Statement by Louis Fisher
for the Committee on House Administration,
"Oversight of the Congressional Research Service"

Longworth House Office Building, Room 1310
June 20, 2019

Chairperson Lofgren and Ranking Member Davis, this statement reflects my service of four decades with the Library of Congress as Senior Specialist in Separation of Powers with Congressional Research Service (1970-2006) and Specialist in Constitutional Law at the Law Library of Congress (2006-2010). Many of my articles and congressional testimony are posted on my personal webpage: http://www.loufisher.org. Although the views in this statement are my own, I have greatly benefited over the years from discussions with other senior CRS analysts who are also retired: Henry Cohen, Harold Relyea, and Morton Rosenberg.

I will focus primarily on two issues: (1) the marked decline in CRS capacity for analytical work from its creation in 1970 to the present time and (2) adoption by CRS in 2004 of a policy in which analysts are directed to follow a new standard of "neutrality," a shift that greatly limits the ability of CRS analysts to perform professional analysis in assisting Congress and has led many top analysts to leave CRS and work elsewhere. As a result, CRS lacks the capacity today to fulfill the statutory purposes assigned to it by Congress.

Precedents for CRS. In 1914, Congress passed legislation to fund a Legislative Reference Service (LRS) within the Library of Congress "to employ competent persons to prepare such indexes, digests, and compilations of law as may be required for Congress and other official use." 38 Stat. 454, 463 (1914). Although LRS began largely as an organization to acquire facts and search for available documents, the Legislative Reorganization Act (LRA) of 1946 looked more ambitiously to "analysis, appraisal, and evaluation" of legislative proposals prepared "without partisan bias." 60 Stat. 812, 836, sec. 303(a) (1946). For a careful study of CRS and its growth after the LRA, see Harold Relyea's article "Across the Hill: The Congressional Research Service and Providing Research for Congress—A Retrospective on Origins," 27 Gov't Info. Q. 414 (2010).

The 1946 statute authorized the Librarian of Congress to appoint a corps of "senior specialists" to cover such broad fields as American government and public administration, American public law, full employment, housing, international affairs, money and banking, taxation, and fiscal policy. The grade for senior specialist was set at not less than the highest

grade in the executive branch "to which research analysts and consultants without supervisory responsibility are currently assigned" (sec. 203(b)).

Much of the motivation behind the LRA was to restore Congress to a coequal power with the executive branch and to protect the constitutional system of checks and balances. It was well understood that during the 1930s and World War II the status, reputation, and capacity of Congress had plummeted (Relyea's article, 417). At a congressional hearing in 1945, lawmakers listened to two Library of Congress officials describe the anticipated duties of senior specialists. In requesting funds for these experts, LRS Director Ernest Griffith said it was not the intention to have these individuals "giv[e] advice." Rather, they would prepare a study "without bias and without recommendations . . . [to] indicate a number of alternative recommendations if so requested." "Organization of Congress" (part 3), hearings before the Joint Committee on the Organization of Congress, 79th Cong., 1st Sess. 440 (1945). Dr. Luther Evans, Chief Assistant Librarian, disagreed with that assessment. The Library had already reached an agreement that LRS experts "would give scholarly research and counsel, and we say in another place that they would give expert opinions." He compared it to "the diagnosis of a physician who sometimes has to give an opinion on a medical case, but he gives it as an expert and not as a layman" (id., 445). At that point Griffith agreed that LRS experts would be at liberty to say: "In my opinion, it would be thus and so, for the following reasons" (id., 446).

Creating CRS. The Legislative Reorganization Act of 1970 marked a major attempt to strengthen the intellectual capacity of Congress. Lawmakers needed to better compete with resources available in the executive branch. In the decades following World War II, Congress had displayed increasing evidence that it was becoming a second-rate, second-class political institution, far too subordinate to presidential power. Years of congressional hearings and reports led to the LRA of 1970. This statute was far more explicit, directing the Library of Congress to prepare itself not merely for reference work but for high-level analytical studies to help Congress fulfill its substantive duties and protect constitutional government. The statute changed the name of LRS to Congressional Research Service (CRS), anticipating that it would triple in size and greatly deepen its analytical mission.

