

1 GORDON P. ERSPAMER (CA SBN 83364)
 Gerspamer@mofo.com
 2 TIMOTHY W. BLAKELY (CA SBN 242178)
 TBlakely@mofo.com
 3 STACEY M. SPRENKEL (CA SBN 241689)
 SSprenkel@mofo.com
 4 DANIEL J. VECCHIO (CA SBN 253122)
 DVecchio@mofo.com
 5 DIANA LUO (CA SBN 233712)
 DLuo@mofo.com
 6 MORRISON & FOERSTER LLP
 425 Market Street
 7 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 8 Facsimile: 415.268.7522

9 Attorneys for Plaintiffs
 Vietnam Veterans of America; Swords to Plowshares: Veterans
 10 Rights Organization; Bruce Price; Franklin D. Rochelle; Larry
 Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs;
 11 and William Blazinski

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 OAKLAND DIVISION

16 VIETNAM VETERANS OF AMERICA, *et al.*,
 17
 Plaintiffs,
 18
 v.
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 20 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 Defendants.
 21

Case No. CV 09-0037-CW

**DECLARATION OF GORDON P.
 ERSPAMER IN SUPPORT OF
 PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' PARTIAL
 MOTION TO DISMISS THIRD
 AMENDED COMPLAINT**

Date: January 13, 2011
 Time: 2:00 p.m.
 Ctrm: 2, 4th Floor
 Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

1 I, Gordon P. Erspamer, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted
3 to practice before this Court. I am a senior counsel with the law firm of Morrison & Foerster LLP,
4 counsel of record for Vietnam Veterans of America, Swords to Plowshares: Veterans Rights
5 Organization, Bruce Price, Franklin D. Rochelle, Larry Meirow, Eric P. Muth, David C. Dufrane,
6 Tim Michael Josephs; and William Blazinski (“Plaintiffs”) in this action. I submit this
7 Declaration in Support of Plaintiffs’ Opposition to Defendants’ Partial Motion to Dismiss
8 Plaintiffs’ Third Amended Complaint. I make this Declaration based on personal knowledge. If
9 called as a witness, I would testify to the facts set forth below.

10 2. Attached hereto as Exhibit A is a true and correct copy of a letter dated
11 December 10, 2010 which I sent by e-mail to Defendants’ counsel in this matter, Joshua E.
12 Gardner.

13 3. Attached hereto as Exhibit B is a true and correct copy of the Reporter’s Transcript
14 of Proceedings before this Court on December 3, 2009, which was the hearing on Defendants’
15 previous motions to dismiss.

16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct and that this Declaration was executed in San Francisco, California
18 on this 10th day of December, 2010.

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/s/ Gordon P. Erspamer
Gordon P. Erspamer

Exhibit A

Exhibit A

MORRISON | FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.

NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK

TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

December 10, 2010

Writer's Direct Contact
415.268.6411
GErspamer@mofocom

Via E-Mail

Joshua E. Gardner, Esq.
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

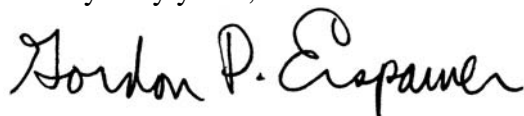
Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,
No. CV 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

This is to demand that you withdraw your recently-filed motion to dismiss. As you know, this motion addresses portions of the complaint that were not amended and as to which the Court has previously passed on and ruled. Thus, your recent motion is in fact a motion to reconsider that does not comply with the legal requirements related to such motions. (*See* Fed. R. Civ. P. 59(e), 60(b); Northern District L.R. 7-9.) More importantly, the motion to dismiss violates the Court's express order to defendants not to revisit these issues.

Should defendants refuse to withdraw their motion, we shall have no alternative but to seek sanctions from the Court.

Very truly yours,



Gordon P. Erspamer

cc: Kimberly L. Herb, Esq.
Timothy Blakely, Esq.

Exhibit B

Exhibit B

PAGES 1 - 38

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

VIETNAM VETERANS OF AMERICA,)
ET AL.,)
PLAINTIFFS,)
VS.)
CIA, ET AL.,)
DEFENDANTS.)
_____)

NO. C-09-0037 CW
THURSDAY, DECEMBER 3, 2009
OAKLAND, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: MORRISON & FOERSTER
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105
BY: GORDON P. ERSPAMER, ESQUIRE
TIMOTHY W. BLAKELY, ESQUIRE

FOR DEFENDANTS: U. S. DEPARTMENT OF JUSTICE
P. O. BOX 883
WASHINGTON, DC 20530
BY: CAROLINE LEWIS-WOLVERTON, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

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THE CLERK: CALLING THE MATTER OF VIETNAM VETERANS
OF AMERICA VERSUS CIA. CIVIL ACTION NUMBER C-09-0037.

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COUNSEL, PLEASE COME FORWARD AND STATE YOUR
APPEARANCES FOR THE RECORD.

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MR. ERSPAMER: GOOD AFTERNOON, YOUR HONOR, GORDON
ERSPAMER, MORRISON & FOERSTER, WITH TIMOTHY BLAKELY FOR THE
PLAINTIFFS.

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MS. LEWIS-WOLVERTON: GOOD MORNING, YOUR HONOR --
GOOD AFTERNOON, EXCUSE ME, CAROLINE LEWIS-WOLVERTON WITH THE
DEPARTMENT OF JUSTICE FOR THE DEFENDANTS.

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THE COURT: GOOD AFTERNOON.

SO, WE HAVE DEFENDANTS' MOTION TO DISMISS. WELL,
THE THING THAT CONCERNS ME IS THE VENUE ISSUE. AND THE VENUE
IS HERE, AS I UNDERSTAND IT, ONLY BECAUSE SWORDS TO PLOWSHARES
IS HERE. AND AS FAR AS SWORDS TO PLOWSHARES IS HERE ONLY IF
THEY CAN ALLEGE THAT THEY ARE ADVOCATES FOR VETERANS AND
THEY'RE DIVERTING THEIR RESOURCES BECAUSE OF THIS PROGRAM. AND
WHETHER CAREFULLY OR INADVERTENTLY THERE ISN'T A CLEAR
STATEMENT THAT THEY, SWORDS TO PLOWSHARES IS, IN FACT,
DIVERTING ITS RESOURCES AS OPPOSED TO ORGANIZATIONS LIKE IT
THAT ARE DIVERTING ITS RESOURCES.

24

25

MR. ERSPAMER: LET ME RESPOND TO THAT.

FIRST OF ALL, THERE ARE TWO BASIS FOR VENUE, YOUR

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1

HONOR.

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THE COURT: THE CASE LAW SAYS BOTH ARE NECESSARY.
YOUR PAPER SAYS A OR B, AND THE CASE YOU CITE SAY A AND B.

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MR. ERSPAMER: WE ARE TALKING ABOUT -- THE OTHER
Page 2

5 ARGUMENT I AM TALKING ABOUT IS THE ARGUMENT ABOUT SIGNIFICANT
6 PORTION OF THE ACTIVITIES GIVEN RISE TO THE CAUSE OF ACTION
7 OCCURRED HERE. SAN FRANCISCO IS ONE OF THE CENTERS FOR THE
8 ACTUAL USE OF THESE CHEMICAL AND BIOLOGICAL WEAPONS.

9 THAT IS ALLEGED SPECIFICALLY IN THE COMPLAINT WITH
10 RESPECT TO THE SAFE HOUSES, THE SAFE HOUSE IN SAN FRANCISCO
11 WHERE THEY USED PROSTITUTES AND ADMINISTERED THE DRUGS
12 SURREPTITIOUSLY TO THE MEN THAT VISITED THE PROSTITUTES. BUT
13 THERE IS MORE THAN THAT.

14 YOUR HONOR MAY BE AWARE OF A CASE INVOLVING A
15 SUBSTANCE CALLED SERATIOUS MARCESSANCE, (PHONETIC). THERE WAS
16 A CASE ACTUALLY ABOUT THE USE OF THAT BACTERIA THAT WAS DROPPED
17 IN CANISTERS. I BELIEVE IT WAS ON MARKET STREET AS PART OF
18 THIS PROGRAM, AND I THINK DISCOVERY WILL SHOW A LOT OF OTHER
19 ACTIVITY IN THIS AREA. AND, IN FACT, WE JUST GOT INFORMATION
20 THAT OVER A HUNDRED CALIFORNIA VETERANS HAVE BEEN REGISTERED
21 UNDER THIS PROGRAM THAT LIVE RIGHT HERE IN CALIFORNIA.

22 LET ME TURN TO THE SWORDS TO PLOWSHARES ISSUE WHICH
23 THE COURT SEEMS TO BE CONCERNED ABOUT. SWORDS TO PLOWSHARES
24 HAS ALWAYS BEEN INTERESTED IN THE SUBJECT OF ADVOCACY FOR
25 VETERANS. AND ACTUALLY TWO -- THREE REPRESENTATIVES OF THE

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1 ORGANIZATION ARE HERE IN COURT. AND THE FERES DOCTRINE IS VERY
2 MUCH A PART OF THAT.

3 SO ONE BASIS FOR STANDING IS THEIR LONG-TIME
4 INTEREST IN ADVOCACY ON BEHALF OF VETERANS WITH RESPECT TO THE
5 ISSUE OF THE FERES DOCTRINE. WE CAN COMPARTMENTALIZE THAT AS
6 ONE ISSUE YOUR QUESTION DID NOT MENTION, BUT LET ME GET TO WHAT
7 THE ORGANIZATION DOES DO WITH RESPECT TO VETERANS.

8 FIRST OF ALL, THEY ARE DEVOTING -- THEY HAVE A WHOLE
9 LEGAL DEPARTMENT AND IT DEVOTES SERVICES TO VETERANS. AND THEY
10 ARE SPECIFICALLY DESIGNED TO DEAL WITH VIETNAM VETERANS AND
11 BOTH GULF WAR AND MORE RECENT VETERANS, BUT A NUMBER OF THE
12 PLAINTIFFS IN THIS CASE WERE AT EDGEWOOD OR OTHER PLACES AT THE
13 SAME TIME AS THE VIETNAM WAR WAS GOING ON. A NUMBER OF THEM
14 ACTUALLY SERVED IN THE VIETNAM WAR. THEY ARE QUITE INTERESTED
15 IN THIS ISSUE.

