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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*, Plaintiffs, vs. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Civil Action No. C 09-0037 CW Noticed Motion Date and Time: October 29, 2009 2:00 p.m. DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

PLEASE TAKE NOTICE THAT on October 29, 2009, at 2:00 p.m., before the Honorable Claudia Wilken, Courtroom No. 2, 4th floor, 1301 Clay Street, Oakland, California, 94612, or as soon thereafter as counsel may be heard by the Court, Defendants, by and through their attorneys, will and hereby do move to dismiss the First Amended Complaint pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure.

Defendants seek dismissal of this action in its entirety. Defendants' Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Kimberly

J. Albers, Paul Weiss, Ena Lima and Clyde Bennett and attachments thereto, the pleadings on file in this matter, and on such oral argument as the Court may permit.

Dated: August 14, 2009

Respectfully submitted,

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GENERAL ORDER 45 ATTESTATION

I, Caroline Lewis Wolverton, am the ECF User filing this Motion to Dismiss. In compliance with General Order 45, X.B, I hereby attest that Kimberly J. Albers, Paul Weiss, Ena Lima and Clyde Bennett each have concurred in the filing of his/her Declaration.

Dated: August 14, 2009

/s/ Caroline Lewis Wolverton
Caroline Lewis Wolverton
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INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

Plaintiffs Vietnam Veterans of America ("VVA"), Swords to Plowshares: Veterans Rights Organization ("Swords to Plowshares") and six U.S. Army veterans bring claims stemming from chemical testing by the Army and the Central Intelligence Agency ("CIA") during the Cold War era. Plaintiffs style their First Amended Complaint as a class action.

The Amended Complaint alleges that the individual Plaintiffs and other Army service members were injured when they participated in tests at Edgewood Arsenal, a U.S. Army research facility in Maryland, that administered or exposed them to chemical agents. Bringing their claims under the Declaratory Judgment Act ("DJA") and the Administrative Procedure Act ("APA"), Plaintiffs assert violations of the Constitution, executive and military directives, and international law. They seek declaratory and injunctive relief requiring Defendants to notify them and all military test participants of the details of the tests and of associated health risks; to search for and provide all participants with all available documentation concerning the tests; to provide all participants with medical examinations and care which Plaintiffs allege that they and other test participants were promised in return for undergoing the tests. Plaintiffs further request a declaration that consent forms that testing participants signed are invalid and that the participants are released from "secrecy oaths" related to the testing. They also seek a declaration that the "*Feres* doctrine" – the Supreme Court's interpretation of the Federal Torts Claims Act ("FTCA") to bar tort suits against the government for injuries arising out of or incident to military service, first articulated in *Feres v. United States*, 340 U.S. 135 (1950) – is unconstitutional. Plaintiffs do not, however, assert a claim under the FTCA or seek money damages.

The United States has neither denied that it conducted chemical testing at Edgewood Arsenal and other locations nor ignored the consequences of the tests. Rather, the tests have been and continue to be the focus of substantial attention by both Congress and the Executive Branch. Congress, the Department of Defense ("DoD") and the Department of Veterans Affairs ("VA") have been actively investigating the tests — which ended more than 30 years ago — and considering, developing and implementing means of providing assistance to the veterans affected.

Plaintiffs' claims are not properly before the Court because they do not fall within its Article III subject matter jurisdiction. First, they are barred by the United States' sovereign immunity. There is no waiver of sovereign immunity applicable to Plaintiffs' claims that the government must provide notification and medical care and produce documents and other information to all test participants; there is no final agency action, as is required by the APA because the government's notification efforts are ongoing. Similarly, there is no final agency action applicable to their claim that the *Feres* doctrine is invalid. Separately, all of Plaintiffs' claims are time-barred under the applicable statute of limitations, 28 U.S.C. § 2401(a). The claims accrued immediately or shortly after the alleged testing participation, and at least four of the individual Plaintiffs filed claims with the VA based on alleged injury from Edgewood tests more than six years before this action was filed. Second, Article III's case-or-controversy requirement bars those of Plaintiffs' claims that are no longer redressable given that the testing at Edgewood ended long ago. Representational standing is lacking vis-a-vis Plaintiff Swords to Plowshares and to the extent that the organizational Plaintiffs seek relief on behalf of non-members. And Article III precludes Plaintiffs' challenge to the *Feres* doctrine as it seeks an improper advisory opinion.

Even if there were subject matter jurisdiction over Plaintiffs' claims, in recognition of Congress' and the Executive's supervisory authority over the military the Court should decline to exercise jurisdiction based on its discretion under the DJA. Especially in light of the amount of time that has passed since the tests ended, those Branches are better positioned than the courts to investigate and address the testing that occurred at Edgewood Arsenal.

In addition, the Court should dismiss for failure to state a claim upon which relief can be granted Plaintiffs' requests for declaratory judgment in the form of an order that the government produce documents and other information about the tests, a declaration that it must provide medical care, and a declaration that the *Feres* doctrine is unconstitutional. Plaintiffs have no constitutional right to government information, and the Freedom of Information Act ("FOIA") and the Privacy Act – whose remedies Plaintiffs have not exhausted – preempt any common-law right. Medical care for military personnel is governed by statute and may not determined by contract. And this Court cannot

declare that the Supreme Court's interpretation of the FTCA in *Feres* and its progeny is unconstitutional.

