

1 GARY G. KREEP (CA Bar No. 066482)
NATHANIEL J. OLESON (CA Bar No. 276695)
2 UNITED STATES JUSTICE FOUNDATION
932 "D" Street, Suite 3
3 Ramona, California 92065
Tel: (760) 788-6624
4 Fax: (760) 788-6414
usjf@usjf.net
5 njoleson@gmail.com

6 Attorneys for Plaintiff,
Gary A. Stein
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 SERGEANT GARY A. STEIN, United States) Case No.:
11 Marine Corps, Camp Pendleton, California 92055;) **COMPLAINT FOR DECLARATORY AND**
12 Plaintiff,) **INJUNCTIVE RELIEF**
13 v.)
14 COLONEL C.S. DOWLING, Commander,)
15 Weapons and Field Training Battalion, Camp)
16 Pendleton, California 92055; RAY MABUS,)
17 SECRETARY OF THE UNITED STATES)
18 NAVY, The Pentagon, Washington, D.C.;)
19 UNITED STATES DEPARTMENT OF)
20 DEFENSE, The Pentagon, Washington, D.C.;)
21 UNITED STATES OF AMERICA; and)
22 BRIGADIER GENERAL DANIEL YOO.)
23 Defendants.)

1 Plaintiff, Gary A. Stein (“STEIN”), through his undersigned counsel, brings this action against
2 the above named defendants, in their official capacities, for declaratory and injunctive relief, alleging as
3 follows:

4 **NATURE OF THIS ACTION**

5 1. This is an action for declaratory and injunctive relief to enjoin an imminent attempt to
6 discharge a good Marine in retaliation for the proper exercise of his First Amendment rights. Though the
7 First Amendment may operate differently in the military and civilian contexts, the military must still
8 respect a service member’s freedom of speech. Sergeant Gary Stein has served with honor in the Marine
9 Corps, and he has spoken on matters of public concern in his capacity as a private citizen. Taken in their
10 full context, his statements are protected by the First Amendment to the United States Constitution, as
11 interpreted and applied by both civilian and military courts. Nonetheless, Defendants are attempting to
12 railroad him out of the Marine Corps, with an Other Than Honorable discharge, on extremely short
13 notice, depriving Plaintiff of (a) his liberty without due process of law; (b) his right that Defendants
14 comply with their own rules, regulations, and procedures; and (c) his rights of full American citizenship
15 as promised by Department of Defense Directive 1344.10 (“DOD Directive 1344.10”). Defendants have
16 left Plaintiff with no choice but to seek this Court’s intervention to prevent a grave injustice.

17 **JURISDICTION AND VENUE**

18 2. The Court has jurisdiction over this action under 28 U.S.C. Section 1331.

19 3. The Court has power to grant declaratory and injunctive relief pursuant to 5 U.S.C. § 702,
20 Federal Rule of Civil Procedure 65, and 28 U.S.C. § 2201.

21 4. The Court has personal jurisdiction over Defendants.

22 5. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e), because events giving rise
23 to this action occurred within this district.

24 **PARTIES**

25 6. STEIN is a member of the Armed Forces of the United States, being an enlisted Marine

1 in good standing with the United States Marine Corps, having served for almost nine years in the Marine
2 Corps, since July 15, 2003, and having attained the rank of Sergeant on May 1, 2008. STEIN wishes, and
3 intends, to reenlist in the Marine Corps, when his current term of service expires, on July 28, 2012, and he
4 had previously requested an extension of his current term until June 28, 2013, which is currently pending.

5 7. Defendant C.S. Dowling (“DOWLING”) is a colonel in the United States Marine Corps,
6 and serves as the Commanding Officer of the Weapons and Field Training Battalion, Marine Corps
7 Recruit Depot, San Diego, California. DOWLING is STEIN’s commanding officer and the Convening
8 Authority with respect to STEIN and the Administrative Separation Board.

9 8. Defendant Ray Mabus (“MABUS”) is the Secretary of the United States Navy, one of the
10 military branches within the Defense Department in the United States Government, whose office is
11 charged by DOD Directive 1344.10, with the legally enforceable duty to “issue appropriate implementing
12 documents” for the purpose of enforcing DOD Directive 1344.10, with respect to service members of the
13 United States Marine Corps, and whose office has immediate supervision over DOWLING in ensuring
14 compliance with DOD Directive 1344.10..

