Military Justice Analysis and Management System (AMJAMS), although I would classify it more as an assessment tool than a research methodology. I was responsible for the AMJAMS IT architecture when I was the Director of Legal Information Services and I was responsible for the data it produced when I was the Director of the Air Force Judiciary. The underlying premise is that the prompt administration of justice is in the best interest of the accused and the Air Force. There is no benefit to an accused in having criminal charges lingering any longer than necessary. Likewise, an Air Force organization cannot productively utilize an airman accused of a crime until the matter is resolved. AMJAMS automates the military justice process and allows us to collect data on how long it takes at every stage of the process from the date an offense occurs until the date final appeals are exhausted if there is a conviction. By examining the data for each segment of the process we can identify areas where we might eliminate or reduce delays. For example, we found the period from filing charges until the trial began was increasing in urinalysis (drug testing) cases. These cases require at least two toxicology experts, one for the prosecution and one for the defense. We found that the

pool of toxicologists with the expertise to testify in these types of cases was too small and the data was sufficient to persuade the Air Force to fund additional training and billets for toxicologists.

Ability to communicate in writing.

Wrote a variety of clear, cogent, accurate, and well-organized products on public policy issues related to foreign affairs, defense, and trade policies in order to convey the results of research and analysis representing varying points of view. Examples include: 1) decision memos, 2) research analyses, 3) briefing papers, 4) analyses of options, 5) evaluation of legislative proposals, and 6) articles covering a complex public policy issue for a major national or international scholarly or trade publication.

- (●) AS A PRINCIPAL JOB RESPONSIBILITY, wrote a variety of authoritative analytical products assessing complex and controversial public policy issues of national and/or international significance to advise senior decision-makers in the public or private sector with varying levels of expertise. These products were related to foreign affairs, defense, and trade policies and included MOST of the above types of documents.
- ( ) ROUTINELY wrote a variety of analytical products assessing complex and controversial public policy issues of national and/or international significance for publication or dissemination to decision-makers in the public or private sector with varying levels of expertise. These products were related to foreign affairs, defense, and trade policies and included AT LEAST THREE of the above types of documents.
- ( ) OCCASIONALLY wrote analytical products assessing complex and controversial public policy issues related to foreign affairs, defense, and trade policies for publication or dissemination to a variety of audiences with varying levels of expertise. These products included ONE OR TWO of the above documents.
- ( ) None of the above.

SUPPORTING INFORMATION: During my tenure as Chief Prosecutor for the Military Commissions I prepared a variety of documents for various decision makers and audiences, including some that required the President's signature. Many of the issues we faced and the written products we prepared were on novel legal and policy issues of national interest and debated at the highest levels of the government. These issues pertained to classified matters, so I am unable to provide specifics.

I wrote several articles for law reviews and major newspapers. A copy of each is attached to my application and links to all of them are included in my resume.

Ability to review written products.

Evaluated the written products of others to meet the quality standards of a public policy organization. This includes making suggestions to improve these written products.

- ( ) As a major job responsibility, evaluated and critically reviewed diverse written research products on public policy issues for compliance with established qualitative standards and made independent judgments on acceptability of material. Was responsible for suggesting revisions to improve products and for ensuring their consistency with standards. This experience was in an organization devoted to the preparation of written public policy analyses directed at high-level decision makers.

- (●) Routinely evaluated and critically reviewed diverse written research products on public policy issues for compliance with established qualitative standards and made independent judgments on acceptability of material. Offered suggestions for product improvement. This experience was in an organization devoted to the preparation of written public policy analyses directed at decision makers.
- ( ) Occasionally evaluated and critically reviewed diverse written research products on public policy issues for compliance with established qualitative standards and made independent judgments on acceptability of material. Offered suggestions for product improvement.
- ( ) None of the above.

SUPPORTING INFORMATION: During my tenure as Chief Prosecutor for the Military Commissions I personally reviewed every significant document and every legal pleading that left our office. I ensured the content was conveyed in concise language and was free of hyperbole. This was a practice I was familiar with as a co-editor of the Air Force Law Review and from evaluating hundreds of research papers prepared by students in classes I taught at the Air War College and Air Command and Staff College.

Ability to apply knowledge of Congressional decision-making.

Have knowledge of congressional processes by which legislation becomes law, the federal budget process, the appropriations process, and oversight, sufficient to provide timely and relevant assistance to agency head, congressional Members, committees, and staff.

- ( ) Gained a comprehensive knowledge of and involvement with congressional decision-making processes through experience such as serving as a SENIOR-level ADVISOR for a Member or congressional committee, for a congressional support agency, for a federal executive branch agency, or for other groups such as private public policy organizations, associations, or interest groups.
- (●) Gained a comprehensive knowledge of and involvement with congressional decision-making processes through experience such as serving as a MID-level STAFF for a Member or congressional committee, for a congressional support agency, for a federal executive branch agency, or for other groups such as private public policy organizations, associations, or interest groups.
- ( ) Gained a thorough knowledge of congressional decision-making processes through academic scholarship or such activities as developing or promoting draft legislative proposals at the staff level in a governmental agency or nonprofit organization or reporting on the legislative aspects of congressional work for an organization.
- ( ) None of the above.

SUPPORTING INFORMATION: I personally participated in the drafting of the Military Commissions Act of 2006 having written some of the language included in the Act and reviewing drafts and providing inputs. I continue to work with some congressional staff members, nongovernmental organizations, and think tanks on possible legislation to replace the military commissions with some form of national security court. I am familiar with the federal procurement and appropriations process. I have two LLMs in government procurement law and I taught procurement and fiscal law for three years at the Air Force

Judge Advocate General's School. I have provided legal advice and assistance in various stages of the procurement process and on fiscal law matters.

Ability to think and plan strategically.

Led or participated in the development and implementation of the strategic vision and direction for a research organization.

- ○ Led the development of and secured approval for the strategic vision and planning for a research organization. This included identifying strategic opportunities, goals, and objectives. Oversaw the implementation of the vision by developing strategic and annual plans; acquiring and utilizing fiscal, human, and resources effectively; and setting performance targets and evaluating progress toward meeting those targets.
- ○ Played a critical role in developing and implementing the strategic vision and planning for a research organization, working under the direction of the head of the organization. This included preparing drafts of major portions of strategic and annual plans, and being responsible for the implementation of significant components of the plan.
- ◉ Participated in developing and implementing the strategic plan for an organization. Was responsible for the implementation of all aspects for at least one major component of the plan.
- ○ None of the above.

SUPPORTING INFORMATION: I directed a top-to-bottom review of Legal Information Services when I was appointed Director and led the implementation of a new organizational structure and strategic focus to align the organization with the current and future needs of military legal practitioners. As noted earlier, I earned the praise of my rating official and The Judge Advocate General of the Air Force for the success of my efforts. In my last assignment as Director of the Air Force Judiciary, I had primary responsibility for implementing JAG Corps 21 initiatives associated with military justice. I hosted a week-long conference in April 2008 to solicit inputs from practitioners at all levels of the military justice process to enhance the delivery of military justice in the 21st century. Many of the suggestions generated at the conference are or will be implemented to keep military justice aligned with the needs of today's and tomorrow's Air Force. We implemented and monitored a number of performance metrics to identify areas requiring attention.

Ability to be client focused.

Met client needs in a public policy research setting. Created an environment and motivated a group in such a way that a high level of support and service was evident to clients. Built long-term relationships with clients by anticipating and understanding their current and future needs; meeting commitments to clients on time and keeping them informed; and seeking and using client feedback. This also included continually evaluating organizational performance from a client's point of view.

- ○ Developed and led client service strategies for a research organization serving a highly demanding clientele. These included: identifying and monitoring client needs, establishing standards for client service, developing pro-active outreach to clients, designing systems and techniques for measuring client service, and evaluating the results.

- ○ Oversaw the implementation of client service strategies for a research organization serving a highly demanding clientele. Oversaw: the execution of client service strategies to ensure that standards were achieved; the implementation of systems and techniques for evaluating client service; and the improvement of client services based on that feedback.
- ○ Participated extensively in client service activities for a research organization serving a highly demanding clientele. Built ongoing relationships with clients and collected feedback on the quality of service provided.
- ◉ None of the above.

SUPPORTING INFORMATION: I have never worked for a purely public policy research organization. The heart of the question asks what I have done to ensure my organizations met current and future client needs. An example would be my tenure as Deputy Commandant and Acting Commandant of the Air Force Judge Advocate General's School. One measure of academic success is the percentage of students that successfully complete a course of study. What that does not tell you is whether the course of study gave students the skills necessary for day-to-day practices at their first duty stations. We implemented comprehensive surveys of both students and their supervisors at the six month and one year points following graduation. We asked the supervisors to assess whether their subordinates returned with the right skills to effectively perform their duties and to identify areas where we might refocus our efforts. We asked graduates how well the course prepared them for the different areas in which they practiced and asked for their suggestions on areas we could eliminate, reduce, bolster, or add. As a result of survey data we increased the moot court requirements in our basic course. The number of courts-martial in the Air Force is less than half what they were a decade ago, so new judge advocates do not have the trial litigation opportunities they had in the past. To compensate somewhat for the decrease in opportunities for real-world experience, we added more moot court time in the basic course to give students a stronger foundation in their initial trial advocacy training before they reach their first duty assignments. The feedback indicated this extra emphasis produced better prepared students at the outset of their Air Force careers. We recognized that the right curriculum for today is probably not right for tomorrow, so a constant feedback and assessment process is imperative.

ELIGIBILITY TO APPLY

Country of Citizenship: USA

- ☐ I am or have been a federal employee.
- ☐ I am a retired federal employee.
- ☐ I am or was a volunteer with the Peace Corps, VISTA, ACTION within the last 12 months.

☐ The Federal Government's hiring options include special appointing authorities for people with disabilities. Federal employers are authorized to use these authorities when considering certain people with disabilities. I wish to be considered under these authorities.

☐ I was a David L. Boren scholar or fellow, and I am no longer a student.

RELEVANT INFORMATION

AWARDS **Award**	**Date**
Headquarters, U.S. Air Force, Outstanding Judge Advocate of the Year for 1990	02/1991

CERTIFICATIONS **Licenses or Certifications**	**Dates**
N.C State Bar	04/1983

SIGNIFICANT DETAILS **Detail**	**Dates**
Senior military member on Air Force Academy sexual assault investigation	02/2003 to 05/2003

OTHER CONSIDERATIONS

MILITARY OCCUPATIONAL SPECIALTY	
Army (enlisted):	
Army (officer):	
Air Force (enlisted):	
Air Force (officer):	Judge Advocate

Navy (enlisted):	
Navy (officer):	
Marine Corps (enlisted):	
Marine Corps (officer):	
US Coast Guard:	

SECURITY CLEARANCE	
The highest level of clearance you have been awarded.	Sensitive Compartmented Information (DCID/14)
Is your security clearance active?	Yes

PASSPORT INFORMATION	
Passport Type	

RECENT PERFORMANCE RATINGS	
Three most recent performance ratings, beginning with the most recent.	Outstanding Outstanding Outstanding

APPLICANT CERTIFICATION

I certify that, to the best of my knowledge and belief, all of the information on and submitted in support of my application is true, correct, complete and made in good faith. I understand that false or fraudulent information on or attached to this application may be grounds for not hiring me or firing me after I begin work, and may be punishable by fine or imprisonment. I understand that any information I give may be investigated.

☑ I certify that I have read and understand the applicant certification statement provided above.

DOCUMENTATION REQUIRED

Morris D. Davis

14954 Alpine Bay Loop ▪ Gainesville, VA 20155 ▪ (703) 753-5693 ▪ col.morris.davis@gmail.com

EXECUTIVE PROFILE

Senior Legal Counsel ▪ Executive Level Leader ▪ Strategic Communicator
LL.M. (x2), J.D., and B.S Degrees ▪ Top Secret / SCI Security Clearance

- Legal executive with a comprehensive knowledge in diverse areas of the law, national security affairs, strategic planning, and the legislative process.
- Powerful speaker and author with the proven ability to influence audiences, including the national and international media, politicians, and special interest groups.
- Dynamic leader who has inspired unique organizations to unsurpassed excellence.
- Distinguished record of integrity and an unwavering commitment to ethics and professionalism.

PROFESSIONAL EXPERIENCE

Director of the Air Force Judiciary 2007 - 2008
Bolling Air Force Base, Washington, DC

Strategic level oversight of the Air Force military justice system covering 550,000 service members. Supervises the development of policy and legislation, trial and appellate level practice, and clemency and parole matters.

- Manages 265 attorneys, paralegal, and support personnel at 70 sites around the world.
- Flattened organizational structure to respond effectively to the needs of the 21st century Air Force.
- Instituted top-to-bottom review of all military justice processes to identify best practices, address areas in need of improvement, and eliminate redundancies.

Chief Prosecutor for Terrorism Trials at Guantanamo Bay, Cuba 2005 – 2007
Pentagon, Washington, DC, and Guantanamo Bay, Cuba

Led a multi-agency task force responsible for prosecuting al Qaida and Taliban members for law of war violations. Advised senior Executive officials and key members of Congress on the detention and prosecution of detainees.

- Led a task force of over 100 attorneys, paralegals, intelligence analysts, law enforcement agents, and support personnel from the Department of Defense, Department of Justice, Central Intelligence Agency, Federal Bureau of Investigation, and other federal agencies.
- Secured the first military commission conviction since World War II.
- Media strategist and spokesperson for the prosecution with television, radio, and print media outlets from around the world. Highly sought after speaker by colleges and professional groups. Authored Yale Law Review Pocket Part article named one of its three most influential of 2007.
- Advisor on the development of the Military Commissions Act. Testified before the House Armed Services Committee, consulted with key congressional leaders, and drafted language for the bill.

Senior Attorney and Legal Advisor to the Commander 2005
Headquarters Twentieth Air Force, F. E. Warren Air Force Base, Cheyenne, WY

Senior legal counsel to the commander responsible for the operation, maintenance, and security of the nation's Intercontinental Ballistic Missiles (ICBM). Managed the delivery of a full range of legal services to 9,500 Air Force personnel deployed over a 46,000 square mile area spread across five states.

- Enhanced the speed and the quality of justice at the command with the highest disciplinary rates in the Air Force by streamlining the decision-making process and increasing the flow of information.
- Devised alternative strategies to avoid government ethics issues with a high-interest program.
- Averted a potential statutory violation related to the arming of members of the National Guard to protect nuclear assets in transit across state lines.

Director of Legal Information Technology 2003 - 2005
Maxwell Air Force Base, Montgomery, AL

Executive level manager for online legal research services for the Department of Defense. Led a team of more than 50 attorneys, paralegals, and IT professionals in developing innovative IT programs to enhance the delivery of legal services throughout the Air Force. Managed a $7 million annual procurement program for JAG Corps IT hardware.

- Provided 24/7 online legal research capabilities to over 7,000 registered users at sites worldwide.
- Spearheaded partnership with the Army for a single Lexis service contract to achieve economy of scale. New joint-service contract ensured top quality service and multi-million dollar savings.
- Led effort to automate manual processes to bolster efficiency and accuracy at reduced costs.

Assistant Dean of the Air Force Law School 2000 - 2003
Maxwell Air Force Base, Montgomery, AL

Senior leader at the busiest of eight schools in Air University. Educated 15,000 students annually in courses conducted 50 weeks per year. Delivered post-graduate level legal training that is accredited for continuing legal education (CLE) credit in every jurisdiction that requires CLE.

- Course director for the highest rated electives at the Air War College and the Air Command and Staff College. Earned "Academic Excellence" recognition from Air War College Commandant.
- Conducted the Air Force's inaugural professional continuing education course utilizing distance learning technology in 1994. Continued nurturing exploitation of distance learning capabilities, including webcasts and online interactive programs. Recognized leader in taking the school house to the students and making education available on-demand from anywhere in the world.
- Handpicked to head the investigation into allegations of rape and sexual assault at the Air Force Academy. Praised for keeping the investigation team motivated and focused despite an 80-plus hour workweek non-stop for more than three months under intense political and media scrutiny.

EDUCATION

LL.M. (Government Procurement Law)	George Washington University, Washington, DC, 1992
LL.M. (Military Law)	U.S. Army JAG School, Charlottesville, VA, 1992
J.D.	N.C. Central University School of Law, Durham, NC, 1983
B.S. (Criminal Justice)	Appalachian State University, Boone, NC, 1980

PUBLICATIONS

"The Influence of *Ex Parte Quirin* and Courts-Martial on Military Commissions," (August 27, 2008). Northwestern University Law Review Colloquy, Forthcoming. (Available at SSRN: http://ssrn.com/abstract=1260016).

"In Defense of Guantanamo Bay," 117 YALE LAW JOURNAL POCKET PART 21 (2007). (Available at: http://thepocketpart.org/2007/08/13/davis.html).

"Unforgivable Behavior, Inadmissible Evidence," op-ed, NEW YORK TIMES, Feb. 17, 2008. (Available at: http://www.nytimes.com/2008/02/17/opinion/17davis.html).

"AWOL Military Justice," op-ed, LOS ANGELES TIMES, Dec. 10, 2007. (Available at: http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story).

"The Guantanamo I Know," op-ed, NEW YORK TIMES, Jun. 26, 2007. (Available at: http://www.nytimes.com/2007/06/26/opinion/26davis.html).

The Role of Military Commissions in the Global War on Terrorism," 37 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW (2005). (Available at: http://www.case.edu/orgs/jil/archives/vol37no2and3/Morris_Davis.pdf

Morris D. Davis

"Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age," AIR AND SPACE POWER JOURNAL – CHRONICLES ONLINE JOURNAL (2004).
(Available at: http://www.airpower.maxwell.af.mil/airchronicles/cc/davis1.html).

REFERENCES

The Honorable James R. Clapper, Jr.
Under Secretary of Defense for Intelligence
Email address: James.Clapper@osd.mil
Phone: (703) 695-0971

Lieutenant General Jack L. Rives
The Judge Advocate General of the Air Force
Email address: Jack.Rives@pentagon.af.mil
Phone: (703) 614-5732

Mr. F. Andrew Turley
Deputy General Counsel
Executive Office of the President, Office of Administration
Email address: fturley@oa.eop.gov
Phone: (202) 395-1267

Brigadier General (retired) Michael G. Lee
Vice President Business Development, Global Security Solutions
Lockheed Martin
Email address: Michael.G.Lee@lmco.com
Phone: (703) 293-4262

Rear Admiral (retired) Donald J. Guter
Dean, Duquesne University School of Law
Email address: guterd@duq.edu
Phone: (412) 396-6280

MORRIS DURHAM DAVIS

Contact Information:

14954 Alpine Bay Loop
Gainesville, Virginia 20155
Email: Col.Morris.Davis@gmail.com
Phone: (Home) 703.753.5693 (Cellular) 703.589.8603

Education:

LL.M. (1992) George Washington University School of Law (Government Procurement Law)

LL.M. (1992) U.S. Army Judge Advocate General School (Military Law -- Concentration in Government Procurement Law)

J.D. (1983) North Carolina Central University School of Law

B.S. (1980) Appalachian State University (Criminal Justice)

Employment:

Nov. 2007 to Jun. 2008	Director, United States Air Force Judiciary Bolling Air Force Base Washington, District of Columbia
Sep. 2005 to Oct. 2007	Chief Prosecutor, Office of Military Commissions Department of Defense Arlington, Virginia and Guantanamo Bay, Cuba
Feb. 2005 to Aug. 2005	Staff Judge Advocate, Headquarters 20th Air Force Francis E. Warren Air Force Base Cheyenne, Wyoming
Jun. 2003 to Jan. 2005	Director, Air Force Legal Information Services Maxwell Air Force Base Montgomery, Alabama
Jul. 2000 to May 2003	Deputy Commandant and Interim Commandant Air Force Judge Advocate General's School Maxwell Air Force Base Montgomery, Alabama
Jul. 1997 to Jun. 2000	Staff Judge Advocate, 7th Bomb Wing Dyess Air Force Base Abilene, Texas

Jul. 1995 to Jun. 1997	Staff Judge Advocate, 14th Flying Training Wing Columbus Air Force Base Columbus, Mississippi
Jun. 1992 to Jun. 1995	Instructor (Government Contracts and Fiscal Law) Air Force Judge Advocate General's School Maxwell Air Force Base Montgomery, Alabama
May 1994 to Sep. 1994	Staff Judge Advocate, 4409th Operations Group (Provisional) Riyadh, Saudi Arabia
Jul. 1991 to May 1992	Student, United States Army Judge Advocate General School Charlottesville, Virginia
May 1988 to Jun. 1991	Appellate Government Counsel Bolling Air Force Base Washington, District of Columbia
Jan. 1988 to Apr. 1988	Circuit Trial Counsel Bolling Air Force Base Washington, District of Columbia
May 1985 to Dec. 1987	Area Defense Counsel Patrick Air Force Base Cocoa Beach, Florida
Dec. 1983 to Apr. 1985	Chief of Military Justice Patrick Air Force Base Cocoa Beach, Florida

Publications:

Davis, Morris D., "The Influence of *Ex Parte Quirin* and Courts-Martial on Military Commissions," (August 27, 2008). Northwestern University Law Review Colloquy, Forthcoming. (Available at SSRN: http://://ssrn.com/abstract=1260016).