Lastly, venue is not proper. The Amended Complaint does not allege that any Plaintiff properly before the Court resides in this district, and no Defendant resides here. Plaintiffs' claims stem from tests at Edgewood Arsenal, which is in Maryland, and there is no substantial part of the events giving rise to the claims that occurred in this district. Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1406(a) therefore provide another basis for dismissal. Transfer to another district would not further the interests of justice because Plaintiffs' claims are outside the subject matter jurisdiction of any Article III court and several fail to state a claim upon which any such court could grant relief.

Dismissal of this lawsuit will not deprive the individual Plaintiffs or other veterans, including those on whose behalf the organizational Plaintiffs advocate, of redress for any injuries that they suffered as a result of testing at Edgewood Arsenal. Congress and the Executive Branch continue to investigate, compile relevant documents and other information, and develop and implement appropriate responses and remedies for veterans who participated in the tests. These efforts include notifying veterans who participated in the testing that they are eligible for clinical examinations by VA physicians, encouraging them to apply for VA medical benefits if they are not already enrolled in the VA health care program, and providing them with information about filing disability benefits claims if they believe that they suffer from a chronic health problem. These provisions, rather than litigation, are proper avenues for relief.

FACTUAL BACKGROUND

According to the Amended Complaint, the individual Plaintiffs and other Army service members participated in chemical tests at Edgewood Arsenal in the late 1950s, the 1960s and the early 1970s during their tours of service in the Army. The tests involved administration of and exposure to drugs and chemical agents such as LSD and Benzilate (both hallucinogens). The Amended Complaint asserts that the individual Plaintiffs and other Army test participants were required to sign consent forms and take "secrecy oaths" under which they promised not to reveal any information about the tests. According to Plaintiffs, test participants were promised medical care

and military medals or commendations. Plaintiffs allege debilitating injuries — physical and emotional — as a result of the tests. Four of the individual Plaintiffs have been found disabled by the VA. (Am. Compl. ¶ 38 (Bruce Price at a disability rating of 100%) ¶ 57 (Frank Rochelle at 80%), ¶ 78 (David Dufrane at 60%), and ¶ 84 (Wray Forrest at 100%).)

Tests on Army service members at Edgewood Arsenal ended by 1975.[1] As early as 1975, Congress began investigating chemical testing by the government, including under the CIA's MKULTRA project referenced in the Amended Complaint.[2] More recently, Congress, DoD and the VA have focused investigative efforts on the testing at Edgewood Arsenal and elsewhere.[3] A great deal of information about the tests is available publicly.[4]

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[1] *See*, *e.g.*, 1993 GAO Report to Chairman, S. Comm. on Veterans' Affairs, "Veterans Disability: Information from the Military May Help VA Assess Claims Related to Secret Tests," at 1 (Feb. 1993), available at **http://archive.gao.gov/d37t11/148642.pdf** (last accessed Aug. 14, 2009) (cited in Am. Compl. ¶ 160).

[2] *See* Project MKULTRA, the CIA's Program of Research in Behavioral Modification, Joint Hr'g Before the S. Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Comm. on Human Resources, 95th Cong. (Aug. 3, 1977) (cited in Am. Compl. ¶ 11).

[3] *See*, *e.g.*, Military Operations Aspects of SHAD and Project 112, Hr'g Before Subcomm. on Health, H. Comm. on Veterans' Affairs, 107th Cong. (2002), available at http://fhp.osd.mil/CBexposures/pdfs/oct9h02.pdf; GAO Report to Congressional Requesters, "Chemical and Biological Defense, DoD and VA Need to Improve Efforts to Identify and Notify Individually Potentially Exposed During Chemical and Biological Tests" (Feb. 2008), available at **http://www.gao.gov/new.items/d08366.pdf**; GAO, "Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide Information on Tests and Potentially Exposed Personnel," GAO-04-410 (Washington, D.C.: May 14, 2004), available at www.gao.gov/new.items/d04410.pdf; DoD, 2003 Report to Congress, Disclosure of Information on Project 112 to the Department of Veterans Affairs, available at http://armedservices.house.gov/comdocs/reports/2003exereports/03-08-12disclosure.pdf; Department of Veterans Affairs, Chemical and Biological Warfare Testing (Oct. 16, 2008), available at **www.vba.va.gov/VBA/benefits/factsheets/misc/chembio.doc**; Department of Veterans Affairs, Chemical Warfare Agent Experiments Among U.S. Service Members (Washington, D.C.: Updated Aug. 2006), available at www1.va.gov/environagents/docs/Revised_USH_IL_Attachment_Military_Human_Subjects_Experiments.pdf. (All websites last accessed Aug. 14, 2009).

[4] *See*, *e.g.*, Force Health Protection and Readiness, Chemical-Biological Warfare Exposures, **http://fhp.osd.mil/CBexposures** (cited in Am. Compl. ¶ 13 and last accessed Aug. 14, 2009) (information about tests, links to GAO and other reports, Institute of Medicine reports, and DoD briefings and reports, and FAQs) & sources cited at n.3, *supra*.

In 2002, Congress directed DoD to develop "a comprehensive plan for the review, declassification, and submittal to the [VA] of all records and information of [DoD] on Project 112 [of which the Edgewood Arsenal tests were part] that are relevant to the provision of benefits by the Secretary of Veterans Affairs to members of the Armed Forces who participated in that project." Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 709(a), 116 Stat. 2458 (codified at 10 U.S.C. § 1074 note). Congress specified that DoD must give the VA records that permit identification of service members who were or may have been exposed to chemical or biological agents, and required GAO and DoD to report to Congress on the plan and its implementation. *Id.* § 709(b), (d)-(e).

