



P.O. Box 87131
San Diego, CA 92138-7131
T/ 619-232-2121
F/ 619-232-0036
e-mail: info@aclusandiego.org

April 14, 2010

Colonel Nicholas F. Marano, USMC
Commanding Officer, Marine Corps Base Camp Pendleton
P.O. Box 555019
Camp Pendleton, CA 92055

Dear Colonel Marano,

According to today's San Diego Union-Tribune, Sergeant Gary Stein was called back to base to review directives on political activities as he was preparing for a television interview, and as a result Sgt. Stein was unable to participate in the interview and removed a Facebook page he had previously posted. I do not currently represent Sgt. Stein, but I write to express the ACLU's concerns about freedom of speech based on the facts as reported.

The ACLU strongly supports the First Amendment rights of servicemembers to comment on issues of public concern. While I appreciate that "the Corps is not looking to file charges," as reported in the story, Sgt. Stein's speech has nonetheless been chilled.

Above all else, the First Amendment protects speech that discusses and critiques the government's policies and conduct. Speech "on issues of social and political concern ... has been recognized as 'the core of what the First Amendment is designed to protect.'" *United States v. Wilcox*, 66 M.J. 442, 446-47 (C.A.A.F. 2008). Although the courts have held that the First Amendment operates differently in the military and civilian contexts, "members of the military are not excluded from the protection granted by the First Amendment." *Parker v. Levy*, 417 U.S. 733, 758 (1974).

The military itself has recognized, "The right to express opinions on matters of public and personal concern is secured to soldier and civilian...." *Committee for GI Rights v. Callaway*, 518 F.2d 466, 470 (D.C. Cir. 1975) (quoting "Guidance on Dissent," AGAM-P, Headquarters, Department of the Army, 23 June 1969). Therefore, military courts have held that "servicemembers as well as the public in general have a right to voice their views so long as it does not impact on discipline, morale, esprit de corps, and civilian supremacy." *United States v. Brown*, 45 M.J. 389, 396 (C.A.A.F. 1996).

Colonel Nicholas F. Marano

April 14, 2010

Page 2

The mere fact that Sgt. Stein identified himself as a Marine is not sufficient to censor his speech, even under existing law. In *Wilcox*, the Court of Appeals for the Armed Forces struck down the conviction of a servicemember who posted “an online profile containing ... views in which the author identified himself as a ‘US Army Paratrooper.’” 66 M.J. at 445. According to the court, the First Amendment prohibited a conviction based on the message “expressed in his online profiles,” without any evidence that “the communications either ‘interfere[d] with or prevent[ed] the orderly accomplishment of the mission,’ or ‘present[ed] a clear danger to loyalty, discipline, mission, or morale of the troops.’” *Id.* at 446, 449. As the court noted:

There is no evidence that any of Appellant's statements were directed at military members or ever reached his unit. And it is pure speculation that the ... views propounded on the Internet by a single person purporting to be a paratrooper either were viewed or would be viewed by other servicemembers or would be perceived by the public or a servicemember as an expression of Army or military policy.

Id. at 450. If the speech in *Wilcox* was protected, then Sgt. Stein’s speech is likely protected as well, as I am aware of no allegation that he advocated views as extreme as the views advocated in *Wilcox*. To my knowledge, there is no evidence of any direct threat to loyalty, discipline, mission, morale, or civilian supremacy presented by Sgt. Stein’s off-base statements.

Thank you for your attention to these issues. I hope that the Corps will ensure that Sgt. Stein enjoys the full measure of his constitutionally protected right to freedom of speech.

Sincerely,

David Blair-Loy
Legal Director