16 IN TERMS OF ACTUALLY RENDERING SERVICES TO AN
17 EDGEWOOD VETERAN OR A VETERAN THAT PARTICIPATED IN THIS TEST,
18 WE ARE LOOKING INTO THAT, BUT UNFORTUNATELY THERE ARE NO
19 COMPUTERIZED RECORDS. AND THE PEOPLE WHO RAN THE ORGANIZATION
20 AT THAT TIME ARE NOT STILL AROUND, ALTHOUGH WE DID CONTACT SOME
21 OF THEM BY TELEPHONE.

22 WE HAVE BEEN TOLD BY OUR CLIENT THAT THEY BELIEVE,
23 BASED UPON THE PURPOSE OF THE ORGANIZATION, THE NUMBER OF
24 CLIENTS THEY HAVE SERVED OVER THE YEARS, AND THE FACT THAT THEY
25 FOR MANY YEARS EXCLUSIVELY RENDERED SERVICE TO PRETTY MUCH

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1 VIETNAM-ERA VETERANS, THEY BELIEVE THEY'VE ACTUALLY RENDERED
2 SERVICES TO VETERANS OF THIS TYPE.

3 BUT THEY DO DEVOTE A SIGNIFICANT PART OF THEIR
4 BUDGET AND THEIR -- A LOT OF THEIR EXPERIENCES ARE RELATED TO
5 THEIR ADVOCACY PROGRAM, WHICH INCLUDES REPRESENTING VETERANS
6 BEFORE THE REGIONAL OFFICES OF THE VETERAN'S ADMINISTRATION AND
7 THE BOARD OF VETERAN'S APPEALS AND THE COURT OF VETERAN'S
8 APPEALS.

9 ADVOCACY FOR THESE VETERANS IS DEFINITELY A PRIMARY
10 ROLE OF THE AGENCY. MOREOVER, THEY ACTUALLY RENDER SERVICES OF

11 COUNSELING, JOB COUNSELING, HOUSING FOR HOMELESS VETERANS, ALL
12 IN THE GENERAL BAY AREA, AND HAVE DONE THAT FOR MANY, MANY
13 YEARS, WHICH I BELIEVE, ALSO WOULD FORM A BASIS FOR THE
14 CONNECTION WITH THIS WHOLE PROGRAM AT EDGEWOOD AND OTHER
15 PLACES.

16 IF YOUR HONOR BELIEVES WE NEED MORE, I THINK THERE
17 IS MORE WE COULD ALLEGE WITH RESPECT TO SWORDS, BUT I THINK THE
18 CASES THAT WE HAVE CITED SAY THAT A GENERAL ALLEGATION IS
19 SUFFICIENT. AND I DO THINK --

20 THE COURT: YOU DON'T ALLEGE IT, YOU SAY
21 ORGANIZATIONS LIKE SWORDS HAVE DONE THESE THINGS.

22 MR. ERSPAMER: SUCH AS SWORDS.

23 THE COURT: IF YOU SAID SWORDS HAS DONE THESE
24 THINGS --

25 MR. ERSPAMER: SWORDS HAS RENDERED SERVICES TO THIS
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1 COMMUNITY. RIGHT NOW WE HAVE NOT ONLY IDENTIFIED ONE SPECIFIC
2 PERSON WHO WAS, WE BELIEVE, INVOLVED IN THESE TESTS IN SOME WAY
3 THAT THEY RENDERED SERVICES TO, BUT WE BELIEVE THAT WE WOULD
4 FIND MORE ONCE WE HAVE GONE THROUGH A HAND REVIEW OF THE FILES,
5 YOUR HONOR.

6 BUT I THINK THERE IS AMPLE BASIS FOR VENUE HERE
7 BASED UPON SWORDS, PRESENCE IN THE CITY, PRESENCE IN SAN
8 FRANCISCO FOR MANY, MANY YEARS, AND THE WHOLE MISSION OF THE
9 ORGANIZATION -- IT'S A NONPROFIT -- IS TO SERVE VETERANS.
10 THAT'S ALL THEY DO.

11 THE COURT: WITH RESPECT TO THE FERES DOCTRINE, THIS
12 COURT CAN'T FIND U.S. SUPREME COURT CASES UNCONSTITUTIONAL.
13 THAT'S NOT HOW IT WORKS.

14 MR. ERSPAMER: I THINK WE MORE OR LESS CONCEDED THAT
15 IN OUR PAPERS AND ACTUALLY, YOUR HONOR, IN THE COMPLAINT
16 ITSELF, BUT THE DIFFERENCE BETWEEN THIS CASE AND THE OTHER
17 FERES DOCTRINE CASES, YOUR HONOR, IS THAT FERES IS USUALLY
18 INTERPOSED AS A DEFENSE.

19 THE COURT: RIGHT. IF IT IS --

20 MR. ERSPAMER: TO A FEDERAL TORTS CLAIMS ACT --
21 (SIMULTANEOUS COLLOQUY.)

22 MR. ERSPAMER: -- OR DIVESTING THE COURT OF
23 JURISDICTION.

24 THE COURT: EXCUSE ME.

25 IF IT IS IMPOSED AS A DEFENSE, THEN YOU COULD SAY

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1 THIS SHOULD NOT BE A DEFENSE. WHILE WE RECOGNIZE THE SUPREME
2 COURT SAYS IT IS, TO PRESERVE OUR RECORD, WE SAY IT ISN'T, AND
3 THEN YOU COULD APPEAL IT AND PERHAPS GET UP TO THE U. S. SUPREME
4 COURT SOME DAY AND THEN ASK IT TO RECONSIDER THE FERES
5 DOCTRINE.

6 MR. ERSPAMER: THAT IS ONE COURSE WE MIGHT HAVE
7 TAKEN, BUT --

8 THE COURT: THAT IS THE ONLY COURSE I CAN THINK OF
9 THAT WOULD WORK. YOU CAN'T TELL ME TO TELL THE U. S. SUPREME
10 COURT THAT ONE OF THEIR CASES IS UNCONSTITUTIONAL. THAT ISN'T
11 HOW IT WORKS.

12 MR. ERSPAMER: I THINK WHAT WE HAVE ASKED, YOUR
13 HONOR, WE DO NOT HAVE AN INDIVIDUAL VETERAN BRINGING THESE
14 CLAIMS. IT IS THE ORGANIZATION AND THE DAMAGE TO THE
15 ORGANIZATION BY HAVING TO DEVOTE RESOURCES TO THESE VETERANS --

16 THE COURT: WELL, PERHAPS. NO MATTER WHO ASKS ME TO

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17 DO IT, I CAN'T DO IT.

18 MR. ERSPAMER: WELL, I THINK WHAT YOU COULD DO IS
19 GRANT THE MOTION TO DISMISS AS TO THAT CLAIM FOR RELIEF, IT
20 WILL BE PRESERVED FOR APPEAL, AND WE WILL TAKE IT UP ON APPEAL,
21 YOUR HONOR. AND THAT IS, FRANKLY, WHAT WE EXPECTED THE COURT
22 TO DO, BUT WE ARE DIRECTLY ASKING THE COURT FOR DECLARATORY
23 RELIEF ON THAT QUESTION, WHICH WE PRESUME WILL BE DENIED, AND
24 WE WILL MOVE ON WITH THE REST OF THE CASE AND WE'LL HAVE
25 PRESERVED THAT ARGUMENT FOR APPEAL.

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1 AND THERE ARE NO CASES ON POINT WITH ORGANIZATIONS
2 AS PLAINTIFFS CHALLENGING THE FERES DOCTRINE THAT I AM AWARE
3 OF. I THINK WE CAN CHALLENGE IT BY WAY OF DECLARATORY RELIEF
4 BASED ON THE DAMAGE TO SWORDS TO PLOWSHARES BY HAVING TO DEVOTE
5 ITS RESOURCES FOR PEOPLE WHO OTHERWISE COULD SUE THE GOVERNMENT
6 AND OBTAIN COMPENSATION IN HEALTH CARE FOR THEIR PROBLEMS.

7 THERE'S ONLY, FROM THE RECORDS THAT WE HAVE RECEIVED
8 JUST QUITE RECENTLY FROM THE DEFENDANTS, ONLY TWO OF 87
9 EDGEWOOD VETERANS HAVE EVER BEEN GRANTED ANY COMPENSATION BY
10 THE VA. THAT'S THE NUMBER THAT WE WERE GIVEN. AND THE FERES
11 DOCTRINE, OF COURSE, EFFECTS HUNDREDS OF THOUSANDS, IF NOT
12 MILLIONS OF PEOPLE. ALL WE WANT TO DO IS PRESERVE THAT ISSUE
13 FOR APPEAL WITH RESPECT TO THE THIRD CLAIM FOR RELIEF.

14 THE COURT: WELL, I GUESS YOU CAN DO THAT HOW YOU
15 THINK BEST, BUT I DON'T THINK EVEN THAT IS THE WAY TO PRESERVE
16 IT BECAUSE IT IS SO OBVIOUSLY FRIVOLOUS TO ASK THE COURT TO SET
17 IT ASIDE.

18 IF YOU WANT TO DEFEND AGAINST A DEFENSE BASED ON THE
19 FERES DOCTRINE AND THEN MAKE YOUR RECORD THAT WAY, THAT SEEMED

20 TO BE THE WAY TO DO IT, BUT THAT'S NOT MY PROBLEM. YOU DO WHAT
21 YOU WANT. OBVIOUSLY I WILL DISMISS IT IMMEDIATELY BECAUSE I --

22 MR. ERSPAMER: CAN I MAKE ONE COMMENT ON THAT, SHORT
23 COMMENT ON THAT?

24 YOUR HONOR, WE BELIEVE THAT THE CLAIM RELATED TO
25 FERES, THE THIRD CLAIM, IS BASED UPON A REASONABLE REQUEST FOR

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1 CHANGE IN THE LAW AND IT IS FRAMED BASED UPON A DISSENT BY
2 JUSTICE FERGUSON IN THE COSTCO CASE. AND HE ELABORATES AT
3 GREAT LENGTH WHY IT'S WRONG, STATUTORILY WRONG. IT HAS BEEN
4 MUCH CRITICIZED. THERE ARE LAW REVIEW ARTICLES WRITTEN ABOUT
5 IT. WE JUST WANT TO PRESERVE IT FOR APPEAL.

6 THE COURT: I WON'T TALK ABOUT IT ANY MORE.

7 SO THOSE ARE MY CONCERNS. IF IT WERE A QUESTION OF
8 VENUE, DEPENDING ON STANDING FROM SWORDS, AND THEY SAY THEY CAN
9 AMEND TO IMPROVE THEIR SHOWING OF STANDING WHICH IN TURN
10 IMPROVES THEIR SHOWING OF VENUE, I WOULD ALLOW THEM TO MAKE
11 THAT AMENDMENT.

