

1 IAN GERSHENGORN  
 Deputy Assistant Attorney General  
 2 MELINDA L. HAAG  
 United States Attorney  
 3 VINCENT M. GARVEY  
 Deputy Branch Director  
 4 JOSHUA E. GARDNER  
 District of Columbia Bar No. 478049  
 5 KIMBERLY L. HERB  
 Illinois Bar No. 6296725  
 6 LILY SARA FAREL  
 North Carolina Bar No. 35273  
 7 BRIGHAM JOHN BOWEN  
 District of Columbia Bar No. 981555  
 Trial Attorneys  
 8 Civil Division, Federal Programs Branch  
 U.S. Department of Justice  
 9 P.O. Box 883  
 Washington, D.C. 20044  
 10 Telephone: (202) 305-7583  
 Facsimile: (202) 616-8202  
 11 E-mail: joshua.e.gardner@usdoj.gov

12 Attorneys for DEFENDANTS

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

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

Case No. CV 09-0037-CW

Noticed Motion Date and Time:  
 January 13, 2011  
 2:00 p.m.

**DEFENDANTS' REPLY  
 MEMORANDUM IN SUPPORT OF  
 PARTIAL MOTION TO DISMISS  
 PLAINTIFFS' THIRD AMENDED  
 COMPLAINT**

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**INTRODUCTION**

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Both on its face and in substance, Defendants’ Partial Motion to Dismiss Plaintiffs’ Third Amended Complaint (“Defendants’ Motion on the Third Amended Complaint” or “Motion”) is not a motion for reconsideration. Instead, Defendants present issues and arguments not previously considered by this Court, including issues that go to the Court’s jurisdiction, in an effort to streamline the claims remaining in this action and aid judicial resolution thereof. In fact, it is both appropriate and advantageous that the Court consider these issues now. As this Court has recognized, Plaintiffs have not always been clear about the nature of their claims. (Dkt. 177 at 7.) In particular, Plaintiffs continually lump the Defendants together without recognizing that they are individual federal agencies and officials with distinct roles and legal obligations. This problem is manifest in, among other things, the purported legal basis for Plaintiffs’ notice claim against the Central Intelligence Agency (“CIA”) and Attorney General and Plaintiffs’ health care claim against the CIA.

As discussed in Defendants’ Motion on the Third Amended Complaint, and which Plaintiffs do not dispute, an Army regulation cannot bind the CIA and Attorney General. Nor can the state common-law duty to warn discussed in a Department of Justice (“DOJ”) letter and memorandum provide a substantive right enforceable through the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. And even if a state tort common law could create a substantive right to notice, the Court lacks subject matter jurisdiction to hear such claims because (1) the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346, is the exclusive remedy for tort claims against the United States, and (2) injunctive relief is not available under the Act. Thus, there is no legal basis for Plaintiffs’ notice claim against the CIA and Attorney General or the health care claim against the CIA. Even if there were a basis for these claims to proceed, a ruling from the Court clarifying the legal basis of those claims would guide the parties’ discovery efforts and

1 enable them to understand the elements of the claims against the Defendants and their available  
2 defenses.

3 Plaintiffs' response to Defendants' contentions is to ignore them and mischaracterize  
4 Defendants' motion as a motion for reconsideration, which Plaintiffs somehow believe is  
5 improper and should not be considered by this Court. Plaintiffs are misguided on a number of  
6 levels. At bottom, Plaintiffs' response is a half-hearted (and baseless) motion to strike  
7 masquerading as an opposition. Moreover, as demonstrated below, the arguments raised in  
8 Defendants' Motion on the Third Amended Complaint are not subject to waiver, do not merely  
9 raise already-considered matters, and are not barred by any Court order. Indeed, the only  
10 legitimate question of waiver raised by the parties' filings is whether Plaintiffs have waived their  
11 opportunity to address the substance of Defendants' Motion on the Third Amended Complaint  
12 since they failed to do so in their opposition. For all these reasons, the claims addressed in  
13 Defendants' Motion on the Third Amended Complaint should be dismissed.  
14  
15

