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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: February 25, 2010 2:00 p.m. DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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

PLEASE TAKE NOTICE THAT on February 25, 2010, 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 Second Amended Complaint pursuant to Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Defendants seek dismissal of this action in its entirety. Defendants' Motion is based on this Notice, their 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: January 5, 2010

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, Clyde Bennett, Norris Jones, Rebecca Sawyer Smith and Paul Weiss have each concurred in the filing of their Declarations.

Dated: January 5, 2010

/s/ 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 during the Cold War era. Plaintiffs style their Second Amended Complaint as a class action on behalf of veterans who participated in the chemical testing. Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), or in the alternative, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Defendants recognize that at the December 3, 2009 hearing on their motion to dismiss the First Amended Complaint, the Court indicated that it did not view Defendants' arguments under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) in support of that motion as warranting dismissal, with the exception of Defendants' arguments concerning Plaintiffs' challenge to the *Feres* doctrine. However, because the allegations of this case so closely resemble those of *United States v. Stanley*, 483 U.S. 669 (1987), which the Supreme Court held were not appropriate for resolution by Article III courts, and because the allegations here also fail to establish subject matter jurisdiction for multiple reasons, we respectfully urge the Court to carefully examine whether jurisdiction can be properly exercised. "It is a fundamental principle that federal courts are courts of limited jurisdiction," *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), and "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears", *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Further, the United States' sovereign immunity protects the government from suit absent an unequivocal waiver, which a plaintiff bears the burden of showing. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). We respectfully submit that the allegations of the Second Amended Complaint do not overcome the presumption that jurisdiction is lacking. Defendants move in the alternative for summary judgment on their argument that Plaintiffs' claims are time-barred.

The Second 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; and to provide all participants with medical examinations and care which Plaintiffs allege that they and other military 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.

The issues this case raises fall squarely within the responsibilities that the Constitution assigns to the Legislative and Executive Branches. The Supreme Court in *Stanley* explained that constitutional separation of powers counsel strongly against consideration of claims stemming from tests at Edgewood Arsenal. Like the claims presented in *Stanley*, Plaintiffs' claims under the DJA — particularly their claims that supervisory military personnel coerced them into agreeing to participate in the testing and signing consent forms — would require this Article III Court to inquire into military discipline and decisionmaking, an inquiry that the Supreme Court stated would amount to a "congressionally uninvited intrusion into military affairs by the judiciary [that] is inappropriate." *Stanley*, 483 U.S. at 682-83.

Plaintiffs' claims for medical care, notification and information are outside the Court's subject matter jurisdiction because they do not fall within the APA's waiver of sovereign immunity. The claims are not supported by any legal requirement by Defendants to take the action that Plaintiffs seek. For the same reason, the APA claims fail to state a claim upon which relief can be granted. Plaintiffs' claims concerning the testing itself and associated consent forms are not justiciable because there is no redress that the Court could properly award. 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. Lastly, 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.

Defendants emphasize that 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. Especially in light of the amount of time that has passed since the tests ended, those government bodies are better positioned than the courts to investigate and address the miliary testing that occurred at Edgewood Arsenal and elsewhere.

FACTUAL BACKGROUND

According to the Second 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 Second 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. Five of the individual Plaintiffs have been found disabled by the VA. (Second Am. Compl. ¶ 40 (Bruce Price at a disability rating of 100%), ¶ 50 (Eric Muth at 50%), ¶ 59 (Frank Rochelle at 80%), ¶ 80 (David Dufrane at 60%), and ¶ 86 (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 Second 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 General Accounting Office 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 Dec. 29, 2009) (cited in Second Am. Compl. ¶ 169).

[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 Second Am. Compl. ¶ 13).

[3] *See*, *e.g.*, 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 (last accessed Dec. 29, 2009); 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 http://www.gao.gov/new.items/d04410.pdf. (last accessed Dec. 29, 2009).

[4] *See*, *e.g.*, Force Health Protection and Readiness, Chemical-Biological Warfare Exposures, http://fhp.osd.mil/CBexposures (cited in Second Am. Compl. ¶ 15 and last accessed Dec. 29, 2009)

Consistent with Congress' direction, the VA has sent letters to Edgewood test participants, as the Second Amended Complaint recognizes. (Second Am. Compl. ¶ 160.) 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.* ¶ 15.)

