

[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 10, 2011]

**No. 11-5092**

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**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

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MORRIS D. DAVIS,

*Plaintiff-Appellee,*

v.

JAMES H. BILLINGTON, Librarian of Congress  
in his official capacity,

*Defendant,*

DANIEL P. MULHOLLAN in his individual capacity,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
No. 1:10-cv-00036-RBW  
(Reggie B. Walton, J.)

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**Brief of Dr. Louis Fisher and Mr. Morton Rosenberg  
As *Amici Curiae* in Support of Plaintiff-Appellee**

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September 9, 2011

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **(A) Parties.**

Col. Morris D. Davis is the Plaintiff-Appellee in this matter. The Defendant-Appellant is Daniel P. Mulhollan. Dr. James H. Billington is a Defendant in the case before the district court; he was sued in his official capacity, and he is not a party to this appeal.

### **(B) Ruling Under Review.**

The ruling under review is an Order denying Defendant-Appellant Mulhollan's motion to dismiss based on qualified immunity, which was issued by District Judge Reggie B. Walton on March 30, 2011 and entered as Docket Number 34. A Memorandum Opinion explaining the Order was issued the same day and entered as Docket Number 35. It is available at No. 1:10-cv-00036-RBW, 2011 WL 1237919 (D.D.C. Mar. 30, 2011).

### **(C) Related Cases**

This case has not previously been before this Court or any other court. We are not aware of any related cases.

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Louis Fisher  
Morton Rosenberg

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\* FISHER, Louis. *Defending Congress and the Constitution* (Lawrence: University of Kansas Press, 2011).....9-10, 10-11, 14, 15, 16, 25  
\* \_\_\_\_\_. *Deciding on War in Iraq: Institutional Failures*, 118 Pol. Sci. W. 389 (2003).....25-26  
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\* Roth, Dennis. *Testimony on February 24, 2010, before the House Committee on Appropriations, printed as Legislative Branch Appropriations for 2011, Part 2, Fiscal Year 2011, Legislative Branch Appropriations Requests, 111th Cong., 2d Sess. (2010)*.....14-15

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

## **GLOSSARY**

CRS      Congressional Research Service

LRA      Legislative Reorganization Act

## INTEREST OF AMICI CURIAE<sup>1</sup>

Dr. Louis Fisher worked for Congressional Research Service from September 1970 to March 2006, serving as Senior Specialist in Separation of powers. He then served as Specialist in Constitutional Law with the Law Library of Congress from March 2006 to August 2010. Dr. Fisher has published twenty books and over 400 articles in law reviews, political science journals, encyclopedias, and other publications. He has testified before congressional committees 50 times on a range of constitutional issues. Many of his articles, books, and congressional testimony are available on his personal webpage, <http://www.loufisher.org>. He has received a number of book awards and scholarly honors.

Mr. Morton Rosenberg worked for Congressional Research Service from December 1972 to August 2008 and served as Specialist in American Public Law. Mr. Rosenberg has published widely in law reviews and testifies frequently before congressional committees on legal and constitutional matters. His monograph, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, was published by The Constitution Project in 2009. In 2005, he received the Mary C. Lawton Award for Outstanding Public

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Service by the American Bar Association Section of Administrative Law and Regulatory Practice.

As former longtime senior CRS analysts, we are interested in this case. For that reason, we submitted separate declarations in the Morris D. Davis case in district court in 2010. Because the actions taken against Col. Davis by CRS Director Daniel P. Mulhollan may potentially damage the integrity and competence of the agency and weaken the institutional strength of Congress, we believe that this brief will provide an important context and background on CRS practices and policies. Throughout our careers at the Library of Congress, we regularly expressed views on public policy questions in CRS memos, CRS reports, congressional testimony, outside publications, and public talks, often taking positions on controversial areas of public policy. This record of expressing expert views became key factors in our advancement and recognition as senior level analysts and contributed to our professional assistance to lawmakers and congressional staff.<sup>2</sup>

### **SUMMARY OF ARGUMENT**

We believe the district court's decision should be affirmed because the reasons offered by Mulhollan for his firing of Davis are at odds with CRS's