16 **I. DEFENDANTS ARE NOT BARRED FROM RAISING THE ISSUES IDENTIFIED**  
17 **IN THEIR PARTIAL MOTION TO DISMISS.**

18 Plaintiffs' sole argument in opposition to Defendants' Motion on the Third Amended  
19 Complaint is a procedural one. Specifically, Plaintiffs claim that this Court should not hear the  
20 motion because it "is a thinly-disguised attempt to seek reconsideration of the Court's January 19,  
21 2010 Order denying in part" Defendants' earlier motion to dismiss. (Pls.' Opposition to Defs.'  
22 Partial Mot. to Dismiss ("Pls.' Opp'n") at 2.) Though Plaintiffs fail to identify the legal theory  
23 underlying their contention,<sup>1</sup> it appears that Plaintiffs believe Defendants have somehow waived  
24

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25 <sup>1</sup> Plaintiffs' citation to Federal Rules of Civil Procedure 59 and 60 is clearly inapposite.  
26 On their face, both rules apply solely to judgments, not interlocutory orders. Furthermore, as this  
27 Circuit has made clear, "as long as a district court has jurisdiction over the case, then it possesses  
28 the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause  
seen by it to be sufficient." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254  
F.3d 882, 889 (9th Cir. 2001) (citation omitted).

1 arguments not previously presented to the Court. Alternatively, Plaintiffs seem to argue that  
2 some aspect of the law of the case doctrine bars this Court from considering Defendants' Motion  
3 on the Third Amended Complaint. Plaintiffs both misconstrue Defendants' Motion and, to the  
4 extent Plaintiffs rely on some uncited legal or procedural authority regarding waiver or the law of  
5 the case doctrine, Plaintiffs misconstrue those authorities. Defendants have not waived their right  
6 to make any legal argument arising from a newly filed amended complaint, nor does the law of  
7 the case doctrine or any other legal doctrine preclude Defendants from raising the new arguments  
8 identified in their present motion.

10 **A. Defendants Have Not Waived Any of the Arguments in Their Motion on the**  
11 **Third Amended Complaint.**

12 As a threshold matter, Plaintiffs appear to believe that, because Defendants did not raise  
13 certain issues or arguments previously, those arguments cannot be made now. Plaintiffs are  
14 incorrect. Defendants have not waived the arguments raised in their Motion on the Third  
15 Amended Complaint. Rule 12(b)(1) and 12(b)(6) defenses generally are not subject to waiver.  
16 This is most obviously the case where the defenses are raised in response to an amended  
17 complaint, which renders the prior complaint a nullity. *See In re Parmalat Sec. Litig.*, 421 F.  
18 Supp. 2d 703, 713 (S.D.N.Y. 2006) (“[Plaintiff] argues that defendants have waived this defense  
19 by not raising it in their motions to dismiss the original complaint. An amended complaint,  
20 however, supersedes the original and entitles a defendant to raise substantive arguments aimed at  
21 judicial resolution of the controversy in a new responsive pleading, even if those arguments were  
22 not raised in response to the original complaint.” (internal quotation marks and citation omitted));  
23 *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (stating that the  
24 only “defenses and objections that are irrevocably waived by answering an original complaint are  
25 those that involve[] the core issue of a party’s willingness to submit a dispute to judicial  
26 resolution, such as” arguments concerning personal jurisdiction, venue, and insufficiency of  
27  
28

1 process or service). Indeed, Defendants are entitled to raise arguments in response to an amended  
2 complaint “irrespective of whether those contentions were raised in response to” a prior operative  
3 pleading. *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, \_\_\_ F. Supp. 2d  
4 \_\_\_\_\_, 2010 WL 3749288, at \*13 (M.D. Pa. Sept. 21, 2010) (“[P]laintiffs’ second amended  
5 complaint supersedes the consolidated amended complaint, which allows defendants to raise  
6 substantive arguments in a new responsive pleading irrespective of whether those contentions  
7 were raised in response to the consolidated amended complaint.” (citations omitted)). In point of  
8 fact, but for Plaintiffs’ express contention that they do not seek to relitigate already-dismissed  
9 claims, such as the lawfulness of the test programs and the *Feres* doctrine, Defendants may have  
10 been obligated to raise all their defenses to all claims in the present motion in order to preserve  
11 them.  
12

