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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*, Plaintiffs, vs. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Civil Action No. C 09-0037 CW Noticed Motion Date and Time: September 24, 2009 2:00 p.m. DEFENDANTS' MOTION TO DISMISS

NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS

PLEASE TAKE NOTICE THAT on September 24, 2009, at 2:00 p.m., before the Honorable Claudia Wilken, Courtroom No. 2, 4th floor, 1301 Clay Street, Oakland, California, 94612, or as soon thereafter as counsel may be heard by the Court, Defendants, by and through their attorneys will and hereby do move to dismiss the Complaint pursuant to Rules 12(b)(3), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

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

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

Dated: June 30, 2009

Respectfully submitted,

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GENERAL ORDER 45 ATTESTATION

I, Caroline Lewis Wolverton, am the ECF User filing this Motion to Dismiss. In compliance with General Order 45, X.B., I hereby attest that Kimberly J. Albers, Clyde Bennett, Norris Jones, Rebecca Sawyer Smith and Paul Weiss have each concurred in the filing of their Declarations.

Dated: June 30, 2009

/s/ Caroline Lewis Wolverton
Caroline Lewis Wolverton
Attorney for Defendants

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UNITED STATES DISTRICT COURT
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VIETNAM VETERANS OF AMERICA, *et al.*, Plaintiffs, vs. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Civil Action No. C 09-0037 CW Noticed Motion Date and Time: September 24, 2009 2:00 p.m. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

Plaintiffs Vietnam Veterans of America ("VVA") and six Army veterans bring claims stemming from chemical testing by the Army and the Central Intelligence Agency ("CIA") during the Cold War era. Plaintiffs allege that they were injured when they participated in tests at Edgewood Arsenal, a U.S. Army research facility in Maryland, that administered or exposed them to chemical agents. Bringing their claims under the Declaratory Judgment Act ("DJA") and the Administrative Procedure Act ("APA"), Plaintiffs assert violations of the Constitution, executive and military directives and international law. They seek declaratory and injunctive relief requiring Defendants to notify them and other military testing participants of the details of the tests and of associated health risks; to search for and provide all participants with all available documentation concerning the tests; to provide all participants with examinations and medical care; to award all participants medals and commendations that Plaintiffs allege were promised in return for participation in the tests; and to transmit to the Department of Veterans Affairs ("VA") available information relating to death or disability compensation based on the testing. Plaintiffs also seek a declaration that consent forms that they signed are invalid, that they are released from "secrecy oaths" related to the testing and that adverse inferences should be drawn from the government's destruction of some documents relating to the tests. Plaintiffs do not seek money damages.

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

Plaintiffs' claims are not properly before the Court for several reasons. Chiefly, venue is not proper. The Complaint does not allege that any Plaintiff resides in this district, and no Defendant resides here. Plaintiffs' claims stem from tests at Edgewood Arsenal, which is in Maryland, and there is no substantial part of the events giving rise to Plaintiffs' claims that

occurred in this district. This action therefore should be dismissed pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1406(a). Transfer to another district would not further the interests of justice because dismissal is also warranted under Fed. R. Civ. P. 12(b)(1) and, for some of Plaintiffs' claims, Fed. R. Civ. P. 12(b)(6).

Regarding rule 12(b)(1), subject matter jurisdiction is absent for several reasons. The United States' sovereign immunity precludes Plaintiffs' claims because they are untimely under the applicable statute of limitations, 28 U.S.C. § 2401(a). The claims accrued immediately or shortly after the Plaintiffs' testing participation, and at least four of the Plaintiffs filed claims with the VA in which they alleged injury from Edgewood tests more than six years before this action was filed. Even if Plaintiffs' claims were not time-barred, there is no waiver of sovereign immunity applicable to their claims that the government must provide notification and medical care and produce documents and other information to all testing participants; there is no final agency action as required by the APA because the government's notification efforts are ongoing. Article III's case-or-controversy requirement bars those of Plaintiffs' claims that are no longer redressable given that the testing at Edgewood ended long ago, and also bars their claims to medals or commendations the award of which is committed to military discretion. VVA lacks organizational standing to seek relief on behalf of non-members or in the form of an order that the military award medals or commendations.

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

Lastly, with respect to rule 12(b)(6), the Court should dismiss for failure to state a claim upon which relief can be granted Plaintiffs' request for declaratory judgment in the form of an order that the government produce documents and other information about the tests and that adverse inferences will be drawn from the government's destruction of some documents, as well as their claims against the Attorney General.

