




Memorandum

April 18, 2007

TO: All CRS Staff

FROM: Daniel P. Mulhollen
Director 

SUBJECT: Access to CRS Reports

In the past four years CRS has hired a third of its staff. The high rate of staff turnover is primarily the result of predicted retirements, and I have felt it important to ensure that new employees are fully informed of our policies on publication, on the dissemination of our products to professional colleagues, and on communications with the media – all components of the broader issue of the appropriate public role of CRS.

What has loosely been referred to as the “CRS publications policy” defines the limits of the Service’s authority to make its products available to anyone other than the Congress of the United States. This policy, which has stirred significant controversy in recent years, is the product of statutory restriction, policy guidance from our congressional oversight committees, and CRS practices formally and informally endorsed by the Congress over the years. Legal, institutional, and resource concerns underlie this policy as well as the other restrictions on our interactions with the public.

Some have taken issue with our dissemination restrictions, arguing, most commonly, that “the taxpayer paid for this work, and therefore ought to have access to it,” or words to that effect. This is an effective “sound bite”, but closer examination of the issue reveals a much more complex picture and a sound rationale for current policy. Efforts have been made to encourage CRS to change its practices, and, failing that, to amend the law to provide for public access, including access to our Web Site. To date these efforts have not been successful and the Congress has made it clear that we are to adhere to the congressional guidance that we have received in the past.

What is the rationale for CRS providing its work solely to the Congress? Three broad concerns go to the heart of the existing policy: impairment of the performance of Members’ representational role, risk to confidentiality, and impact on the mission and congressional focus that characterizes our efforts. These issues also inform our policies on furnishing products to individuals outside Congress and our guidelines on staff interactions with the media.

The Statutory Restriction on Publication

For over fifty years CRS has been statutorily prohibited from publishing its products without oversight committee approval. Formal prohibition on publication of CRS products originated in 1952. The limitation began in the House as a flat prohibition on publications by the Library of Congress using funds appropriated to the Legislative Reference Service (now CRS). In 1954 a provision was added providing for exception only with the approval of our oversight committees. The standard appropriations language text which appears annually in the law appropriating funds for the Legislative Branch today reads as follows:

Provided, That no part of such amount may be used to pay any salary or expense in connection with any publication, or preparation of material therefore (except the Digest of Public General Bills), to be issued by the Library of Congress unless such publication has obtained prior approval of either the Committee on House Administration of the House of Representatives or the Committee on Rules and Administration of the Senate.

The term “publication” in this context has generally been construed to encompass all manner of communicating information to the public. The legislative history of the provision – with its concern over diverting CRS (then LRS) resources to providing materials to the public – and subsequent Joint Committee on the Library guidance, make clear the intended breadth of the type of “publication” that is being barred by the provision. It is today widely interpreted to include both distributing paper copies to the public, as well as putting the content on a web site. In relation to the “publications policy”, so-called, for CRS, the term has been interpreted over the years to connote the act of sharing with the public – that is, with persons or entities outside the congressional community. This interpretation is a clear outgrowth of the context within which the Service works, i.e., in a confidential and exclusive relationship with the Congress.

The prohibition appears each year in the annual appropriations act for the Legislative Branch and is intended to preserve the role of CRS as a confidential resource. The appropriations acts, supplemented by other congressional guidance that CRS has received over the years, and supported by judicial opinions, leave to the Members and committees the decision whether and how to place individual CRS products in the public domain. Members routinely make our products available to interested persons either directly, by inclusion in congressional publications, or through their own web sites.

The Publication Prohibition in Practice

In a 1980 communication the Joint Committee on the Library reaffirmed the prohibition against public dissemination of our work:

Congressional policy that the circulation of CRS materials prepared specifically for congressional use be limited to the Congress, and that the long-standing policy of confidentiality in the work of CRS for individual congressional clients, should be maintained.

It is noteworthy that in this instance the Joint Committee referred to the restriction on “circulation” of CRS materials, making it clear that the term “publication” in the statute is interpreted broadly.

The continued vitality of congressional directives regarding the confidentiality of CRS material is reinforced by statements and actions of both the Senate and the House. A 1980 Senate Resolution (S. Res. 396, 96th Cong., 2d Sess. 1980) is one of the clearest official expressions of these principles. This resolution, occasioned by a subpoena issued in an administrative proceeding for CRS material, reads:

Whereas, the communications between [CRS] and the members and committees of the Congress are an integral part of the legislative process and privileged under the Speech or Debate Clause of the Constitution, [and]...memoranda of [CRS] are in the custody and under the control of the members and committees for whom they have been prepared, and [CRS] has no authority to release them to anyone outside the Congress... Resolved, That it is the determination of the Senate that the communications of [CRS] to the members and committees of the Congress are under the custody and control of the Congress and may be released only by the Congress, its Houses, committees and members, in accordance with the rules and privileges of each House...
126 Cong. Rec. S3162 (daily ed. March 27, 1980).