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<sup>2</sup> Plaintiff-Appellee has consented to the filing of this amici brief. Defendant-Appellant has stated that he does not take a position on our request to file this brief. Amici have filed a Motion for Leave to submit this brief.

statutory mandate. Davis’s op-ed in the *Wall Street Journal* and letter to the *Washington Post* did not harm CRS. Outside speaking and writing are a critical part of being an effective CRS employee and an essential means of achieving national recognition and serving Congress. Because CRS analysts like us have expressed our opinions in public for so many years, Mulhollan did not provide Davis with fair warning that his op-ed and letter to the editor were impermissible and would, in Mulhollan’s mind, compromise his ability to serve effectively as a CRS employee.

## **ARGUMENT**

### **I. MULHOLLAN’S ACTIONS VIOLATE THE STATUTORY MANDATE OF CRS AS SET FORTH IN THE LEGISLATIVE REORGANIZATION ACT OF 1970**

In his Brief to this Court, Mulhollan concludes that the op-ed and letter to the editor published by Davis in the *Wall Street Journal* and *Washington Post* “were *not* constitutionally protected, because they interfered with CRS’s ability to carry out its statutory mandate and with Davis’s own job performance and working relationships.” Def.’s Br. 39 (emphasis in original). Because we believe Mulhollan fundamentally misconceives, distorts, and violates the “statutory mandate” of CRS, it is essential to clarify the intent of Congress when it created CRS in 1970. Clearly Congress directed CRS to perform its duties “without

partisan bias,” *id.* A-2. No one disputes that. But Mulhollan acknowledges in the Addendum to his Brief that Congress expected senior CRS staff to provide expert views on public policy issues by providing “analysis, appraisal, and evaluation of legislative proposals,” determining “the advisability of enacting such proposals,” estimating the “probable results of such proposals and alternatives,” and evaluating “alternative methods for accomplishing those results.” *Id.* A-2, A-3. As explained below, such assistance can come at the direct request of Congress or through private publications and public statements by CRS analysts.

In 1970, after years of hearings and study, Congress passed legislation to strengthen itself as an independent branch of government. Lawmakers recognized that their institutional powers had declined and it was essential to rebuild their capacity to assert legislative powers against the executive branch and better exercise constitutional responsibilities. S. Rept. No. 91-202, 91st Cong., 1st Sess. 2 (1969). The Legislative Reorganization Act (LRA) of 1970 directed the Library of Congress to prepare itself not merely for reference work but to recruit high-level specialists to help Congress with substantive duties. Pub. L. 91-510, 84 Stat. 1140, 1181-85 (1970).

Dr. Fisher arrived at CRS in 1970 and Mr. Rosenberg two years later. Both understood the important statutory mission of strengthening Congress and the system of checks and balances. They wanted to assist in that commitment. When

Mulhollan announced his intention to retire as CRS Director on January 19, 2011, he articulated the same understanding of legislative intent. In a meeting with agency employees, he spoke about joining the Library in 1969 at a time when the country turned against President Lyndon Johnson because of the Vietnam War. Congress “felt that it must bolster its capacities to govern and assess problems independent of the executive.” Statement of Daniel Mulhollan, January 19, 2011, reprinted in LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION 309 (2011). According to Mulhollan , the purpose of the LRA of 1970 was “to bolster its standing as the First Branch of Government” and ensure that specialists in the Library of Congress would provide “independent, objective sources of expertise, analysis and information.” *Id.* Congress insisted that it “have readily available experts whose level of knowledge allows them to provide sophisticated analyses of all issues.” *Id.* Combined with other legislative initiatives, Congress “asserted its prominence within the checks and balances of the American government.” *Id.* Mulhollan recalled several actions in those early years that “seared into my mind the dangers inherent in the centralization of power within the executive branch.” *Id.*

Those are extraordinary statements. The remarks by Mulhollan in January 2011 accurately reflect the intent of Congress in 1970 to create a pool of Senior Specialists and Specialists who would offer expert views to lawmakers on matters

of public policy. *Id.* 287-89. Unfortunately, what Mulhollan proceeded to do in his many years as CRS Director was to significantly undermine and violate legislative intent and the express language of the LRA.

