

1 IAN GERSHENGORN
 Deputy Assistant Attorney General
 2 MELINDA L. HAAG
 United States Attorney
 3 VINCENT M. GARVEY
 Deputy Branch Director
 4 JOSHUA E. GARDNER
 District of Columbia Bar No. 478049
 5 KIMBERLY L. HERB
 Illinois Bar No. 6296725
 6 LILY SARA FAREL
 North Carolina Bar No. 35273
 7 BRIGHAM JOHN BOWEN
 District of Columbia Bar No. 981555
 8 JUDSON O. LITTLETON
 Texas Bar No. 24065635
 Trial Attorneys
 9 Civil Division, Federal Programs Branch
 U.S. Department of Justice
 10 P.O. Box 883
 Washington, D.C. 20044
 11 Telephone: (202) 305-7583
 Facsimile: (202) 616-8202
 12 E-mail: joshua.e.gardner@usdoj.gov

13 Attorneys for DEFENDANTS

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

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

Case No. CV 09-0037-CW

**DEFENDANTS' MOTION FOR
 RELIEF FROM NON-DISPOSITIVE
 PRETRIAL ORDER OF
 MAGISTRATE JUDGE**

**DEFENDANTS' MOTION FOR RELIEF FROM NON-DISPOSITIVE
PRETRIAL ORDER OF MAGISTRATE JUDGE**

Pursuant to Local Rule 72-2, Federal Rule of Civil Procedure 72(a), and 28 U.S.C. § 636(b)(1)(A), Defendants hereby file this Motion for Relief From Non-Dispositive Pretrial Order of Magistrate Judge. Specifically, Defendants object to the portion of the Magistrate Judge's October 5, 2011 order denying the Department of Defense and Department of the Army's (collectively, "DoD") motion for a protective order concerning discovery regarding pre-1953 testing. Dkt. No. 294 at 9-10.

Defendants contended that Plaintiffs did not have constitutional claims for notice and health care, and that the only arguable legal basis for review of DoD's testing programs arose under the Administrative Procedure Act ("APA") and was predicated upon a 1953 Department of the Army document and a 1990 version of an Army regulation known as AR 70-25. Dkt. No. 252 at 22-25. The Magistrate Judge concluded that "the Third Amended Complaint alleges both constitutional and APA violations and the district court has not limited Plaintiffs' claims against the DoD. Accordingly, Plaintiffs' discovery requests to the DoD are not limited to their APA claims, and even if they were, the Court would find that DoD has waived any objection under the APA as discussed above." Dkt. No. 294 at 10. With respect to the purported waiver, the Magistrate Judge found that Defendants had not made a timely objection to such discovery, and that "it appear[ed] to be a new objection raised for the first time earlier this year in letters to Plaintiffs' counsel." *Id.* at 9.

Respectfully, as discussed below, the Magistrate Judge's conclusion about waiver is factually incorrect, and the conclusion about Plaintiffs' maintenance of a constitutional claim for notice and health care against DoD is inconsistent with the reasoning of this Court's September 9, 2011 order rejecting identical constitutional claims against the CIA. Dkt. No. 281; *see generally* Defs.' Mot. for Prot. Order, Dkt. No. 252 at 22-25; Defs.' Reply, Dkt. No. 286 at 11-15.

I. Defendants Have Not Waived Objections To Discovery Regarding Pre-1953 Testing.

Contrary to the Magistrate Judge's conclusion, Defendants have consistently raised objections to discovery regarding pre-1953 testing in response to Plaintiffs' operative written discovery requests. For example, after Magistrate Judge Larson instructed Plaintiffs to reconsider

1 the scope and breadth of their written discovery in his November 12, 2010 order, *see* Dkt. No.
2 178, Plaintiffs served their “Amended Request for Production of Documents to All Defendants”
3 on December 2, 2010.¹ In their objections and responses to that discovery — and all subsequent
4 discovery requests — Defendants objected both generally to discovery beyond the scope
5 permissible under the APA, as well as specifically to discovery regarding pre-1953 testing. *See*
6 Dkt. No. 286-2 at 5 (objection no. 8), 21 (objection no. 17). Accordingly, the Magistrate Judge’s
7 ruling that Defendants have waived their objections to pre-1953 discovery is factually incorrect,
8 and Defendants request that the Court overturn that aspect of the Magistrate Judge’s order.

