LEGAL DEPARTMENT

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

December 4, 2009

Via UPS and email

James H. Billington
Librarian of the United States Congress
The Library of Congress
101 Independence Avenue, SE
Washington, DC 20540

Dear Dr. Billington:

We have been retained by Col. Morris Davis to represent him in connection with his unconstitutional termination from his job as an Assistant Director at the Congressional Research Service. We write this letter in an attempt to persuade you to reinstate Col. Davis to his position immediately.

Col. Davis has been serving as the Assistant Director of the Foreign Affairs, Defense and Trade Division of CRS since December 22, 2008. Prior to that time, Col. Davis was the chief prosecutor for the United States military commissions at Guantanamo Bay, Cuba. He resigned from that position in October 2007 because of his belief that the military commission process was fundamentally flawed. He thereafter became a vocal critic of the military commissions, writing articles, giving speeches, and testifying to Congress. Col. Davis's work for CRS is not related to the military commissions or to Guantanamo issues, and Col. Davis and his division have no responsibilities for anything having to do with those issues.

On November 10, 2009, Col. Davis met with his supervisor, Daniel Mulhollan, the Director of CRS, for one of their regular bi-weekly meetings. At this meeting, Mr. Mulhollan informed Col. Davis that he was very pleased with Col. Davis's job performance, and that others at CRS had stated that they liked Col. Davis and thought that he was doing a very good job. Those comments were consistent with Col. Davis's formal 6-month written review and prior comments by Mr. Mulhollan.

The next day, November 11, 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 in Guantanamo in federal court and

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some in military commissions. The Washington Post also published a letter to the editor that day from Col. Davis on the same subject. The views expressed by Col. Davis were similar to ones he had publicly made prior to working for CRS. Both pieces were written by Col. Davis in his personal capacity, on his home computer, during non-work hours. Neither mentioned CRS or Col. Davis's work for CRS, nor gave any indication that Col. Davis was writing in anything but his personal capacity. Instead, both bylines made clear that the author was an individual writing in his capacity as the former chief Guantanamo prosecutor.

Immediately after the articles appeared, Mr. Mulhollan sent a highly threatening and hostile email to Col. Davis regarding the op-ed and letter to the editor, questioning Col. Davis's judgment and ability to continue serving as an Assistant Director. On November 12, Mr. Mulhollan called Col. Davis into a meeting at 5:00 p.m. Richard Ehlke, the acting Deputy Director, was also present. 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. Mr. Mulhollan then informed Col. Davis that he would not be converted to permanent status and that, instead, Col. Davis's probationary period would be extended for 90 additional days.

At 5:00 p.m. the very next day, Mr. Mulhollan again called Col. Davis into a meeting. Richard Ehlke was present for this meeting as well. When Col. Davis refused to acknowledge that he should not have written the op-ed and letter to the editor, Mr. Mulhollan handed him a pre-written formal letter of admonishment for writing the op-ed and letter. 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.

One week later, on November 20, again at 5:00 p.m., Mr. Mulhollan called Col. Davis on the telephone. Mr. Mulhollan informed Col. Davis that he would be terminated as of December 21, and that he would thereafter be given a 30-day position as Mr. Mulhollan's Special Advisor, during which time his sole responsibility would be to find a different job. Mr. Mulhollan had his assistant deliver a written notice of termination to Col. Davis immediately after that call.

The Library's decision to terminate Col. Davis for writing the op-ed and letter to the editor is a clear violation of Col. Davis's First Amendment and due process rights. The Supreme Court has long made clear that public employees such as Col. Davis are protected by the First Amendment when they engage in speech about matters of public concern. Those First Amendment rights can be overcome only if the employee's

interest in the speech is outweighed by the government's interest, as employer, in the orderly operation of the public workplace and the efficient delivery of public services by public employees. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). Even a cursory analysis makes clear that the Library's actions here were unconstitutional.