12 OBVIOUSLY, I AM NOT GOING TO GRANT THEIR CAUSE OF
13 ACTION ON THE FERES DOCTRINE. THE REMAINING PORTIONS OF YOUR
14 MOTION TO DISMISS I AM NOT INCLINED TO GRANT. SO, YOU MAY
15 ADDRESS THAT IF YOU LIKE.

16 MS. LEWIS-WOLVERTON: THANK YOU, YOUR HONOR.

17 FIRST OF ALL, ON THE VENUE, I DO JUST WANT TO
18 RESPOND TO MR. ERSPAMER'S STATEMENTS ABOUT THE ALLEGATIONS WITH
19 RESPECT TO SWORDS.

20 FOR STANDING, TO SATISFY THE REQUIREMENTS OF ARTICLE
21 III, AN INJURY, IN FACT, MUST BE ALLEGED IN THE COMPLAINT. AND
22 THAT INJURY, IN FACT, MUST BE CONCRETE AND PARTICULARIZED. AND

23 THE ALLEGATIONS WITH RESPECT TO SWORDS MEET NEITHER OF THOSE
24 CRITERIA.

25 WITH RESPECT TO ADVOCACY, AS A GENERAL MATTER, THAT
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1 MR. ERSPAMER WAS DESCRIBING, THAT IS FAR FROM THE ARTICLE III
2 REQUIREMENT OF A CONCRETE INJURY. IT SEEMS QUITE TENUOUS AT
3 BEST AND NOT NONDESCRIPT.

4 WITH RESPECT TO HIS STATEMENT ABOUT CERTAIN TESTS
5 HAVING TAKEN PLACE IN SAN FRANCISCO, THE AMENDED COMPLAINT
6 DOESN'T ALLEGE THAT ANY OF THE PLAINTIFFS WHO ARE BEFORE THE
7 COURT WERE PARTICIPANTS IN THOSE CASES. SO -- I AM SORRY, IN
8 THOSE TESTS. SO THERE IS NO BASIS ALLEGED FOR VENUE IN
9 ACCORDANCE WITH WHERE A SUBSTANTIAL PART OF THE EVENTS TOOK
10 PLACE. THAT CRITERIA IS NOT SATISFIED BY THE ALLEGATIONS IN
11 THE COMPLAINT.

12 WITH RESPECT TO --

13 THE COURT: IF THEY ARE SAYING IT'S A CLASS ACTION,
14 SOME OF THE CLASS MEMBERS SUFFERED THEIR DAMAGE OR WHATEVER IT
15 WAS IN CALIFORNIA, THEN I GUESS THEIR ARGUMENT IS A SUBSTANTIAL
16 PORTION OF THE COMPLAINED OF EVENTS IF YOU LOOK AT IT AS A
17 CLASS ACTION HAVE HAPPENED HERE.

18 MS. LEWIS-WOLVERTON: THEY WOULD CERTAINLY NEED A
19 CLASS REPRESENTATIVE AND RIGHT NOW THERE IS NO PLAINTIFF.

20 THE COURT: I AM NOT SURE THAT IS TRUE. IS THAT
21 TRUE THEY HAVE SOME CLASS REPRESENTATIVE WHO MAY HAVE
22 EXPERIENCED THEIR DIFFICULTIES IN OTHER STATES, BUT IF A
23 SUBSTANTIAL PORTION OF SIMILAR DIFFICULTIES OCCURRED TO OTHER
24 CLASS MEMBERS, PERHAPS THAT PROVIDES VENUE, I DON'T KNOW.

25 MS. LEWIS-WOLVERTON: YOUR HONOR, THE WAY THE

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1 COMPLAINT READS AND THE INDIVIDUAL NAMED PLAINTIFFS, ARE ALL
2 ALLEGED TO HAVE UNDERGONE TESTING AT EDGEWOOD ARSENAL, WHICH IS
3 IN MARYLAND.

4 AND THE ALLEGATIONS ABOUT SAN FRANCISCO, I BELIEVE,
5 RELATED TO ANOTHER PROGRAM. IN THE PAPERS IN RESPONSE TO OUR
6 MOTION TO DISMISS, THERE WASN'T A REFERENCE TO THE SAN
7 FRANCISCO ISSUE AS A BASIS FOR VENUE, SO I AM TRYING TO FIND IN
8 THE COMPLAINT WHERE IT IS.

9 PERHAPS MR. ERSPAMER COULD HELP DIRECT ME.

10 MR. ERSPAMER: I REFER, YOUR HONOR, TO ACTUALLY TWO
11 DIFFERENT THINGS. ONE OF WHICH IS SPECIFICALLY ALLEGED IN TWO
12 PLACES IN THE COMPLAINT, AND THAT HAS TO DO WITH THE USE OF
13 SAFE HOUSES FOR PURPOSES OF TESTING THE SUBSTANCES THAT HAD
14 ALREADY BEEN TESTED ON THE SOLDIERS.

15 THE PART OF THE CASE THAT THE COUNSEL SEEMS TO BE
16 IGNORING IS THAT IT'S NOT ONLY A CLASS ACTION, BUT WE HAVE
17 ORGANIZATIONAL PLAINTIFFS WHO HAVE MEMBERS ALL OVER -- IN THE
18 CASE OF ONE, HAVE MEMBERS ALL OVER THE COUNTRY, AND THE SECOND
19 ONE, SWORDS, HAS CLIENTS HERE IN THE BAY AREA. THEY'RE REALLY
20 IN OAKLAND AND SAN FRANCISCO ARE THEIR ONLY BASES OF OPERATION
21 FOR THEIR SERVICES TO VETERANS.

22 BUT THERE ARE TWO SPECIFIC REFERENCES IN THE
23 COMPLAINT TO THE OPERATION OF THESE SAFE HOUSES BY THE CENTRAL
24 INTELLIGENCE AGENCY WHICH WENT ON, I BELIEVE, FOR A PERIOD OF
25 YEARS. IF YOU GIVE ME A MOMENT, I WILL GIVE YOU THE PARAGRAPH

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1 CITES.

2 I BELIEVE, YOUR HONOR, IF WE ARE GOING TO BE
3 AMENDING, WE CAN ADD OTHER THINGS THAT OCCURRED HERE IN SAN
4 FRANCISCO. THE EDWARD NEVIN CASE WAS CERTAINLY THE ONE I
5 MENTIONED ABOUT SERATIOUS MARCESSANCE. THAT'S WHERE THEY
6 DROPPED THE AGENTS ON CANISTERS IN SAN FRANCISCO.

7 THE COURT: COUNSEL SAYS THAT DOESN'T REALLY HELP
8 MATTERS UNLESS THAT HAPPENED TO ONE OF THE NAMED PLAINTIFFS IN
9 SAN FRANCISCO. DO YOU --

10 MR. ERSPAMER: NO, NO. I COMPLETELY DISAGREE WITH
11 THAT. THE --

12 THE COURT: DO YOU HAVE A CASE?

13 MR. ERSPAMER: THE PROGRAM, AS WE ALLEGE IN THE
14 COMPLAINT, IT'S VERY, VERY DETAILED, HAD THREE STAGES. THE
15 FINAL ONE OF WHICH WAS TO ACTUALLY TEST THE SUBSTANCES IN URBAN
16 SETTINGS BOTH HERE AND ABOARD. THEY WERE TESTED IN CALIFORNIA.
17 THEY WERE TESTED IN THE DUGWAY PROVING GROUNDS AND A NUMBER OF
18 OTHER AREAS.

19 THE COURT: BUT DO YOU HAVE A CASE THAT SAYS IF YOU
20 HAVE A CLASS ACTION THAT THE VENUE CAN BE BASED ON UNNAMED
21 CLASS MEMBERS HAVING SOMETHING HAPPEN TO THEM IN THE STATE?

22 MR. ERSPAMER: I THINK THE VENUE CAN BE PLACED BASED
23 UPON THE -- WHERE THE ACTIVITIES THAT ARE COMPLAINED OF
24 OCCURRED AND A SUBSTANTIAL PORTION OF THEM OCCURRED HERE, EVEN
25 IF THE INDIVIDUAL PLAINTIFFS DO NOT RESIDE IN CALIFORNIA.

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1 THE COURT: EVEN IF THE SUBSTANTIAL ACTIVITIES THAT
2 HAPPENED HERE HAPPENED TO SOMEBODY WHO ISN'T A NAMED PLAINTIFF.

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MR. ERSPAMER: CORRECT.

THE COURT: DO YOU HAVE A CASE --

MR. ERSPAMER: CERTAINLY FOR PURPOSES OF THE ORGANIZATION --

THE COURT: EXCUSE ME. YOU NEED TO STOP TALKING WHEN I TRY TO INTERRUPT --

MR. ERSPAMER: I'M SORRY, YOUR HONOR.

THE COURT: -- BECAUSE THE REPORTER CAN'T GET US BOTH AT ONCE, AND SOMETIMES I JUST HAVE TO STOP YOU. YOU NEED TO NOT START WHEN I'M SPEAKING.

MR. ERSPAMER: SORRY, YOUR HONOR.

THE COURT: MY QUESTION IS, IS THERE A CASE THAT YOU COULD CITE TO ME, APPARENTLY YOU DIDN'T MAKE THIS ARGUMENT IN YOUR OPPOSITION, IS THERE A CASE THAT SAYS IF A SUBSTANTIAL PORTION OF THE ACTIVITIES OCCURRED IN A GIVEN STATE, EVEN IF THEY DIDN'T OCCUR TO ONE OF THE NAMED PLAINTIFFS, IS THAT ADEQUATE FOR VENUE?

MR. ERSPAMER: YOUR HONOR, I CANNOT THINK OF A CASE CITED -- EVEN DISCUSSION IN EITHER BRIEFS OF THAT QUESTION. I CAN'T TELL YOU THAT THERE IS OR ISN'T, BUT I CAN TELL YOU, IN ADDITION TO LOOKING AT THE CASE FROM THE POINT OF VIEW OF THE INDIVIDUAL PLAINTIFFS, WE HAVE THESE TWO ORGANIZATIONAL PLAINTIFFS, ONE OF WHOM HAS MEMBER --

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THE COURT: YOU SAID THAT, BUT THE SWORDS PROBLEM IS THE PROBLEM OF THE ALLEGATIONS THAT YOU MADE.

MR. ERSPAMER: CAN I GIVE YOU THOSE TWO CITES?

