

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
 4 VIETNAM VETERANS OF AMERICA;  
 5 SWORDS TO PLOWSHARES: VETERANS  
 6 RIGHTS ORGANIZATION; BRUCE PRICE;  
 7 FRANKLIN D. ROCHELLE; LARRY  
 8 MEIROW; ERIC P. MUTH; DAVID C.  
 9 DUFRANE; TIM MICHAEL JOSEPHS; and  
 10 WILLIAM BLAZINSKI, individually,  
 11 on behalf of themselves and all  
 12 others similarly situated,

13 Plaintiffs,

14 v.

15 CENTRAL INTELLIGENCE AGENCY;  
 16 DAVID H. PETRAEUS, Director of  
 17 the Central Intelligence Agency;  
 18 UNITED STATES DEPARTMENT OF  
 19 DEFENSE; LEON E. PANETTA,  
 20 Secretary of Defense; UNITED  
 21 STATES DEPARTMENT OF THE ARMY;  
 22 JOHN M. MCHUGH, United States  
 23 Secretary of the Army; UNITED  
 24 STATES OF AMERICA; ERIC H.  
 25 HOLDER, Jr., Attorney General of  
 26 the United States; UNITED STATES  
 27 DEPARTMENT OF VETERANS AFFAIRS;  
 28 and ERIC K. SHINSEKI, United  
 States Secretary of Veterans  
 Affairs,

Defendants.

No. C 09-0037 CW

ORDER GRANTING IN  
 PART, AND DENYING  
 IN PART,  
 PLAINTIFFS' MOTION  
 FOR CLASS  
 CERTIFICATION  
 (Docket No. 346),  
 DENYING  
 DEFENDANTS'  
 MOTIONS FOR LEAVE  
 TO FILE A MOTION  
 FOR  
 RECONSIDERATION  
 AND FOR RELIEF  
 FROM A  
 NONDISPOSITIVE  
 ORDER OF  
 MAGISTRATE JUDGE  
 (Docket Nos. 431  
 and 471), AND  
 GRANTING IN PART,  
 AND DENYING IN  
 PART, PLAINTIFFS'  
 MOTION TO  
 SUBSTITUTE (Docket  
 No. 439)

21 Plaintiffs Vietnam Veterans of America, Swords to Plowshares:  
 22 Veterans Rights Organization, Bruce Price, Franklin D. Rochelle,  
 23 Larry Meirow, Eric P. Muth, David C. Dufrane, Tim Michael Josephs  
 24 and William Blazinski move for class certification and to  
 25 substitute Kathryn McMillan-Forrest as a named Plaintiff in this  
 26 action in place of her late husband, former Plaintiff Wray C.  
 27 Forrest. Defendants United States of America; U.S. Attorney  
 28 General Eric Holder; the Central Intelligence Agency and its

1 Director David H. Petraeus (collectively, CIA); the U.S.  
2 Department of Defense and its Secretary Leon Panetta  
3 (collectively, DOD); the U.S. Department of the Army and its  
4 Secretary John M. McHugh; and the U.S. Department of Veterans  
5 Affairs and its Secretary Eric K. Shinseki (collectively, DVA)  
6 oppose Plaintiffs' motions, and move for relief from a  
7 nondispositive order of the Magistrate Judge. The DVA also seeks  
8 leave to file a motion for reconsideration of the Court's November  
9 15, 2010 Order, which allowed Plaintiffs to amend their complaint  
10 to assert a claim against DVA. Plaintiffs oppose Defendants'  
11 motions. Having considered the arguments made by the parties in  
12 their papers and the hearing on the motion for class  
13 certification, the Court GRANTS in part Plaintiffs' motions for  
14 class certification and DENIES it in part and DENIES Defendants'  
15 motions. The Court construes Plaintiffs' motion to substitute as  
16 a motion to amend and GRANTS it in part and DENIES it in part.

17 BACKGROUND

18 "Military experiments using service member[s] as subjects  
19 have been an integral part of U.S. chemical weapons program,  
20 producing tens of thousands of 'soldier volunteers' experimentally  
21 exposed to a wide range of chemical agents from World War I to  
22 about 1975." Sprenkel Decl., Ex. 1 at VET001\_015677.<sup>1</sup> See also  
23 Herb Decl., Ex. 1, 1 (describing the establishment of the Army's  
24 Medical Research Division in 1922 and related research  
25 activities). "Formal authority to recruit and use volunteer  
26 \_\_\_\_\_

27 <sup>1</sup> Plaintiffs also offer evidence that volunteers for testing "were  
28 being recruited into 1993," but not that experiments took place  
through that time. Sprenkel Decl., Ex. 3, at VET125-07490.

1 subjects in [chemical warfare] experiments was initiated in 1942.”  
2 Id.; see also Herb Decl., Ex. 2, VET002\_001801 (describing World  
3 War II (WWII) era testing of mustard agents and Lewisite involving  
4 “over 60,000 U.S. servicemen”). “From 1955 to 1975, thousands of  
5 U.S. service members were experimentally treated with a wide range  
6 of agents, primarily at U.S. Army Laboratories at Edgewood  
7 Arsenal, Maryland.” Sprenkel Decl., Ex. 1 at VET001\_015677. See  
8 also Answer ¶ 5 (admitting “that the DOD used approximately 7,800  
9 armed services personnel in the experimentation program at  
10 Edgewood Arsenal” and that it “administered 250 to 400 chemical  
11 and biological agents during the course of its research at  
12 Edgewood Arsenal involving human subjects”). The experiments had  
13 a variety of purposes, including increasing the country’s  
14 defensive and offensive capabilities for war and researching  
15 behavior modification. Answer ¶ 3.

16 Plaintiffs contend that participants were administered  
17 secrecy oaths<sup>2</sup> and told that they could not discuss the  
18 experimentation program with anyone, under threat of a general  
19 court martial. Defendants have been unable to locate written  
20 secrecy oaths administered during WWII or the Cold War.

21 Various memoranda and regulations were intended to govern  
22 these experiments. In February, 1953, the Secretary of Defense  
23 issued the Wilson Directive to the Army, Navy and Air Force  
24 governing “the use of human volunteers by the Department of  
25 \_\_\_\_\_

26 <sup>2</sup> Plaintiffs define “secrecy oath” to include “all promises or  
27 agreements, whether written or oral, and whether formal or  
28 informal, made by test participants after being told that they  
could never speak about their participation in the testing  
programs.” Mot. at 2, n.2.

1 Defense in experimental research in the fields of atomic,  
2 biological and/or chemical warfare." Sprenkel Decl., Ex. 26,  
3 C001. The Wilson Directive stated, "The voluntary consent of the  
4 human subject is absolutely essential," and provided that, before  
5 such consent can be given, the participant must be informed of,  
6 among other things, the nature of the experiment, "all  
7 inconveniences and hazards reasonably to be expected; and the  
8 effects upon his health and person which may possibly come from  
9 his participation in the experiment." Id. at C001-02. It further  
10 provided, "Proper preparation should be made and adequate  
11 facilities provided to protect the experimental subject against  
12 even remote possibilities of injury, disability, or death." Id.  
13 at C003. A June 1953 Department of the Army memorandum, CS:385,  
14 repeated these requirements and further stated, "Medical treatment  
15 and hospitalization will be provided for all casualties of the  
16 experimentation as required." Sprenkel Decl., Ex. 27, 1-2, 7.  
17 These requirements were codified in Army Regulation (AR) 70-25,  
18 which was promulgated on March 26, 1962 and reissued in 1974.  
19 Sprenkel Decl., Ex. 28; Herb Decl., Exs. 11, 12.

20 Plaintiffs contend that, despite the memoranda and  
21 regulations discussed above, all volunteers participated without  
22 giving informed consent because the full risks of the experiments  
23 were not fully disclosed. See, e.g., Blazinski Depo. 97:8-11.

24 In 1990, the Army issued an updated version of AR 70-25.  
25 Herb Decl., Ex. 13. Among other changes, this version added a  
26 provision stating,

27 Duty to warn. Commanders have an obligation to ensure  
28 that research volunteers are adequately informed  
concerning the risks involved with their participation

1 in research, and to provide them with any newly acquired  
2 information that may affect their well-being when that  
3 information becomes available. The duty to warn exists  
4 even after the individual volunteer has completed his or  
5 her participation in research. . . .

6 Id. at 5. It also required the Army to create and maintain a  
7 "volunteer database" so that it would be able "to readily answer  
8 questions concerning an individual's participation in research"  
9 and "to ensure that the command can exercise its 'duty to warn.'"  
10 Id. at 3, 13-14. It further provided, "Volunteers are authorized  
11 all necessary medical care for injury or disease that is a  
12 proximate result of their participation in research." Id. at 3.

13 In 1991, the DOD issued regulations addressing the protection  
14 of human test subjects. 56 Fed. Reg. 28003 (codified at 32 C.F.R.  
15 §§ 29.101-124). These regulations adopted some of the basic  
16 principles of informed consent set forth in the Wilson Directive.  
17 See 32 C.F.R. § 219.116.

18 In 2002, Congress passed section 709 of the National Defense  
19 Authorization Act for Fiscal Year 2003 (NDAA), Pub. L. No. 107-  
20 314, Div. A, Title VII, Subtitle A, § 709(c), 116 Stat. 2586,  
21 which required the Secretary of Defense to work to identify  
22 projects or tests, other than Project 112,<sup>3</sup> "conducted by the  
23 Department of Defense that may have exposed members of the Armed  
24 Forces to chemical or biological agents."

25 The DOD has issued two memoranda releasing veterans in part  
26 or in full from secrecy oaths that they may have taken in

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26 <sup>3</sup> Project 112 referred to "the chemical and biological weapons  
27 vulnerability-testing program of the Department of Defense  
28 conducted by the Deseret Test Center from 1963 to 1969," including  
"the Shipboard Hazard and Defense (SHAD) project of the Navy."  
NDAA § 709(f).

1 conjunction with testing. The first, issued by former Secretary  
2 of Defense William Perry in March 1993, releases

3 any individuals who participated in testing, production,  
4 transportation or storage associated with any chemical  
5 weapons research conducted prior to 1968 from any non-  
6 disclosure restrictions or written or oral prohibitions  
(e.g., oaths of secrecy) that may have been placed on  
them concerning their possible exposure to any chemical  
weapons agents.

7 Herb Decl. Ex. 44 (the Perry memorandum). The second, issued by  
8 the Office of the Deputy Secretary of Defense on January 11, 2011,  
9 after the instant litigation began, does not have a date  
10 restriction and states,

11 In the 1990s, several reviews of military human subject  
12 research programs from the World War II and Cold War  
13 eras noted the common practice of research volunteers  
14 signing "secrecy oaths" to preclude disclosure of  
15 research information. Such oaths or other non-  
disclosure requirements have reportedly inhibited  
veterans from discussing health concerns with their  
doctors or seeking compensation from the Department of  
Veterans Affairs for potential service-related  
disabilities.

16 . . .

17 To assist veterans seeking care for health concerns  
18 related to their military service, chemical or  
19 biological agent research volunteers are hereby released  
20 from non-disclosure restrictions, including secrecy  
21 oaths, which may have been placed on them. This release  
22 pertains to addressing health concerns and to seeking  
23 benefits from the Department of Veterans Affairs.  
Veterans may discuss their involvement in chemical and  
biological agent research programs for these purposes.  
This release does not affect the sharing of any  
technical reports or operational information concerning  
research results, which should appropriately remain  
classified.

24 . . .

25 This memorandum, which is effective immediately, does  
26 not affect classification or control of information,  
consistent with applicable authority, relating to other  
requirements pertaining to chemical or biological  
weapons.

27 Herb Decl. Ex. 46 (the 2011 memorandum).  
28

1           The DVA, which Plaintiffs contend participated in some  
2 capacity in some of the other Defendants' testing programs,  
3 processes service-connected death or disability compensation  
4 (SCDDC) claims of class members. See Sprenkel Decl., Ex. 44 at  
5 MKULTRA0000190090\_0325; Sprenkel Decl., Ex. 45 VET001\_009241.  
6 Plaintiffs also contend that the DVA engaged in human testing of  
7 similar substances, including LSD and Thorazine. Sprenkel Decl.,  
8 Ex. 46. To establish that a death or disability is connected to a  
9 veteran's participation in the testing programs for the purposes  
10 of SCDDC claims, individuals seeking survivor or disability  
11 benefits must establish that "it is at least as likely as not that  
12 such a relationship exists." Sprenkel Decl., Ex. 47,  
13 VET001\_015127-28; see also Sprenkel Decl., Ex. 23, 41:2-6.