9 **II. Plaintiffs Do Not Maintain Constitutional Claims For Notice And Health Care**
10 **Against DoD.**

11 The Magistrate Judge rejected DoD’s motion for a protective order in part because it
12 concluded that “the district court has not limited Plaintiffs’ claims against the DoD.” Dkt. No.
13 294 at 9-10. But this Court expressly referred the issue of whether constitutional claims remain
14 against DoD for notice and health care to the Magistrate Judge for resolution in the first instance.
15 Dkt. No. 281. The fact that this Court has yet to address the issue therefore cannot be a proper
16 basis upon which to deny Defendants’ motion for a protective order regarding pre-1953 testing.

17 The Magistrate Judge further concluded that discovery concerning pre-1953 testing was
18 appropriate because “the Third Amended Complaint alleges both constitutional and APA
19 violations.” *See* Dkt. No. 294 at 9-10. But the fact that Plaintiffs may have pleaded a
20 constitutional claim in their complaint is not dispositive. Rather, consistent with this Court’s
21 ruling regarding the purported constitutional claims for notice and health care against the CIA,
22 *see* Dkt. No. 281, what is dispositive is Plaintiffs’ course of conduct and representations in the
23 two-and-a-half years *since* they filed their complaint.

24 ¹ Magistrate Judge Larson noted that, “instead of granting Plaintiffs’ motion to compel
25 production of documents, because discovery in this case is potentially vast and burdensome, it is
26 more prudent to give the parties a final opportunity to come to a workable solution to the current
27 discovery dispute without mandating specific production.” Dkt. No. 178 at 8. Magistrate Judge
28 Larson further expressly contemplated that Defendants would have the opportunity to “state any
individualized objections to Plaintiffs’ requests with specificity,” *id.*, and Defendants did provide
specific objections based upon both the APA and pre-1953 testing, among other objections, in
response to the Plaintiffs’ Amended Discovery Requests.

1 In its recent opinion, this Court explained that the CIA’s motion to dismiss sought
2 dismissal of Plaintiffs’ notice and health care claims in their entirety, and that if the CIA “had
3 mischaracterized the legal theory underlying [Plaintiffs’] claims, to avoid dismissal, Plaintiffs had
4 a duty in their opposition to inform the CIA and the Court.” Dkt. No. 281 at 7. Under this
5 rationale — and as set forth fully in DoD’s prior briefing — the same conclusion should be
6 reached concerning the notice and health care claims against DoD. *See* Defs.’ Mot. for Prot.
7 Order, Dkt. No. 252 at 22-25; Defs.’ Reply, Dkt. No. 286 at 11-15.

8 Here, any alleged constitutional claims regarding notice and health care did not survive
9 the Court’s January 19, 2010 order granting in part and denying in part Defendants’ motion to
10 dismiss Plaintiffs’ Second Amended Complaint. Dkt. No. 252 at 5-6 (citing Dkt. No. 59). As
11 this Court recognized in that Order (and as Plaintiffs do not dispute), “Defendants move[d] to
12 dismiss Plaintiffs’ Second Amended Complaint (SAC) *in its entirety* for lack of subject matter
13 jurisdiction and for failure to state claim.” Dkt. No. 59 at 1 (emphasis added). With respect to
14 Plaintiffs’ notice claim, Defendants argued that “Plaintiffs have no constitutional right to
15 government information.” Dkt. No. 57 at 21. At the time, Plaintiffs *agreed* with Defendants’
16 position and represented to the Court that they “*do not seek relief based on . . . a constitutional*
17 *right to information.*” Dkt. No. 43 at 24 (emphasis added). Rather, Plaintiffs argued that their
18 notice claim was based only upon Defendants’ “own duties and regulations,” and that their health
19 care claim was “based on Defendants’ obligation to provide medical care as required by their own
20 duties and regulations.” *Id.* Accordingly, this Court concluded that “Plaintiffs’ claims
21 concerning Defendants’ failure to provide medical care and proper notice of the experiments’
22 health effects arise under 5 U.S.C. § 706(1).” Dkt. No. 59 at 18.²

23 In addition, in Defendants’ partial motion to dismiss Plaintiffs’ Third Amended
24 Complaint, DoD unequivocally moved for dismissal of Plaintiffs’ claim for health care in full.

25 ² Consistent with that ruling, this Court expressly noted that Plaintiffs’ claims regarding secrecy
26 oaths, which “appear to arise under the United States Constitution, might be time-barred by
27 section 2401(a).” Dkt. No. 59 at 19. Had the Court believed that Plaintiffs had outstanding
28 constitutional claims for notice and health care against DoD, that same statute of limitations
would have applied to those claims.