15 9. Defendant, the United States Department of Defense (“DOD”), is a department of the
16 Executive Branch of the United States Government, which adopted, and is in charge of enforcing, the
17 UCMJ, and DOD Directive 1344.10.

18 10. Defendant United States of America (“US”) is a government entity supervising the
19 Armed Forces of the United States of America, and is the entity empowered to enforce sanctions for
20 knowing and willful violations of the law, and whose agents are responsible for regulating and enforcing
21 the UCMJ and DOD Directive 1344.10, including their enforcement as challenged herein by STEIN.

22 11. Defendant Brigadier General Daniel Yoo (“YOO”) is the Commanding General of U. S.
23 Marine Corps Depot, San Diego, and he exercises authority, as a result of that position, over the
24 separation of STEIN from service with the Marine Corps.

25 12. All defendants are sued in their official capacity for declaratory and injunctive relief

1 pursuant to 5 U.S.C. § 702.

2 **RELEVANT FACTS**

3 13. During the period of 2010-2012, STEIN— through activities unconnected with his duties
4 as a U. S. Marine, and on his own personal time — and three other individuals, spoke, wrote, and
5 otherwise communicated with other private citizens in connection with a variety of matters of public
6 concern, including public policy issues. In so doing, STEIN expressed personal opinions on political
7 candidates and issues, but not as a representative of the Armed Forces of the United States. STEIN, and
8 the three other individuals, maintained an account on the computer social networking site known as
9 “Facebook” (hereinafter “Facebook page”).

10 14. In April, 2010, STEIN was approached by a representative of Chris Matthews, host of the
11 HARDBALL television program, about appearing on that show. He obtained permission from his
12 immediate superior, his Gunnery Sergeant, and made travel plans to so appear. On his way to appear on
13 the television program, he received a telephone call from Headquarters, Marine Corps, in Quantico,
14 Virginia, and he was ordered to return to his base. Subsequently, he was approached by his Chief Warrant
15 Officer concerning his Facebook page, because of the possibility that it could be construed as emanating
16 from military sources, rather than from private sources. STEIN took down his Facebook page while he
17 reviewed the matter. STEIN was urged by a Judge Advocate of the First Marine Expeditionary Force to
18 add a disclaimer to his Facebook page that all statements therein are personal views, not made in an
19 official capacity, and not representing the views of the U. S. Marine Corps, if he was going to leave the
20 page up. STEIN thereafter put the Facebook page that he hosted with three other individuals back up on
21 the Internet, adding thereon an appropriate disclaimer consistent with what he had been advised
22 concerning the permissible maintenance of a Facebook page. STEIN was not advised, at that time, nor at
23 any subsequent time, to take down the Facebook page, to remove it from the Internet, or to make any
24 further modifications thereto.

25 15. From November, 2010, thru March 1, 2012, STEIN is alleged to have posted on his

1 Facebook page various criticisms of Barack Obama, questions concerning the Obama Administration's
2 policies, and critiques of John McCain, Ron Paul, Newt Gingrich, Rick Santorum, Mitt Romney, and
3 others. However, STEIN did not disobey or advocate disobeying any particular order actually issued by
4 any superior officer. Though some of the language he used in discussing certain hypothetical unlawful
5 orders might have been viewed as intemperate, he subsequently clarified, repeatedly, and publicly, that he
6 was only discussing the settled principle of military law that service members should not follow unlawful
7 orders.

8 16. During the 17-month period, from November, 2010, through March 1, 2012, no attempt
9 was made by any of STEIN's commanding officers, or any other Marine Corps officer, to restrict or
10 correct STEIN's, and his friends', face book activities, including comments about Barack Obama, and
11 others, as candidates in the 2012 Presidential election, nor was there any effort by any defendant, or any
12 person serving under any defendant, to modify or change the Facebook content, or to counsel or discuss
13 said content in relation to STEIN's duties as a member of the Marine Corps, or otherwise to advise
14 STEIN that his Facebook activities in any way prejudiced the good order and discipline of the Marine
15 Corps.