In 2008, the GAO — the audit, evaluation and, investigative arm of Congress — conducted a comprehensive audit of DOD's and the VA's efforts to investigate the testing and to notify veterans who were participants. 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 (last accessed Dec. 29, 2009). In its report to congressional requesters following the audit, the GAO made specific recommendations for improvement of the DoD's and VA's efforts, with which those agencies largely concurred. *Id.* at 30-31 & Appx. II-III.

Plaintiffs filed this action on January 7, 2009. On July 24, 2009, after Defendants moved to dismiss, Plaintiffs amended their complaint. Defendants moved to dismiss the amended complaint, and following a December 3, 2009 hearing on the motion the Court granted Plaintiffs leave to amend the complaint to bolster their allegations concerning venue. On December 17, 2009, Plaintiffs filed the Second Amended Complaint.

(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*.

ARGUMENT

Like the claims of the previous complaints, Plaintiffs' claims in the Second Amended Complaint fall outside the Court's subject matter jurisdiction and, in part, fail to state a claim upon which relief can be granted. The Second Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) 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 Env't, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). As referenced above, federal courts are courts of limited jurisdiction, and there is a presumption that jurisdiction is lacking in a given case. *Owen Equip. & Erection Co.*, 437 U.S. at 374; *Stock W., Inc.*, 873 F.2d at 1225.

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 Branch's supervisory authority over the military and active exercise of that authority to investigate and address the miliary testing that is the subject of Plaintiffs' claims.

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.'" *Nordic Village, Inc.*, 503 U.S. at 33-34 (quoting *Irwin v. Dep't 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*, 70 F.3d at 1107.

1. Plaintiffs Do Not Establish an APA Waiver of Sovereign Immunity.

Plaintiffs allege entitlement to the APA's waiver of sovereign immunity for their claims for medical care, notice and information based on what they assert is Defendants' failure to provide or unreasonable delay in providing those things. (Second Am. Compl. ¶¶ 22, 183.) Plaintiffs' reliance on the APA fails because they do not satisfy its requirements for a claim of failure to act or of unreasonable delay. The Second Amended Complaint identifies no legal obligation that supports Plaintiffs' claims.

While the APA authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take," *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis in original). An agency's failure to act or delay in acting "cannot be unreasonable with respect to action that is not required." *SUWA*, 542 U.S. at 63 n.1. This limitation "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65. Nor can a finding of failure to act or unreasonable delay be based on an action "committed to agency discretion by law." *E.g.*, *Heckler*

v. Chaney, 470 U.S. 821, 828-30 (1984).[5] Judicial intervention under section 706(1) is warranted only "[w]hen agency recalcitrance is in the face of clear statutory [or regulatory] duty or is of such a magnitude that it amounts to an abdication of statutory [or regulatory] responsibility." *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998) (internal citations omitted).

a. In support of their claim to medical care, Plaintiffs identify the 1962 version of Army Regulation 70-25, the current version of that regulation, and what Plaintiffs allege is a confidential Army memorandum that is consistent with the 1962 regulation as to medical care but is not attached to the Second Amended Complaint. (Second Am. Compl. ¶¶ 17, 125-28, 130.) Neither version of Army Regulation 70-25 can supply a duty to provide the medical care that Plaintiffs seek.[6] A requirement that the Army provide medical care over the course of test participants' lifetimes would conflict with 10 U.S.C. § 1074, which authorizes the Army to provide medical care to servicemembers only if they are on active duty, in the Reserves, or have retired based on length of service or disability.[7] *Accord* Army Reg. 40-400, ch. 3 (2008) ("Persons Eligible for Care in Army [military treatment facilities] and Care Authorized") (Attach. 1). Veterans like Plaintiffs may seek medical care as provided by the Veterans Benefit Act, 38 U.S.C. §§ 1701 *et seq.*; *see also* 38 C.F.R. pt. 17. We nevertheless address the regulatory provisions on which Plaintiffs rely.

> The 1962 version of Army Regulation 70-25 provided with respect to medical care:
>
> **Additional safeguards.** As added protection for volunteers, the following safeguards will be provided:
>
> a. A physician approved by The Surgeon General will be responsible for the medical care of volunteers. The physician may or may not be the project leader but will have

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[5] Review of a claim under 5 U.S.C. § 706(1) is analogous to review of a claim for the extraordinary remedy of mandamus. *See, e.g.*, *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). Mandamus relief may be granted only when "(1) the plaintiff's claim is clear and certain; (2) the defendant official's duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Idaho Watersheds v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002).

[6] The confidential memorandum on its own would not constitute a "legally binding commitment enforceable under § 706(1)." *SUWA*, 542 U.S. at 72.

