

# CREAgram

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## **OUTSIDE WRITING, LECTURING ACTIVITIES BY CRS STAFF: OBJECTIVITY**

The Director's Statement on "Outside Activities," dated January 23, 2004, because of its tenor and emphasis, has raised rather than answered more questions for conscientious CRS staff. Judging from members' comments and inquiries to us, the Director's Statement is having the unfortunate, but perhaps the intended effect of chilling and intimidating staff who want or had planned to engage in professionally-related writing or lecturing activities outside of their CRS employment. We believe that this result is detrimental not only to the individual employee, but to the professionalism, reputation and mission of the agency as a whole. Ultimately, the knowledge and skills gained in outside research and scholarship benefit directly the quality of the services individuals are able to provide to Congress.

**IMPORTANCE OF OUTSIDE, PROFESSIONAL ACTIVITIES.** Outside speaking, writing, lecturing and teaching activities by CRS staff create important opportunities for professional, career, and personal growth and advancement. Such occasions generate interactions and contacts with academic or professional colleagues in one's field; advance research and speaking skills; provide opportunities for feedback on analysis and innovative theories and hypotheses; and may contribute to a certain public recognition and standing of the employee as an expert in the subject, reflecting positively on the reputation and esteem of our agency generally.

It is significant to note that "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.<sup>1</sup> It is inconsistent and self-defeating for the agency to require, as a factor for promotion, recognition as an expert in one's field by the professional community outside of Congress, and then to discourage and intimidate employees from engaging in precisely those kinds of outside writing and scholarship activities which may garner such recognition.

**RIGHT TO ENGAGE IN PUBLIC POLICY DISCUSSION.** The right to engage as a private citizen in outside writing on issues of public policy and public concern does not derive from Library of Congress regulations, nor depend upon the forbearance of CRS management, but rather has its basis in the First Amendment to the United States Constitution. As explained recently by the United States Court of Appeals: "As a public employee [appellant] retains his First Amendment rights to speak on matters

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<sup>1</sup>See, e.g., Position Description and Ranking Factors, Social Science Analyst, GS-15, Factor 1-9.

of public concern upon entry into public service.”<sup>2</sup> Even more than just a matter of individual “rights,” the Supreme Court has recognized the important contribution to society made by federal employees in sharing their knowledge and expertise through outside writing and lecturing: “Federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas.”<sup>3</sup>

**LIBRARY REGULATIONS ON WRITING AND LECTURING.** What do the Library of Congress Regulations actually say about outside writing, speaking, lecturing and teaching by staff? As a general and initial statement, the regulations specifically and expressly encourage such activity:

Staff members are encouraged to engage in teaching, lecturing, or writing that is not prohibited *by law*. LCR 2023-3, Section 3A. (Emphasis added)

You may be assured that there is *no* federal law that provides *any* prohibition on CRS staff engaging generally in outside writing activities on matters of public concern.

**Controversial Matters.** Writing for publication on the outside, whether in books, scholarly journals or more popular periodicals, will most often gain the interest of publishers, associations and the reading public when it relates to topical matters, that is, the “hot issues” of the day. There is, it should be noted initially, a specific responsibility under Library of Congress Regulations for staff, when “speaking and writing on controversial matters ... to disassociate themselves explicitly from the Library and from their official positions.” LCR 2023-3, Section 3B. The Library regulations thus expressly contemplate employees weighing in on what might be considered “controversial matters,” but when doing so require that they provide an explicit “disclaimer” where an association may be made with their official status.

**Subject Area of Specialization.** Unlike the older Library Regulations, the current provisions now expressly provide that “[p]ersonal writings as well as prepared or extemporaneous speeches by staff members shall not be subject to prior review.” LCR 2023-3, Section 3B. However, where the subject of the writing or speech relates 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,” the staff members shall:

(1) assure accurate presentation of the 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.

**NONPARTISANSHIP AND OBJECTIVITY.** When do outside writings or lectures involve “sources of potential damage,” in the words of the Library Regulation, to one’s “ability to perform official Library duties in an objective and nonpartisan manner”?

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<sup>2</sup>*Van Ee v. E.P.A.*, 202 F.3d 296, 304 (D.C. Cir. 2000); *U.S. v. N.T.E.U.* 513 U.S. 454, 465 (1995); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Sanjour v. E. P. A.*, 56 F.3d 85, 90 (D.C. Cir. 1995).