THE COURT: WHAT TWO?

MR. ERSPAMER: TO THE SAN FRANCISCO --

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THE COURT: SURE.

MR. ERSPAMER: 130(E) AND 141 ARE THE TWO PARAGRAPH CITES.

THE COURT: OKAY.

MR. ERSPAMER: AND THE -- I DO -- WE DO BRIEF THIS ISSUE, SUBSTANTIAL RELATIONSHIP TO THE FORUM, BUT HERE WE HAVE, YOUR HONOR, TAKE ONE MORE MINUTE TO EXPLAIN.

WE HAVE A PROGRAM THAT IS REALLY NATIONAL IN SCOPE. THE CHEMICAL TEST, WE ARE USING ARMY PEOPLE, WERE CENTERED AT EDGEWOOD BUT THEY ACTUALLY USED ARMY-BASED PERSONNEL ALL OVER THE COUNTRY. AND THE BIOLOGICAL TESTS WERE CENTERED AT FORT DETRICK IN MARYLAND. AND THEY ALSO, THOSE ACTIVITIES TOOK PLACE ALL OVER THE COUNTRY. WE HAVE TWO BASIC TYPES OF SUBSTANCES TESTED.

AND THE ACTIVITIES OF THE PROGRAM WERE NATIONWIDE IN SCOPE. THEY WENT ON FOR THREE DECADES. SO THERE ARE SUBSTANTIAL CONTACTS WITH EVERY SINGLE STATE IN THE UNION, I BELIEVE.

THE COURT: YOU MIGHT SEE IF YOU CAN FIND ONE IN CALIFORNIA BEFORE YOU HAVE TO AMEND YOUR COMPLAINT.

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DID YOU WANT TO TALK ABOUT ANY OF THE OTHER ASPECTS OF THE MOTION TO DISMISS?

MS. LEWIS-WOLVERTON: YES, I WOULD LIKE TO, THOUGH, RESPOND ON THE SAN FRANCISCO TEST POINT NOW THAT MR. ERSPAMER CITED THE PARAGRAPH FOR ME.

THE ALLEGATION IN PARAGRAPH 130(E) IS THAT THE FEDERAL BUREAU OF NARCOTICS OPERATED SAFE HOUSES IN SAN FRANCISCO AND NEW YORK WHERE THEY SECRETLY ADMINISTERED

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9 EXPERIMENTAL SUBSTANCES TO PATRONS OF PROSTITUTES. THAT'S
10 PARAGRAPH 130(E).

11 AND THEN IT CONTINUES, AND FEDERAL BUREAU OF
12 NARCOTICS MAINTAIN CLOSE WORKING RELATIONSHIPS WITH LOCAL
13 POLICE AUTHORITIES AND COULD BE UTILIZED TO PROTECT THE
14 ACTIVITY IN CRITICAL SITUATIONS AND GIVES THE CODE NAME FOR THE
15 EXPERIMENTS.

16 THERE IS NO ALLEGATION THAT ANY OF THE PLAINTIFFS
17 WAS -- SOUNDS LIKE THESE ARE CIVILIANS, THERE'S NO INDICATION
18 THAT THESE WERE VETERANS WHO WERE TARGETED, AND THERE'S NO
19 INDICATION THAT EITHER VETERAN'S ADVOCACY ORGANIZATIONS WHO ARE
20 PLAINTIFFS IN THIS CASE REPRESENT THE INTEREST OF SUCH PEOPLE
21 WHO ARE NONVETERANS WHO FREQUENTED THE PROSTITUTION PLACES OF
22 BUSINESS.

23 AND ALSO IN THE CASE MANAGEMENT STATEMENT, THE
24 PLAINTIFFS HAVE MADE IT CLEAR THE CLASS THEY WISH TO REPRESENT
25 IS A CLASS COMPRISED OF VETERANS. AND THE ALLEGATION THAT
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16

1 MR. ERSPAMER CITED IN THE COMPLAINT DOES NOT SEEM TO INDICATE
2 AT ALL IT HAS ANYTHING TO DO WITH VETERANS. SO, I DON'T KNOW
3 THAT THE PLAINTIFF -- THE PRESENCE OF SWORDS OR VIETNAM
4 VETERANS OF AMERICA WOULD BE ABLE TO RELY ON THAT PARAGRAPH ON
5 THE BASIS FOR REPRESENTING A CLASS.

6 THE COURT: OKAY.

7 MS. LEWIS-WOLVERTON: FOR THOSE REASONS WE DON'T
8 BELIEVE THERE IS A BASIS FOR VENUE IN THIS DISTRICT BECAUSE
9 SWORDS IS NOT PRESENT WITH STANDING BEFORE THE COURT.

10 NOW, ON THE OTHER PARTS OF THE MOTION, WE HAVE
11 ARGUED THAT THE COURT LACKS SUBJECT MATTER JURISDICTION.

12 FIRST, I WOULD LIKE TO ADDRESS THEIR, THE
13 PLAINTIFFS' CLAIM FOR NOTICE AND INFORMATION. PLAINTIFFS RELY
14 ON THE ADMINISTRATIVE PROCEDURES ACT PROVISION FOR JURISDICTION
15 OVER CLAIMS FOR AGENCY FAILURE TO ACT OR UNREASONABLE DELAY.

16 THAT'S AT 5 U.S.C., SECTION 7061, AND THEY ARGUE
17 THAT THE GOVERNMENT EITHER FAILED OR UNREASONABLY DELAYED IN
18 NOTIFYING VETERANS WHO PARTICIPATED IN THESE TESTS AND
19 PROVIDING THEM WITH INFORMATION ABOUT THE TESTS.

20 FIRST, THE GOVERNMENT HAS ALREADY PROVIDING THE
21 NOTICE AND INFORMATION TO THE PLAINTIFFS ASKING THE COURT TO
22 ORDER, BUT MORE TO THE POINT, THE PLAINTIFFS HAVE NOT
23 IDENTIFIED A STATUTORY OR REGULATORY REQUIREMENT TO SUPPORT THE
24 FINDING THAT THE GOVERNMENT HAS A CLEAR AND NONDISCRETIONARY
25 DUTY TO PROVIDE THE NOTICE AND INFORMATION THAT THEY SEEK.

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17

1 THE SUPREME COURT HAS MADE IT CLEAR THAT THOSE ARE
2 THE REQUIREMENTS TO SATISFY A CLAIM UNDER SECTION 7061, A CLEAR
3 NONDISCRETIONARY DUTY.

4 THE PLAINTIFFS RELY ON ARMY REGULATION 7025 AS THE
5 SOURCE OF THE DUTY THAT THEY SAY IS SUFFICIENT TO MEET THAT
6 STANDARD, BOTH THE 1962 VERSION OF THE REGULATIONS AND THAT'S
7 WHAT WAS IN PLACE AT THE TIME OF THE TEST, BUT ALSO THE CURRENT
8 VERSION.

9 1962 VERSION OF ARMY REGULATION 7025 DOES NOT
10 ADDRESS NOTIFICATION AND INFORMATION AT ALL, SO THAT CAN'T FORM
11 A BASIS FOR 7061 CLAIM.

12 THE 1990 VERSION OF THE REGULATION, AND THAT IS THE
13 CURRENT VERSION, CAN'T APPLY RETROACTIVELY. THE SUPREME COURT
14 HAS MADE IT CLEAR THERE IS A PRESUMPTION AGAINST RETROACTIVITY

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THE COURT: MAYBE THEY SHOULD STILL NOTIFY THEM,
EVEN IF THEY DIDN'T NOTIFY THEM BEFORE OR PERHAPS DIDN'T HAVE A
DUTY TO NOTIFY THEM BEFORE, MAYBE THEY HAVE A DUTY TO NOTIFY
THEM NOW.

MS. LEWIS-WOLVERTON: YOUR HONOR, THEY ARE NOTIFYING
THEM.

THE COURT: THEN WE WON'T HAVE A LAWSUIT. IF YOU DO
WHAT THEY WANT YOU TO, THEN --

MS. LEWIS-WOLVERTON: THAT'S PART OF OUR ARGUMENT.

THE COURT: -- YOU CAN SETTLE.

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MS. LEWIS-WOLVERTON: THE GOVERNMENT, UNDER THE
ACTIVE SUPERVISION AND OVERSIGHT OF CONGRESS, HAS BEEN WORKING
ON NOTIFYING AND PROVIDING THE VERY INFORMATION THAT THE
PLAINTIFFS SEEK.

THE COURT: THAT WOULD GO TO THE MERITS.

MS. LEWIS-WOLVERTON: RIGHT. RIGHT. BUT THE LEGAL
POINT IS THAT THERE IS NO LEGAL REQUIREMENT THAT IS AVAILABLE
TO SATISFY THE REQUIREMENTS OF 7061, SO THERE IS NOT A BASIS TO
ORDER, UNDER THE APA, THE GOVERNMENT TO PROVIDE THE NOTICE AND
INFORMATION.

ON THE CLAIM FOR MEDICAL CARE, THERE IS ALSO NO
SUBJECT MATTER JURISDICTION FOR SIMILAR REASONS. AGAIN, THE
PLAINTIFFS RELY ON THE ARMY REGULATION 7025, BOTH THE 1962 AND
THE CURRENT VERSION.

THE 1962 VERSION, AND THAT WAS THE ONE, AGAIN, IN
EFFECT AT THE TIME OF THE TESTS, THAT PROVIDED UNDER A SECTION
HEADING ADDITIONAL SAFEGUARDS THAT ADDED PROTECTION FOR

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18 VOLUNTEERS, THE FOLLOWING SAFEGUARDS WILL BE PROVIDED. AND IT
19 LISTED THAT REQUIRED MEDICAL TREATMENT AND HOSPITALIZATION WILL
20 BE PROVIDED FOR ALL CASUALTY. THE MAIN LANGUAGE OF THAT
21 REGULATION ADDRESSES MEDICAL TREATMENT AND HOSPITALIZATION THAT
22 IS NECESSARY IN RESPONSE TO A NEED THAT ARISES DURING THE
23 TESTS. THAT'S CONSISTENT WITH THE HEADING ADDITIONAL
24 SAFEGUARDS.