13  
14 Additionally, courts frequently hear subsequent Rule 12 motions “where such motions are  
15 not interposed for delay or harassment.” *SCO Group, Inc. v. Novell Inc.*, 377 F. Supp. 2d 1145,  
16 1151 (D. Utah 2005) (“Even if there was some factual basis for the motion when the prior motion  
17 was brought, the motion does not appear to be brought for purposes of delay. In fact, [Defendant]  
18 appears to be asserting these issues so that they can be ruled on before further time and money be  
19 spent on other issues in the case”); *see also Shields*, 25 F.3d at 1128 (stating that a successive  
20 motion to dismiss was “an effort to achieve judicial resolution of the controversy, not to foreclose  
21 it”). Here, Defendants’ motion is not made for purposes of delay or harassment, but rather to  
22 streamline this case.<sup>2</sup> In fact, all Defendants are currently engaged in discovery while this motion  
23 is pending and do not seek a stay.  
24

25  
26 <sup>2</sup> Defendants’ interest in streamlining the case is further demonstrated by the fact that they  
27 do not raise here issues that were squarely addressed in prior briefing, issues such as venue,  
28 statute of limitations defenses, standing, and the Supreme Court’s decision in *United States v. Stanley*, 483 U.S. 669 (1987).



1           **B.     The Law of the Case Doctrine Does Not Serve As a Bar to Defendants’**  
2           **Motion on the Third Amended Complaint.**

3           Although it is unclear, Plaintiffs may be attempting to ground their opposition on some  
4           aspect of the law of the case doctrine. Under this doctrine, “a court is ordinarily precluded from  
5           reexamining an issue previously decided by the same court, or a higher court, in the same case.”  
6           *Hydrick v. Hunter*, 500 F3d 978, 986 (9th Cir. 2007) (quoting *Richardson v. United States*, 841  
7           F.2d 993, 996 (9th Cir.1988)). An issue is not barred by the doctrine, however, unless it was  
8           “squarely . . . presented for decision”; “‘peripheral’ statements as to issues that were not briefed  
9           or argued do not constitute law of the case.” *Perkins v. Am. Electric Power Fuel Supply, Inc.*, 91  
10          F. App’x 370, 374 (6th Cir. 2004). Indeed, courts have found that issues not briefed by the  
11          parties are not precluded from consideration under the law of the case doctrine. For instance, one  
12          court found that the law of the case doctrine did not apply where “at the most basic level, the  
13          merits of the instant motion were not briefed or ruled upon by the Court . . . in any meaningful  
14          way whatsoever.” *Nesselrotte v. Allegheny Energy, Inc.*, No. 06-01390, 2008 WL 2890832, \*3  
15          (W.D. Pa. July 23, 2008). Another concluded that the doctrine only applies “if those matters were  
16          fully briefed to and necessary predicates to” an earlier decision; “if the issues were not briefed,  
17          the law of the case doctrine does not bar this Court from addressing them now.” *In re Wright*,  
18          No. SA-03-CV-932, 2004 WL 569517, \*5 (W.D. Tex. Mar. 8, 2004). For the reasons described  
19          below, neither the law of the case doctrine, nor the Court’s orders, nor any other rule deprives  
20          Defendants of their right to address those matters presented in their Motion on the Third  
21          Amended Complaint.  
22          Amended Complaint.  
23          Amended Complaint.

24                           **1.     The CIA Raises Entirely New Issues that this Court Has Not**  
25                           **Previously Addressed.**

26           The CIA raises three entirely new issues in Defendants’ Motion on the Third Amended  
27           Complaint. None of these issues were briefed by the parties as part of Defendants’ prior motions,  
28

1 due in large measure to the fact that Plaintiffs have not clearly indicated how their legal theories  
2 apply specifically to the CIA. Thus, these issues are not precluded under the law of the case  
3 doctrine. Furthermore, to the degree the Court touched on issues related to those currently before  
4 the court, new motions are permitted where the legal arguments raised by the CIA are a logical  
5 outgrowth of (or “triggered” by) the Court’s order on Defendants’ earlier motion to dismiss. *See*  
6 *SCO Group, Inc.*, 377 F. Supp. 2d at 1151 (concluding that the defendant’s arguments were not  
7 the same in both briefs because the briefs discussed different elements of the same claim); *see id.*  
8 (holding that its “previous order on [defendant’s] first motion to dismiss obviously triggered the  
9 filing of [defendant’s] present motion”). For these reasons, none of the three arguments raised by  
10 the CIA should be denied review.  
11