First, the Addendum to Mulhollan's Brief reproduces the statutory list of 22 broad areas of public policy to be covered by CRS Senior Specialists and Specialists: agriculture, American government and public administration, American public law, conservation, education, engineering and public works, housing, industrial organization and corporation finance, international affairs, international trade and economic geography, labor and employment, mineral economics, money and banking, national defense, price economics, science, social welfare, taxation and fiscal policy, technology, transportation and communications, urban affairs, and veterans affairs. The statute authorized the CRS Director to supplement this list with other broad fields. Def.'s Br. A-4, A-5.

When Dr. Fisher became Senior Specialist in 1988, he joined 17 other colleagues in the Office of Senior Specialists. FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, 289-90. They were not part of any CRS division and thus had full freedom to initiate professional work subject only to review by the CRS front office. One of Mulhollan's first actions was to eliminate the Office of Senior Specialists and place Senior Specialists in divisions, subject to review and control by division chiefs. With their independence weakened, a number of Senior

Specialists resigned and sought opportunities outside the Library. They were not replaced. As a result of attrition and retirement, the number of Senior Specialist has declined over the years until it now stands at four, all of them nearing retirement. The positions of Senior Specialist, mandated by statute, will soon drop to zero. *Id.* 290. Similarly, the number of Specialists has fallen from about 38 in the late 1980s to three by the end of 2011. *Id.* 290. That number will reach zero with pending retirements.

During his time as CRS Director, Mulhollan took steps to effectively eliminate the top two levels of experts within the agency that Congress had established by law to assist it with substantive duties and constitutional analysis. By law, Congress announced: “We need Senior Specialists and Specialists with nationally recognized credentials to help us with our legislative and constitutional duties.” By administrative action, Mulhollan decided: “No, you don’t.”

The willingness of CRS management to violate both the express and intent of the LRA of 1970 is underscored by another development. The Senior Specialists and Specialists referred to above were appointed on the basis of their analytical skills. To be selected, Senior Specialists had to compete against other “nationally recognized experts.”<sup>3</sup> Individuals cannot develop that reputation by

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<sup>3</sup> “The specialized experience must have been such as to constitute an outstanding and recognized professional attainment in the field as evidenced by academic attainment, work experience, scholarly contributions, and professional associations

being “neutral,” “cautious,” and “balanced” – which is how Mulhollan’s Brief describes the role of CRS employees. Instead of strengthening the agency (and Congress) by appointing nationally recognized experts, Mulhollan began giving the titles “Senior Specialist” and “Specialist” to administrative officials who did not compete for the positions, were not nationally recognized experts, and lacked the education, experience, and academic skills to function in the substantive areas statutorily designated by Congress. None of these newly created “Senior Specialists” and “Specialists” has the capacity to write analytical reports on the substantive areas identified by Congress in the statute. None can meet with lawmakers and staff to discuss substantive issues. None can testify before congressional committees, as had been done on a regular basis by research Senior Specialists and Specialists. Thus, contrary to Mulhollan’s Brief, his actions fail to comply with the statutory mandate.

## **II. DAVIS’S OP-ED AND LETTER DID NOT HARM CRS**

In his Brief, Mulhollan states that a “reasonable official here also could have concluded that Davis’s publications caused substantial harm to his working relationship with his direct supervisor, Mulhollan.” Def.’s Br. 32. Mulhollan

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sufficient to merit national recognition as an authority in the field of American national government and public administration.” The Library of Congress, Vacancy Announcement No. 30309, May 12, 1983, for Senior Specialist in American National Government and Public Administration.

explained that the CRS policy on outside speaking and writing emphasizes that CRS employees “have a special responsibility to ensure that the agency’s ability to function is not compromised by the appearance that CRS has its own agenda, or that its employees are so set in their personal views that they cannot be trusted to provide objective research and analysis.” *Id.* 30. He said that a “reasonable official” in his position “could have concluded that Davis’s termination was permissible because the newspaper pieces compromised Davis’s appearance of objectivity, as well as that of his division and CRS as a whole; . . .” *Id.* 21.