16 17. Instead, on March 21, 2012, STEIN was notified by his Commanding Officer,
17 DOWLING, of the institution of Administrative Separation Proceedings, whereby DOWLING was
18 recommending STEIN's discharge from the U.S. Marine Corps, because of alleged misconduct, as set
19 forth in a Notification of Administrative Separation Proceedings dated 21 March 2012 [hereinafter
20 "Notification"]. Attachment "A". As grounds for discharge, the Notification alleged only:

21 The bases for this recommendation are as follows: (1) that on or about 1 March 2012, you
22 allegedly made statements regarding the President of the United States that are prejudicial to good
23 order and discipline, as well as service discrediting in violation of Article 134, UCMJ; (2) from
24 on or about November 2010 to the present you allegedly created, administered, and provided
25 content to a Facebook page, as well as other online media sources, in violation of DOD Directive

1 1344.10. [*Id.*, p.1.]

2 18. According to the Notification, DOWLING intended to recommend that STEIN receive a
3 separation from service characterization of “Other Than Honorable Conditions” (“OTH”). An OTH
4 characterization is the worst possible mark on a service member’s record that can be imposed without the
5 convening of a Court Martial Board. Moreover, it is the legal equivalent to the ineradicable stigma of a
6 Bad Conduct Discharge, imposed in a sentence of a Court Martial, and divests the separated service
7 member of substantially all veterans’ benefits for his, or her, lifetime. Further, such a characterization
8 could follow STEIN for the rest of his life, and impact his future ability to earn a livelihood.

9 19. The Notification required STEIN to respond — in default of which his rights would be
10 “waived” — within two working days, the absolute minimum time required by Section 6304.4 of the
11 Marine Corps Separation and Retirement Manual (“MARCORSEPMAN”). Attachment “H.” The
12 Notification was served on STEIN during a period that the defendants knew that all Judge Advocates
13 serving as defense counsel at STEIN’s base were involved in annual legal training, and, thus, were
14 unavailable to consult with him before his response was required to be filed.

15 20. STEIN responded timely to the Notification, and defendants immediately scheduled a
16 hearing for March 30, 2012 — just nine days after the Notification. Attachment “B.” Defendants were
17 aware that any members of the Judge Advocate able to serve as defense counsel were at a conference and
18 could not begin work on STEIN’s case until March 23, 2012, at the earliest.

19 21. On March 23, 2012, STEIN’s military attorney notified the hearing officer that he had a
20 scheduling conflict on Friday, March 30, 2012. In response, by letter dated March 26, 2012, the hearing
21 was delayed one day, until Saturday, March 31, 2012. On March 25, 2012, Plaintiff requested an
22 additional one week in order to allow more adequate preparation for the hearing, but that request was
23 summarily denied on March 26, 2012. Attachment “C.”

24 22. On March 26, 2012, STEIN retained, as civilian counsel, J. Mark Brewer, one of
25 plaintiff’s undersigned counsel, pursuant to MARCORSEPMAN, Section 6304.3(c). Attachment “H.” On

1 March 27, 2012, STEIN's civilian counsel again requested an extension of the hearing date for 10
2 days. Attachment "I." On March 28, 2012, that request was denied, but the hearing date was adjourned to
3 April 5, 2012, which is Maundy Thursday. Attachment "D."

4 23. On March 30, 2012, STEIN's military attorney submitted to defendants a Request for
5 Legal Ethics Opinion, which would respond to three questions relevant and necessary to the conduct and
6 outcome of the Notification hearing:

7 "1. Has the Defense Department's Directive Number 1344.10 and other interpretative documents
8 been modified to fully comply with the Order ... in *Rigdon v. Perry*, 963 F. Supp. 150, 164
9 (D.D.C. 1997)....

10 "2. May an active duty, non-commissioned, U.S. Marine maintaining a Facebook web page
11 bearing a clear disclaimer that all statements are personal views, not made in an official capacity
12 and not representing the views of the Marine Corps, make statements thereon supporting or
13 opposing either (i) a political party or (ii) a candidate for federal, state or local office or (iii) both?