14           Defendants have undertaken some efforts to provide notice to  
15 participants in the testing program. In recent years, the DVA,  
16 with the assistance of the DOD, sent notice letters to certain  
17 individuals who participated in some WWII and Cold War era testing  
18 programs. For the first round of letters related to WWII era  
19 testing sent in 2005, DOD compiled a database of approximately  
20 4,495 individuals who had been exposed to mustard gas or Lewisite  
21 and sent letters to approximately 321 individuals or their  
22 survivors for whom Defendants could locate contact information.  
23 Sprenkel Decl., Ex. 56.<sup>4</sup> These letters stated in part,

24 \_\_\_\_\_  
25  
26 <sup>4</sup> In 1990, DVA contacted 128 veterans who participated in mustard  
27 gas testing. Herb Decl., Ex. 27, DVA014 001257. Defendants have  
28 offered no evidence about what information was provided to these  
veterans at that time or whether these 128 veterans were among the  
321 veterans contacted more recently.

1 You may be concerned about discussing your participation  
2 in mustard agent or Lewisite tests with VA or your  
health care provider.

3 On March 9, 1993 the Deputy Secretary of Defense  
4 released veterans who participated in the testing,  
5 production, transportation or storage of chemical  
6 weapons prior to 1968 from any non-disclosure  
restriction. Servicemembers who participated in such  
tests after 1968 are permitted to discuss the chemical  
agents, locations, and circumstances of exposure only,  
because this limited information has been declassified.

7 Herb Decl., Ex. 30.

8 For the second round of letters, the DOD compiled a database  
9 of approximately 10,000 individuals who participated in Cold War  
10 era testing, sent letters to fewer than 4,000 people for whom they  
11 located contact information, and provided the database to the DVA.  
12 Sprenkel Decl., Exs. 38-40. The DOD excluded from this database  
13 individuals who fell into a number of categories, such as those  
14 who participated in particular types of chemical and biological  
15 tests. See, e.g., Sprenkel Decl., Ex. 36. Defendants did not  
16 include in the letters the names of the chemical or biological  
17 agents to which the participants were exposed. Sprenkel Decl.,  
18 Ex. 34. The letters sent by the DVA stated,

19 You may be concerned about releasing classified test  
20 information to your health care provider when discussing  
21 your health concerns. To former service members who  
22 have participated in these tests, DoD has stated:

23 "You may provide details that affect your health to your  
24 health care provider. For example, you may discuss what  
25 you believe your exposure was at the time, reactions,  
26 treatment you sought or received, and the general  
27 location and time of the tests. On the other hand, you  
28 should not discuss anything that relates to operational  
information that might reveal chemical or biological  
warfare vulnerabilities or capabilities."

. . .

If you have questions about chemical or biological agent  
tests, or concerns about releasing classified  
information, contact DoD at (800) 497-6261, Monday  
through Friday, 7:30 a.m. to 4:00 p.m. Eastern Standard  
time.

1 Sprenkel Decl., Ex. 77. The letter also provided information about  
2 obtaining a clinical examination from the DVA and contacting the  
3 DVA to file a disability claim. Id. The DVA also included a fact  
4 sheet from the DOD. The DVA's own expert in chemical agent  
5 exposures recognized that this fact sheet "has some significant  
6 inaccuracies." Sprenkel Decl., Ex. 52, DVA052 000113. The DOD  
7 also placed some information on its public website, including the  
8 contents of the Perry memorandum.

9 In the instant motion, Plaintiffs seek certification of a  
10 class consisting of

11 All current or former members of the armed forces, or in  
12 the case of deceased members, the personal  
13 representatives of their estates, who, while serving in  
14 the armed forces, were test subjects in any human  
15 Testing Program that was sponsored, overseen, directed,  
16 funded, and/or conducted by the Department of Defense or  
17 any branch thereof, including but not limited to the  
18 Department of the Army and the Department of the Navy,  
19 and/or the Central Intelligence Agency, between the  
20 inception of the Testing Programs in approximately 1922  
21 and the present. For the purposes of this definition,  
22 "Testing Program" refers to a program in which any  
23 person was exposed to a chemical or biological substance  
24 for the purpose of studying or observing the effects of  
25 such exposure.

19 Reply, at 17. Plaintiffs exclude "persons who were exclusively  
20 test participants in Project 112/SHAD (Shipboard Hazard and  
21 Defense)." Id. at 17 n.15.

22 As stated in their motion for class certification and  
23 clarified at the hearing, Plaintiffs seek to prosecute various  
24 claims arising under the United States Constitution and the  
25 Administrative Procedures Act (APA), 5 U.S.C. §§ 701, et seq., on  
26 behalf of the class against the DOD, the Army, the CIA and the  
27 DVA. Against the DOD, the Army and the CIA, Plaintiffs seek on  
28 behalf of the class a declaration that the secrecy oaths are

1 invalid and an injunction requiring Defendants to notify class  
2 members that they have been released from such oaths. Against the  
3 DOD and the Army, Plaintiffs seek to prosecute claims on behalf of  
4 the class asserting (1) under the APA, that these Defendants are  
5 required to provide class members with notice<sup>5</sup> of their exposures  
6 and known health effects, and medical care as set forth in the  
7 agencies' own policies; (2) under the Fifth Amendment, that these  
8 Defendants' failure to provide class members with notice, medical  
9 care and a release from secrecy oaths violated their substantive  
10 due process liberty rights, including their right to bodily  
11 integrity; (3) under the Fifth Amendment, that these Defendants'  
12 failure to provide class members with any procedures whatsoever to  
13 challenge this deprivation violated their procedural due process  
14 rights; (4) under the Fifth Amendment, that these Defendants'  
15 failure to comply with their own regulations and procedures  
16 regarding notice and medical care deprived class members of their  
17 due process rights; and (5) under the First and Fifth Amendment,  
18 that the failure to provide a release from secrecy oaths prevented  
19 class members from filing claims for benefits with the DVA and  
20 thereby violated their right of access to the courts. Against the  
21 DVA, Plaintiffs seek to prosecute a claim on behalf of the class  
22 under the Fifth Amendment's due process clause asserting the  
23 agency is an inherently biased adjudicator of class members'

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24  
25  
26 <sup>5</sup> Plaintiffs define "notice" as "notice to each test participant  
27 regarding the substances to which he or she was exposed, the doses  
28 to which he or she was exposed, the route of exposure (e.g.,  
inhalation, injection, dermal, etc.) and the potential health  
effects associated with those exposures or with participation in  
the tests." Mot. at 2.

1 claims for benefits. They seek appointment of named Plaintiffs  
2 Tim Josephs, William Blazinski and Vietnam Veterans of America  
3 (VVA) as class representatives.

4 Although Plaintiffs seek to substitute Kathryn McMillan-  
5 Forrest as a named Plaintiff in this action in place of her late  
6 husband, former Plaintiff Wray Forrest, they do not seek  
7 appointment of Ms. McMillan-Forrest as a representative for the  
8 class.

9 DISCUSSION

10 I. Motion for Class Certification

11 A. Legal Standard

12 Plaintiffs seeking to represent a class must satisfy the  
13 threshold requirements of Rule 23(a) as well as the requirements  
14 for certification under one of the subsections of Rule 23(b).  
15 Rule 23(a) provides that a case is appropriate for certification  
16 as a class action if: "(1) the class is so numerous that joinder  
17 of all members is impracticable; (2) there are questions of law or  
18 fact common to the class; (3) the claims or defenses of the  
19 representative parties are typical of the claims or defenses of  
20 the class; and (4) the representative parties will fairly and  
21 adequately protect the interests of the class." Fed. R. Civ. P.  
22 23(a).

23 Plaintiffs must also establish that one of the subsections of  
24 Rule 23(b) is met. In the instant case, Plaintiffs seek  
25 certification under subsections (1)(A) and (2). A court may  
26 certify a class pursuant to Rule 23(b)(1)(A) if the plaintiffs  
27 establish that "prosecuting separate actions by or against  
28 individual class members would create a risk of . . . inconsistent

1 or varying adjudications with respect to individual class members  
2 that would establish incompatible standards of conduct for the  
3 party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Rule  
4 23(b)(2) permits certification where "the party opposing the class  
5 has acted or refused to act on grounds that apply generally to the  
6 class, so that final injunctive relief or corresponding  
7 declaratory relief is appropriate respecting the class as a  
8 whole." Fed. R. Civ. P. 23(b)(2).

9 Plaintiffs bear the burden of demonstrating that each element  
10 of Rule 23 is satisfied, and a district court may certify a class  
11 only if it determines that the plaintiffs have borne their burden.  
12 Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982);  
13 Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir.  
14 1977). The court must conduct a "'rigorous analysis,'" which may  
15 require it "'to probe behind the pleadings before coming to rest  
16 on the certification question.'" Wal-Mart Stores, Inc. v. Dukes,  
17 131 S. Ct. 2541, 2551 (2011) (quoting Falcon, 457 U.S. at 160-61).  
18 "Frequently that 'rigorous analysis' will entail some overlap with  
19 the merits of the plaintiff's underlying claim. That cannot be  
20 helped." Dukes, 131 S. Ct. at 2551. To satisfy itself that class  
21 certification is proper, the court may consider material beyond  
22 the pleadings and require supplemental evidentiary submissions by  
23 the parties. Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir.  
24 1975).

25 B. Claims at Issue

26 Defendants contend that Plaintiffs improperly seek  
27 certification to prosecute claims that are not asserted in their  
28

1 third amended complaint (3AC) or that have been abandoned or  
2 dismissed, and to pursue relief not requested in the 3AC.

3 Defendants argue that, because in the 3AC Plaintiffs  
4 requested only declaratory relief regarding the validity of the  
5 secrecy oaths and did not demand injunctive relief requiring  
6 Defendants to notify test participants that they are released from  
7 the oaths, Plaintiffs cannot now properly seek certification of a  
8 class to pursue such a remedy. Opp. at 9. Defendants cite no  
9 authority in support of this contention. Although Federal Rule of  
10 Civil Procedure 8(a) requires that a "pleading that states a claim  
11 for relief must contain . . . a demand for the relief sought,  
12 which may include relief in the alternative or different types of  
13 relief," a court is not limited to the relief sought in this  
14 demand when entering a final judgment. See Fed. R. Civ. P. 54(c)  
15 (final judgments other than default judgments "should grant the  
16 relief to which each party is entitled, even if the party has not  
17 demanded that relief in its pleadings"). The Ninth Circuit has  
18 applied this rule to uphold a court's power to award declaratory  
19 relief when that relief was not requested in the complaint. See  
20 Arley v. United Pacific Ins. Co., 379 F.2d 183, 186-187 (9th Cir.  
21 1967). Defendants make no showing that they would be prejudiced  
22 by a request for injunctive relief. Accordingly, the Court  
23 rejects their argument that a class, if certified, may not pursue  
24 injunctive relief on this claim.

25 Defendants also contend that Plaintiffs seek certification of  
26 a class to pursue claims that were previously dismissed.  
27 Specifically, Defendants point to Plaintiffs' request in their  
28 proposed order that the class be certified to pursue declarations

1 that, by "subjecting members of the Proposed Class to  
2 participation in the human testing programs, DOD put members of  
3 the Proposed Class at risk of adverse health effects," and that  
4 "DOD violated the Official Directives by failing to implement  
5 procedures to determine whether members of the Proposed Class have  
6 particular diseases--mental or physical--as a result of the  
7 testing programs." Opp. at 10 (citing Proposed Order ¶¶ 1.e,  
8 1.f). Defendants argue that these requests challenge the  
9 lawfulness of the testing program itself, claims which the Court  
10 has already dismissed with prejudice. These requests, however,  
11 can more properly be viewed as part of Plaintiffs' claims for  
12 notice and health care. A declaration that the DOD has not  
13 implemented procedures that would allow it to recognize and  
14 diagnose whether members have illnesses related to their  
15 participation in the testing programs, for example, is part of a  
16 claim that the DOD and the Army have systematically failed to  
17 provide proper medical care to remedy such diseases. Similarly,  
18 the request for a declaration that the DOD put Plaintiffs at risk  
19 of adverse health effects is part of Plaintiffs' claim that the  
20 DOD and the Army failed to notify class members of such risks.  
21 These requests for relief have not been dismissed.