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

FACTUAL BACKGROUND

According to the Complaint, the individual Plaintiffs participated in chemical tests at Edgewood Arsenal in the late 1950s, the 1960s and the early 1970s during their tours of service in the Army. The tests involved administration of and exposure to drugs and chemical agents such as LSD and Benzilate (both hallucinogens). The Complaint asserts that Plaintiffs and other test participants were required to sign consent forms and take "secrecy oaths" under which they promised not to reveal any information about the tests. According to Plaintiffs, test participants were promised medical care and military medals or commendations. Plaintiffs allege that they suffered debilitating injuries — physical and emotional — as a result of the tests. Four of the Plaintiffs have been found disabled by the VA. (Compl. ¶ 35 (Bruce Price at a disability rating of 100%) ¶ 55 (Frank Rochelle at 80%), ¶ 76 (David Dufrane at 60%), and ¶ 82 (Wray Forrest at 100%).)

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

In 2002, Congress directed DoD to develop "a comprehensive plan for the review, declassification, and submittal to the [VA] of all records and information of [DoD] on Project 112 [of which the Edgewood Arsenal tests were part] that are relevant to the provision of

---

[1] *See*, *e.g.*, 1993 GAO Report to Chairman, S. Comm. on Veterans' Affairs, "Veterans Disability: Information from the Military May Help VA Assess Claims Related to Secret Tests," at 1 (Feb. 1993), available at **http://archive.gao.gov/d37t11/148642.pdf** (last accessed June 30, 2009) (cited in Compl. ¶ 153).

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

[3] *See*, *e.g.*, Military Operations Aspects of SHAD and Project 112, Hr'g Before Subcomm. on Health, H. Comm. on Veterans' Affairs, 107th Cong. (2002), available at http://fhp.osd.mil/CBexposures/pdfs/oct9h02.pdf; GAO Report to Congressional Requesters, "Chemical and Biological Defense, DoD and VA Need to Improve Efforts to Identify and Notify Individually Potentially Exposed During Chemical and Biological Tests" (Feb. 2008), available at **http://www.gao.gov/new.items/d08366.pdf**; GAO, "Chemical and Biological Defense: DOD Needs to Continue to Collect and Provide Information on Tests and Potentially Exposed Personnel," GAO-04-410 (Washington, D.C.: May 14, 2004), available at www.gao.gov/new.items/d04410.pdf; DoD, 2003 Report to Congress, Disclosure of Information on Project 112 to the Department of Veterans Affairs, available at http://armedservices.house.gov/comdocs/reports/2003exereports/03-08-12disclosure.pdf; Department of Veterans Affairs, Chemical and Biological Warfare Testing (Oct. 16, 2008), available at **www.vba.va.gov/VBA/benefits/factsheets/misc/chembio.doc**; Department of Veterans Affairs, Chemical Warfare Agent Experiments Among U.S. Service Members (Washington, D.C.: Updated Aug. 2006), available at www1.va.gov/environagents/docs/Revised_USH_IL_Attachment_Military_Human_Subjects_Experiments.pdf. (All websites last accessed June 30, 2009).

[4] *See*, *e.g.*, Force Health Protection and Readiness, Chemical-Biological Warfare Exposures, **http://fhp.osd.mil/CBexposures** (cited in Compl. ¶ 13 and last accessed June 30, 2009) (information about tests, links to GAO and other reports, Institute of Medicine reports, and DoD briefings and reports, and FAQs) & sources cite at n.3, *supra*.

benefits by the Secretary of Veterans Affairs to members of the Armed Forces who participated in that project." Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 709(a), 116 Stat. 2458 (codified at 10 U.S.C. § 1074 note). Congress specified that DoD must give the VA records that permit identification of service members who were or may have been exposed to chemical or biological agents, and required GAO and DoD to report to Congress on the plan and its implementation. *Id.* § 709(b), (d)-(e).

Consistent with Congress' direction, the VA sent letters to Edgewood testing participants in 2006, as the Complaint recognizes. (Compl. ¶ 144.) In addition to informing participants that notwithstanding any nondisclosure obligations they can provide details about their tests to health care providers, the letters offered clinical examinations by VA physicians, encouraged the veterans to apply for VA health care benefits if they were not already enrolled in the VA health care program, and provided information about filing a claim for VA disability benefits if they believe that they suffer from chronic health problems. While Plaintiffs allege that not all participants have been notified, they recognize that DoD has issued notice that it is constructing a registry of testing participants with completion expected in 2011. (*Id.*)

Plaintiffs filed this action on January 7, 2009, seeking declaratory and injunctive relief as described above. Defendants now move for dismissal pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue, Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

ARGUMENT

Plaintiffs' claims should be dismissed for improper venue pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3). In the alternative, dismissal is warranted pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and based on the Court's discretion under the Declaratory Judgment Act. Several claims are also appropriate for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

I. Venue is Not Proper.

Plaintiffs assert that venue is proper under 28 U.S.C. §§ 1391(e) and 1402(a). (Compl. ¶ 20.) The Complaint, however, contains no allegations supporting their assertion, nor is it otherwise apparent that either statute authorizes Plaintiffs to bring their claims in this district.

