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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA *et al.*, Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY *et al.*, Defendants.	Case No. CV 09-0037-CW **[PROPOSED] INJUNCTION AND JUDGMENT PURSUANT TO THE COURT'S SUMMARY JUDGMENT ORDER** Complaint filed January 7, 2009

PLAINTIFFS' PROPOSED INJUNCTION

WHEREAS, the Court has granted Plaintiffs summary judgment that Defendant Department of the Army has an ongoing duty to warn members of the class about newly acquired information that may affect their well-being now and in the future as it becomes available, and good cause appearing therefor;

IT IS HEREBY ORDERED that said Defendant is enjoined as follows:

1. This injunction pertains only to individuals who, while serving in the armed forces, were test subjects in any testing program in which humans were exposed to a chemical or biological substance for the purpose of studying or observing the effects of such exposure (that was sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof, including but not limited to the Department of the Army). Defendant shall provide such test subjects with newly acquired information that may affect their well-being that it has learned since its original notification, now and in the future as it becomes available, as set forth below.

2. This injunction applies only to information that may affect the well-being of test subjects that has been acquired by the Department of the Army and/or its agents since June 30, 2006. Specifically, as the Court has ruled, that information to be provided to each test subject includes:

a. The nature, duration, and purpose of the testing undergone by that particular test subject;

b. The method and means by which the testing was conducted;

c. The inconveniences and hazards reasonably to be expected by that test subject as a result of participation in the testing; and

d. The effects upon their health which may possibly come from such participation.

Such information is referred to hereafter as the "Newly Acquired Information";

3. Class members who became test subjects before August 8, 1988, shall be notified of Newly Acquired Information;

4. Within thirty (30) days of the date of entry of this injunction (the "Entry Date"), the Department of the Army shall file with the Court a report:

a. describing the efforts it has undertaken to locate the Newly Acquired Information as of the Entry Date from the various sources of information available to it, which may include, but are not limited to, such sources as the Chem-Bio Database, the Mustard Gas Database, the Chemical, Biological, Radiological & Nuclear Defense Information Analysis Center ("CBRNIAC") Database and other related databases created in conjunction with Battelle Memorial Institute, and the Defense Technical Information Center ("DTIC") repository;

b. confirming whether Newly Acquired Information has been found and describing generally its nature;

c. explaining the plan it has in its discretion developed for transmitting Newly Acquired Information to the class members entitled to notification, including the methods intended for notification which may include direct mail, online notice, and/or publication notice;

d. committing to transmit the Newly Acquired Information as of the Entry Date to those class members no later than ninety (90) days from the Entry Date, and outlining its plan to do so; and

e. outlining the plan and policies it has in its discretion developed for (i) periodically collecting and transmitting Newly Acquired Information that becomes available to it after the Entry Date and (ii) providing any necessary update reports to the Court regarding such future efforts.

5. The Court retains jurisdiction to enforce the terms of this Injunction and Order.

Dated: _____

_____
The Honorable Claudia Wilken, Chief District Judge,
Northern District of California

PLAINTIFFS' PROPOSED JUDGMENT

This matter came before the Court on Plaintiffs' motion for partial summary judgment and Defendants' cross-motion for summary judgment. On July 24, 2013, the Court issued a Memorandum Decision and Order granting, in part, and denying, in part, Plaintiffs' motion for partial summary judgment and granting, in part, and denying, in part, Defendants' cross-motion for summary judgment. (Docket No. 537.) Based on the Memorandum Decision and Order, and pursuant to Rule 54 of the Federal Rules of Civil Procedure,

IT IS HEREBY ADJUDGED AS FOLLOWS:

