

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-0037 CW

VIETNAM VETERANS OF AMERICA; SWORDS
TO PLOWSHARES: VETERANS RIGHTS
ORGANIZATION; BRUCE PRICE; FRANKLIN
D. ROCHELLE; LARRY MEIROW; ERIC P.
MUTH; DAVID C. DUFRANE; and WRAY C.
FORREST, individually, on behalf of
themselves and all others similarly
situated,

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANTS'
MOTIONS TO DISMISS
AND DENYING
DEFENDANTS'
ALTERNATIVE MOTION
FOR SUMMARY JUDGMENT

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

Plaintiffs Vietnam Veterans of America (VVA), Swords to
Plowshares: Veterans Rights Organization and six individual
veterans assert claims against Defendants Central Intelligence
Agency (CIA), et al., arising from the United States' human
experimentation programs. Defendants move to dismiss Plaintiffs'
Second Amended Complaint (SAC) in its entirety for lack of subject
matter jurisdiction and for failure to state a claim. In the
alternative, they move for summary judgment on Plaintiffs' claims,
arguing that they are time-barred. Defendants had previously moved
to dismiss Plaintiffs' First Amended Complaint for improper venue,
lack of subject matter jurisdiction, and failure to state a claim.
At the December 3, 2009 hearing on that motion, the Court indicated
that it would grant Plaintiffs leave to file an amended complaint
to cure deficiencies in their claim of venue in the Northern
District of California. Before this Court issued its written order

1 on that motion, Plaintiffs filed their Second Amended Complaint,
2 which cures these deficiencies. Accordingly, the Court DENIES as
3 moot Defendants' first Motion to Dismiss to the extent it is based
4 on improper venue. (Docket No. 34.) The remaining arguments in
5 Defendants' first Motion to Dismiss are repeated in its current
6 motion. Thus, the Court does not require another opposition, reply
7 or hearing on these issues. The Court GRANTS in part Defendants'
8 first and second Motions to Dismiss and DENIES them in part. The
9 Court DENIES Defendants' Alternative Motion for Summary Judgment.

10 BACKGROUND

11 The following allegations are contained in Plaintiffs' SAC.

12 Beginning in the early 1950s, the CIA and the Army engaged in
13 experiments involving human subjects. The purposes of these
14 experiments varied; some focused on determining the levels at which
15 chemicals would cause casualties in order to develop new biological
16 and chemical weapons. Other tests, including the "MKULTRA"
17 program, involved researching "psychological warfare" and
18 developing mind-control methods. The experiments exposed
19 participants to various chemicals, drugs and/or the implantation of
20 electronic devices. Many of the tests occurred at Edgewood Arsenal
21 and Fort Detrick, both located in Maryland.

22 Various memoranda and regulations were intended to govern
23 these experiments. In February, 1953, the CIA and the Department
24 of Defense (DOD) issued the Wilson Directive, which was intended to
25 bring the United States into compliance with the 1947 Nuremberg
26 Code on medical research. The Directive stated that the "voluntary
27 consent of the human subject is absolutely essential." SAC

28 ¶ 119(a). A June, 1953 Department of the Army memorandum stated,

1 "Medical treatment and hospitalization will be provided for all
2 casualties of the experiments" in order to protect volunteers. SAC
3 ¶ 125(b) (emphasis in SAC). This language was codified in Army
4 Regulation (AR) 70-25, which was promulgated on March 26, 1962.
5 SAC ¶¶ 128, 130. AR 70-25 also echoed the Wilson Directive,
6 stating that informed consent is "essential" and, to that end, a
7 test participant "will be fully informed of the effects upon his
8 health or person which may possibly come from his participation in
9 the experiment." SAC ¶ 126(b).

10 Approximately 7,800 armed services personnel, including the
11 six named individual Plaintiffs in this action, volunteered to
12 participate in the experiments. However, the volunteers
13 participated without giving informed consent because the risks of
14 the experiments were not fully disclosed, despite the memoranda and
15 regulation discussed above.