[7] No individual Plaintiff alleges that he retired from the Army for length of service or disability.

> authority to terminate the experiment at any time that he believes death, injury, or bodily harm is likely to result.
>
> b. All apparatus and instruments necessary to deal with likely emergency situations will be available.
>
> c. Required medical treatment and hospitalization will be provided for all casualties.
>
> d. The physician in charge will have consultants available to him on short notice throughout the experiment who are competent to advise or assist with complications which can be anticipated.

Army Reg. 70-25 ¶ 5 (1962) (Attach. 2). Subsection (c)'s provision for medical treatment and hospitalization plainly contemplates such care as an "additional safeguard" available to address a medical need arising during an experiment rather than care over the course of a test participant's lifetime. This is clear from the provision's inclusion among a list of other "safeguards" that were to be in place while experiments were conducted. *See, e.g.*, *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 1404 (2008) (under rule of interpretation *ejusdem generis*, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows").

The current version of Army Regulation 70-25, issued in 1990, cannot be applied retroactively to create legal obligations arising from tests that took place more than 20 years earlier. There is a presumption against retroactive application of the law and regulations, and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also INS v. St. Cyr*, 533 U.S. 289, 321 (2001) ("A statute has retroactive effect when it . . . creates a new obligation, imposes a new duty . . . in respect to transactions or considerations already past . . ."). (internal quotations marks omitted). Only "unambiguous direction" in statutory or regulatory language will satisfy the "demanding" standard for retroactive application. *St. Cyr*, 533 U.S. at 316 (recognizing that "[c]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation") (internal quotation marks omitted). The language of the current version of Army

Regulation 70-25 does not clearly and unambiguously establish a retroactive application to impose a duty with respect to tests that were conducted before its effective date.

Apart from the absence of retroactivity, the current version of Army Regulation 70-25 does not supply a legal obligation to provide the medical care that Plaintiffs claim. Plaintiffs rely on paragraph 2-5(j), which states that "[t]he Surgeon General (TSG) will . . . [d]irect medical followup, *when appropriate*, on research subjects to ensure that any long-range problems are detected and treated." Army Reg. 70-25 ¶ 2-5(j) (1990) (emphasis added) (Attach. 3). The provision gives no guidance on how to determine when medical follow-up is "appropriate" and thus commits the decision to the discretion of the Surgeon General. *See Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (regulation that authorizes an agency official to take action for any reason the official "considers appropriate" commits decision to official's discretion); *see also Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F. 3d 135, 140 (9th Cir. 1997) (statutory provision for legal services to senior citizens "to the maximum extent feasible in accordance with their need" left federal court "ill-equipped" to determine how that could be accomplished). Paragraph 3-1(k), which states that "[v]olunteers *are authorized* all necessary medical care for injury or disease that is a proximate result of their participation in research," Army Reg. 70-25 ¶ 3-1(k) (1990) (emphasis added) (Attach. 3), cannot be construed to apply to individuals, like Plaintiffs, to whom Congress has not authorized the Army to provide medical care. *See* 10 U.S.C. § 1074; Army Reg. 40-400, ch. 3 (2008); discussed *supra* at 8.

b. Army Regulation 70-25 — the 1962 and the current versions — similarly does not support Plaintiffs' claim to notification and information.[8] The 1962 version of the regulation contains no provision for notification and information such as Plaintiffs claim. *See* Army Reg. 70-25 (1962) (Attach. 2.) The current regulation imposes a duty on commanders "to ensure research volunteers are adequately informed concerning the risks associated with their participation, and provide them

[8] The other materials that Plaintiffs reference — statements to Congress, a Department of Justice opinion letter and a Central Intelligence Agency ("CIA") legal opinion, (*see* Second Am. Compl. ¶¶ 13-14) — establish no "legally binding commitment enforceable under § 706(1)." *SUWA*, 542 U.S. at 72.

with any newly acquired information that may affect their well-being when that information becomes available." Army Reg. 70-25, ¶ 2-8c (1990) (Attach. 3). The current regulation set forth a new duty to warn in 1990, but its plain language does not apply retroactively to cover individuals who volunteered in the 1960s. *See, e.g.*, *St. Cyr*, 533 U.S. at 316; *Bowen*, 488 U.S. at 208. Therefore, the Army has not failed to act in accordance with the 1962 or 1990 regulations.