In our judgment, there has been substantial harm to CRS as an institution. The agency’s ability to function has been compromised by managerial actions. The harm and functional incapacity did not flow from actions by Davis. The agency’s professional descent began long before he arrived. It started with the elimination of research Senior Specialist and Specialists, in direct defiance of statutory mandates. The institutional decline accelerated by replacing research Senior Specialists and Specialists with non-expert administrators who are incapable of discharging the statutory purposes of the LRA of 1970. The decline continued with vague managerial announcements about research “neutrality” and “not taking positions” on controversial public policies. In recent years, political scientists, historians, law professors, and professional societies have been highly critical of Mulhollan for using the standard of “neutrality” to replace objective,

analytical, and useful research. FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, 298-307.

The damage done to the professional capacity of CRS by Mulhollan and other CRS managers was discussed during House hearings in 2010. Dennis Roth, head of the CRS union (CREA), testified before the House Appropriations Committee that the firing of Davis “has had an intimidating and chilling effect” within the agency. Statement by Dennis Roth, February 24, 2010, reprinted at “Legislative Branch Appropriations for 2011, Part 2, Fiscal Year 2011, Legislative Branch Appropriations Requests,” hearings before the House Committee on Appropriations, 111th Cong., 2d Sess. 54-55, 58-59 (2010). He testified that CRS employees want to participate in their fields of expertise, “but now they are uncertain about possible negative consequences.” Roth elaborated on the incoherence and unfairness of CRS policy. Outside speaking and writing “are a necessary, obligatory part of their duties, i.e., it is a promotion criterion.” He expressed concern that CRS employees, because of the firing of Col. Davis, “will refrain from outside speaking and writing activities that could enhance their professional reputations and, ultimately, enhance the credibility of the Service.” Roth noted that under CRS guidelines, “recognition of the analyst’s professional expertise” by “high ranking officials in State governments, public interest groups, the courts, and subject matter experts and policy analysts in the Federal and other

professional communities, among others, is a specific ranking factor in evaluation for promotion to higher-level grades in CRS.” But in seeking to gain such recognition, CRS employees are at risk of being sanctioned or fired.

As the capacity of CRS declines as an analytical institution, Congress loses an important resource specifically designed to provide professional assistance for legislation and oversight. Malcolm M. Feeley, President of the Law and Society Association and professor at the Boalt Hall School of Law, University of California (Berkeley), wrote to Librarian of Congress James H. Billington on February 15, 2006, expressing concern about the direction of CRS. The American system depends on “the free flow of ideas and on policy built on credible information.” The Library of Congress and CRS were established “to provide precisely this sort of information to members of Congress.” Senior analysts had been fulfilling that responsibility for years. To sanction them for doing so, he said, “is outrageous.” FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION*, 305.

### **III. OUTSIDE SPEAKING AND WRITING ARE CRITICAL TO BEING AN EFFECTIVE CRS EMPLOYEE**

CRS Senior Specialists and Specialists have a long tradition of providing assistance to Members of Congress and legislative committees through private publications and outside speeches. Before joining CRS in September 1970, Dr. Fisher published two articles on The President’s refusal to spend appropriated

funds. *Funds Impounded by the President: The Constitutional Issue*, 38 G.W. L. REV. 124 (1969); *The Politics of Impounded Funds*, 15 ADMIN. SCI. Q. 361 (1970). Because of those publications, the Senate Judiciary Committee requested his professional assistance over a period of years in participating in committee hearings, committee markups, writing a section of the conference report, and preparing a colloquy between Senators Sam Ervin and Hubert Humphrey to explain the purpose of the Impoundment Control Act of 1974. FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, 207-09.

In 1991, Congress passed the Federal Employees Pay Comparability Act to establish a senior level pay system. At that time, Mr. Rosenberg was one of 23 Specialists in the CRS bargaining unit. All Specialists were required to demonstrate each year the quality and quantity of written products and work for members and committees and “intellectual leadership.” To satisfy the latter, Mr. Rosenberg provided a detailed account of his outside publications, speeches, or lectures. He made CRS aware of everything he was doing and saying over the years. He received an outstanding rating for every year from 1991 to his retirement in 2008.