The statute authorized a number of senior specialists within CRS, to be compensated at the "highest grade in the executive branch of the Government to which research analysts and consultants without supervisory responsibility, are assigned." 84 Stat. 1182 (1970). That grade was GS-17. Congress specified broad fields for these senior specialists, including American government and public administration, American public law, international affairs, national defense, and taxation and fiscal policy. The clear intent was to create a congressional staff agency with the capacity and willingness to deliver to the legislative branch nonpartisan, professional, and expert analysis, especially for those appointed to the top level of senior specialist. There was no suggestion at all in 1970 that CRS analysts would be limited to producing "neutral" reports.

A Senate report specified that "sound congressional decisionmaking is rooted in the availability of accurate information and expert analysis." S. Rept. No. 91-202, 91st Cong., 1st

Sess. 18 (1969). Not just information but *analysis*. Experts had to review available information and subject it to the kinds of professional scrutiny that would yield a reasonable and thoughtful result. Analysts at the level of senior specialist were required to do more than present two sides of a question. If one side was stronger, they had a duty to say so. The same obligation applied to research specialists at the level of GS-16 and to other CRS analysts. Congress expected the work of CRS to involve "more creative effort than the mere acquisition, storage and retrieval of data and information produced elsewhere" (id., 19). Obtaining and compensating "high caliber specialists and senior specialists" would provide research assistance to Congress "of the highest possible quality" (id., 42). Similar objectives are found elsewhere in the legislative history of the LRA. H. Rept. No. 91-125, 91st Cong., 2d Sess. 100 (1970).

Working at CRS. I began my career at CRS in September 1970 after receiving my doctorate in political science at the New School for Social Research and teaching for three years at Queens College. With strong interests in all three branches of government and their interactions, I decided to relocate to Washington, D.C. My move from New York City coincided with the expanded CRS mission. It was a wonderful opportunity to work in an environment where I could do not only research but constantly test and apply it.

From 1970 forward, at no time did I hear the slightest suggestion that CRS analysts at any level should limit their research and written products to mere reference work, simply summarizing what others have said about an issue without offering an individual judgment. The year before joining CRS I published a law review article analyzing the constitutional issue of Presidents who decide not to spend appropriated funds, an issue referred to as "impoundment." I concluded in that article that a constitutional issue emerged when Congress discovered that a program had been cancelled or abbreviated because the President considered the statutory purpose unwise, wasteful, or inexpedient. In my judgment, the President "no longer operates on the basis of legislative authority. On the contrary, he matches his will against that of Congress." Louis Fisher, "Funds Impounded by the President: The Constitutional Issue," 38 G.W. L. Rev. 124, 135-26 (1969). I cited a remark by Representative George Mahon: "economy is one thing, and the abandonment of a policy and program of the Congress another thing." Id., 126.

Upon joining CRS, my article on impoundment led to lengthy assignments with Senator Sam J. Ervin, Jr., chairman of the Subcommittee on Separation of Powers of the Senate Judiciary Committee. At hearings, he asked that I sit directly behind him to provide assistance on legislation that would curb presidential impoundment. There was no expectation or desire that I would be "neutral." I considered the impoundment policy of President Nixon to be unconstitutional and regularly offered my advice on how to combat it. In response to misleading claims by the Nixon administration, I published an article in the *Washington Star* on February 25, 1973, entitled "Impoundment Relies on Weak Arguments." I examined the legal and political arguments offered by the administration and found none of them persuasive or credible. My article was reprinted in the Congressional Record. 119 Cong. Rec. 5801 (1973). The publication received positive comments from CRS management, both within my division and at the level of CRS Director.

When Senator Ervin held a markup on the Senate impoundment bill, he sat in a room with other committee members who submitted amendments to him, either typed or handwritten. He would recognize a Senator, receive the piece of paper, and hold it in front of his eyes to read it. Without making any comments he would hand the paper to me, seated to his right. My duty was to offer thoughts about the amendments, particularly whether they strengthened or weakened congressional control. I could suggest changes so that the amendment was consistent with the purpose of the impoundment bill. No one expected me, or wanted me, to be "neutral."