<sup>3</sup>*U.S. v. N.T.E.U.*, 513 U.S. 454, 464 (1995).

As to nonpartisanship, the standards involved concerning one's "official Library duties" seem fairly definable and discernable. The term "partisan" in federal law in this context, as well as in common usage, is defined as relating to a political party and/or the candidates of a political party.<sup>4</sup> There is, as you know, a specific statutory obligation in the agency's organic act for CRS to perform its specified duties for Congress "without partisan bias."<sup>5</sup> While this statutory provision obviously relates on its face to official duties and the manner in which official work is performed and provided to Congress, it is also obvious that overtly and notoriously "partisan" polemics in outside writings or speeches in one's area of specialization may potentially damage the acceptability, reception, and credibility in Congress even of one's otherwise nonpartisan official work.<sup>6</sup> Common sense and dictates of professionalism counsel that opinions or conclusions expressed in one's area of specialization in outside writing should not, for reasons of both nonpartisanship and objectivity, be based merely upon party politics or one's political party preferences.

As to "objectivity," there is no specific statutory mandate for "objectivity" in official work as there is regarding the absence of "partisan bias," and the considerations and factors involved are decidedly more subjective and nuanced. However, as to outside writing, it is clear that merely because a staffer has reached a *conclusion* or has an *opinion* on a public policy matter in outside writing which is based upon nonpartisan, independent and generally accepted methodologies of analysis and scholarship, does *not* indicate that one is no longer "objective" nor "unbiased" on that subject and, in fact, would appear to indicate just the opposite. The term "objective" speaks directly to the integrity of the scholarship and methodology employed in the formulation and presentation of one's work. In common usage, the relevant dictionary definition of "objective" includes "expressing or involving the use of facts without distortion by personal feelings or prejudices" (*Webster's New Collegiate Dictionary*). The detailed CRS handbook on "objectivity" in official CRS duties similarly stresses the methodology and scholarship employed in one's work, finding that one must consider "reasonable arguments for all sides of an issue, and if appropriate, the strength and weaknesses of these arguments"; should "include as appropriate, significant non-mainstream or unfashionable policy analysis and positions"; must not involve "bias by omission" through use of "selective issue and data inclusion"; and, in controversial analyses, suggests that one may wish to consider the "implications of a broader range of methodologies, assumptions and data ...."<sup>7</sup>

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<sup>4</sup>Note, for example, definition of "partisan," in 5 C.F.R. 734.101; *Blaylock v. United States Merit Systems Protection Board*, 851 F.2d 1348, 1352, 1353 (11th Cir. 1988): "partisan" activity involves "entanglement ... with political parties," and "political party activity," citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *U.S. Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

<sup>5</sup>2 U.S.C. § 166(d).

<sup>6</sup>Whether a theoretical problem with the "reception" that might be afforded one's work because of *outside* writing is tantamount to "damage" to one's actual "ability to perform *official* ... duties in ... [a] nonpartisan manner," may arguably involve both questions of fact as well as interpretation. However, it is clear that the Library may expressly prohibit specifically identified partisan political activities of staff under another LCR dealing with political activities, 2023-7. *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C.Cir. 1985).

<sup>7</sup>Congressional Research Service, "Objectivity and Nonpartisanship in CRS Products and Services, Guidelines and Procedures," at 3 (December 1996).

Thus, when one’s outside writings, and the opinions and conclusions contained therein, are drawn from and based upon a fair consideration, analysis and application of the known facts and of the appropriate, competing theories and hypotheses, such writings and conclusions are “objective” by definition. Furthermore, the fruits of such objective, outside research that informs this writing would appear to directly facilitate, rather than damage, one’s ability to perform official functions in an objective manner. While it is clear that we in CRS (as well as everyone else in the Federal Government) are not subject to as strict an “impartiality” or “non-bias” standard as are Federal judges (who must by law recuse themselves from any matter in which their “impartiality may reasonably be questioned”),<sup>8</sup> it is interesting to note by analogy that even a Federal judge is not deemed to be “biased” or “partial” on an official matter before him merely because that judge has demonstrated in outside writings or speeches that he has a particular opinion, idea or philosophy concerning a relevant public policy or legal principle.<sup>9</sup>

**USE OF OFFICIAL RESOURCES.** Unless staff have clearance and permission from supervisory personnel, the preparation and writing for outside activities should not be done on “official time,” nor be done on or with resources, supplies or equipment of the Library (to the extent such resources are not also available to the general public). LCR 2023-2, Section 3. The Library Regulations do encourage staff participation in outside professional associations, however, and allow for certain official time for some professional associational activities (consistent with the regulations in the rest of the Government permitting *de minimis* use of official resources for approved outside associational activity).<sup>10</sup> In the course of outside employment, staff should not use information coming to them in the course of their Library work “to the detriment of the Library or the public interest,” or to the preferential advantage of an outside entity. LCR 2023-3, Sec. 2A(5).

