



1 (“MCRD San Diego”) has debarred her from most areas of the Law Center (Building 12), which houses  
2 confidential legal and investigatory files. Plaintiff asserts she is denied access to the courtrooms. This  
3 is not true. Plaintiff is still permitted to testify in any case in which her testimony is needed and to  
4 attend any courtroom proceeding in which her presence is needed.<sup>1/</sup>

5 Although Plaintiff’s Complaint alleges various claims against multiple defendants, the only  
6 claim she raises in her motion for a preliminary injunction is a First Amendment claim against LtCol.  
7 Sullivan in his official capacity and against Ray Mabus, the Secretary of the Department of the Navy,  
8 in his official capacity (“collectively referred to as “the United States”). Plaintiff claims the Acting  
9 Commanding General’s decision violates her alleged First Amendment right of access to the courtroom,  
10 and she demands access to MCRD San Diego’s Law Center. Her motion includes broad rhetoric about  
11 the First Amendment but completely neglects to recognize the military’s right to control its military  
12 base.

13 Plaintiff is demanding access to a military base. The Supreme Court has historically, repeatedly  
14 recognized the military’s unfettered right to run its military installations as it deems fit. Cafeteria and  
15 Rest. Workers Union v. McElroy, 367 U.S. 886, 890-894 (1961); Greer v. Spock, 424 U.S. 828, 836-840  
16 (1976); United States v. Albertini, 472 U.S. 675, 694-697 (1985). Concomitant of this right is the  
17 “historically unquestioned power of (its) commanding officer summarily to exclude civilians from the  
18 area of his command.” Greer, 424 U.S. at 838 (*quoting Cafeteria Workers*, 367 U.S. at 893. Although  
19 the Supreme Court has recognized the military’s right to disbar a civilian from an entire base, here the  
20 Court addresses an even narrower set of circumstances. The Acting Commanding General has barred  
21 Plaintiff only from portions of Building 12, the Law Center, until the criminal investigations are over.  
22 She is still allowed access to the base courtrooms. The Acting Commanding General’s decision does  
23 not violate her First Amendment right to access MCRD San Diego, to the extent any such right exists.

24 Any remaining support for Plaintiff’s requested remedy evaporates when viewed through the  
25 proper lens. The only source of subject matter jurisdiction for Plaintiff’s First Amendment claim is the

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26 <sup>1/</sup> This point was clarified during discussions prior to the filing of this opposition, and the  
27 United States has offered to stipulate to this fact.

1 Administrative Procedure Act (“APA”), 5 U.S.C. §702. Under the APA, Plaintiff must prove the Acting  
2 Commanding General’s decision, to be accorded substantial deference, is “arbitrary and capricious.”  
3 The ongoing criminal investigations and the nature of the allegations against her more than justifies the  
4 Commanding General’s decision to secure the protection of the confidential files stored in the Law  
5 Center.

6 Plaintiff has failed to sustain her burden of proving the four requirements for injunctive relief,  
7 and her motion should be denied.

8 II.

9 FACTS

10 MCRD San Diego is a military installation under the military command and management control  
11 of the Commandant of the Marine Corps. (Ex. A, Sullivan Decl., ¶ 3.) The Law Center, located in  
12 Building 12, houses the following sections: Administrative Support, Civil Law, Military Justice, Legal  
13 Assistance, and Defense. (Id. ¶ 6.) Every section maintains either confidential Naval Criminal  
14 Investigative Service (“NCIS”) Reports of Investigation (“ROI”), confidential and privileged  
15 prosecution files or defense investigatory files involving ongoing criminal cases (General and Special  
16 Courts-Martial), confidential administrative investigatory files, and other privileged and personal  
17 information protected by the attorney-client privilege, the attorney work product, the Privacy Act, 5  
18 U.S.C. § 552a, and other federal statutes applicable to ensuring the safeguarding of official  
19 documentation and personal information obtained and maintained within an official system of records.  
20 (Id. ¶ 7.)