Davis, Morris D., *"In Defense of Guantanamo Bay,"* 117 YALE L.J. POCKET PART 21 (2007), http://thepocketpart.org/2007/08/13/davis.html [named one of their three most popular and influential articles of the year for 2007]

Davis, Morris D., *"Unforgivable Behavior, Inadmissible Evidence,"* op-ed, N.Y. TIMES, Feb. 17, 2008, http://www.nytimes.com/2008/02/17/opinion/17davis.html

Davis, Morris D., *"AWOL Military Justice,"* op-ed, L.A. TIMES, Dec. 10, 2007, http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story

Davis, Morris D., *"The Guantanamo I Know,"* op-ed, N.Y. TIMES, Jun. 26, 2007, http://www.nytimes.com/2007/06/26/opinion/26davis.html

Davis, Morris D., *"The Role of Military Commissions in the Global War on Terrorism,"* 37 CASE W. RES. J. INT'L LAW (2005), http://www.case.edu/orgs/jil/archives/vol37no2and3/Morris_Davis.pdf

Davis, Morris D., *"Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age,"* AIR AND SPACE POWER JOURNAL – CHRONICLES ONLINE JOURNAL (2004), http://www.airpower.maxwell.af.mil/airchronicles/cc/davis1.html

Davis, Morris D., *"The Domestic Components Requirement of the Buy American Act: Dismayed in America?,"* 36 A.F. LAW REV. 129 (1994)

Presentations:

"What Process is Due Alien Unlawful Enemy Combatants?," Fordham University School of Law, New York City, New York, Apr. 2008

"Civil Liberties in Times of Crisis," (with Julian Ku, Hofstra University; Elisa Massimino, Human Rights First; and David Remes, Covington & Burling), 102nd Annual Meeting of the American Society of International Law, Washington, District of Columbia, Apr. 2008

"The Rule of Law Today," (luncheon keynote speaker) Sponsored by the Pennsylvania Bar Association, Philadelphia, Pennsylvania, Apr. 2008

"Security and Civil Rights: Can We Have Both?," (with Professor Louis René Beres, Purdue University), Co-Sponsored by the University of Utah and the Utah Minority Bar Association on the 40th anniversary of the death of Dr. Martin Luther King, Jr., Salt Lake City, Utah, Apr. 2008

"The Status of Military Commissions," Air Force Judge Advocate General's Corps Continuing Legal Education Conference, George Mason University School of Law, Nov. 2007

"Confronting Terrorism Here and Abroad: Which Way Forward?," (with Major General John D. Altenburg; Professor Richard Rosen, Texas Tech School of Law; and COL Dwight Sullivan, Chief Defense Counsel, Office of Military Commissions), Sponsored by the Center of Law, Ethics and National Security, Duke University, Durham, North Carolina, Apr. 2007

"The Future of Military Commissions," Sponsored by the Institute for National Security and Counterterrorism, Syracuse University School of Law, Syracuse, New York, Mar. 2007

"Military Commissions Panel," (with Professor Robert Chesney, Wake Forest University School of Law; COL Dwight Sullivan, Chief Defense Counsel, Office of Military Commissions; and Mr. Jess Bravin, Reporter, The Wall Street Journal), Air Force Judge Advocate General's Corps Keystone Leadership Summit, Orlando, Florida, Oct. 2006 (transcript at The Reporter, Vol. 33, No. 4, at 144 (Dec. 2006))

"The Role of Military Commissions in the Global War on Terrorism," Sponsored by the Institute for Global Security Law and Policy, Case Western Reserve Univ., Cleveland, Ohio, Feb. 2006

Media Appearances:

NBC Nightly News; ABC World News Tonight; Good Morning America; Fox News; Dan Rather Reports; C-Span (live from Case Western Reserve Univ.); National Public Radio (Morning Edition, Weekend Edition, Day to Day, All Things Considered and the Diane Rehm Show); BBC (The World); Newsweek Radio; CBS Radio; Australian Broadcasting Company (Lateline and ABC Radio); Canadian Television Network (The Verdict); Canadian Broadcasting Corp. Radio One (The Current); CTV News; Al Jazeera World News Live; Democracy Now!

Other Appearances:

Testified before the House Armed Services Committee at a hearing on the Military Commissions Act of 2006, Sep. 13, 2006

Testified before the House Armed Services Committee at a hearing on the implications of the Supreme Court's decision in *Boumediene v. Bush* on detainees at Guantanamo Bay, Jul. 30, 2008

Future Publications and Appearances:

Presentation at the Thomas M. Cooley School of Law, Sep. 24, 2008

Presentation at the Yale Law School, Sep. 25, 2008

References:

The Honorable James R. Clapper, Jr.
Under Secretary of Defense for Intelligence
Email address: James.Clapper@osd.mil
Phone: 703.695.0971

Lieutenant General Jack L. Rives
The Judge Advocate General of the Air Force
Email address: Jack.Rives@pentagon.af.mil
Phone: 703.614.5732

Mr. F. Andrew Turley (Brigadier General, U.S. Air Force Reserve)
Deputy General Counsel
Executive Office of the President, Office of Administration
Email address: fturley@oa.eop.gov
Phone: 202.395.1267

Brigadier General (retired) Michael G. Lee
Vice President Business Development, Global Security Solutions
Lockheed Martin
Email address: Michael.G.Lee@lmco.com
Phone: 703.293.4262

Rear Admiral (retired) Donald J. Guter
Dean
Duquesne University School of Law
Email address: guterd@duq.edu
Phone: 412.396.6280

The New York Times
nytimes.com

February 17, 2008

OP-ED CONTRIBUTOR

Unforgivable Behavior, Inadmissible Evidence

By MORRIS DAVIS

Washington

TWENTY-SEVEN years ago, in the final days of the Iran hostage crisis, the C.I.A.'s Tehran station chief, Tom Ahern, faced his principal interrogator for the last time. The interrogator said the abuse Mr. Ahern had suffered was inconsistent with his own personal values and with the values of Islam and, as if to wipe the slate clean, he offered Mr. Ahern a chance to abuse him just as he had abused the hostages. Mr. Ahern looked the interrogator in the eyes and said, "We don't do stuff like that."

Today, Tom Ahern might have to say: "We don't do stuff like that very often." Or, "We generally don't do stuff like that." That is a shame. Virtues requiring caveats are not virtues. Saying a man is honest is a compliment. Saying a man is "generally" honest or honest "quite often" means he lies. The mistreatment of detainees, like honesty, is all or nothing: We either do stuff like that or we do not. It is in our national interest to restore our reputation for the latter. (All opinions here are my own, and do not necessarily reflect those of the Air Force or Defense Department.)

Some accounts of detainee abuse in the war on terrorism are overblown, but others are not. After humiliating prisoners at Abu Ghraib by forcing them to strip naked and lie in a pile like a stack of firewood or simulating the drowning of detainees to persuade them to talk, we can no longer say we "don't do stuff like that" — and we do not have to look far to see the damage. The disclosure last month of a manual for Canadian diplomats listing the United States as a country where prisoners might face torture, referring specifically to Guantánamo Bay, Cuba, was an embarrassment on both sides of the border.

During the Persian Gulf War in 1991, the Iraqi armed forces surrendered by the tens of thousands because they believed Americans would treat them humanely. Our troops reached the outskirts of Baghdad in 100 hours and suffered fewer than 150 combat-related fatalities in large part because of these mass surrenders.

Would it have been different if the perception of us as purveyors of torture and humiliation existed back then? Would tens of thousands of Iraqis have put down their weapons if they believed they were going to be humiliated, abused or tortured, or would they have fought? Had they chosen to fight, the war would have lasted longer and cost

more and casualties would have skyrocketed. Our reputation in 1991 as the good guys paid dividends and supported our national interests. We must regain that reputation.

We can start by renouncing cruel, inhuman and degrading treatment of detainees and unreservedly committing to uphold the Detainee Treatment Act, which passed Congress in 2005 but was diluted by a presidential signing statement. We must also reaffirm our adherence to the United Nations Convention Against Torture, which the Senate ratified in 1990.

Just as important, we need to come to grips with the practice known as waterboarding, the simulated drowning of a person to persuade him to talk. There was some progress in recent weeks: the C.I.A.'s director, Gen. Michael Hayden, told Congress that the practice may be illegal under current law; the director of national intelligence, Michael McConnell, told a reporter, "Whether it's torture by anybody else's definition, for me it would be torture"; Attorney General Michael Mukasey, after being asked if waterboarding would be torture if done to him, said that "I would feel that it was"; and on Wednesday, Congress passed a law forbidding the C.I.A. to use waterboarding and other harsh techniques.

Why a few others in positions of power still find it so difficult to admit the obvious about waterboarding is astounding. We can never retake the moral high ground when we claim the right to do unto others that which we would vehemently condemn if done to us.

Once we condemn and stop all waterboarding, what do we do in cases where it was conducted? An obvious step is to prohibit the use of evidence derived by waterboarding in criminal proceedings against detainees. Regardless of whether the technique has produced actionable intelligence, it did not produce reliable evidence with a place in our justice system. Imagine the outrage if the Iranian government tied down an American, convinced him the choices were to cooperate or die, and then used his "confession" as evidence in a death-penalty trial.

My policy as the chief prosecutor for the military commissions at Guantánamo was that evidence derived through waterboarding was off limits. That should still be our policy. To do otherwise is not only an affront to American justice, it will potentially put prosecutors at risk for using illegally obtained evidence.

Unfortunately, I was overruled on the question, and I resigned my position to call attention to the issue — efforts that were hampered by my being placed under a gag rule and ordered not to testify at a Senate hearing. While some high-level military and civilian officials have rightly expressed indignation on the issue, the current state can be described generally as indifference and inaction.

At a Senate hearing in December, the legal adviser for the military commissions, Brig. Gen. Thomas Hartmann, refused to rule out using evidence obtained by waterboarding. Afterward, Senator Lindsey Graham, who is also a lawyer in the Air Force Reserves, said that no military judge would allow the introduction of such evidence. I hope Senator

Graham is right about military judges, and it is unfortunate that any might be put in a position where he has to make such a decision.

Regrettably, at a Pentagon press briefing last week announcing that Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks, and five others had been charged and faced the death penalty, General Hartmann again declined to rule out the use of evidence acquired through waterboarding. Military justice has a proud history; this was not one of its finer moments.

That is not to say those subjected to waterboarding get a free pass. If the prosecution can build a persuasive case without using the coerced "confession," then whether a defendant endured waterboarding is immaterial in determining guilt or innocence.

There are some bad men at Guantánamo Bay and a few deserve death, but only after trials we can truthfully call full, fair and open. In that service, we must declare that evidence obtained by waterboarding be banned in every American system of justice. We must restore our reputation as the good guys who refuse to stoop to the level of our adversaries. We are Americans, and we should be able to state with conviction, "We don't do stuff like that."

Morris Davis, an Air Force colonel, was the chief prosecutor for the military commissions at Guantánamo Bay, Cuba, from 2005 to 2007.

THE YALE LAW JOURNAL POCKET PART

COLONEL MORRIS D. DAVIS

In Defense of Guantanamo Bay

You have probably seen the drawing that, depending on your perspective, appears to be either a beautiful young woman or an ugly old hag. At first blush such polar opposite impressions of the same image seem illogical, but upon closer examination you see how different observers can draw starkly different conclusions. A similar phenomenon applies to impressions of the detention facility and military commissions at Guantanamo Bay, Cuba. As Senator Lindsey Graham has said, "[t]he image of Guantanamo Bay and the reality of Guantanamo Bay are completely different."[1] My vantage point as the chief prosecutor for the military commissions biases my perspective, so I make no claim that my views are completely objective. By the same token, the perspectives of those critical of Guantanamo Bay are probably just as biased. That said, what I offer is my perspective, which is likely to contrast sharply with the ugly picture of Guantanamo Bay that many attempt to sell to the public.

What I see is a clean, modern facility that employs humane detention practices to prevent enemy combatants from causing harm in the future and that utilizes fair trial procedures that exceed standards accepted in comparable international tribunals to adjudicate the guilt or innocence of enemy combatants alleged to have committed punishable offenses in the past. If truth be told, and often it is not, there is no compelling reason to cut and run from the detention facility or the military commissions.

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1. Robert Behre, *Graham Says Listening to 9/11 Planner Was Chilling*, POST & COURIER (Charleston, S.C.), Mar. 25, 2007, at AA11.

I. GUANTANAMO BAY: THE DETENTION FACILITY

I became the chief prosecutor for the military commissions in September 2005, and since then I have been to Guantanamo Bay many times. Camp X-Ray closed in the early part of 2002, long before my association with military commissions. Overgrown with weeds, Camp X-Ray was only inhabited by banana rats and iguanas when I first saw it in January 2006. Nonetheless, to this day news stories about Guantanamo Bay frequently contain pictures of detainees in Camp X-Ray, even though it was abandoned more than five years ago. Those old pictures of Camp X-Ray, coupled with memories of criminal acts committed by a few individuals at other detention facilities, tinge the public's impressions of Guantanamo Bay. That is unfortunate. Any notion that detainees are held in facilities that even remotely resemble Camp X-Ray or are subjected to abusive treatment is absolutely wrong.

Detainees are held in Camp Delta, a complex made up of Camps 1 through 6. The structures range from metal roof buildings with wire mesh sides and individual wire mesh cells to hard-sided metal buildings with communal living arrangements and air-conditioned concrete facilities with individual cells modeled after confinement facilities in the United States. Unlike Camp X-Ray, all of the facilities have indoor plumbing. Detainees receive three culturally appropriate meals per day, each has a personal copy of the Koran, and the guard force maintains respectful silence during the five daily prayer periods. Camp 6 was under construction when I first visited Guantanamo Bay in early 2006, and it opened later in the year. Camps 5 and 6 are modeled after confinement facilities in the United States where U.S. citizens are currently incarcerated. Camp 5 is modeled after the Miami Correctional Facility operated by the Indiana Department of Corrections, and Camp 6 is modeled after the correctional facility in Lenawee County, Michigan. Detainees are offered at least two hours of outdoor recreation time per day, twice the amount of time that U.S. citizens incarcerated at the U.S. Penitentiary in Florence, Colorado receive.

I have visited a number of military and civilian confinement facilities in the United States during the course of my career, and I believe many of our own incarcerated citizens would be envious of the treatment afforded to the detainees at Guantanamo Bay. It is a clean, safe, and secure environment where the detainees receive nutritionally sound and culturally appropriate meals and the full range of medical care provided by the same practitioners that treat members of the armed forces. I honestly believe the standards at Guantanamo Bay rival any at similar facilities I have seen in the United States.

The many young men and women who serve there do not get the credit they deserve. They endure threats and are subjected to having every substance that can be excreted from the human body thrown in their faces, yet with very

few exceptions they have performed professionally, honorably, and in a manner of which all Americans should be proud. They do this with almost no fanfare or thanks.[2]

The fact of the matter is that the truth about Guantanamo Bay does not generate sensational headlines, and as a result the accolades the facility has earned receive almost no attention. For instance, following an inspection by the Organization for Security and Cooperation in Europe (OSCE) in March 2006, a Belgian representative said that, "[a]t the level of detention facilities, it is a model prison, where people are better treated than in Belgian prisons," yet this positive comment about Guantanamo Bay was not widely reported.[3] Likewise, following a visit in March 2007, Senator Graham said the detention facility is "absolutely one of the best run prisons in the world."[4] Very few people had the opportunity to hear Senator Graham's praises.

Some critics describe Guantanamo Bay as the equivalent of a Soviet gulag or a Nazi concentration camp. While the shock value of their dramatic descriptions grabs headlines, the reality I have observed does not by any stretch of the imagination match their hyperbole. This point is illustrated by the case of David Hicks, often referred to as the "Australian Taliban." In order to foster public outrage and build sufficient political pressure to secure his release, for several years David Hicks, his family, and his supporters waged an aggressive media campaign alleging that he was mistreated while in detention. When his case came to trial before a military commission in March 2007, however, he and his defense counsel stipulated that he was not mistreated, and in the sentencing proceedings Mr. Hicks expressed his thanks to the men and women of the U.S. armed forces for the way he was treated.[5] This suggests that a measure of skepticism is in order when assessing the truth of exaggerated claims of abuse made by detainees and their supporters.[6] In short, based upon

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2. Rather than receiving the praise they deserve, the young men and women serving at Guantanamo Bay are often vilified. Columnist Nat Hentoff referred to them as "captors" and complained they "keep shaming the United States in front of its allies." Mr. Hentoff cited information from Amnesty International, an attorney for some of the detainees, and the father of a detainee who pled guilty to providing material support for terrorism as facts for his opinion piece. Nat Hentoff, Op-Ed., *This is America? Gitmo Mistreatment Continues*, WASH. TIMES, May 7, 2007, at A19.

3. Rear Adm. Harry B. Harris, Jr., *Inside Guantanamo Bay*, CHI. TRIB., May 17, 2006, at C27.

4. Behre, *supra* note 1.

5. For a summary of Hicks' allegations of mistreatment and his later recantation at trial, see Cameron Stewart, *On the Torture Trail*, THE AUSTRALIAN, Apr. 28, 2007, at 22.

6. Australian columnist Andrew Bolt said the lament by the Hicks defense team that he had become physically frail and emotionally fragile because of his detention were contradicted by his appearance at trial, where he appeared "looking fat, healthy and tanned, and cracking jokes." He also noted that Australians are seeing "other myths about Hicks' suffering quietly

what I have seen firsthand, the American public has nothing to be ashamed of in the way the young men and women of its armed forces treat detainees at Guantanamo Bay.

II. THE DETENTION OF ENEMY COMBATANTS: APPLYING A TRADITIONAL LAW OF WAR PRINCIPLE

Some argue that indefinite detention without charges or a trial is unfair. That argument holds true for those taken into custody by law enforcement authorities for ordinary criminal conduct and held in civilian jails, but the analogy does not fit a warfare context. Detainees are held at Guantanamo Bay because of their involvement with or support of al Qaeda and its affiliates during a period of armed conflict, not because they are alleged to have robbed the corner liquor store. Their actions fall under Title 10 of the U.S. Code (Armed Forces), not Title 18 (Crimes and Criminal Procedure). Prior to the Treaty of Westphalia in 1648, those captured during armed conflicts could generally expect one of two unpleasant fates: death or enslavement. The treaty expressed a principle that endures to this day, that persons captured during armed conflicts will be detained and then repatriated upon the end of hostilities. Millions have been detained during armed conflicts, most notably during World War II and more recently during the war in Vietnam.[7] By blurring the lines between procedures applicable to domestic crimes committed by ordinary criminals and law of war procedures applicable to the detention of enemy combatants, critics mislead the public. Detaining captured enemy combatants without charges or trials and placing them in a position where they are incapable of inflicting harm on us or our allies is entirely consistent with internationally accepted principles that have endured for more than four centuries.