12 First, CIA argues in the Motion on the Third Amended Complaint that a state tort  
13 common-law duty is not enforceable against the CIA through the APA. As discussed in more  
14 detail below, this issue was not briefed before because it was unclear that Plaintiffs were seeking  
15 to establish that the DOJ letter and memorandum – which concerned the CIA’s duties for the  
16 MKULTRA program as enforced through the FTCA – was also the source of the CIA’s alleged  
17 duty to provide notice to service members.<sup>3</sup> Even if it was briefed, (which it was not), this issue  
18 did not crystallize until this Court ruled on the earlier motion to dismiss. As recognized by the  
19 CIA, “[t]his Court previously held that the sole potential legal basis for this claim against the CIA  
20 is stated in a 1978 Department of Justice letter and memorandum regarding the CIA’s  
21 MKULTRA program.” (Mot. at 7.) A necessary question of law flows from this determination:  
22 “Having established that Plaintiffs’ notice claim rests on a state common law duty, the next  
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26 <sup>3</sup> Tellingly, Plaintiffs’ Opposition fails to provide an answer to the basic question they  
27 claim has already been decided in this case: what is the substantive *federal* law that provides the  
28 basis for their notice claim against the CIA?

1 question for this Court is whether this duty may be the source of a substantive right to be enforced  
2 by the CIA.” (*Id.* at 9.) And more specifically, Defendants’ motion raises the issue of whether a  
3 state common law duty can be used in the present case under the APA where “the APA does not  
4 borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory  
5 relief against the United States.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854  
6 (D.C. Cir. 2010) (J. Kavanaugh, concurring). Thus, the issue presented here – which may  
7 implicate the Court’s jurisdiction, (*see* Mot. at 12 n.12) – not only is different from the issue  
8 previously raised, but also is triggered by the Court’s ruling in the earlier motion to dismiss.  
9 Accordingly, the CIA is entitled to raise the issue in the present motion.

11 In addition, identifying the source of federal law for Plaintiffs’ notice claim against the  
12 CIA would help guide the parameters of discovery and assist the parties in further developing  
13 their claims or defenses. Although Defendants’ Motion on the Third Amended Complaint  
14 establishes that there is no such federal authority, if Plaintiffs are correct that there is one, it  
15 would greatly benefit the parties to identify that authority now. As an illustration, if the FTCA  
16 were the source of authority (which it is not), the parties would need to develop evidence in  
17 discovery in accordance with the other legal requirements that Congress set forth in the FTCA.  
18 For example, the Ninth Circuit established detailed guidance on the type of evidence that needs to  
19 be developed to determine whether the FTCA’s discretionary function exception bars duty to  
20 warn claims similar to the one brought by Plaintiffs in this case. *See Prescott v. United States*,  
21 973 F.2d 696 (9th Cir. 1992); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th  
22 Cir. 1987). Additionally, this Court previously noted that “28 U.S.C. § 2401(a) provides a six-  
23 year limitations period for civil actions commenced against the United States.” (Dkt. 59 at 18).  
24 However, if the Court were to find that the FTCA serves as the basis for Plaintiffs’ notice claims,  
25 the limitations period is only two years. *See* 28 U.S.C. § 2401(b) (“A tort claim against the  
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1 United States shall be forever barred unless it is presented in writing to the appropriate Federal  
2 agency within two years after such claim accrues.”). At this stage of the case, it would  
3 significantly benefit the parties to understand whether rules like this applied, but that is not  
4 currently possible because this issue has not been litigated and decided.

