

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

9 DAVID LOY (SBN 229235)  
10 ACLU FOUNDATION OF SAN DIEGO &  
11 IMPERIAL COUNTIES  
12 P.O. Box 87131  
13 San Diego, CA 92138-7131  
14 Tel: (619) 232-2121  
15 Fax: (619) 232-0036  
16 [davidloy@aclusandiego.org](mailto:davidloy@aclusandiego.org)

17 Attorneys for Plaintiff

18 **UNITED STATES DISTRICT COURT**  
19 **SOUTHERN DISTRICT OF CALIFORNIA**

20 SERGEANT GARY A. STEIN,  
21  
22 Plaintiff,  
23  
24 v.  
25 COLONEL C.S. DOWLING, *et al.*,  
26  
27 Defendants.

**Case No. 12-cv-0816 H (BGS)**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RENEWED MOTION FOR  
TEMPORARY RESTRAINING  
ORDER**

28

1 On April 4, 2012, this Court denied Plaintiff's request for a temporary restraining order  
2 without prejudice. Order Denying Plaintiff's Motion for Temporary Restraining Order Without  
3 Prejudice ("Order"), p. 16.

4 In support of its decision that Plaintiff not be prejudiced by the Court's denial, and in  
5 recognition that the Court "only had a limited time to review the matter," the Court "at a  
6 **minimum strongly** recommend[ed] that the military voluntarily provide Plaintiff's counsel a  
7 continuance of twenty-four hours or more to permit review of this Court's order" by the Ninth  
8 Circuit. *Id.* (Emphasis added.) In its haste to discharge Plaintiff, the military refused to make  
9 this accommodation, notwithstanding this Court's observation that:

10 (a) "[t]his case was especially complicated because it implicates First  
11 Amendment rights, fundamental rights protected by the United States Constitution"; and

12 (b) "[t]he Plaintiff has been in the United States Marines for nearly nine years,  
13 and the country owes Plaintiff and other Marines a debt of gratitude for their service."

14 *Id.* at 2.

15 In a further effort to encourage the military to delay the separation proceeding against  
16 Plaintiff, the Court suggested that Plaintiff "renew his request for continuance to the  
17 administrative board[,] question[ing] the government's insistence on proceeding so  
18 expeditiously after Plaintiff's nine years of service." *Id.* at 16. In response to this suggestion,  
19 Plaintiff requested a continuance, which was summarily denied. The hearing went forward as  
20 scheduled on Thursday, April 5, 2012, beginning at 8:00 am, and lasting until approximately  
21 11:00 pm.

22 **1. Demonstration of Disrespect for this Court.**

23 At the separation hearing, Plaintiff learned that Assistant United States Attorney, Tom  
24 Stahl, had conveyed this Court's requests to Major Houltz, the "neutral" Legal Advisor to the  
25 Administrative Separation Board, and that Major Houltz unilaterally, without asking the other  
26 two members of the board, refused to consider any continuance, and throughout the hearing  
27 made it clear that the Board was **not** going to "make a record for the federal court." The Legal  
28

1 Advisor is required to be neutral, and can be challenged for impartiality. Plaintiff made such a  
2 challenge to Colonel Dowling, who summarily denied the request. Kreep Declaration, para.  
3 2.

## 4 **2. Imposing Punishment for Seeking this Court's Review.**

5 Further, the fact that Plaintiff had sought relief in this Court was used by the  
6 prosecution to argue that Sargent Stein had behaved improperly. Kreep Declaration, para. 3.  
7 In short, the Court's deference shown to the military was not reciprocated by the separation  
8 board, to Plaintiff's prejudice, prompting this request for reconsideration of Plaintiff's motion  
9 for a temporary restraining order and preliminary injunction. Moreover, Defendants have  
10 acted to punish a United States Marine for having availed himself of the right to seek the  
11 protection of this Court.

## 12 **3. No examination of First Amendment claims.**

13 Throughout its Order, this Court assumed that, notwithstanding Plaintiff's Commanding  
14 Officer's "belated[] counsel[ing] on March 23, 2012, after initiating Plaintiff's administrative  
15 separation procedures on March 21, 2012,"<sup>1</sup> the Separation Board would carefully and  
16 judiciously examine Plaintiff's claims.