Consistent with Congress' direction, the VA sent letters to Edgewood test participants in 2006, as the Amended Complaint recognizes. (Am. Compl. ¶ 151.) In addition to informing participants that notwithstanding any nondisclosure obligations they can provide details about their tests to health care providers, the letters offered clinical examinations by VA physicians, encouraged the veterans to apply for VA health care benefits if they were not already enrolled in the VA health care program, and provided information about filing a claim for VA disability benefits if they believed that they suffer from chronic health problems. While Plaintiffs allege that not all participants have been notified, they recognize that DoD has publicly stated that it is constructing a registry of test participants with completion expected in 2011. (*Id.* ¶ 13.)

Plaintiffs filed this action on January 7, 2009. On July 24, 2009, after Defendants moved to dismiss, Plaintiffs amended their complaint. Defendants again move for dismissal.

ARGUMENT

Even as amended, Plaintiffs' claims fall outside the Court's subject matter jurisdiction, and several fail to state a claim upon which relief can be granted, and venue is not proper. The Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6).

I. Subject Matter Jurisdiction is Lacking.

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Steel Co. v. Citizens for a Better Envt., 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W. v. Conf'd Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

When presented with a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the Court accepts the well-pled allegations of the complaint as true except where the moving party presents factual evidence in support of its argument, in which case the opposing party must come forward with evidence to satisfy its burden of establishing subject matter jurisdiction. *E.g.*, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, subject matter jurisdiction is lacking because Plaintiffs' claims are barred by sovereign immunity and, in part, are nonjusticiable for failure to meet Article III's case-or-controversy requirement. Even if the Court had jurisdiction, it should decline to exercise it in recognition of Congress' and the Executive's supervisory authority over the military.

A. The United States' Sovereign Immunity Precludes Plaintiffs' Claims.

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 [1941]); *accord, e.g.*, *Gomez-Perez v. Potter*, _ U.S. _, 128 S. Ct. 1931, 1942 (2008) ("'[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text' and 'will be strictly construed, in terms of its scope, in favor of the sovereign'") (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996) (alteration in original)). Only Congress can waive the United States' sovereign immunity, and any waiver, "to be effective, must be 'unequivocally expressed.'" *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting cases)). Waivers of sovereign immunity "are not generally to be 'liberally construed.'" *Id.* at 34. Absent a clear waiver by Congress, courts are without jurisdiction to entertain a suit against the United States. *Mitchell*, 445 U.S. at 538. A plaintiff suing the United States bears the burden of showing an unequivocal waiver of sovereign immunity. *E.g.*, *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (citing *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987)).

1. The Administrative Procedure Act Does Not Authorize Plaintiffs' Claims for Notification, Production of Information and Medical Care, or their Challenge to the *Feres* Doctrine.

Plaintiffs appear to rely on the APA as the waiver of sovereign immunity necessary for their claims.[5] (*See* Am. Compl. ¶ 20.) Although the APA waives sovereign immunity for certain suits seeking judicial review of final government action, 5 U.S.C. § 702, its waiver of sovereign immunity, like other such waivers, must be "strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

The APA expressly excludes from the scope of its waiver claims for relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The scope of the APA's waiver is also limited by its provision that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review," 5 U.S.C. § 704. *E.g.*, *Lujan v. Defenders of Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *Gallo Cattle Co. v. Dep't of Agr.*, 159 F.3d 1194, 1198 (9th Cir. 1998); *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1058 (N.D. Cal. 2008). These provisions preclude an APA waiver of sovereign immunity for Plaintiffs' claims for medical examinations and care, notification and documents, and their claim that the *Feres* doctrine is unconstitutional.

a. Plaintiffs base their claim for declaratory and injunctive relief in the form of medical examinations and care on their allegation that the government promised it to testing participants in exchange for their undergoing testing. (*E.g.*, Am. Compl. ¶ 2.) This claim is thus contractual in nature and seek specific performance. The Tucker Act, 28 U.S.C. §§ 1346(a), 1491, governs contract claims against the United States and "'impliedly forbids declaratory and injunctive relief'" on such claims. *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998) (quoting

[5] Neither 28 U.S.C. § 1331 nor the DJA waives sovereign immunity. *E.g.*, *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009) (28 U.S.C. § 1331); *Muirhead v. Mecham*, 427 F.3d 14, 17 n.1 (1st Cir. 2005) (DJA).

North Side Lumber Co. v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985)); *accord, e.g., United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 931-32 (9th Cir. 2009) (*citing Tucson Airport Auth. & North Side Lumber Co.*); *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc). Because Plaintiffs' claim for declaratory and injunctive relief in the form of medical examinations and care is based on an alleged contractual obligation of the United States, it is excluded from the APA's waiver of sovereign immunity. *See, e.g.*, *Tucson Airport Auth.*, 136 F.3d at 646.

b. In support of their request for a declaratory ruling that Defendants must notify test participants of the details of the tests, search for and produce documents concerning the tests, and that the *Feres* doctrine is invalid, Plaintiffs reference no statute that makes their claims reviewable, nor do they challenge any final agency action. (*See* Am. Compl. ¶¶ 174-175, 178, 180, 182-189.) The claims therefore are not reviewable under the APA.