The mechanism used to determine whether a person detained in the war on terror is an enemy combatant, and therefore subject to continued detention, is a Combatant Status Review Tribunal (CSRT). A CSRT is a one-time administrative hearing, and its decision is subject to review by the United States Court of Appeals for the District of Columbia.[8] Additionally, each

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exposed by his return [to Australia]." Andrew Bolt, Op-Ed., *It's Hicks Hysteria*, HERALD SUN (Austl.), May 23, 2007, at 19.

7. Senator John McCain and Colonel Jim Thompson were held by the Vietnamese for six years and nine years, respectively, without being charged or tried. *See* Richard Bernstein, *The Glory and Tragedy of a P.O.W. Scorned*, N.Y. TIMES, Aug. 2, 2001, at E1; Kate Zernike, *Military Lawyers Urge Protections for Detainees*, N.Y. TIMES, Jul. 14, 2006, at A14.

8. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2742 (to be codified at 10 U.S.C. § 801 note).

detainee receives an annual review by an Administrative Review Board (ARB) to assess whether he represents a continuing threat. Depending on the ARB's determination, the detainee may be kept in detention, transferred to the control of another country, or released.[9] As of May 15, 2007, about 390 detainees had been released or transferred through the ARB process. Of that number, the Department of Defense says thirty rejoined the fight against the United States.[10] It is important to remember that both CSRTs and ARBs are administrative, not judicial, proceedings, and the procedures and rules for criminal trials do not apply. That distinction is lost in some of the arguments made by the detainees' supporters. The CSRTs and ARBs also satisfy the Geneva Convention requirement of an Article 5 hearing to determine each detainee's status.[11] These processes are separate and distinct from the military commissions. I have no direct role in them; therefore, I do not have the personal experience necessary to comment on them in depth.

III. MILITARY COMMISSIONS

The Military Commissions Act of 2006 permits the prosecution of "alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."[12] While the detention of enemy combatants has a prospective focus – to prevent individuals from inflicting harm in the future – prosecution has a retrospective focus: to hold individuals accountable for unlawful acts committed in the past. The individuals detained at Guantanamo Bay came into U.S. custody in a variety of ways, and evidence and information useful in assessing whether there is a prosecutable case may exist in a multitude of domestic and international channels. In order to conduct this Herculean mission of information gathering and analysis, the Department of Defense

9. For additional information on Combatant Status Review Tribunals and Administrative Review Boards, see generally Department of Defense Detainee Affairs, http://www.defenselink.mil/home/features/Detainee_Affairs (last visited July 13, 2007).

10. *Six Former Guantanamo Inmates Rejoined Fight, Military Says*, WASH. POST, May 15, 2007, at A12.

11. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War requires a "competent tribunal" to determine the status of a detained person if there is doubt as to whether the detainee fits any of the categories for prisoner of war status listed in Article 4. Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

12. Military Commissions Act, 10 U.S.C. § 948b (2006). The Act defines "alien" as "a person who is not a citizen of the United States." 10 U.S.C. § 948a(3). Accordingly, a citizen of the United States is not subject to trial before a military commission.

created the Criminal Investigation Task Force (CITF) in early 2002. CITF is a joint-service organization with investigators, intelligence analysts, attorneys, and support personnel from all branches of the armed forces, and its mission is worldwide.[13] The men and women at CITF receive little recognition for the enormously difficult work they do collecting information and evidence from around the world, assembling it in a coherent manner, analyzing it for possible links to other cases or operations, and presenting it to the prosecutors to determine whether prosecution in a military commission is feasible. Based upon the work of hundreds of current and past CITF personnel, we expect to prosecute about seventy-five detainees in trials before military commissions.[14]

Military commissions have been used repeatedly throughout our nation's history, but until now they had not been utilized since the World War II era. Recounting the historical underpinnings of military commissions and their evolution since their reintroduction by the President's Military Order of November 13, 2001, is a task better suited for a law review article. Instead, my focus here is on the rights an accused has in a trial before a military commission and the source of those rights. Some critics seem to believe that if an accused does not receive a trial that looks just like Martha Stewart's and ends with a verdict like O.J.'s, then military commissions are fatally deficient.

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13. *See* Brigadier Gen. Eric Patterson, *CITF: Criminal Investigation Task Force – OSI*, TIG BRIEF: THE INSPECTOR GENERAL (Nov.-Dec. 2003), *available at* http://findarticles.com/p/articles/mi_m0PAJ/is_6_55/ai_112482127/print.

14. The notion that a bunch of innocent people – farmers and aid workers – in the wrong place at the wrong time are likely to be convicted in military commissions is inaccurate. The charge sheets in the first three cases – Hicks, Khadr, and Hamdan – are available at the Department of Defense, Military Commissions website, http://www.defenselink.mil/news/commissions.html (last visited July 13, 2007). Hicks pled guilty to providing material support for terrorism by attending al Qaeda training and taking up arms against the United States and our allies in Afghanistan after 9/11. *See* Referred Charges for David M. Hicks, http://www.defenselink.mil/news/d20070301hicks.pdf (last visited July 13, 2007); *see also* Department of Defense News Release, Mar. 30, 2007, http://www.defenselink.mil/releases/release.aspx?releaseid=10678 (last visited July 13, 2007). Khadr is charged with, among other things, killing a U.S. service member and making improvised explosive devices intended to kill U.S. forces and our allies. Referred Charges for Omar Ahmed Khadr, http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf (last visited July 13, 2007). Hamdan is charged with serving as Osama bin Laden's bodyguard and driver, and he was apprehended in Afghanistan after 9/11 in possession of surface-to-air missiles. Military Commission Charges Referred for Salim Ahmed Hamdan, http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf (last visited July 13, 2007). Additionally, transcripts of the CSRTs for the high value detainees, including the statement of Khalid Shaykh Muhammed admitting that he planned the 9/11 attacks and personally decapitated *Wall Street Journal* reporter Daniel Pearl, are available at the Department of Defense CSRT and ARB page, http://www.defenselink.mil/news/Combatant_Tribunals.html (last visited July 13, 2007). These examples are representative of the types of cases that will come before military commissions.

In other words, they contend that an alien unlawful enemy combatant is entitled to the same rights and protections as an ordinary American citizen in an Article III court or a service member in a trial by court-martial. They are mistaken.

Alien unlawful enemy combatants detained outside the United States do not have constitutional rights. In a recent decision, the United States Court of Appeals for the District of Columbia said, "[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States."[15] This recent decision concerning alien unlawful enemy combatants detained in the current global war on terrorism parallels a decision a decade earlier concerning Cuban and Haitian migrants in detention at Guantanamo Bay. In the migrants' case, the Eleventh Circuit Court of Appeals held that the ability of the United States to assert "control and jurisdiction" over the installation was not equivalent to sovereignty and did not extend statutory or constitutional rights that apply within the United States.[16] Both decisions are consistent with the express language of the lease between the United States and Cuba, which says "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas."[17]

If alien unlawful enemy combatants have no rights under the Constitution, then what rights do they have, and what is the source of those rights? The answer is Common Article 3 of the Geneva Conventions. The Supreme Court, in *Hamdan v. Rumsfeld*, said:

> Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention." One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[18]

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15. Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 2007 U.S. LEXIS 8757 (2007).

16. Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995).

17. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 26, 1903, T.S. No. 418.

18. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795 (2006) (internal citations omitted).

How broad are the rights guaranteed by Common Article 3? The commentary that accompanies Common Article 3 explains:

> We must be very clear about one point; it is only "summary" justice which it is intended to prohibit. No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.
>
> As can be seen, Article 3 does not protect an insurgent who falls into the hands of the opposing side from prosecution in accordance with the law, even if he has committed no crime except that of carrying arms and fighting loyally.[19]

Justice Stevens, writing for the majority in *Hamdan v. Rumsfeld*, noted that Common Article 3 does not define "all the judicial guarantees which are recognized as indispensable by civilized peoples."[20] "But," he wrote, "it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)."[21]

Article 75 of Protocol I lists a number of basic rights,[22] including the rights: to be informed of the charges; to a trial before an impartial and regularly constituted court; to a means of presenting a defense; to not be held accountable for conduct that was not proscribed at the time of the offense (no ex post facto liability); to a presumption of innocence until proven guilty; to be present at the trial; to not be compelled to testify or admit guilt; to examine, or have examined on his behalf, witnesses called against him; to obtain witnesses on his behalf; to not be tried again by the same party for an offense already the subject of a pronounced judgment (no double jeopardy);[23] to have the

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19. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3 Commentary, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

20. *Hamdan*, 126 S.Ct. at 2797.

21. *Id.*

22. The International Covenant on Civil and Political Rights, to which the United States is a party, contains an analogous list of minimum guarantees. *See* International Covenant on Civil and Political Rights art. 14, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

23. Interestingly, the Rome Statute of the International Criminal Court allows the prosecution to appeal an announced decision of the court based upon procedural error, an error of law, or an error of fact. Rome Statute of the International Criminal Court art. 81, ¶ 1, July 17,

judgment announced publicly; and to have his post-trial remedies, and any time deadlines, explained.[24]

The procedures set out by Congress in the Military Commissions Act of 2006 (MCA) meet or exceed the judicial guarantees recognized as indispensable by civilized peoples. The accused and counsel must be served a copy of the charges in English or the language the accused understands.[25] A military commission is a regularly constituted court,[26] and the MCA includes safeguards to ensure impartiality, such as a statutory prohibition on any effort to unlawfully influence the trial participants[27] and the right to peremptorily challenge and challenge for cause members of the commissions (that is, jurors).[28] Congress has said that the MCA does not define new crimes; instead it codifies existing crimes subject to trial before a military commission.[29] It has also said that the MCA establishes procedures governing military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States.[30] If the defense contends an offense was not proscribed at the time alleged in a charge, it can file a motion to dismiss under the Rules for Military Commissions.[31] The accused has the means to present a defense through the services of military and civilian defense counsel,[32] or he may elect to represent himself with counsel on stand-by.[33] The accused is presumed innocent until his guilt is established by legal and competent evidence beyond a

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1998, 37 I.L.M. 999. Likewise, Article 25 of the Statute of the International Criminal Tribunal for the Former Yugoslavia permits the prosecutor to appeal decisions of the tribunal based upon errors of law or fact. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 25, May 25, 1993, 32 I.L.M. 1192. One can only imagine the outcry if the Military Commissions Act allowed the prosecution to appeal a finding of not guilty rendered by a military commission and to prosecute the accused a second time for the same offense.

24. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75., *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M 1391.

25. Military Commissions Act, 10 U.S.C. § 948s (2006).

26. 10 U.S.C. § 948b(f).

27. *Id.* § 949b.

28. *Id.* § 949f.

29. *Id.* § 950p.

30. *Id.* § 948b(a).

31. R.M.C. 505; *see* MANUAL FOR MILITARY COMMISSIONS (Jan. 18, 2007), *available at* http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf.

32. 10 U.S.C. § 949c(b).

33. *Id.* §§ 949a(b)(1)(D), (3).

reasonable doubt.[34] He is entitled to be present at all open sessions of the court.[35] He may not be compelled to testify at the military commission.[36] He has the right to confront and respond to all of the evidence and witnesses presented against him,[37] and he is entitled to assistance in securing evidence and witnesses on his behalf.[38] The MCA prohibits the trial of an accused a second time for the same offense.[39] The decision of the military commission is announced as soon as the members have reached a verdict and, if the accused is found guilty, when they have determined a sentence.[40] Finally, the accused is entitled to the assistance of counsel as his case progresses through four stages of post-trial review, ending at the United States Supreme Court.[41]

Perhaps the biggest myth surrounding military commissions is the widely believed, yet totally false, claim that an accused can be excluded from his own trial, and convicted and sentenced, based on secret evidence he is not allowed to see or hear. The MCA states: "The accused shall be permitted . . . to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing . . . ."[42] Additionally, the MCA gives the accused the right to be present for all open sessions of the trial.[43] In short, unless the accused voluntarily absents himself from the trial proceedings or is excluded for cause due to his own behavior, he has the statutory right to be present and to see, hear, and confront all of the evidence presented to the court members on the issue of his guilt or innocence and for sentencing. The secret trial/secret evidence/secret verdict mirage would make a wonderful mantra for those who

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34. *Id.* § 949*l*(c)(1).

35. *Id.* § 949d(b).

36. *Id.* § 948r(a).

37. *Id.* § 949a(b)(1)(A).

38. *See id.* § 949j.

39. *Id.* § 949h.

40. *Id.* § 949n.

41. *Id.* § 950h(c).

42. *Id.* § 949a(b)(1)(A).

43. *Id.* §§ 949a(b)(1)(B), 949d(b). The accused may be excluded if, after a warning from the military judge, his presence endangers the physical safety of individuals or his behavior disrupts the proceedings. *Id.* § 949d(e). The accused may also be excluded from sessions held under Military Commissions Rule of Evidence (M.C.R.E.) 505, which protects classified information when "disclosure would be detrimental to the national security." MIL. COMM. R. EVID. 505. These sessions are held outside the presence of the court members (jurors) and spectators to discuss issues related to classified material. *Id.* § 949d(d)-(f). M.C.R.E. 505 sessions are comparable to sessions in federal court under the Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (1988), or sessions in a court-martial under Military Rule of Evidence 505. *See* MIL. R. EVID. 505.

wish to disparage military commissions, if only their claim were true. It is, however, totally false.

Anyone who has observed a trial by court-martial will find that a trial before a military commission looks very familiar. Congress directed the Secretary of Defense to enact rules and procedures for military commissions based, to the extent practicable, upon the principles of law and rules of evidence for trials before general courts-martial.[44] The Secretary did so in the Manual for Military Commissions (MMC) published on January 18, 2007. In the forward to the MMC, Secretary Gates said the manual is adapted from the Manual for Courts-Martial (MCM).[45] A side-by-side comparison of the MMC and the MCM shows the two documents track very closely to each other with respect to rules of both procedure and evidence.

Two areas of military commissions practice are the most contentious: the potential use of evidence obtained by coercion and the admissibility of hearsay evidence. The MCA prohibits introduction of evidence obtained by torture.[46] It goes on to say that a statement obtained from the accused shall not be excluded on the grounds of alleged coercion that does not amount to torture if the military judge finds the evidence would have probative value to a reasonable person.[47] If a statement, from the accused or another person, was obtained

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44. 10 U.S.C. § 949a(a).

45. MANUAL FOR MILITARY COMMISSIONS, supra note 31..

46. *Id.* § 948r(b).

47. *Id.* § 949a(b)(2)(A), (C). Note that the probative value standard is the same as in the International Criminal Tribunal for the Former Yugoslavia. *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Rules of Procedure and Evidence, Rule 89, March 14, 1994, U.N. Doc. IT/32/Rev.39, 33 I.L.M. 484 (1994). The International Criminal Court assesses the probative value of evidence, taking into account the prejudice such evidence may cause to a fair trial. Rome Statute of the International Criminal Court art. 69, ¶ 4, July 17, 1998, 37 I.L.M. 999. The International Criminal Tribunal for Rwanda may admit any relevant evidence it deems to have probative value. *See* International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, Rules of Procedure and Evidence, Rule 89, June 29, 1995, U.N. Doc. ITR/3/Rev.1 (1995). The Special Court for Sierra Leone may admit any relevant evidence. Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 89, Jan. 16, 2002, *available at* http://www.sc-sl.org/rulesofprocedureandevidence.pdf. The rules of evidence for the Extraordinary Chambers in the Courts of Cambodia, a tribunal created by agreement between the United Nations and the Royal Government of Cambodia for the prosecution of alleged atrocities during the Khmer Rogue era, states: "Unless provided otherwise in these IRs, all evidence is admissible. The Trial judges shall weigh all such evidence independently in deciding whether guilt has been proven beyond a reasonable doubt." Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 87.1, June 12, 2007, *available at* http://www.unakrt-online.org/Docs/Court%20English.pdf.

prior to December 30, 2005—the date the Detainee Treatment Act was enacted—and the defense contends that the degree of coercion renders the statement unreliable, the statement will not be admitted unless the military judge finds, based on the totality of the circumstances, that the statement is reliable, that it possesses sufficient probative value, and that its admission is in the interest of justice.[48] A statement obtained after December 30, 2005, must meet the same criteria, and the methods used to obtain the statement must not amount to cruel, inhuman, or degrading treatment prohibited by the Detainee Treatment Act.[49]

The truth is that any statement made by a person whose freedom of movement is restrained by a person in a position of authority is the product of some degree of coercion, regardless of whether the person in authority is a police officer who has pulled someone over on the side of the road or a soldier guarding a captured enemy fighter on the battlefield. In either case the person making the statement is engaged in a conversation that was not the product of his or her own choosing. The challenge is determining when a questioner has gone too far in order to elicit a response. This will certainly be an area of debate in the courtroom as the military commissions go forward. I do not, however, believe it is cause for alarm. The team responsible for prosecuting a case must decide what evidence it intends to introduce at trial. If there is a question whether the methods used to obtain a statement went too far, then I have the authority to make the final decision on behalf of the prosecution. We understand the importance of both doing justice for the individual on trial and ensuring that observers around the world have confidence that the trials are in fact just, and both of those considerations guide the prosecution's trial preparations. If we choose to offer evidence the defense believes should not be admitted because it is not reliable, they can challenge it, and the military judge must decide whether or not it is admitted. If it is admitted, both sides can argue to the members what weight, if any, they should give the evidence in their deliberations. If a conviction results, the accused has the assistance of counsel to raise issues in four stages of post-trial appellate review: before the convening authority, the Court of Military Commission Review, the U.S. Court of Appeals for the District of Columbia Circuit, and the U.S. Supreme Court.[50] These are, in my opinion, ample safeguards to ensure that trials of alien unlawful enemy combatants before military commissions are fair.

Similarly, permitting the admission of hearsay evidence does not deprive an accused of a fair trial. The MCA states that hearsay is admissible unless a

48. 10 U.S.C. § 948r(c).

49. *Id.* § 948r(d).

50. *Id.* §§ 950b, 950f, 950g.

party challenges the evidence and persuades the military judge that its probative value is substantially outweighed by the danger that it will result in unfair prejudice, confuse the issues, mislead the commission, or cause undue delay, waste of time, or needless presentation of cumulative evidence.[51] This applies equally to evidence for the prosecution and the defense. Admittedly, this broader standard allows the introduction of some evidence that would not ordinarily be admissible in a trial in federal court or a court-martial, but the rights afforded an American citizen are not the universally mandated benchmark for measuring the rights afforded to an alien unlawful enemy combatant in a military commission. Recall the rights set out in Article 75 of Protocol I, rights that Justice Stevens highlighted as the judicial guarantees recognized as indispensable by civilized peoples. Note that there is no hearsay rule listed among those indispensable rights. [52] Examine the rules for the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia—judicial systems expressly sanctioned by the United Nations—and you find no hearsay rule. Finally, examine the rules for the Nuremberg trials and you again find no rule banning or limiting the admissibility of hearsay.[53] An accused in a military commission is entitled to a fair trial, not one that is identical in every respect to the trial of an American citizen. Since hearsay rules are not an internationally recognized judicial guarantee, the notion that Congress created a system of justice at Guantanamo Bay that is an embarrassment because it allows hearsay evidence is one of many false flags.

IV. CONCLUSION

As I said at the outset, what I offer are personal impressions from my vantage point, and this is what I see: during a period of armed conflict, we are

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51. *Id.* § 949a(b)(2)(E).

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75., *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M 1391.

53. Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Rules of Procedure, August 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm. The Avalon Project at Yale Law School contains many historical records of war crimes trials following World War II. A review of some of the decisions handed down by those tribunals show many convictions were based almost entirely on hearsay evidence. *See generally* The Avalon Project, http://www.yale.edu/lawweb/avalon/imt/imt.htm (last visited July 13, 2007).

detaining alien unlawful enemy combatants consistent with an internationally accepted principle that dates back more than four hundred years. We are detaining them in facilities that by any objective measure meet or exceed the physical standards of confinement facilities in the United States where many American citizens are incarcerated. We afford them treatment – culturally appropriate food, a full range of medical care, accommodation of religious practices – that would be the envy of some of our own incarcerated citizens. And the ones we seek to hold accountable for past conduct in trials before military commissions are afforded rights and protections that meet or exceed the judicial guarantees recognized as indispensable by civilized peoples.