16 Test participants were required to sign a secrecy oath, which
17 required their agreement that they would

18 not divulge or make available any information related to
19 U.S. Army Intelligence Center interest or participation
20 in the [volunteer program] to any individual, nation,
21 organization, business, association, or other group or
22 entity, not officially authorized to receive such
23 information.

24 SAC ¶ 156 (alteration in SAC). Any violation of the oath would
25 result in punishment under the Uniform Code of Military Justice
26 (UCMJ). Based on the form's language, participants erroneously
27 believed that punishment under the UCMJ could occur even after
28 their discharge from military service. In September, 2006, some,
but not all, participants received letters from the Department of
Veterans Affairs (DVA), advising them that the DOD had authorized

1 them to discuss their exposure with their health care providers.

2 Following congressional hearings in the 1970s on the program,
3 the CIA, the Department of Justice (DOJ) and the Department of the
4 Army stated that they would work to locate test participants and
5 compensate those who had health conditions or diseases connected to
6 their participation in the experiments. These efforts have not
7 yielded substantial results. Although some participants have been
8 notified and have received information on their exposure, others
9 have not.

10 Based on these allegations, Plaintiffs seek declaratory and
11 injunctive relief. They ask the Court to declare that the consent
12 forms signed by the individual Plaintiffs are not valid or
13 enforceable; that the individual Plaintiffs are released from the
14 secrecy oaths; that Defendants are obliged to notify the individual
15 Plaintiffs and other test participants about their exposures and
16 the known health effects and to provide all available documents and
17 evidence concerning their exposures; that Defendants violated the
18 individual Plaintiffs' rights under the Due Process Clause; and
19 that Defendants are obliged to provide medical care to the
20 individual Plaintiffs. Plaintiffs also seek injunctive relief,
21 requiring Defendants to notify volunteers of the details of their
22 participation in the human experimentation program; to conduct a
23 thorough search of "all available document repositories" and
24 provide victims with all documents concerning their exposure; to
25 provide examinations and medical care to all volunteers involved in
26 the MKULTRA, Edgewood, and other human experiments, to the extent
27 that the volunteers have a disease or condition related to their
28 exposures; to supply the DVA with information on the individual

1 Plaintiffs' participation in the experiments, so that they may seek
2 service-connected death or disability compensation; and to cease
3 committing violations of United States and international law.
4 Separately, the organization Plaintiffs seek a declaration that the
5 Supreme Court's holding in United States v. Feres, 340 U.S. 135
6 (1950), is unconstitutional.¹

7 Plaintiffs intend to move to certify this case as a class
8 action encompassing "all veterans who were involved in the Human
9 Test Series." SAC ¶ 174.

10 DISCUSSION

11 I. Dismissal under Rule 12(b)(1)

12 A. Legal Standard

13 Subject matter jurisdiction is a threshold issue which goes to
14 the power of the court to hear the case. Federal subject matter
15 jurisdiction must exist at the time the action is commenced.
16 Moronggo Band of Mission Indians v. Cal. State Bd. of Equalization,
17 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed
18 to lack subject matter jurisdiction until the contrary
19 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873
20 F.2d 1221, 1225 (9th Cir. 1989).

21 Dismissal is appropriate under Rule 12(b)(1) when the district
22 court lacks subject matter jurisdiction over the claim. Fed. R.
23 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the
24 sufficiency of the pleadings to establish federal jurisdiction, or

25
26 ¹ In Feres, the Court held that injuries that "arise out of or
27 are in the course of activity incident" to military service fall
28 outside the sovereign immunity waiver of the Federal Tort Claims
Act. 340 U.S. at 146. The Feres doctrine bars suits for money
damages involving injuries incident to military service. See Costo
v. United States, 248 F.3d 863, 866 (9th Cir. 2001).