During their nearly eight decades of service to the Library of Congress, Dr. Fisher and Mr. Rosenberg were frequently asked to testify on controversial matters of public policy as a result of their private publications in law reviews and other

scholarly journals. Outside writings were an important factor in developing their reputation as nationally recognized scholars and prepared the way for their appointments as Senior Specialist and Specialist. It is counterproductive for Congress to seek nationally recognized scholars and have CRS managers silence them.

#### **IV. DAVIS’S EXPRESSIONS OF EXPERT OPINIONS WERE NOT INCOMPATIBLE WITH CRS DUTIES**

According to Mulhollan, Davis was fired for writing an op-ed in the *Wall Street Journal* that “criticized Attorney General Eric Holder” and his letter to the *Washington Post* that “sharply criticized a statement by former Attorney General Michael Mukasey.” Def.’s Br. 12. First, there was no issue of partisanship. Objections were raised against both a Democratic and Republican Attorney General. Second, it is fully consistent with the statutory mandate of CRS for analysts and specialists to write frank assessments of public policy issues, including public officials. In 1973, when he was a GS-13, Dr. Fisher published a lengthy critique of the Nixon administration for impounding funds. *Impoundment Relies on Weak Arguments, The [Washington] Sunday Star and Daily News*, Feb. 25, 1973, C-2. Included within his critique were statements by such high-level officials as Richard Nixon, Roy Ash, and Casper Weinberger. The article, providing no disclaimer, merely stated: “Louis Fisher is the author of ‘President and Congress: Power and Policy’ (The Free Press).” CRS management was

pleased with his initiative and raised no objections to the content or the lack of a disclaimer. The article was reprinted twice in the *Congressional Record*; 119 Cong. Rec. 5801-03, 7087-88 (1973).

Also in 1973, Dr. Fisher was interviewed by *U.S. News & World Report*. The interview ran six pages and included numerous personal judgments about conflicts between the two elected branches, impoundment, executive privilege, executive orders, nominations to the Supreme Court, congressional investigations, “leaks” of classified information, and national security. *Power Struggle in Congress*, Interview With Louis Fisher, U.S. News & World Report, April 23, 1973, at 64-69. Unsure of clearance policies, Dr. Fisher submitted the interview manuscript to CRS management, which insisted on only one change. Instead of “Interview With Dr. Louis Fisher, Author,” CRS asked that he add: “Analyst for the Library of Congress.” He did so. CRS was clearly pleased with the national attention he received and wanted to share in it. The article indicated his affiliation with the Library of Congress but lacked a disclaimer. CRS management raised no objection. Over the years, Dr. Fisher appeared regularly on NPR and C-SPAN to express expert views on pending issues of controversial public policy. At no time did CRS management raise any objections to his appearances or lack of disclaimers.

Mr. Rosenberg experienced similar intellectual freedom to express expert views in outside writing, including law reviews. Implicit in the LRA of 1970 was the understanding that Senior Specialists and Specialists would be required to maintain national recognition by public writings and lectures in their areas of their expertise. He was encouraged by his division head to actively engage in such activities and did so.

Throughout his tenure at CRS he dealt with issues of significant constitutional, legal, and/or political sensitivity. When lawmakers and committees asked for his expert views, he gave them. His style, in writing and in personal contacts, was usually blunt and direct where research and analysis led him to a firm conclusion. As some examples, he often told Members, chairs, and key staffers what they did not want to hear. He criticized legislation, the failure of Congress to properly oversee the executive branch, the Executive for usurping congressional powers, and specifically criticized public officials who were responsible for the decisions. He did all this with the full awareness and support of the CRS managers. Mr. Rosenberg did so consistent with his understanding that in providing candid and often critical opinions he was reflecting the professionalism, reputation, and mission of CRS as a whole and that outside speaking, writing, lecturing and teaching activities provided important opportunities for him and his CRS colleagues for professional, career and personal growth.

Despite his often blunt advice during his many decades of service at CRS, Mr. Rosenberg does not recall any instance of a Member of Congress or staffer ever questioning his objectivity or non-partisanship because he offered personal opinions on controversial policy issues in outside speaking and writing activities. Nor did a Member ever question CRS's ability to serve as an objective, non-partisan entity because of opinions he voiced in outside activities. Dr. Fisher had the same experience. Members of Congress, legislative staff, and committees asked for his expert views. They might disagree with some positions or conclusions, but they never questioned his right and duty to speak plainly and offer his evidence and reasoning.