I challenge anyone to review the MCA and MMC, compare them to the rules for the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia, and then explain why military commissions provide an inferior standard of justice by comparison.[54] Perhaps a rule here or there in one of the other systems is more advantageous to an accused than the comparable rule in military commissions, but a holistic comparison against each system shows, in my view, that the quality of justice provided by the MCA and MMC meets or exceeds the standards in any of the U.N.-sanctioned tribunals.[55]

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54. Some members of Congress have objected to the "excessive" $102 million price tag of a proposal by the Department of Defense to construct a legal complex at Guantanamo Bay to try approximately seventy-five alien unlawful enemy combatants. Carol Rosenberg, *Fast Funding Sought for Terror-Trial Site*, MIAMI HERALD, Dec. 4, 2006, at A1. The Department of Defense has scaled the proposal back to approximately $10 million. Renee Schoof, *Lawmaker: Move Guantanamo Trials to U.S.*, MIAMI HERALD, May 10, 2007, at A7. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by the United Nations in 1993 and 1995, respectively, and they have completed trials for approximately 128 defendants. The United Nations has appropriated more than $2.5 billion for the two tribunals to date. The tribunals employ approximately 2,200 personnel, and their combined operating budget for the biennium 2006-2007 exceeds $600 million. *See* G.A. Res. 61/242, U.N. Doc. A/RES/61/242 (Dec. 22, 2006); G.A. Res 61/241, U.N. Doc. A/RES/61/241 (Dec. 22, 2006). For additional information on the two tribunals, see the ICTY homepage, http://www.un.org/icty/ (last visited July 13, 2007), and the ICTR homepage, http://69.94.11.53/default.htm (last visited July 13, 2007).

55. Some predicted it was inevitable that the military commissions would be compared to the Nuremberg trials, which many argue are the paradigm for war crime tribunals. Jeffrey Rosen, *A Terror Trial, With or Without Due Process*, N.Y. TIMES, Sept. 10, 2006, § 4, at 14. The first military commission had barely adjourned before Ben Wizner of the American Civil Liberties Union complained it lacked the "dignity and gravitas of Nuremberg" and represented "an unwitting symbol of our shameful abandonment of the rule of law." Ben Wizner, *Tribunals of the Absurd*, L.A. TIMES, Apr. 5, 2007, at A23. To the contrary, the rules in place for the military commissions provide far more due process protections than the accused received at Nuremberg. The Nuremberg Charter and Rules of Procedure required

Am I ashamed of the picture I see of Guantanamo Bay and the military commissions? Absolutely not. There are those who want to sell a false and ugly picture of the facilities and the process, and they have been very successful in manipulating public opinion while we on the other side have been largely ineffective. If they continue to succeed in generating a false sense of collective shame, then perhaps public pressure will become so great that the political process will bend and cause a change of course. In my opinion, that would be unfortunate and unnecessary. Even some of the most vocal critics claim they are not soft on terrorism and do not want to set terrorists free, but they believe Guantanamo Bay and military commissions have become such liabilities that we need to look for other alternatives. Perhaps if we do a better job of educating the public about the truth, we will demonstrate that there is nothing wrong with the alternatives currently in use. We have a good story to tell, and we should not be ashamed to tell it. I see in Guantanamo a clean, safe, and humane facility to detain enemy combatants and a fair process to adjudicate the guilt or innocence of those alleged to have committed crimes defined by Congress and the laws of war. To paraphrase a quote from Jane Austen's *Pride and Prejudice*,[56] there is nothing more deceitful than the contrived indignation of those intent on closing Guantanamo Bay by any means necessary. Blow away the smoke of their hyperbole, and look again through clear eyes. The picture looks much better than you were led to believe.

Colonel Davis is the chief prosecutor for the military commissions. He is an Air Force judge advocate.

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an accused to testify at trial (that is, an accused had no right to remain silent or right against self-incrimination), contained no limitation on the admissibility of hearsay evidence, and provided for no appeal of a conviction or sentence. *See* Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Rules of Procedure, August 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm. Ten of the accused sentenced to death at Nuremberg were hung two weeks after their sentences were announced. *See* The Nuremberg Trials: Chronology, http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergChronology.html (last visited July 13, 2007).

56. JANE AUSTEN, PRIDE AND PREJUDICE 42 (Signet Classics 1950) (1813) ("'Nothing is more deceitful,' said Darcy, 'than the appearance of humility.'").

Opinion - Justice and Guantanamo Bay

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

By MORRIS DAVIS

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

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

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

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

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

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

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

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

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

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

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

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

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

The Washington Post

Justice indeed worth showcasing

Wednesday, November 11, 2009

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

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

Suzanne E. Spaulding, McLean

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

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

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

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

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

Morris Davis, Gainesville

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

Congressional Research Service

MEMORANDUM

November 13, 2009

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

From: Daniel P. Mulhollan
Director

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Congressional Research Service

November 20, 2009

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

Dear Mr. Davis,

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

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

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

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

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

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

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

Sincerely,

Daniel P. Mulhollan
Director
Congressional Research Service

Enclosures:

LCR 2017-2.1 and LCR 2010-11

cc:

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

EXHIBIT A

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

LIBRARY OF CONGRESS REGULATIONS

THE LIBRARY OF CONGRESS

LCR 2023-3

SUBJECT: Outside Employment and Activities

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

Contents:

Section 1. Purpose

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

Section 2. Outside Employment

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

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

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

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

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

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

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

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

C. Staff members may

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

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

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

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

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

performing in this capacity.

Section 3. Teaching, Writing, and Lecturing

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

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

Section 4. Copyright Claims

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

Section 5. Book Endorsements

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

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

Section 6. Evaluations of Library Materials

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

Section 7. Intermediaries and Product Recommendations

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

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

Section 8. Memberships in Organizations

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

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

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

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

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

Section 10. Post-Employment Restrictions

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

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

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

Comments: lcweb@loc.gov

EXHIBIT B

Policy

Outside Speaking and Writing

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

Statement

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

Disclaimer

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

Conflict of Interest

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

Advocacy v. Research

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

Background

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

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

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

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

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

Expectations

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

Contact:

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

Last reviewed July 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress, and DANIEL P. MULHOLLAN, in his individual capacity, Defendants.	)	Civil Action No. 10-0036 (RBW)

ORDER

For reasons that will be explained in the Court's forthcoming memorandum opinion addressing Defendant Mulhollan's Motion to Dismiss, the Defendants' Motion to Stay Litigation Except as to the Individual Capacity Defenses of Daniel P. Mulhollan is hereby **DENIED**. Accordingly, it is hereby

ORDERED that the Library of Congress file its answer, or other form of responsive pleading permitted by the Federal Rules of Civil Procedure, within five days of this Order.[1]

So **ORDERED** this 14th day of October 2010.

_____/s/_____
REGGIE B. WALTON
United States District Judge

[1] Until the Court rules on Mr. Mulhollan's claimed entitlement to qualified immunity, Mr. Mulhollan may file a protective order with the Court should he be called upon to participate in the Library's response to this Order in a way that he feels infringes his asserted right to qualified immunity.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, *in his official capacity as the Librarian of Congress*, and DANIEL P. MULHOLLAN, *in his individual capacity*, Defendants.	)	Civil Action No. 10-0036 (RBW)

ORDER

For the reasons explained in the Court's Memorandum Opinion issued on this same date, it is hereby

ORDERED that the Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan is **DENIED**. It is further

ORDERED that the Motion to Dismiss on Behalf of James Billington is **DENIED**.

So **ORDERED** this 30th day of March 2011.

_____/s/_____
REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS S. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, *in his official capacity as the Librarian of Congress*, and DANIEL P. MULHOLLAN, *in his individual capacity*, Defendants.	Civil Action No. 10-0036 (RBW)

MEMORANDUM OPINION

The plaintiff, Morris S. Davis, brings this action against James H. Billington, the Librarian of Congress, in his official capacity, and Daniel P. Mulhollan, the director of the Congressional Research Service ("CRS"), in his individual capacity, alleging that the defendants violated his First and Fifth Amendment rights. Complaint ("Compl.") ¶¶ 78-85. On October 14, 2010, the Court denied the Defendants' Motion to Stay Litigation Except as to the Individual Capacity Defenses of Daniel P. Mulhollan ("Defs.' Mot. to Stay"), and stated that the reasons for its denial would be explained in a forthcoming memorandum opinion.[1] Civil Action 10-0036 (RBW), October 14, 2010 Order. This is that Memorandum Opinion. This Memorandum

[1] The October 14, 2010 Order also ordered defendant Billington to answer or otherwise respond to the plaintiff's Complaint within five days. Defendant Billington satisfied that Order by filing his motion to dismiss on October 19, 2010. Defendant Mulhollan had earlier filed his motion to dismiss on March 29, 2010.

Opinion also addresses the Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan ("Def. Mulhollan's Mot. to Dismiss"), and the Motion to Dismiss on Behalf of Defendant James Billington ("Def. Billington's Mot. to Dismiss"), both of which remain pending before the Court and are opposed by the plaintiff.[2]

In this Memorandum Opinion, the Court first further explains why it denied the motion for a partial stay, and then will address the motions to dismiss, which collectively raise three principal arguments in favor of dismissal: First, that the plaintiff cannot state a claim for damages against defendant Mulhollan in his individual capacity; second, that the plaintiff fails to state a claim under either the First or Fifth Amendments; and third, that defendant Mulhollan is entitled to qualified immunity as to the plaintiff's constitutional claims. The ensuing pages explain both the Court's earlier denial of the motion to stay and now its denial of both motions to dismiss.

[2] In addition to the record documents cited previously, the Court considered the following in deciding the motions: the Memorandum of Points and Authorities in Support of Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan ("Def. Mulhollan's Mem."); the Plaintiff's Opposition to Defendants' Motion to Stay Litigation Except as to the Individual Capacity Defenses of Daniel P. Mulhollan ("Pl.'s Opp'n. to Stay"); the Reply Memorandum in Support of Defendants' Motion to Stay Litigation Except as to the Individual Capacity Defenses of Daniel P. Mulhollan ("Defs.' Reply to Stay"); the Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss of Defendant Daniel P. Mulhollan ("Pl.'s Opp'n to Mulhollan Mot. to Dismiss"); the Reply Memorandum in Support of Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan ("Def. Mulhollan's Reply"); the Memorandum of Points and Authorities in Support of Motion to Dismiss on Behalf of Defendant James Billington ("Def. Billington's Mem."); the Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss of Defendant James Billington ("Pl.'s Opp'n to Billington Mot. to Dismss"); and the Reply Memorandum in Support of Motion to Dismiss on Behalf of James Billington ("Def. Billington's Reply").

I. BACKGROUND[3]

Between September 2005 and October 2007, the plaintiff, who at that point in his career had achieved the rank of Colonel in the United States Air Force, served as the Chief Prosecutor for the Department of Defense's Office of Military Commissions. Compl. ¶ 2. In this position, he oversaw the prosecution of suspected terrorists held at the Guantanamo Bay Naval Base ("Guantanamo Bay") in Cuba. Id. Believing that the military commissions system had become "fundamentally flawed," id., the plaintiff resigned from his position as Chief Prosecutor in October 2007, id., and retired from his position as a military officer at that same time, id. ¶ 12. He has since become a "vocal and highly public critic of the system, speaking, writing[,] and testifying to Congress about his personal views and firsthand experiences." Id. ¶ 2.

A. The Plaintiff's Hire by the Library of Congress

In December of 2008, the Library of Congress (the "Library") hired the plaintiff as its Assistant Director of the Foreign Affairs, Defense and Trade Division (the "FADTD" or the "plaintiff's division") of the CRS. Id. ¶¶ 3, 26. The CRS is the public policy research arm of the United States Congress and a service unit of the Library. Id. ¶ 14. In his position as Assistant Director of the FADTD, the plaintiff represents that his "primary responsibilities were to lead, plan, direct, and evaluate the research and analytical activities in the policy areas assigned to his division, which included matters relating to foreign affairs, the Defense Department, and international trade and finance, but not issues related to military commissions." Id. ¶ 29. According to the plaintiff, "sole responsibility for topics relating to the military commissions

[3] The following description of events is based upon the factual allegations set forth in the plaintiff's Complaint.

system and the prosecution of the individuals held at Guantanamo [Bay] belongs to the American Law Division" and "[m]embers of Congress and their staffs know that [the American Law Division] is the division responsible for military-commission-related issues." Id. ¶¶ 31-32. The plaintiff also asserts that, within his division, he "had no authority to establish policy, and he had little opportunity for significant contact with the public." Id. ¶ 29. He therefore contends that he was "not expected to and did not author written reports or analyses on behalf of [the CRS,]" and that "[h]is name has not appeared on any reports distributed to Congress. Nor have any congressional inquiries or requests for information been directed to him." Id. ¶ 29.

B. The Plaintiff's Opinion Articles

On November 11, 2009, both the Wall Street Journal and the Washington Post published articles written by the plaintiff that "reflect[ed] his personal views regarding Guantanamo [Bay] and the military commissions process." Id. ¶¶ 43-44, 50. These articles relied exclusively on the plaintiff's professional experiences prior to his employment with the CRS. Id. ¶ 50. According to the plaintiff, neither of these articles criticized Congress, any Member of Congress, any political party, or positions associated exclusively with one political party, nor did they criticize the CRS, the Library, or any of their employees or policies. Id. ¶¶ 47, 50. Rather, the plaintiff contends that the "opinion pieces relate[d] to subjects of immense public concern . . . for the foreseeable future," as they discussed the then-current policies of "President Obama and Attorney General Eric Holder . . . with respect to [future announcements concerning additional decisions about] the military-commission or federal-court trial of other Guantanamo [Bay] detainees." Id. ¶ 45. The plaintiff wrote the articles at his home, away from his workplace during non-working hours, and he did not receive any form of compensation for their authorship.

Id. ¶¶ 48-49. The plaintiff also indicates that, although he previously engaged in speech similar to that at issue here, he was not reprimanded by either defendant in any way prior to the two articles being published on November 11, 2009. Id. ¶¶ 33-42.

The plaintiff had informed defendant Mulhollan that his articles would be published prior to their publication, and after Mulhollan had the opportunity to review them, Mulhollan sent multiple emails to the plaintiff expressing his dissatisfaction with the plaintiff's actions. Id. ¶¶ 53-54. The day after the articles' publication, on November 12, 2009, Mulhollan told the plaintiff in a meeting that he would not be converted from probationary status to permanent status, as had been the planned development of the plaintiff's employment with the CRS prior to the November 11, 2009 publications. Id. ¶ 55. On November 13, 2009, Mulhollan again called the plaintiff into a meeting and served him with a Memorandum of Admonishment in response to the publication of the two November 11, 2009 articles. Id. ¶¶ 56-57. Mulhollan's last alleged act of retaliation occurred on November 20, 2009, when he informed the plaintiff that, because the plaintiff had written the opinion articles, he would be reassigned to work temporarily as Mulhollan's Special Advisor beginning on December 21, and that thirty days thereafter he would be separated entirely from the CRS. Id. ¶¶ 58-59. Although the plaintiff filed suit on January 8, 2010, Def. Mulhollan's Mem. at 5, which was prior to the expiration of his thirty days as Mulhollan's Special Advisor, subsequent filings with the Court indicate that the expected and allegedly retaliatory acts described in the plaintiff's complaint—namely the complete separation from the CRS—did in fact ultimately occur. See Pl.'s Opp'n to Stay at 1-3.

C. The Library's Regulations

The Library's internal personnel regulations generally encourage employees to speak and write publicly and they do not restrict employees from engaging in public discourse when discussing issues not within an employee's area(s) of specialty. Compl. ¶¶ 65-67 (citing Library of Congress Regulation ("LCR") 2023-3 § 3(A) - (B)). However, when speaking on "controversial matters," the regulations dictate that Library employees should "explicitly disassociate" themselves from the Library and "their official positions," but such statements made by employees are not subject to prior review.[4] Id. ¶¶ 66-67 (citing LCR-2023-3 § 3(A) - (B)). Additionally, the Library's regulations state that "where an employee's writing relates to library science, the administration or policies of the Library, matters relating to an employee's official duties or responsibilities, or matters specifically addressing Members of Congress, the employee is expected to, among other things, "'assure, when appropriate, that staff members' opinions clearly differentiate from Library policy.'" Id. ¶ 67 (quoting LCR-2023-3 § 3(B)).

[4] Section 3 of LCR 2023 reads in its entirety:

"Section 3. Teaching, Writing, and Lecturing

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

In 2004, defendant Mulhollan issued a statement clarifying the Library's regulations as applied to the CRS, which has since been adopted as policy and is implemented and enforced by defendant Mulhollan. Id. ¶ 68. This clarification, entitled Outside Speaking and Writing, encourages Library employees to submit their authored works for prior review and provides that employees are responsible for using "sound judgment in deciding when engagement in an outside activity may place the reputation of [the CRS] at risk." Id. ¶¶ 69-71. However, the term "sound judgment" is neither defined nor discussed, which the plaintiff alleges affords "the Library and [the CRS] unfettered discretion to determine which speech to punish." Id. ¶¶ 71, 76.

II. THE DEFENDANTS' MOTION TO STAY THIS LITIGATION

The defendants requested that this Court issue "an order staying [this] action except as to [the] litigation of Director Mulhollan's individual capacity defenses, including both qualified immunity and statutory bars to [the plaintiff's] Bivens claims for damages against Director Mulhollan." Defs.' Mot to Stay at 2. As noted above, however, this Court denied that request on October 14, 2010. Davis v. Billington, et al., No. 10-0036 (RBW) (D.D.C. Oct. 14, 2010).

A. Standard of Review

Upon balancing the competing interests of the parties, a court has inherent power to stay proceedings on its docket. Feld Entm't v. Am. Soc'y for the Prevention of Cruelty to Animals, 523 F. Supp. 2d 1, 2-3 (D.D.C. 2007). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 879 n.6 (1998) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). In determining whether to grant a stay, "the [C]ourt, in its sound discretion, must assess and balance the nature

and substantiality of the injustices claimed on either side." Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1980). The party requesting a stay must make out a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." Feld Entm't, 523 F. Supp. 2d at 3 (quoting Landis, 299 U.S. at 255).

B. Legal Analysis

As noted above, the defendants sought "an order staying [this] action except as to [the] litigation of Director Mulhollan's individual capacity defenses." Defs.' Mot. to Stay at 2. As grounds for this request, defendant Mulhollan argued that he is shielded "from both liability and the burdens of litigation" by the doctrine of qualified immunity, id. at 4, and he asserted that "were [the] plaintiff permitted to embark upon discovery as to Dr. Billington and the Library, it would have an immediate and direct effect on [him], his qualified immunity defense, and his right not to participate in discovery until the Court has ruled on his motion to dismiss." Id. at 6. In other words, defendant Mulhollan maintains that "for the protections of [qualified immunity] to be meaningful to [him], litigation should be stayed as to the Library pending the outcome of [his motion to dismiss]." Defs.' Reply to Stay at 4.