After the bill went to conference committee to iron out House and Senate differences, I was asked the write the section of the conference report dealing with impoundment. H. Rept. No. 1101, 93d Cong., 2d Sess. 76-77 (1974). In doing so, I presented substantive—not neutral—analysis. I was also asked to prepare a floor dialogue between Senator Ervin and Senator Hubert Humphrey to explain the purpose of the impoundment title. My draft was published without any changes. 120 Cong. Rec. 20481-82 (1974). Throughout that process I supported the legislation as necessary to combat an unconstitutional expansion of presidential power. I never considered it my duty to be neutral, nor did CRS management. President Nixon signed the bill on July 12, 1974. In recognition of the work I did on the legislation, especially the impoundment title, I received from him a signing pen and personal letter, dated July 22, 1974. The letter did not state, but could have: "This letter is in recognition of your work to curb presidential power."

Similar high-profile duties developed during the Reagan administration. A doubling of the national debt led to the Gramm-Rudman-Hollings (GRH) deficit control act of 1985. The Senate did not hold a hearing on GRH to examine its constitutionality. The draft bill required the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to estimate the levels of total revenues and budget outlays to determine whether the deficit for a particular year would exceed the statutory limit. CBO would have to specify the degree to which expenditures needed to be cut to eliminate the excess deficit. Upon receiving the joint OMB-CBO report, it was the duty of the President—without exercising any discretion—to issue an order to eliminate the excess deficit.

On October 17, 1985, the House Committee on Government Operations held a hearing on Gramm-Rudman. I was one of four to testify. The others were Comptroller General Charles Bowsher, OMB Director Jim Miller, and CBO Director Rudolph Penner. They did not analyze the constitutional issue. That was left to me. I testified that GAO and CBO, because they were part of the legislative branch, could not be given "substantive enforcement responsibilities, as would be the case with Gramm-Rudman." I looked partly to the Supreme Court's decision in *Buckley v. Valeo* (1976), which prohibited Congress from vesting substantive and enforcement responsibilities in legislative officers.

GRH affected the balance of power between the executive and legislative branches. Rep. Mike Synar said to me at the hearing: "you sit there as the only person whom I can find in this city or anywhere in this country who has done the type of constitutional scrutiny and analysis which is necessary to give any of us assurance that we are not going down a path that may be dangerous." "The Balanced Budget and Emergency Deficit Control Act of 1985," hearing

before the House Committee on Government Operations, 99th Cong., 1st Sess. 221 (1985). At the hearing, a Republican member of the committee, Thomas N. Kindness, suggested that my testimony was written to satisfy the committee chairman, Jack Brooks. I replied: "Had you made the request, Mr. Kindness, the result would have been the same" (id., 229). A three-judge court held that the delegation of executive power to the Comptroller General was unconstitutional. Synar v. United States, 626 F. Supp. 1374, 1391-93 (D.D.C. 1986). The Supreme Court affirmed. Bowsher v. Synar, 478 U.S. 714 (1986).

In 1987, I served as research director of the House Iran-Contra Committee. For seven months I was detailed to the committee to provide guidance for the hearings and to help write the final report. Chairman Lee Hamilton did not expect me to be neutral. He wanted my assistance to help protect the institutional and constitutional interests of Congress and the system of separation of powers. When officials from the Reagan administration testified before the Iran-Contra Committee, they frequently relied on the sole-organ doctrine to promote independent and exclusive presidential power in external affairs. In the final report, I explained why the sole-organ language from the 1936 *Curtiss-Wright* case was not only extraneous to the issue before the Supreme Court but falsely portrayed the position of John Marshall when he served as a member of the House of Representatives in 1800. I was not neutral on that issue. Iran-Contra Affair, H. Rept. No. 100-433, S. Rept. No. 100-216, 100th Cong., 1st Sess. 472-74 (November 1987).