A decade later, Senate Legal Counsel was authorized by resolution to challenge a subpoena that was issued in a case in the U.S. Tax Court to an American Law Division attorney. The subpoena sought both testimony and documents relating to a memorandum the attorney had prepared for a Senator on certain tax questions that had been posed by a constituent. In introducing the resolution, the Senate Majority Leader reiterated the importance of "protecting the work done by CRS in preparing communications to the Members and committees of Congress":

A committee or Member of the Senate, of course, may determine to make available to the public a report or memorandum which the Congressional Research Service has provided to the committee or Senator. Senator McClure, in this case, sought to assist his constituent in that way. Nevertheless, even when a final product prepared by CRS is released to the public, it is important to protect the confidentiality of CRS's preparatory work in order to encourage the freest possible exploration by CRS of issues about which committees or Members seek information or advice. It would be detrimental to the free flow of information and advice within the Congress to subject lawyers and other analysts at CRS to examination outside of the Congress about the basis of their communications to committees and Members.
136 Cong. Rec. S7112 (daily ed. May 24, 1990).

House General Counsel has similarly successfully defended CRS against efforts to subpoena documents related to analysts' work for Members and committees. The assertions of privilege for the Service's materials in administrative and judicial proceedings have been uniformly successful.

In summary, our work remains proprietary to the members unless and until they decide otherwise.

Institutional Concerns Regarding Public Access

Confidentiality. The "Speech or Debate" clause of the Constitution, referenced in the above congressional resolutions, states that "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place." While this clause has been interpreted to grant broad legal immunity to Members and their aides for statements made during the course of debate or when activity occurs in the performance of "legislative acts,"

it has been made clear in recent years that the protection does not extend to representational responsibilities generally. The protection has been extended to areas where it has been considered necessary to prevent impairment of deliberations and other legitimate legislative activities. Of major concern here has been the extent to which a policy permitting significant public dissemination of our products might render the protection that our support to Members currently enjoys under the umbrella of this constitutional provision inapplicable to congressional communications with CRS. Currently, CRS products prepared for the Congress are considered to be protected from scrutiny by third parties without permission of the Congress or the Member for whom the work was prepared. Stated simply, the concern in this regard is that if the Service were to become generally known to frequently distribute products directly to the general public – and thereby to be seen more as a purveyor of products to the public rather than as adjunct staff to Congress – we might be subject to “questioning” (i.e., litigation, subpoena, or other demand for production of documents) regarding our work that would do serious harm to our confidential working relationship with our congressional clients.

Although the Courts have recognized the propriety of congressional activities intended to inform the general public, this informing function has been held to be outside the scope of so-called speech or debate immunity. Recent judicial narrowing of the scope of the application of this protection has exacerbated the potential threat to confidentiality. Case law supports the conclusion that widespread dissemination of products to the general public would likely be viewed by the courts as an exercise of Congress’ representational or informing function for which speech or debate immunity would not attach. While an effort could be made to distinguish CRS confidential memoranda from our congressional distribution reports, the potential for damage to speech or debate protection claims for any CRS products would potentially still be significant. Under proposals for wholesale distribution of CRS products to the public, those engaged in such distribution – CRS staff, congressional staff, or Members – might be vulnerable to lawsuits seeking release of CRS files, damages, injunctions, etc. More likely – and more importantly for future relations between CRS and Congress – would be an erosion over time of the idea that CRS works solely for the Congress and that our analysts operate as a confidential staff resource to Members and committees.

Congressional Focus and Resource Issues. Public expectations of access could have significant cost implications for CRS – both in responding to requests and in answering public concerns regarding products provided. Widespread public access to CRS products could cause analysts to become more conscious of the need to address views, methods, disciplines, and expectations of a non-congressional audience, and thereby shift the focus of our products away from their current emphasis on the congressional audience. As a result, our congressional clients, recognizing such a change in the content and protection afforded our work, would either request more confidential memoranda, which are available only to the requester, or, more significantly, no longer have confidence in CRS’ ability to truly serve as their adjunct staff. As we know, memoranda are more resource intensive to prepare than products which are available for distribution to all Members and committees and take advantage of economies of scale. Writing for a public audience also has the potential to alter the extent to which CRS products can rely on a certain level of knowledge on the part of the reader, complicating the analyst’s task and perhaps increasing the length of products. There is also the potential for incurring significant costs in any process of creating an effective system for making CRS work available to the public, the monitoring of products for

necessary redaction, and the cost of a likely increase in the volume of requests for tailored individual requests for written products that are not made available to the public.

Recent Public Access Issues

Policy on Distribution Outside the Congressional Community. In keeping with the policies outlined above, CRS has generally refrained from making its products directly available to non-congressional requesters, save for a few exceptions based on principles of reciprocity. For example, research divisions have furnished individual products to Executive Branch and Judicial Branch offices and employees, state and local government officials, and representatives of foreign government entities when it has been deemed to enhance CRS service to the Congress. Analysts occasionally respond to requests for products from individual researchers, corporations, law offices, private associations, libraries, law firms, and publishers where a collegial exchange of information is deemed to benefit our work. With limitations, on occasion CRS also furnishes CRS products to the media and foreign embassies for similar reasons.