The plaintiff opposed the motion to stay, asserting that the defendants were "attempt[ing] to expand the qualified immunity doctrine to stay all litigation of all claims against all defendants, including defendants for whom qualified immunity is not available." Pl.'s Opp'n to Stay at 3. And the plaintiff argued that because defendant Billington has been sued in his official capacity as the Librarian of Congress he is not protected by qualified immunity, and he must therefore respond to the plaintiff's Complaint. Id. The plaintiff further objected to the timing of

the motion to stay, noting that "the Supreme Court . . . has focused on the individual-capacity defendant's right to avoid peculiarly disruptive proceedings like 'unnecessary and burdensome discovery or trial proceedings,' which necessarily occur only after the defendant has filed a response to the plaintiff's complaint." Id. at 4 (quoting Crawford-El v. Britton, 523 U.S. 574, 598 (1998)).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callhan, 555 U.S. 223, __, 129 S.Ct. 808, 815 (2009). Qualified immunity is "an immunity from suit rather than a mere defense to liability." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). A district court "must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." Crawford-El, 523 U.S. at 597-98. The Supreme Court has "repeatedly stressed . . . the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson, 555 U.S. at __, 129 S.Ct. at 815 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)). It must be remembered, however, that qualified immunity is not a right to immunity "from litigation in general." Behrens v. Pelletier, 516 U.S. 299, 312 (1996).

Here, the defendants' motion to stay was premature, overly encompassing, and did not demonstrate a clear case of hardship. First, although defendant Mulhollan had filed a pre-answer motion to dismiss, defendant Billington had not yet responded to the plaintiff's Complaint with an answer or any other form of responsive pleading or motion permissible under the Federal

Rules of Civil Procedure. Pl.'s Oppn' to Stay at 3; see Fed. R. Civ. P. 8(b)-(c), 12 (b). While the defendants cited ample case authority supporting the issuance of a stay of discovery pending resolution of the qualified immunity issue, see Defs.' Mot to Stay at 5 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[u]ntil this threshold immunity question is resolved, discovery should not be allowed,") and Behrens, 516 U.S. at 308 (1996) (qualified immunity "is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery")) (emphasis added), as the plaintiff aptly noted, the defendant did not cite any authority to support the extension of qualified immunity to the pleading stage. Pl.'s Opp'n to Stay at 8. The Court was similarly unable to find authority supporting a pre-answer or dispositive motion stay of litigation.[5] Because this litigation was only in the infancy of the pleading stage when the stay was requested, and consequently had not, and still has not, yet reached the discovery stage, granting the defendants' motion to stay would have freed the Library from participating in the "litigation in general," Behrens, 516 U.S. at 312, rather than protecting defendant Mulhollan's asserted right to qualified immunity.

Second, and similarly, the defendants' motion cut too broad a swath in its attempt to stay litigation as to the Library based solely on Mulhollan's alleged right to qualified immunity. "A stay of discovery pending determination of a motion to dismiss is rarely appropriate when the

[5] Although the Feld Court apparently granted a pre-answer and responsive motion stay of "all proceedings," 523 F. Supp. 2d at 5, that case is inapplicable here. The court in Feld granted a temporary stay of all proceedings pending resolution of an earlier-filed, related case. Id. at 2. Further, the Feld court determined that the second matter was filed only after the court denied a counterclaim Feld attempted to assert in the first matter because it would have resulted in "additional expenses to the plaintiffs, would likely create a need for new counsel to pursue [the claim] where no need . . . exist[ed], and that the claim was being used as a tool by [Feld] to indefinitely prolong the . . . litigation." Id. at 3. These factual and procedural differences make Feld inapposite to the situation in this case.

pending motion will not dispose of the entire case." Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 3 (D.D.C. 2001) (citation and internal quotation marks omitted); see Pearson, __ U.S. at __, 129 S. Ct. at 815 (2009) (noting only that qualified immunity should "be resolved prior to discovery . . . at the earliest possible stage in litigation") (citations and internal quotation marks omitted). Because only defendant Mulhollan's motion to dismiss was before the Court when the stay was requested and it only addressed the claims against him, it was impossible for the Court, at that time, to dispose of the entire case based on the motion to dismiss the claims against Mulhollan.

Finally, there was no indication that defendant Mulhollan would be "peculiarly disrupt[ed]," Crawford-El, 523 U.S. at 605, by the Court requiring the Library to file an answer or other responsive pleading. In fact, Mulhollan had likely already expended substantial efforts in responding to the plaintiff's Complaint by raising and analyzing not only his qualified immunity challenge, but also multiple defenses on other grounds. The Court therefore determined that requiring the Library to similarly respond to the plaintiff's Complaint would not further significantly burden defendant Mulhollan. This was especially so given that, as the defendants in fact conceded, the legal assertions and alleged factual underpinnings of each set of the plaintiff's claims are "substantively identical," Defs.' Reply to Stay at 4-5, and that both defendants are represented by the same counsel. Conversely, there was a fair possibility that granting the stay would prolong the injury the plaintiff asserted he was enduring due to his termination. See Pl.'s Opp'n to Stay at 10 & n.4 (asserting that the plaintiff remains unemployed despite his best efforts to acquire employment).

For all of these reasons on October 14, 2010, the Court denied the defendants' motion to stay. Davis v. Billington, et al., No. 10-0036 (RBW) (D.D.C. Oct. 14, 2010).

III. THE DEFENDANTS' MOTIONS TO DISMISS

A motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) tests whether the complaint has properly stated a claim upon which relief can be granted. Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988). For a complaint to survive a Rule 12(b)(6) motion, Federal Rule of Civil Procedure 8(a) requires only that it provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8(a) does not require "detailed factual allegations," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), a plaintiff is required to provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," Ashcroft v. Iqbal, __ U.S. __, __, 129 S. Ct. 1937, 1949 (2009), in order to "give the defendant fair notice of what the claim is and the grounds upon which it rests," Twombly, 550 U.S. at 555 (internal citation, quotation marks, and alteration omitted). Thus, while "detailed factual allegations are not necessary to withstand a Rule 12(b)(6) motion to dismiss, to provide the grounds of entitlement to relief, a plaintiff must furnish more than labels and conclusions or a formulaic recitation of the elements of a cause of action." Hinson ex rel. N.H. v. Merritt Educ. Ctr., 521 F. Supp. 2d 22, 27 (D.D.C. 2007) (quoting Twombly, 550 U.S. at 555) (internal quotation marks and alterations omitted). Or, as the Supreme Court more recently stated, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, __ U.S. at __, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570).

A claim is facially plausible "when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). A complaint alleging facts that are "'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557).

Finally, in evaluating a Rule 12(b)(6) motion, "[t]he complaint must be liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979) (internal quotation marks and citations omitted), and the Court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the Court] may take judicial notice," EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997) (footnote omitted); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (noting that courts may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). On the other hand, although the Court must accept the plaintiffs' factual allegations as true, any conclusory allegations are not entitled to an assumption of truth and even those allegations pleaded with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." Iqbal, __ U.S. at __, 129 S. Ct. at 1950. In the final analysis, dismissal for failure to state a claim is "proper when . . . the court finds that [a] plaintiff[] [has] failed to allege all the material elements of [that claim]." Taylor v. FDIC, 132 F.3d 753, 761 (D.C. Cir. 1997).

A. The Plaintiff's Bivens Claims

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971). Bivens "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of money damages against the responsible federal official." Davis v. Passman, 442 U.S. 228, 234 (1979). "[W]hether to recognize a Bivens remedy may require two steps." Wilkie v. Robbins, 551 U.S. 537, 550 (2007). First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Id. (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)). Second, "even in the absence of an alternative, a Bivens remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" Wilkie, 551 U.S. at 550 (quoting Bush, 462 U.S. at 378). Where special factors counsel hesitation, "the judiciary should decline to exercise its discretion in favor of creating damages remedies against federal officials." Spagnola v. Mathis, 859 F.2d 223, 226 (D.C. Cir. 1988).

As initially employed by the Supreme Court in Bivens, the phrase "special factors counseling hesitation" had nothing to do with the merits of the particular remedy sought by a plaintiff, but rather concerned the question of who—Congress or the courts—should decide whether such a remedy should be provided. Bush, 462 U.S. at 379-80. A statutory system of

"comprehensive procedural and substantive provisions giving meaningful remedies against the United States," Spagnola, 859 F.2d at 226, for example, constitutes a "special factor counseling hesitation," id., because such a system indicates Congress's intent to establish and regulate the remedies provided for claims brought in accordance with that system. Indeed, it is the "comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention," in deference to the existence of this special factor. Id. at 227 (citing Schweiker v. Chilicky, 487 U.S. 412 (1988)); see Chilicky, 487 U.S. at 421-22 ("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 for the violation.").

Despite exercising caution in the face of special factors, courts have nonetheless also been mindful of whether there exists meaningful relief for alleged constitutional violations. See Spagnola, 859 F.2d at 227 n.6 (observing that, at two separate points in Bush, the majority "appeared to suggest that the specific remedies extended under the [Civil Service Reform Act] were 'meaningful'"). The Supreme Court has declined to answer the question "whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary." Bush, 462 U.S. at 379 n.14; see id. at 388 ("The question is not what remedy the court should provide for a wrong that would otherwise go unredressed."); id. at 391 (Marshall, J., concurring) (declaring that there is nothing foreclosing a federal employee from pursuing a Bivens remedy when his injury is not attributable to personnel actions that may be remedied under a federal statutory scheme). When the question is one of augmenting or supplementing

statutory relief, courts have not been hesitant to deny a Bivens action. See Bush, 462 U.S. at 372 (assuming, as petitioner asserted, that "civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered," but nonetheless declining to accord a Bivens remedy) (emphasis added); Chilicky, 487 U.S. at 425 (declining to provide a Bivens remedy even though "Congress ha[d] failed to provide for complete relief") (emphasis added); Spagnola, 859 F.2d at 229 (noting that, "[a]fter Chilicky, it is quite clear that if Congress has 'not inadvertently' omitted damages against officials in the statute at issue, then courts must abstain from supplementing Congress' otherwise comprehensive statutory relief scheme with Bivens remedies") (emphasis added); Navab-Safavi v. Broad. Bd. of Governors, 650 F. Supp. 2d 40, 71 (D.D.C. 2009), aff'd on other grounds, __ F.3d __, 2011 WL 691363 (D.C. Cir. Mar. 1, 2011) (explaining that "Congress's provision of substantive rights and procedural remedies has been a defining feature of the other regulatory schemes that the District of Columbia Circuit has held to preclude Bivens recovery") (emphasis in original). When, however, "there are available no other alternative forms of judicial relief," Davis, 442 U.S. at 245, and the consequence becomes one of "damages or nothing," id., courts have not been hesitant to recognize a Bivens remedy. See id. at 248-49 (finding the plaintiff had no other alternative forms of judicial relief and allowing him to seek redress for alleged Fifth Amendment violations in the form of damages); Navab-Safavi, 650 F. Supp. 2d at 73 ("The strongest reason for recognizing a Bivens action in this instance is that the only 'meaningful remedies' available to [a] plaintiff are monetary damages.") (quoting Bush, 462 U.S. at 368).

Defendant Mulhollan asserts that the plaintiff's individual capacity claims against him cannot "survive in light of resounding pronouncements by the Supreme Court and the [District of

Columbia] Circuit that Bivens claims arising from federal employment disputes are precluded by the Civil Service Reform Act ("CSRA")." Def. Mulhollan's Mem. at 7. Accordingly, the defendant argues that the CSRA is a special factor that precludes the plaintiff from pursuing relief under Bivens. Id. Citing Chilicky as the "linchpin decision" for denying a Bivens remedy in this case, the defendant maintains that although the plaintiff "enjoys no avenue for review under [the CSRA]," id. at 11, the omission of relief for individuals in the plaintiff's position from the CSRA was not inadvertent and recognition of a Bivens remedy would therefore "turn Congress's deliberate and carefully crafted federal employee scheme 'upside down,'" id. at 14. The plaintiff, on the other hand, maintains that he is "precisely the type of plaintiff who should be entitled to a [Bivens] damages remedy for the violation of his constitutional rights." Pl.'s Opp'n to Mot. to Dismiss at 9. He contends that because the Library of Congress is not an Executive Agency, it is excluded from the definition of agencies covered by the CSRA. Id. at 9 n.2. The plaintiff therefore notes that he is not subject to the "detailed procedural protections of Chapters 23 or 43" of the CSRA. Id. Moreover, he points out that as a probationary employee serving less than one year as Assistant Director, he is likewise not covered by the procedural protections in Chapter 75 of the CSRA. Id. Defendant Mulhollan does not contest the plaintiff's assertion that his termination falls outside the ambit of the CSRA; instead, he argues that no distinctions need be drawn between adequacy of remedy and availability of review in light of Chilicky. Defs.' Reply in Support of Mot. to Dismiss at 2-9. As explained below, the Court does not agree with defendant Mullhollan.

The Court agrees with the parties that the plaintiff's termination falls outside the reach of the CSRA. See Pl.'s Opp'n to Mot. to Dismiss at 9 n.2; Def. Mulhollan's Mem. at 11. Thus,

much like in Navab-Safavi, the strongest reason for recognizing the plaintiff's Bivens claim is that the only meaningful remedies available to him are monetary damages. See Navab-Safavi, 650 F. Supp. 2d at 73. Another, similar reason for recognizing the plaintiff's Bivens claims is the fact that, unlike the plaintiffs in Bush, Chilicky, and Spagnola, the plaintiff here faces a "complete unavailability of review." Pl.'s Opp'n to Mot. to Dismiss at 10. Because the issue here is not simply one of remedy, but also of meaningful review, this case is distinguishable from Spagnola and this Circuit's application of Chilicky to Spagnola.

Although Spagnola stands for the proposition that a limited remedy under the CSRA may nonetheless be considered a meaningful remedy, the plaintiff here faces both an absence of review and lacks the possibility for relief under the CSRA. While the circumstances surrounding the plaintiffs' First Amendment claims in Spagnola "differ[ed] markedly" from one another, the District of Columbia Circuit noted that "the CSRA accord[ed] claimants in their respective positions substantially the same relief," as

> each could petition the Office of Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB") alleging a "prohibited personnel practice." If the OSC believed the allegations meritorious, it was required to report findings and recommendations of corrective action to the agency involved. If the agency failed to take action, the OSC could have requested that the MSPB order corrective action.

859 F.2d at 225 (internal citations omitted). Moreover, neither of the Spagnola plaintiffs could assert one of the prohibited "major personnel actions" (e.g., removal, reduction in grade or pay, or suspension of more than fourteen days), as defined by the CSRA. Id. (citing 5 U.S.C. §§ 7511-14, 7701-03 (1982)); see Spagnola, 859 F.2d 228 n.9 (explaining that Spagnola challenged a series of minor personnel actions). For this reason, they could not avail themselves of the more elaborate administrative protections reserved by Congress under the CSRA for employees

alleging unconstitutional "major personnel actions." Spagnola, 859 F.2d at 225. Nonetheless, the Spagnola plaintiffs could still petition the OSC, make allegations, and ensure that the OSC conducted the requisite "adequate inquiry" into the allegations. Id.; see id. at 228 n.9 (observing that the CSRA entitled claimants "to the remedy (albeit a limited one) of an OSC petition"). The plaintiff here alleges a significantly greater employment action—complete termination from his position at the CRS—and yet, under the CSRA he has no remedy at all, not even a limited one. See Pl.'s Opp'n to Mot. to Dismiss at 9. It seems strange, then, that Congress would accord relief under the CSRA for the minor personnel actions challenged in Spagnola, but intentionally omitted relief for those in the plaintiff's position who had experienced major personnel actions as a result of alleged constitutional violations.

In analyzing the claims before it, the Spagnola Court found "Chilicky . . . significant not only for its holding, but for its analysis of Bush." 859 F.2d at 227. As the Circuit noted, "in applying the Bush 'special factors' doctrine to the [statutory claims] before it, the Chilicky Court made clear that it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." Id.; see Navab-Safavi, 650 F. Supp. 2d at 74-75 (observing that "no matter how the existence of [] review [under the statutory scheme at issue] might factor into a determination as to whether a Bivens remedy is available, its relevance is minimal in a case involving a claimant who is ineligible under [that statute]") (internal quotation marks and alterations omitted). But, while discussing the significance of a meaningful remedy, which it deemed the "principal lesson of Bush," Spagnola, 859 F.2d at 228, the Spagnola Court observed that Chilicky never explicitly determined the extent of Bush's preclusive effect, and noted that Chillicky only dealt with the issue by

implication, see id. ("the Chillicky Court included a citation implicitly suggesting that the preclusive effect of Bush extends even to those claimants within the system for whom the CSRA provides 'no remedy whatsoever.'" (emphasis added)). There can be no doubt then that the existence of a meaningful remedy is indeed the principal lesson of Bush. And the District of Columbia Circuit observed that the CSRA does provide meaningful, although sometimes incomplete, remedies to those federal employees who fall within its protections and they may thus avail themselves of its procedural and substantive protections. See Spagnola, 859 F.2d at 228 (explaining that the statutory scheme before the court "at least technically accommodates appellants' constitutional challenges") (emphasis added). This Court, however, finds it needs more than just an "implicit[] suggesti[on]," Spagnola, 859 F.2d at 228, before it can agree with defendant Mulhollan that Congress's provision of no review whatsoever is a special factor counseling hesitation. In other words, the Court cannot accept the proposition that a system affording absolutely no review for the plaintiff's alleged constitutional violations can fairly or accurately be deemed "comprehensive." Cf. Navab-Safavi, 650 F. Supp. 2d 40, 71 (examining Bush, Chilicky, and Spagnola, and concluding that their "discussions of specific entitlement programs suggest that for purposes of the special factors analysis, a statutory scheme is a comprehensive congressional system to administer public rights when it provides both substantive rights and administrative procedures for adjudicating those rights") (internal quotation omitted); id. at 73 (noting that the "remedial regimes at issue in Bush and [Chilicky], which were deemed to provide meaningful remedies against the United States, offered the prospect of monetary compensation for the claimed economic harms") (internal quotation omitted).

Based on the above analysis of the current legal landscape, the Court finds that the absence of an "alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch," Wilkie, 551 U.S. at 550, to provide the plaintiff a remedy in damages. Further, the Court, in making "the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counseling hesitation," id., has not found persuasive the defendant's arguments against recognizing the plaintiff's Bivens claims based on the CSRA being a "special factor counseling hesitation before authorizing" the plaintiff to pursue his claim for damages. Accordingly, the Court concludes that the plaintiff has properly stated claims under Bivens against defendant Mulhollan in his individual capacity.

B. The Plaintiff's First Amendment Claim

It is beyond question that a public employee does not relinquish his First Amendment rights to comment on matters of public interest by virtue of his government employment. Connick v. Myers, 461 U.S. 138, 140 (1983) (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). A public employee's claim of First Amendment violations by his government employer is evaluated under the four elements set forth in Pickering v. Board of Education of Township High, 391 U.S. 563 (1968), and clarified by subsequent cases that have construed Pickering. Hall v. Ford, 856 F.2d 255, 258 (D.C. Cir. 1988). First, the public employee must have been speaking on a matter of public concern. Id. (citing Connick, 461 U.S. at 138). Second, the court must balance the interests of the employee, "'as a citizen, in commenting upon matters of public interest, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Hall, 856 F.2d at 258 (quoting Pickering, 391 U.S.

at 568). Third, the employee must prove that the speech was a substantial or motivating factor in the adverse employment action. Hall, 856 F.2d at 258 (citing Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Finally, the government employer must be given an opportunity to prove that it would have reached the same decision even absent the protected conduct. Hall, 856 F.2d at 258. The first two inquiries are questions of law for the court to resolve. Id. The latter two elements are questions of fact usually left for the jury to decide. Id.

The state interest factor of the Pickering balancing test "focuses on the effective functioning of the public employer's enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987). Whether the speech at issue "impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties," id., thus become pertinent factors in assessing the "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities," Connick, 461 U.S. at 150; see Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("A government entity has broader discretion to restrict speech when it acts in its role as an employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."). The "manner, time, and place" in which the speech occurred are also factors relevant to the balancing exercise undertaken by the court. Connick, 461 U.S. at 152. Additionally, while "unadorned speculation as to the impact of the speech" will not suffice in the Pickering balance, a court may draw "reasonable inferences of harm from the employee's speech, his position, and his working relationship with his superior." Hall, 856 F.2d at 261.