22 Defendants also contend that Plaintiffs' statement that  
23 "factual issues underpinning" the due process claims include  
24 whether Defendants "obtained the informed consent of test  
25 participants, adopted reasonable testing protocols and procedures,  
26 and complied with their obligations to adopt procedures for  
27 continued medical care and treatment of casualties" improperly  
28 re-asserts claims about the lawfulness of the testing program that

1 were already dismissed with prejudice. Opp. at 11. If Plaintiffs  
2 seek to litigate whether Defendants had “adopted reasonable  
3 testing protocols and procedures” to challenge the lawfulness of  
4 the testing itself, such a claim was previously dismissed and a  
5 class will not be certified to pursue it. However, Plaintiffs’  
6 argument that Defendants lacked reasonable testing protocols to  
7 obtain informed consent, so that the secrecy oaths given by class  
8 members were void from the beginning, relates to a claim that the  
9 Court has not dismissed.

10 Finally, Defendants argue that Plaintiffs are trying now to  
11 pursue constitutional claims for notice and health care that they  
12 previously abandoned or did not include in the 3AC and that they  
13 should be limited to prosecuting claims under the APA. Defendants  
14 contend that they previously moved to dismiss Plaintiffs’ claims  
15 in their entirety and suggest that, in response, Plaintiffs  
16 disavowed any constitutional basis for their notice and health  
17 care claims. However, in their opposition to that motion,  
18 Plaintiffs clearly asserted the constitutional basis for these  
19 claims. See, e.g., Docket No. 43, at 22-23 (“Defendants violated  
20 due process and fundamental constitutional rights (and binding  
21 regulations) by subjecting Plaintiffs to testing without informed  
22 consent and by failing to provide follow-up information and health  
23 care.”). Further, the 3AC does allege constitutional claims  
24 related to notice and health care against the DOD and the Army,  
25 see, e.g., 3AC ¶¶ 184-86, which this Court has not previously  
26 dismissed, unlike the corresponding claims previously asserted  
27 against the CIA. The constitutional claims contained in these  
28 paragraphs of the 3AC were not limited to substantive due process

1 challenges and can be fairly read to encompass procedural due  
2 process claims, particularly in conjunction with the extensive  
3 allegations of procedural deficiencies alleged elsewhere in the  
4 3AC.

5 C. Standing and Identification of Representatives

6 Defendants argue that Plaintiffs have not identified a proper  
7 representative. They state that, because in the 3AC Plaintiffs  
8 stated, "The proposed class representatives are Plaintiffs VVA and  
9 Swords to Plowshares," 3AC ¶ 175, they cannot now seek to have  
10 Josephs and Blazinski appointed as class representatives, in that  
11 this would be a "functional" amendment of their complaint. Opp.  
12 at 12. However, in a separate paragraph of the 3AC, Plaintiffs  
13 did identify Blazinski and Josephs as proposed class  
14 representatives. In that pleading, Plaintiffs added Blazinski and  
15 Josephs for the first time, referring to them as the Additional  
16 Plaintiffs, see 3AC at 62, and stated, "Together with one or more  
17 of the original Plaintiffs, Plaintiffs may seek approval for the  
18 Additional Plaintiffs to serve as class representatives," 3AC  
19 ¶ 222.

20 Defendants also argue that VVA does not have standing and  
21 cannot serve as a class representative, because it itself is not a  
22 class member and did not suffer the same injuries as class  
23 members. Plaintiffs respond that VVA has associational standing.  
24 Although Defendants admit that the Ninth Circuit has recognized  
25 associational standing in such situations, they argue that the  
26 Supreme Court has recently made a "pronouncement" that "a class  
27 representative must be part of the class and possess the same  
28 interest and suffer the same injury as the class members." Opp.

1 at 12-13 (quoting Dukes, 131 S. Ct. at 2550). As Plaintiffs point  
2 out, this was not a new requirement set forth by the Supreme Court  
3 in Dukes, which did not deal with associational standing; instead,  
4 this was a quote from several earlier cases. See Dukes, 131 S.  
5 Ct. at 2550 (quoting East Tex. Motor Freight System, Inc. v.  
6 Rodriguez, 431 U.S. 395, 403 (1977); Schlesinger v. Reservists  
7 Comm. to Stop the War, 418 U.S. 208, 216 (1974)). Although it is  
8 true that a class representative must fulfill this requirement,  
9 "many courts have held that organizations with associational  
10 standing may serve as class representatives, at least where the  
11 underlying purpose of the organization is to represent the  
12 interests of the class." Monaco v. Stone, 2002 U.S. Dist. LEXIS  
13 28646, at \*127 (E.D.N.Y.) (collecting cases); see also  
14 International Union, United Auto., etc. v. LTV Aerospace & Defense  
15 Co., 136 F.R.D. 113, 123-124 (N.D. Tex. 1991) (collecting cases).  
16 Thus, the Ninth Circuit has rejected the argument that the unions  
17 cannot serve as class representatives because they "are not  
18 members of the class they seek to represent" as "without merit,  
19 since, in their associational capacity, the unions are acting on  
20 behalf of" the class members. California Rural Legal Assistance,  
21 Inc. v. Legal Services Corp., 917 F.2d 1171, 1175 (9th Cir. 1990).  
22 See also Prado-Steiman v. Bush, 221 F.3d 1266, 1267 (11th Cir.  
23 2000) (remanding to district court to ensure that "at least one of  
24 the named class representatives possesses the requisite individual  
25 or associational standing to bring each of the class's legal  
26 claims"); In re Pharm. Indus. Average Wholesale Price Litig., 277  
27 F.R.D. 52, 61-62 (D. Mass. 2011) (finding that organizations with  
28 associational standing may serve as class representatives).

1           The Supreme Court has held that “an association has standing  
2 to bring suit on behalf of its members when: (a) its members would  
3 otherwise have standing to sue in their own right; (b) the  
4 interests it seeks to protect are germane to the organization’s  
5 purpose; and (c) neither the claim asserted nor the relief  
6 requested requires the participation of individual members in the  
7 lawsuit.” Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333,  
8 343 (1977). See also Oklevueha Native Am. Church of Haw., Inc. v.  
9 Holder, 676 F.3d 829, 839 (9th Cir. 2012) (applying the standard  
10 for associational standing set forth in Hunt).

11           Defendants do not dispute that the VVA has met the last two  
12 requirements; instead, they argue that the VVA cannot meet a  
13 purported additional requirement for associational standing, that  
14 there must be a “compelling need” for VVA to serve as a class  
15 representative to vindicate the rights of class members not  
16 currently before the Court. Opp. at 13. In support of such an  
17 additional requirement, Defendants cite Black Coalition v.  
18 Portland School Dist., 484 F.2d 1040 (9th Cir. 1973), in which the  
19 Ninth Circuit stated that “an association has standing to  
20 represent its members in a class suit only if ‘there is a  
21 compelling need to grant [it] standing in order that the  
22 constitutional rights of persons not immediately before the court  
23 might be vindicated.’” Id. at 1043 (quoting Norwalk CORE v.  
24 Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968)).  
25 However, Black Coalition was decided before the Supreme Court  
26 enunciated the three part test for associational standing in Hunt  
27 and has not been cited for this proposition thereafter. In later  
28 cases, the Ninth Circuit has relied on the Hunt test alone when

1 assessing associational standing. See, e.g., Oklevueha Native Am.  
2 Church, 676 F.3d at 839; Or. Advocacy Ctr. v. Mink, 322 F.3d 1101,  
3 1109-1113 (9th Cir. 2003). Further, at least one other Court of  
4 Appeals has since rejected the contention "that associations never  
5 have representational standing without a showing of compelling  
6 need" because any such requirement "was substantially undercut by  
7 later associational standing cases," including Hunt. See  
8 Associated General Contractors v. Otter Tail Power Co., 611 F.2d  
9 684, 688-689 (8th Cir. 1979). Indeed, after Hunt, the Ninth  
10 Circuit has allowed associations to represent classes along with  
11 individual plaintiffs. California Rural Legal Assistance, 917  
12 F.2d at 1175. Accordingly, the Court finds that the VVA has  
13 associational standing to represent the class, as long as some of  
14 its members would otherwise have standing to sue in their own  
15 right.<sup>6</sup>

16 Defendants argue that Plaintiffs have not met their burden to  
17 show, on a claim-by-claim basis, that at least one of the proposed  
18 class representatives has standing to pursue each claim. "In a  
19 class action, standing is satisfied if at least one named  
20 plaintiff meets the requirements." Bates v. UPS, 511 F.3d 974,  
21 \_\_\_\_\_

22 <sup>6</sup> To meet this requirement, VVA relies on two of the named  
23 Plaintiffs in this action, Josephs and David Dufrane, as well as  
24 four individuals who are not named Plaintiffs, but are members of  
25 the VVA. Defendants argue that three of the VVA members do not  
26 have standing because they did not participate in chemical or  
27 biological testing and participated as test subjects instead in  
28 equipment testing or "blood work." Opp. at 15 n.25. Plaintiffs  
reply that servicemen who were "exposed to nerve agents or other  
chemical substances during 'equipment tests' are part of the  
proposed class." Reply, at 7. The Court need not reach this  
contention because Defendants and Plaintiffs agree that at least  
VVA members Josephs, Dufrane and Doe were exposed to biological or  
chemical testing.

1 985 (9th Cir. 2007) (citing Armstrong v. Davis, 275 F.3d 849, 860  
2 (9th Cir. 2001)).

3 "[T]o satisfy Article III's standing requirements, a  
4 plaintiff must show (1) it has suffered an 'injury in fact' that  
5 is (a) concrete and particularized and (b) actual or imminent, not  
6 conjectural or hypothetical; (2) the injury is fairly traceable to  
7 the challenged action of the defendant; and (3) it is likely, as  
8 opposed to merely speculative, that the injury will be redressed  
9 by a favorable decision." Maya v. Centex Corp., 658 F.3d 1060,  
10 1067 (9th Cir. 2011) (quoting Friends of the Earth, Inc., v.  
11 Laidlaw Ent'l Serv., Inc., 528 U.S. 167, 180-81 (2000)). This  
12 Court has previously recognized, "In the context of declaratory  
13 relief, a plaintiff demonstrates redressability if the court's  
14 statement would require the defendant to 'act in any way' that  
15 would redress past injuries or prevent future harm." Vietnam  
16 Veterans of Am. v. CIA, 2010 U.S. Dist. LEXIS 3787, at \*15 (N.D.  
17 Cal.) (quoting Mayfield v. United States, 588 F.3d 1252, 2009 WL  
18 4674172, at \*6 (9th Cir. 2009), replaced by 599 F.3d 964 (2010)).  
19 Where a "plaintiff seeks prospective injunctive relief, he must  
20 demonstrate 'that he is realistically threatened by a repetition  
21 of [the violation],'" which may be shown by demonstrating "that  
22 the harm is part of a 'pattern of officially sanctioned . . .  
23 behavior, violative of the plaintiffs' [federal] rights.'" Armstrong,  
24 275 F.3d at 860-61 (internal citations omitted).

25 Defendants contend primarily that Plaintiffs cannot establish  
26 injury-in-fact or redressability for each claim.

1                    1. Notice

2                    Plaintiffs seek an order requiring that Defendants provide  
3 notice to class members regarding the substances to which they  
4 were exposed, the dosage of the substances, the route of exposure  
5 and potential health effects of exposure or participation in the  
6 experiments, and a declaration that Defendants have a continuing  
7 duty to provide updated notice to all class members as more  
8 information about exposures and medical effects is learned or  
9 acquired.

10                   Defendants argue that the proposed representatives cannot  
11 demonstrate that they have a redressable injury regarding notice,  
12 because "they have already received all the information that they  
13 could receive through this suit." Opp. at 15. Defendants rely on  
14 the fact that Blazinski, Josephs, Dufrane and Doe requested and  
15 received what Defendants refer to as their "service member test  
16 files" from the DOD, which Defendants contend included information  
17 regarding the substances to which they were exposed, dosage and  
18 routes of exposure. Defendants further contend that Blazinski and  
19 Josephs received a notice letter from the DVA with similar  
20 information.