Under 28 U.S.C. § 1406(a), a court must dismiss a case that has been filed in the wrong district the unless interests of justice warrant transfer to a district where the case could have been brought. 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."); *accord, e.g.*, *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992). Plaintiffs bear the burden of establishing that venue is proper, *See*, *e.g.*, *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979), and they do not meet it. Because, as explained below, transfer would not be in the interests of justice, the Complaint should be dismissed pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3).[5]

A. 28 U.S.C. § 1391(e) Does Not Confer Venue in This District.

Under 28 U.S.C. § 1391(e), a civil action against a federal official, employee or agency, or the United States may be brought

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

28 U.S.C. § 1391(e).

Venue does not appear to be proper under section 1391(e) based on any of the Plaintiffs' residence. The Complaint makes no allegation as to where any Plaintiff resides. With respect to VVA, its website states that it is a non-profit corporation organized under section 501(c)(19)

[5] The Court can rule on venue before reaching subject matter jurisdiction. *See Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits . . . "Jurisdiction is vital only if the court proposes to issue a judgment on the merits") (internal quotation marks omitted).

of the Internal Revenue Code. Vietnam Veterans of America/Who We Are, **http://www.vva.org/who.html** (last accessed June 30, 2009). For purposes of 28 U.S.C. § 1391(e), a corporate plaintiff resides in the state of its incorporation. *E.g.*, *Merchants Fast Motor Lines, Inc. v. I.C.C.*, 5 F.3d 911, 921 (5th Cir.1993); *Data Disc. Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1289 (9th Cir. 1977) (citing *American Cyanamid Co. v. Hammond Lead Products, Inc.*, 495 F.2d 1183, 1184-85 (3d Cir. 1974)). The Complaint does not allege the state of VVA's incorporation, but the VVA charter posted on its website states that VVA is a "nonprofit corporation under the laws of the State of New York." Vietnam Veterans of America/VVA Strategic Documents, **http://www.vva.org/OrgDocs/vva_charter.pdf** (last accessed June 30, 2009).

Plaintiffs assert in the Joint Case Management Statement that venue is proper because "several of the individual plaintiffs are members of the VVA which has multiple local chapters in this District, including a chapter in Alameda County, California." (Joint Case Management Report ¶ 1.A, citing Compl. ¶¶ 124, 134, Docket No. 26.) However, section 1391(e) specifies a plaintiff's residence as a basis for venue. Membership in an organization that may have chapters in the district does not establish a residence.

Nor is venue proper under 28 U.S.C. § 1391(e) based on where a substantial part of the events or omissions giving rise to the claim occurred, or where Defendants reside. The Complaint focuses on testing at Edgewood Arsenal, which Plaintiffs recognize is in Maryland. (*See* Compl. ¶ 95.) Plaintiffs assert in the Joint Case Management Statement that "events alleged in the Complaint took place in this District." (Joint Case Management Report ¶ 1.A, citing Compl. ¶¶ 124, 134.) The requirement for venue under section 1391(e), however, is that a "substantial part of the events or omissions giving rise to the claim" must have occurred in this district. 28 U.S.C. § 1391(e) (emphasis added). The paragraphs of the Complaint on which Plaintiffs rely — paragraphs 124 and 134 — set forth allegations that provide background information rather than relate a substantial part of the events or omissions on which Plaintiffs' claims are based. Indeed, those allegations do not describe tests in which the individual

Plaintiffs are alleged to have participated. Paragraph 124 contains a one-sentence allegation about experiments on prisoners at a state medical facility at Vacaville, California. (Compl. ¶ 124(d).) None of the individual Plaintiffs is alleged to have been a prisoner or to have participated in experiments in Vacaville. Paragraph 134 contains a one-sentence allegation concerning surreptitious administration of drugs to subjects lured by prostitutes to "safe houses" in San Francisco and New York City. (*Id.* ¶ 134.) The Complaint does not allege that any Plaintiff was administered drugs in this district, surreptitiously after being lured by prostitutes or otherwise.[6]

B. 28 U.S.C. § 1402(a) Does Not Confer Venue in This District.

Under 28 U.S.C. § 1402(a), in pertinent part, a civil action against the United States may be brought

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

28 U.S.C. § 1402(a).

As observed above, the Complaint does not allege that any individual Plaintiff resides in this district. With respect to VVA, assuming that it is a corporation within the meaning of 28 U.S.C. § 1402(a), under that section venue may be based on the corporation's principal place of business, principal office or principal agency. *See id.* The Complaint does not allege the

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[6] Plaintiffs have not asserted that venue is proper based on a Defendant's residence, nor could it be. The named Defendant federal agencies and officials reside, for purposes of 28 U.S.C. § 1391(e), where they perform their official duties. *See* 14D Wright, Miller and Cooper, *Federal Practice and Procedure* § 3815, 371 (3d ed. 2007); *Lamont v. Haig*, 590 F.2d 1124, 1128 n.19 (D.D.C. 1978). Defendants CIA, Department of the Army and DoD reside in the Eastern District of Virginia. Defendants CIA Director Panetta, Defense Secretary Gates and Army Secretary Green, because they are sued in the official capacities, reside in the Eastern District of Virginia or the District of Columbia. Attorney General Holder, who is sued in his official capacity, resides in the District of Columbia. Venue for claims against the United States itself is governed by 28 U.S.C. § 1402, which is addressed in the next section. *See* 14D Wright, Miller and Cooper, § 3814 at 367; *Misko v. United States*, 77 F.R.D. 425, 429 n.7 (D.D.C. 1978).