1 allege an actual lack of jurisdiction which exists despite the
2 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.
3 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.
4 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

5 B. Analysis

6 Defendants assert that the Court lacks subject matter
7 jurisdiction because the United States has not waived sovereign
8 immunity for Plaintiffs' claims, because the claims are time-barred
9 and because Plaintiffs lack standing to bring their claims
10 concerning the lawfulness of the testing, consent forms and secrecy
11 oaths.²

12 1. Sovereign Immunity

13 To bring a claim against an agency of the United States, a
14 plaintiff must establish a waiver of sovereign immunity.
15 Rattlesnake Coalition v. U.S. EPA, 509 F.3d 1095, 1103 (9th Cir.
16 2007). Under 5 U.S.C. § 702, the judicial review provision of the
17 Administrative Procedure Act (APA), sovereign immunity is waived
18 "in all actions seeking relief from official misconduct except for

19 _____
20 ² In asserting that the Court lacks subject matter
21 jurisdiction over these claims, Defendants offer several arguments
22 concerning Plaintiffs' entitlement to relief. These arguments are
23 immaterial to whether Plaintiffs' complaint should be dismissed
24 under Rule 12(b)(1). "Where a court initially has jurisdiction
25 under the APA, . . . the existence of statutory limitations on the
26 remedies that the court may impose does not defeat jurisdiction."
27 Rosemere Neighborhood Ass'n v. U.S. EPA, 581 F.3d 1169, 1172 n.2
28 (9th Cir. 2009). "As a general rule, when '[t]he question of
jurisdiction and the merits of [the] action are intertwined,'
dismissal for lack of subject matter jurisdiction is improper."
Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage
Leasehold & Easement in the Cloverly Subterranean Geological
Formation, 524 F.3d 1090, 1094 (9th Cir. 2008) (quoting Safe Air
for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)).
Defendants' arguments that Plaintiffs' claims lack merit and that
relief is unavailable are considered below with respect to
dismissal under Rule 12(b)(6).

1 money damages." The Presbyterian Church v. United States, 870 F.2d
2 518, 525 (9th Cir. 1989); see also Rosemere Neighborhood Ass'n v.
3 U.S. EPA, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) ("Section 702
4 waives the government's sovereign immunity for actions, such as
5 this one, that seek injunctive relief."). Section 702 "permits a
6 citizen suit against an agency when an individual has suffered 'a
7 legal wrong because of agency action'" Rattlesnake, 509
8 F.3d at 1103 (quoting 5 U.S.C. § 702). An agency's failure to act
9 constitutes "agency action" for the purposes of section 702. See 5
10 U.S.C. § 551(13).

11 Defendants argue that the United States' sovereign immunity
12 bars Plaintiffs' claims for (1) medical care; (2) notice and the
13 production of documents on the known health effects of Defendants'
14 human experimentation program; and (3) a declaration that the
15 Supreme Court's Feres doctrine is unconstitutional.

16 Because Plaintiffs' claims for medical care and notice arise
17 under section 702, sovereign immunity does not bar the Court's
18 jurisdiction over these claims. Plaintiffs allege that Defendants'
19 failure to provide medical care and to disclose information
20 concerning the experiments is unlawful. With regard to medical
21 care, Plaintiffs assert that Defendants' legal duties arise from
22 previously confidential Army documents and the 1962 version of
23 AR 70-25. As mentioned above, the documents and the regulation
24 require that medical care will be provided for "all casualties" of
25 the experiments. To demonstrate Defendants' legal obligation to
26 disclose information, Plaintiffs cite various documents, including
27 a 1978 DOJ opinion letter, which states that

28 the CIA may well be held to have a legal duty to notify

1 those MKULTRA drug-testing subjects whose health the CIA
2 has reason to believe may still be adversely affected by
3 their prior involvement in the MKULTRA drug-testing
4 program; that an effort should thus be made to notify
5 these subjects; . . . and, while the CIA might lawfully
6 ask another agency to undertake the notification effort
7 in this instance, the CIA also has lawful authority to
8 carry out this task on its own.

9 SAC ¶ 14; SAC, Ex. A at A-006. The DOJ opined that the CIA,
10 "having created the harm or risk" to test participants' health, has
11 a common-law duty "to notify individuals as an effort directed at
12 rendering assistance and preventing further harm." SAC, Ex. A. at
13 A-002. By citing these documents, regulation and letter,
14 Plaintiffs sufficiently allege they have suffered a legal wrong
15 based on agency inaction. They therefore state a section 702
16 claim, for which sovereign immunity is waived.