21                   Defendants conflate standing with the ultimate merits of  
22 Plaintiffs' claims. See, e.g., Equity Lifestyle Props., Inc. v.  
23 Cnty. of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008)  
24 ("The jurisdictional question of standing precedes, and does not  
25 require, analysis of the merits."). Further, the documents to  
26 which Defendants point are not so clear as to establish as a  
27 matter of law that these individuals received the notice that  
28

1 Plaintiffs demand in this case.<sup>7</sup> Many of the test files are  
2 partially illegible and list substances by internally-used codes  
3 or agent numbers, which were indecipherable to the recipients.  
4 See, e.g., Dufrane Depo. 81:15-82:10. Defendants argued at the  
5 hearing that the test files also "oftentimes"--but not  
6 always--contained information about the chemical compounds to  
7 which service members were exposed; however, the documents  
8 themselves do not make clear which codes corresponded with  
9 compounds listed elsewhere in the test files, and which were  
10 undefined. Further, Defendants' contention at the hearing that  
11 the proposed representatives could have called the DOD to ask what  
12 the codes meant does not establish that the DOD and the Army  
13 affirmatively provided notice of this information to Blazinski,  
14 Josephs, Dufrane and Doe. Plaintiffs also contend that the test  
15 files were largely unintelligible to the class members who did  
16 receive them and that this has interfered with their ability to  
17 access medical care. See, e.g., Dufrane Depo. Tr. 141:1-142:13.  
18 Defendants have not challenged this contention. The test files  
19 also contain little or no information about potential health  
20 effects.

21 Defendants rely on the letters from the DVA to assert that  
22 each of the proposed representatives has received notice of the  
23 \_\_\_\_\_

24 <sup>7</sup> Defendants cite "Ex. 525" apparently as the service member test  
25 file for Doe, see Opp. at 16 (citing Ex. 525); see also Herb  
26 Decl., Ex. 52 (Doe Depo.), 42:4-22 (Doe identifying an exhibit  
27 "marked as Exhibit 525" as the volunteer test file that the Army  
28 mailed him in 2011 at this request). However, Defendants did not  
provide this exhibit to the Court. Accordingly, Defendants have  
not established that Doe's test file contained sufficient  
information to provide the notice demanded by Plaintiffs in the  
instant case.

1 known potential health effects associated with substances to which  
2 he was exposed or with participation in studies. Defendants  
3 contend that the DOD "is unaware of any general long-term health  
4 effects associated with the chemical and biological testing  
5 programs," and that the DVA notices were accompanied by a fact  
6 sheet from the DOD which stated that a study "did not detect any  
7 significant long-term health effects in Edgewood Arsenal  
8 volunteers" from "exposure to the chemicals tested." Opp. at 17;  
9 Herb Decl. Ex. 53. Defendants argue that the DOD has thus  
10 fulfilled any obligation to provide notice of known potential  
11 health effects. These letters do not establish that, as a matter  
12 of law, the proposed representatives lack standing. First, the  
13 letters from the DVA were not sent by the DOD and the Army, which  
14 Plaintiffs claim have a duty to provide such notice.<sup>8</sup> Further,  
15 the letters only provided general information regarding the  
16 testing programs, without any individualized information about  
17 substances to which the particular recipient was exposed, doses or  
18 possible health effects. See Herb Decl., Exs. 33, 34.<sup>9</sup> Finally,  
19 the conclusion expressed in the letters, that there are no long  
20

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21  
22 <sup>8</sup> The DOD testified that this form letter was "a VA document," and  
23 that the DOD could only give "advisory" recommendations of changes  
24 to the letter, but that the DVA ultimately decided whether to  
accept or reject those suggestions and was responsible for the  
content. Sprenkel Reply Decl., Ex. 88 (Kilpatrick Depo.),  
518:8-519:16).

25 <sup>9</sup> The Court also notes that the DVA sent Blazinski this letter  
26 after Defendants took his deposition in this case, at which he  
27 testified that he did not recall receiving any such letter. See  
Blazinski Decl. ¶¶ 2-3; Blazinski Depo. 112:112:4-113:10; Sprenkel  
28 Reply Decl. ¶ 4, Ex. 77. Defendants may not attempt to moot  
Plaintiffs' claims on behalf of the class by picking off the named  
representatives in such a way.

1 term health effects from the testing, is contradicted by  
2 Defendants' own documents. Specifically, an internal DVA  
3 memorandum to its clinicians stated that "long-term psychological  
4 consequences . . . are possible from the trauma associated with  
5 being a human test subject," Sprenkel Decl., Ex. 49, 3, and long-  
6 term psychological health effects were not included in the DVA  
7 notice letter. Further, Mark Brown, the DVA's own expert in  
8 chemical agent exposures, stated that the representations about  
9 health effects in the letter were "clearly incorrect." Sprenkel  
10 Decl., Ex. 52, DVA052 000113. Specifically, he rejected the  
11 letter's statement that a particular study "did not detect any  
12 significant long-term health effects in Edgewood Arsenal  
13 volunteers" because the study did find some such effects, and he  
14 suggested that the letter be rephrased to state that the study  
15 found "few significant long-term health effects." Id. This  
16 change was not made in the fact sheet sent to the proposed  
17 representatives. See Herb Decl., Exs. 33, 34. Accordingly, these  
18 letters do not establish that the proposed class representatives  
19 have received notice of the potential health effects associated  
20 with participating in the testing. Thus, they could benefit  
21 individually from receiving the notice that they seek on behalf of  
22 the class. Accordingly, the Court concludes that Blazinski,  
23 Josephs, and the VVA, through Josephs, Dufrane and Doe, have  
24 standing to prosecute the claims for notice.

25 2. Health care

26 Plaintiffs seek declaratory and injunctive relief requiring  
27 the DOD and the Army to provide medical care to all participants  
28 for conditions arising from the testing program.

1 Defendants challenge on several grounds the standing of the  
2 proposed representatives to assert this claim. First, Defendants  
3 argue that Josephs, Blazinski and Doe have not sought medical care  
4 from the DOD and the Army since they left the service. Rather,  
5 they have only sought such care from the DVA and therefore cannot  
6 establish that they were injured by the failure of the DOD and the  
7 Army to provide health care. Defendants do not dispute that  
8 Dufrane did attempt to seek medical care from the DOD and the  
9 Army, by sending them a letter about his health issues, and that  
10 “[n]othing ever happened” as a result. See Sprengel Decl., Ex. 79  
11 at 77:2-12, 77:25-79:9. Further, as Defendants acknowledge, the  
12 DOD and the Army did not have any mechanism for individuals to  
13 make a claim for medical treatment. See Opp. at 18. The fact  
14 that the proposed representatives had no way to make such a  
15 request is itself an injury that could be remedied by their claim.

16 Second, Defendants contend that the proposed class  
17 representatives were able to seek care from the DVA and thus  
18 cannot establish that they suffered any injury from their  
19 inability to seek medical care from the DOD and the Army.  
20 However, this does not necessarily relieve the DOD and the Army  
21 from being required independently to provide medical care,  
22 particularly because Plaintiffs may be able to establish that the  
23 scope of their duty may be different than that of the DVA.

24 Finally, Defendants argue that Plaintiffs’ claim for medical  
25 care is in fact for money damages, not for equitable relief, and  
26 thus that the APA’s waiver of sovereign immunity does not apply to  
27 this claim. Defendants claim that, because the Court would thus  
28 not have jurisdiction to afford relief, Plaintiffs’ injuries

1 cannot be redressed. Defendants raised the same argument in their  
2 second motion to dismiss the health care claims, see Docket No.  
3 218, 12-13, which the Court denied, see Docket No. 233, 8-10.

4 Further, the cases upon which Defendants rely do not counsel  
5 the result that they urge. In Schism v. United States, 316 F.3d  
6 1259 (Fed. Cir. 2002), the Federal Circuit held that compensation  
7 of members of the military, including claims for benefits that are  
8 compensation for services rendered, is governed by statute and not  
9 contract. 316 F.3d at 1273. There, the plaintiffs were seeking  
10 full, free lifetime health care coverage as a form of deferred  
11 compensation for military service, premised on an implied-in-fact  
12 contract for such coverage. Here, Plaintiffs are not seeking  
13 medical care as a form of deferred compensation for their military  
14 service.

15 In Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), the  
16 plaintiff sought "either the provision of medical services by the  
17 Government or payment for the medical services," which the Third  
18 Circuit characterized as "a traditional form of damages in tort  
19 compensation for medical expenses to be incurred in the future."  
20 Id. at 715. Because the "payment of money would fully satisfy"  
21 the plaintiff's claim, the court concluded that it was actually a  
22 claim for money damages. Id. The Third Circuit subsequently  
23 explained that the principle derived from Jaffee is "that an  
24 important factor in identifying a proceeding as one to enforce a  
25 money judgment is whether the remedy would compensate for past  
26 wrongful acts resulting in injuries already suffered, or protect  
27 against potential future harm." Penn Terra, Ltd. v. Dept. of  
28 Envtl. Res., 733 F.2d 267, 276-277 (3d Cir. 1984). Here,

1 Plaintiffs' injury could not be fully remedied by money damages.  
2 Further, they seek to end purported ongoing rights violations, not  
3 compensation for harms that took place completely in the past.

4 Finally, in Zinser v. Accufix Research Inst., Inc., 253 F.3d  
5 1180 (9th Cir. 2001), the Ninth Circuit did not "rule[] that a  
6 claim seeking service connection for an ailment or entitlement to  
7 ongoing medical care is essentially one for damages," as  
8 Defendants represent. Opp. at 40. In that products liability  
9 case, which did not involve military service, the Ninth Circuit  
10 found, in determining whether the relevant claim was equitable or  
11 for money damages, the "salient facts" were that the operative  
12 complaint sought the creation of a "medical monitoring fund" and  
13 requested an award of compensatory and punitive damages. Zinser,  
14 253 F.3d at 1194 (emphasis in original). Such requests are not at  
15 issue here.

16 Accordingly, the Court concludes that Josephs, Blazinski, and  
17 the VVA, through Josephs, Dufrane and Doe, have standing to  
18 prosecute the claims for medical care.

### 19 3. Secrecy Oaths

20 Defendants argue that, because Blazinski, Josephs, Dufrane  
21 and Doe no longer feel constrained by any secrecy oath and  
22 Defendants have already released all putative class members from  
23 any secrecy oath through the 1993 and 2011 memoranda, Plaintiffs  
24 cannot establish any injury that could be redressed through the  
25 relief sought here.

26 Plaintiffs reply that Defendants' argument would mean that  
27 anyone who feels unconstrained enough by the secrecy oath to come  
28 forward to represent the class would thereby lose standing.

1 Plaintiffs also offer evidence that Dufrane testified that he  
2 continued to feel bound by the secrecy oath to some extent. See  
3 Dufrane Depo. 93:13-20. Further, as Plaintiffs point out, the  
4 fact that these individuals have made some disclosures about the  
5 testing, including to their spouses, counsel and other named  
6 Plaintiffs, does not mean that they do not suffer ongoing effects  
7 of the secrecy oaths, such as a continuing fear of prosecution.

8 Further, Defendants have not issued a complete release for  
9 the proposed representatives and VVA members who participated in  
10 testing after 1968, including Josephs, Blazinski and Doe. Herb  
11 Decl., Exs. 19, 49; Doe Depo. 47:5-18. The 2011 memorandum only  
12 allows test participants to speak about their involvement in  
13 chemical and biological agent testing for the limited purposes of  
14 addressing health concerns and seeking benefits from DVA. It is  
15 not clear, for example, whether they are allowed to obtain  
16 therapeutic counseling, participate in group therapy or discuss  
17 their experiences with their spouses or other family members,  
18 without fear of prosecution.

19 Further, Defendants have not established that they  
20 communicated the release provided in the Perry memorandum to  
21 Dufrane, who participated in testing prior to 1968. See Herb  
22 Decl., Ex. 80. Dufrane received the notice letter from the DVA  
23 quoted above, which allowed only disclosure of "details that  
24 affect your health to your health care provider." See Dufrane  
25 Depo. 92:17-23; Herb Decl., Ex. 82. Defendants cite no evidence  
26 that they communicated an unconditional release to him.

27 Accordingly, Josephs, Blazinski, Doe and Dufrane could  
28 benefit from equitable relief that would invalidate the secrecy

1 oaths altogether and that would require Defendants to communicate  
2 that release clearly to class members.

3 Defendants also assert that the proposed representatives lack  
4 standing to prosecute the secrecy oath claim against the CIA,  
5 because "Plaintiffs' 3AC contains not a single allegation that the  
6 CIA was involved in the administration of secrecy oaths or that  
7 any of the named Plaintiffs or VVA members believes he has a  
8 secrecy oath with the CIA," because none of the Plaintiffs and  
9 individual VVA members testified to personal knowledge of the  
10 CIA's involvement and because the CIA itself has determined that  
11 "no such agreements" with these individuals exist. Opp. at 21.  
12 In denying the CIA's motion for judgment on the pleadings, the  
13 Court has already held that

14 Plaintiffs plead facts about the CIA's pervasive  
15 involvement in planning, funding and executing the  
16 experimentation programs. Plaintiffs also plead that  
17 the CIA had an interest in concealing the programs from  
18 "enemy forces" and "the American public in general."  
19 3AC ¶ 145 (citation and internal quotation marks  
20 omitted). These allegations, construed in Plaintiffs'  
21 favor, suggest that the challenged secrecy oath could be  
22 traced fairly to the CIA and that a court order directed  
23 at the CIA could redress Plaintiffs' alleged injuries.