1. Judgment is entered for Plaintiffs on their claim, pursuant to the Administrative Procedures Act ("APA"), that Defendant Department of the Army ("Army") has an ongoing duty to warn class members of any information acquired after the last notice was provided, and in the future, that may affect their well-being, when that information becomes available ("Notice Claim"). Plaintiffs are entitled to an injunction on that Notice Claim and such injunction shall issue. All other aspects of Plaintiffs' APA claims for notice are dismissed with prejudice.
2. All of Plaintiffs' APA claims for medical care are dismissed with prejudice. [Plaintiffs have filed a Motion for Leave to File a Motion for Reconsideration regarding this claim and a proposed Motion for Reconsideration. (Docket Nos. 538, 538-1).]
3. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to provide Plaintiffs with notice, medical care and a release from secrecy oaths violated their substantive due process liberty rights, including their right to bodily integrity, is dismissed with prejudice.
4. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to provide Plaintiffs with any procedures whatsoever to challenge this deprivation violated their procedural due process rights, is dismissed with prejudice.
5. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to comply with their own regulations and procedures regarding notice and medical care deprived Plaintiffs of their due process rights, is dismissed with prejudice.

6. Plaintiffs' claim that, under the First and Fourteenth Amendment, the failure to provide a release from secrecy oaths prevented Plaintiffs from filing claims for benefits with the DVA and thereby violated their right of access to the courts, is dismissed with prejudice.
7. Plaintiffs' claim for a declaration that any secrecy oaths are invalid and claim for an injunction requiring Defendants to notify Plaintiffs that they have been released from such oaths is dismissed with prejudice.
8. Plaintiffs' claim against the Department of Veterans Affairs is dismissed with prejudice.
9. The Court declares that the Army has an obligation under AR 70-25 to warn individuals who, while serving in the armed forces, were test subjects in any testing program in which humans were exposed to a chemical or biological substance for the purpose of studying or observing the effects of such exposure (that was sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof, including but not limited to the Department of the Army) of any information acquired after the last notice was provided, and in the future, that may affect their well-being, when that information becomes available.

IT IS SO ORDERED AND ADJUDGED.

Dated: _____

_____
The Honorable Claudia Wilken,
Chief District Judge, Northern District of California

DEFENDANTS' STATEMENT AND PROPOSED FINAL JUDGMENT

INTRODUCTION

In its July 24, 2013 Order, the Court granted summary judgment to Defendants on all of Plaintiffs' claims, except for a portion of their Administrative Procedure Act ("APA") claim against the Army concerning an ongoing "duty to warn." On that claim, the Court granted summary judgment to Plaintiffs "to the extent that Plaintiffs seek to require the Army to warn class members of any information acquired after the last notice was provided, and in the future, that may affect their well-being, when that information becomes available." Dkt. 537 at 72. The Court ordered the parties to "submit a joint proposed injunction and judgment that comply with the terms of this order" within fourteen days of the entry of its order. *Id.* The Court further noted that, if the parties were unable to agree to the form of an injunction and the judgment, the parties shall "file a single form of each that shows the terms to which they were able to agree and their separate proposals for the remaining terms." *Id*.

In compliance with the Court's Order of July 24, 2013, Defendants hereby submit their proposed form of judgment. By the submission of this alternative form of judgment, the Defendants do not consent to the entry of any judgment against them in this case for any relief (including the alternative judgment), and we continue to oppose the Court's liability determination on which any such judgment would be based. Defendants have submitted this alternative form of judgment solely to set forth their view, discussed herein, that only limited relief would be available to Plaintiffs in any event under the Court's contested decision finding liability and applicable law. Any judgment entered against Defendants (including the alternative form of judgment) would then be subject to appeal by Defendants. Defendants hereby provide the following statement explaining our proposed final judgment.

DISCUSION

Injunctive relief "does not automatically issue upon a finding of liability." *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 943, 948 (N.D. Cal. 2009). "When it is awarded, equitable relief must be carefully tailored to 'be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Sierra Forest Legacy v. Sherman*, Nos. 2:05-cv-00205, 2:05-cv-

00211, 2013 WL 1627894, at *6 (E.D. Cal. Apr. 15, 2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Plaintiffs have the burden of establishing entitlement to injunctive relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This is true even where injunctive relief is sought after a finding of liability. *See Apple Inc.*, 673 F. Supp. 2d at 948. As discussed below, Defendants submit that prospective injunctive relief is inappropriate.