Even if the current version of the regulation had retroactive effect, it would not supply a basis for a finding of failure to act. The provision explains how the duty to warn must be accomplished:

> To accomplish this [duty to warn], the [Major Army Command] or agency conducting or sponsoring research must establish a system which will permit the identification of volunteers who have participated in research conducted or sponsored by that command or agency, and take actions to notify volunteers of newly acquired information.

Army Reg. 70-25, ¶ 3-2(h) (1990) (Attach. 3). DoD has stated, and Plaintiffs have not disputed, that it is developing such a system that can be utilized to identify and notify test participants, provide information about chemical exposure, including identifying the chemicals to which a given participant was exposed, and provide necessary treatment, with completion expected by 2011. Force Health Protection and Readiness, http://fhp.osd.mil/CBexposures/ (cited in Second Am. Compl. ¶ 15 and last accessed Dec. 29, 2009). Plaintiffs argue that the time DoD has estimated for completion of the system is unreasonable and justifies Court intervention. However, that DoD's work on developing the system, which again is under congressional oversight, is ongoing and is expected to be complete within approximately two years precludes a finding of "agency recalcitrance [] in the face of clear [] duty or [] of such a magnitude that it amounts to an abdication [] responsibility," *ONRC Action*., 150 F.3d at 1137 (internal citations omitted).

C. Plaintiffs do not identify any regulation or other legal obligation on the part of the CIA or the Defendants other than the Army and DoD. On that ground alone, those other Defendants should be dismissed vis-à-vis the claims for notice, information and medical care.

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,[9] 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 Corr. of Mil. Records*, 996 F.2d 362, 366 (D.C. Cir. 1993) (citing *Soriano v. United States*, 352 U.S. 270 (1957)).[10] Should the Court conclude that compliance with 28 U.S.C. § 2401(a) is not a jurisdictional prerequisite, Defendants request summary judgment on the timeliness of Plaintiffs' claims in accordance with Fed. R. Civ. P. 56. Under Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986).

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

[10] 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.

"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. Trs. 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).

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 Second 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* Second Am. Compl. ¶¶ 29-87.) 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 Second 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).)[11] As in *Bishop* and *Sweet*, that the individual Plaintiffs may 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 GAO. (*E.g.*, Second Am. Compl. ¶ 169, 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

[11] The referenced individual Plaintiffs' records are filed under seal. Dkt No. 45. 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 they should not for the reasons set forth herein).

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 Second Amended Complaint are also time-barred vis-à-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 Second 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. 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.

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.

"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 Coll. v. Ams. 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 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).

"[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 Second 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 Dec. 29, 2009) (cited in Second Am. Compl. ¶ 169). 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.

To be sure, the Ninth Circuit and other courts have recognized that declaratory relief may be appropriate when "sending a message" and providing educational information is in the public interest. *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987); *Bilbrey v. Brown*, 738 F.2d 1462, 1470-71 (9th Cir. 1984). Here, however, the public interest is furthered by deference to the considered judgment of the Legislative and Executive Branches

regarding investigation and development of appropriate government responses to the testing of servicemembers at Edgewood Arsenal and other military facilities. Article I assigns those Branches of government supervisory authority over the military, which necessarily encompasses determinations of how to afford appropriate vindication and to educate the public in connection with military matters. *See, e.g.*, *Stanley*, 483 U.S. at 681-82. Accordingly, neither Plaintiffs' asserted interest in vindication nor the public interest provides a basis on which to conclude that Plaintiffs' claims concerning the testing itself and consent forms are redressable by this Court.

C. 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 Second 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 Reg'l 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 challenge to the *Feres* doctrine therefore should be dismissed as nonjusticiable under Article III.

D. The Issues Raised by Plaintiffs' Claims for Declaratory Relief are within the Province of the Executive and Legislative Branches and Not Properly Addressed by an Article III Court.

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 here.

The DJA grants courts discretion on whether to exercise jurisdiction over claims brought pursuant to it. 28 U.S.C. § 2201(a) ("In 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' Second 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 Agents 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 inquiry into military matters in 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* Updated Initial 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"); *Pub. 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.*, *Pub. 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 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)). 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, addressed immediately below, 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, the Second Amended Complaint does not cite any legal obligation on the part of Defendants for the notice, information and medical care that they claim. *See supra* at 7-11. Those claims therefore should be dismissed for failure to state a claim upon which relief can be granted.

B. 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).

CONCLUSION

For the foregoing reasons, the Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) or, in the alternative, enter summary judgment in the Defendants' favor pursuant to Fed. R. Civ. P. 56.

DATED this January 5, 2010.

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