#### **V. DAVIS DID NOT HAVE FAIR WARNING THAT OUTSIDE SPEAKING AND WRITING WERE NOT PERMITTED**

At issue in this case is whether Mulhollan fired Davis without providing fair warning that his speech was prohibited. In his Brief, Mulhollan faults Davis for criticizing Attorney General Holder and former Attorney General Mukasey. After being alerted to the publication of the pieces in the *Wall Street Journal* and the *Washington Post*, Mulhollan sent an email to Davis "questioning his judgment and his ability to continue to serve as Assistant Director." Def.'s Br. 12. Mulhollan then issued a memorandum of admonishment, stating that Davis's op-ed and letter to the editor "damaged his ability to lead his division in providing objective, non-partisan analysis to the Congress." *Id.* 13. As explained earlier, there was nothing

“partisan” about the publications. They criticized Attorneys General from both political parties.

Mulhollan’s Brief is clear that he knew that after Davis had resigned from the military he “spoke publicly about what he perceived to be flaws in the military commissions system for Guantanamo detainees. . . . He published articles in newspapers and a law review, gave speeches, and testified before Congress.” Def.’s Br. 9-10. Mulhollan was therefore given “fair notice” that Davis had been critical of military commissions in his writings, public speeches, and congressional testimony. If CRS analysts are prohibited from taking positions on controversial public policies (which certainly applied to military commissions), why would CRS even *interview* Davis?

It is possible to interview someone whose record of public visibility and advocacy is not acceptable to CRS management, but only if during the interview it is pointed out that this past behavior cannot continue. However, after Davis began working for CRS in December 2008, the CRS Deputy Director was aware that he would attend and speak about military commissions at a Human Rights Watch dinner. *Id.* 10. Davis was permitted to participate in a law school conference on military commissions, on the condition that “he attend in his private time.” *Id.* 11. This condition was highly misleading. If CRS employees are not allowed to speak publicly about controversial issues of public policy, it should be irrelevant whether

the event is scheduled on official leave or by taking vacation. According to Mulhollan's reasoning, either type of professional activity would violate CRS management policy. These (and other) mixed signals from Mulhollan and senior CRS managers failed to give Davis clear guidance and fair warning. What was the CRS policy? It appears that CRS employees may not speak on controversial public policies without risk of punishment or removal. If that policy had been made clear, employees who decided to ignore the policy would clearly endanger their careers. No such clarity appears with CRS policy toward Davis.

Due process is violated whenever a statute or ordinance is so vague that "it does not give fair warning of the proscribed conduct" or is an "unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion." *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1581 (D.C. Cir. 1985). Mulhollan failed to give fair warning to Davis; the policies he promoted for all CRS employees were inherently vague and permitted arbitrary enforcement. As a result, Davis was exposed to agency action that was capricious and unconstitutional, especially because it violated the core constitutional right of free speech for public employees and their right to comment upon matters "of public concern." *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Mulhollan's Brief maintains that a "reasonable official" in his position "could have concluded that Davis's termination was permissible because the

newspaper pieces compromised Davis’s appearance of objectivity, as well as that of his division and CRS as a whole; called into question Davis’s professional judgment and his ability to serve as an example for his subordinates on compliance with CRS policies; and harmed his working relationship with his direct supervisor. Mulhollan was therefore entitled to qualified immunity on the First Amendment claim.” Def.’s Br. 21.

First, it was never demonstrated how or why the newspaper pieces “compromised Davis’s appearance of objectivity.” Precisely what form of compromise emerged is wholly unclear. The same vagueness occurs with the phrase “appearance of objectivity.” CRS management realized before they interviewed Davis that he had criticized military commissions. They knew that when they hired him. They continued to understand his objections to military commissions when he spoke and attended conferences on military commissions. No one who followed Davis could have been in the least surprised by what he wrote in the *Wall Street Journal* and *Washington Post*.