location of VVA's principal place of business, principal office or principal agency, but its website indicates that it is Silver Spring, Maryland. The home page of the VVA website lists the organization's street address as "8605 Cameron Street, Silver Spring, MD 20910." Vietnam Veterans of America, **http://www.vva.org** (last accessed June 30, 2009). Its "Directions to VVA" page states: "The VVA National Headquarters is conveniently located in Silver Spring, Maryland." Vietnam Veterans of America/Directions to Our Office, **http://www.vva.org/directions.html** (last accessed June 30, 2009). That VVA has chapters in this district – as Plaintiffs state in the Joint Case Management Statement ¶ 1.A – does not establish that the organization's principal place of business is here.

* * *

Plaintiffs do not meet their burden of establishing that venue in this district is proper under either 28 U.S.C. § 1391(e) or 28 U.S.C. § 1402(a). Even if the case were brought where venue is proper, for the reasons explained below, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction and, for some of the claims, failure to state a claim upon which relief can be granted. Transfer therefore would not be in the interests of justice, and this case should be dismissed pursuant to Fed. Rule 12(b)(3) and 28 U.S.C. § 1406(a).

II. Subject Matter Jurisdiction is Lacking.

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

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

When presented with a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the Court accepts the allegations of the complaint as true except where the moving party presents factual evidence in support of its argument, in which case the opposing party must come forward with evidence to satisfy its burden of establishing subject

matter jurisdiction. *E.g.*, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, subject matter jurisdiction is lacking because Plaintiffs' claims are barred by sovereign immunity and, in part, are nonjusticiable for failure to meet Article III's case-or-controversy requirement. Even if the Court had jurisdiction, it should decline to exercise it in recognition of Congress' and the Executive's supervisory authority over the military, which we address first.

A. Pursuant to Its Discretion Under the Declaratory Judgment Act, the Court Should Not Exercise Jurisdiction Over Plaintiffs' Claims.

The DJA grants courts discretion on whether to exercise jurisdiction over claims brought pursuant to it. 28 U.S.C. § 2201(a) (subject to exceptions not relevant here, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."); *accord e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (recognizing discretionary nature of declaratory relief); *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992) (same). The Supreme Court explained in *Wilton*:

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

Wilton, 515 U.S. at 288. Here, exercise of the Court's discretion under the DJA to not consider Plaintiffs' claims — even if they were properly before the Court, which Defendants maintain they are not — would be appropriate, primarily in recognition of the constitutional assignment of authority over the military to the political branches of government. The substantial passage of time and existence of administrative avenues for relief further counsel against exercise of jurisdiction over the Complaint's requests for declaratory relief.

1. Article I of the Constitution authorizes Congress and the Executive to supervise the military. *United States v. Stanley*, 483 U.S. 669, 681-82 (1987) (citing U.S. Const., Art. I, § 8,

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

Like this case, *Stanley* involved claims stemming from chemical testing at Edgewood Arsenal, including a constitutional claim based on "failure to warn, monitor or treat" the plaintiff following testing. *Stanley*, 483 U.S. at 672-73; *Stanley v. CIA*, 574 F. Supp. 474, 476 (S.D. Fla. 1983) (recognizing that testing occurred at Edgewood Arsenal), *ultimately rev'd by Stanley*, 483 U.S. 669. The Supreme Court recognized that it was "confronted with an explicit constitutional authorization for *Congress* 'to make Rules for the Government and Regulation of the land and naval Forces,'" as well as the "insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, navy, and militia upon the political branches." *Stanley*, 483 U.S. at 681-82 (quoting U.S. Const., Art. I, § 8, cl. 14) (emphasis in original). Finding that those constitutional provisions "counsel[ed] hesitation" before involving the Judiciary in review of the claims that stemmed from testing at Edgewood Arsenal, the Court refused to infer a judicial remedy of damages under *Bivens v. Six Unknown Named Agences of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for any injuries resulting from the tests. *Stanley*, 483 U.S. at 681-82. The Court did not "see any reason why [its] judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to [Federal Tort Claims Act ("FTCA")] suits," where damages claims are barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). *Stanley*, 483 U.S. at 681. If anything, the FTCA's "explicit" and "unqualified" authorization for judicial involvement in tort claims against the government might have left the Court "freer to

compromise military concerns" in confronting claims under that statute. *Id.* The Supreme Court found no difference in the degree of disruption to military affairs between the *Bivens* context and the FTCA context. *Id.* at 682. In both circumstances:

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

Id. at 682-83.