In weighing the state's interest in having taken the challenged employment action, "some attention must be paid to the responsibilities of the [aggrieved] employee within the agency." Rankin, 483 U.S. 390. "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." Id. In the attempt to discern whether an employee is a "key deputy [who must be] loyal, cooperative, willing to carry out [his] superiors' policies, and perceived by the public as sharing [his] superiors' aims," Hall, 856 F.2d at 263, a court should ask three, successive questions, id. at 264. Hall instructs a court to "[a]sk first whether the employee's position relates to an area as to which there is room for principled disagreement on goals or their implementation . . . [i.e.,] is it a policy area?" Id. at 264 (emphasis in original). If the answer to this first question is yes, then the court must "ask whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation . . . [i.e.,] was the individual a policy level employee?" Id. (emphasis in original). If the answer to this question is also yes, then the court must finally "ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech." Id. "At a minimum," for the "key deputy" heighted burden of caution to apply, "the employee's speech must relate to the policy areas for which he is responsible." Id.

As explained above, to withstand the defendants' motion to dismiss under Rule 12(b)(6), the plaintiff's claim of retaliation based on the First Amendment "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, __ U.S. at __, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 570). Here, because the defendants seemingly concede that the plaintiff's opinion articles addressed matters of public concern, see

Def. Mulhollan's Mem. at 18 (stating that "in this motion we address only the second Pickering element"); Def. Billington's Mem. at 7 (same), the only First Amendment inquiry for the Court to make at this time is whether the plaintiff's Complaint states a plausible claim that his speech interests as a citizen outweighed the Library's need to terminate him in order to allow it to effectively and efficiently perform its responsibilities to the public. And in making this assessment, the Court must find only that the plaintiff asserts facts sufficiently specific to plausibly tip the Pickering balance in his favor. Iqbal, __ U.S. at __, 129 S. Ct. at 1949.

It is no surprise that both defendants Mulhollan and Billington argue that the plaintiff's allegations "do not contain factual material that would plausibly suggest . . . that his interests in speaking outweighed [the] CRS's interests in promoting the efficiency of its public service." Def. Mulhollan's Mem. at 18; see also Def. Billington's Mem. at 7. The defendants place great weight on Hall's conclusion that "the higher the level the employee occupies, the less stringent [is] the government's burden of proving interference with its interest," Def. Mulhollan's Mem. at 18 (quoting Hall, 856 F.2d at 261), and argue that the plaintiff was a policy-level employee subject to a greater burden of caution in the exercise of his speech, Def. Mulhollan's Mem. at 19-21.[6] Although the defendants may disagree with them, the Court is nonetheless confined to the factual allegations of the plaintiff's Complaint, and must, moreover, accept those allegations as true at this stage of the proceedings. For the reasons explained below, the Court finds that the

[6] As defendant Billington acknowledges early on in his memorandum in support of his motion to dismiss, "certain of the arguments asserted herein are substantively identical to the arguments" asserted in the memorandum in support of defendant Mulhollan's motion to dismiss. Def. Billington's Mem. at 2 n.1. Given the similarity of the arguments and the near identity of the language with which those arguments are presented, the Court will not always cite the memoranda of both defendants throughout the remainder of this Memorandum Opinion.

plaintiff's allegations adequately state a claim of unconstitutional termination in violation of the First Amendment.

First, the plaintiff's allegations indicate that he was not a policy-level employee as defined by Hall, and thus was not required to exercise any special degree of caution in the exercise of his speech. See Hall, 856 F.2d at 264 (clarifying that an employee's policy-level status matters only to the extent that "the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech"). According to the plaintiff, his "primary responsibilities were to lead, plan, direct and evaluate the research and analytical activities in the policy areas assigned to his division." Compl. ¶ 29. While the plaintiff uses the phrase "policy areas," the Court distinguishes this use of the phrase from the significance given to the term "policy" in Hall, 856 F.2d at 264-65, based on the fact that the CRS is the actual "public policy research arm," compl. ¶ 14, of the Library. In other words, because public policy is one of the primary responsibilities of the CRS, the entire organization could be considered as one collective "policy" operation if the language of Hall were applied literally. Moreover, because the CRS is divided into discrete areas of varying specialties, it would seem to only make sense that the individual units of the CRS would be referred to by Library employees as "policy areas." The Court therefore interprets paragraph 29 of the plaintiff's Complaint, in which he uses the term "policy areas," as simply a generalized indication that he managed the individual unit of the CRS tasked with Foreign Affairs, Defense and Trade, and not as the plaintiff's acknowledgment that he was a "key deputy" within the CRS and accordingly answers the first Hall inquiry—whether the plaintiff's position had a relationship to policy concerns—in the negative. In any event, the plaintiff contends that he "had no

authority to establish policy, and he had little opportunity for significant contact with the public." Id. ¶ 29. The second Hall inquiry—whether the plaintiff was a policy level employee—must therefore similarly be answered in the negative. Lastly, the plaintiff unequivocally asserts that the speech for which he was fired was not related to his official work at the CRS. Compl. ¶¶ 30-32; see id. ¶ 3 (the plaintiff "did not have any official responsibilities or duties over issues relating to the military commissions"); id. ¶ 35 (describing how defendant Mulhollan required the plaintiff to attend a conference on personal time using a vacation day because "the subject of the conference—Guantanamo and the military commissions system—had nothing to do with [the plaintiff's] CRS job responsibilities or duties"). Consequently, even if the plaintiff could be classified as a policy-level employee, it is clear that his speech did not "at a minimum, . . . relate to [the] policy areas for which he [wa]s responsible." Hall, 856 F.2d at 264.

Satisfied that the plaintiff was not, under Hall, required to use any extra degree of caution in the exercise of his speech, the Court now turns to the alleged harm the plaintiff's speech caused or could have caused Director Mulhollan, the CRS, or the Library at large. The Supreme Court cautioned in Connick "that a stronger showing [of harm to the government-employer] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Connick, 461 U.S. at 152-53 (observing that only one question out of fourteen on a questionnaire the plaintiff distributed within her office "touched upon matters of public concern in only a most limited sense"). As noted above, the plaintiff here engaged in speech pertaining to matters of immense public concern, namely, "the military commissions process [at Guantánamo Bay], and the decision to try certain detainees in federal court in the United States." Compl. ¶ 45. Given the public's substantial interest in receiving "the personal views or experiences . . . [the plaintiff]

acquired as the former Chief Prosecutor [for the Department of Defense's Office of Military Commissions]," compl. ¶ 50, the Court must require a relatively stronger showing of harm to the government-employer to tip the Pickering balance in the defendants' favor. See Am. Fed'n of Gov't Emps. v. Loy, 332 F. Supp. 2d 218, 230-31 (D.D.C. 2004) (Walton, J.) (rejecting the government's speculative assertions as to how the plaintiff's speech harmed it and noting that the government must instead come forth with "affirmative evidence" of this harm).

The defendants indicate that, above and beyond any potential harm the plaintiff's speech might reasonably have been expected to cause, his speech did in fact produce a "disruption" because defendant Mulhollan believed it "undermined [the plaintiff's] ability" to fulfill his duties and lead the FADTD as its Assistant Director. Def. Mulhollan's Mem. at 30 (arguing that this disruption is evidenced in the plaintiff's Complaint through its incorporation of the November 13, 2009 Memorandum of Admonishment and the November 20, 2009 letter of separation); see also Def. Billington's Mem. at 20 (same).

It bears repeating that even though the defendants disagree with the plaintiff's allegations, in deciding the defendants' motions to dismiss under Rule 12(b)(6), the Court is limited to the factual allegations in the plaintiff's Complaint and any documents it incorporates by reference. The Complaint sets forth only a handful of instances when the plaintiff's writings could be construed as having created a disruption—after he reviewed the opinion pieces, defendant Mulhollan sent several emails to the plaintiff, compl. ¶ 54; on November 12, 2009, the day after the writings were published, defendant Mulhollan called the plaintiff into a meeting during which the acting Deputy Director of CRS was also present, id. ¶ 55; the letter of admonishment from defendant Mulhollan to the plaintiff, id. ¶ 56; the November 20, 2009 phone call from

defendant Mulhollan to the plaintiff informing him of his removal from the CRS, which was immediately followed by a letter stating the same, id. ¶ 58; and an email sent to all CRS employees from Mulhollan on November 24, 2009, informing them of the plaintiff's removal from the CRS and that he would be replaced, id. ¶ 60. However, these events—the meetings, emails, telephone calls, and letters, all initiated by defendant Mulhollan himself—strike the Court as examples of typical, everyday employer/employee interactions, rather than examples of harm to a government-employer. Furthermore, there is nothing in the Complaint suggesting that the subject of these events was harmful to the effective and efficient functioning of the Library. In their attempt to convince the Court otherwise, the defendants remind the Court that it is entitled to draw "reasonable inferences" of harm from the employee's speech, his position, and his working relationship with his superior, Def. Billington's Mem. at 19 (quoting Hall, 856 F. 26 at 261) & 22, and ask the Court to infer that the plaintiff's actions created "dissonance," id. at 21, between himself and defendant Mulhollan and undermined his ability to lead the FADTD. The Court, however, is unable to draw that inference given that the record currently before it indicates that the plaintiff had previously engaged in similar speech without any detrimental impact on his working relationship with defendant Mulhollan or anyone else. See compl. ¶¶ 33-40, 46. Perhaps more damaging to this claim of an impaired working relationship, however, is the fact that defendant Mulhollan reassigned the plaintiff to work as his special advisor, id. ¶ 58, which seemingly indicates that the plaintiff still had a good "working relationship with his superior," Hall, 856 F.2d at 261. Indeed, it seems that the greatest disruption to the CRS and the Library was the loss of an employee, the plaintiff, who, one day prior to the publication of his articles, was told by defendant Mulhollan that "he was very pleased with [the plaintiff's] job

performance, and that others at [the] CRS had stated that they respected and appreciated [the plaintiff] and thought that he was doing a very good job." Compl. ¶ 42.

The plaintiff's interest in speaking, on the other hand, is significant. He alleges that "[n]either of his opinion pieces singled out or criticized Congress, any Member of Congress, any political party, or positions associated with one party but not another," id. ¶ 47, and that they were written on and submitted from "his home computer, during non-work[ing] hours," id. ¶ 48; see Navab-Safavi, 650 F. Supp. 2d at 55 (concluding that the plaintiff's speech did not interfere substantially with her job because it was engaged in away from her workplace, not during her work hours, without the use of any work-related materials, and did not implicate or criticize her employers). Moreover, the only information in the articles from which it could be inferred that the plaintiff might have had some association with the government was his identification as the former Chief Prosecutor for the Department of Defense's Office of Military Commissions; however, nothing in either piece suggested any current association the plaintiff had with the federal government, or indicated any relationship he had the Library. See Def. Mulhollan's Mem., Exhibits ("Exs.") 2 (The plaintiff's Wall Street Journal piece) & 3 (The plaintiff's Washington Post piece). In addition, nothing in the content of the plaintiff's speech concerning "the military commissions process [at Guantanamo Bay], and the decision to try certain detainees in [the] federal court[s] in the United States," compl. ¶ 45, was derived from his employment at the CRS, where, according to the plaintiff, his work was "not related to the military commissions system," id. ¶ 30. Instead, the plaintiff contends that "sole responsibility for [matters] relating to the military commissions system . . . belongs to the American Law Division" of the Library, id. ¶ 31, of which he was not a member.

The defendants argue that the plaintiff's duties were actually greater than alleged in the Complaint, Def. Mulhollan's Mem. at 21-22, that "the Library's interest is in guaranteeing the impartiality and the appearance of impartiality projected by the signed work and the professional conduct" of its employees, id. at 26 (quoting Keeffe v. Library of Cong., 777 F.2d 1573, 1579-80 (D.C. Cir. 1985)), and that the plaintiff directly threatened the CRS's "interest in ensuring continued adherence to its core values of objectivity and non-partisanship," Def. Mulhollan's Mem. at 27. Keeffe, a case relied upon by the defendants, however, is distinguishable. In that case, the Library's Office of General Counsel opined that an analyst's actual and apparent impartiality might be compromised by her participation in a political party convention because "a delegate has an interest in the success of the convention's candidate or party platform." Keeffe, 777 F.2d at 1576. Here, the plaintiff alleges that his articles did not side with one party or the other and, instead, simply expressed his personal and private opinions as a citizen and former Department of Defense employee. Compl. ¶¶ 47-50. Moreover, the plaintiff in Keeffe was an analyst for the Library whose "work for [the] CRS identifie[d] . . . [her] by name." Keeffe, 777 F.2d at 1576. On the contrary, the plaintiff was not an analyst; rather, he was an Assistant Director who, he represents, "was not expected to and did not author written reports or analyses on behalf of the CRS. His name had not appeared on any reports distributed to Congress. Nor ha[d] any congressional inquiries or requests for information been directed to him." Compl. ¶ 29. Thus, as represented in the Complaint, the facts depict a private citizen engaging in speech, on his own time, on a matter of public concern unrelated to his job at the CRS.

While it is not inconceivable that at some stage later in the proceedings the defendants may be able to present evidence of how the plaintiff's speech impaired the effective and efficient

functioning of the CRS or the Library, such evidence is not currently before the Court in the plaintiff's Complaint or any of its attachments. Accordingly, because as pleaded the plaintiff's speech "substantially involved matters of public concern," Connick, 461 U.S. at 152, and did not in any significant way cause harm to his government-employer, the Pickering balance tips decidedly in the plaintiff's favor. The plaintiff has therefore stated a plausible First Amendment claim.

C. The Plaintiff's Fifth Amendment Due Process Claim

The vagueness doctrine is an outgrowth not of the First Amendment, but of the Fifth Amendment. United States v. Williams, 553 U.S. 285, 304 (2008). A statute or ordinance is vague if either: one, it does not give fair warning of the proscribed conduct, or, two, if it is an unrestricted delegation of power that enables enforcement to occur with arbitrary and unchecked discretion. Keeffe , 777 F.2d at 1581. Observing that vague laws "offend several important values," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), the Supreme Court has concluded that

> [l]aws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Id. "What renders a statute vague . . . is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." Williams, 553 U.S. at 306.

The plaintiff's third cause of action alleges that, in violation of the Fifth Amendment, the Library regulation and the CRS policy regulating outside speech by Library and CRS employees

are unconstitutionally vague on their face and as applied to the plaintiff.[7] Compl. ¶ 83. The defendants dispute the plaintiff's characterization of the regulation and policy as vague, arguing that, at best, the plaintiff alleges arbitrary enforcement by citing examples of occasions when he previously spoke publicly about the military commissions without reprimand. Def. Mulhollan's Mem. at 34 ("The plaintiff's allegations of arbitrary enforcement do not amount to a valid vagueness claim."); Def. Billington's Mem. at 32 (same). The defendants further assert that both the Library regulation and the CRS policy are facially sound under the Fifth Amendment because they make clear and concise statements about what outside speech and writing is permitted. Def. Mulhollan's Mem.at 36. For the reasons outlined below, the Court finds that the regulation and the policy are not void as facially vague, but that they were unconstitutionally applied to the plaintiff.

1. The Plaintiff's Facial Challenge to the Regulation and the CRS Policy

The Library regulation and the CRS policy adopted to supplement that regulation provide reasonably clear notice that, while outside speaking is encouraged, see Pl.'s Opp'n. to Mot. to Dismiss at Ex. A (LCR 2023-3) (stating "staff members are encouraged to engage in teaching, lecturing, or writing that is not prohibited by law" (emphasis added)), employees must take efforts to ensure that the views expressed in outside speech concerning controversial matters are

[7] The Complaint actually asserts a vagueness claim under both the First and the Fifth Amendments. Compl. ¶¶ 83-85. Although the Supreme Court recently clarified that the vagueness doctrine is located squarely within the Fifth Amendment's due process language, Williams, 553 U.S. at 304, vagueness concerns are "elevated when the law regulates speech." Bryant v. Gates, 532 F.3d 888, 893 (2008); see Grayned, 408 U.S. at 109 (observing that "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (internal quotations omitted). Accordingly, the Court will construe the plaintiff's third cause of action as solely an alleged Fifth Amendment violation, but with the "elevated concern" accorded alleged First Amendment violations.

solely the employee's personal views, see id., Ex. A (LCR 2023-3) (providing that "in speaking on and writing on controversial matters, staff members are expected to disassociate themselves explicitly from the Library and from their official positions"); id., Ex. B (The CRS policy) at 2 ("For [the] CRS, almost everything that staff say or write has the potential to be 'controversial.'"). The Court is somewhat troubled by Director Mulhollan's admonition that "almost everything" has the potential to be controversial, id., Ex. B (The CRS Policy) at 2, but is unsure whether this statement was made simply due to the legitimate concern for the all-too-pervasive practice of statements being distorted or taken out of context for partisan or political purposes, or is rather a comment on the nature of the work performed at the CRS. In other words, the Court does not understand how "almost everything" a CRS employee states could be potentially controversial. Nonetheless, an employee with the same question could seek guidance from the Review Office. See id. ("While it is not a formal requirement, the [CRS] strongly encourages all staff to submit draft outside writings to the Review Office, which welcomes the opportunity to provide input and advice."). And the existence and encouraged use of the Review Office counsels against a finding that either the regulation or the policy is void on its face for vagueness reasons. See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973) (finding "it . . . important . . . that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the" regulation). Thus, although the regulation and the policy are themselves reasonably clear, to the extent that

an employee desires further clarity, he or she may seek guidance from the Review Office.[8] See Keeffe, 777 F.2d at 1581 (observing that "whether self-initiated or initiated by others, this review procedure enables the employee to resolve any ambiguity about the reach of the regulation and to decide whether it will be applied to her proposed conduct").

Further, the regulation and the policy satisfactorily alert employees of the need to "avoid sources of potential damage to their ability to perform" their duties at the Library in an objective and nonpartisan manner. Pl.'s Opp'n to Mot. to Dismiss, Ex. A (LCR 2023-3) § 3 ("[W]here some association may be made with a staff member's official status, staff members shall . . . avoid sources of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner[,] and . . . assure, when appropriate, that staff members' opinions clearly differentiate from Library policy."). While there is no doubt that the LCR and the policy "are marked by flexibility and reasonable breadth," Grayned, 408 U.S. at 110 (internal quotation marks omitted), the Court finds that it is clear what the regulation, clarified by the policy, "as a whole prohibits," id.—an employee from conveying the impression to an outside audience that the employee is engaging in speech on behalf of or espousing the view of the Library.

As was noted in Keeffe, it is again here "worth emphasizing that the Library's regulation restricts only the exercise of [F]irst [A]mendment rights in ways that impinge on employees' official duties." Keeffe, 777 F.2d at 1580. It is significant that the sections of the regulation at

[8] It should be noted, however, that while the Review Office can constitutionally seek to clarify regulations, it cannot evaluate proposed speech on the basis of its content or act as a prior restraint on such speech. See Grayned, 408 U.S. at 113 (observing that the ordinance at issue "does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement").

issue here, LCR 2023-3 § 3(A)-(B), and the supplemental CRS policy do not explicitly prohibit any speech, although they do implicitly prohibit speech that will damage the perceived objectivity and nonpartisanship of the employee or the CRS. See Keeffe 777 F.2d at 1583 (leaving "the Library free to adopt those interpretations that permit and even encourage the widest possible participation of its employees in public life"). Moreover, the only explicit limitation is a formal disclaimer clarifying that the views expressed in the speech are not those of the CRS or the Library, and this is required only when "some association may be made with a staff member's official status" as a Library employee. Pl.'s Opp'n to Mot. to Dismiss, Ex. A (LCR 2023-3) § 3. This minimal limitation on an employee's outside speech reflects the Library's measured calculation that "it is inescapable that some off-duty activities of a public servant are incompatible with the undivided loyalty and integrity the person must show on behalf of [his] client or constituency." Keeffe, 777 F.2d at 1580. The regulation and the policy "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," Grayned, 408 U.S. at 108, and are thus not impermissibly vague under the Fifth Amendment. As the court in Keeffe observed, the "CRS'[s] regulations are not a triumph of careful drafting, but the [CRS] need not discard them." 777 F.2d at 1583.