My outside writing and congressional testimony contributed to promotions within CRS. I entered as a GS-12 and by 1988 moved to GS-17 as Senior Specialist in Separation of Powers. To my knowledge, at no time did my expression of expert opinions within CRS or in my outside publications and speeches ever prompt a member of Congress or legislative staffer to decline my assistance. Lawmakers and Hill staff are accustomed to hearing a variety of viewpoints. They expect, and want, reasoned and informed analysis, even when the results challenge their own positions. My research and writing on controversial matters created a close, constructive, and professional working relationship with members of Congress and their staff. I appeared regularly on C-SPAN and NPR to express my views on pending issues of controversial public policy. No one in CRS management raised any objections. Instead, they were pleased with my public appearances.

As senior specialist, I was closely involved with various issues, including a proposal to grant the President an item veto. A GAO report in 1992 concluded that if President Reagan possessed an item veto, he could have saved up to $70 billion over a six-year period. U.S. General Accounting Office, "Line Item Veto: Estimating Potential Savings," GAO/AFMD-92-7, January 1992. Senator Robert Byrd asked me to evaluate the report. At the request of Comptroller General Bowsher, I met with the authors of the report. Examining the same data available to GAO, I concluded that a more realistic estimate of savings over the six-year period would not be $70 billion but rather $2-3 billion at most and probably less. 138 Cong. Rec. 9981-82 (1992).

After my report went to GAO, Comptroller General Bowsher wrote to Senator Byrd and now estimated that actual savings over the six years would have been much less than $70 billion. Such savings, he said, could be "close to zero." He even admitted that one could conceive of situations where the "net effect of item veto power would be to increase spending." Presidents intent on attracting legislative support for spending programs could endorse projects desired by lawmakers. Bowsher expressed regret that the $70 billion figure created a "misleading impression." His letter, dated July 23, 1992, is reprinted at 142 Cong. Rec. 6513 (1996). Senator Byrd did not ask me for some kind of "neutral" work, nor did CRS management. Instead, my task was to look at evidence and perform professional analysis.

From 1985 to 1995, I testified eleven times against different proposals that would grant the President an item veto. My testimony was reviewed and approved by CRS management. No one suggested that it was inappropriate for me to take a position on this issue. In testimony before the Senate Committee on Government Affairs, I explained that the item-veto bill was unconstitutional and would weaken not only legislative power but also judicial independence. The bill was enacted in 1996, challenged in court, and eventually struck down by the Supreme Court the following year. Raines v. Byrd, 521 U.S. 811 (1997).

In 1998, the Senate Intelligence Committee asked me to evaluate a memo written by the Office of Legal Counsel (OLC) in the Justice Department, claiming that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information. On that premise, OLC concluded that a pending bill granting limited whistleblower rights to intelligence community employees was unconstitutional. OLC memo by Christopher H. Schroeder, November 26, 1996. After completing a memo that rebutted OLC's analysis, I was invited to testify before the committee, which I did with Peter Raven-Hansen of the George Washington University Law School. Our critiques of the OLC memo were similar. "Disclosure of Classified Information to Congress," hearings before the Senate Select Committee on Intelligence, 105th Cong., 2d Sess. 5-37 (1998).

The committee then asked me to return a week later to testify again, this time sitting next to an attorney from OLC, Randolph D. Moss. I supported the constitutionality of the bill; Moss opposed it on constitutional grounds. Two hours after the hearing I received a call from a committee staffer, telling me that the committee agreed to report the bill unanimously, 19 to zero. The bill passed the Senate, 93 to 1. 144 Cong. Rec. 2871 (1998). The House Intelligence Committee, which rejected the position that the President exercised exclusive control over national security information, asked me to testify. In doing so, I also helped draft some of the bill language. After the House passed its bill and the two houses agreed in conference, the bill went to President Clinton who signed it into law. 112 Stat. 2413 (1998).