17 The Court, however, lacks subject matter jurisdiction over the
18 organization Plaintiffs' request for a declaration that the Supreme
19 Court's Feres doctrine is unconstitutional. Quite clearly, this
20 Court cannot declare a United States Supreme Court case
21 unconstitutional. Plaintiffs admitted as much at hearing,
22 explaining that they wish to preserve the point for appeal.
23 Accordingly, the Court dismisses with prejudice the request for a
24 declaration that the Feres doctrine is unconstitutional.

25 2. Statute of Limitations under 28 U.S.C. § 2401(a)

26 Defendants assert that the Court lacks subject matter
27 jurisdiction because Plaintiffs' claims are time-barred under 28
28 U.S.C. § 2401(a).³ Defendants cite John R. Sand and Gravel Company

29 ³ Section 2401(a) provides:

30 Except as provided by the Contract Disputes Act
31 (continued...)

1 v. United States and its holding that 28 U.S.C. § 2501, which
2 provides a six-year limitations period for claims filed in the
3 Court of Federal Claims, can constitute a jurisdictional bar. 552
4 U.S. 130, 133-36 (2008).

5 Because John R. Sand addressed a different statute, its
6 holding does not apply here. As Defendants acknowledge, the Ninth
7 Circuit has stated that "§ 2401(a)'s six-year statute of
8 limitations is not jurisdictional." Cedars-Sinai Med. Ctr. v.
9 Shalala, 125 F.3d 765, 770 (9th Cir. 1997). The Ninth Circuit has
10 not reexamined Cedars-Sinai in light of John R. Sand. Defendants
11 nevertheless argue that John R. Sand "casts substantial doubt" on
12 Cedars-Sinai because the language of section 2501 parallels the
13 language of section 2401(a). Defs.' Reply in Support of Mot. to
14 Dismiss of August 14, 2009 at 8. However, John R. Sand is
15 distinguishable from Cedars-Sinai. In rejecting the John R. Sand
16 petitioner's argument that section 2501 is not jurisdictional, the
17 Supreme Court reviewed its earlier decisions holding that
18 section 2501's statutory predecessors were jurisdictional in
19 nature. The Court followed those decisions based on stare decisis.
20 See 552 U.S. at 139. Contrary to Defendants' argument, John R.
21 Sand did not broadly hold that all federal statutes governing
22 limitations periods are jurisdictional in nature. Thus, John R.

23
24 _____
25 ³(...continued)

26 of 1978, every civil action commenced against
27 the United States shall be barred unless the
28 complaint is filed within six years after the
right of action first accrues. The action of
any person under legal disability or beyond the
seas at the time the claim accrues may be
commenced within three years after the
disability ceases.

1 Sand is not clearly irreconcilable with Cedars-Sinai. The Court is
2 still bound by Cedars-Sinai and does not find that section 2401(a)
3 creates a jurisdictional bar. See, e.g., Sierra Club v. Johnson,
4 2009 WL 482248, *9 (N.D. Cal.); Public Citizen, Inc. v. Mukasey,
5 2008 WL 4532540, *8 (N.D. Cal.).

6 3. Plaintiffs' Standing to Seek Declaratory Relief
7 Concerning the Legality of the Testing and Consent
8 Forms

9 In order to provide declaratory relief, a court must have "an
10 actual case or controversy within its jurisdiction." Principal
11 Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). To
12 satisfy the "case or controversy" requirement, a plaintiff must
13 establish "the three elements of Article III standing: (1) he or
14 she has suffered an injury in fact that is concrete and
15 particularized, and actual or imminent; (2) the injury is fairly
16 traceable to the challenged conduct; and (3) the injury is likely
17 to be redressed by a favorable court decision." Salmon Spawning &
18 Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir.
19 2008). In the context of declaratory relief, a plaintiff
20 demonstrates redressability if the court's statement would require
21 the defendant to "act in any way" that would redress past injuries
22 or prevent future harm. Mayfield v. United States, ___ F.3d ___,
23 2009 WL 4674172, at *6 (9th Cir. 2009).