5  
6 The second issue raised by the CIA in the Motion is that, even if state tort common law  
7 could create a substantive right to notice enforceable against the CIA, this Court lacks subject  
8 matter jurisdiction to hear such claims. As this Circuit has made clear, “[t]he FTCA is the  
9 exclusive remedy for tortious conduct by the United States . . . .” *F.D.I.C. v. Craft*, 157 F.3d 697,  
10 706 (9th Cir. 1998); (*see also* Mot. at 10-11). Furthermore, injunctive relief is not available  
11 through the FTCA. *Moon v. Takisaki*, 501 F.2d 389, 390 (9th Cir. 1974) (“The [FTCA] makes  
12 the United States liable in money damages for the torts of its agents under specified conditions,  
13 but the Act does not submit the United States to injunctive relief.”). In the instant case, if this  
14 Court were to find that state tort law provided a substantive right to notice, a clear jurisdictional  
15 issue would arise: APA Section 702 expressly states that sovereign immunity is not waived “if  
16 [an]other statute . . . impliedly forbids the relief sought,” and the FTCA is the exclusive tort  
17 remedy against the United States and forbids injunctive relief. Therefore, the Court lacks subject  
18 matter jurisdiction. Defendants’ Motion on the Third Amended Complaint raises and addresses  
19 this issue and its effect on the Court’s subject matter jurisdiction for the first time in this case.  
20  
21

22 Moreover, like the first issue raised by the CIA, this issue only became poised for  
23 resolution following the Court’s order on the earlier motion to dismiss. In its order on the earlier  
24 motion, this Court noted that “Plaintiffs also allege that the CIA remains under a legal duty to  
25 disclose, as explained by the DOJ opinion letter.” (Dkt. 59 at 15.) The Court then stated that  
26 “[e]ven though this is not a statutory duty, the government can be held liable for the breach of its  
27 duty to warn . . . .” (*Id.* at 16.) However, this was the first time that the DOJ letter and  
28

1 memorandum to which the Court referred, which concerned the CIA's duties for the MKULTRA  
2 program as potentially enforced through the FTCA, was being cited as the alleged source of the  
3 CIA's duty to provide notice to service members in this case. In Plaintiffs' Second Amended  
4 Complaint, the DOJ letter and memorandum is mentioned only once, as part of the background  
5 section of the complaint. (See Dkt. 53 at ¶ 14). Additionally, in Plaintiffs' opposition to  
6 Defendants' earlier motion to dismiss, Plaintiffs do not cite the letter and memorandum in the  
7 argument section of their brief. As it arose for the first time in the Court's order, this is the first  
8 opportunity the CIA has had to raise the defense, which, in any event, is not subject to waiver and  
9 cannot be the law of the case.

11           The CIA raises a third and final issue in the present motion. In its earlier order, this Court  
12 considered Plaintiffs' contention that "obligatory duties' imposed by Defendants' own  
13 regulations," which Plaintiffs sought to "demonstrate . . . [by] citat[ion to] AR 70-75," provided a  
14 basis for their medical care claim. (Dkt. 59 at 16.) The CIA had not previously briefed whether  
15 and how that regulation would create individual liability for each individual agency because, it  
16 was not clear that Plaintiffs were arguing that AR 70-25 somehow bound the CIA. Now, as part  
17 of this motion, CIA seeks resolution of the subsequent question: whether, even if it were assumed  
18 that AR 70-25 could entitle service members to medical care, the CIA can be bound by the  
19 Army's regulation. This issue necessarily implicates questions about the limitations on an  
20 agency's power to act, and neither this Court nor the parties have addressed this issue. Thus, no  
21 rule, order, or doctrine prevents the CIA from raising this issue now.

24           **2. This Court Did Not Address Plaintiffs' Claims Against the Attorney**  
25           **General, Let Alone Decide Those Issues.**

26           To support their contention that the Attorney General has previously argued that claims  
27 against him "should be dismissed for failure to state a claim," Plaintiffs cite to Defendants'  
28 motion to dismiss Plaintiffs' original complaint. (Pls.' Opp'n at 4 (citing Defs.' Mot. to Dismiss