25 READING THAT REQUIREMENT ALSO TO PROVIDE LIFETIME
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19

1 CARE TO TEST PARTICIPANTS WOULD CONFLICT WITH THE STATUTE THAT
2 GOVERNS THE ARMY'S CARE PROVISION OF MEDICAL CARE TO
3 INDIVIDUALS. 10 U.S.C. SECTION 1074 PROVIDES THAT THE
4 INDIVIDUALS WHOM THE ARMY IS AUTHORIZED TO PROVIDE CARE FOR ARE
5 ACTIVE DUTY SERVICE MEMBERS, MEMBERS OF THE RESERVES, AND
6 VETERANS WHO RETIRED UNDER SPECIAL CATEGORIES, AND THE
7 PLAINTIFFS DON'T ALLEGE THAT THEY RETIRED UNDER THOSE
8 CATEGORIES.

9 THE COURT: PRESUMABLY PEOPLE WITH SERVICE-CONNECTED
10 INJURIES WOULD BE ENTITLED TO CARE.

11 MS. LEWIS-WOLVERTON: YES. THAT IS UNDER THE
12 PROVISIONS FOR VETERAN'S BENEFIT. AND THOSE ARE ADMINISTERED
13 BY THE DEPARTMENT OF VETERAN'S AFFAIRS AND THAT --

14 THE COURT: DIDN'T THEY SUE THEM, TOO?

15 MS. LEWIS-WOLVERTON: I AM SORRY?

16 THE COURT: DIDN'T THEY SUE THEM, TOO?

17 MS. LEWIS-WOLVERTON: NO, THE DEPARTMENT OF
18 VETERAN'S AFFAIRS IS NOT A DEFENDANT.

19 THE COURT: YOU MAY HAVE GIVEN THEM AN IDEA.

20 MS. LEWIS-WOLVERTON: AND THE PLAINTIFFS, IN FACT,

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21 IN THE PAPERS THAT WE SUBMITTED UNDER SEAL, FOUR OF THE
22 PLAINTIFFS HAVE FILED CLAIMS WITH THE DEPARTMENT OF VETERAN'S
23 AFFAIRS.

24 THE COURT: I GUESS WHAT THEY'RE TRYING TO SAY IS IF
25 YOU HAD NOTIFIED PEOPLE WHO MAY NOT KNOW OF THE SERVICE

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1 CONNECTEDNESS OF THEIR DIFFICULTIES, THEN YOU GAVE THEM THE
2 INFORMATION THAT WOULD LEAD THEM TO DISCOVER THAT THEIR INJURY
3 WAS SERVICE CONNECTED, THEN THEY WOULD BE ABLE TO GO TO THE DVA
4 AND APPLY FOR SERVICE-CONNECTED MEDICAL CARE.

5 MS. LEWIS-WOLVERTON: THAT IS EXACTLY WHAT'S
6 HAPPENING.

7 THE COURT: THEN GOOD. THEN YOU'LL WIN YOUR LAWSUIT
8 OR THEY WILL WIN BECAUSE YOU WILL HAVE DONE WHAT THEY ARE
9 ASKING YOU TO.

10 IT KIND OF SEEMS LIKE YOU OUGHT TO SETTLE, REALLY.
11 IT SEEMS LIKE THE GOVERNMENT IS MAINLY SAYING WE ARE ALREADY
12 DOING WHAT YOU WANT US TO DO, SO MAYBE YOU SHOULD TELL THEM
13 WHAT IT IS YOU THINK THEY ARE NOT DOING. YOU SAY YOU DON'T
14 WANT TO TRY TO SETTLE. IT SEEMS LIKE YOU DO WANT TO TRY TO
15 SETTLE.

16 THE GOVERNMENT IS SAYING THEY ARE DOING WHAT YOU
17 WANT. IF YOU THINK THEY AREN'T, MAYBE YOU NEED TO TELL THEM
18 WHAT IT IS THEY AREN'T DOING AND SOMETIMES PLAINTIFFS'
19 ATTORNEYS HAVE GOOD IDEAS ABOUT WHAT THE GOVERNMENT COULD DO TO
20 HELP PEOPLE OUT THAT THE GOVERNMENT WANTS TO HELP OUT.

21 MS. LEWIS-WOLVERTON: ALONG WITH --

22 MR. ERSPAMER: YOUR HONOR, IF YOU WANT ME TO RESPOND
23 TO THAT.

24 MS. LEWIS-WOLVERTON: I WOULD LIKE TO ADDRESS THAT,
25 IF I MIGHT.

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21

1 THE COURT: WHY DON'T YOU FIRST FINISH UP ANYTHING
2 ELSE YOU MIGHT WANT TO SAY ABOUT THE MERITS TO YOUR MOTION TO
3 DISMISS.

4 MS. LEWIS-WOLVERTON: THANK YOU.

5 THE COURT: MAYBE THAT WAS ALL, SO WE FINISH THAT
6 UP.

7 MS. LEWIS-WOLVERTON: THANK YOU.

8 I WOULD PREFER TO ADDRESS THAT AND CONTINUE ON, THE
9 IDEA OF WORKING WITH THE PLAINTIFFS TO GET THE NOTICE AND
10 INFORMATION THAT THE GOVERNMENT IS PROVIDING.

11 THE VIETNAM VETERANS OF AMERICA IS A REGULAR INVITEE
12 TO MONTHLY ROUNDTABLE MEETINGS THAT THE DEPARTMENT OF DEFENSE
13 HOST, AND THE VETERAN'S AFFAIRS ATTENDS THESE MEETINGS AS WELL,
14 A NUMBER OF VETERAN'S SERVICE ORGANIZATIONS, LIKE THE VVA, ALL
15 ATTEND AND TALK ABOUT THESE VERY THINGS.

16 IN FACT, TWO MONTHS AGO THERE WAS A MEETING TOO TALK
17 ABOUT THE DOD'S PROGRESS ON NOTICE AND INFORMATION EFFORT AND
18 THE DOD BRIEFED ALL OF THE PARTICIPANTS AND VVA WAS INVITED ON
19 THE PROGRESS. AND VVA HAS AN OPPORTUNITY THROUGH THAT VENUE TO
20 GET FEEDBACK AND INPUT INTO THE PROCESS. AND THE DOD HAS THESE
21 MEETINGS IN RESPONSE TO RECOMMENDATIONS BY THE GENERAL
22 ACCOUNTING OFFICE IN RESPONSE TO REQUESTS FROM CONGRESS TO
23 CONDUCT AN AUDIT OF DOD EFFORTS TO IDENTIFY ALL THE VETERANS
24 AND WORKING WITH THE VA TO NOTIFY THEM AND GET THEM THE
25 INFORMATION.

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1 ONE OF THE RECOMMENDATIONS WAS TO HAVE GREATER
2 INTERACTION WITH THE VETERAN'S SERVICE ORGANIZATIONS LIKE VVA,
3 AND SO IN RESPONSE, DOD HAS THESE MONTHLY MEETINGS.

4 SO PLAINTIFFS HAVE PLENTY OF OPPORTUNITY TO GIVE
5 INPUT. THAT'S ANOTHER REASON WHY THIS REALLY ISN'T PROPERLY
6 BEFORE THE COURT.

7 AND THAT FEEDS INTO MY NEXT ARGUMENT, WHICH IS THAT
8 THE COURT SHOULD EXERCISE ITS DISCRETION UNDER THE DECLARATORY
9 JUDGMENT ACT, TO THE EXTENT THE CASE IS DISMISSED FOR THE OTHER
10 REASONS I HAVEN'T ADDRESSED TO DECLINE TO EXERCISE JURISDICTION
11 HERE BECAUSE CONGRESS IS WORKING VERY CLOSELY WITH THE
12 DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF VETERAN'S AFFAIRS
13 WITH THE EXECUTIVE BRANCH TO ADDRESS THESE VERY PROBLEMS.

14 AND SEPARATION OF POWERS PRINCIPLES COUNSEL STRONGLY
15 AGAINST THE COURT ALSO FROM INVOLVING THEMSELVES WITH THESE
16 PROCESSES.

17 AS I SAID, THE JAO CONDUCTED AN AUDIT AND ISSUED A
18 REPORT IN FEBRUARY OF 2008 OF THE NOTIFICATION INFORMATION
19 EFFORTS, AND MADE SPECIFIC RECOMMENDATIONS, ABOUT FIVE OR SO,
20 TO THE DOD AS WELL AS THE VA ABOUT HOW THEY MIGHT IMPROVE THE
21 PROCESS.

22 AND IT'S NOTEWORTHY THAT ONE OF THE PRIMARY CLAIMS
23 THE PLAINTIFFS HAVE ASSERTED WAS FOR FAILURE TO ACT OR
24 UNREASONABLE DELAY. NOT ONE OF THOSE RECOMMENDATIONS FROM THE
25 JOA ADDRESSED THE AMOUNT OF TIME THAT DOD WAS TAKING TO COMPLY
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1 WITH ITS OBLIGATION THAT CONGRESS HAS IMPOSED ON IT TO GET THIS
Page 20

2 NOTIFICATION AND INFORMATION OUT. THE DOD IS WORKING
3 DILIGENTLY ON INVESTING CONSIDERABLE RESOURCES INTO THE EFFORT
4 AND REALLY CONGRESS IS WORKING CLOSELY TO MAKE SURE THAT DOD
5 STAYS ON THE TRACK OF GETTING THESE PEOPLE THE INFORMATION, THE
6 NOTICE, THAT THEY ARE -- THAT CONGRESS AND DOD HAVE DETERMINED
7 THEY ARE ENTITLED TO, AND THERE IS NOT A PLACE UNDER
8 CONGRESSIONAL -- I AM SORRY, UNDER CONSTITUTIONAL SEPARATION OF
9 POWERS FOR THE COURT TO INSERT AN ARTICLE III BODY INTO THAT
10 PROCESS. THE CONSTITUTION ASSIGNS SUPERVISORY AUTHORITY OVER
11 THE MILITARY TO THE LEGISLATIVE AND EXECUTIVE BRANCH OF
12 GOVERNMENT AND THEY ARE ACTIVELY EXERCISING THAT AUTHORITY.

13 THE COURT: OKAY. WHAT ABOUT THIS SECRECY OF THE
14 OATH? ARE YOU MAINTAINING THAT THIS OATH, SECRECY OF THE OATH
15 IS REQUIRED OR ARE YOU WILLING TO SAY IT ISN'T?

16 MS. LEWIS-WOLVERTON: THERE IS EVIDENCE THAT IT IS
17 NOT REQUIRED. IT HAS BEEN RESCINDED.

18 THE COURT: IF IT ISN'T RESCINDED, YOU WOULD RESCIND
19 IT NOW?

20 MS. LEWIS-WOLVERTON: I DON'T HAVE AUTHORIZATION TO
21 SAY THAT, BUT THERE IS CERTAINLY EVIDENCE THAT IT IS NO LONGER
22 APPLICABLE.