24 If a court has subject matter jurisdiction, it may then
25 consider whether it should exercise its discretion to grant
26 declaratory relief. This decision is guided by the factors set out
27 in Brillhart v. Excess Insurance Company, 316 U.S. 491 (1942).
28 Principal Life Ins. Co., 394 F.3d at 672. Brillhart states that
"1) the district court should avoid needless determination of state

1 law issues; 2) it should discourage litigants from filing
2 declaratory actions as a means of forum shopping; and 3) it should
3 avoid duplicative litigation." Principal Ins. Co., 394 F.3d at 672
4 (alteration marks and citation omitted). The Ninth Circuit has
5 also noted other relevant considerations:

6 whether the declaratory action will settle all aspects of
7 the controversy; whether the declaratory action will
8 serve a useful purpose in clarifying the legal relations
9 at issue; whether the declaratory action is being sought
10 merely for the purposes of procedural fencing or to
11 obtain a 'res judicata' advantage; or whether the use of
12 a declaratory action will result in entanglement between
13 the federal and state court systems. In addition, the
14 district court might also consider the convenience of the
15 parties, and the availability and relative convenience of
16 other remedies.

17 Id. (quoting Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225
18 n.5 (9th Cir. 1998) (en banc)).

19 Defendants argue that Plaintiffs lack standing to seek a
20 declaration on the lawfulness of the testing and the associated
21 consent forms because such relief would not redress their alleged
22 injuries.

23 With regard to a declaration on the testing's lawfulness,
24 Plaintiffs lack standing. A declaration would not redress their
25 past injuries or those of putative class members. Nor would a
26 declaration prevent future harm; the individual Plaintiffs are no
27 longer members of the armed forces and they do not plead or argue
28 that they might be subject to Defendants' experimentation programs
in the future. Vindication through a declaration that they have
been wronged does not redress the individual Plaintiffs' injuries
for the purposes of Article III.

Plaintiffs cite Bilbrey v. Brown, 738 F.2d 1462 (9th Cir.
1984), and Greater Los Angeles Council on Deafness, Inc. v. Zolin,

1 812 F.2d 1103 (9th Cir. 1987). These cases are distinguishable and
2 do not support their position. Neither case involved a challenge
3 to the plaintiffs' standing to seek declaratory relief; instead,
4 both cases inquired into whether the district courts properly
5 exercised their discretion in denying such relief. See Bilbrey,
6 738 F.2d at 1470; Zolin, 812 F.2d at 1112. And unlike the Bilbrey
7 and Zolin plaintiffs, the individual Plaintiffs and the putative
8 class members will not face future harm by Defendants'
9 experimentation programs.⁴ Because the individual Plaintiffs do
10 not satisfy the threshold issue of standing, the Court need not
11 consider whether declaratory relief would be appropriate.

12 However, a declaration concerning the lawfulness of the
13 consent forms, to the extent that they required the individual
14 Plaintiffs to take a secrecy oath, would redress their alleged
15 injuries. Plaintiffs assert that these oaths cause ongoing harm
16 because they prohibit the individual Plaintiffs from seeking
17 treatment and counseling for the harm inflicted by the experiments.
18 Because a declaration that the oaths were unlawful would allow the
19 individual Plaintiffs to speak freely about their experiences, they

21 ⁴ In Bilbrey, two elementary school students alleged that
22 their search by two school officials was unconstitutional. 738
23 F.2d at 1464. Although the named plaintiffs had moved on to high
24 school by the time of their appeal, the court noted that they
25 represented a class "including future persons attending Columbia
County Elementary Schools" and, as a result, there were "persons
before the court, other than appellants, who [stood] to benefit
from such" declaratory relief. Id. at 1471.

26 In Zolin, the plaintiffs challenged county officials' refusal
27 to provide sign-language interpreters to enable deaf individuals to
28 serve as jurors. 812 F.2d at 1106. The plaintiffs argued that the
officials' decision violated their rights under the Fourteenth
Amendment and under Section 504 of the Rehabilitation Act. Id.
Thus, a declaration could have redressed their injuries and those
of class members because it could prevent future harm.