1 Original Compl. (Dkt. 29 at 24)).) This Court, however, dismissed “Defendants’ motion to  
2 dismiss the original complaint . . . as moot in light of the filing of the amended complaint.” (Dkt.  
3 39 at 1.) As a result, for purposes of the law of the case doctrine, the Court neither considered nor  
4 ruled on any of the substantive arguments in that motion such that the Attorney General is now  
5 barred from reasserting those arguments. Nor did the Court consider or rule on this issue in  
6 response to Defendants’ subsequent motions to dismiss. As a result, nothing prevents the  
7 Attorney General from presently arguing that Plaintiffs have failed to state a claim against him.<sup>4</sup>  
8 *See In re Chocolate Confectionary Antitrust Litig.*, 2010 WL 3749288, at \*13 (“[P]laintiffs’  
9 second amended complaint supersedes the consolidated amended complaint, which allows  
10 defendants to raise substantive arguments in a new responsive pleading irrespective of whether  
11 those contentions were raised in response to the consolidated amended complaint.” (citations  
12 omitted)); *infra* Part I.A.

### 15 3. The Department of Defense’s Argument Is Not Barred By the Law of 16 the Case Doctrine.

17 As stated in Defendants’ Motion on the Third Amended Complaint, the Department of  
18 Defense (“DoD”) recognizes that it “previously argued, and the Court has considered, whether  
19 AR 70-25 may form the basis of a legally cognizable obligation to provide health coverage.”  
20 (Motion at 19.) Nothing, however, bars consideration of the new arguments raised here. First,  
21 this Court may assess its prior decision in light of the new complaint and Plaintiffs’ contentions in

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22 <sup>4</sup> Plaintiffs have now filed four complaints in this matter to correct deficiencies in venue,  
23 assert new claims, and add new parties (despite the fact that Plaintiffs were aware of and could  
24 have addressed most, if not all, these problems at the outset of the litigation). It is disingenuous  
25 for Plaintiffs to argue that they are entitled to repeatedly seek and receive opportunities to correct  
26 deficiencies in their filings, while arguing that the Attorney General is precluded from identifying  
27 any perceived shortcomings in his responses to those numerous amendments. Furthermore, as  
28 discussed in Part I.A, the Attorney General has not waived his right to argue that Plaintiffs have  
failed to identify a single legal basis upon which he is responsible for notifying former service  
members of government test programs, a failure which, again, is particularly notable given  
Plaintiffs’ three amendments to their original pleading.

1 their motion for leave to file a third amended complaint. Second, the deference due to the Army's  
2 interpretation of its regulation was not addressed in the parties' earlier briefs or the Court's prior  
3 order.

4 DoD's argument in the Motion on the Third Amended Complaint that it neither intended  
5 nor committed to providing lifetime medical care under AR 70-25 is implicated – indeed,  
6 supported – by Plaintiffs' arguments in their motion to file a third amended complaint. Plaintiffs'  
7 proposed amended complaint sought a court order “directing the [Department of Veterans  
8 Affairs (“VA”)] to propose a plan to remedy denials of affected claims for SCDDC and/or  
9 eligibility for medical care based upon service connection and to devise procedures for resolving  
10 such claims.” (Dkt. 177 at 4 (citation omitted).) Plaintiffs also sought a court order requiring the  
11 VA to apply a rule of reasonable doubt to the VA's “rating procedures and standards for deciding  
12 [the] chemical and biological weapons claims” of former test participants. (*Id.* at 5-6.) Plaintiffs'  
13 proposed claims against the VA make clear that they recognize that current law not only requires  
14 that the VA provide medical care for service-connected illnesses and injuries, but also contains  
15 procedures and standards that govern the care of veterans exposed to the very chemical and  
16 biological agents at issue in this case. This being the case, Plaintiffs own contentions undermine  
17 the notion that DoD has these same duties. In this respect, it is telling that nowhere in Plaintiffs'  
18 Third Amended Complaint do they allege that service members have *ever* sought medical care  
19 from DoD or the Army – a clear recognition by Plaintiffs that medical care for service-related  
20 injuries is exclusive to the VA. This lends further support to DoD's contention in Defendants'  
21 Motion on the Third Amended Complaint that it is other “provisions of law,” such as those laws  
22 governing care by the VA, and not AR 70-25, that provides a “substantive right to entitlement to a  
23 benefit or compensation arising from a test program.” (*See* Motion at 21-22.) Therefore, AR 70-  
24 25, by its own terms, cannot be a basis for DoD provided care. Given Plaintiffs' Third Amended  
25  
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28

1 Complaint raising these issues, this court is “free to re-examine its ruling on the causes of action  
2 in the prior complaint with a view of determining whether, in the light of the new cause of action,  
3 its previous order was correct.” *Sidebotham v. Robison*, 216 F.2d 816, 823 (9th Cir. 1954).