23 THE COURT: IF YOU FOUND SOMEONE WHO WOULD SAY THAT,
24 THEN THAT WOULD RESOLVE ONE ISSUE.

25 MS. LEWIS-WOLVERTON: SURE. SURE. AND IN THOSE

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24

1 MONTHLY ROUNDTABLES, THAT'S A VENUE FOR THE VVA TO ADDRESS THAT
2 AND RAISE IT DIRECTLY.

3 ALSO CONGRESS IS VERY AWARE OF THE MATTER. AND TO
4 THE EXTENT THAT THERE ARE ANY LASTING SECRECY OBLIGATIONS, THEN

5 THOSE BODIES, CONGRESS AND THE EXECUTIVES, ARE THE ONES TO
6 ADDRESS THEM PARTICULARLY SINCE SECRECY WOULD BE TIED TO
7 NATIONAL SECURITY.

8 THE COURT: RIGHT. BUT IF THERE AREN'T ANY, THEN
9 YOU COULD JUST SETTLE THAT PORTION OF THIS CASE, AND THAT WOULD
10 TAKE CARE OF THAT.

11 MS. LEWIS-WOLVERTON: YES. THAT'S CORRECT, YOUR
12 HONOR.

13 THE COURT: OKAY. SO YOU WANT TO RESPOND?

14 MR. ERSPAMER: YES, YOUR HONOR, JUST ON THE QUESTION
15 OF NOTIFICATION. LET ME START THERE.

16 THE COURT: KEEP IT SHORT BECAUSE WE ARE NOT GOING
17 TO SETTLE IT NOW.

18 MR. ERSPAMER: I WILL EVEN MAKE IT SHORTER.

19 IT HAS BEEN GOING ON FOR 35 YEARS. THE CIA DIRECTOR
20 STANSFIELD TURNER PROMISED CONGRESS IN 1975 DURING THE CHURCH
21 HEARINGS THEY WOULD NOTIFY EVERYONE. THEY STILL HAVEN'T. THE
22 ONLY THING THEY ARE DOING IS A DATABASE AND THEY'VE NOTIFIED A
23 SMALL NUMBER OF ACTUAL PARTICIPANTS TO THIS DATE, OR
24 SUCCESSFULLY NOTIFIED. THAT'S ENOUGH ON THAT.

25 YOUR HONOR, 1074 IS A NEW ARGUMENT THEY BROUGHT UP
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25

1 IN THEIR REPLY IN TERMS OF THE AUTHORITY. I JUST WANTED TO
2 POINT OUT TO THE COURT --

3 THE COURT: WHICH ONE IS 1074?

4 MR. ERSPAMER: 1074, I'M SORRY, DID I GET THE NUMBER
5 WRONG?

6 THERE'S A SPECIFIC SECTION C1 THAT SAYS, FUNDS
7 APPROPRIATED TO A MILITARY DEPARTMENT MAY BE USED TO PROVIDE

8 MEDICAL AND DENTAL CARE TO PERSONS ENTITLED TO SUCH CARE UNDER
9 LAW OR REGULATION.

10 THE COURT: OH, THAT.

11 MR. ERSPAMER: THERE'S A SPECIFIC AUTHORIZATION THAT
12 INCORPORATES ALL OTHER DUTIES WHICH WOULD INCORPORATE THE ARMY
13 REGULATIONS THAT WE REFER TO --

14 THE COURT: WELL, THEY WOULD GET THEIR CARE UNDER A
15 SERVICE CONNECTION.

16 MR. ERSPAMER: THERE'S ACTUALLY AUTHORITY FOR
17 GETTING CARE WITHOUT A SERVICE CONNECTION. IT IMPLIES BOTH,
18 REGULATIONS APPLY BOTH TO CIVILIANS AND MILITARY PEOPLE. AND
19 THIS IS ONE OF THE PROBLEMS WITH THE CASE PRESENTATION BY THE
20 DEFENDANTS.

21 THE PROMISES WERE MADE BY MULTIPLE DEFENDANTS,
22 INCLUDING CIA REPRESENTATIVES, WHO MAY HAVE AN INDEPENDENT DUTY
23 TO PROVIDE CARE, AND THE DEPARTMENT OF DEFENSE MAY HAVE AN
24 INDEPENDENT DUTY TO PROVIDE CARE, NOT JUST SERVICE CONNECTION.

25 THE PROBLEM WITH VA CARE, YOU DON'T GET CARE OR HAVE
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26

1 A VERY HIGH PRIORITY UNLESS YOU HAVE ESTABLISHED SERVICE
2 CONNECTION AT A FAIRLY HIGH RATE, 70 PERCENT OR ABOVE. SO IT
3 MAY OR MAY NOT GET CARE BECAUSE OF SERVICE CONNECTION. IF YOU
4 CAN'T ESTABLISH SERVICE CONNECTION, YOU GET NO CARE AT ALL FROM
5 THE VA. SO WE WOULD ARGUE THERE'S AN INDEPENDENT DUTY OF THE
6 OTHER DEFENDANTS.

7 THE COURT: BUT THAT'S NOT DAMAGES?

8 MR. ERSPAMER: WE ARE NOT ASKING FOR DAMAGES. WE
9 ARE ASKING -- WE SPECIFICALLY ALLEGED IN THE COMPLAINT THAT
10 THIS AREA OF MEDICAL CARE FOR PEOPLE WHO HAVE CHEMICAL,

11 MULTIPLE CHEMICAL, BIOLOGICAL EXPOSURES, THERE AREN'T MANY
12 DOCTORS WHO KNOW MUCH ABOUT THIS. AND THE DEFENDANTS HAVE VERY
13 PARTICULARIZED KNOWLEDGE ABOUT THE EFFECTS ON THE BODY AND THE
14 MEDICAL EFFECTS, AND SO ON, AND WE WANT CARE IN KIND TO BE
15 ORDERED AS PART OF THE DECLARATORY RELIEF FOR THESE VETERANS.
16 THAT'S WHAT WE'VE ASKED FOR.

17 THE COURT: NOT THROUGH THE VA?

18 MR. ERSPAMER: WE HAVE NOT YET INCLUDED THE VA AS A
19 DEFENDANT, IN ADDITION TO THE VA. SOME SMALL NUMBER OF THESE
20 PEOPLE HAVE GOTTEN SERVICE CONNECTION FROM THE VA, INCLUDING A
21 COUPLE OF OUR PLAINTIFFS. THEY ARE GETTING CARE FROM THE VA,
22 BUT A LARGE NUMBER OF THE PUTATIVE CLASS DOES NOT HAVE SERVICE
23 CONNECTION NOR DO THEY HAVE ANY MEDICAL CARE BEING PROVIDED BY
24 ANYBODY THAT'S A PART TO THIS LAWSUIT.

25 THE COURT: WHAT IS YOUR IDEA ABOUT HOW, FOR
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27

1 EXAMPLE, THE CIA WOULD PROVIDE MEDICAL CARE TO SOMEONE?

2 MR. ERSPAMER: IT COULD BE THROUGH ONE OF THE OTHER
3 DEFENDANTS, LIKE SUCH AS THE DEPARTMENT OF THE ARMY. THEY HAVE
4 A WHOLE MEDICAL CARE SYSTEM FOR EVERYONE WHO'S ALREADY IN THE
5 MILITARY. THAT'S WHAT THAT BIG ISSUE IN WASHINGTON, D.C. WAS
6 ABOUT WITH RESPECT TO THE HOSPITAL THERE A YEAR OR TWO AGO.

7 THE COURT: WALTER REED.

8 MR. ERSPAMER: WALTER REED. YEAH.

9 SO, YOUR HONOR, MOST THE OTHER POINTS, I THINK, ARE
10 COVERED IN THE BRIEFS.

11 I THINK THE ONLY THING THAT COUNSEL MISSED WITH
12 RESPECT TO THE QUESTION OF A DUTY IS THE OPINION LETTER FROM
13 THE DEPARTMENT OF JUSTICE THAT'S ATTACHED TO THE COMPLAINT.

♀

14 THEY HAVE CONCLUDED A LONG TIME AGO THAT THEY HAD A DUTY TO
15 WARN. I BELIEVE THAT WAS WRITTEN IN 1975. THAT'S QUITE A LONG
16 TIME AGO.

17 AND THEY SAID IT MAY ALSO HAVE A DUTY TO PROVIDE
18 HEALTH CARE. THERE IS QUITE A COMPREHENSIVE ANALYSIS OF IT. I
19 THINK IT'S EXHIBIT A OR B, I FORGET WHICH, TO THE COMPLAINT IS
20 THAT OPINION LETTER FROM THE DEPARTMENT OF JUSTICE.

21 AND WHAT THEY DID WAS THEY SHOVED IT TO ONE SIDE AND
22 THEY REALLY DIDN'T DO ANYTHING UNTIL THE LAST FEW YEARS. THAT
23 HAS BEEN THE HISTORY OF THAT AND THE HISTORY OF THE MEDICAL
24 CARE.

25 I DON'T KNOW IF THERE IS ANYTHING ELSE YOUR HONOR
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28

1 WANTS ME TO RESPOND TO, BUT I THINK A LOT IS IN THE BRIEFS.

2 THE COURT: ALL RIGHT. WELL, I'LL TAKE A LOOK AT
3 IT.

4 I THINK I MAY NEED YOU TO AMEND THE COMPLAINT TO
5 MAKE SOME OF THE ALLEGATIONS THAT YOU SAY YOU CAN MAKE.

6 ON THE OTHER HAND, I AM NOT INCLINED TO WAIT ON
7 THAT. I WANT TO JUST GO AHEAD WITH THE CASE MANAGEMENT
8 CONFERENCE AND PROCEED AS THOUGH WE WERE GOING TO BE IN THIS
9 COURT. IF IT ENDS UP WE ARE NOT, YOU WILL STILL HAVE TO DO THE
10 SAME SORTS OF THINGS IN SOME OTHER COURT, SO IT WON'T REALLY
11 HURT TO GET STARTED.

12 MS. LEWIS-WOLVERTON: YES, YOUR HONOR. MAY I
13 RESPOND TO THE LAST POINT? MR. ERSPAMER INDICATED THAT THE
14 ONLY THING I MISSED WAS THE DOJ OPINION LETTER. AND IT'S CLEAR
15 UNDER THE NORTON VERSUS SOUTHERN UTAH WILDERNESS AREA CASE THAT
16 AN AGENCY LETTER CANNOT CONSTITUTE THE LEGALLY BINDING

17 AUTHORITY THAT IS NECESSARY TO SUPPORT A CLAIM UNDER APA
18 SECTION 7061. SO THAT CAN'T FORM A BASIS FOR SUBJECT MATTER
19 JURISDICTION THERE.