1 have standing to assert their declaratory relief claim concerning
2 the consent forms and secrecy oaths. Further, such relief would
3 avoid potential future litigation by clarifying whether the
4 veterans may discuss their experiences without facing consequences.

5 Accordingly, the Court dismisses with prejudice Plaintiffs'
6 declaratory relief claim concerning the lawfulness of Defendants'
7 testing program because a declaration would not redress their past
8 injuries or prevent future harm to them. Plaintiffs' claim for a
9 declaration on the lawfulness of the consent forms, to the extent
10 that they required the individual Plaintiffs to take a secrecy
11 oath, may go forward.

12 II. Dismissal under Rule 12(b)(6)

13 A. Legal Standard

14 A complaint must contain a "short and plain statement of the
15 claim showing that the pleader is entitled to relief." Fed. R.
16 Civ. P. 8(a). When considering a motion to dismiss under Rule
17 12(b)(6) for failure to state a claim, dismissal is appropriate
18 only when the complaint does not give the defendant fair notice of
19 a legally cognizable claim and the grounds on which it rests.

20 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
21 considering whether the complaint is sufficient to state a claim,
22 the court will take all material allegations as true and construe
23 them in the light most favorable to the plaintiff. NL Indus., Inc.
24 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
25 principle is inapplicable to legal conclusions; "threadbare
26 recitals of the elements of a cause of action, supported by mere
27 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
28 ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550

1 U.S. at 555).

2 B. Analysis

3 Defendants argue that Plaintiffs have failed to state a claim
4 with regard to their requests for documents and medical care, which
5 Plaintiffs assert under 5 U.S.C. § 702. As mentioned above,
6 section 702 provides a right of judicial review for persons who
7 have suffered a legal wrong based on agency action or inaction.
8 The scope of this right is limited. The statute, in relevant part,
9 provides:

10 Nothing herein (1) affects other limitations on judicial
11 review or the power or duty of the court to dismiss any
12 action or deny relief on any other appropriate legal or
13 equitable ground; or (2) confers authority to grant
relief if any other statute that grants consent to suit
expressly or impliedly forbids the relief which is
sought.

14 5 U.S.C. § 702. For section 702 claims, 5 U.S.C. § 706 "prescribes
15 standards for judicial review and demarcates what relief a court
16 may (or must) order." Rosemere, 581 F.3d at 1172 n.2. When a
17 plaintiff asserts an agency's failure to act, a court can grant
18 relief by compelling "agency action unlawfully withheld or
19 unreasonably delayed." 5 U.S.C. § 706(1). A "'claim under
20 § 706(1) can proceed only where a plaintiff asserts that an agency
21 failed to take a discrete agency action that it is required to
22 take.'" Sea Hawk Seafoods, Inc. v. Locke, 568 F.3d 757, 766 (9th
23 Cir. 2009) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S.
24 55, 64 (2004)) (emphasis in original).

25 1. Claims for Notice and Production of Documents

26 Plaintiffs cite the Wilson Directive, AR 70-25 (1962) and a
27 DOJ opinion letter to show that Defendants had a legal duty to act.
28 AR 70-25 (1962), which incorporates language from the Wilson

1 Directive, states that a participant "will be told as much of the
2 nature, duration, and purpose of the experiment, the method and
3 means by which it is to be conducted, and the inconveniences and
4 hazards to be expected, as will not invalidate the results" and
5 "will be fully informed of the effects upon his health or person
6 which may possibly come from his participation in the experiment."
7 AR 70-25 ¶ 4(a)(1) (1962). The DOJ letter states that the CIA has
8 a legal duty to notify participants because the agency placed test
9 participants in harm's way. SAC Ex. A at A-006; see also
10 Restatement (Second) of Torts § 321 ("If the actor does an act, and
11 subsequently realizes or should realize that it has created an
12 unreasonable risk of causing physical harm to another, he is under
13 a duty to exercise reasonable care to prevent the risk from taking
14 effect.").