4 Moreover, the Army’s interpretation of AR 70-25 is entitled to deference. As discussed in  
5 Defendants’ Motion on the Third Amended Complaint, an agency’s interpretation of its own  
6 regulation is “controlling unless plainly erroneous or inconsistent with the regulation.” *Auer v.*  
7 *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). This is particularly true where the “subject  
8 matter is technical and the relevant background complex.” *Chae v. SLM Corp.*, 593 F.3d 936,  
9 948 (9th Cir. 2010) (quoting *Auer*, 519 U.S. at 461, and citing *Geier v. Am. Honda Motor Co.*,  
10 529 U.S. 861, 883 (2000)). Here, the government has not previously raised, and this Court has  
11 not previously addressed, the critical question of the deference due to the Army’s interpretation of  
12 its regulation.<sup>5</sup> As such, the law of the case doctrine does not serve as a bar preventing the Court  
13 from addressing this issue now.

## 16 **II. DEFENDANTS’ MOTION ON THE THIRD AMENDED COMPLAINT** 17 **COMPLIES WITH PRIOR STATEMENTS AND ORDERS FROM THIS COURT.**

18 Contrary to Plaintiffs’ assertions, Defendants’ Motion on the Third Amended Complaint  
19 complies with both the letter and spirit of the Court’s prior instructions. Plaintiffs contend that,  
20 during the December 3, 2009 hearing on the motion to dismiss Plaintiffs’ First Amended  
21 Complaint, this Court instructed the parties not to rebrief issues previously raised, and that  
22 Defendants are ignoring this instruction. (Pls.’ Opp’n 4-5.) As a threshold matter, the language  
23 cited by Plaintiffs to support this argument states only that Defendants need not repeat arguments  
24 previously raised, but does not bar Defendants from doing so. (Ex. B to Erspamer Decl. (Dkt.

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26 <sup>5</sup> Nor is this argument waived. As discussed in Part I.A, a 12(b)(6) claim is not waived by  
27 virtue of the fact that the issue was not addressed in a prior motion to dismiss on an inoperative  
28 complaint.



1 189.2) at 34 (responding to a question from Plaintiff’s counsel – who told the Court that Plaintiffs  
2 were going to file an amended complaint and asked whether Defendants’ subsequent motion to  
3 dismiss would need to address only venue or “rebrief everything” – that Defendants need not  
4 rebrief all issues and instead “*may* just incorporate by reference your previous motion” (emphasis  
5 added)).) Furthermore, even if the Court sought to bar Defendants from reasserting issues  
6 previously raised, it did so only to the extent that “something [Defendants] say is exactly the same  
7 as they said before.” (*Id.*) For the reasons discussed above, *see supra* Part I, the arguments made  
8 in the present Motion differ from those raised previously, and thus would not fall into such a  
9 prohibition.  
10

11           Additionally, Defendants’ Motion on the Third Amended Complaint is consistent with  
12 this Court’s Order Granting in Part and Denying in Part Plaintiffs’ Motion to File Third Amended  
13 Complaint. (Dkt. 177.) In that Order, the Court stated that “Defendants may not file a motion to  
14 dismiss based on the arguments made in this motion,” i.e., the motion to file a third amended  
15 complaint and the opposition thereto. (*Id.* at 18.) Thus, the Court preserved the right of all the  
16 Defendants to file a motion to dismiss so long as such a motion did not revisit the futility  
17 arguments addressed in Defendants’ opposition to the motion to file a third amended complaint.  
18 Those arguments related solely to the claims against the VA and do not form the basis of the  
19 pending motion.  
20

21  
22 **III. PLAINTIFFS HAVE WAIVED THEIR RIGHT TO RESPOND TO THE  
23 SUBSTANCE OF DEFENDANTS’ MOTION.**

24           As noted, Plaintiffs’ responsive motion to strike filed under the guise of an opposition –  
25 and a cursory one, neglecting to cite a single case, at that. Through this ruse, Plaintiffs apparently  
26 have granted themselves leave to address the merits in some other later filing. (Pls.’ Opp’n at 6.)  
27 There is no basis for doing so. Even if Plaintiffs’ procedural objections had merit, (which they do  
28 not), Plaintiffs were required to address Defendants’ Motion on the Third Amended Complaint to