Defendants' Views on Plaintiffs' Proposed Injunction

Even if an injunction were appropriate under these circumstances, Plaintiffs' proposed injunction is inappropriate for several reasons. As discussed below, it reaches beyond the scope of the Court's liability finding, infringes on agency discretion, imposes the burden of continuing Court oversight, and could potentially subject the Department of the Army to contempt proceedings for every alleged violation. First, Plaintiffs' proposed injunction seeks to enjoin aspects of the "Notice" claims over which the Court granted Defendants' motion for summary judgment. In Plaintiffs' motion for partial summary judgment, they defined "Notice" to mean "notice to each test subject regarding the substances and doses to which he or she was exposed, the route of exposure (*e.g.*, inhalation, injection, dermal, etc.), and the known or potential health effects associated with those exposures or with participation in the tests, with a continuing duty to provide updated information as it is acquired." Dkt. 490 at 1, n.1. Later in that same brief, Plaintiffs further defined what they meant by "Notice" as follows:

> The duty flowing from AR 70-25, reflected in its plain meaning, requires Defendants to provide individualized Notice of the "nature" and "methods and means" of the testing (e.g., exposure, substance tested, route of exposure, and dose), "the inconveniences and hazards," and "the effects upon [the test subject's] health or person which may possibly come from his participation in the experiment" (e.g., potential health effects, including updated information as it is acquired). AR 70-25 ¶ 4(a)(1) (1962).

Id. at 8-9.

In other words, Plaintiffs drew a clear distinction between the "nature" and "methods and means" of the testing, on the one hand, and "the inconveniences and hazards" and "the effects upon [the test subject's] health or person, which may possibly come from his participation in the experiment," on the other. It is only these later two categories of "Notice" — *e..g.*, the "duty to

warn" — over which the Court granted Plaintiffs summary judgment, while granting Defendants' summary judgment motion with respect to the remainder of Plaintiffs' notice claim. *See* Dkt. 537 at 32; 40 ("[T]he Court concludes that Defendants' duty to warn test subjects of possible health effects is not limited to the time that these individuals provide consent to participate in the experiments. Instead, Defendants have an ongoing duty to warn about newly acquired information that may affect the well-being of test subjects after they completed their participation in research."). Accordingly, the Court granted Plaintiffs' summary judgment motion only "to the extent that Plaintiffs seek to require the Army to warn class members of any information acquired after the last notice was provided, and in the future, that may affect their well-being, when that information becomes available." *Id.* at 72.

Despite the Court's ruling, Plaintiffs in their proposed injunction seek to obscure their prior distinctions concerning different categories of "Notice" and require the Army to provide information to class members concerning, among other things, "[t]he nature, duration, and purpose of the testing undergone by that particular test subject;" and "[t]he method and means by which the testing was conducted." *See* Pls' Proposed Injunction ¶ 2(a)-(b). The Court should thus reject Plaintiffs' attempt to shoehorn information regarding "the substances and doses to which he or she was exposed," and "the route of exposure" into the "duty to warn."[1]

[1] Relatedly, Plaintiffs' proposed injunction seeks to impose obligations upon the Department of Defense ("DoD") despite the Court's dismissal of all claims against that agency. *See* Dkt. 537 at 44 ("Because the Court dismissed the claim based on the Wilson Directive and found no basis for enforcing CS: 385 and AR [70-25] against the DoD, the Court grants judgment in favor of the DoD on this claim in its entirety."). Specifically, Plaintiffs' proposed injunction seeks to obligate the Army to provide "newly acquired information that may effect their well being" concerning tests that were "sponsored, overseen, directed, funded, and/or conducted by the Department of Defense or any branch thereof." *See* Pls' Proposed Injunction at ¶ 1. There is no legal basis to obligate the Army to exercise a duty to warn concerning any tests that were conducted by a service branch other than the Army. Similarly, Plaintiffs' proposed injunction states that it "applies only to information that may affect the well-being of test subjects that has been acquired by the Department of the Army and/or Department of Defense since June 30, 2006." *Id.* at ¶ 2. Again, there is no legal basis to obligate the Department of the Army to exercise a "duty to warn" based upon newly discovered information by the Department of Defense. Accordingly, Plaintiffs' attempt to include the Department of Defense within the terms of their proposed injunction is inappropriate.