21 In July 2010, the Staff Judge Advocate (“SJA”) at MCRD San Diego received a briefing from  
22 NCIS personnel and an Assistant U.S. Attorney from the U.S. Attorney’s Office in San Diego about an  
23 ongoing federal criminal investigation involving Plaintiff. (Id. ¶ 9.) The SJA was told the investigation  
24 related to allegations that Plaintiff had fraudulently misrepresented her credentialing authority to gain  
25 access to the NCIS field office located at the Marine Corps Air Station at Miramar, California (“MCAS  
26 Miramar”). (Id.) He was informed she was also under investigation for alleged witness tampering and  
27 attempted obstruction of justice involving improper communications to civilian witnesses who were  
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1 scheduled to testify at a court-martial hearing held at MCRD San Diego. (Id.) In August 2010, the  
2 Acting Commanding General<sup>2/</sup> was briefed on the issue. (Id. ¶ 10.) To secure the confidential  
3 investigatory files maintained at the Law Center, the Acting Commanding General decided to deny  
4 Plaintiff access to the Law Center, with the exception of the courtrooms. (Id. ¶¶11-12.) Plaintiff can  
5 access any courtroom at the Law Center should a party in any judicial proceeding call her to testify as  
6 a witness. (Id. ¶ 13.) His decision remains in effect until the conclusion of the criminal investigations.  
7 (Id. ¶ 11.)

8 During this same time period, Plaintiff also ran into trouble with the Marine Corps Air Station  
9 in Beaufort, South Carolina (“MCAS Beaufort”). On July 22, 2010, the Commanding Officer at MCAS  
10 Beaufort debarred Plaintiff from the base, stating:

11 I have determined you attempted to interfere, or left the distinct impression of an attempt to  
12 interfere, with a witness’s participation in the pending court-martial of United States v. Corporal  
13 J.W. Sims. Given your conduct, and the effect that your presence can have on this and other  
witnesses, I consider your presence aboard this Air Station to be detrimental to the good order  
and discipline required aboard this installation.

14 (Ex. B, Letter fr. Col. J.R. Snider to Plaintiff, dated July 22, 2010.) The evidence in support of Col.  
15 Snyder’s decision was a Report of Investigation (“ROI”) from NCIS, detailing a conversation with a  
16 potential prosecution witness. (Ex. C, ROI dated June 25, 2010.) According to the ROI, the witness  
17 related a conversation with Plaintiff, during which Plaintiff allegedly told the witness that NCIS would  
18 try to “coerce or bully her around,” and that she should not trust them. (Ex. C, p.3.) According to the  
19 witness, Plaintiff told her, “I can’t tell you not to talk to them, but it would be in your best interest not  
20 to.” (Id.) At a hearing, the witness again testified Plaintiff said she could not tell the witness not to talk  
21 to NCIS, but that in her experience the people they talked to felt pressured into answering questions.  
22 According to the witness, Plaintiff continued at length about other people’s negative experiences with  
23 NCIS. (Ex. D, Hearing Tr.)

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26 <sup>2/</sup> At that time, due to the Commander’s absence, the Chief of Staff for the Commander  
27 became the Acting Commanding General. (Ex. A, Sullivan Decl., ¶ 10 & n.1.)

1 III.

2 ANALYSIS

3 A. STANDARD OF REVIEW

4 In seeking a preliminary injunction, Plaintiff must establish she is likely to succeed on the merits,  
5 she is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips  
6 in her favor, and an injunction is in the public interest. Winter v. Natural Resources Defense Council,  
7 \_\_ U.S. \_\_, 129 S. Ct. 365, 374 (2008); Small v. Operative Plasterers’ and Cement Masons’ Int’l Ass’n,  
8 611 F.3d 483, 490 (9<sup>th</sup> Cir. 2010) (*quoting Winter*). Plaintiff appears to argue satisfaction of the first  
9 factor necessarily satisfies the remaining three requirements. (Mem. in Supp. Prelim. Inj., pp.5:14-6:3.)  
10 The Supreme Court’s decision in Winter flatly contradicts her argument – she must make a showing on  
11 all four prongs. Alliance for Wild Rockies v. Cottrell, – F.3d –, 2010 WL 3665149 (9<sup>th</sup> Cir. 2010), *as*  
12 *amended*. “A preliminary injunction is an extraordinary remedy never to be awarded as of right.”  
13 Winter, 129 S. Ct. at 376. Plaintiff has not established any of the four requirements, and her request  
14 should be denied.

15 B. PLAINTIFF HAS FAILED TO ESTABLISH ALL FOUR REQUIREMENTS FOR A  
16 PRELIMINARY INJUNCTION AND THE COURT SHOULD DENY HER REQUEST

17 1. As A Matter of Law, Plaintiff Will Not Succeed On The Merits.