While Plaintiffs' claim do not sound in tort, the constitutional provisions that the Supreme Court found to "counsel hesitation" in *Stanley* is equally applicable. The judicial inquiry that Plaintiffs seek would be the same that the Supreme Court rejected as unacceptably intrusive and disruptive to the military regime in *Stanley*. Both cases concern testing at Edgewood Arsenal, and Plaintiffs have indicated that they will seek to compel the testimony that the Supreme Court stated in *Stanley* would be improper. (*See* Joint Case Management Statement ¶ 8.A.2 ("Plaintiffs anticipate that they will require a substantial expansion of the interrogatories permitted pursuant to Rule 33 and depositions permitted pursuant to Rule 30").) The Supreme Court's warning that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate," *Stanley*, 483 U.S. at 683, applies fully here.

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

Given these factors as well as Congress' and the Executive's ongoing investigation of testing at Edgewood Arsenal and development and implementation of remedies, exercise of the Court's discretion under the DJA not to consider the claims for declaratory relief presented here

would be consistent with "considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288.

2. Separately with respect to Plaintiffs' claims for medical care, documents and other information, the existence of statutorily created administrative schemes specific to those concerns counsels strongly against the requested declaratory relief. *See, e.g.*, *Public Serv. Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241 (1952) ("the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review"); *Frommert v. Conkright*, 206 F. Supp. 2d 435, 441 (W.D.N.Y. 2002) (availability of adequate relief under statutory scheme rendered declaratory judgment inappropriate).

The Veterans' Benefits Act establishes a medical benefits program through which most veterans are eligible to receive medical care, and represents the vehicle that Congress provided for veterans to receive health care from the government. *See* 38 U.S.C. §§ 1701 *et seq.*; *see also* 38 C.F.R. pt. 17. Indeed, the letters that the VA mailed to participants in the Edgewood Arsenal tests encouraged them to apply for VA health care benefits. The Declaratory Judgment Act should not be interpreted to supply an additional remedy. *See Feres*, 340 U.S. at 144 (recognizing that Congress could not have intended for both the Veterans' Benefit Act and the FTCA to supply remedies to injured service members); *see also Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673-74 (1977) (military compensation scheme provided by Veterans' Benefit Act "provides an upper limit of liability for the Government as to service-connected injuries").

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, represent Congress' determination of the extent to which private individuals and entities are entitled to release of government records, and establish the administrative procedures that Congress established as the appropriate channels for requests for release of government information. There is no First Amendment right to access government information, and any

common-law right is preempted by FOIA and the Privacy Act. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (addressing FOIA) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14-15 (1978)). Only once the statutorily prescribed procedures have been exhausted has Congress provided for judicial involvement. *See*, *e.g.*, *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986) (FOIA); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377-78 (9th Cir. 1986) (Privacy Act). An additional declaratory remedy for government documents is neither warranted nor appropriate. *See*, *e.g.*, *Edmonds Inst. v. Dep't of Interior*, 383 F. Supp. 2d 105, 111-12 (D.D.C. 2005) ("Until such time as [the plaintiff] is seeking the concrete remedy of agency action on its [FOIA] request, a declaratory judgment action is not the favored course.").

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

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

1. Plaintiffs' Claims are Time-Barred.

In suits brought against the United States, compliance with the applicable statute of limitations — which reflects Congress's decision to waive sovereign immunity only if suit is brought within a particular time period — is a condition of federal court jurisdiction, and must be strictly observed. *See Soriano v. United States*, 352 U.S. 270, 273 (1957); *Kendall v. Army Bd. for Correction of Mil. Records*, 996 F.2d 362, 366 (D.C. Cir. 1993) (citing *Soriano*).[7] Congress established a six-year statute of limitations for non-tort civil suits against the United States. 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978,[8] every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."). Like all statutes of limitations, it serves in part to protect the United States and the courts "from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

"Under federal law, 'a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *DirectTV, Inc. v. Webb*, 545 F.3d 837, 852 (9th Cir. 2008) (quoting *Stanley v. Trustees of Cal. State U.*, 433 F.3d 1129, 1136 (9th Cir. 2006)); *see also Kubrick*, 444 U.S. at 122 (a statute of limitations begins to run when the plaintiff possesses "the critical facts that he has been hurt and who has inflicted the injury").

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[7] We recognize that the Ninth Circuit has held that 28 U.S.C. § 2401(a) is not jurisdictional. *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). However, the recent Supreme Court decision in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), that 28 U.S.C. § 2501, which uses very similar language to § 2401(a), is jurisdictional casts significant doubt on the continued validity of the *Cedars-Sinai* holding. The Ninth Circuit recently found *John R. Sand & Gravel Co.* to be "instructive" in determining whether 28 U.S.C. § 2401(b)'s limitations period is jurisdictional while recognizing that the question of whether the *Cedar-Sinai*'s holding regarding 28 U.S.C. § 2401(a) can survive *John R. Sand & Gravel* was not presented in the case before it. *Marley v. United States*, No. 06-36003, 2009 WL 1508584, *4 (9th Cir. June 1, 2009).