2. The Regulation and the Policy as Applied to the Plaintiff

Because the regulation and policy are facially constitutional, the constitutionality of the Library's action turns on the application of the regulation and policy to the plaintiff. As such, the Court must examine whether the plaintiff had "fair warning," Grayned, 408 U.S. at 108, that he would be punished for the publication of his opinion articles. In conducting this analysis, the District of Columbia Circuit's disposition of Keeffe provides direct guidance. See Keeffe, 777

F.2d at 1582 (inquiring "whether Keeffe had fair notice, at the time she left for the Democratic Convention in New York, that her service as a delegate was legitimately proscribed because it conflicted with her professional duty"). As did the Circuit in Keeffe, this Court now similarly concludes that the plaintiff was not given reasonable warning that he would be punished under the regulation or the policy.

The plaintiff alleges that he had, prior to the November 11, 2009, publication of his two opinion articles, engaged in similar speech regarding the military commissions, not only without punishment, but with the blessing of his superiors at the CRS. See compl. ¶ 33 ("[I]n February 2009, [the plaintiff] gave . . . [a] dinner speech at a Human Rights Watch dinner that reflected his oft-stated criticism of the Bush administration's policies relating to military commissions. The CRS Deputy Director had given him approval to attend the dinner, and [the plaintiff] reported to her what happened the next day. He was not told by anyone that his speech had threatened [the] CRS or the Library's work, or that it had compromised his objectivity or non-partisanship."); id. ¶ 46 ("The views expressed by [the plaintiff] in the opinion pieces were similar to those he had already expressed publicly both before and after the commencement of his employment with [the] CRS."); see also id. ¶¶ 34-40 (detailing other outside speech engaged in by the plaintiff in which he criticized the military commissions system, and asserting that the plaintiff "was not disciplined in any manner before publication of the opinion pieces on November 11, 2009[,] for writing or speaking publicly about Guantanamo [Bay] or the military commissions"). Based on these allegations, it is plain that the discipline following the publication of the opinion pieces was a departure from what had previously been the norm. This history of the Library's acceptance of the plaintiff's prior outside speech commands a finding that the plaintiff never "received the

constitutionally mandated 'reasonable opportunity to know what [was] prohibited' that was necessary in order for [him] to conform [his] conduct." Keefee, 777 F.2d at 1582 (quoting Grayned, 408 U.S. at 108).

Although the defendants contend that the Library's lax enforcement of an otherwise clear regulation cannot sustain a vagueness challenge, Def. Mulhollan's Mem. at 34; Def. Billington's Mem. at 32, both the Supreme Court and the District of Columbia Circuit have held otherwise by ruling that fair warning is required, and where fair warning is absent due to prior interpretation or enforcement, a person cannot reasonably conform his or her conduct to what is expected. See Grayned, 408 U.S. at 114 (concluding that the Rockford City Council had "made the basic policy choices, and [had] given fair warning as to what [was] prohibited"). This is so because "the Library must . . . give loud and clear advance notice when it [decides] to interpret a particular regulation as a prohibition or limitation on an employee's outside activity. Without this notice, an employee is entitled to read the Library's overly long silence as assent." Keeffe, 777 F.2d at 1583 (emphasis added). Here, where the plaintiff's earlier outside activity was met with not only an "overly long silence," id., but express approval of prior speaking engagements at which he commented about the military commissions, the plaintiff was not provided fair warning of the adverse consequences of his November 11, 2009 publications in the Wall Street Journal and the Washington Post. Accordingly, the plaintiff has adequately stated a claim for relief under the Fifth Amendment.

D. Qualified Immunity

As noted previously in this Memorandum Opinion, the doctrine of qualified immunity protects government officials from liability for civil damages when their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known. Pearson, 555 U.S. at __, 129 S.Ct. at 815. Qualified immunity balances two important interests—"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Id. In Saucier v. Katz, 533 U.S. 194 (2001) the Supreme Court mandated a two-step process for resolving government officials' claims of qualified immunity. Pearson, 555 U.S. at __, 129 S.Ct. at 815. Under Saucier, a court must first decide whether the facts alleged by the plaintiff make out a violation of a constitutional right. Id. at 816. Then, the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct. Id. In more recent years, however, the Supreme Court has clarified that

> while [the Saucier] sequence . . . is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.

Id. at 818.

"For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness of the action must have been apparent. Hope, 536 U.S. at 739. Thus, public officials can be on notice that their conduct violates established law even in novel factual circumstances. Id. at 741. "[G]eneral statements of the law are not inherently incapable of

giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." Id.

Because the preceding pages of this Memorandum Opinion conclude that the plaintiff does indeed allege facts establishing two distinct constitutional violations, the Court's qualified immunity analysis will focus on whether those First and Fifth Amendment rights were clearly established when defendant Mulhollan allegedly violated them by terminating the plaintiff.

1. The Plaintiff's First Amendment Claim

On November 12, 2009, when defendant Mulhollan first commenced what amounted to a series of reprimands that ultimately resulted in the plaintiff's separation from the CRS, it had been established both by the Supreme Court and the District of Columbia Circuit that a public employer could not punish an employee for lawful speech in the absence of harm to the effective functioning of the employer's operations. See Pickering, 391 U.S. at 568 (concluding that a balance must be struck between the interests of the employee "as a citizen, in commenting upon matters of public interest and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); Rankin, 483 U.S. at 388 (holding that the state interest element of the Pickering balance focuses on the effective functioning of the public employer); Hall, 856 F.2d at 264 (determining that an employee's speech must, at a minimum, relate to the policy areas for which he is responsible before a policy-level employee can be reprimanded for outside speech). Further, the Supreme Court had already suggested that when an employee's speech involved matters of heightened public concern, an enhanced showing of harm to the government is required. Connick, 461 U.S. at 152.

Although the Court's inquiry is objective, rather than subjective, see Hope, 536 U.S. at 739 (observing that a right is clearly established when a reasonable official would understand his conduct was in violation of that right), the plaintiff asserts that defendant Mulhollan's own behavior suggests that the First Amendment right in question was "sufficiently clear" to him and that defendant Mulhollan understood its applicability to the actions he took in response to the plaintiff's articles. According to the Complaint, defendant Mulhollan twice asked the plaintiff to "acknowledge that . . . First Amendment protections did not apply" to the publication of the two articles. Compl. ¶¶ 55-56. These alleged exchanges between the plaintiff and defendant Mulhollan regarding the plaintiff's articles and the First Amendment shows that Mulhollan was at least aware of "a general constitutional rule already identified in the decisional law," Hope, 536 U.S. at 741, and that this constitutional rule might have applicability to the plaintiff's articles. Therefore, because the plaintiff alleges in his Complaint the violation of a clearly established constitutional right, defendant Mulhollan's motion to dismiss on qualified immunity grounds must be denied.

2. The Plaintiff's Fifth Amendment Claim

The District of Columbia Circuit held in Keeffe, a case with strikingly similar factual circumstances to those under examination here, that the Fifth Amendment requires a public employer give "loud and clear advance notice when it [decides] to interpret a particular regulation as a prohibition or limitation on an employee's outside activity." 777 F.2d at 1583. Accordingly, the Fifth Amendment right to fair notice of prohibited conduct was clearly established when defendant Mulhollan reassigned and later terminated the plaintiff's employment following the publication of his two opinion pieces. Because the Complaint adequately states a

violation of a clearly established right under the Fifth Amendment, the Court must deny defendant Mulhollan's motion to dismiss the claim on qualified immunity grounds.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Stay Litigation was earlier denied by this Court. The Motion to Dismiss on Behalf of Defendant Daniel P. Mulhollan and the Motion to Dismiss on Behalf of James Billington are now both also denied.[9]

_____/s/_____
REGGIE B. WALTON
United States District Judge

[9] The Court will contemporaneously issue an order consistent with this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT DANIEL P. MULHOLLAN'S ANSWER TO PLAINTIFF'S COMPLAINT

Defendant Daniel P. Mulhollan, in his individual capacity ("Defendant"), responds to Plaintiff's Complaint as follows:

FIRST DEFENSE

As to some or all of the claims asserted in this action, Plaintiff has failed to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

SECOND DEFENSE

The Court lacks subject matter jurisdiction over some or all of the claims asserted in this action. Fed. R. Civ. P. 12(b)(1).

THIRD DEFENSE

Plaintiff lacks standing as to some or all of the claims asserted in this action. Fed. R. Civ. P. 12(b)(6).

FOURTH DEFENSE

Some or all of the claims asserted in this action are premature, non-ripe, or non-justiciable. Fed. R. Civ. P. 12(b)(6).

FIFTH DEFENSE

As to some or all of the claims asserted in this action, Plaintiff has failed to exhaust his administrative remedies. Fed. R. Civ. P. 12(b)(6).

SIXTH DEFENSE

Plaintiff's claims and/or request for relief are barred, in whole or in part, by the doctrine of unclean hands.

SEVENTH DEFENSE

Plaintiff's requested remedy under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ("Bivens") as to his wrongful discharge claim under the First Amendment is barred and precluded by "special factors" including without limitation the Civil Service Reform Act of 1978 ("CSRA") and the Congressional Accountability Act of 1995 ("CAA").

EIGHTH DEFENSE

Plaintiff's requested remedy under Bivens as to his vagueness claim under the First Amendment and/or Fifth Amendment is barred and precluded by "special factors" including without limitation the CSRA and the CAA.

NINTH DEFENSE

Insofar as Plaintiff seeks damages from Defendant in his individual capacity as to his wrongful discharge claim under the First Amendment, Defendant is entitled to immunity as to such claims and/or requests for relief under the doctrines of qualified and absolute immunity.

TENTH DEFENSE

Insofar as Plaintiff seeks damages from Defendant in his individual capacity as to his vagueness claim under the First Amendment and/or Fifth Amendment, Defendant is entitled to

immunity as to such claims and/or requests for relief under the doctrines of qualified and absolute immunity.

ELEVENTH DEFENSE

Defendant is not liable to Plaintiff because any action undertaken by Defendant was reasonable, lawful and justified.

TWELFTH DEFENSE

In response to the numbered paragraphs of Plaintiff's Complaint, Defendant answers as follows:

1. The allegations in this paragraph constitute argument and Plaintiff's characterization of his case, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

2. Defendant admits the allegations in the first and second sentences of this paragraph. In response to the allegations in the third sentence of this paragraph, Defendant admits that Plaintiff resigned from his position as Chief Prosecutor for the Department of Defense's Office of Military Commissions in October 2007, but lacks knowledge or information sufficient to form a belief as to the reasons for Plaintiff's resignation. The allegations in the fourth sentence of this paragraph constitute argument and Plaintiff's opinion, to which no answer is required. Further, Defendant is unsure as to the meaning of the terms "vocal" and "highly public" in this context, as they are unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

3. In response to the allegations in the first sentence of this paragraph, Defendant admits that in December 2008, Plaintiff was appointed by the Library of Congress as Assistant Director of the Foreign Affairs, Defense and Trade ("FDT") Division of the Congressional Research Service ("CRS"), pursuant to the recommendation of the Director of CRS. 2 U.S.C. § 166(c)(2).

Defendant denies the allegations in the second sentence of this paragraph. Defendant denies the allegations in the third sentence of this paragraph, in particular to the extent that Plaintiff suggests that "official responsibility" for issues relating to the military commissions falls exclusively within the ambit of the American Law Division ("ALD"), except to admit that ALD is one of the divisions within the CRS that has responsibility over issues relating to the military commissions.

4. In response to the allegations in the first sentence of this paragraph, Defendant admits that in November 2009, the Attorney General announced that some detainees would be subject to trial in federal court and that others would be prosecuted before military commissions. In response to the allegations in the second sentence of this paragraph, Defendant admits that Plaintiff wrote an op-ed and a letter to the editor addressing issues raised in light of the Attorney General's November 2009 announcement regarding the future prosecution of Guantanamo Bay detainees, but lacks knowledge or information sufficient to form a belief as to the substantive basis for Plaintiff's opinion pieces. Defendant denies the allegations in the third sentence of this paragraph. The allegations in the fourth sentence of this paragraph constitute argument, conclusions of law, and Plaintiff's opinion, to which no answer is required. To the extent a response is deemed required, the allegations in this sentence are unclear, vague, and subjective, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

5. Defendant denies the allegations in the first sentence, except that Defendant admits the Director of CRS, Daniel Mulhollan, met with Plaintiff on November 10, 2009. In response to the allegations in the second sentence of this paragraph, Defendant denies those allegations, except that Defendant admits that the opinion pieces were published in print on November 11, 2009, and avers that the Wall Street Journal op-ed was published on-line on November 10, 2009. The allegations in the third sentence contain argument, Plaintiff's opinion, and his characterization of events, to which no answer is required. To the extent a response is deemed required, Defendant is

unsure as to the meaning of the phrase "immediately after," insofar as it is subjective, unclear, and vague as employed here; to the extent that Defendant can ascertain what Plaintiff means by the phrase "immediately after," Defendant denies those allegations. The allegations in the fourth sentence of this paragraph constitute argument and Plaintiff's characterizations of the events alleged to have occurred on November 20, 2009, to which no answer is required. To the extent an answer is deemed required, Defendant denies those allegations as stated, except that Defendant admits that on November 20, 2009, Defendant advised Plaintiff that his probationary period would not be converted to permanent status.

6. The allegations in this paragraph constitute conclusions of law, argument, and Plaintiff's characterization of his case, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

JURISDICTION AND VENUE

7. The allegations in this paragraph constitute conclusions of law, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

8. The allegations in this paragraph constitute conclusions of law, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

9. The allegations in this paragraph constitute conclusions of law and Plaintiff's characterization of his case, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations, except to admit that venue is proper.

10. The allegations in this paragraph constitute conclusions of law, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

11. The allegations in this paragraph constitute conclusions of law, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

PARTIES

12. Defendant admits the allegations in this paragraph, except that Defendant lacks knowledge or information sufficient to form a belief as to Plaintiff's current residence.

13. Defendant admits the allegations in the first sentence of this paragraph. The allegations in the second sentence of this paragraph constitute conclusions of law and argument, to which no answer is required. Further, Defendant is unsure as to the meaning of the statement that "Dr. Billington is responsible for the Library's personnel policies and practices and retains ultimate authority to hire or terminate employees" in this context, insofar as it is unclear and vague as employed here; to the extent that Defendant can ascertain what Plaintiff means by this statement, Defendant denies those allegations as stated, except that Defendant admits that the Librarian of Congress is authorized by statute to "make rules and regulations for the government of the Library." 2 U.S.C. § 136. The allegations in the third sentence of this paragraph constitute conclusions of law, to which no answer is required.

14. As to the allegations in the first clause of the first sentence of this paragraph, Defendant denies those allegations, except that Defendant admits that Daniel Mulhollan served as Director of CRS until he retired from that position on or about April 2, 2011. The allegations in the second clause of the first sentence of this paragraph constitute conclusions of law, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations as stated, except that Defendant admits that CRS constitutes "a separate department in the Library of Congress," 2 U.S.C. § 166(a), and is statutorily charged with the provision of "research and analytical services" to Congress, id. § 166(d)(1). The allegations in the second sentence of this paragraph constitute conclusions of law, argument, and Plaintiff's characterization of his case, to which no answer is required. Further, Defendant is unsure as to the meaning of the statement that "Mr. Mulhollan is responsible for CRS's policies and practices with regard to outside speaking and

writing by CRS employees" in this context, as it is unclear and vague as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the allegations. To the extent a response is otherwise deemed required, Defendant denies the allegations. The allegations in the third sentence of this paragraph constitute conclusions of law, to which no answer is required.

FACTUAL ALLEGATIONS

Col. Davis' Professional Experience and Qualifications[1]

15. The allegations in the first sentence of this paragraph constitute argument and opinion, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations, except that Defendant admits that Plaintiff served approximately twenty-five years of military service. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of this paragraph, except that Defendant admits that Plaintiff represented that he had held some or all of the positions described therein in his application materials for employment as Assistant Director at CRS.

16. Defendant admits the allegations in the first sentence of this paragraph. In response to the allegations in the second sentence of this paragraph, Defendant is unsure as to the meaning of the term "numerous" in this context, as it is unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the allegations, except that Defendant admits that Plaintiff received certain awards and honors during his military career.

17. Defendant admits the allegations in this paragraph.

18. The allegations in the first and second sentences of this paragraph constitute argument and opinion, to which no answer is required. To the extent a response is deemed required, Defendant is unsure as to the meaning of the terms "successful," "extensive experience and

[1] The subheadings in Plaintiff's complaint do not constitute substantive allegations of fact, and thus no answer is required. To the extent a response is deemed required, Defendant categorically denies each and every statement contained in or suggested by Plaintiff's subheadings. Defendant reproduces those subheadings herein for the convenience of the Court only, and such reproduction should not be construed as suggesting agreement with or admission of any of the statements contained or implied therein.

expertise," "entrusted," "primary," "enormous," and "intense public scrutiny" in this context, as they are unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the allegations. The allegations in the third sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Plaintiff fails to identify the source or sources of any alleged praise or acknowledgments he received for his performance, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

Col. Davis' Public Speaking and Writing Prior to His Hiring at CRS

19. In response to the allegations in this paragraph, Defendant admits that Plaintiff resigned from his position as Chief Prosecutor for the Department of Defense's Office of Military Commissions in October 2007, but lacks knowledge or information sufficient to form a belief as to the reasons for Plaintiff's resignation.

20. The allegations in this paragraph constitute argument and opinion, to which no answer is required. To the extent a response is deemed required, Defendant is unsure as to the meaning of the term "vocal critic of the system" in this context, as it is unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the allegations, except that Defendant admits that Plaintiff publicly discussed his views as to the military commission system.

21. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except that Defendant admits that Plaintiff represented that he had published op-ed pieces in some or all of the publications described therein in his application materials for employment as Assistant Director at CRS.

22. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except that Defendant admits that Plaintiff represented that he

had made presentations at some or all of the institutions described therein in his application materials for employment as Assistant Director at CRS.

23. Defendant admits the allegations in this paragraph.

24. The allegations in this paragraph constitute argument and characterizations of the referenced but unspecified "writings, public speeches, and testimony" allegedly created or provided by Plaintiff over an unspecified period, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

Col. Davis' Hiring by the Congressional Research Service

25. Defendant admits the allegations in the first through third sentences of this paragraph. In response to the allegations in the fourth sentence of this paragraph, Defendant denies those allegations, except that Defendant admits that Plaintiff was not told during his interview that if hired as a CRS Assistant Director, he would be required to "cease" all speaking and writing about the military commissions.

26. Defendant admits the allegations in the first sentence of this paragraph. In response to the allegations in the second sentence of this paragraph, Defendant admits that Plaintiff accepted the Assistant Director position on the same day it was offered to him, but lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Plaintiff turned down another offer of employment with the federal government.

27. In response to the allegations in the first sentence of this paragraph, Defendant denies those allegations as stated, except that Defendant admits that Defendant and the selection committee at CRS for the Assistant Director position had knowledge of Plaintiff's military service, including his tenure with the military commissions, and certain of his public writing and speaking on the subject of military commissions. The allegations in the second and third sentences of this paragraph

constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that Plaintiff was not told upon his appointment that he would be required to "cease" all speaking and writing about the military commissions. See Response to ¶ 25, supra.

28. The allegations in this paragraph constitute argument, speculation, and characterizations of Plaintiff's subjective thought processes and beliefs, and are based upon an unfounded premise of alleged fact, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

Col. Davis' Work for the Congressional Research Service

29. Defendant admits the allegations in the first and second sentences of this paragraph. In response to the allegations in the third sentence of this paragraph, Defendant admits that Plaintiff's responsibilities as Assistant Director of FDT included those identified, among others, but denies that Plaintiff's responsibilities did not include "issues related to military commissions." Defendant denies the allegations in the fourth sentence of this paragraph. Defendant admits the allegations in the fifth sentence of this paragraph. Defendant admits the allegations in the sixth sentence of this paragraph. As to the allegations in the seventh sentence of this paragraph, Defendant is unsure as to the meaning of the phrase "directed to him" in this context, insofar as it is unclear, vague, and subjective as employed here; to the extent that Defendant can ascertain what Plaintiff means by the phrase "directed to him," Defendant denies those allegations.