18 a. The Administrative Procedure Act Is The Vehicle By Which Plaintiff’s  
Claim Must Be Evaluated

19 Plaintiff cites to 28 U.S.C. § 1331 as the basis for the Court’s subject matter jurisdiction.  
20 (Compl. ¶ 4.) The section grants the Court original jurisdiction over civil actions arising under the  
21 Constitution, but it does not waive sovereign immunity. California v. Arizona, 440 U.S. 59, 61-62  
22 (1979) (“It is well-settled that the United States must give its consent to be sued even when [a party]  
23 invokes the Court’s original jurisdiction[.]”); United States v. Park Place Assoc., 563 F.3d 907, 924 (9<sup>th</sup>  
24 Cir. 2009) (28 U.S.C. § 1331 grants district courts original jurisdiction arising under the Constitution,  
25 but it does not waive sovereign immunity). Plaintiff is “barred by federal sovereign immunity from  
26 suing the United States in the absence of an express waiver of this immunity by Congress.” Block v.  
27 North Dakota ex rel. Bd. of Univ. and Sch. Lands, 461 U.S. 273, 280 (1983). “As a sovereign, the  
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1 United States “is immune from suit save as it consents to be sued.” Henderson v. United States, 517  
2 U.S. 654, 673 (1996) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Here, the only  
3 statute under which Plaintiff can proceed to pursue her constitutional claim for injunctive relief is the  
4 Administrative Procedure Act (“APA”), 5 U.S.C. § 702. See Bowen v. Massachusetts, 487 U.S. 879,  
5 891-92 (1988); Hill v. United States, 571 F.2d 1098, 1102 (9<sup>th</sup> Cir. 1978) (APA “is cast as a blanket  
6 waiver of sovereign immunity as to a broad category of actions against the government”).

7 b. The Acting Commanding General’s Decision Was Well-Founded In Fact  
8 And Law

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10 Under the APA, the Acting Commanding General’s decision to bar Plaintiff from portions of  
11 the Law Center can be set aside only if the Court finds his decision is arbitrary and capricious. 5 U.S.C.  
12 § 706(2)(A); Carpenter v. Mineta, 432 F.3d 1029, 1032 (9<sup>th</sup> Cir. 2005). Whether his decision violates  
13 Plaintiff’s First Amendment rights, if any, is subject to de novo review and should be set aside if  
14 contrary to the Constitution. 5 U.S.C. § 706(2)(B); Carpenter, 432 F.3d at 1032. His decision is  
15 eminently reasonable and falls well within the bounds of the First Amendment.

16 One of the purposes of the Constitution is to “provide for the common defense.” Greer, 424 U.S.  
17 at 837 (quoting U.S. Const., Preamble, citing U.S. Const., Art. I, s 8, Art. II, s 2). The control of access  
18 to a military base is clearly within the constitutional powers granted to Congress and delegated to the  
19 Secretary of the Navy. Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961). “[T]his Court over  
20 the years has on countless occasions recognized the special constitutional function of the military in our  
21 national life, a function both explicit and indispensable.” Greer, 424 U.S. at 837. The business of a  
22 military installation like MCRD San Diego is to train Marines. Id. at 838. “A necessary concomitant  
23 of the basic function of a military installation has been ‘the historically unquestioned power of (its)  
24 commanding officer summarily to exclude civilians from the area of his command.’” Id. (quoting  
25 Cafeteria Workers, 367 U.S. at 893). As far back as 1857, a military commanding officer can exclude  
26 at will an individual whenever, in the commanding officer’s opinion, the interests of the base requires  
27 it. Cafeteria Workers, 367 U.S. at 893. Commanding officers of military installations have

1 “unquestioned authority” to exclude a civilian from any area onboard. Id. at 892; see also id. at 896 (in  
2 its military capacity, the federal government “has traditionally exercised unfettered control.”) The  
3 military’s strong interest trumps any First Amendment claim Plaintiff may assert. Albertini, 472 U.S.  
4 at 686-87 (exclusion of plaintiff from military base did not violate the First Amendment; Greer, 424 U.S.  
5 at 838; United States v. Walsh, 770 F.2d 1490, 1492 (9<sup>th</sup> Cir. 1985) (plaintiff did not have a First  
6 Amendment right to demonstrate on military base against cruise missiles); United States v. Douglass,  
7 579 F.2d 545, 549 (9<sup>th</sup> Cir. 1978) (plaintiff entered military property to use public telephone to call  
8 attorneys and press about protest, and was arrested; he enjoyed no First Amendment immunity from the  
9 military’s decision to debar him from base).

10 In Cafeteria Workers, 367 U.S. at 887, the plaintiff was a short-order cook at a cafeteria located  
11 at a military installation then referred to as “the Naval Gun Factory.” Identification badges were issued  
12 to those authorized to enter the base. On November 15, 1956, the plaintiff was required to turn in her  
13 identification badge and was not allowed to enter the base because a Lieutenant Commander determined  
14 she no longer met the installation’s security requirements. Id. at 888. The Admiral onboard  
15 subsequently approved the Lieutenant Commander’s decision. The plaintiff filed suit in district court,  
16 claiming the Admiral’s decision violated her due process rights under the Fifth Amendment. After  
17 reviewing the historical underpinnings of a military’s right to control access to its installations, the  
18 Supreme Court held “there can remain no serious doubt” of the Admiral’s authority to exclude the  
19 plaintiff from the base. Id. at 893-94.