1 avoid conceding those arguments they failed to address. *See, e.g., Pecover v. Elecs. Arts Inc.*, 633  
 2 F. Supp. 2d 976, 984-85 (N.D. Cal. 2009); *Smith v. Nat'l City Bank of Ind.*, No. C 09-5715, 2010  
 3 WL 1729392, at \*3 (N.D. Cal. Apr. 27, 2010); *Gomez v. City & Cnty. of San Francisco*, No. C  
 4 04-1692, 2005 WL 43869, at \*5 n.4 (N.D. Cal. Jan. 10, 2005). By refusing to address  
 5 Defendants' motion on the merits, notwithstanding their obligation to do so, Plaintiffs necessarily  
 6 have conceded it. The claims addressed in Defendants' Motion on the Third Amended Complaint  
 7 should be dismissed.<sup>6</sup>

### 9 CONCLUSION

10 For the reasons stated above and in the Defendants' Partial Motion to Dismiss Plaintiffs'  
 11 Third Amended Complaint, this Court should dismiss the notice and health care claims against  
 12 the CIA, all claims against the Attorney General, and the medical care claim against DoD.

13  
 14  
 15 Dated: December 17, 2010

Respectfully submitted,

16 IAN GERSHENGORN  
 17 Deputy Assistant Attorney General  
 18 MELINDA L. HAAG  
 19 United States Attorney  
 20 VINCENT M. GARVEY  
 21 Deputy Branch Director

/s/ Kimberly L. Herb

22 JOSHUA E. GARDNER  
 23 KIMBERLY L. HERB  
 24 LILY SARA FAREL  
 25 BRIGHAM JOHN BOWEN  
 26 Trial Attorneys  
 27 U.S. Department of Justice  
 28 Civil Division, Federal Programs Branch

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25 <sup>6</sup> Should the Court, notwithstanding Plaintiffs' failure to oppose Defendants' Motion as  
 26 required, nonetheless provide Plaintiffs a second opportunity to address Defendants' Motion,  
 27 Defendants respectfully request an opportunity to reply. Defendants also request that this Court  
 28 not delay briefing on the present motion; if the Court permits additional briefing, Plaintiffs should  
 have no more than ten days (the time they had remaining on their opposition) to file a response.

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P.O. Box 883  
Washington, D.C. 20044  
Telephone: (202) 305-8356  
Facsimile: (202) 616-8470  
E-mail: Kimberly.L.Herb@usdoj.gov

Attorneys for Defendants

**Beaudoin, Kathy E.****From:** ECF-CAND@cand.uscourts.gov**Sent:** Friday, December 17, 2010 6:53 PM**To:** efilings@cand.uscourts.gov**Subject:** Activity in Case 4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al Reply Memorandum

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United States Department of the Army  
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United States Department of Defense  
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Eric H. Holder, Jr  
Eric K. Shinseki  
United States Secretary of Veterans Affairs

**Document Number:** [194](#)**Docket Text:**

12/20/2010

**Reply Memorandum re [187] MOTION to Dismiss *Plaintiffs' Third Amended Complaint* filed by Central Intelligence Agency, Robert M. Gates, Pete Geren, Eric H. Holder, Jr, Leon Panetta, Eric K. Shinseki, United States Department of Defense, United States Department of Veterans Affairs, United States Department of the Army, United States Secretary of Veterans Affairs, United States of America. (Herb, Kimberly) (Filed on 12/17/2010)**

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Adriano Hrvatin ahrvatin@mofo.com, patherton@mofo.com

Brigham John Bowen Brigham.Bowen@usdoj.gov

Gordon P. Erspamer GErspamer@mofo.com, jdwright@mofo.com, kbeaudoin@mofo.com, lsario@mofo.com

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@mofo.com, jhaskins@mofo.com

Timothy W. Blakely tbladely@mofo.com, lyan@mofo.com

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