



May 15, 2012

Via U.S. mail and email

Patrick F. Kennedy
Under Secretary for Management
U.S. Department of State
2201 C Street NW, Room 7207
Washington, DC 20520

Dear Mr. Kennedy:

We write in connection with Peter Van Buren, a Foreign Service Officer at the U.S. Department of State. The State Department has proposed terminating Mr. Van Buren, and this termination is currently under review by the Director General of the Foreign Service and Director of Human Resources. We believe that the State Department's actions constitute a violation of Mr. Van Buren's constitutional rights and urge you to reinstate Mr. Van Buren to his position on the Board of Examiners.

Mr. Van Buren has been a FSO with the State Department for 23 years. Recently, he served as an examiner on the Board of Examiners. Prior to that time, Mr. Van Buren was a Team Leader on a Provincial Reconstruction Team in Iraq. When he returned from his posting in Iraq, Mr. Van Buren became a vocal critic of the reconstruction effort and wrote *We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People*. Mr. Van Buren submitted his book for review under 3 Foreign Affairs Manual 4170, which requires pre-clearance for an employee's speech or writing on "matters of official concern," broadly defined as anything related to a "policy, program, or operation of the employee's agency or to current U.S. foreign policies, or [that] reasonably may be expected to affect the foreign relations of the United States." 3 FAM 4172.1-3(A)(2). Materials "must be submitted for a reasonable period of review, not to exceed thirty days." 3 FAM 4172.1-5. After the 30-day examination period had expired with no response from the State Department, Mr. Van Buren moved forward with the publication of his

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book. Mr. Van Buren's current work for the State Department is not related to the Iraq reconstruction effort, and his positions since returning from Iraq have included no responsibilities related to those issues.

Mr. Van Buren also maintains a personal blog on a variety of topics, including the Iraq reconstruction and other matters of public concern. Mr. Van Buren includes a disclaimer on each blog post clearly stating that the views expressed therein are his own. Moreover, Mr. Van Buren's style and tone leave no doubt that he is speaking only for himself and not as an official spokesperson for the State Department. Mr. Van Buren has also published a number of articles, emphatically in his own voice, about his time in Iraq in the *New York Times*, *Rolling Stone*, *Huffington Post*, and other major news outlets.

Beginning in August 2011 and coinciding with the publication of his book, Mr. Van Buren was subjected to a series of adverse personnel actions. These actions have included suspension of his security clearance, confiscation of his Diplomatic Passport, being placed on administrative leave, being banned from the State Department Building, losing access to his State Department computer, and being reassigned to a makeshift telework position. The Government Accountability Project filed a complaint with the Office of Special Counsel alleging that these actions were prohibited personnel actions taken in retaliation for Mr. Van Buren's book. That complaint is still pending.

Nonetheless, the State Department recommended that Mr. Van Buren be "separate[d] for cause" based on a Report of Investigation prepared by the Bureau of Diplomatic Security. This proposed termination for Mr. Van Buren's speech raises substantial constitutional questions and creates the appearance of impermissible retaliation for Mr. Van Buren's criticism of the State Department. The Supreme Court has long made clear that public employees are protected by the First Amendment when they engage in speech about matters of public concern. A public employee's 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. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The government bears an even greater burden of justification when it prospectively restricts employees' expression through a generally applicable statute or regulation. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) ("*NTEU*"). By those standards, the State Department's actions here appear to be unconstitutional.

There can be no dispute that the subject matter of Mr. Van Buren's book, blog posts, and news articles – the reconstruction effort in Iraq – is a matter of immense public concern. This issue has been the subject of a

nationwide, highly contentious, and very public debate. *See, e.g., 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).

The public’s interest in hearing speech about these issues from Mr. Van Buren 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 Metropolitan Books decided to publish Mr. Van Buren’s book and that so many choose to read his book and blog. Indeed, Mr. Van Buren’s speech about the reconstruction effort in Iraq implicates the very core of the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

The Supreme Court has repeatedly held that public employees retain their First Amendment rights even when speaking about issues directly related to their employment, as long as they are speaking as *private citizens*. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). In his book, blog posts, and articles, it is clear that Mr. Van Buren is speaking in his own voice and not on behalf of the State Department. Writing blog posts and articles from home, on his own time and on his personal computer, is a paradigmatic example 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 Mr. Van Buren’s unique experience in Iraq, it is unlikely that the State Department would be able to sustain its burden of demonstrating that its interests outweigh Mr. Van Buren’s and the public’s First Amendment rights. That is especially so because there can be no legitimate claim that Mr. Van Buren’s speech caused any disruption to the State Department or to its ability to operate efficiently.

Further, the State Department’s pre-publication review policy, as applied to blog posts and articles, raises serious constitutional questions. Through its policy, the State Department is prospectively restricting the speech of Mr. Van Buren as well as all present and future State Department employees. Where, as here, the restriction limits speech before it occurs, the Supreme Court has made clear that the government’s burden is especially heightened. *NTEU*, 513 U.S. at 468. The State Department must show that

the interests of potential audiences and a vast group of present and future employees are outweighed by that expression's necessary impact on the *actual* operation of government. *Id.* Courts have also required careful tailoring of prospective restrictions to ensure they do not sweep too broadly and that they actually address the identified harm. *Id.* at 475. Given this heightened standard, it is highly unlikely that the State Department could sustain its burden of demonstrating that its policy is constitutional.

There is no justification for such an expansive prior restraint on State Department employees' speech. The State Department's policy affects all employees and is broadly written to include all "matters of official concern." This encompasses a vast amount of speech – including Mr. Van Buren's and that of numerous other State Department bloggers – that would in no way harm the "actual operation of the government." The overbreadth of the State Department's policy is abundantly clear when compared with the practice of the Department of Defense. Hundreds of active-duty soldiers, many with access to classified and sensitive information, post articles and maintain personal blogs without pre-clearance and without posing any harm to military operations.

Further, the State Department's pre-publication requirement covers even more speech than necessary to serve the government's stated interests – to protect classified information and to prevent views of employees from being improperly attributed to the government. 3 FAM 4172.1-1. As such, the policy is not carefully drawn to ensure that it does not unnecessarily chill a vast amount of protected speech, nor is it tailored to address the identified harm. *See Harman v. City of New York*, 140 F.3d 111, 123 (2d Cir. 1998).

The State Department's actions create the strong appearance of impermissible retaliation against Mr. Van Buren for his criticism of the reconstruction effort in Iraq. We hope that the State Department will reconsider the proposed termination of Mr. Van Buren and reinstate him to his position on the Board of Examiners.

Sincerely,

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