There can be no dispute that the subject matter of Col. Davis's speech – the military commissions and the prosecution of suspected terrorists – is a matter of immense public concern. These issues are the subject of a nationwide, highly contentious, and very public debate that has been dominating the news and our government's attention. *Cf. Connick*, 461 U.S. at 146 (characterizing issues of "public concern" as subjects "relating to any matter of political, social, or other concern to the community"); *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (*en banc*) ("current government policies" are "perhaps the paradigmatic 'matter[] of public concern'") (alteration in original).

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The public's interest in hearing speech about these issues from Col. Davis, the former chief Guantanamo prosecutor, is also plain. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."); *Sanjour*, 56 F.3d at 94 ("[G]overnment employees are in a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular."). It is precisely for that reason that both the Wall Street Journal and the Washington Post published Col. Davis's opinions. Indeed, Col. Davis's speech about the military commissions implicates the very core of the First Amendment. *Connick*, 461 U.S. at 145 ("[S]peech on public issues occupies the highest rung of the heirarchy [sic] of First Amendment values and is entitled to special protection.") (internal quotations omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

The Supreme Court's recent decision in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), does not change this result. In that case, the Court ruled that government employees do not have First Amendment rights – even on matters of public concern – when they are speaking in their official capacity, pursuant to their job duties. That is obviously not the case here. Col. Davis wrote these pieces from his home computer, on his own time, about matters that he became intimately familiar with prior to his work for CRS and that are not within his purview at CRS. Even if some argument could be concocted that the subject of his pieces relates to his work at CRS, *Garcetti* made clear that public employees still retain their First

Amendment rights even when speaking about issues directly related to their employment, as long as they are speaking as private citizens. *Id.* at 421. Writing op-eds and letters to the editor for publication in newspapers are paradigmatic examples of speech that public employees may legitimately engage in as private citizens. *Pickering*, 391 U.S. 563 (unconstitutional to discipline teacher for writing letter to the editor); *Garcetti*, 547 U.S. at 423 (citing op-eds as private citizen speech).

Given the enormous public interest in receiving speech on this subject and Col. Davis's unique experience as a prosecutor, it is highly unlikely that the Library would be able to sustain its burden of demonstrating that its interests outweigh Col. Davis's and the public's First Amendment rights. *See, e.g., Connick*, 461 U.S. at 150, 152 (holding that the more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made; "[w]e caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.").

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That is especially so because there can be no legitimate claim that Col. Davis's speech caused any disruption to CRS or to its ability to operate efficiently. The Library's position appears to be that because Col. Davis expressed views with which some Members of Congress might disagree, Col. Davis cannot function effectively as a CRS employee. That argument makes no sense given that the views expressed by Col. Davis in the Wall Street Journal and Washington Post are virtually identical to the opinions he publicly voiced on numerous occasions prior to his being hired at CRS. If CRS and the Library were truly concerned that Col. Davis's speech about the military commissions would undermine his ability to represent them or CRS's ability to function, presumably he would not have been hired in the first place. Moreover, since he has been at CRS, Col. Davis has previously spoken publicly about these very same issues – with no objection and no problems from anyone at CRS or the Library. In fact, both Mr. Mulhollan and CRS attorneys have approved Col. Davis's prior speaking engagements on these very subjects, on the condition that he conduct them, as he did here, on his own, personal time. Any claim that Col. Davis's public expression of his views about the military commissions is a legitimate reason for disqualifying him from serving as a CRS employee is belied by these previous approvals of similar speech. Finally, there is no evidence to suggest that the publication of these articles actually caused any disruption for CRS or any of its employees. *See, e.g., McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (mere allegations of interference with a working relationship cannot "serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views"). If necessary, we are confident that discovery would reveal that there was in fact no disruption and that there is no basis for any claim that Col. Davis's

speech has impaired his ability to perform or CRS's ability to continue functioning as it always has.