20 AND ALSO THE RELEVANT STATUTE GOVERNING CARE BY THE
21 VA PROVIDES THE SERVICE CONNECTION OF 50 PERCENT OR MORE
22 SATISFIES THE STANDARD. I JUST WANTED TO CLARIFY THOSE.

23 BUT BECAUSE OF THE VENUE PROBLEMS, WE REALLY DO
24 THINK THE CASE SHOULD BE DISMISSED. WE UNDERSTAND YOUR HONOR
25 IS INCLINED TO ALLOW AN AMENDED COMPLAINT. WE WOULD LIKE AN
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29

1 OPPORTUNITY TO RESPOND TO A MOTION TO AMEND TO SEE WHAT THE
2 GROUNDS ARE.

3 THE COURT: WELL, I WOULD DISMISS WITH LEAVE TO
4 AMEND, SO THEY WOULDN'T NEED TO MAKE A MOTION. THEY'LL JUST
5 FILE AN AMENDED COMPLAINT IN TEN DAYS OR WHATEVER, AND IF YOU
6 STILL FELT YOU NEEDED TO MOVE TO DISMISS IT, YOU WOULD MOVE TO
7 DISMISS IT AGAIN.

8 MS. LEWIS-WOLVERTON: OKAY. THANK YOU.

9 THE COURT: AND IF I FOUND THAT I DID HAVE --
10 DISMISSED IT, I WOULD TRANSFER IT TO, I SUPPOSE, IT WOULD END
11 UP IN WASHINGTON DC IN THE DISTRICT COURT IN THE DISTRICT OF
12 COLUMBIA. IF I TRANSFER IT SOMEWHERE, THAT'S WHERE I WOULD
13 TRANSFER IT, RIGHT?

14 MR. ERSPAMER: THAT'S PROBABLY THE PLACE THAT HAS
15 THE MOST CONNECTIONS TO THE CASE.

16 THE COURT: THAT IS WHERE THE DEFENDANTS ARE.

17 MR. ERSPAMER: THAT IS WHERE THE DEFENDANTS RESIDE,
18 YES.

19 THE COURT: SO THAT'S WHAT I WOULD DO IF I DID

20 DISMISS IT.

21 SHEILAH, WOULD YOU GIVE THEM SCHEDULING ORDERS?

22 WE WILL GO AHEAD AND SET THE DATES. STARTING WITH
23 ALTERNATIVE DISPUTE RESOLUTION, YOU CAN BRING THE DATES DOWN AS
24 WE SET THEM. YOU WILL GET ANOTHER COPY OF THAT THROUGH
25 E-FILING. ATTACHED TO IT, YOU WILL FIND THE ORDER FOR PRETRIAL

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1 PREPARATION WHICH WILL INCLUDE THE PAPERWORK YOU'LL NEED TO BE
2 FILED IN ADVANCE OF THE PRETRIAL CONFERENCE.

3 THE FIRST THING IS THE SETTLEMENT, WHICH YOU SAID
4 YOU DIDN'T WANT TO -- I GRANTED THE EXEMPTION. I GUESS NOW
5 THAT I SEE IT, IT SEEMS TO ME THAT YOU COULD SETTLE IT.

6 SO, HOW ABOUT GOING TO A MAGISTRATE JUDGE? WOULD
7 THAT BE THE BEST OR SHOULD WE -- YOU WANT TO GO TO A PRIVATE
8 MEDIATOR?

9 MR. ERSPAMER: ANY OF THOSE OPTIONS ARE FINE WITH
10 US.

11 MS. LEWIS-WOLVERTON: YOUR HONOR, IF YOUR HONOR
12 DIRECTS US TO GO TO MEDIATION, WE CERTAINLY WOULD. WE DON'T
13 THINK IT IS APPROPRIATE BECAUSE WE DO THINK THESE MATTERS ARE
14 CONSTITUTIONALLY ASSIGNED TO THE LEGISLATURE.

15 THE COURT: IF WHAT YOU ARE SAYING IS CORRECT, AND
16 YOU'RE REALLY WILLING AND, IN FACT, ARE DOING EVERYTHING THEY
17 WANT YOU TO, THAT WOULD BE ENOUGH TO SETTLE. IF YOU AGREE TO
18 DO THE THINGS YOU ALREADY KNOW YOU WANT TO DO, AND MAKE THEM
19 DISMISS THEIR CASE.

20 MS. LEWIS-WOLVERTON: TRUE. WE THINK IT IS
21 SUPERFLUOUS, BUT IF YOUR HONOR ORDERS US TO DO IT, WE WILL.

22 THE COURT: LET'S HAVE A SETTLEMENT CONFERENCE JUST
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23 WITH A MAGISTRATE JUDGE WOULD BE THE BEST WAY TO DO IT.

24 MR. ERSPAMER: THAT'S FINE.

25 THE COURT: WE WILL DO THAT WITHIN THE NEXT 120

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1 DAYS.

2 MEANWHILE, THE PLAINTIFFS GAVE ME A LIST OF PROPOSED
3 DATES. THE DEFENDANT DID NOT. SHOULD I USE THEIR DATES OR DO
4 YOU HAVE DIFFERENT DATES YOU WANT TO SUGGEST?

5 MS. LEWIS-WOLVERTON: WE DON'T BECAUSE WE DON'T
6 THINK THE CASE SHOULD PROCEED IN THIS FORUM.

7 THE COURT: OKAY. I WILL USE THEIRS.

8 FACT DISCOVERY CUTOFF, MAY 31, 2011.

9 DESIGNATION OF EXPERTS, MAY 31ST, 2011. AND IF ANY
10 OF THOSE HAPPEN TO BE WEEKEND DAYS, CUTOFF WILL BE THE FIRST
11 COURT DAY AFTER THAT WEEKEND DAY. I DON'T HAVE A 2011 CALENDAR
12 HANDY.

13 THE CLERK: IT'S --

14 THE COURT: THAT'S ALL RIGHT. THEY CAN USE THE NEXT
15 BUSINESS DAY.

16 EXPERT DISCOVERY CUTOFF OCTOBER -- AUGUST 31ST,
17 2011.

18 LAST DAY FOR HEARING DISPOSITIVE MOTIONS, WELL THAT
19 ONE I DO NEED A THURSDAY. SO LET'S CALL IT THE FIRST THURSDAY
20 IN 2012.

21 THE CLERK: JANUARY 5TH.

22 THE COURT: IT IS JANUARY 5TH. THEY HAVE A
23 THURSDAY.

24 AND THEN YOU SAID YOU WANT TO FILE THEM OCTOBER 7TH.
25 ORDINARILY IT WOULDN'T BE FILED THAT FAR IN ADVANCE OF THE

1 HEARING, BUT YOU HAD IN MIND A MORE LENGTHY BRIEFING SCHEDULE,
2 I TAKE IT.

3 MR. ERSPAMER: YES, YOUR HONOR.

4 THE COURT: DID YOU WANT TO FILE THE MOTION OR DO
5 YOU WANT THEM TO FILE IT?

6 MR. ERSPAMER: BOTH SIDES? WE CAN DO BOTH SIDES.

7 THE COURT: I DON'T LIKE TO DO IT THAT WAY. I WANT
8 SOMEBODY TO FILE FIRST. SO SINCE YOU ARE ANXIOUS, LET'S HAVE
9 YOU FILE FIRST.

10 MR. ERSPAMER: THAT'S FINE.

11 THE COURT: FILE YOUR CASE DISPOSITIVE MOTION ON
12 OCTOBER 7TH. WHY DON'T WE HAVE THE DEFENDANT FILE ITS
13 OPPOSITION AND CROSS-MOTION THREE WEEKS LATER, WHENEVER THAT
14 MIGHT BE, AND THE PLAINTIFFS CAN FILE THEIR REPLY AND THEIR
15 OPPOSITION TO THE CROSS-MOTION TWO WEEKS AFTERWARDS, AND THE
16 DEFENDANTS CAN FILE THEIR REPLY TO THE CROSS-MOTION ONE WEEK
17 AFTER THAT.

18 AND IF I AM COUNTING RIGHT, THAT SHOULD END UP
19 SOMEWHERE IN THE NEIGHBORHOOD OF DECEMBER, AND THEN WE CAN HAVE
20 THE HEARING ON JANUARY 5TH, AS YOU PROPOSE.

21 THEN WE WOULD HAVE A PRETRIAL -- WELL, THE TRIAL, I
22 DON'T KNOW IF IT GOES UP TO 2012.

23 IS MARCH 26TH OF 2012 A MONDAY?

24 THE CLERK: YES.

25 THE COURT: SO WE CAN SET THE TRIAL FOR MARCH 26TH

1 OF 2012. SHEILAH, IF YOU CAN GIVE ME THE TWO TUESDAYS BEFORE
2 THAT. WOULD BE, I GUESS, THE --

3 THE CLERK: 13TH.

4 THE COURT: PRETRIAL CONFERENCE ON MARCH 13TH.

5 YOU HAD THAT.

6 MR. ERSPAMER: YES, WE DID.

7 THE COURT: SOMEBODY CHECKED INTO MY SCHEDULES.

8 MR. ERSPAMER: YES, WE DID.

9 THE COURT: MARCH 13TH AT 2:00 O'CLOCK FOR PRETRIAL
10 CONFERENCE.

11 AND THIS IS A BENCH TRIAL, HOW LONG WILL IT TAKE TO
12 TRY?

13 MR. ERSPAMER: IT IS REALLY HARD TO SAY, YOUR HONOR.
14 AT THIS POINT, CAN WE DEFER THAT ISSUE?

15 THE COURT: NO -- AT THE MOMENT MY CALENDAR IS
16 PRETTY OPEN IN 2012, BUT AT SOME POINT I'LL START SETTING
17 THINGS.

18 MR. ERSPAMER: MAYBE A MONTH WOULD BE ABOUT MY
19 GUESS.

20 THE COURT: OKAY. FIVE TIMES -- HOW ABOUT FOUR
21 WEEKS? FOUR TIMES FIVE IS 20, 20 DAYS BENCH TRIAL.

22 AND IF YOU COULD FILE AN AMENDED COMPLAINT IN TWO
23 WEEKS?

24 MR. ERSPAMER: TWO WEEKS IS FINE, YOUR HONOR.
25 WITHIN TWO WEEKS. MAYBE WE WILL BE ABLE TO DO IT FASTER.

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1 THE COURT: AND THEN WHAT YOU CAN DO AS SOON AS YOU
2 GET IT IS FILE A MOTION TO DISMISS WITHIN THE TIME PERIOD THAT

2009-12-03 Motion to Dismiss Hearing Transcript.txt
3 IS REQUIRED, WHICH I FORGET WHAT IT IS, AND NOTICE IT FOR
4 HEARING.