1 Dkt. No. 187 at 19 (“PLAINTIFFS’ CLAIM FOR MEDICAL CARE AGAINST THE
2 DEPARTMENT OF DEFENSE MUST BE DISMISSED.”). In that motion, DoD explained that
3 “Plaintiffs’ claims of entitlement to medical care from DoD are predicated on DoD policy and
4 regulations, namely a 1953 memorandum from the Army Chief of Staff and AR 70-25.” *Id.* In
5 opposing Defendants’ motion, and consistent with their prior representations to the Court and the
6 parties, Plaintiffs did *not* allege that they were asserting a constitutional claim for health care.
7 Dkt. No. 217. And, in ruling upon Defendants’ motion, the Court expressly stated that Plaintiffs’
8 health care claim was based upon the June 1953 memorandum and AR 70-25. Dkt. No. 233 at 3-
9 4. To the extent Plaintiffs then believed they had pending constitutional claims, they were
10 obligated to say so in their responding briefs — but they did not do so. *See* Dkt. No. 281 at 7 (“If
11 the CIA had mischaracterized the legal theory underlying their claims, to avoid dismissal,
12 Plaintiffs had a duty in their opposition to inform the CIA and the Court.”).

13 Plaintiffs’ representations to the Court that they are not pursuing constitutional claims for
14 notice and health care against any of the Defendants are also consistent with the representations
15 they made in discovery. In Plaintiffs’ March 11, 2011 amended responses to Defendants’
16 interrogatories, they did not identify the Constitution as a basis for DoD’s alleged “duty to locate
17 and warn all test participants.” *See* Dkt. No. 253-2 at 16-17 (response 8). Rather, the *only* bases
18 Plaintiffs identified for this purported duty were the APA, AR 70-25, the common law, the 1953
19 Wilson Memorandum, and CS 385 (June 30, 1953). *Id.* Accordingly, Defendants respectfully
20 request that the District Court overrule that portion of the Magistrate Judge’s order concluding
21 that Plaintiffs may pursue constitutional claims for notice and health care against DoD. *See*
22 Defs.’ Mot. for Prot. Order, Dkt. No. 252 at 22-25; Defs.’ Reply, Dkt. No. 286 at 11-15.

23 **III. Plaintiffs’ APA Claims Are Limited To Post-1953 Testing.**

24 Plaintiffs contend that a 1953 Memorandum and the 1990 version of AR 70-25 constitute
25 discrete legal obligations that require DoD action under the APA. Dkt No. 43 at 6. Although the
26 issue was raised by Defendants but not addressed by the Magistrate Judge, neither of these
27 documents operates retroactively such that review of pre-1953 testing would be appropriate.
28 First, nothing in the language of the 1953 Memorandum suggests that it applies to pre-1953

1 testing. Second, the effective date of the 1990 version of AR 70-25 is February 24, 1990. *See*
2 *United States v. Gomez-Rodriguez*, 77 F.3d 1150, 1153-54 (9th Cir. 1996). Third, section 3-
3 2.a.(1)(d) of AR 70-25 provides **prospective** procedural guidance as to the affirmative steps
4 necessary to establish procedures for implementing a “duty to warn,” and section 3-2.h. provides
5 that, to establish a notification effort, the agency must **prospectively** “establish a system which
6 will permit the identification of volunteers who have participated in research conducted or
7 sponsored by that command or agency, and take actions to notify volunteers of newly acquired
8 information.” Accordingly, because there is no basis for APA review of pre-1953 testing,
9 Defendants respectfully request that this Court overturn that aspect of the Magistrate Judge’s
10 decision denying Defendants’ motion for a protective order.

11 Dated: October 7, 2011

Respectfully submitted,

12 IAN GERSHENGORN
13 Deputy Assistant Attorney General
14 MELINDA L. HAAG
15 United States Attorney
16 VINCENT M. GARVEY
17 Deputy Branch Director

18 /s/ Joshua E. Gardner

19 JOSHUA E. GARDNER
20 KIMBERLY L. HERB
21 LILY SARA FAREL
22 BRIGHAM JOHN BOWEN
23 JUDSON O. LITTLETON
24 Trial Attorneys
25 U.S. Department of Justice
26 Civil Division, Federal Programs Branch
27 P.O. Box 883
28 Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8470
E-mail: joshua.e.gardner@usdoj.gov