A "final agency action" is an action that "mark[s] the consummation of the agency's decisionmaking process" and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted). With respect to their claim for notification to all test participants, as set forth above, Plaintiffs recognize that in addition to the notification efforts that the government already has undertaken, DoD has announced that it is in the process of constructing a registry of the veterans who participated in testing at Edgewood Arsenal that will allow for any additional notifications that are needed. That DoD's construction of its database has not been completed necessarily precludes the possibility of final agency action. Accordingly, Plaintiffs have alleged no final agency action with respect to the claim for notification, and it is barred by sovereign immunity. *See, e.g., Lujan*, 497 U.S. at 882; *Gallo Cattle Co.*, 159 F.3d at 1198.

Regarding Plaintiffs' request that the government be ordered to search for and produce documents, the FOIA and the Privacy Act establish procedures through which individuals may request such a search and production. Those Acts require exhaustion of their procedures as a prerequisite for judicial review. *See*, *e.g.*, *Davis v. Astrue*, 513 F. Supp. 2d 1137, 1148 (N.D. Cal. 2007) (citing *United States v. Steele*, 799 F.2d 461, 465 (9th Cir. 1986)) (FOIA); *Haase v. Sessions*,

893 F.2d 370, 373 (D.C. Cir. 1990) (Privacy Act); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377-78 (9th Cir. 1986) (Privacy Act). Outside of those statutory schemes, there is no entitlement to access government documents. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (addressing FOIA) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14-15 (1978)). Plaintiffs do not seek review of an agency's action on a request under the FOIA or the Privacy Act, and hence they allege no final agency action. Even if they had pursued FOIA or Privacy Act requests, those statutes provide adequate remedies in court, 5 U.S.C. § 552(a)(4)(B) (FOIA); 5 U.S.C. § 552a(g)(3)(A) (Privacy Act), thereby precluding review under the APA. *See, e.g., Lujan*, 497 U.S. at 882; *Gallo Cattle Co.*, 159 F.3d at 1198.[6]

With respect to their claim for a declaratory ruling that the *Feres* doctrine is unconstitutional, Plaintiffs challenge no agency determination of the doctrine's constitutionality. Accordingly, final agency action is likewise absent for that claim, and it too is barred by sovereign immunity.

2. All of Plaintiffs' Claims are Time-Barred.

Congress established a six-year statute of limitations for non-tort civil suits against the United States. 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978,[7] every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."). Like all statutes of limitations, 28 U.S.C. § 2401(a) serves in part to protect the United States and the courts "from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Compliance with the statute — which reflects Congress' decision to waive sovereign immunity only if suit is brought within a particular time period — is a condition of federal court jurisdiction and must be strictly observed. *See, e.g.*, *Kendall v. Army Bd. for Correction*

[6] It is worth noting that the government has made a large amount of information about the testing available publicly, as described above.

[7] The Contract Disputes Act of 1978 is not applicable here. *See* 41 U.S.C. § 602.

of Mil. Records, 996 F.2d 362, 366 (D.C. Cir. 1993) (citing *Soriano v. United States*, 352 U.S. 270 (1957)).[8]

"Under federal law, 'a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *DirectTV, Inc. v. Webb*, 545 F.3d 837, 852 (9th Cir. 2008) (quoting *Stanley v. Trustees of Cal. State U.*, 433 F.3d 1129, 1136 (9th Cir. 2006)); *see also Kubrick*, 444 U.S. at 122 (a statute of limitations begins to run when the plaintiff possesses "the critical facts that he has been hurt and who has inflicted the injury"). Consistent with that standard, other lawsuits concerning testing at Edgewood Arsenal and the CIA's MKULTRA project have been dismissed on statute of limitations grounds, and those cases are instructive here.

In *Bishop v. United States*, 574 F. Supp. 66 (D.D.C. 1983), a U.S. Army veteran who alleged that he was injured when he participated in drug experiments at Edgewood Arsenal brought claims under the Fifth and other constitutional amendments and the FTCA. The government argued that the claims were untimely. *Id.* at 66. The court agreed and dismissed the case, explaining:

> Plaintiff knew that he was experiencing problems since the test and that the symptoms he suffered were similar to those during and after the test. He also knew that he was involved in an experiment in which a drug was used. It appears that the only thing he did not know was that he had been given a derivative of [Quinuclidinyl Benzilate, a chemical hallucinogen]. Based on the undisputed facts, it is clear that since 1963, the plaintiff knew that he had been hurt and who inflicted the injury . . . As in *Kubrick*, the only thing really unknown to the plaintiff was the name of the drug that he had been administered and perhaps his legal rights. The Court concludes that his claims against the defendants are therefore barred as being untimely.

Id. at 67 (citing *Kubrick*, 444 U.S. at 122).

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[8] We recognize that the Ninth Circuit held in *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), that 28 U.S.C. § 2401(a) is not jurisdictional. However, the recent Supreme Court decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), that 28 U.S.C. § 2501, which uses language very similar to § 2401(a), is jurisdictional casts significant doubt on the continued validity of the *Cedars-Sinai* holding. The Ninth Circuit recently found *John R. Sand & Gravel Co.* to be "instructive" in determining whether 28 U.S.C. § 2401(b)'s limitations period is jurisdictional while recognizing that the question of whether the *Cedar-Sinai*'s holding regarding 28 U.S.C. § 2401(a) can survive *John R. Sand & Gravel* was not presented in the case before it. *Marley v. United States*, 567 F.3d 1030, 1035 & n.3 (9th Cir. 2009). We respectfully submit that in light of *John R. Sand & Gravel Co.*, the limitations period of 28 U.S.C. § 2401(a) should be found to be jurisdictional.