By 1988 there were 18 senior specialists. To be selected, one had to compete with other "nationally recognized experts." One cannot develop that reputation by being neutral and descriptive. CRS selected its last senior specialist through a competitive process in 1989. Since that time, CRS management has allowed the number of research senior specialists to drift down until there are now only two senior specialists, with each person close to retirement. Similarly,

CRS management has allowed the number of research specialists (GS-16s) to drop from about 38 in the late 1980s to about three. That number will soon reach zero because of pending retirements. Thus, over a period of several decades, CRS management will have eliminated the two top levels of experts within the agency that Congress had established by law to assist it with substantive duties and constitutional analysis.

CRS Policy of Neutrality. During my first 33 years in CRS, no one in management told me to avoid the expression of individual opinions, either in my CRS reports or in outside writings. CRS Director Daniel Mulhollan frequently told me I was an ideal senior specialist because of my analytical reports to Congress, frequent testimony before congressional committees, and outside publications and talks.

In early December 2003 I was asked to meet with Director Mulhollan and several of his aides about an article I had written concerning the Iraq War. Entitled "Deciding on War in Iraq: Institutional Failures," it was published in the peer-reviewed academic journal *Political Science Quarterly*. The article is available at http://www.loufisher.org/docs/wp/423.pdf. Yet instead of discussing my article in any detail, we focused on an op-ed written by David Broder of the *Washington Post* on December 7, 2003, which referred to my article. The op-ed carried this title: "Congress's Cop-out on War." My article had an entirely different purpose, focusing on six claims by the Bush administration that Saddam Hussein possessed weapons of mass destruction, with all six claims found to be empty.

CRS management was concerned because Representative Henry Hyde, chairman of the House International Relations Committee that reported the Iraq Resolution, wrote a letter to the *Washington Post* defending the resolution and criticizing the op-ed. After the letter appeared on December 23, I spoke with Rep. Hyde's office several times, including the staffer who prepared the letter. I discovered that his objection was to the op-ed, not to my article. I was told by one of his staffers that Rep. Hyde encouraged "competitive analysis" and "diversity of opinion." I had expressed my professional judgment. To the congressional office, the matter was closed.

For CRS, the matter remained quite open. I had two lengthy meetings with CRS management over the op-ed. At the first meeting, I was told by one of Mulhollan's legal advisers that I had violated the CRS policy of "neutrality." Surprised, I said that in my 33 years with the agency I had never heard or seen the word with regard to CRS policy. As the meeting continued, I reminded Mulhollan and those in the room that CRS reviewers had consistently approved my congressional testimony, which regularly took positions for and against House and Senate bills, including their constitutionality or lack thereof. Nothing in my nearly 40 appearances before committees at that time could be called neutral. The same applied to my CRS reports and memos. I took positions based on nonpartisan, objective, professional analysis. I told Mulhollan it was my practice to give him copies of my books and articles, including a recent book called *Congressional Abdication of War and Spending* (2000), which was not neutral even in its title.

On December 22, 2003, I prepared a memo for Mulhollan in order to review existing standards for CRS research. I explained that throughout my career at CRS "I have been strongly

committed to keeping political institutions strong, defending legislative prerogatives, and in maintaining a vigor and health to checks and balances. I do that because the concentration of political power in a single branch poses a threat to democratic values, representative government, legislative deliberation, and individual liberties." Those values had directed my congressional testimony, reports, and memos, all of them reviewed and approved by CRS. Over the year, the agency had "supported my interest in and commitment to political institutions, separation of powers, and checks and balances."

In a memo of January 23, 2004, Mulhollan "admonished" me for the article in *Political Science Quarterly*, stating that "damage has been done" because I had criticized both branches on a war powers question, "the very subject for which you have responsibility as a CRS analyst." The result, he said, was "damage to CRS in fulfilling its responsibility to provide unbiased analysis to its congressional clients." According to this memo, CRS has a duty to provide "unbiased analysis" to Congress. Certainly a CRS analyst may not allow one's personal feelings or political opinions to enter into a written product or oral presentation. However, if a draft bill violates express or implied language in the Constitution or conflicts with court rulings, a CRS analyst is expected to say so. If a contemplated procedure violates House and Senate rules, a CRS analyst has a duty to point that out. As to my article in *Political Science Quarterly* being "critical of both branches" on a subject that I had "responsibility [for] as a CRS analyst," that had been true for 33 years on a range of issues, without incident or any objections raised by CRS management.