14 "3. May such a Marine make statements critical of a candidate for political office when that
15 candidate is also currently serving in office? Does a separate rule apply to criticisms of a
16 candidate for political office serving as President of the United States?" [Attachment "E."]

17 24. To date, there has been no response to the Request for a Legal Ethics Opinion.

18 25. On March 30, 2012, STEIN, through counsel, reiterated his request to extend the hearing
19 date until at least a date following a substantive response to the Request for a Legal Ethics Opinion.
20 Attachment "F." STEIN's counsel was informed orally on that same day that the request was denied, and
21 that the hearing on the Administrative Separation Proceedings would commence at 8 a.m., on Maundy
22 Thursday, April 5, 2012.

23 26. STEIN and newly-retained civilian co-counsel have had insufficient time to prepare for
24 the hearing on the Notification, the results of which may severely prejudice STEIN with respect to his
25 continued military career, future employment, and other important aspects of his life.

1 in paragraphs 1-31, as if set forth fully herein.

2 33. DOD Directive 1344.5.2 requires that “the Secretaries of the military departments shall
3 issue appropriate implementing documents for their respective departments.” Such implementing
4 documents are issued as Secretary of the Navy Instructions (“SecNavInstruct) or Operation Navy
5 Instructions (“OpNavInstruct”), but a diligent search has failed to reveal any such instructions. These
6 instructions are required so that each different military department tailors the application of the DOD
7 Directive to that specific military department. MABUS having failed to carry out his duty to apply this
8 DOD Directive to the particular needs of the Navy and the Marine Corps, means that this regulation may
9 not be used as the basis for discipline against enlisted members of the U.S. Marine Corps.

10 **COUNT II**

11 **(Violation Of MARCORSEPMAN Requirement To Counsel Plaintiff)**

12 34. Plaintiff hereby re-alleges and incorporates by reference each of the foregoing allegations in
13 paragraphs 1-33, as if set forth fully herein.

14 35. MARCORSEPMAN states “When a Marine’s performance or conduct falls within any of
15 the reasons within section 2 [which includes the charge of misconduct brought against Plaintiff] and all
16 required command attempts at leadership and rehabilitation of the Marine have been unsuccessful, the
17 commanding officer should initiate separation processing, subject to the specific requirements found in
18 this chapter.” MARCORSEPMAN, Section 6302.

19 36. MARCORSEPMAN Section 6105.1 states “that reasonable efforts at rehabilitation
20 should be made before initiation of separation proceedings.” No such reasonable efforts having been
21 made, it is a violation of MARCORSEPMAN, and its policy and procedures, to have proceeded directly
22 to involuntary separation procedures against STEIN. Such violation of Marine Corps policy and
23 procedures violates Plaintiff’s Constitutional right to due process under the Fifth Amendment to the
24 United States Constitution.

25 //

1 **COUNT III**

2 **(Violation of MARCORSEPMAN Requirement To Specify Basis For Proposed Separation,**
3 **Violation of MARCORSEPMAN Right to Effective Assistance Of Civilian Counsel, Denial of Due**
4 **Process And Right To Effective Assistance Of Counsel Under the Fifth Amendment To The U. S.**
5 **Constitution)**

6 37. Plaintiff hereby re-alleges and incorporates by reference each of the foregoing allegations
7 in paragraphs 1-36, as if set forth fully herein.

8 38. Defendants have failed to provide STEIN with a statement of the basis for separation as
9 required by MARCORSEPMAN, Section 6304, and have refused to postpone the Notification hearing
10 date to afford STEIN a reasonable period of time to consult with his military and newly-engaged civilian
11 legal co-counsel, in accordance with MARCORSEPMAN Section 6303, to prepare an adequate case and
12 defense in response to the charges set forth in the Notification, such failure and refusal constituting an
13 unreasonable and unconstitutional deprivation of STEIN's right to due process under the Fifth
14 Amendment to the U.S. Constitution, causing irreparable harm and injury to him.

15 **COUNT IV**

16 **(Denial Of First Amendment Rights)**

17 39. Plaintiff hereby re-alleges and incorporates each of the foregoing allegations in
18 paragraphs 1-38, above as if set forth fully herein.