24 Based on their pleadings, Plaintiffs have standing to  
25 bring claims against the CIA regarding the secrecy oath.

26 Docket No. 281, 5-6. Thus, Defendants' argument has already been  
27 rejected. The CIA's self-serving statement that it cannot locate  
28 records of secrecy oaths that it directly administered, and thus  
does not believe that such oaths were made, does not establish  
this fact or that other secrecy oaths cannot be traced fairly to  
the CIA. Similarly, the fact that Plaintiffs stated in a response  
to an interrogatory prior to the completion of discovery that, at  
the time, they did not have "facts identifying specific

1 circumstances where the Central Intelligence Agency directly  
2 administered secrecy oaths to Plaintiffs” does not prove as a  
3 matter of law that the CIA was not involved in the secrecy oaths  
4 at all, especially because Plaintiffs also stated that they had  
5 evidence that the CIA financially supported testing by other  
6 entities with the knowledge that secrecy oaths were administered.  
7 Herb Decl., Ex. 43.

8 Accordingly, the proposed representatives have standing to  
9 bring claims against the CIA related to the secrecy oath.

10 4. Claims of a biased adjudication by the DVA

11 Defendants argue that the proposed representatives cannot  
12 establish that they suffered an actual injury from the DVA’s  
13 allegedly biased adjudications of their claims. Defendants direct  
14 their arguments to Blazinski and Josephs only, contending that  
15 these individuals cannot show how the outcomes of their disability  
16 claims was in error or would be altered if they win relief on this  
17 claim.<sup>10</sup> Defendants argue that Josephs was granted forty percent  
18 disability based on his exposure to Agent Orange while serving in  
19 Vietnam and would not be granted a higher rating if the DVA were  
20 to find that his illness was also connected to the testing to  
21 which he was exposed at Edgewood Arsenal, although they admit that  
22 the DVA never issued a decision regarding this issue. Defendants  
23 also contend that the denial of Blazinski’s claim for benefits  
24 would not have been different if DVA were unbiased, because he did  
25 not submit sufficient documentation of his illnesses to the DVA  
26

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27  
28 <sup>10</sup> Defendants do not contend that Dufrane or Doe do not have  
standing to assert this claim.

1 and did not appeal the denial of his claim to the Board of  
2 Veterans' Appeals.

3 Defendants misconstrue the nature of this claim. Plaintiffs  
4 need not establish that they were denied benefits; instead, the  
5 cause of action is based on the denial of a procedural due process  
6 right to a neutral, unbiased adjudicator. See Raetzel v.  
7 Parks/Bellefont Absentee Election Bd., 762 F. Supp. 1354, 1356 (D.  
8 Ariz. 1990) ("When a person is denied the procedural opportunity  
9 to influence an administrative decision, standing is based on the  
10 denial of that right, even if that decision would not have been  
11 affected."). The Supreme Court has held that the denial of  
12 procedural due process is an injury in its own right, "does not  
13 depend on the merits of the claimant's substantive assertions,"  
14 and is actionable even without proof of other injury. Carey v.  
15 Piphus, 435 U.S. 247, 266 (1978). See also Clements v. Airport  
16 Auth., 69 F.3d 321, 333 (9th Cir. 1995) ("the 'absolute' right to  
17 adequate procedures stands independent from the ultimate outcome  
18 of the hearing"); Kuck v. Danaher, 600 F.3d 159, 165 (2d Cir.  
19 2010) ("The viability of [the plaintiff's] due process claim does  
20 not turn on the merits of his initial challenge; rather, it  
21 concerns whether he received the process he was due."). Because  
22 both Blazinski and Josephs applied for benefits, they have  
23 standing to pursue this claim, regardless of whether or not they  
24 will ultimately receive more benefits as a result of this action.

25 Defendants also contend that, to assess whether Plaintiffs  
26 were injured, the Court would be required to review DVA's  
27 procedures, which it lacks jurisdiction to do under 38 U.S.C.  
28 § 511. The Court has already addressed, and rejected, this

1 contention. In granting Plaintiffs leave to assert this claim  
2 against the DVA, the Court acknowledged that § 511 "precludes  
3 federal district courts from reviewing challenges to individual  
4 benefits determinations, even if they are framed as constitutional  
5 challenges." Docket No. 177, 8. Nonetheless, the effect of § 511  
6 on claims that "purport not to challenge individual benefits  
7 decisions, but rather the manner in which such decisions are  
8 made," has not been addressed by the Ninth Circuit. Id. The  
9 Court then reviewed several decisions from other Circuit Courts of  
10 Appeals that did address this issue. Id. at 9-11 (discussing in  
11 detail Broudy v. Mather, 460 F.3d 106 (D.C. Cir. 2006); Beamon v.  
12 Brown, 125 F.3d 965, 972 (6th Cir. 1997)). Applying the standards  
13 set forth in Broudy and Beamon, the Court held,

14 Section 511 does not bar Plaintiffs' claim under the  
15 Fifth Amendment. Under this theory, they mount a facial  
16 attack on the DVA as the decision-maker. They do not  
17 challenge the DVA's procedures or seek review of an  
18 individual benefits determination. Nor do they attack  
19 any particular decision made by the Secretary. The crux  
20 of their claim is that, because the DVA allegedly was  
21 involved in the testing programs at issue, the agency is  
22 incapable of making neutral, unbiased benefits  
23 determinations for veterans who were test participants.  
24 This bias, according to Plaintiffs, renders the benefits  
25 determination process constitutionally defective as to  
26 them and other class members. Whether the DVA is an  
27 inherently biased adjudicator does not implicate a  
28 question of law or fact "necessary to a decision by the  
Secretary" related to the provision of veterans'  
benefits. See Thomas v. Principi, 394 F.3d 970, 975  
(D.C. Cir. 2005).

Docket No. 177, 11. Defendants have moved for leave to file a  
motion for reconsideration of the Court's conclusion, asserting  
that the Ninth Circuit's recent decision in Veterans for Common  
Sense v. Shinseki, 678 F.3d 1013 (2012), compels a different  
result. Docket No. 431. Arguing that such reconsideration would

1 preclude the sole claim against the DVA, Defendants also have  
2 moved for relief from a nondispositive order of the magistrate  
3 judge granting discovery from DVA that was related to this claim.  
4 Docket No. 471.

5 Veterans for Common Sense does not require reconsideration of  
6 the Court's prior conclusion. In that case, two nonprofit  
7 organizations challenged delays in the provision of care and  
8 adjudication of claims by the DVA and the lack of adequate  
9 procedures during the claims process. The court found that the  
10 challenges to delays were barred by § 511, because to adjudicate  
11 those claims, the district court would have to examine the  
12 circumstances surrounding the DVA's provisions of benefits to  
13 individual veterans and adjudication of individual claims. Id. at  
14 1027-30. However, after discussing the decisions reached by other  
15 circuits in Broudy, Beamon and several other cases, the court  
16 concluded that it did have jurisdiction over the claims seeking  
17 review of the DVA's procedures for handling benefits claims at its  
18 regional offices. Id. at 1033-35. In so holding, the court  
19 stated that, unlike the other claims, this claim "does not require  
20 us to review 'decisions' affecting the provision of benefits to  
21 any individual claimants" and noted that the plaintiff "does not  
22 challenge decisions at all." Id. at 1034. The court explained,

23 A consideration of the constitutionality of the  
24 procedures in place, which frame the system by which a  
25 veteran presents his claims to the VA, is different than  
26 a consideration of the decisions that emanate through  
27 the course of the presentation of those claims. In this  
28 respect, VCS does not ask us to review the decisions of  
the VA in the cases of individual veterans, but to  
consider, in the "generality of cases," the risk of  
erroneous deprivation inherent in the existing  
procedures compared to the probable value of the  
additional procedures requested by VCS. . . . Evaluating

1 under the Due Process Clause the need for subpoena  
2 power, the ability to obtain discovery, or any of the  
3 other procedures VCS requests is sufficiently  
independent of any VA decision as to an individual  
veteran's claim for benefits that § 511 does not bar our  
jurisdiction.

4 Id. at 1034.<sup>11</sup> Thus, the Ninth Circuit considered some of the same  
5 authority and applied a similar standard as this Court did in its  
6 earlier order. This Court would have reached the same conclusion  
7 if it had had the benefit of the decision in Veterans for Common  
8 Sense at that time.<sup>12</sup> Accordingly, the Court DENIES Defendants'

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11 <sup>11</sup> The court also found that the fact that the organizational  
12 plaintiff could not "bring its suit in the Veterans Court, that  
13 court cannot claim exclusive jurisdiction over the suit," and  
14 because it could not assert the claim within the exclusive review  
15 scheme set forth by the Veterans' Judicial Review Act, "that  
16 scheme does not operate to divest us of jurisdiction." Veterans  
17 for Common Sense, 678 F.3d at 1034-35. However, such a finding  
18 was not necessary to the decision. The court noted, "Even if an  
19 individual veteran could raise these claims in an appeal in the  
20 Veterans Court or the Federal Circuit, that fact alone does not  
21 deprive us of jurisdiction here." Id. at 1035 n.26. Because the  
22 claim raised here "is sufficiently independent of any VA decision  
23 as to an individual veteran's claim for benefits," id. at 1034,  
24 the Court need not reach this alternative ground.

25 <sup>12</sup> Nor does the Supreme Court's decision in Elgin v. Dept. of  
26 Treasury, 132 S. Ct. 2126 (2012), compel a different result. In  
27 Elgin, the Supreme Court considered whether the statutory scheme  
28 of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101,  
et seq., provided "the exclusive avenue to judicial review when a  
qualifying employee challenges an adverse employment action by  
arguing that a federal statute is unconstitutional." 132 S. Ct.  
at 2130. Elgin is inapplicable for a number of reasons. First,  
the Court considered a statutory scheme other than that at issue  
here, while in Veterans for Common Sense, the Ninth Circuit  
considered the precise statutory scheme at issue in this case.  
Second, in Elgin, the petitioners challenged the specific adverse  
employment actions that were taken against them, and sought relief  
including reinstatement to their former positions and backpay.  
132 S. Ct. at 2131. It was central to the Court's decision that  
they brought such challenges, because it found that the CSRA was  
the exclusive method by which covered employees could obtain  
review of adverse employment actions taken against them, whatever  
the grounds for the challenge were, with one limited exception.  
See id. at 2133-34, 2138-40. Here, Plaintiffs do not seek to  
challenge any particular DVA decision as to an individual

1 motions for leave and for relief (Docket Nos. 431 and 471) and  
2 reaffirms its conclusion that it does have jurisdiction to  
3 adjudicate this claim.

4 D. Class Definition

5 While it is not an enumerated requirement of Rule 23, courts  
6 have recognized that "in order to maintain a class action, the  
7 class sought to be represented must be adequately defined and  
8 clearly ascertainable." DeBremaeker v. Short, 433 F.2d 733, 734  
9 (5th Cir. 1970) (citing Weisman v. MCA Inc., 45 F.R.D. 258 (D.  
10 Del. 1968)). "A class is ascertainable if it identifies a group  
11 of unnamed plaintiffs by describing a set of common  
12 characteristics sufficient to allow a member of that group to  
13 identify himself or herself as having a right to recover based on  
14 the description." Hanni v. Am. Airlines, Inc., 2010 U.S. Dist.  
15 LEXIS 3410, at \*24 (N.D. Cal. 2010) (quoting Moreno v. Autozone,  
16 Inc., 251 F.R.D. 417, 421 (N.D. Cal. 2008)). "The identity of  
17 class members must be ascertainable by reference to objective  
18 criteria." 5 James W. Moore, Moore's Federal Practice, § 23.21[1]  
19 (2001). Thus, a class definition is sufficient if the description  
20 of the class is "definite enough so that it is administratively  
21 feasible for the court to ascertain whether an individual is a  
22 member." O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319  
23 (C.D. Cal. 1998). Where the class definition proposed is overly  
24 broad or unascertainable, the court has the discretion to narrow  
25 it.

26  
27  
28 veteran's claim for benefits and the review of their claim would  
not necessitate such an inquiry.

1 In their opposition, Defendants made three arguments that the  
2 proposed class definition was unascertainable. Plaintiffs  
3 subsequently revised their proposed definition to address two of  
4 Defendants' contentions, that the definition did not require that  
5 class members were service members when they were test subjects  
6 and that it did not explain testing programs. At the hearing,  
7 Defendants confirmed that Plaintiffs' modifications resolved their  
8 concerns about these two issues.