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

Consistent with that standard for accrual, other lawsuits concerning testing at Edgewood Arsenal and the CIA's MKULTRA project have been dismissed on statute of limitations grounds, and those cases are instructive here.

In *Bishop v. United States*, 574 F. Supp. 66 (D.D.C. 1983), a U.S. Army veteran who alleged that he participated in drug experiments at Edgewood Arsenal brought claims under the Fifth and other amendments and the FTCA. The government moved to dismiss or, in the alternative, for summary judgment on the ground that the claims were untimely. *Id.* at 66. The court agreed and dismissed the case, explaining:

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

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

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

Similarly in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit dismissed as untimely FTCA claims based on chemicals tests conducted as part of the CIA's MKULTRA program. The plaintiff, a non-veteran, claimed that he suffered physical and emotional injuries after the CIA surreptitiously gave him LSD. The circuit held that the

plaintiff's claims accrued when he became aware of the basic facts of the claims, *viz.*, when he believed that he had been injured and that a CIA drug experiment was the cause. *Id.* at 121-22. The Complaint alleges that the individual Plaintiffs knew of the injuries that they allege and linked them to participation in tests at Edgewood Arsenal either immediately or shortly after the testing ended. (*See* Compl. ¶¶ 24-82.) In addition, at least four of the Plaintiffs filed claims with the VA in which they claimed injury resulting from testing at Edgewood Arsenal more than six years prior to the filing of the Complaint. (*See* Ex. A (Decl. of Kimberly J. Albers, attaching Rochelle records showing claims beginning in 1973), Ex. B (Decl. of Paul Weiss, attaching Dufrane records showing claims beginning in 1997), Ex. C (Decl. of Ena Lima, attaching Eric Muth records showing claims beginning in 1997), Ex. D (Decl. of Clyde Bennett, attaching Price records showing claim in 2001).[9]) As in *Bishop* and *Sweet*, that Plaintiffs' may not have known what drugs they were given does not alter the key facts that they knew they had been injured and believed that Edgewood tests were the cause. *See Bishop*, 547 F. Supp. at 67; *Sweet*, 528 F. Supp. at 1072. Because Plaintiffs' claims accrued more than six years before they filed suit, they are barred by 28 U.S.C. § 2401(a).[10]

2. The Administrative Procedure Act Does Not Authorize Plaintiffs' Claims for Notification, Production of Information and Medical Care.

The APA appears to be the basis on which Plaintiffs rely to argue waiver of sovereign immunity for their requests that the government be ordered to provide testing participants notification, documents and medical care. (*See* Joint Case Management Statement ¶ 1.A.) Although the APA waives sovereign immunity for certain suits seeking judicial review of final

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[9] In accordance with Civil L.R. 79-5, the individual plaintiffs' records are submitted for filing under seal as they contain sensitive information covered by the Privacy Act. Defendants reserve the right to present evidence in support their statute of limitations arguments concerning Plaintiffs Meirow and Forrest in a future motion, if their claims continue (which Defendants submit they should not for the reasons set forth herein).

[10] As VVA appears to rely on the injuries claimed by the individual Plaintiffs in support of its claims, VVA's claims are not properly before the Court if the individual Plaintiffs' claims are untimely.

government action, 5 U.S.C. § 702, its waiver of sovereign immunity, like other such waivers, must be "strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The scope of the APA's waiver is limited by its provision at 5 U.S.C. § 704 that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review." *Gallo Cattle Co. v. Dep't of Agr.*, 159 F.3d 1194, 1198 (9th Cir. 1998); *see also Lujan v. Defenders of Wildlife*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"). Plaintiffs' claims concerning notification to testing participants, production of information and provision of medical care do not fall within the scope of the APA's waiver.

a. Plaintiffs seek a declaratory ruling that Defendants "are obligated to notify Plaintiffs and other test participants and provide all available documents and evidence concerning their exposures and known health effects," and corresponding injunctive relief. (Compl. ¶¶ 159, 165(b)-(c).) However, they reference no statute that makes their claims reviewable, nor do they challenge any "final agency action" as is required for review under the APA. *See Gallo Cattle Co.*, 159 F.3d at 1198. A "final agency action" is an action that "mark[s] the consummation of the agency's decisionmaking process" and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted).

With respect to their claim for notification to all test participants, as set forth above, Plaintiffs recognize that in addition to the notification efforts that the government already has undertaken, DoD is in the process of constructing a registry of the veterans who participated in testing at Edgewood Arsenal that will allow for any additional notifications that are needed. That DoD's construction of its database has not been completed, (Compl. ¶ 13), necessarily precludes the possibility of final agency action. Accordingly, Plaintiffs have alleged no final agency action with respect to these claims, and they are barred by sovereign immunity. *See* 28 U.S.C. § 704.