20 The Supreme Court held the plaintiff’s due process rights under the Fifth Amendment were not  
21 violated, even though she had not received notice and a hearing. To determine what type of procedures  
22 due process required under those circumstances, the Supreme Court began with a determination of the  
23 precise nature of the government function involved and of the private interest affected by the  
24 governmental action. Id. at 895. The Court found the government function involved was as proprietor,  
25 to manage the internal operation of an important federal military establishment. Id. at 896. In that  
26 proprietary military capacity, according to the Court, the federal government “has traditionally exercised  
27 unfettered control.” Id. The private interest affected, according to the Court, was the denial of a

1 privilege – the opportunity to work at one isolated and specific military installation. The Supreme Court  
2 held the federal government’s dispatch of its own internal affairs so vastly outweighed the plaintiff’s  
3 interest in keeping her job that she could be summarily discharged.

4 So long as the Admiral’s decision was rational, according to the Supreme Court, the plaintiff’s  
5 due process rights had not been violated. The plaintiff could not constitutionally have been excluded  
6 from the installation “if the announced grounds for her exclusion had been patently arbitrary or  
7 discriminatory – that she could not have been kept out because she was a Democrat or a Methodist.”  
8 Id. at 898; see also Albertini (commanding officer of a military base has broad discretion to exclude  
9 civilians from a military base which cannot be exercised in a manner that is “patently arbitrary or  
10 discriminatory”).<sup>3/</sup> The Supreme Court held the Admiral’s decision was rational.

11 In Greer, 424 U.S. at 832, political candidates running for public office asked the commanding  
12 officer for permission to enter Fort Dix, a military installation in New Jersey, for the purpose of  
13 distributing political leaflets and holding political meetings with service personnel. The commanding  
14 officer denied their request. The political candidates filed suit, arguing the commanding officer’s  
15 decision, and the military regulations upon which he relied, violated the First and Fifth Amendments.  
16 The district court granted the plaintiffs’ request for a preliminary injunction, prohibiting the military  
17 authorities from interfering with political speeches and flyers in the areas of Fort Dix open to the general  
18 public. Id. at 834. The Court of Appeals affirmed. The Supreme Court reversed.

19 The Court found the military installation was a private forum, not a public forum; it was the  
20 business of all military installations like Fort Dix to train service members, not provide a public forum.  
21 Id. at 835-37. On countless occasions, the Court has recognized the “special constitutional function of  
22 the military,” the business of which was to fight or be ready to fight wars. The Court stated the  
23 military’s decisions about civilian access was “historically unquestioned power.” Id. Given the  
24 government’s strong interests in a private forum, the Supreme Court held, the plaintiffs “had no  
25 generalized constitutional right to make political speeches or distribute leaflets at Fort Dix. Id. at 838.

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27 <sup>3/</sup> In Albertini, the plaintiff was convicted for violating 18 U.S.C. § 1382, which makes it  
28 unlawful to reenter a military base after having been barred by the commanding officer.

1 Here, the Acting Commanding General's decision is more narrow than the decisions at issue in  
2 Cafeteria Worker, Greer and Albertini, all of which consistently recognize the military's unfettered  
3 control over its installations. MCRD San Diego is a nonpublic forum built for the purpose of enabling  
4 the military to provide for the common defense of the nation. The military's strong interest far  
5 outweighs Plaintiff's private interests. Her interest at issue is not access to the base or the courtrooms  
6 – she is allowed access to those areas. The military's strong interest in protecting the security of its base  
7 far outweighs Plaintiff's purported private interest to freely roam the Law Center whenever she wishes.  
8 As in Cafeteria Worker and Greer, she can be summarily denied access to the area and has no  
9 constitutional right of access.

10 Moreover, the Acting Commanding General's decision is based on ensuring the security of the  
11 base. He is not barring Plaintiff from portions of the Law Center because she is a Democrat or a  
12 Methodist. He is barring her because she is the subject of one or more criminal investigations involving  
13 her truthfulness and credibility. The allegations against Plaintiff involve witness tampering, obstruction  
14 of justice involving improper communications with civilian witnesses at MCRD San Diego, and  
15 fraudulent misrepresentation of her credentialing authority to gain access to the NCIS field office at  
16 MCAS Miramar. All of these acts are connected to military investigations, the files of which are in the  
17 Law Center. The Acting Commanding General's decision is not arbitrary and capricious.