As for the “appearance of objectivity,” Davis explained in clear terms why he disagreed with former Attorney General Mukasey. Focusing on evidence and reasoning (supposedly the hallmarks of objectivity), his op-ed and letter easily met professional and academic standards. Therefore, there is no reason to call “into question Davis’s professional judgment.” His op-ed and letter were sound and

clear. No shadow was thrown over his “ability to serve as an example for his subordinates on compliance with CRS policies.” Mulhollan has not identified any analytical deficiencies in the op-ed, other than to use phrases like “sharply criticized” (*id.* 12), “strongly worded” (*id.* 31), “personal tone” (*id.* 31), “inflammatory criticisms of high-level government officials” (*id.* 38), and “strident criticisms of current and former government officials” (*id.* 39). We regard the op-ed by Davis as more measured and professional than the action taken by Mulhollan against Davis, which suggests that current and former government officials should be beyond the reach of frank criticism.

Such a position would open the door to punishment by agency officials for any employee who criticized Congress, the President, or the Supreme Court. Consider this sentence in the Mulhollan Brief: “At the very least, a reasonable government official in Mulhollan’s position could have concluded that any inconsistency in the prior application of the CRS policy on outside speaking and writing did not prohibit CRS from responding to a particularly egregious violation of that policy by terminating Davis’s probationary employment.” *Id.* 45. This sentence concedes that there was some “inconsistency” in how CRS policed outside speaking and writing in the past. That is the type of “arbitrary” and “unchecked discretion” identified by the D.C. Circuit in *Keefe*. Moreover, how

could CRS employees possibly monitor their speaking and writing to ensure that it is not “particularly egregious” to management?

We are left with the final reason for firing Davis. The dispute over his op-ed and letter “harmed his working relationship with his direct supervisor.” *Id.* 21. On that ground, Mulhollan argues for qualified immunity for his decision to remove Davis from the agency. What objective signal does that send to CRS employees? They are put on notice that if they say someone or write something that “harms their relationship with a direct supervisor,” they can be sanctioned or removed. This language in the Mulhollan Brief highlights the arbitrary and capricious climate that existed at CRS when Davis arrived and went to work. It also underscores the degree to which Mulhollan’s action collides with the statutory mandate of CRS to provide analytical assistance to Congress.

There is another reason why Davis has a right to recover damages from Mulhollan. From January 2004 to March 2006, Mulhollan attempted to punish Dr. Fisher for an article he published in *Political Science Quarterly*, a peer-reviewed journal at Columbia University. *Deciding on War in Iraq: Institutional Failures*, 118 POL. SCI. Q. 389 (2003), <http://www.loufisher.org/docs/wp/423.pdf>. The Library’s General Counsel’s office intervened to tell CRS that it could not sanction him for expressing his expert views in this journal. The attorneys in the office read

the article and concluded that he had a First Amendment right to have it published.

FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, 290-306.

Dr. Fisher was eventually transferred to the Law Library in March 2006, where he recovered his intellectual freedom. Over a period of almost five years, he testified eleven times on a number of controversial public policies stretching over a period of decades, often a half-century or more: presidential item veto, war powers, NSA surveillance, the state secrets privilege, restoring the rule of law, national security whistleblowers, and criminal penalties for Presidents and executive officials who mislead Congress and the public about the need for military force. On each occasion he offered professional judgments on pending legislation. There was no effort within the Law Library to water down his views to satisfy some standard of “neutrality.” *Id.*, 306.

On the basis of this experience with Dr. Fisher and the Library’s General Counsel’s office, Mulhollan was fully educated on the rights of free speech within the Library and CRS. He had learned limits to his authority to sanction employees for outside writing. Any reasonable official would not have treated Davis in the manner of Mulhollan.

## **CONCLUSION**

For the foregoing reasons, the D.C. Circuit should affirm the order of the district court and return the case for further proceedings.

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Louis Fisher  
Morton Rosenberg

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,609 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
  
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Louis Fisher  
Morton Rosenberg  

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Amici for Plaintiff-Appellee Morris D. Davis  
Dated: September 9, 2011

## **CERTIFICATE OF SERVICE**

On September 9, 2011, we filed in person one original and eight copies of our *amici* brief to the D.C. Circuit.

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Louis Fisher  
Morton Rosenberg

Executed on September 9, 2011