Regarding Plaintiffs' request that the government be ordered to search for and produce documents, FOIA and the Privacy Act establish procedures through which individuals may request such a search and production. Those Acts require exhaustion of their procedures as a prerequisite for judicial review. *See*, *e.g.*, *Davis v. Astrue*, 513 F. Supp. 2d 1137, 1148 (N.D. Cal. 2007) (citing *United States v. Steele*, 799 F.2d 461, 465 (9th Cir. 1986)) (FOIA); *Haase v. Sessions*, 893 F.2d 370, 373 (D.C. Cir. 1990) (Privacy Act); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377-78 (9th Cir. 1986) (Privacy Act). Outside of those statutory schemes, there is no entitlement to access government documents. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 936-37 (addressing FOIA) (quoting *Houchins*, 438 U.S. at 14-15). Plaintiffs do not seek review of an agency's action on a request under FOIA or the Privacy Act, and hence they allege no final agency action. Even if they had pursued FOIA or Privacy Act requests, those statutes provide adequate remedies in court, 5 U.S.C. § 552(a)(4)(B) (FOIA); 5 U.S.C. § 552a(g)(3)(A) (Privacy Act), thereby precluding review under the APA. *See* 5 U.S.C. § 704. It is also worth noting that the government has made a large amount of information about the testing available publicly, as referenced above.

b. Plaintiffs' claim for medical examinations, care and treatment amounts to a claim for damages. *See*, *e.g.*, *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) ("the request for prompt medical examinations and all medical care and necessary treatment, in fact, is a claim for money damages"). The claim is therefore barred by sovereign immunity. *See* 5 U.S.C. § 702 (waiving sovereign immunity for "relief other than money damages"); *Jaffee*, 592 F.2d at 719.

C. Plaintiffs' Claims Concerning Medals and Commendations and for Violation of the Fifth Amendment, Military and Executive Directives and International Law are Not Justiciable.

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

for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Id.* Rather, Article III requires that federal courts exercise their jurisdiction only to decide actual cases and controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). In the absence of an actual case or controversy, a court is without jurisdiction to decide a matter. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In an effort to give meaning to Article III's case-or-controversy requirement, courts mandate that all cases be "justiciable." *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992); *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504, 507 (9th Cir. 2003). Plaintiffs' claims are not justiciable for a number of reasons.

1. Plaintiffs Lack Standing to Bring Claims for Violation of the Fifth Amendment, Military and Executive Directives and International Law.

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

Plaintiffs claim that Defendants violated their rights under the Fifth Amendment Due Process Clause, what the Complaint describes as "the 1953 Wilson Directive," "the Official Directives," and international law. The testing that is the subject of the Complaint ended more than 30 years ago, and a declaration now could not redress any of the injuries alleged. Because

the tests are not ongoing, no injunctive relief on these claims is possible. The claims are not redressable. Plaintiffs therefore lack standing to bring them.

2. VVA Lacks Standing to Seek Relief on Behalf of Non-Members and to Seek Declaratory Relief Regarding Medals and Commendations.

The Complaint suggests that VVA seeks relief on behalf of individuals beyond its membership who participated in chemical tests. (*E.g.*, Compl. ¶ 160.) It also appears to seek award of military medals and commendations to non-members. (*Id.* ¶ 165.) Regardless of whether VVA possesses representational standing with respect to other claims asserted in the Complaint, standing is lacking for these claims.

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

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

Accord, *e.g.*, *Smith v. Pacific Prop. and Dvp. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004).

a. While an organization may have standing to bring suit on behalf of its members, reliance on alleged injuries to non-members does not satisfy the requirements for representational standing. *See Friends of the Earth*, 528 U.S. at 181; *Smith*, F.3d at 1101 (9th Cir. 2004) (an association's "representational standing is contingent upon the standing of its members to bring suit"). Thus, to the extent that VVA seeks relief on behalf of non-members, its claims should be dismissed for lack of standing.

b. Whether a veteran is entitled to a military medal or commendation is an individualized determination. *See, e.g.*, Army Reg. 600-8-22 § 3-1(c) ("The decision to award an individual a decoration and the decision as to which award is appropriate are both subjective decisions made by the commander having award approval authority . . . [T]he award should reflect both the individual's level of responsibility and his or her manner of performance. The degree to which an individual's achievement or service enhanced the readiness or effectiveness of his or her organization will be the predominant factor.") (available online at

http://www.army.mil/usapa/epubs/pdf/r600_8_22.pdf, last accessed June 30, 2009). Prosecution of a claim of entitlement to such an award therefore would "require[] participation of the individual member[]" seeking it, if the claim could be brought at all.[11] VVA therefore lacks standing to bring that claim.