Second, rather than focus upon the existence of a "duty to warn," Plaintiffs' proposed injunction impermissibly attempts to provide Plaintiffs' counsel and the Court with oversight over how the Department of Army must fulfill that duty, raising with it the attendant possibility of contempt through continuing court oversight for the failure to do so. This is inappropriate under the narrow scope of review under section 706(1) of the APA. As the Supreme Court has explained, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004).[2] Yet, through their proposed injunction Plaintiffs seek Court review and oversight precisely to "specify" how the Department of the Army must carry out a "duty to warn" under AR 70-25. For example, Plaintiffs' proposed injunction sets forth oversight obligations concerning which sources of information the Army should examine ("which may include, but are not limited to, such sources as the Chem-Bio Database, the Mustard Gas Database, the Chemical, Biological, Radiological & Nuclear Defense Information Analysis Center ("CBRNIAC") Database and other related databases created in conjunction with Battelle Memorial Institute, and the Defense Technical Information Center ("DTIC") repository"); oversight obligations concerning the creation of a "plan it has in its discretion developed for transmitting Newly Acquired Information to the class members entitled to notification, including the methods intended for notification such as direct mail, online notice, and publication notice" — presumably for Court and class counsel approval; requiring the transmission of information associated with the "duty to warn" within a fixed timeframe ("committing to transmit the Newly Acquired Information as of the Entry Date to those class members no later than ninety (90) days from the Entry Date, and outlining its plan to do so"); and providing reporting requirements concerning the implementation of a "duty to warn" (requiring that the Army "outlin[e] the plan and policies it has in its discretion developed for (i) periodically collecting and transmitting Newly Acquired

[2] Plaintiffs' apparent position now stands in contrast to the position taken in their summary judgment briefing, in which they recognized and acknowledged that "[a]gencies will always possess some inherent discretion over how to do something they are required to do. But that does not negate the underlying mandatory duty to act." Dkt. 502 at 10.

Information that becomes available to it after the Entry Date and (ii) providing any necessary update reports to the Court and Plaintiffs' counsel regarding such future efforts.") Pls' Proposed Injunction ¶ 4(a)-(e).

Plaintiffs' injunction thus goes well beyond the narrow relief they can obtain under section 706(1) and, indeed, highlights why, as discussed below, the "duty to warn" language in the 1988, 1989 and 1990 versions of AR 70-25 is not properly the subject of a section 706(1) claim in the first instance. As the Court correctly noted in its summary judgment decision, "[a] claim under § 706(1) can be maintained 'only where there has been a genuine failure to act.' *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). The Ninth Circuit 'has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Id*. (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991))." Dkt. 537 at 42. Accordingly, the Court rejected Plaintiffs' claim "to the extent that Plaintiffs seek to require the DOD and Army to provide notice to each class member which discloses on an individual basis the substances to which he or she was exposed, the doses to which he or she was exposed, the route of exposure and the known effects of the testing," because such a claim "is not brought properly under § 706(1)." Dkt 537 at 43. Plaintiffs' proposed injunction, which seeks to require the Court (and Plaintiffs) to oversee the Army's implementation of a "duty to warn" is thus impermissible given the APA claim brought by Plaintiffs in this case.

Defendants' Additional Views Regarding Injunctive Relief

The prospect of a prospective injunction and the associated risk of contempt for failure to follow such an injunction in the future is made all the more problematic given the inherently discretionary nature of the "duty to warn" found by the Court. While the Court found the *existence* of such a duty, the Court did not —and through issuance of an injunction cannot — dictate the Army's *exercise* of that duty. In its order, the Court granted summary judgment to the Plaintiffs only "to the extent that Plaintiffs seek to require the Army to warn class members of any information acquired after the last notice was provided, and in the future, that *may* affect their well-being, *when that information becomes available*." Dkt. 537 at 72 (emphasis added). The

duty to warn is only triggered if, in the exercise of the agency's scientific judgment, it determines that the newly acquired information ***may*** affect the well-being of test participants. Because the "duty to warn" contained in AR 70-25 is necessarily predicated on a scientific and discretionary judgment by the Army, the actual exercise of that duty may form neither the basis for a section 706(1) claim nor the basis for a prospective injunction. *See In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (recognizing the highly discretionary nature of a "duty to warn" of newly discovery information concerning health effects in the context of an FTCA claim).