15 AR 70-25 (1962) and the DOJ letter support a claim under
16 section 702 for which the Court could compel discrete agency
17 action. The 1962 version of AR 70-25 mandated the disclosure of
18 information so that volunteers could make informed decisions. Army
19 regulations have the force of law. See Nat'l Med. Enters. v.
20 Bowen, 851 F.2d 291, 293 (9th Cir. 1988); Kern Copters, Inc. v.
21 Allied Helicopter Svc., Inc., 277 F.2d 308, 310 (9th Cir. 1960).
22 Plaintiffs allege that Defendants defaulted on this legal
23 requirement. Plaintiffs also allege that the CIA remains under a
24 legal duty to disclose, as explained by the DOJ opinion letter.
25 Even though this is not a statutory duty, the government can be
26 held liable for the breach of its duty to warn, so long as the
27 decision on whether to warn is not considered a discretionary act.
28 See In re Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982,

1 996-99 (9th Cir. 1987); see generally 28 U.S.C. § 2680(a). Here,
2 an Army regulation, buttressed by the DOJ opinion, suggests that
3 Defendants had a non-discretionary duty to warn the individual
4 Plaintiffs about the nature of the experiments. See AR 70-25
5 ¶ 4(a)(1) (1962).⁵

6 Defendants argue that, because Plaintiffs failed to exhaust
7 administrative remedies under the Freedom of Information Act (FOIA)
8 and the Privacy Act, they fail to state an APA claim. This
9 argument fails because Plaintiffs' claims do not arise under the
10 FOIA or the Privacy Act, but rather under Defendants' own memoranda
11 and regulations, and the common-law duty to warn.

12 2. Claims for Medical Care

13 Defendants assert that, because government-provided medical
14 care for veterans is governed by statute, Plaintiffs' claim for
15 medical care must fail to the extent that it relies on an alleged
16 contractual obligation. Plaintiffs assert that their right to
17 medical care arises from "obligatory duties" imposed by Defendants'
18 own regulations. Opp'n at 7. They dispute Defendants' assertion
19 that this claim arises under a contract theory.

20 To demonstrate their entitlement to medical care, Plaintiffs
21 cite AR 70-25 (1962). As noted above, the 1962 version of the
22 regulation provided volunteers with the safeguard of requiring
23 "medical treatment and hospitalization . . . for all casualties."
24 AR 70-25 ¶ 5(c) (1962).

25
26 ⁵ AR 70-25 ¶ 4(a)(1) (1962) requires notice to the extent
27 that it would not "invalidate the results," which suggests that
28 Defendants had discretion at the time of the experiments on the
scope of what volunteers would be told. Because the results can no
longer be invalidated, AR 70-25 (1962) does not give Defendants
discretion concerning disclosure now.

1 Defendants concede that AR 70-25 (1962) accords a right to
2 medical care, but contend that such care was "an 'additional
3 safeguard' available to address a medical need during an experiment
4 rather than care over the course of a test participant's lifetime."
5 Defs.' Reply in Support of Mot. to Dismiss of August 14, 2009 at 4-
6 5. The language of the regulation does not require this
7 conclusion. The safeguards were put in place to protect a
8 volunteer's health. The fact that symptoms appear after the
9 experiment ends does not obviate the need to provide care.

10 Defendants also maintain that ordering the Army to provide
11 medical care would conflict with 10 U.S.C. § 1074, which states in
12 relevant part,

13 Under joint regulations to be prescribed by the
14 administering Secretaries, a member of a uniformed
15 service described in paragraph (2) is entitled to medical
16 and dental care in any facility of any uniformed service.

17 10 U.S.C. § 1074(a). The Court does not find a conflict. Although
18 the statute creates an entitlement for active service members and
19 certain former members to medical and dental care, it does not bar
20 the Court from granting injunctive relief to vindicate Plaintiffs'
21 claims.

22 Because Plaintiffs allege that their medical care has been
23 wrongfully withheld and that they have been injured by Defendants'
24 failure to act, they have sufficiently alleged a claim for medical
25 care under section 702.