17 Thus, the Court ruled that "[f]or the Court to step in and decide as a preliminary matter  
18 that the Plaintiff's bare protected speech, unrelated to any violation of any military rule and  
19 regulation, would be premature." *Id.*, p. 6. Thus, the Court expressed its trust that the  
20 separation board would address "Plaintiff's counsel[']s constitutional arguments" that DoD  
21 Directive 1344.10 was not "narrowly tailored and not overly broad." *Id.* . For example, the  
22 directive makes a distinction between political and partisan communications. The Court stated  
23 that "the military should properly evaluate these contentions in the administrative separation  
24 proceedings." *Id.*, p. 8. This simply did not take place, as detailed in the Declaration of co-  
25 counsel Gary G. Kreep. Kreeep Declaration, para. 15.

---

26  
27  
28 <sup>1</sup> Order, p. 6.

1 **4. Denial of fair hearing and notice.**

2 The Court believed that the separation board would “listen to counsel’s arguments and  
3 evaluate the merits of the matter.” Order, p. 16. Additionally, it was believed that the  
4 administrative separation proceeding would be conducted according to fair procedures and  
5 timely notice, having forewarned the military that if it “intentionally” denied Plaintiff a hearing  
6 without timely notice it could put Plaintiff’s Due Process rights in jeopardy. Order, pp. 4-5.  
7 Not only did the military refuse to grant any continuance as strongly suggested by the Court,  
8 but it restricted voir dire, provided extensive prosecution documents to defense counsel for the  
9 first time during the hearing, limiting evidentiary objections, and barring all defense witnesses  
10 (including a retired Marine Corps Brigadier General called as an expert witness) from testifying  
11 as to the standard to determine what violated “good order and discipline” and “service  
12 discrediting” as well as whether plaintiff’s conduct violated “good order and discipline” and  
13 was “service discrediting” — two of the most critical issues in this case. *See* Kreep  
14 Declaration, paras. 2, 5, 6, and 9.

15 **5. No Administrative Remedy.**

16 As the Court noted, Plaintiff need not exhaust administrative remedies if an  
17 administrative appeal would be futile. Order, p. 12. Such would be the case here. As the  
18 Court points out, Plaintiff could appeal his separation to the Convening Authority, in this case  
19 Colonel C.S. Dowling, a defendant in this case. Under applicable Marine Corps regulations,  
20 Plaintiff has no appeal rights of an adverse action, once taken by General Yoo. Order, pp. 4-7.  
21 Any subsequent proceedings before the Naval Board of Corrections (*see* Order p. 15) would be  
22 only an ancillary proceeding, after Plaintiff’s final discharge from the Marine Corps, and based  
23 on the incomplete record developed without protection of his procedural rights, which simply  
24 cannot be relied upon. *See* Kreep Declaration, para. 16.

25 **6. Conclusion**

26  
27 For the reasons stated above, only the immediate issuance of a temporary restraining  
28 order will protect nine-year Marine Corps veteran plaintiff Gary A. Stein from suffering an

1 unjust and illegal separation from the U.S. Marine Corps and an “other than honorable”  
2 discharge.

3  
4 Dated: April 6, 2012

Respectfully submitted,

5 **s/David Loy**

6 David Loy  
7 Attorney for Plaintiff

8 Of counsel:

9 J. MARK BREWER  
10 BREWER & PRITCHARD  
11 Three Riverway, 18th Floor  
12 Houston, TX 77056  
13 Tel: (713) 209-2910  
14 Fax: (713) 659-5302  
15 [brewer@bplaw.com](mailto:brewer@bplaw.com)

16 STEWART RHODES  
17 OATHKEEPERS  
18 5130 S. Fort Apache Road.  
19 Suite 215-160  
20 Las Vegas, NV 89148  
21 Tel: (702) 353-0627  
22 [rhodeslegalwriting@gmail.com](mailto:rhodeslegalwriting@gmail.com)

23 WILLIAM J. OLSON  
24 HERBERT W. TITUS  
25 JOHN S. MILES  
26 JEREMIAH L. MORGAN  
27 WILLIAM J. OLSON, P.C.  
28 370 Maple Avenue, West, #4  
Vienna, Virginia 22180-5615  
Tel: (703) 356-5070  
Fax: (703) 356-5085  
[wjo@mindspring.com](mailto:wjo@mindspring.com)