9 In their third argument, Defendants contend that the class  
10 definition is overly broad because it includes individuals who  
11 have not applied for DVA benefits based on testing or whose  
12 applications were approved or otherwise not rejected. This  
13 argument is essentially the same as Defendants' contention that  
14 Blazinski and Josephs do not have standing to prosecute the claim  
15 that the DVA is a biased adjudicator. As discussed above, the  
16 cause of action seeks to remedy, not the denial of benefits, but  
17 the denial of a neutral, unbiased adjudicator to review a claim  
18 for benefits. Further, when a plaintiff pursues injunctive relief  
19 to prevent future harm based on a policy or practice generally  
20 applicable to the class, it is not required that all of the class  
21 members have already been injured by the unlawful policy or  
22 practice. See Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir.  
23 1998) (explaining that, for a class to be certified under Rule  
24 23(b)(2), "[i]t is sufficient if class members complain of a  
25 pattern or practice that is generally applicable to the class as a  
26 whole[,] [e]ven if some class members have not been injured by the  
27 challenged practice"). Thus, test participants who have applied  
28 or may apply for benefits in the future may all be class members

1 for the purposes of the claim against the DVA. The proposed  
2 definition is not overly broad.

3 E. Rule 23(a) Requirements

4 1. Numerosity

5 Plaintiffs contend that they have met the numerosity  
6 requirement because "the Proposed Class has at least tens of  
7 thousands of members." Mot. at 11. Plaintiffs also assert that  
8 "Defendants admit that as many as 100,000 military personnel, at  
9 numerous facilities over several decades, were subjected to the  
10 testing programs." Id. Defendants do not dispute that Plaintiffs  
11 have satisfied the numerosity requirement, and the Court finds  
12 that they have.

13 2. Adequacy

14 Rule 23(a)(4) of the Federal Rules of Civil Procedure  
15 establishes as a prerequisite for class certification that "the  
16 representative parties will fairly and adequately protect the  
17 interests of the class." Plaintiffs argue that there are no  
18 conflicts of interest between the proposed representatives and the  
19 absent class members and that their counsel has extensive  
20 experience prosecuting complex litigation involving veterans, as  
21 well as sufficient resources available for the representation.  
22 Mot. at 23. Defendants do not challenge the adequacy of the  
23 proposed representatives or their counsel. Accordingly, the Court  
24 finds that Plaintiffs have fulfilled their burden to establish  
25 that this requirement is satisfied.

26 3. Commonality

27 Rule 23(a)(2) requires that there be "questions of law or  
28 fact common to the class." Fed. R. Civ. P. 23(a)(2). It requires

1 that such common questions exist; it does not require that they  
2 predominate over individual questions, unlike Rule 23(b)(3), under  
3 which Plaintiffs do not seek certification.

4 The Ninth Circuit has explained that Rule 23(a)(2) does not  
5 preclude class certification if fewer than all questions of law or  
6 fact are common to the class:

7 The commonality preconditions of Rule 23(a)(2) are less  
8 rigorous than the companion requirements of Rule  
9 23(b)(3). Indeed, Rule 23(a)(2) has been construed  
10 permissively. All questions of fact and law need not be  
11 common to satisfy the rule. The existence of shared  
12 legal issues with divergent factual predicates is  
13 sufficient, as is a common core of salient facts coupled  
14 with disparate legal remedies within the class.

15 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

16 That "commonality only requires a single significant question of  
17 law or fact" was recently recognized both by the Supreme Court and  
18 the Ninth Circuit. See Dukes, 131 S. Ct. at 2556; Mazza v. Amer.  
19 Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012). Thus, for  
20 class certification, there must be at least one "common contention  
21 . . . of such a nature that it is capable of classwide  
22 resolution--which means that determination of its truth or falsity  
23 will resolve an issue that is central to the validity of each one  
24 of the claims in one stroke." Dukes, 131 S. Ct. at 2551.

25 a. APA claims for notice and medical care and  
26 constitutional claim for due process violations based  
27 on failure to adhere to policies and regulations

28 Defendants contend that commonality cannot be found for these  
claims. They assert that there is no common source of a legal  
duty to provide health care or notice to test participants because  
different regulations and memoranda were in effect throughout the  
class period; each can only apply to individuals who were later

1 subjected to testing and none can retroactively provide benefits.  
2 Defendants also argue that to ascertain whether the Army or DOD  
3 has failed to provide medical care or notice will require an  
4 examination of whether each individual class member knew about the  
5 substances to which he or she was exposed or has suffered health  
6 effects as a result of the test.<sup>13</sup>

7 Plaintiffs reply that the regulations and directives upon  
8 which they rely contain similar provisions, which are "forward-  
9 looking obligations to all test participants regardless of the  
10 date of their testing." Reply at 20.

11 Plaintiffs are correct. The various regulations and  
12 documents contain identical or similar provisions. Further,  
13 Plaintiffs do not seek retroactive application of these  
14 obligations. Plaintiffs do not contend that the regulations  
15 created additional entitlements with respect to the medical care  
16 test participants may have received prior to the creation of any  
17 relevant regulations. For example, they do not ask that the Army  
18 and DOD be held liable for failure to provide medical care based  
19 on the regulations prior to such date. Instead, Plaintiffs'  
20 contention is that the regulations create prospective obligations  
21 to provide for future testing-related medical needs for all test  
22 volunteers, and an ongoing duty to warn. There is nothing in any  
23 version of the regulations or other documents that limits these  
24 \_\_\_\_\_

25 <sup>13</sup> Defendants also challenge commonality regarding these claims  
26 based on their argument that "Plaintiffs' proposed class is  
27 overbroad." Opp. at 29, 32. As previously noted, Plaintiffs  
28 revised their proposed class definition to address the particular  
issues raised in this section, and Defendants agreed at the  
hearing on this motion that the revisions addressed their  
concerns.

1 forward-looking provisions to those people who became test  
2 volunteers after the regulation was created.

3 In the 1990 version of AR 70-25, the definition for human  
4 subject or experimental subject included, with limited exceptions,  
5 "a living individual about whom an investigator conducting  
6 research obtains data through interaction with the individual,  
7 including both physical procedures and manipulations of the  
8 subject or the subject's environment." Herb Decl., Ex. 13, 16.  
9 The definition does not exclude individuals who were subjected to  
10 testing prior to the date of the regulations. Further, by its  
11 terms, the section in the 1990 regulation regarding the duty to  
12 warn contemplates an ongoing duty to volunteers who have already  
13 completed their participation in research. Id. at 5. Defendants  
14 maintain that the human experimentation programs ended in 1975.  
15 Whether the 1990 regulations created such duties toward any of the  
16 class members is a common question, which is central to the  
17 validity of these claims and can be accomplished on a class-wide  
18 basis.

19 Defendants point to potential questions of fact that may  
20 affect whether they ultimately will be found to have violated a  
21 duty toward any particular class member. Defendants argue that  
22 their liability will differ based on whether the class member was  
23 provided some amount of notice, whether there are actually any  
24 known health effects related to the testing of the particular  
25 substances to which the class member was exposed or whether the  
26 class member suffered adverse health effects that Defendants  
27 failed to treat. Not all questions of law and fact must be  
28 identical for this requirement to be met. Because there is a

1 common question of law regarding whether Defendants had duties to  
2 provide notice and health care to class members, the Court finds  
3 that Plaintiffs have met their burden to establish commonality on  
4 these claims.

5 b. Secrecy oath claims

6 Plaintiffs argue that their claim seeking a declaration that  
7 the secrecy oaths taken by members of the proposed class are  
8 invalid and that Defendants must notify test participants that  
9 they are released from any secrecy oaths raises common questions  
10 "whether [the] secrecy oaths are valid, and whether members of the  
11 Proposed Class should be unconditionally released from any such  
12 oaths." Reply at 23. The Court finds that Plaintiffs have not  
13 met their burden to establish these questions are common to the  
14 class.

15 First, Plaintiffs have offered no evidence that class members  
16 were required uniformly to take secrecy oaths or that the contents  
17 of such oaths were similar. Without a showing of such a factual  
18 predicate, the Court is unable to make a class-wide determination  
19 whether the oaths are unenforceable. In support of their  
20 contention that "Participants were required to swear to Secrecy  
21 Oaths and told that they could never speak about their  
22 participation, under threat of general court martial," Plaintiffs  
23 cite several pieces of evidence. One of these documents is a  
24 National Academy of Sciences study, entitled "Veterans at Risk,"  
25 and written in response to a request for research made by the DVA.  
26 Sprenkel Decl., Ex. 13, VET123-002589. In discussing the mustard  
27 and Lewisite testing during WWII, the report states, "All of the  
28 men in the chamber and field tests, and some of the men in the

1 patch tests, were told at the time that they should never reveal  
2 the nature of the experiments." Herb Decl., Ex. 2, VET002-001801.  
3 The authors also state, "It is clear that there may be many  
4 exposed veterans and workers who took an oath of secrecy during  
5 WWII and remain true to that oath even today." VET123-002593,  
6 2606-2607; see also Sprenkel Decl., Ex. 1, VET001\_015682 (quoting  
7 the "Veterans at Risk" study). In their reply brief, Plaintiffs  
8 also provided a National Academies report titled, "Health Effects  
9 of Perceived Exposure to Biochemical Warfare Agents." Sprenkel  
10 Reply Decl., Ex. 80. In summarizing findings of an earlier study  
11 about predictive factors for post-traumatic stress disorder in  
12 veterans who participated in mustard gas and Lewisite testing  
13 during World War II, this report stated, "Because the tests were  
14 secret, some participants were compelled to take an oath of  
15 secrecy and were subject to criminal prosecution if they disclosed  
16 their participation." Id. at 13. See also Sprenkel Decl., Ex. 10  
17 (Hamed Depo.), 158:5-10 (former DOD employee recounting that  
18 veterans who participated in testing during WWII told her that  
19 they had been administered secrecy oaths).<sup>14</sup> Nor have Plaintiffs  
20

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21 <sup>14</sup> Plaintiffs also rely on the deposition testimony of Blazinski  
22 and Josephs, who both participated in Cold War era testing at  
23 Edgewood Arsenal. However, the testimony cited does not establish  
24 that these individuals swore a secrecy oath, as defined by  
25 Plaintiffs, but rather that they were given varying instructions  
26 not to discuss their participation and that the tests were top  
27 secret. See Sprenkel Decl., Ex. 11 (Blazinski Depo.), 101:5-22  
28 (testifying that before he participated in the experiments, he was  
"told right up front that this was top secret. We weren't to  
discuss this with anyone, any tests that were taken there,  
anything about the program."); 104:2-13 (stating that he did not  
recall if he signed a secrecy agreement); Sprenkel Decl, Ex. 12  
(Josephs Depo.), 160:3-22 ("I remember discussions that I was not  
to discuss this with anyone. I -- I think maybe your immediate  
family was permitted, but, of course, they had to know where you

1 submitted evidence of a policy requiring that secrecy oaths be  
2 given prior to participation in testing. The evidence they offer,  
3 in addition to being hearsay, is insufficient to make a prima  
4 facie showing that class members throughout the class period swore  
5 similar secrecy oaths, the enforceability of which could be  
6 adjudicated on a class-wide basis. Without such a showing, the  
7 Court cannot consider whether a complete release from secrecy  
8 oaths is appropriate on a class-wide basis, because the Court  
9 would need to consider the terms of the oath which each individual  
10 swore, if any.

11 Second, Plaintiffs' legal theory is that, "[b]ecause no test  
12 participant was provided with information sufficient to enable  
13 informed consent, the Secrecy oaths should be deemed valid ab  
14 initio." Mot. at 15. Under this theory, a determination of the  
15 validity of the secrecy oaths turns on what information was  
16 provided to the class members when they swore them. The evidence  
17 Plaintiffs cite in support of this argument is two pages of a  
18 statement made by the former General Counsel of the Army during  
19 Congressional hearings in 1975. This evidence does not establish  
20 that it can be determined a class-wide basis. In the document,  
21 the General Counsel discussed the testing of LSD on thirty-one  
22 individuals at Edgewood between 1958 and 1960 and acknowledged  
23 that certain information was withheld from participants. Sprenkel  
24 Decl. Ex. 15 at 160-62. This included the exact properties of the

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25  
26 were. . . . But I don't know if a secrecy oath was involved.");  
27 see also Mot. at 2, n.2 (defining "secrecy oath" as "all promises  
28 or agreements, whether written or oral, and whether formal or  
informal, made by test participants after being told that they  
could never speak about their participation in the testing  
programs.") (emphasis added).