3. Award of Military Medals and Commendations Is Committed to Military Discretion.

In *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002), the Ninth Circuit set forth the test for determining whether a military decision may be challenged in an Article III court:

> Under the *Mindes* [*v. Seaman*, 453 F.2d 197 (5th Cir. 1971),] test as modified by this Circuit, a person challenging a military decision generally must satisfy two threshold elements before a court can determine whether review of his claims is appropriate. "An internal military decision is unreviewable unless the plaintiff alleges (a) a violation of [a recognized constitutional right], a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies." . . . If the plaintiff alleges both of these things, a court weighs four factors to determine whether judicial review of his claims is appropriate. These factors include:
>
> (1) The nature and strength of the plaintiff's claim;
>
> (2) The potential injury to the plaintiff if review is refused;
>
> (3) The extent of interference with military functions; and
>
> (4) The extent to which military discretion or expertise is involved.

Wenger, 282 F.3d at 1072 (quoting *Khalsa v. Weinberger*, 779 F.2d 1393, 1398 (9th Cir. 1985)). The third and fourth factors are generally considered together. *Id.* at 1075.

Neither of the two threshold elements identified in *Wenger* is satisfied with respect to Plaintiffs' claim for medals or commendations. Plaintiffs do not claim that non-receipt of military awards violates a constitutional right, a statute or military regulation. And they do not allege exhaustion of the Army's administrative remedy. The Army maintains an administrative system — the Army Board for Correction of Military Records ("ABCMR") — through which service members as well as veterans may pursue claims that the Army should award them a

[11] Defendants explain in the next section that Plaintiffs' claims concerning medals and commendations are nonjusticiable.

medal or commendation. *See*, *e.g.*, *id*. at 1073. *See also* 10 U.S.C. § 1130 (providing for member of Congress to request review of proposal for otherwise untimely military award).

Even if Plaintiffs met the threshold elements for court challenge of a military decision, application of the four factors identified in *Wenger* would demonstrate that their claims are nonjusticiable. Regardless of the strength of Plaintiffs' claim to military medals or commendations and any potential injury that might result from lack of judicial review, whether to make such awards is a quintessentially discretionary decision that rests entirely with the military. *See, e.g., Wilson v. United States*, 24 Cl. Ct. 842, 846 (Cl. Ct. 1992) (Air Force decision to award a lesser medal than recommended by the plaintiff's supervisor was "purely a discretionary one and therefore [] not reviewable by [a] court") (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *see also Blankenship v. United States*, 84 Fed. Cl. 479, 485 (Fed. Cl. 2008) ("Discretionary authority to correct military records lies with the Secretary of a military department") (citing 10 U.S.C. § 1552(a)(1)[12]). Like in *Wenger* where the Ninth Circuit concluded that the third and fourth *Mindes* factors weighed against reviewability of the National Guard's suspension of promotion proceedings, consideration of Plaintiffs' claim to medals or commendations "would necessarily 'involve the court in a very sensitive area of military expertise and discretion.'" *Wenger*, 282 F.3d at 1076. Judicial action, especially where Plaintiffs have not pursued relief before the ABCMR, would represent improper interference with military functions. *See*, *e.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of running the [military] . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.").

Plaintiffs' claim of entitlement to military medals or commendations therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) as nonjusticiable.

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[12] Under 10 U.S.C. § 1552(a)(1), "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."

III. Plaintiffs' Claims for Documents and Other Information, that Adverse Inferences Should be Drawn, and Against the Attorney General Should be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted if a plaintiff fails to plead enough facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009).

A. As described above, Plaintiffs ask that Defendants be ordered to provide them with "all available documents and evidence concerning their exposures and known health effects." (Compl. ¶¶ 159, 165(b).) They do not rely on FOIA or the Privacy Act; indeed, they could not as they have not exhausted administrative remedies under those statutes. *See supra* at 14. As previously discussed, Plaintiffs have no constitutional right to government information, and FOIA and the Privacy Act preempt any common-law right. *See*, *e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 934. Their claim for documents and other information should be dismissed for failure to state a claim upon which relief can be granted.

B. Plaintiffs ask the Court for a declaratory judgment that "the Court must draw adverse inferences from D[efendants'] document destruction, redactions, spoliations, and other wrongful acts described [in the Complaint]." (Compl. ¶ 159.) What Plaintiffs seek is an evidentiary ruling concerning how the Court should make findings of fact, should the case proceed to that stage, prior to issuing a judgment in this case. *See*, *e.g.*, *Ritchie v. United States*, 451 F.3d 1019, 1024 (9th Cir. 2006) (addressing adverse inference rule and destruction of documents concerning chemical testing). Such an evidentiary ruling necessarily could not be a component of that judgment. Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is warranted.

C. Plaintiffs name the Attorney General as a Defendant but do not appear to assert any claim against him. He therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, the Court should dismiss this action pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3) or, in the alternative, pursuant to Fed. R. Civ. P. 12(b)(1) and, for some of Plaintiffs' claims, Fed. R. Civ. P. 12(b)(6).

DATED this 30th day of June, 2009.

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