In *Sweet v. United States*, 528 F. Supp. 1068 (D.S.D. 1981), an Army veteran who participated in testing of LSD at Edgewood Arsenal alleged injury as a result of the Army's failure to advise him that he had been given LSD and to provide him with medical care following the testing. The court concluded that the plaintiff's claims accrued when he believed that he had been injured and that the injury was linked to testing at Edgewood Arsenal. *Id.* at 1072. Because the plaintiff did not file suit within the limitations period that began running upon accrual his claims were time-barred despite a subsequent letter from the Army informing him that he may have been given LSD. *Id.* That letter, the court explained, "added nothing to the critical facts already in Sweet's possession concerning his injury and its alleged cause." *Id.*

Similarly in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit dismissed as untimely FTCA claims based on chemicals tests conducted under the CIA's MKULTRA project. The plaintiff, a non-veteran, claimed that he suffered physical and emotional injuries after the CIA surreptitiously gave him LSD. The court of appeals held that the plaintiff's claims accrued when he became aware of the basic facts of the claims, *viz.*, when he believed that he had been injured and that a CIA drug experiment was the cause. *Id.* at 121-22.

Here, the Amended Complaint alleges that the individual Plaintiffs knew of the injuries that they allege and linked them to participation in tests at Edgewood Arsenal either immediately or shortly after their tests ended. (*See* Am. Compl. ¶¶ 27-85.) In addition, at least four of the individual Plaintiffs filed claims with the VA in which they asserted injuries caused by testing at Edgewood Arsenal more than six years prior to the filing of the Amended Complaint. (*See* Ex. A (Decl. of Kimberly J. Albers, attaching Rochelle records showing claims beginning in 1973), Ex. B (Decl. of Paul Weiss, attaching Dufrane records showing claims beginning in 1997), Ex. C (Decl. of Ena Lima, attaching Muth records showing claims beginning in 1997), Ex. D (Decl. of Clyde Bennett, attaching Price records showing claim in 2001).)[9] As in *Bishop* and *Sweet*, that the individual Plaintiffs may

[9] In accordance with Civil L.R. 79-5, the individual Plaintiffs' records are submitted for filing under seal because they contain sensitive information that is covered by the Privacy Act. Defendants reserve the right to present evidence in support their statute of limitations arguments concerning Plaintiffs Meirow and Forrest in a future motion, if their claims continue (which Defendants submit

not have known what drugs they were given does not alter the key facts that they knew they had been injured and that they believed tests at Edgewood Arsenal were the cause. *See Bishop*, 547 F. Supp. at 67; *Sweet*, 528 F. Supp. at 1072. Plaintiffs also acknowledge that information about the tests has been publicly available for many years, including in testimony before Congress and reporting by the Government Accountability Office. (*E.g.*, Am. Compl. ¶ 160, citing 1994 congressional testimony on human experimentation and 1993 GAO report on veterans' disability and military information on "secret tests"). Consequently, even if the individual Plaintiffs did not know of their alleged injuries or the alleged cause prior to six years before the filing of this suit, they "ha[d] reason to know." *DirectTV, Inc.*, 545 F.3d at 852. Because the individual Plaintiffs' claims accrued more than six years before they filed suit, they are untimely under 28 U.S.C. § 2401(a).

With respect to the organizational Plaintiffs' claims, because information about the tests has been public for so long, the first and second claims of the Amended Complaint are also time-barred vis-a-vis the organizational Plaintiffs. Especially because they are veterans' advocacy organizations, they either "kn[ew] or ha[d] reason to know of the injury which is the basis of [their] action" well before six years prior to the filing of this suit. *DirectTV, Inc.*, 545 F.3d at 852. The third claim for relief, which challenges the *Feres* doctrine, is time-barred because the doctrine has been in existence for far more than six years prior to the filing of the Amended Complaint (or of the original Complaint if the amendment were to relate back, which it does not, *see* Fed. R. Civ. P. 15(c)). *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 686-88 (1987) (recognizing consistent application of *Feres* doctrine since *Feres* was decided in 1950).

B. Much of the First Amended Complaint is Not Justiciable.

"The judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of . . . executive acts" but is limited by Article III of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically

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they should not for the reasons set forth herein).

associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Id.* Rather, Article III requires that federal courts exercise their jurisdiction only to decide actual cases and controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The DJA requires the same. *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). Absent an actual case or controversy, a court lacks jurisdiction. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In an effort to give meaning to Article III's case-or-controversy requirement, courts mandate that all cases be "justiciable." *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

Plaintiffs' claims that the testing and associated consent forms violated the Constitution, military and executive directives and international law are not justiciable because Plaintiffs lack standing to bring them. Plaintiff Swords to Plowshares does not satisfy the requirements for representational standing. Representational standing is also absent to the extent that the organizational Plaintiffs seek relief on behalf of non-members.

1. Plaintiffs Lack Standing for their Claims that the Testing and Consent Forms Violated the Constitution, Military and Executive Directives and International Law Because the Claims are Not Redressable.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. The doctrine of standing "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752. The "irreducible constitutional minimum of standing" requires satisfaction of each of three elements: (1) "an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of" such that the injury is "fairly traceable" to the defendant; and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted); *accord, e.g., Arakaki v. Lingle*, 477 F.3d 1048, 1059 (9th Cir. 2007). A plaintiff bears the burden of establishing standing to assert a claim. *Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (citing *Lujan*).