**ACCEPTANCE OF FEES, PAYMENTS.** The Director’s Statement spoke to the inclusion in the Library Regulations of an “appearance of conflict of interest” standard in the outside activities

<sup>8</sup>When federal employees are *not* acting in adjudicatory capacity, that is, in a similar position as a judge, then judicial standards of “impartiality” do not apply. *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1168 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). “We must not impose judicial roles upon administrators when they perform functions very different from those of judges.” *Note Center for Auto Safety v. F.T.C.*, 586 F. Supp. 1245, 1248-1249 (D.D.C. 1984); *United States v. Halderman*, 559 F.2d 31, 132-133 n. 274 (D.C.Cir. 1976); *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583 (D.C.Cir. 1970). “Agencies are required to consider in good faith, and to objectively evaluate, arguments presented to them; agency officials, however, need not be subjectively impartial.” *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 801 (D.C.Cir. 1975).

<sup>9</sup>*United States v. Cooley*, 1 F.3d 985, 993 (10<sup>th</sup> Cir. 1993), no grounds for recusal where “judge has previously expressed an opinion on a point of law” in issue; *In re Boston’s Children First*, 244 F.3d 164, 168 (1<sup>st</sup> Cir. 2001), no bias under law or Code of Judicial Conduct when making public comments, even on a *pending* case, when it is a “scholarly presentation made for purposes of legal education”; *see also Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7<sup>th</sup> Cir. 1982); *Camacho v. Autoridad De Telephones De Puerto Rico*, 868 F.2d 482, 491-492 (1<sup>st</sup> Cir. 1989); S. Rpt. No. 93-419, 93<sup>rd</sup> Cong., 1<sup>st</sup> Sess., 2 (1973)(legislative history of recusal statute, 28 U.S.C. § 455, “expression of opinion” on “general proposition of law” does “not disqualify the judge”).

<sup>10</sup>LCR 2023-3, Section 9, LCR 2022-3, Sec. 2; *note, e.g.*, 5 C.F.R. §2635.704(b), *Example 3*.

provisions, at LCR 2023-3. The specific “appearance of conflict of interest” standard cited by the Director in LCR 2023-3, however, is set out in Section 2A(1) and Section 2A(6) of that cited regulation (“Outside Employment”), and applies only to the “acceptance of a fee, compensation, gift, payment of expense, or any other thing of substantial monetary value” (Section 2A(1)); or when one engages in outside “employment with any person, firm or other private organization having business either directly or indirectly with the Library ....” (Section 2A(6)). The acceptance of fees or employment on the outside may thus raise certain “conflict of interest” questions that might not be raised by uncompensated outside activities. While the statutory “honoraria ban” was found by the Supreme Court to be unconstitutional on First Amendment grounds, and will *not* be enforced against any federal employee,<sup>11</sup> it should be noted that outside compensated activities of federal employees generally, and Library employees specifically, are not left totally unregulated. Staff should be sensitive to the traditional conflict of interest issues in the Federal Government involving outside private payments, such as the *source* of private remuneration and that source’s “interests” in official matters before you (*note* LCR 2023-3, Sec. 2A(4), acquiring conflicting interest or relationship), as well as insuring that you are not paid by outside, private sources merely for doing your Government job (such as, for example, lecturing in your area of speciality before a group of Capitol Hill legislative assistants [*note* LCR 2023-3, Sec. 2B]).

We hope that this discussion has shed some additional light on what may be important and productive outside writing activities in various fields of scholarship and expertise by CRS staff. CREA will continue to monitor this and other workplace issues of interest and importance to our members.

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### **Keeping the lines of communication open**

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<sup>11</sup>*U.S. v. N.T.E.U., supra*; U.S. Department of Justice, Office of Legal Counsel, February 26, 1996.