The Library's position appears to be that the mere fact that Col. Davis expressed his personal views in public about these matters of such intense public interest and debate is a sign of his bad judgment and unsuitability. That position is inconsistent with the official policies of the Library and CRS with respect to public speech by their employees. As you know, the Library has specific regulations addressing outside speech by its employees. Far from prohibiting speech by employees such as Col. Davis, the official policy actually "encourages" outside speech. *See* LCR 2023-3. To the extent the Library or CRS are now attempting to create a new policy, Col. Davis obviously was not given sufficient notice of this new policy (even assuming that such a new policy is constitutional) to justify disciplining him for engaging in speech that was previously permissible. His termination is, therefore, constitutionally deficient. *See, e.g., Keeffe v. Library of Congress*, 777 F.2d 1573, 1582 (D.C. Cir. 1985) (holding that Library's adverse action against employee must be overturned because Library failed to provide "fair notice" of new policy, especially in light of past practice and experience, such that employee did not receive the "constitutionally mandated 'reasonable opportunity to know what is prohibited'") (internal citation omitted).

The lack of an express disclaimer that Col. Davis was not speaking on behalf of CRS in either the op-ed or the letter to editor is not a legitimate reason for terminating Col. Davis. As you know, the Library and CRS have not always required their employees to include express disclaimers in the past. In fact, Col. Davis himself has previously received approval to make speeches and write pieces without such an express disclaimer. The reason an express disclaimer does not always make sense is that, as here, an express disclaimer will sometimes only serve to draw attention to the fact that the speaker is associated with the Library or CRS, when there is otherwise no indication of that association from the speech. If the Library and CRS now intend to change their past practice and policy to require employees to include express disclaimers in all circumstances or in specified circumstances, Col. Davis was not provided with sufficient notice of any such policy. Any attempt to discipline him for violation of such a policy is, accordingly, constitutionally impermissible. *Keeffe*, 777 F.2d at 1582.

Perhaps recognizing the constitutional problems with firing Col. Davis for making this protected speech, the notice of termination given to Col. Davis contains two purported additional bases for his termination having nothing to do with the op-ed or letter to the editor. Those purported bases both have to do with an internal policy debate about whether interns should be listed as authors on CRS reports. Suffice it to

say that Col. Davis did not receive a letter of admonishment or a notice of termination after those incidents. Indeed, well after those incidents, Daniel Mulhollan told Col. Davis that he was doing a good job and that everyone was happy with his work. As the factual discussion detailed earlier makes clear, Col. Davis was fired immediately after publication of the op-ed and letter to the editor. To now claim that he is being terminated for unrelated reasons is disingenuous, at best.

Finally, it should be noted that the fact that Col. Davis was on probationary status is irrelevant. The Supreme Court has made clear that government employers cannot terminate employees for constitutionally impermissible purposes, especially when speech is at issue, regardless of the employee's status. *Perry v. Sindermann,* 408 U.S. 593, 596-97 (1972) (holding that the lack of a contractual or tenure right to re-employment, taken alone, did not defeat plaintiff's claim that the nonrenewal of his contract violated his free speech rights under the First and Fourteenth Amendments, and stating that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech").

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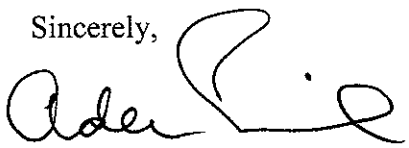
We are well aware that this is not the first time that CRS and the Library have been involved in a situation where a prominent CRS employee has been disciplined for engaging in lawful, fully protected speech. In addition, as the recent lawsuit brought by the ACLU on behalf of Dianne Schroer also made crystal clear, courts do not look kindly at instances where government employers illegally act towards their future or present employees.

We trust that the Library will reconsider the decision to terminate Col. Davis and immediately reinstate him to his Assistant Director position. Given that the Library has told Col. Davis that Dec. 21 will be his last day on the job, we will need to hear back from you by December 14, 2009. If the Library is not willing to reinstate Col. Davis, we will be forced to bring an appropriate lawsuit on his behalf, seeking declaratory and injunctive relief, damages, attorneys' fees and costs. We look forward to hearing from you shortly.

Sincerely,



Aden Fine
Senior Staff Attorney
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Jameel Jaffer
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cc: Daniel P. Mulhollan; Elizabeth Pugh; Richard Ehlke; Joanne Jenkins

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