The testing that is the subject of the Amended Complaint ended more than 30 years ago. *See*, *e.g.*, 1993 GAO Report "Veterans Disability: Information from the Military May Help VA Assess

Claims Related to Secret Tests," at 1, available at **http://archive.gao.gov/d37t11/148642.pdf** (last accessed Aug. 14, 2009) (cited in Am. Compl. ¶ 160). A declaration now that the tests and associated consent forms violated Plaintiffs' rights under the Constitution, executive and military directives and international law could not redress any of the injuries that Plaintiffs allege. Because the tests are not ongoing, no injunctive relief on those claims is possible, and the claims are not redressable. Plaintiffs therefore lack standing to bring them.

2. Representational Standing is Absent vis-a-vis Swords to Plowshares and to the Extent that the Organizational Plaintiffs Seek Relief on Behalf of Non-Members.

The Supreme Court explained the requirements for representational standing in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000):

> An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Accord, *e.g.*, *Smith v. Pacific Prop. and Dvp. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). An association's "representational standing is contingent upon the standing of its members to bring suit." *Smith*, 358 F.3d at 1101. That standard is not met with respect to Plaintiff Swords to Plowshares. Nor is representational standing established to the extent that the organizational Plaintiffs seek declaratory and injunctive relief on behalf of individuals beyond their membership.

While the Amended Complaint alleges that members of VVA were testing participants, it does not allege that any member of Swords to Plowshares participated in the tests that are the subject of the first and second claims for relief. (*See* Am. Compl. ¶¶ 25-26.) Because Swords to Plowshares is not alleged to have any member who "would [] have standing to sue in [his] own right," *Friends of the Earth, Inc.*, 528 U.S. at 181, on those claims, it does not meet the criteria for representational standing for them. Swords to Plowshares therefore is not properly before the Court as a Plaintiff with respect to the first and second claims for relief.

Separately, neither organizational Plaintiff satisfies the requirements of representational standing insofar as it seeks relief on behalf of non-members who allegedly participated in chemical tests. While an organization may have standing to sue on behalf of its members, reliance on alleged

injuries to non-members does not satisfy the requirements for representational standing. *See Friends of the Earth*, 528 U.S. at 181; *Smith*, F.3d at 1101. To the extent that the organizational Plaintiffs seek relief on behalf of non-members, their claims should be dismissed for lack of standing.

3. The Organizational Plaintiffs' Challenge to the *Feres* Doctrine Does Not Satisfy Article III's Case or Controversy Requirement.

As referenced above, the Supreme Court's interpretation of the FTCA to bar tort suits against the government for injuries arising out of or incident to military service is known as the *Feres* doctrine. *E.g.*, *Johnson*, 481 U.S. at 686-88. The Amended Complaint asserts no claim under the FTCA. Its challenge to the constitutionality of the *Feres* doctrine in the third claim for relief is solely in the abstract. The claim seeks an improper advisory opinion concerning a defense to a tort claim that has not been asserted in this action. *See, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (rejecting claim for declaratory judgment as to validity of affirmative defense not asserted in habeas proceedings) (citing *Coffman v. Breeze Corp.*, 323 U.S. 316, 322-24 (1945)); *see also, e.g.*, *Citizens for Honesty and Integrity in Regional Planning v. Cty. of San Diego*, 399 F.3d 1067, 1068 (9th Cir. 2005) ("A declaratory judgment plaintiff may not 'carve[] out' of the potential controversy a single federal question whose answer will be declared by the federal courts ahead of time.") (quoting *Calderon*) (alteration in original). The third claim for relief therefore should be dismissed as nonjusticiable under Article III.

C. Pursuant to Its Discretion Under the Declaratory Judgment Act, the Court Should Decline Jurisdiction Over Plaintiffs' Claims.

In addition to the above-described reasons why the Court cannot exercise jurisdiction over Plaintiffs' claims, there is good reason why the Court should not. The constitutional assignment of authority over the military to the political branches of government, Congress' and the Executive Branch's active involvement in investigating and addressing government testing, the passage of time since the tests occurred, and the existence of administrative avenues for relief strongly counsel in favor of declining jurisdiction.

The DJA grants courts discretion on whether to exercise jurisdiction over claims brought pursuant to it. 28 U.S.C. § 2201(a) ("[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other

legal relations of any interested party seeking such declaration . . .") (emphasis added); *accord e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (recognizing discretionary nature of declaratory relief). The Supreme Court explained in *Wilton*:

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Wilton, 515 U.S. at 288. As set forth below, exercise of the Court's discretion under the DJA to not consider Plaintiffs' claims — even if they were properly before the Court, which Defendants maintain they are not — is warranted.

1. Article I of the Constitution authorizes Congress and the Executive to supervise the military. *United States v. Stanley*, 483 U.S. 669, 681-82 (1987) (citing U.S. Const., Art. I, § 8, cl. 14); *accord, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) ("The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court.") (describing cases). Consistent with that authority and as described above, Congress and DoD have been investigating the testing that is the subject of Plaintiffs' Amended Complaint, and considering, developing and implementing means of providing assistance to the veterans affected. As the Supreme Court recognized in *Stanley*, 483 U.S. at 681-683, constitutional separation of powers counsels strongly against insertion of the Judiciary into issues that at bottom are military matters.