18 2. Plaintiff Has Not Established She Is Likely To Suffer Irreparable Harm In The  
19 Absence Of Preliminary Relief

20 Plaintiff has made no attempt to establish that she is likely to suffer irreparable harm in the  
21 absence of a preliminary injunction. (Mem. in Supp. of Mot. for Prelim. Inj., p.5:14-6:3.) Although she  
22 claims that “Lt. Col. Sullivan’s order impairs her ability to meet and confer with defense counsel,  
23 prevents her from attending any courtroom proceedings or testifying on behalf of her clients’ cases,”  
24 (id. p.5:12-14), the attached declaration from Lt. Col. Sullivan makes clear that is not the case. Plaintiff  
25 can continue to meet and confer with defense counsel at any location off the base, or even any location  
26 on the base, except for the Law Center. Likewise, Plaintiff is free to attend any courtroom proceeding  
27 where defense counsel requests her presence or her testimony is needed. Thus, this is not a case  
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1 involving “sweeping closure of the entire proceeding to the public and press.” ABC, Inc. v. Powell, 47  
2 M.J. 363, 366 (C.A.A.F. 1997). Rather, this is a limited restriction to protect the security of the base  
3 from a civilian who is currently under criminal investigation, and Plaintiff fails to show how this limited  
4 restriction – which still allows her to access court proceedings whenever her presence or testimony is  
5 requested – would cause her irreparable harm. Her motion should be dismissed on this basis alone.

6 3. The Balance Of Equity Tips in Favor Of The United States, And Denial Of Injunctive  
7 Relief Is In The Public Interest

8 The balance of equities tips sharply in favor of the United States. The military has a strong  
9 interest in controlling its military installations, including civilian access to the base. (See Section  
10 (III(B)(1)(b).) Here, the Acting Commanding General has a particularized interest in protecting the  
11 security of the Law Center because of the nature of the confidential files located therein. Aside from  
12 the courtrooms, Plaintiff has not explained why she needs access to the remaining areas. She can still  
13 meet with defense counsel and clients, just not at the Law Center, and the ban continues only until  
14 completion of the criminal investigations. If the injunction is granted and confidential files are  
15 compromised, the resulting harm would be irreparable.

16 In addition, the public interest favors deference to the military. “In exercising their sound  
17 discretion, courts of equity should pay particular regard for the public consequences in employing the  
18 extraordinary remedy of injunction.” Winter, 129 S. Ct. at 376-77. Decisions requiring professional  
19 military judgments must be constantly made during the daily operation of a military installation such  
20 as MCRD San Diego. The Court is not confronted with circumstances warranting an immediate reversal  
21 of a decision made by the command of MCRD San Diego, about an issue pertaining to MCRD  
22 San Diego.

23 IV.

24 CONCLUSION

25 For the reasons set forth above, the United States respectfully requests the Court to deny  
26 Plaintiff’s motion for a preliminary injunction for failure to establish the four requirements of a  
27 preliminary injunction.

1 DATED: October 18, 2010

Respectfully submitted,

2 LAURA E. DUFFY  
United States Attorney

3 s/ Beth A. Clukey

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5 Assistant United States Attorney  
6 Attorneys for Defendants  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CAROLYN MARTIN, )  
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 Plaintiff, )  
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 v. )  
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 NAVAL CRIMINAL INVESTIGATIVE )  
 SERVICE (“NCIS”); MARK D. CLOOKIE, )  
 NCIS DIRECTOR; WADE JACOBSON, )  
 NCIS ACTING SPECIAL AGENT IN )  
 CHARGE, MARINE CORPS WEST FIELD )  
 OFFICE; SEAN SULLIVAN, STAFF )  
 JUDGE ADVOCATE, MARINE CORPS )  
 RECRUIT DEPOT SAN DIEGO; GERALD )  
 “JERRY” MARTIN, NCIS SPECIAL )  
 AGENT; RAY MABUS, SECRETARY OF )  
 THE NAVY; JOHN DOES 1-7, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. 10-cv-01879-WQH (AJB)

**CERTIFICATE OF SERVICE BY EMAIL**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893. I am not a party to the above-entitled action. I have caused service of:

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION** (dated 10/18/10)

to the following individuals, by email:

John David Blair-Loy  
ACLU Foundation of San Diego and Imperial  
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2010.

s/ Beth A. Clukey  
BETH A. CLUKEY