19 40. STEIN's activities, complained of in the Notification, did not violate Article 134, UCMJ,
20 as construed by civilian and military courts in light of the First Amendment.

21 41. STEIN's activities, complained of in the Notification, did not violate DOD Directive
22 1344.10. Even if they did, DOD Directive 1344.10 violates the First Amendment as applied to Plaintiff,
23 because it is vague and/or overbroad, unconstitutionally restricts core political speech, and/or unlawfully
24 discriminates, based on content or viewpoint of speech

25 42. The statements made, and the activities conducted, by STEIN, which defendants contend

1 violate Article 134, UCMJ, and DOD Directive 1344.10, constitute statements and activities
2 protected under the First Amendment to the United States Constitution, including, but not limited to, the
3 freedom of speech, the freedom of the press, the freedom of assembly, and the right to petition the
4 government for a redress of grievances.

5 43. The United States District Court for the District of Columbia has determined that
6 ambiguity and confusion in the DOD Directive implicates First Amendment rights. Defendants have
7 failed to ensure that the DOD directive, as written, complies with, and is in this case is being interpreted
8 consistent with, an injunction against DOD and the United States Navy by the United States District
9 Court for the District of Columbia that was never appealed. See *Rigdon v. Perry*, 962 F. Supp. 150
10 (D.D.C. 1997).

11 44. The restrictions against (a) speaking before a partisan political gathering, including any
12 gathering that promotes a cause; and (b) participating in any “discussion” as an advocate for or against a
13 cause, appear, to be content- and viewpoint-discriminatory. See *Rigdon v. Perry*, 962 F. Supp. 150, 164
14 (D.D.C. 1997).

15 45. The Administrative Separation Board, which consists of three non-lawyers, is scheduled
16 to decide novel and complex issues, concerning the application of existing DOD regulations to new
17 modalities of social media, having a chilling effect on STEIN’s First Amendment rights. Established
18 written guidance being relied on by the government is ambiguous and contradictory. Accordingly, STEIN
19 sought a Legal Ethics Opinion on March 30, 2012, which is now pending. Allowing the hearing to
20 proceed on April 5, 2012, would deprive STEIN of the opportunity to seek such an Ethics Opinion to
21 clarify his obligations, and to allow him an opportunity to follow that guidance, if it requires changes in
22 the Facebook page, or other actions. Further, if the guidance from competent military authority
23 demonstrates that STEIN’s actions are permissible, it would allow for the termination of the
24 Administrative Separation Board prior to hearing this case, and the withdrawal of any contemplated
25 adverse action against STEIN.

1 Dated: April 2, 2012

2 Respectfully submitted,

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5 GARY G. KREED (CA Bar No. 066482)
6 NATHANIEL J. OLESON (CA Bar No. 276695)
7 UNITED STATES JUSTICE FOUNDATION
8 932 "D" Street, Suite 3
9 Ramona, California 92065
10 Tel: (760) 788-6624
11 Fax: (760) 788-6414
12 usjf@usjf.net
13 njoleson@gmail.com

14 Attorneys for Plaintiff, Gary A. Stein

15 **Of Counsel:**

16
17 J. MARK BREWER (TX Bar No. 02965010)
18 Brewer & Pritchard
19 Three Riverway, 18th Floor
20 Houston, TX 77056
21 Tel: (713) 209-2910
22 Fax: (713) 659-5302
23 brewer@bplaw.com

24 STEWART RHODES
25 OATHKEEPERS
5130 S. Fort Apache Road, Suite 215-160
Las Vegas, NV 89148
Tel: (702) 353-0627
rhodeslegalwriting@gmail.com

WILLIAM J. OLSON (VA Bar No. 15841)
HERBERT W. TITUS (VA Bar No. 41126)
JOHN S. MILES
JEREMIAH L. MORGAN
William J. Olson, P.C.
370 Maple Avenue, West, #4
Vienna, Virginia 22180-5615
Tel: (703) 356-5070
Fax: (703) 356-5085
wjo@mindspring.com
johnsmiles@hotmail.com

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DAVID LOY (CA Bar No. 229235)
ACLU Foundation of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138-7131
Tel: 619-232-2121
davidloy@aclusandiego.org