In January 2004, CRS management began to direct its analysts to follow an entirely new policy of "neutrality," both within the institution and with outside speaking and writing. Nothing in the Legislative Reorganization Act of 1970 or its legislative history implied, invited, or required that policy. Congress understood then and understands now that it is necessary and appropriate for experts in CRS to speak and write publicly about their discipline. Lawmakers seek competent and professional opinions from CRS analysts.

In a memo to Mulhollan on January 31, 2004, I expressed concern that if "we err on the side of caution at every turn, we risk legitimate and much more serious criticism that our products lack analytical rigor, integrity, interest, and value." If lawmakers receive from CRS only descriptive reports and background material without thoughtful analysis, "Congress may decide it has to go elsewhere" for assistance. I noted that when the Congressional Budget Office releases a budget projection or study, "it knows that not all readers on Capitol Hill will be happy with the result." It issues its best professional judgment and responds as necessary to criticism." It does not attempt to follow a policy of neutrality.

I brought the dispute to the attention of the Library's Office of the General Counsel, which concluded that I had a constitutional, statutory, and Library right to express my professional views on the outside, including views that overlapped my assigned research areas in CRS. Attorneys in the office had read my article in *Political Science Quarterly* and found nothing in it that violated Library policy. They told me that any effort by CRS to punish me for writing in that manner would not be successful under Library policy.

In a public statement on February 9, 2006, Senator Robert C. Byrd defended "Library of Congress expert Dr. Louis Fisher, who for 36 years has provided insight and analysis of issues involving Constitutional checks and balances, separation of powers, and Congressional responsibility." He added: "Congress needs people like Lou Fisher with the brains and the backbone to help us do our work. I only wish that more people, including some who have sworn to protect and defend the Constitution, shared his passion." The text of this letter appears in Louis Fisher, Defending Congress and the Constitution 297-98 (2011). Other national and international criticism of CRS policy on neutrality appears on pages 295-307.

Transfer to the Law Library. On March 6, 2006, the Library of Congress transferred me from CRS to the Law Library of Congress, where I recovered in full my capacity to perform professional analysis. I learned that the Law Librarian was quite familiar with my record at CRS, including expressing personal positions on various issues of public policy. When I arrived at the Law Library, he made it clear that he wanted me to continue that type of analysis, with no attention to "neutrality." In the review process within the Law Library, there was no effort to water down my writing or conceal my position. Members of Congress and committees asked for my expert opinions and received them.

Far from being uncomfortable about my professional work, the Law Library in its monthly newsletter included a section called "Outreach by Lou Fisher." It provided convenient links to my talks, testimony, and outside publications. The Law Library placed my congressional testimony and journal articles—expressing positions on controversial matters of public policy and constitutional law—on two Web sites, one for Congress and the other for the general public.

During my five years at the Law Library, I testified eleven times before congressional committees, expressing my views on a variety of issues, including the state secrets privilege. Executive officials insisted that the privilege be exercised solely by the President. In my reports for the Law Library and in testimony on four occasions before congressional committees I gave reasons why I opposed the state secrets privilege and offered recommendations for statutory limitations.

My last product at the Law Library was a 32-page analytical report on national security law, prepared for a member of the House who asked specifically for my personal and professional judgments. I did precisely that and the Law Library cleared the report for his use. It was a satisfying way to conclude my work for the Library of Congress. However, uncertainty within CRS remains about the "neutrality" policy for conducting research. If CRS discourages analysts from expressing expert views, both within the organization and outside, Congress will be denied the work it requested, authorized, and mandated with the Legislative Reorganization Act of 1970. Moreover, because of CRS managerial decisions, GS-17 senior specialists and GS-16 specialists have been nearly eliminated and those resources, specifically authorized by the 1970 statute, are unavailable to members of Congress and their committees. Strengthening the analytical capacity of CRS is especially important because of heightened partisanship in recent years.