In *Atmospheric Testing*, plaintiffs brought an FTCA action claiming that the government breached a duty to warn radiation test participants of the dangers to which they may have been exposed. *Id.* at 996. The Ninth Circuit concluded that such a duty fell squarely within the "discretionary function" exception to the FTCA because:

> any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not known. A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants.

Id. at 997. The policy that underlies the FTCA's "discretionary function" exception and the limitations upon judicial review contained in section 706(1) are similar: to avoid excessive judicial entanglement in the inner workings and discretionary decision-making of the Executive Branch. Because the "duty to warn" contained in AR 70-25 vests substantial discretion in Army officials to determine when and under what circumstances that duty is triggered, prospective injunctive relief is inappropriate.

In addition, the inherently discretionary duty to warn contained in the 1988, 1989, and 1990 versions of AR 70-25 counsel against the imposition of a prospective injunction under Federal Rule of Civil Procedure 65(d), which requires that "[e]very order granting an injunction" must "state its terms specifically," and "describe in reasonable detail — and not by reference to

the complaint or other document — the act or acts restrained or required." As the Supreme Court has explained,

> the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."

Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (footnotes and citations omitted); *Atiyeh v. Capps*, 449 U.S. 1312, 1317 (1981) (staying district court injunction pending appeal because the language in the injunction directing prison officials to accomplish a reduction of "at least 250" by a certain date "falls short of this specificity requirement"); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1048 (9th Cir. 2013) (holding that portions of an injunction were too vague to be enforceable under Rule 65, including, among other provisions, a prohibition from "soliciting or targeting a user base generally understood, in substantial part, to be engaging in infringement . . ."); *Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000) (vacating district court's imposition of an injunction because the injunction failed to provide guidance regarding how the enjoined party should determine what particular information is confidential or privileged").

Questions concerning how, when, and in what manner the duty to warn should be exercised under AR 70-25 demonstrate that an injunction to follow the regulation would lack the requisite specificity to comply with Rule 65. For example, the question of what level of scientific evidence is required to trigger the duty to warn in a particular case, let alone what form the notice must take, must be left to agency discretion and cannot be enjoined on a class-wide basis under Section 706(1). Likewise, whether the government must actively seek out studies or scientific research concerning the various test substances, and from what sources they must search, should be left to the Army. Similar questions reinforce the point: whether, in exercising the duty to warn, the Army must search through foreign medical journals; whether the Army must search for and notify test participants of journals that consider the health effects on non-humans, such as mice; whether the Army must search the world's literature on a daily basis; whether the Army must

conduct annual studies; whether the Army's notification obligation could be satisfied by posting the studies or information on DoD or Army websites; whether, if an injunction were entered, the Army would be at risk of contempt if it was unable to find the current address for a particular test participant if it believed that he was at risk for a certain medical condition. As in *Atmospheric Testing*, all of these questions highlight the inherently discretionary nature of a duty to warn and why prospective injunctive relief would be inappropriate under the circumstances.

Furthermore, determining what constitutes "Newly Acquired Information," and when the acquisition of such information triggers a "duty to warn" through notices or otherwise, will simply embroil the Court in endless rounds of litigation over whether particular information is sufficiently reliable or medically important enough to justify not only the significant burdens of locating particular test subjects and providing new "warnings," but also whether this burden outweighs the considerable danger of unduly alarming former service members about phantom risks based upon potentially unreliable information or reports. This reinforces the fact that these are quintessentially determinations that must be left to the discretion of the military, and any injunction would improperly establish the Court as an arbiter of endless disputes between Plaintiffs and the government in areas far beyond the Court's competence.