Like this case, *Stanley* involved claims stemming from chemical testing at Edgewood Arsenal, including a constitutional claim based on "failure to warn, monitor or treat" the plaintiff following testing. *Stanley*, 483 U.S. at 672-73; *Stanley v. United States*, 574 F. Supp. 474, 476 (S.D. Fla. 1983) (stating that testing occurred at Edgewood Arsenal), *ultimately rev'd by Stanley*, 483 U.S. 669. The Supreme Court recognized that it was "confronted with an explicit constitutional authorization for *Congress* 'to make Rules for the Government and Regulation of the land and naval Forces,'" as well

as the "insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, navy, and militia upon the political branches." *Stanley*, 483 U.S. at 681-82 (quoting U.S. Const., Art. I, § 8, cl. 14) (emphasis in original). Finding that those constitutional provisions "counsel[ed] hesitation" before involving the Judiciary in review of the claims that stemmed from testing at Edgewood Arsenal, the Court refused to infer a judicial remedy of damages under *Bivens v. Six Unknown Named Agences of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for any injuries resulting from the tests. *Stanley*, 483 U.S. at 681-82. The Court did not "see any reason why [its] judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits," where damages claims are barred by the *Feres* doctrine. *Stanley*, 483 U.S. at 681. If anything, the FTCA's "explicit" and "unqualified" authorization for judicial involvement in tort claims against the government might have left the Court "freer to compromise military concerns" in confronting claims under that statute. *Id.* The Supreme Court found no difference in the degree of disruption to military affairs between the *Bivens* context and the FTCA context. *Id.* at 682. In both circumstances:

> [a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.

Id. at 682-83.

While Plaintiffs' claims do not sound in tort, the constitutional provisions that the Supreme Court found to "counsel hesitation" in *Stanley* are equally applicable to this case. The judicial inquiry that Plaintiffs seek would be the same that the Supreme Court rejected as unacceptably intrusive and disruptive to the military regime in *Stanley*. Both cases concern testing at Edgewood Arsenal, and both implicate military decisionmaking and relations between the military and the enlisted service members who were the testing subjects. Indeed, Plaintiffs have already indicated that they will seek to compel the testimony of military officers concerning details of the testing at Edgewood that the

Supreme Court stated in *Stanley* would be improper. (*See* Joint Case Management Statement ¶ 8.A.2 ("Plaintiffs anticipate that they will require a substantial expansion of the interrogatories permitted pursuant to Rule 33 and depositions permitted pursuant to Rule 30").) The Supreme Court's warning that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate," *Stanley*, 483 U.S. at 683, applies fully here. Further, because Plaintiffs pursue injunctive relief that would direct the Executive's actions in response to the testing where the government has already undertaken responsive action under Congress' oversight, Plaintiffs' claims seek to "draw the federal courts into conflict with the executive branch." *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

The political branches are better equipped than the courts to investigate what happened at Edgewood Arsenal and other test locations, to make factual conclusions, and to study, develop and implement appropriate remedies. Especially given the substantial passage of time since the tests occurred and consequent effect on availability of witnesses and documents, as well as the memories of those witnesses who can be found, the mechanisms of litigation and attendant strict evidentiary requirements are not suited to resolution of the issues presented.

Given these factors and especially Congress' and the Executive's ongoing investigation of the testing and development and implementation of remedies, exercise of the Court's discretion under the DJA not to consider the claims for declaratory relief presented here would be consistent with "considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288.

2. Separately with respect to Plaintiffs' claims for medical care, documents and other information, the existence of statutorily created administrative schemes specific to those concerns counsels strongly against the requested declaratory relief. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964) ("even though Rule 57 of the Federal Rules of Civil Procedure permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided"); *Public Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241 (1952) ("the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review"); 10B Wright, Miller & Kane,

Federal Practice and Procedure § 2758, at 537 (1998) ("Declaratory relief ordinarily [] should not be granted if a special statutory proceeding has been provided for the determination of particular questions") (citing, *inter alia*, *Katzenbach*).

The Veterans' Benefits Act establishes a program through which most veterans are eligible to receive medical care, and represents the vehicle that Congress provided for veterans to receive health care from the government. *See* 38 U.S.C. §§ 1701 *et seq.*; *see also* 38 C.F.R. pt. 17. Indeed, the letters that the VA mailed to Edgewood Arsenal test participants encouraged them to apply for VA health care benefits. The DJA should not be interpreted to supply an additional remedy. *See, e.g.*, *Public Serv. Comm'n of Utah*, 344 U.S. at 241; *see also Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673-74 (1977) (military compensation scheme provided by Veterans' Benefit Act "provides an upper limit of liability for the Government as to service-connected injuries").

The FOIA and the Privacy Act represent Congress' determination of the extent to which private individuals and entities are entitled to release of government records, and establish the administrative procedures that Congress deemed the appropriate channels for requests for release. *See* 5 U.S.C. §§ 552, 552a. There is no First Amendment right to access government information, and any common-law right is preempted by the FOIA and the Privacy Act. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 936-37 (addressing FOIA) (quoting *Houchins*, 438 U.S. at 14-15). Only once the statutorily prescribed procedures have been exhausted has Congress provided for judicial involvement. *See*, *e.g.*, *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986) (FOIA); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377-78 (9th Cir. 1986) (Privacy Act). An additional declaratory remedy for government documents is neither warranted nor appropriate. *See*, *e.g.*, *Edmonds Inst. v. Dep't of Interior*, 383 F. Supp. 2d 105, 111-12 (D.D.C. 2005) ("Until such time as [the plaintiff] is seeking the concrete remedy of agency action on its [FOIA] request, a declaratory judgment action is not the favored course.").

3. With respect to the third claim for relief, the lack of power in this Court to declare the Supreme Court's interpretation of the FTCA to be unconstitutional strongly counsels in favor of declining jurisdiction over Plaintiffs' challenge to the *Feres* doctrine.