I recently polled the divisions on their practices with respect to furnishing products to individuals and organizations not in the congressional community. As a result of the varying practices that were revealed, I restated the CRS policy on distribution of our products to such entities, articulating the need for agreement on standards across the Service to ensure consistency, to better appraise our current practices, and to be better able to articulate the standard of the Service in this regard when asked. This policy looks specifically at the sharing of our products with government entities (both federal, state, and local), with public organizations, institutions, and individuals, with the media, and with foreign embassies. Clearly, this policy is itself an outgrowth of the publications policy, reflecting the fact that our work is intended for Congress, and it is the Congress that decides when further dissemination is appropriate. Adherence to consistent and articulated standards for sharing with those outside the congressional community is important to our efforts to maintain our confidential relationship with Congress and to any future need to enforce restrictions. Our congressional overseers would expect no less of us. Despite misunderstanding fueled by mis-characterization by the press and others, this policy restatement does not further prohibit dissemination of products under certain circumstances, but simply requires accounting of the practices via division notice and approval.

The Media. I also recently updated the policy on interacting with the media. In doing so, I emphasized that the risks to individual staff members and to CRS as a whole are greater with today's media because of the instant dissemination of news, the competition among media outlets, and the lack of control over quotation, its context and subsequent appearance elsewhere. The updated policy retains the basic requirement that has been a part of the CRS media policy since its inception: "staff must adhere to the basic tenets of CRS, respecting the confidential nature of our work for Congress and the requirements of objectivity, non-partisanship and non-advocacy whenever they speak to the media on matters relating to their work." The policy also provides that all on-the-record media interactions be reported to division/office management, as was urged under the former policy. It describes a role for the Office of Communications in assisting staff in determining if speaking with the media is advisable, and in following up on questions of the accuracy of reporting on staff comments or on CRS products.

The Internet and CRS Products. We are all aware of the proliferation of Internet sites that make CRS products available – some for a fee, some free of charge. In this electronic age it is obviously very difficult to control access to our congressional distribution products that appear on our own Web Site, even with restricted access to that site. Some sites present our products in searchable form, some not. Some are relatively complete in their coverage, while others focus on particular subject areas. Some publishers have even published CRS reports as hard copy books without permission of the author, often in out-of-date and excerpted form that runs the risk of misleading the reader. What they all have in common is that they make these products available without CRS approval. The fact that our work – the product of a government entity – is not copyrighted, makes it legally impossible to prohibit such use. The presence of these access points for our products, however, does not diminish the need for CRS to carefully hew to our obligation not to be involved in public distribution activities.

Conclusion

In part through added exposure, especially through online sources, CRS products have come to be widely cited as authoritative, timely, and accurate sources of information on public policy issues of the day. Audiences, including policy makers, industry leaders, professors, and students, have viewed our products as trusted and valued sources of information. However, over the years we have preserved CRS' confidential relationship with the Congress by severely restricting access to our products as a general policy. Any relaxation of restrictions on dissemination to the public would be in conflict with the history of legislative provisions, policy statements and communications on the issue. These pronouncements have had the effect of restricting the disclosure or publication of CRS materials by emphasizing that communications from the Service to Congress are constitutionally protected, confidential, and subject to the custody and control of the Congress. The same rationales have been relied upon to limit access to the CRS Web Site to congressional users. I am convinced – to borrow the sound bite I noted at the beginning – that the true value of CRS is as a resource devoted solely to the needs of Congress. In that way, the taxpayers realize the utmost value for their “investment.” Our staff is also better able to maintain its reputation for objective, authoritative and advocacy-free expertise devoted to an informed National legislature.

The reasons for limiting public dissemination of our work can be summarized as follows. First, there is a danger that placing CRS, a legislative support agency, in an intermediate position, responding directly to constituents as members of the public, would threaten the dialog on policy issues between Members and their constituents that was envisioned by the Constitution as the essence of the representational role of Members. Leaving dissemination of CRS products to the discretion of Members avoids placing a “faceless bureaucracy” between constituents and their elected representative. Second, the current judicial and administrative perception of CRS as “adjunct staff” of the Congress might be altered if CRS were seen as speaking directly to the public, putting at risk Speech or Debate Clause constitutional protections afforded the confidential work performed by this agency. To date, litigation demands for testimony of CRS employees and production of documents used in preparing memoranda and reports for the Congress have been quashed. And third, if CRS products were routinely disseminated broadly to the public, over time these products might come to be written with a large public audience in mind and would no longer be focused solely on congressional needs. In addition to placing a burden on congressional offices asked to respond or comment on CRS work, responding to the

inevitable questions posed by the public to CRS would likely require the Service to shift significant resources away from direct service to the Congress in order to meet this demand.

Other related policies – dissemination of products to those outside the congressional community and the media policy – flow from similar principles. I believe CRS would be a very different place and suffer a diminution in its role as adjunct staff to Congress were it not for the various restrictions we place on product distribution and staff interaction with the press. And, despite the somewhat hyperbolic reaction of some, there is little new in the recently announced policies nor anything particularly onerous. The majority of our seasoned staff abide by these regulations and understand and are comfortable with the principles that underlie them. Those who have joined CRS in the last few years must also become acculturated in these practices and understand their origin and rationale.