30. Defendant admits the allegations in the first sentence of this paragraph. As to the allegations in the second sentence of this paragraph, Defendant is unsure as to the meaning of the term "mandate" in this context, as it is unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations as stated, except that Defendant denies that FDT has no responsibility over issues

involving military commissions or Guantanamo Bay. Defendant denies the allegations in the third sentence of this paragraph.

31. Defendant denies the allegations in the first sentence of this paragraph. As to the allegations in the second sentence of this paragraph, Defendant denies those allegations to the extent that Plaintiff alleges, implies, or suggests that attorneys and analysts in ALD have sole responsibility for issues involving military commissions or Guantanamo Bay. Otherwise, Defendant admits that the responsibilities of ALD attorneys and analysts include such issues as military commissions and Guantanamo Bay. Defendant denies the allegations in the third sentence of this paragraph. As to the allegations in the fourth sentence of this paragraph, Defendant is unsure as to the meaning of the adjective "several" and the phrase "conducted by" in this context, insofar as they are unclear, vague, and subjective as employed here, but to the extent that Defendant can ascertain what Plaintiff means by the adjective "several" and the phrase "conducted by," Defendant denies those allegations.

32. The allegations in the first sentence of this paragraph constitute argument and speculation, to which no answer is required. To the extent a response is deemed required, Plaintiff fails to specify the members or staff of Congress to whom he refers, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations. The allegations in the second sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Plaintiff fails to specify the reports to which he refers, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations, except that Defendant denies those allegations to the extent that Plaintiff alleges, implies, or suggests that attorneys and analysts in ALD have sole responsibility for subject-matter expertise over issues involving military commissions or Guantanamo Bay.

33. In response to the allegations in the first sentence of this paragraph, Defendant denies those allegations, including without limitation any allegation, implication, or suggestion that each

alleged but unspecified time that Plaintiff spoke publicly on such issues it was with the knowledge or express approval of CRS or that CRS had knowledge of or provided express approval as to the substance or time, place, and manner of such speech, except that Defendant admits that Plaintiff spoke publicly on issues involving the historical aspects of military commissions on occasion during his employment with CRS. In response to the allegations in the second through fourth sentences of this paragraph, Defendant denies those allegations, including without limitation any allegation, implication, or suggestion that CRS provided any agency approval, commentary, or review of Plaintiff's participation in the February 2009 Human Rights Watch dinner, except that Defendant admits that Plaintiff spoke at that event. Further, Defendant denies having knowledge of the comments or speeches made by Plaintiff at that event.

34. Defendant denies the allegations as phrased in the first sentence of this paragraph, except that Defendant admits that on July 21, 2009, Plaintiff informed Defendant by e-mail about a BBC Radio interview request for Plaintiff's retrospective view regarding the military commissions, provided an advance copy of the interview questions that BBC Radio had provided Plaintiff, and asked for Defendant's thoughts about how Plaintiff should respond to the interview request. Defendant denies the allegations as phrased in the second sentence of this paragraph, except that Defendant admits that in response to Plaintiff's request for Defendant's thoughts regarding the interview request, Defendant stated that Plaintiff could participate in the interview, but should decline to answer questions that called for opinions as to current policy issues.

35. Defendant admits the allegations in the first sentence of this paragraph. The allegations in the second sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that he approved Plaintiff's request to participate in the panel discussion. The allegations in the third sentence of this paragraph constitute argument to which no answer is

required. To the extent an answer is required, Defendant denies those allegations, except that Defendant admits that Plaintiff discussed his attendance at the conference with CRS attorney Kent Ronhovde.

36. The allegations in the first sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Plaintiff fails to specify the "previously expressed public views" and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations. The allegations in the second sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge and information sufficient to form a belief as to the truth of those allegations, including without limitation the specific comments alleged to have been made during the "question-and-answer session."

37. In response to the allegations in the first sentence of this paragraph, Defendant admits that some portions of the Case Western conference were posted on the internet, but lacks knowledge or information sufficient to form a belief as to whether the conference was posted in its entirety or when any portions might have been posted. Defendant denies the allegations in the second sentence. The allegations in the third sentence of this paragraph constitute argument, in particular insofar as they are based upon an unfounded premise of alleged fact, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations and avers that he lacked knowledge or information regarding the substance of Plaintiff's spoken comments at the conference. Further, the phrase "anyone else from CRS or the Library" is unclear and vague as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this sentence.

38. In response to the allegations in the first sentence of this paragraph, Defendant admits that Plaintiff received the Charles Whittaker Award from the Lawyers Association of Kansas

City on or about November 5, 2009, and that Plaintiff informed Defendant that the basis for his receipt of the award was the stance he had taken as military prosecutor at Guantanamo Bay, but otherwise lacks knowledge or information sufficient to form a belief as to the factual basis for Plaintiff's receipt of the award. Defendant admits the allegations in the second sentence of this paragraph. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of this paragraph. The allegations in the fourth sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations. The allegations in the fifth sentence of this paragraph constitute argument, in particular insofar as they are based upon an unfounded premise of alleged fact, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, and avers that he lacked knowledge or information regarding the substance of Plaintiff's spoken comments at the conference. Further, the phrase "anyone else from CRS or the Library" is unclear, vague, impermissibly broad, and unduly burdensome as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this sentence.

39. The allegations in this paragraph are unclear and vague, as they fail to explain what Plaintiff means by the phrase "publicly expressed" and likewise fail to specify the "other occasions" to which Plaintiff refers, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

40. The allegations in this paragraph constitute argument and Plaintiff's characterizations of his case, in particular insofar as they are based upon one or more unfounded premises of alleged fact, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

41. The allegations in the first sentence of this paragraph constitute argument, in particular insofar as they are based upon an unfounded premise of alleged fact, to which no answer is required. To the extent a response is deemed required, the allegations are unclear and vague insofar as they fail to specify the "numerous occasions" or "others" to which Plaintiff refers; to the extent that Defendant can ascertain what Plaintiff means by those terms, Defendant denies those allegations, except that Defendant admits that he on occasion provided comments to Plaintiff on certain aspects of his performance and his demeanor while explaining that other areas of his performance needed improvement. The allegations in the second sentence of this paragraph constitute argument, in particular insofar as they are based upon an unfounded premise of alleged fact, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations. The allegations in the third sentence of this paragraph constitute argument to which no response is required. To the extent a response is required, Defendant denies those allegations, except that Defendant admits that Plaintiff's first formal review, after six months of probationary status, was generally positive.

42. The allegations in this paragraph constitute argument to which no response is required. To the extent a response is required, Defendant denies those allegations, except that Defendant admits that he met with Plaintiff on or about November 10, 2009, before Plaintiff's opinion pieces had appeared in print or on the internet and before Defendant was aware that Plaintiff had written and submitted those opinion pieces for publication.

The *Wall Street Journal* Op-Ed, the *Washington Post* Letter to the Editor, and Mr. Mulhollan and the Library's Decision to Terminate Col. Davis

43. In response to the allegations in this paragraph, Defendant denies those allegations, except that Defendant admits that the opinion pieces were published in print on November 11, 2009, and avers that the Wall Street Journal op-ed was published on-line on November 10, 2009. Further,

Defendant respectfully refers the Court to the referenced document for a full and accurate statement of its contents, and otherwise denies those allegations.

44. Defendant admits that the print edition of the Washington Post published on November 11, 2009, contained the letter to the editor written by Plaintiff. Further, Defendant respectfully refers the Court to the referenced document for a full and accurate statement of its contents, and otherwise denies those allegations.

45. The allegations in the first sentence of this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that Plaintiff's opinion pieces related to aspects of Guantanamo Bay, the military commissions process, and the decision to try some detainees in civilian courts, but respectfully refers the Court to the referenced document for a full and accurate statement of its contents. The allegations in the second sentence of this paragraph constitute conclusions of law, argument, and speculation, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

46. The allegations in the first and second sentences of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant is unsure as to the meaning of the phrases "those [views] he had already expressed publicly" and "prior publications and presentations" in this context, as they are unclear, vague, and non-specific as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations. The allegations in the third sentence of this paragraph constitute argument and characterizations of the referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations.

47. The allegations in this paragraph constitute argument and characterizations of the referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations.

48. The allegations in this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

49. The allegations in this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

50. The allegations in the first and second sentences of this paragraph constitute argument and characterizations of the referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations, except that Defendant admits that the referenced documents do not contain an express disclaimer disassociating the views expressed therein from the Library or CRS. The allegations in the third sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

51. The allegations in the first and second sentences of this paragraph constitute argument and characterizations of the referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations, except that Defendant admits that the referenced documents do not contain an express disclaimer

disassociating the views expressed therein from the Library or CRS. The allegations in the third sentence of this paragraph constitute argument and characterizations of Plaintiff's subjective thought processes, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

52. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

53. The allegations in the first sentence of this paragraph constitute argument, to which no answer is required. To the extent a response is deemed required, Defendant is unsure as to the meaning of the phrase "shortly thereafter" in this context, as it is unclear, vague, and subjective as employed here, and Defendant therefore lacks knowledge or information sufficient to form a belief as to the truth of those allegations as stated, except that Defendant avers that Plaintiff did not inform him that he had submitted the opinion pieces for publication or that they had been selected for publication until 7:34 p.m. on November 10, 2009. Defendant admits the allegations in the second and third sentences of this paragraph.

54. The allegations in this paragraph constitute argument and characterizations of unspecified referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant is unsure as to the meaning of the word "after" in this context, insofar as it is unclear and vague as employed here, in particular to the extent it implies the absence of intervening discussions or correspondence between e-mails. To the extent that Defendant can ascertain what Plaintiff means by the word "after," Defendant denies those allegations as stated, except that Defendant admits that he sent Plaintiff an e-mail after reviewing the opinion pieces on the evening of November 10, 2009. Otherwise, Defendant respectfully refers the Court to the unspecified referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations.

55. In response to the allegations in the first and second sentences of this paragraph, Defendant admits that on November 12, 2009, he requested that Plaintiff attend a meeting with him and acting Deputy Director Richard Ehlke. The allegations in the third sentence constitute Plaintiff's characterizations of the meeting that occurred on November 12, 2009, to which no response is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that he expressed concern regarding Plaintiff's publication of the opinion pieces and his unprofessional attitude, and doubt about Plaintiff's professional judgment and suitability as an Assistant Director of CRS. The allegations in the fourth sentence of this paragraph constitute argument and characterizations of the November 12 meeting, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that he did not convert Plaintiff to permanent status.

56. In response to the allegations in the first through third sentences of this paragraph, Defendant denies those allegations, except that Defendant admits that on November 13, 2009, he again requested that Plaintiff attend a meeting with him and acting Deputy Director Ehlke, and that he provided Plaintiff a memorandum of admonishment. The allegations in the fourth sentence constitute Plaintiff's characterization of the November 13 meeting, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations, except that Defendant admits that during the course of the meeting, he indicated he could not accept Plaintiff's bad judgment.

57. The allegations in this paragraph constitute argument and characterizations of the referenced document, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced document for a full and accurate statement of its contents, and otherwise denies the allegations.

58. In response to the allegations in this paragraph, Defendant denies those allegations, except that Defendant admits that he spoke with Plaintiff on November 20, 2009, reiterated a prior conversation with Plaintiff regarding his removal as Assistant Director effective December 21, 2009, and offer of a thirty-day temporary position as Senior Advisor to the Director, and forwarded to Plaintiff an official notice of separation during his probationary period. Defendant respectfully refers the court to the December 18, 2009 memorandum issued to Plaintiff by Defendant, which memorializes the expectations and duties regarding Plaintiff's thirty-day position as Senior Advisor.

59. The allegations in the first sentence of this paragraph constitute argument, in particular insofar as they are based upon an unfounded premise of alleged fact, and characterizations of the referenced documents, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations as stated, except that Defendant admits that the letter of separation addressed Plaintiff's opinion pieces along with other related and independent failures of professional judgment. The allegations in the second sentence of this paragraph constitute conclusions of law, argument, and speculation, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations as stated.

60. The allegations in the first sentence of this paragraph constitute argument and characterizations of the referenced document, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced document as attached for a full and accurate statement of their contents, and otherwise denies the allegations, except that Defendant admits he sent an e-mail on November 24, 2009 to CRS staff regarding the change (as of December 21, 2009) of the Assistant Director of FDT from Morris Davis to Edward Bruner.

61. In response to the allegations in this paragraph, Defendant denies those allegations, except that Defendant admits that after Plaintiff's separation as Assistant Director, Plaintiff served in a temporary thirty-day appointment with CRS, and that the appointment expired under its own terms on January 20, 2010.

62. The allegations in this paragraph constitute argument and characterizations of Plaintiff's subjective beliefs and thought processes, to which no answer is required. To the extent a response is deemed required, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations.

63. The allegations in this paragraph constitute conclusions of law, argument, and characterizations of the alleged subjective beliefs and thought processes of unspecified persons, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

64. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

The Library of Congress' Regulation on Outside Speaking and Writing and CRS' Policy and Practice Regarding Outside Speaking and Writing

65. The allegations in this paragraph purport to characterize the language of Library of Congress Regulation ("LCR") 2023-3 and quote portions thereof, and thus require no answer. To the extent a response is deemed required, Defendant respectfully refers the Court to LCR 2023-3 for a full and accurate statement of its contents, and otherwise denies the allegations.

66. The allegations in this paragraph constitute conclusions of law and purport to characterize the language of LCR 2023-3, and thus require no answer. To the extent a response is

deemed required, Defendant respectfully refers the Court to LCR 2023-3 for a full and accurate statement of its contents, and otherwise denies the allegations.

67. The allegations in this paragraph constitute conclusions of law and purport to characterize the language of LCR 2023-3 and quote portions thereof, and thus require no answer. To the extent a response is deemed required, Defendant respectfully refers the Court to LCR 2023-3 for a full and accurate statement of its contents, and otherwise denies the allegations.

68. Defendant admits the allegations in the first and second sentences of this paragraph. The allegations in the third sentence of this paragraph constitute argument and characterizations of the CRS Policy on "Outside Speaking and Writing," to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the CRS Policy on "Outside Speaking and Writing" for a full and accurate statement of its contents, and otherwise denies the allegations as stated.

69. The allegations in this paragraph constitute argument and characterizations of LCR-2023 and the CRS Policy on "Outside Speaking and Writing," to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to LCR-2023 and the CRS Policy on "Outside Speaking and Writing" for a full and accurate statement of their contents, and otherwise denies the allegations as stated.

70. The allegations in this paragraph constitute argument and purports to characterize the CRS Policy on "Outside Speaking and Writing" and quote from portions thereof, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the CRS Policy on "Outside Speaking and Writing" for a full and accurate statement of its contents, and otherwise denies the allegations as stated.

71. The allegations in this paragraph constitute argument and purport to characterize the CRS Policy on "Outside Speaking and Writing" and quote from portions thereof, to which no

answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the CRS Policy on "Outside Speaking and Writing" for a full and accurate statement of its contents, and otherwise denies the allegations as stated.

72. Defendant admits the allegations in the first sentence of this paragraph. The allegations in the second sentence of this paragraph constitute conclusions of law, argument, and characterizations of the alleged subjective beliefs and thought processes of unspecified persons, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

73. The allegations in this paragraph constitute argument and characterizations of the referenced document, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the referenced document for a full and accurate statement of its contents, and otherwise denies the allegations as stated.

74. The allegations in this paragraph constitute conclusions of law, argument, and characterizations of the alleged subjective beliefs and thought processes of unspecified persons, to which no answer is required. To the extent a response is deemed required, Defendant denies those allegations.

75. The allegations in this paragraph constitute argument and characterizations of the Director's position, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers the Court to 2 U.S.C. § 166 and LCR 217, "Function and Organization of the Congressional Research Service," for a full and accurate account of the authority and responsibilities of CRS and the Director, and otherwise denies the allegations as stated.

76. The allegations in this paragraph constitute conclusions of law, argument, and characterizations of the Library's policy and CRS' policy on outside speaking and writing, to which no answer is required. To the extent a response is deemed required, Defendant respectfully refers

the Court to the referenced documents for a full and accurate statement of their contents, and otherwise denies the allegations.

77. The allegations in this paragraph constitute argument and characterizations of the alleged writings and opinions of unspecified persons, to which no answer is required. To the extent a response is deemed required, the allegations are unclear and vague, because they fail to specify the "nature of the [] jobs and [] expertise" of the individuals to whom Plaintiff refers, fail to specify the meaning of "regularly," "in public," "policy matters of public concern" and "controversial and high-profile issues;" therefore, Defendant lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and otherwise denies the allegations.

First Cause of Action
(First Amendment – unconstitutional termination)

78. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

79. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

80. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

Second Cause of Action
(First Amendment – unconstitutional policy)

81. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

82. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

Third Cause of Action
(First and Fifth Amendment – Due Process)

83. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

84. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

85. The allegations in this paragraph constitute conclusions of law and argument, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations.

PRAYER FOR RELIEF

The allegations pleaded under the heading "Prayer for Relief" constitute, as labeled, Plaintiff's prayer for relief, to which no answer is required. To the extent a response is deemed required, Defendant denies the allegations. Further, Defendant denies that Plaintiff is entitled to the relief requested or to any other relief. Moreover, judgment should be entered against Plaintiff and for Defendant, and such other relief as may be proper should be awarded to Defendant.

Defendant expressly denies all allegations that are not expressly admitted in this Answer.

Dated: April 13, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

JENNIFER D. RICKETTS
Branch Director

SUSAN K. RUDY
Assistant Branch Director

/s/ Christopher R. Hall
CHRISTOPHER R. HALL
DEANNA L. DURRETT
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch

OF COUNSEL:

ELIZABETH A. PUGH
General Counsel

EVELIO RUBELLIA
Associate General Counsel

MEREDITH SKOWRONSKI
Assistant General Counsel
Office of the General Counsel
Library of Congress
101 Independence Ave, SE
Washington, DC 20540

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NOTICE OF APPEAL

Notice is hereby given that Defendant Daniel P. Mulhollan appeals to the United States Court of Appeals for the District of Columbia Circuit the Order of this Court of March 30, 2011 [Docket No. 34] and the underlying Memorandum Opinion [Docket No. 35], in which the District Court denied Defendant Mulhollan's Motion to Dismiss and rejected Defendant Mulhollan's invocation of a qualified immunity defense and arguments for preclusion of Plaintiff's claims for compensatory and punitive damages.

Dated: April 13, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

JENNIFER R. RIVERA
Branch Director

SUSAN K. RUDY
Assistant Branch Director

/s/ Christopher R. Hall
CHRISTOPHER R. HALL
DEANNA L. DURRETT
Trial Attorneys
U.S. Department of Justice, Civil Division
Federal Programs Branch

OF COUNSEL:

ELIZABETH A. PUGH
General Counsel

EVELIO RUBELLIA
Associate General Counsel

MEREDITH SKOWRONSKI
Assistant General Counsel
Office of the General Counsel
Library of Congress
101 Independence Ave, SE
Washington, DC 20540

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Appendix was filed with the Court and served on the following counsel on Aug. 1, 2011, by electronic service through the CM/ECF system and by sending one paper copy by first-class mail, postage prepaid, to:

Frederick V. Mulhauser
American Civil Liberties Union of the National Capital Area
1400 20th Street NW, Suite 119
Washington, DC 20036-5920
Direct: 202-457-0800
Email: fmulhauser@aol.com

Arthur Barry Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street NW, Suite 119
Washington, DC 20036-5920
Firm: 202-457-0800
Email: artspitzer@aol.com

Aden J. Fine
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400
Firm: 212-549-2607
Direct: 212-549-2693
Email: afine@aclu.org

/s/ Sharon Swingle
Sharon Swingle
Counsel for Defendant-Appellant