The inappropriateness of the entry of a prospective injunction is further highlighted by the Court's finding in its July 24, 2013 Order that the application of the "duty to warn" contained in certain versions of AR 70-25 was ambiguous. In its July 24, 2013 Order, the Court recognized that that an APA 706(1) claim can only proceed where a plaintiff asserts that an agency has failed to take a discrete legal action required by law. Dkt. 537 at 21. The Court then correctly explained that "[a] discrete action is legally required when the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Id.*

In determining whether AR 70-25 creates a duty to warn individuals who participated in tests before the regulation was amended in 1988, the Court made the following observation:

> As the Court previously noted, there is nothing in these documents that "limits these forward-looking provisions to those people who became test volunteers after the regulation was created." Class Cert. Order, Docket No. 485, 39-40. However, there is also nothing that clearly requires that these provisions apply to those who became test volunteers before they were created.

Id. at 33. The Court elsewhere held that AR 70-25 was "less clear whether this ongoing duty is owed to individuals who participated in tests before 1988 or whether it is limited to only those who might have done so after AR 70-25 was revised in 1988;" *id.*, observed that AR 70-25 "does not make clear" that it applies to individuals who participated in tests before 1988; *id.*, and that language in the 1988, 1989 and 1990 versions of AR 70-25 "did not clearly include" individuals who participated in tests before 1988. *Id*. at 33 -34. Ultimately, the Court determined that AR 70-25 was ambiguous as to whether it applied to individuals who were test participants before the regulation was amended and settled on the interpretation that it found "more persuasive." *Id.* at 34, 39. Given that the Court found that AR 70-25 is ambiguous as to whether the "duty to warn" applies to the class members, AR 70-25 cannot create a sufficiently clear legal duty to give rise to an injunction (or liability, for that matter) under APA section 706(1).

Finally, because the Court based its conclusion that the Army had a "duty to warn" on its interpretation of AR 70-25, it logically follows that the only injunction that would be consistent with that holding would be an injunction that required the Army to abide by AR 70-25. Yet courts have expressed substantial concerns about entering such "follow-the-law" injunctions. The Ninth Circuit has recognized "the well established principle of federal law that administrative agencies are entitled to a presumption that they 'act properly and according to law.'" *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007) (quoting *Fed. Comc'ns Comm'n v. Schreiber*, 381 U.S. 279, 296 (1965)); *See also United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (internal citations omitted).

As numerous courts have recognized, "[i]njunctions that broadly order the enjoined party simply to obey the law and not violate the statute are generally impermissible." *NLRB v. U.S. Postal Serv.*, 486 F.3d 683, 691 (10th Cir. 2007); *see Int'l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004). An injunction to follow the law is particularly inappropriate in a case brought against a government agency because it could potentially subject the agency to charges of contempt for every alleged failure to comply and would deprive the agency of the

framework Congress created for adjudicating such claims under the Administrative Procedure Act. *Cobell v. Norton*, 392 F.3d 461, 475 (D.C. Cir. 2004) (holding that under an order to obey the law, "defendants would be subject to contempt charges for every legal failing, rather than simply to the civil remedies provided in the APA"); *see NLRB v. Express Pub. Co.*, 312 U.S. 426, 435–36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged"). Accordingly, because the Court's order finding liability based on its interpretation of AR 70-25 could only give rise to an inappropriate follow-the-law directive, the Court should not enter an injunction in this case.

Defendants' Proposed Judgment

For the foregoing reasons, and in light of the broad, open-ended language in AR 70-25, Defendants submit it would be inappropriate to enter a prospective injunction, with the possibility of contempt for failure to abide by such an injunction, based upon the Court's finding that AR 70-25 creates a "duty to warn" class members. Accordingly, pursuant to the Court's July 24, 2013 Order, Defendants propose an alternative form of judgment that we believe would be appropriate under the circumstances should the Court determine to enter judgment against the Army over Defendants' objections. As noted above, by the submission of this alternative form of judgment, the Defendants do not consent to the entry of any judgment against them in this case for any relief (including the alternative judgment), and we continue to oppose the Court's liability determination on which any such judgment would be based. Defendants have submitted this alternative form of judgment solely to set forth their view, discussed herein, that only limited relief would be available to Plaintiffs in any event under the Court's contested decision finding liability and applicable law. Any judgment entered against Defendants (including the alternative form of judgment) would then be subject to appeal by Defendants.[3]