II. Plaintiffs' Claims for Documents and Other Information and for Medical Care, and their Challenge to the *Feres* Doctrine Should be Dismissed for Failure to State a Claim upon which Relief can be Granted.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted if a plaintiff fails to plead enough facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009). With respect to Plaintiffs' claims for documents and other information, medical care, and their challenge to the constitutionality of the *Feres* doctrine, in addition to the jurisdictional defects of those claims described above, the claims fail under the Rule 12(b)(6) standard.

A. As described above, Plaintiffs ask that Defendants be ordered to provide them with "all available documents and evidence concerning their exposures and known [and suspected] health effects." (Am. Compl. ¶ 174; *accord id.* ¶ 180(a)-(b).) They do not rely on the FOIA or the Privacy Act; indeed, they could not as they have not exhausted administrative remedies under those statutes. As previously discussed, Plaintiffs have no constitutional right to government information, and the FOIA and the Privacy Act preempt any common-law right. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 934. Their claim for documents and other information therefore should be dismissed for failure to state a claim upon which relief can be granted.

B. Government-provided medical care for veterans is "governed exclusively by statute and therefore may not be granted by contract." *Schism v. United States*, 316 F.3d 1259, 1268 (Fed. Cir. 2002). Plaintiffs' claim that the government is contractually obligated to provide them and other test participants with medical care therefore fails to state a claim upon which relief can be granted.

C. In essence, the third claim for relief asks this Court to issue an opinion that the Supreme Court's interpretation of the FTCA through the *Feres* doctrine is unconstitutional. However, this Court cannot declare the Supreme Court's interpretation of law to be unconstitutional. *See, e.g.*, *Labash v. Dep't of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) ("[O]nly the United States Supreme Court can overrule or modify *Feres*."); *see also, e.g.*, *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (recognizing that doctrine is binding on lower courts). Consequently, it cannot grant relief in the form of an order that the *Feres* doctrine is unconstitutional as Plaintiffs' third claim for relief requests. The claim therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III. Venue is Not Proper.

Plaintiffs assert venue under 28 U.S.C. §§ 1391(e) and 1402(a). (Am. Compl. ¶ 21.) Neither statute, however, provides a basis for venue in this district.

While the Amended Complaint alleges that Swords to Plowshares resides in San Francisco, that Plaintiff is not properly before the Court because for the reasons set forth above. Because the Amended Complaint does not allege that any other Plaintiff is a resident of this district or that a substantial part of the events or omissions at issue occurred here, and because no Defendant resides in this district, venue is not proper. Because transfer would not be in the interests of justice, dismissal pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3) is appropriate.

A. Under 28 U.S.C. § 1391(e), venue is proper

> in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e).

None of the Defendants resides in this district. The named Defendant federal agencies and officials reside, for purposes of 28 U.S.C. § 1391(e), where they perform their official duties. *See* 14D Wright, Miller and Cooper, *Federal Practice and Procedure* § 3815, 371 (2007); *Lamont v. Haig*, 590 F.2d 1124, 1128 n.19 (D.D.C. 1978). Defendants CIA, Department of the Army and DoD reside in the Eastern District of Virginia. Defendants CIA Director Panetta, Defense Secretary Gates and Army Secretary Green, because they are sued in the official capacities, reside in the Eastern District of Virginia or the District of Columbia. Attorney General Holder, who is sued in his official capacity, resides in the District of Columbia. Venue for claims against the United States itself is governed by 28 U.S.C. § 1402, which is addressed in the next section. *See* 14D Wright, Miller and Cooper, § 3814 at 367; *Misko v. United States*, 77 F.R.D. 425, 429 n.7 (D.D.C. 1978).

Nor is venue proper under based on where a substantial part of the events or omissions giving rise to the claim occurred. The Amended Complaint focuses on testing at Edgewood Arsenal, which Plaintiffs recognize is in Maryland. (*See* Am. Compl. ¶ 98.)

Under these circumstances and because the Amended Complaint does not allege that any Plaintiff properly before the Court resides here, venue is not proper under section 1391(e).

B. Under 28 U.S.C. § 1402(a), in pertinent part, venue is proper

> (1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;
>
> (2) In the case of a civil action by a corporation . . . in the judicial district in which is located the principal place of business or principal office or agency of the corporation . . .

28 U.S.C. § 1402(a). As observed above, the Amended Complaint does not allege that any Plaintiff properly before the Court resides in this district, by virtue of principal place of business or otherwise.[10]

Under 28 U.S.C. § 1406(a), a court must dismiss a case that has been filed in the wrong district the unless interests of justice warrant transfer to a district where the case could have been brought. 28 U.S.C. § 1406(a); *accord, e.g.*, *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992). Even if this case were brought where venue is proper, for the reasons explained above, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Transfer therefore would not be in the interests of justice. Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1406(a) therefore provide additional grounds for dismissal.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3) and 12(b)(6).

DATED this August 14, 2009.

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[10] The Amended Complaint does not allege the location of VVA's principal place of business, principal office or principal agency, but its website indicates that it is Silver Spring, Maryland. The home page of the VVA website lists the organization's street address as "8605 Cameron Street, Silver Spring, MD 20910." Vietnam Veterans of America, **http://www.vva.org**. Its "Directions to VVA" page states: "The VVA National Headquarters is conveniently located in Silver Spring, Maryland." Vietnam Veterans of America/Directions to VVA, **http://www.vva.org/directions.html.** (VVA Website last accessed Aug. 14, 2009.)

Respectfully submitted,

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