26 III. Defendants' Alternative Motion for Summary Judgment

27 A. Legal Standard

28 Summary judgment is properly granted when no genuine and
disputed issues of material fact remain, and when, viewing the

1 evidence most favorably to the non-moving party, the movant is
2 clearly entitled to prevail as a matter of law. Fed. R. Civ.
3 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
4 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
5 1987).

6 B. Analysis

7 Defendants argue that they are entitled to summary judgment as
8 a matter of law because Plaintiffs' claims are time-barred. As
9 noted above, 28 U.S.C. § 2401(a) provides a six-year limitations
10 period for civil actions commenced against the United States.
11 Defendants assert that the individual Plaintiffs knew of their
12 injuries "either immediately or shortly after their tests ended,"
13 which was over six years prior to the filing of this action.
14 Defs.' Mot. to Dismiss of Jan. 5, 2010, at 14.

15 Plaintiffs' claims concerning Defendants' failure to provide
16 medical care and proper notice of the experiments' health effects
17 arise under 5 U.S.C. § 706(1). Several courts have held that there
18 is no applicable statute of limitations for claims under section
19 706(1). See Pub. Citizen, Inc., 2008 WL 4532540, at *7 (citing Am.
20 Canoe Ass'n v. U.S. EPA, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998)
21 (stating that "application of a statute of limitations to a claim
22 of unreasonable delay is grossly inappropriate"); see also
23 Wilderness Soc'y v. Norton, 434 F.3d 584, 588 (D.C. Cir. 2006)
24 (stating that the D.C. Circuit has "repeatedly refused to hold that
25 actions seeking relief under 5 U.S.C. § 706(1) . . . are time-
26 barred if initiated more than six years after an agency fails to
27 meet a statutory deadline"). Defendants do not provide contrary
28 authority, but instead argue that Plaintiffs do not assert valid

1 APA claims; the Court rejected this argument above.

2 Plaintiffs' claims concerning the consent forms and secrecy
3 oaths, both of which appear to arise under the United States
4 Constitution, might be time-barred by section 2401(a). At this
5 early stage, however, the record does not offer the Court a basis
6 to rule on the issue as a matter of law. The evidence proffered by
7 Defendants addresses four of the six individual Plaintiffs'
8 knowledge of their injuries allegedly attributable to the testing
9 at Edgewood; this evidence does not shed light on these Plaintiffs'
10 awareness as to the lawfulness of their consent or secrecy oaths.⁶
11 Thus, the Court finds it premature to decide whether Plaintiffs'
12 claims concerning the consent forms and their secrecy oaths are
13 barred by the statute of limitations.

14 Accordingly, the Court denies Defendants' Alternative Motion
15 for Summary Judgment as to Plaintiffs' claims under the APA; these
16 claims are not time-barred. The Court denies without prejudice
17 Defendants' Alternative Motion for Summary Judgment as to
18 Plaintiffs' other claims; Defendants may renew their motion after a
19 fuller record has been developed.

20 CONCLUSION

21 For the foregoing reasons, the Court GRANTS in part and DENIES
22 in part Defendants' Motions to Dismiss (Docket Nos. 34 and 57) and
23 DENIES Defendants' Alternative Motion for Summary Judgment.
24 (Docket No. 57.) The organization Plaintiffs' claim for
25 declaratory relief that the Feres doctrine is unconstitutional is

26
27 ⁶ Also, given that the individual Plaintiffs took an oath not
28 to discuss the testing program, which presumably delayed their
filing of this action, Defendants may be equitably estopped from
asserting a statute of limitations defense.

1 dismissed with prejudice for lack of subject matter jurisdiction.
2 Plaintiffs' claim for declaratory relief on the lawfulness of the
3 testing program is dismissed with prejudice for lack of standing.
4 Defendants' Motions to Dismiss are denied with regard to
5 Plaintiffs' other claims.

6 In accordance with the Court's Case Management Order of
7 December 23, 2009, discovery responses shall be due thirty days
8 from the date of this Order. (Docket No. 54.) A further case
9 management conference will be held on January 5, 2012.

10 IT IS SO ORDERED.

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12 Dated: January 19, 2010



13 CLAUDIA WILKEN
14 United States District Judge
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United States District Court
For the Northern District of California