1 material to be administered and in some cases the time, location  
2 or method of administration. Id. The General Counsel also stated  
3 that other information was supposed to be given to them, including  
4 the general nature of the experiments and that the subject could  
5 terminate the experiment at any time, but that available records  
6 did not indicate what information was actually given in each case.  
7 Id. This testimony only supports the conclusion that certain  
8 information was withheld from these particular subjects and that,  
9 even for them, there was variance in the information provided.  
10 Plaintiffs introduce no evidence that there was a general policy  
11 or practice not to provide such information to test subjects  
12 before requiring them to sign a secrecy oath. Without such  
13 evidence, the Court cannot make a class-wide determination of  
14 whether such oaths are invalid ab initio.

15 Accordingly, the Court finds that Plaintiffs have not met the  
16 commonality requirement for their claims based on the secrecy  
17 oaths.

18 c. Claims of a biased adjudication by the DVA

19 Plaintiffs contend that there are many common questions of  
20 law or fact on this claim, including whether the DVA was involved  
21 in testing programs, and whether it had an interest in determining  
22 there were no long-term health effects from such testing.

23 Defendants have not challenged Plaintiffs' showing of commonality  
24 on this claim. Accordingly, the Court finds that Plaintiffs have  
25 fulfilled their burden to establish that the requirement is  
26 satisfied for this claim.

1           4. Typicality

2           Rule 23(a)(3)'s typicality requirement provides that a "class  
3 representative must be part of the class and possess the same  
4 interest and suffer the same injury as the class members."

5 Falcon, 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc.  
6 v. Rodriguez, 431 U.S. 395, 403 (1977)) (internal quotation marks  
7 omitted). The purpose of the requirement is "to assure that the  
8 interest of the named representative aligns with the interests of  
9 the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th  
10 Cir. 1992). "[T]he typicality requirement is 'permissive' and  
11 requires only that the representative's claims are 'reasonably co-  
12 extensive with those of absent class members; they need not be  
13 substantially identical.'" Rodriguez v. Hayes, 591 F.3d 1105,  
14 1124 (9th Cir. 2010) (internal citations omitted). Rule 23(a)(3)  
15 is satisfied where the named plaintiffs have the same or similar  
16 injury as the unnamed class members, the action is based on  
17 conduct which is not unique to the named plaintiffs, and other  
18 class members have been injured by the same course of conduct.  
19 Id. Class certification is inappropriate, however, "where a  
20 putative class representative is subject to unique defenses which  
21 threaten to become the focus of the litigation." Id. (quoting  
22 Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner &  
23 Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990).

24           Defendants argue that the claims of Blazinski, Josephs and  
25 the VVA members related to notice and medical care are not typical  
26 of claims of putative class members who participated in testing  
27 prior to the issuance of the Wilson Directive in 1952. Opp. at  
28 28, n.37. Having found that the claims regarding the obligations

1 derived from the 1990 regulations are as applicable to those who  
2 participated in testing prior to their issuance as after that  
3 date, the Court rejects Defendants' contention.

4 In a footnote, Defendants state, without elaboration, that  
5 "Plaintiffs have not identified a single individual whose claims  
6 are typical of widows," Opp. at 28, n.37, apparently referring to  
7 Plaintiffs' request to include in their class definition, "in the  
8 case of deceased members, the personal representatives of their  
9 estates," Mot. at 1-2; Reply, at 17. In reply, Plaintiffs  
10 acknowledge that none of the proposed class representatives are  
11 survivors of veterans but assert that the proposed representatives  
12 are typical of deceased veterans' survivors because "the claims  
13 that deceased veterans' representatives assert are the claims of  
14 those deceased veterans." Reply at 25, n.25 (emphasis in  
15 original); see also Mot. to Substitute 2-3 (arguing that Ms.  
16 McMillan-Forrest "stands in her late husband's shoes for purposes  
17 of filing a [dependency and indemnification compensation] claim").

18 Pursuant to 38 U.S.C. § 5121(a) and 38 C.F.R. § 3.5(a), a  
19 deceased veteran's spouse, children or dependent parents are  
20 entitled to receive benefits accrued by the veteran at the time of  
21 his death, such as disability benefits. Thus, claims asserting  
22 that the DVA is a biased adjudicator of such benefits are the  
23 same, whether asserted by the veterans themselves or the personal  
24 representatives of deceased veterans' estates.

25 However, the survivors' own entitlement to dependency and  
26 indemnity compensation is separate from the claims of the deceased  
27 veterans themselves; such entitlements arise only upon the  
28 service-connected deaths of veterans and accrue to the survivors,

1 not the estates of deceased veterans. See 38 C.F.R. § 3.5(a)(1).  
2 Plaintiffs have not proposed a class representative with an  
3 entitlement to dependency and indemnity compensation. Thus, the  
4 proposed class representatives' claims are not typical of claims  
5 that the DVA is a biased adjudicator of dependency and indemnity  
6 compensation claims.

7 Further, the claims by the veterans themselves for notice are  
8 not reasonably coextensive with the claims of deceased veterans'  
9 personal representatives. Plaintiffs contend that the veterans  
10 are entitled to notice under the APA and the Constitution based on  
11 the DOD and the Army's own regulations.<sup>15</sup> In their briefing on  
12 their motion to substitute Ms. McMillan-Forrest, to which  
13 Plaintiffs refer in support of this argument in their reply on  
14 their class certification motion, Plaintiffs contend that  
15 Defendants' duty toward the test participants applies "whether  
16 they are alive or deceased," and that, as "a practical matter, to  
17 discharge this duty to deceased test participants, Defendants must  
18 give Notice to the personal representative of the test  
19 participant's estate . . ." Reply in Supp. of Mot. to Substitute  
20 at 2. The Wilson Directive and versions of AR 70-25 mandate that  
21 Defendants provide information to the test participants regarding  
22 the possible effects upon their own health or person. Plaintiffs  
23

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24  
25 <sup>15</sup> Although Plaintiffs have also sought certification of claims  
26 that the combination of Defendants' failure to provide class  
27 members with notice, medical care and a release from secrecy oaths  
28 together violated their substantive due process liberty rights,  
including their right to bodily integrity, and of a lack of  
procedures to challenge this failure, the Court has already  
concluded that the constitutional claims based on the secrecy  
oaths lack commonality.

1 do not explain how such a duty to the test participants may  
2 continue after they are deceased, when effects upon health and  
3 person can no longer occur. Instead, they contend that the  
4 survivors are entitled to notice regarding the veteran's exposure,  
5 doses and potential health effects because such information may be  
6 relevant or necessary for survivors to submit claims for accrued  
7 benefits or dependency and indemnity compensation, not because  
8 such notice is required by the APA, the Constitution and the  
9 regulations, the basis of the claimed duty toward the test  
10 participants. See Mot. to Substitute, 2-3. Further, Plaintiffs  
11 have conceded that the medical care claims do not survive a  
12 veteran's death and cannot be asserted by a veteran's personal  
13 representative on behalf of his or her estate. Id. at 1. Thus,  
14 the proposed class representatives' notice and health care claims  
15 are not typical of deceased veterans' personal representatives'  
16 claims.

17 Defendants also make several arguments that the proposed  
18 class representatives' secrecy oath claims are atypical of those  
19 of the class. Because the Court has already found that Plaintiffs  
20 have not met the commonality requirement for these claims, the  
21 Court does not reach these arguments.

22 F. Rule 23(b) requirements

23 Plaintiffs seek certification under either Rule 23(b)(1)(A)  
24 or 23(b)(2). Although common issues must predominate for class  
25 certification under Rule 23(b)(3), no such requirement exists for  
26 either subsection under which Plaintiffs seek certification. See  
27 Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998).

28 Accordingly, Defendants' various arguments that individual issues

1 predominate and preclude certification are not on point. See Opp.  
2 at 36, 38.

3 Rule 23(b) (2) permits certification where "the party opposing  
4 the class has acted or refused to act on grounds that apply  
5 generally to the class, so that final injunctive relief or  
6 corresponding declaratory relief is appropriate respecting the  
7 class as a whole." Fed. R. Civ. P. 23(b). Plaintiffs argue that  
8 Defendants have uniformly failed to fulfill their legal  
9 obligations to the class, "as all class members were participants  
10 in human testing programs, were denied Notice and medical care,  
11 and had their constitutional rights violated by the Secrecy  
12 oaths." Mot. at 24. Plaintiffs also argue that the DVA uniformly  
13 failed to act as a neutral adjudicator of class members' claims.

14 For certification under this provision, "[i]t is sufficient  
15 if class members complain of a pattern or practice that is  
16 generally applicable to the class as a whole. Even if some class  
17 members have not been injured by the challenged practice, a class  
18 may nevertheless be appropriate." Walters, 145 F.3d at 1047; see  
19 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal  
20 Practice & Procedure § 1775 (2d ed. 1986) ("All the class members  
21 need not be aggrieved by or desire to challenge the defendant's  
22 conduct in order for some of them to seek relief under Rule  
23 23(b) (2)."). Rule 23(b) (2) does not require a court "to examine  
24 the viability or bases of class members' claims for declaratory  
25 and injunctive relief, but only to look at whether class members  
26 seek uniform relief from a practice applicable to all of them."  
27 Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010). "Class  
28 certification under Rule 23(b) (2) is appropriate only where the

1 primary relief sought is declaratory or injunctive.” Zinser v.  
2 Accufix Research Institute, Inc., 253 F.3d 1180, 1195 (9th Cir.  
3 2001).

4 Defendants contend that Plaintiffs cannot meet the Rule  
5 23(b)(2) requirement for several reasons. First, Defendants  
6 contend that “at least three different sets of regulations and  
7 directives . . . have governed DOD’s alleged notice duty for the  
8 members of the putative class” from 1953 and later, which would  
9 require this “Court to have to adjudicate and provide relief  
10 dependent on the applicable legal framework.” Opp. at 38. In  
11 Rodriguez, the Ninth Circuit has rejected similar arguments in the  
12 context of the certification of a class to prosecute claims based  
13 on the denial of bond hearings in immigration proceedings. In so  
14 ruling, the court noted, “The particular statutes controlling  
15 class members’ detention may impact the viability of their  
16 individual claims for relief, but do not alter the fact that  
17 relief from a single practice is requested by all class members.  
18 Similarly, although the current regulations control what sort of  
19 process individual class members receive at this time, all class  
20 members[] seek the exact same relief as a matter of statutory or,  
21 in the alternative, constitutional right.” Rodriguez, 591 F.3d at  
22 1126. See also Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir.  
23 1988) (emphasizing that, although “the claims of individual class  
24 members may differ factually,” certification under Rule 23(b)(2)  
25 is a proper vehicle for challenging “a common policy”). Here,  
26 Plaintiffs also “seek uniform relief from a practice applicable to  
27 all of them.” Rodriguez, 591 F.3d at at 1125.  
28

1 Defendants also argue that this requirement cannot be met  
2 because "at least 4,000 individuals have received some form of  
3 notice," referring to the DVA's form letters to veterans. Mot. at  
4 39. As the Court explained above, these were sent by the DVA and  
5 do not negate Plaintiffs' contention that the DOD and the Army  
6 refused to send notice. Further, these letters by themselves are  
7 facially insufficient to satisfy the basic components of the  
8 notice that Plaintiffs allege Defendants have the duty to provide  
9 because they omit any information specific to the class members  
10 themselves.

11 Finally, Defendants contend that certification under Rule  
12 23(b) (2) is inappropriate because "Plaintiffs' claim for medical  
13 care" is "essentially a claim for monetary damages." Opp. at 39.  
14 The Court has rejected above Defendants' characterization of this  
15 claim.

16 Accordingly, the Court finds that Plaintiffs have established  
17 that certification under Rule 23(b) (2) is appropriate. The Court  
18 does not reach Plaintiffs' alternative argument that certification  
19 can be granted under Rule 23(b) (1) (A).

20 II. Motion to Substitute

21 Plaintiffs move to substitute Kathryn McMillan-Forrest as a  
22 named Plaintiff in this action, in place of her late husband,  
23 Plaintiff Wray Forrest, who passed away on August 31, 2010.

24 On April 11, 2012, Defendants filed a statement noting "the  
25 death during the pendency of this action of Wray Forrest, a  
26 Plaintiff in this action." Docket No. 411.