5 I MAY TAKE IT UNDER SUBMISSION ON THE PAPERS, BUT
6 JUST TO GET A BRIEFING SCHEDULE GOING, GO AHEAD AND NOTICE IT
7 FOR HEARING. AND THEN MEANWHILE, WE WILL PROCEED WITH THE CASE
8 MANAGEMENT SCHEDULE THAT I HAVE OUTLINED.

9 MR. ERSPAMER: WOULD THAT MOTION TO DISMISS THAT YOU
10 JUST REFERRED TO BE ON THE VENUE ISSUE, ANTICIPATING, OR
11 REBRIEF EVERYTHING?

12 THE COURT: NO. IF SOMETHING THEY SAY IS EXACTLY
13 THE SAME AS THEY SAID BEFORE AND I DIDN'T DISMISS IT, THEN YOU
14 WOULDN'T REPEAT THOSE SAME ARGUMENTS.

15 I WILL ISSUE AN ORDER ON THIS MOTION TO DISMISS.
16 AND ON YOUR NEXT MOTION TO DISMISS, IF YOU MAKE ONE, YOU MAY
17 JUST INCORPORATE BY REFERENCE YOUR PREVIOUS MOTION AND THE
18 PREVIOUS DENIAL OF IT. YOU DON'T NEED TO REBRIEF THE WHOLE
19 THING. ALL YOU NEED TO DO IS REBRIEF ANYTHING THAT CHANGED BY
20 VIRTUE OF THEIR AMENDED COMPLAINT.

21 MS. LEWIS-WOLVERTON: OKAY.

22 THE COURT: THAT WON'T WAIVE ANY OF THE OBJECTIONS
23 YOU MADE THE FIRST TIME AROUND.

24 MS. LEWIS-WOLVERTON: THANK YOU.

25 MR. ERSPAMER: THAT MAKES SENSE. THANK YOU.

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1 THE COURT: IF YOU DECIDE TO ANSWER IT INSTEAD, OF
2 COURSE YOU CAN DO THAT.

3 IF YOU WANTED TO AGREE TO SEND IT TO DC, THAT WOULD
4 BE FINE AS WELL.

5 AND YOU CAN ALSO TALK ABOUT SETTLEMENT BEFORE GOING

2009-12-03 Motion to Dismiss Hearing Transcript.txt
6 TO SEE THE MAGISTRATE JUDGE. IF COUNSEL IS CORRECT THAT
7 PERHAPS THE SECRECY THING IS OFF THE TABLE, YOU CAN PERHAPS
8 SETTLE THAT PART. MAYBE YOU CAN TALK ABOUT WHAT THEY ARE DOING
9 IN TERMS OF NOTICE AND DISCLOSURES AND SEE IF YOU CAN REACH
10 SOME COMMON GROUND WHERE THEY WOULD AGREE TO DO THE SORT OF
11 THINGS THAT YOU WANT THEM TO DO OR YOU COULD PROPOSE TO THEM
12 THE THINGS THAT YOU DO WANT THEM TO DO, AND SEE HOW THAT GOES.

13 MR. ERSPAMER: THAT'S PERFECTLY FINE WITH US. WE
14 WOULD BE HAPPY TO HAVE THAT DISCUSSION.

15 THE COURT: OKAY.

16 ALL RIGHT. ANYTHING ELSE THEN?

17 MS. LEWIS-WOLVERTON: THE OTHER MATTER IS DISCOVERY
18 THAT HAS BEEN PENDING AS REFERENCED IN THE PARTIES' CASE
19 MANAGEMENT STATEMENT. WE REACHED AN INFORMAL AGREEMENT UNDER
20 WHICH THE GOVERNMENT PROVIDED A NUMBER OF DOCUMENTS TO THE
21 PLAINTIFFS IN EXCHANGE FOR AN AGREEMENT THAT THEY WOULDN'T
22 PURSUE THEIR ADDITIONAL DISCOVERY REQUESTS UNTIL EITHER THE
23 COURT RULES ON A MOTION TO DISMISS OR A DATE CERTAIN. I THINK
24 IT IS FEBRUARY 19TH.

25 AND SINCE NOW IT SOUNDS LIKE THEY ARE GOING TO BE
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1 FILING AN AMENDED COMPLAINT, WE THINK IT IS APPROPRIATE TO TALK
2 ABOUT A REASONABLE SORT OF SET OF DATES FOR DISCOVERY.

3 THE COURT: WELL, I WILL STICK WITH THE DEAL YOU
4 MADE, WHICH WAS I THINK 30 DAYS AFTER -- THE MOTION TO DISMISS
5 IS LIKELY TO BE DENIED IN SUBSTANCE. IN OTHER WORDS, THE CASE
6 WILL GO FORWARD. THE WORST THING THAT WILL HAPPEN IS IT WILL
7 BE -- WORSE THING FOR THEM MAYBE, NOT BE THE WORST THING FOR A
8 NUMBER OF OTHER PEOPLE, BUT THE WORST THING FOR THEM WOULD BE

2009-12-03 Motion to Dismiss Hearing Transcript.txt
9 THAT IT'S TRANSFERRED TO DC, IN WHICH CASE YOU WOULD STILL HAVE
10 TO DO DISCOVERY.

11 I WILL ABIDE BY YOUR AGREEMENT AND THE DISCOVERY
12 WILL START TO BECOME DUE WITHIN 30 DAYS OF AN ORDER, WHICH I
13 ANTICIPATE WOULD BE A MOTION, DENIAL OF THE SUBSTANTIVE
14 PORTIONS OF YOUR MOTION TO DISMISS, EVEN THOUGH THE VENUE
15 ASPECT MAY STILL BE PENDING.

16 MS. LEWIS-WOLVERTON: AND THIS IS A --
17 THE COURT: OR FEBRUARY 19TH. I HOPE THE ORDER WILL
18 COME OUT MORE THAN 30 DAYS BEFORE FEBRUARY 19TH, BUT IF IT
19 DOESN'T, FEBRUARY 19TH.

20 MR. ERSPAMER: THANK YOU, YOUR HONOR.

21 MS. LEWIS-WOLVERTON: BUT IF THE PLAINTIFFS AMEND
22 THEIR COMPLAINT, THEN WE WOULD BE RESPONDING TO THAT COMPLAINT.

23 WHAT I AM SAYING IS, WE WOULD LIKE THE DISCOVERY TO
24 FLOW 30 DAYS FROM THAT ORDER.

25 THE COURT: WHAT I AM SAYING IS NO.

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1 MS. LEWIS-WOLVERTON: OKAY.

2 THE COURT: 30 DAYS FROM THIS ORDER. YOU DON'T HAVE
3 PERMISSION TO AMEND ANYTHING OTHER THAN THE --

4 MR. ERSPAMER: VENUE.

5 THE COURT: BEEF UP YOUR VENUE. YOU MAY NOT ADD NEW
6 CLAIMS OR BEEF UP ANYTHING ELSE WITHOUT MAKING A MOTION TO
7 AMEND YOUR COMPLAINT. THE PART YOU HAVE PERMISSION ABOUT IS
8 THE VENUE.

9 MR. ERSPAMER: WE UNDERSTAND.

10 THE COURT: AND THAT'S BASED ON THE SUBSTANCE OF
11 WHAT YOU HAVE CLAIMED SO FAR, I WILL ALLOW THE DISCOVERY TO GO

2009-12-03 Motion to Dismiss Hearing Transcript.txt
FORWARD 30 DAYS FROM WHEN MY ORDER COMES OUT, OR FEBRUARY 19TH.

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MS. LEWIS-WOLVERTON: OKAY.

MR. ERSPAMER: THANK YOU VERY MUCH.

MS. LEWIS-WOLVERTON: THANK YOU.

(PROCEEDINGS CONCLUDED AT 4:15 P.M.)

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CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C-09-0037 CW VIETNAM VETERANS OF AMERICA, ET AL., VERSUS CIA, ET AL., PAGES NUMBERED 1 THROUGH 38, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

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†

Other Supporting Documents

[4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al](#)
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Case Name: Vietnam Veterans of America et al v. Central Intelligence Agency et al

Case Number: [4:09-cv-00037-CW](#)

Filer: Swords to Plowshares: Veterans Rights Organization
Vietnam Veterans of America

Bruce Price

Franklin D. Rochelle

Larry Meirow

Eric P. Muth

David C. Dufrane

William Blazinski

Tim Michael Josephs

Document Number: [189](#)

Docket Text:

[Declaration of Gordon P. Erspamer in Support of \[188\] Memorandum in Opposition, filed by William Blazinski, David C. Dufrane, Tim Michael Josephs, Larry Meirow, Eric P. Muth, Bruce Price, Franklin D. Rochelle, Swords to Plowshares: Veterans Rights Organization, Vietnam Veterans of America. \(Attachments: # \(1\) Exhibit A, # \(2\) Exhibit B\)\(Related document\(s\)\[188\]\) \(Erspamer, Gordon\) \(Filed on 12/13/2010\)](#)

4:09-cv-00037-CW Notice has been electronically mailed to:

Adriano Hrvatin ahrvatin@mofocom, patherton@mofocom

Brigham John Bowen Brigham.Bowen@usdoj.gov

Gordon P. Erspamer GErspamer@mofocom, jdwright@mofocom, kbeaudoin@mofocom, lsario@mofocom

Joshua Edward Gardner joshua.e.gardner@usdoj.gov, kathleen.white@usdoj.gov

Kimberly L. Herb Kimberly.L.Herb@usdoj.gov

Lily Sara Farel lily.farel@usdoj.gov

Stacey Michelle Sprenkel ssprekel@mofocom, jhaskins@mofocom

Timothy W. Blakely tbladely@mofocom, lyan@mofocom

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[STAMP CANDStamp_ID=977336130 [Date=12/13/2010] [FileNumber=6983489-0]

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937f3ef9c96851615d39953b9e24892390474a49399f990ea507bc8cbcbc]]

Document description:Exhibit A

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11365f35a33d08cdda77dba42b5fc6ebe9e0e484cfa9f6c96e9d15ab272]]

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