27 Less than ninety days later, on June 5, 2012, Plaintiffs  
28 filed the instant motion to substitute pursuant to Federal Rule of

1 Civil Procedure 25(a)(1). Rule 25(a)(1) provides in part, "If a  
2 party dies and the claim is not extinguished, the court may order  
3 substitution of the proper party." Plaintiffs seek to substitute  
4 Ms. McMillan-Forrest to prosecute Mr. Forrest's APA and  
5 constitutional claims regarding notice and his claim that the DVA  
6 is a biased adjudicator of SCDDC claims. Plaintiffs do not seek  
7 to substitute Ms. McMillan-Forrest to prosecute his secrecy oath  
8 claim and claims for medical care, which they acknowledge do not  
9 survive his death. Plaintiffs also seek to add to the complaint  
10 the following sentence: "Plaintiff Kathryn McMillan-Forrest is the  
11 surviving spouse of Wray Forrest, has filed a claim for accrued  
12 disability benefits and dependency and indemnity compensation, and  
13 is substituted in Wray Forrest's place as named Plaintiff." Mot.  
14 at 4.

15 In opposition, Defendants primarily contend that Plaintiffs'  
16 motion is properly considered as a motion to amend because Mr.  
17 Forrest was no longer a party at the time the motion was made. On  
18 November 15, 2010, the Court granted Plaintiffs leave to file  
19 their 3AC within three days of that date, and directed them to  
20 "make any correction necessitated by the passing of Plaintiff Wray  
21 Forrest." See Docket No. 177, at 18. When Plaintiffs timely  
22 filed their 3AC, which is the operative complaint in this action,  
23 they removed Mr. Forrest from the list of Plaintiffs in the  
24 caption, and referred to him as a "former" Plaintiff throughout  
25 the body of the 3AC. Subsequently, they consistently omitted Mr.  
26 Forrest's name when they listed the Plaintiffs in this action,  
27 until they filed their motion for class certification and, shortly  
28 thereafter, their administrative motion to substitute Ms.

1 McMillan-Forrest. See, e.g., Pls.' Opp. to Defs.' Mot. to Dismiss  
2 the 3AC, Docket No. 188; Pls.' Mot. to Strike Admin. Record,  
3 Docket No. 211. Because Plaintiffs amended their complaint to  
4 remove Mr. Forrest on November 15, 2010, he was no longer a party  
5 to this action when Plaintiffs first sought to substitute Ms.  
6 McMillan-Forrest in his place on March 6, 2012. Accordingly, as  
7 Defendants urge, the Court construes Plaintiffs' motion as a  
8 motion for leave to amend.

9 Federal Rule of Civil Procedure 15(a) provides that leave of  
10 the court allowing a party to amend its pleading "shall be freely  
11 given when justice so requires." Because "Rule 15 favors a  
12 liberal policy towards amendment, the nonmoving party bears the  
13 burden of demonstrating why leave to amend should not be granted."  
14 Genentech, Inc. v. Abbott Laboratories, 127 F.R.D. 529, 530-531  
15 (N.D. Cal. 1989). Courts consider five factors when assessing the  
16 propriety of a motion for leave to amend: undue delay, bad faith,  
17 futility of amendment, prejudice to the opposing party and whether  
18 the plaintiff has previously amended the complaint. Ahlmeyer v.  
19 Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir.  
20 2009). However, these factors are not of equal weight;  
21 specifically, "delay alone no matter how lengthy is an  
22 insufficient ground for denial of leave to amend." United States  
23 v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). Futility of  
24 amendment, by contrast, can alone justify the denial of a motion  
25 for leave to amend. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.  
26 1995); Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir.  
27 Cal. 1988).

1 Defendants contend that amendment would be futile for a  
2 variety of reasons. As to the biased adjudicator claim against  
3 the DVA, Defendants reassert the same arguments regarding the  
4 Court's lack of jurisdiction that the Court has already rejected  
5 in this and previous Orders. Thus, the Court concludes that  
6 Defendants have not established that this claim is futile. As to  
7 the notice claims, Defendants also repeat arguments rejected in  
8 this and prior Orders. To the extent that they further contend  
9 that Ms. Wray-Forrest will not ultimately be able to prove these  
10 claims, "a proposed amendment is futile only if no set of facts  
11 can be proved under the amendment to the pleadings that would  
12 constitute a valid and sufficient claim or defense." Miller, 845  
13 F.2d at 214. Such evidence-based arguments are more properly  
14 asserted in a motion for summary judgment.

15 Defendants also contend that any claim asserted by Ms. Wray-  
16 Forrest for notice under the APA would be futile, because the  
17 regulations and other documents could only support an obligation  
18 to warn or provide notice to the test participant himself or  
19 herself and not to that person's next-of-kin. As addressed above,  
20 Plaintiffs fail to explain how a duty to warn test participants of  
21 the effects of testing upon their health and person may continue  
22 after the participants have passed away and such effects can no  
23 longer continue. Instead, they contend that the survivors of  
24 these participants require this information to obtain access to  
25 their own entitlements. Although this may support other claims,  
26 it does not support a non-discretionary duty to warn survivors  
27 under the APA based on the regulations and related documents.  
28

1 Accordingly, Defendants have established that Ms. Wray-Forrest's  
2 APA claim for notice would be futile.

3 Defendants also contend that Plaintiffs unduly delayed in  
4 seeking amendment. Plaintiffs respond that they mistakenly  
5 believed that the Court had already granted leave to substitute  
6 Ms. Wray-Forrest as a "correction" contemplated by the Court's  
7 November 15, 2010 Order and that the three day period referred to  
8 in that Order was to file an amended pleading, not to substitute  
9 Ms. Wray-Forrest as well. See Reply to Admin. Mot. to Substitute,  
10 Docket No. 374, 1-2; April 5, 2012 Hrg. Tr., Docket No. 414,  
11 10:9-11-1. For this reason, the Court does not find the time  
12 between Mr. Forrest's death and the filing of the initial motion  
13 to substitute constitutes undue delay.

14 Finally, Defendants argue that they were prejudiced by the  
15 delay in the filing of this motion, arguing that Plaintiffs seek  
16 amendment "in order to have an individual plaintiff with standing  
17 to seek dependency and indemnity compensation from VA for the  
18 purposes of their class certification motion." Opp. to Mot. to  
19 Substitute, 4. However, Plaintiffs have not asked the Court to  
20 appoint Ms. Wray-Forrest as a class representative, and thus her  
21 inclusion in the action as an individual Plaintiff is not relevant  
22 to the resolution of the motion for class certification.

23 Defendants also contend that they were deprived of a fair  
24 opportunity to address the potential inclusion in the class of  
25 personal representatives of the estates of deceased test  
26 participants in their opposition to Plaintiffs' motion for class  
27 certification, contending that this was an "abstract" notion until  
28 Plaintiffs moved to substitute shortly before their opposition was

1 due. However, in their motion, Plaintiffs defined their proposed  
2 class to include such individuals, giving Defendants sufficient  
3 notice that this was at issue in the motion so that Defendants  
4 could present their arguments in opposition to the inclusion of  
5 these individuals. Further, the Court notes that it granted  
6 Defendants' sole request for an extension of time and additional  
7 pages to oppose the motion for class certification, see Docket  
8 Nos. 353, 360, and that they did not seek any additional time to  
9 file their opposition after Plaintiffs moved to substitute Ms.  
10 Wray-Forrest or seek leave to file a supplemental brief.

11 Accordingly, the Court GRANTS in part and DENIES in part  
12 Plaintiffs' motion to amend. Plaintiffs are granted leave to file  
13 a fourth amended complaint, within four days of the date of this  
14 Order, adding Ms. Wray-Forrest to the caption of the action and  
15 adding the following language to the body of the complaint:

16 "Plaintiff Kathryn McMillan-Forrest is the surviving spouse of  
17 Wray Forrest, has filed a claim for accrued disability benefits  
18 and dependency and indemnity compensation, and is substituted in  
19 Wray Forrest's place as named Plaintiff, except as to the APA  
20 claim for notice, the secrecy oath claims and claims for medical  
21 care."

22 III. Appointment of Class Counsel

23 Rule 23(g) (1) of the Federal Rules of Civil Procedure  
24 provides in part:

25 Unless a statute provides otherwise, a court that certifies a  
26 class must appoint class counsel. In appointing class  
counsel, the court:

27 (A) must consider:

28 (i) the work counsel has done in identifying or  
investigating potential claims in the action;

- 1 (ii) counsel's experience in handling class
- 2 actions, other complex litigation, and the types of
- 3 claims asserted in the action;
- 4 (iii) counsel's knowledge of the applicable law;
- 5 and
- 6 (iv) the resources that counsel will commit to
- 7 representing the class;
- 8 (B) may consider any other matter pertinent to counsel's
- 9 ability to fairly and adequately represent the interests
- 10 of the class;
- 11 (C) may order potential class counsel to provide
- 12 information on any subject pertinent to the appointment
- 13 and to propose terms for attorney's fees and nontaxable
- 14 costs;
- 15 (D) may include in the appointing order provisions about
- 16 the award of attorney's fees or nontaxable costs under
- 17 Rule 23(h); and
- 18 (E) may make further orders in connection with the
- 19 appointment.

20 Fed. R. Civ. P. 23(g) (1).

21 Plaintiffs represent that their counsel, the law firm of

22 Morrison & Foerster LLP, has sufficient resources to pursue the

23 instant case vigorously, expertise in prosecuting class actions of

24 this nature, and knowledge of the applicable law. In particular,

25 Gordon Erspamer, who will serve as lead counsel, has prosecuted

26 several notable cases on behalf of veterans, including Veterans

27 for Common Sense, discussed above. The Court notes that counsel

28 has devoted considerable time and resources working on behalf of

the putative class thus far. Accordingly, the Court APPOINTS Morrison and Foerster LLP as class counsel.

CONCLUSION

For the reasons set forth above, the Court GRANTS in part Plaintiffs' motion for class certification and DENIES it in part (Docket No. 346). To prosecute the biased adjudicator claim against the DVA, except as to claims for dependency and indemnity compensation, the Court certifies a class defined as

1 All current or former members of the armed forces, or in  
2 the case of deceased members, the personal  
3 representatives of their estates, who, while serving in  
4 the armed forces, were test subjects in any human  
5 Testing Program that was sponsored, overseen, directed,  
6 funded, and/or conducted by the Department of Defense or  
7 any branch thereof, including but not limited to the  
8 Department of the Army and the Department of the Navy,  
9 and/or the Central Intelligence Agency, between the  
10 inception of the Testing Programs in approximately 1922  
11 and the present. For the purposes of this definition,  
12 "Testing Program" refers to a program in which any  
13 person was exposed to a chemical or biological substance  
14 for the purpose of studying or observing the effects of  
15 such exposure.

16 To prosecute the APA and constitutional claims against the DOD and  
17 the Army premised on the violation of their own regulations, the  
18 Court certifies a class defined as

19 All current or former members of the armed forces, who,  
20 while serving in the armed forces, were test subjects in  
21 any human Testing Program that was sponsored, overseen,  
22 directed, funded, and/or conducted by the Department of  
23 Defense or any branch thereof, including but not limited  
24 to the Department of the Army and the Department of the  
25 Navy, and/or the Central Intelligence Agency, between  
26 the inception of the Testing Programs in approximately  
27 1922 and the present. For the purposes of this  
28 definition, "Testing Program" refers to a program in  
which any person was exposed to a chemical or biological  
substance for the purpose of studying or observing the  
effects of such exposure.

The Court further GRANTS Plaintiffs' request to appoint VVA, Tim  
Josephs and William Blazinski as class representatives and  
Morrison & Foerster LLP as class counsel.

The Court DENIES Defendants' motions for leave to file a  
motion for reconsideration and for relief from a nondispositive  
order of the Magistrate Judge (Docket Nos. 431 and 471).

Finally, the Court GRANTS in part and DENIES in part  
Plaintiffs' motion to substitute, which the Court construed as a  
motion to amend (Docket No. 439). Plaintiffs are granted leave to  
file a fourth amended complaint, within four days of the date of

1 this Order, adding Ms. Wray-Forrest to the caption of the action  
2 and adding the following language to the body of the complaint:  
3 "Plaintiff Kathryn McMillan-Forrest is the surviving spouse of  
4 Wray Forrest, has filed a claim for accrued disability benefits  
5 and dependency and indemnity compensation, and is substituted in  
6 Wray Forrest's place as named Plaintiff, except as to the APA  
7 claim for notice, the secrecy oath claims and claims for medical  
8 care."

9 IT IS SO ORDERED.

10  
11 Dated: September 30, 2012

  
12 CLAUDIA WILKEN  
13 United States District Judge  
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