[3] On page 44 of its summary judgment Order, the Court stated that "[b]ecause the Court dismissed the claim based on the Wilson directive and found no basis for enforcing CS: 385 and

DEFENDANTS' ALTERNATIVE PROPOSED FINAL JUDGMENT

This matter came before the Court on Plaintiffs' motion for partial summary judgment and Defendants' cross-motion for summary judgment. On July 24, 2013, the Court issued a Memorandum Decision and Order granting, in part, and denying, in part, Plaintiffs' motion for partial summary judgment and granting, in part, and denying, in part, Defendants' cross-motion for summary judgment. Dkt. 537. Based on the Memorandum Decision and Order, and pursuant to Rule 54 of the Federal Rules of Civil Procedure,

IT IS HEREBY ADJUDGED AS FOLLOWS:

1. All of Plaintiffs' APA claims for notice, except to the extent that Plaintiffs seek to warn class members of any information acquired after the last notice that may affect their well-being when that information has become available and in the future, are dismissed with prejudice.
2. All of Plaintiffs' APA claims for medical care are dismissed with prejudice.
3. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to provide Plaintiffs with notice, medical care and a release from secrecy oaths violated their substantive due process liberty rights, including their right to bodily integrity, is dismissed with prejudice.
4. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to provide Plaintiffs with any procedures whatsoever to challenge this deprivation violated their procedural due process rights, is dismissed with prejudice.
5. Plaintiffs' claim that, under the Fifth Amendment, these Defendants' failure to comply with their own regulations and procedures regarding notice and medical care deprived Plaintiffs of their due process rights, is dismissed with prejudice.
6. Plaintiffs' claim that, under the First and Fourteenth Amendment, the failure to provide a release from secrecy oaths prevented Plaintiffs from filing claims for benefits with the DVA and thereby violated their right of access to the courts, is dismissed with prejudice.

AR 90-75 against the DOD, the Court grants judgment in favor of the DOD on this claim in its entirety." Dkt. 537 at 44. It appears the Court intended to refer to AR 70-25 rather than AR 90-75.

7. Plaintiffs' claim for a declaration that any secrecy oaths are invalid and claim for an injunction requiring Defendants to notify Plaintiffs that they have been released from such oaths is dismissed with prejudice.

8. Plaintiffs' claim against the Department of Veterans Affairs is dismissed with prejudice.

9. The Court declares that the Army has an obligation under the 1988, 1989 and 1990 versions of AR 70-25 to warn class members who participated in Army testing of any information acquired after the last notice was provided, and in the future, that may affect their well-being, when that information becomes available.

IT IS SO ORDERED AND ADJUDGED.

DATE: _____

_____
CLAUDIA WILKEN
United States District Chief Judge

PLAINTIFFS' STATEMENT REGARDING "DEFENDANTS' STATEMENT AND PROPOSED FINAL JUDGMENT"

The Court ordered the parties to "submit a joint proposed injunction and judgment that comply with the terms of this Order. If the parties are unable to agree to the terms of the injunction and the judgment, they shall file a single form of each that shows the terms to which they were able to agree and their separate proposals for the remaining terms. Thereafter, an injunction and judgment shall enter." (July 24, 2013 Order (Docket No. 537) at 72.) Plaintiffs submit that Defendants' attached "Statement," which offers no form of injunction — and much of which is devoted to arguing why no injunction should issue at all — is not exactly in the spirit of the Court's Order. It reads more like a motion for reconsideration (without leave) of the Court's ruling in Plaintiffs' favor on the notice claim (*id.* at 44). Plaintiffs can certainly respond if and when the Court may order, but wish to avoid delay in having the injunction entered.

Plaintiffs have submitted a form of Judgment that differs from Defendants' proposed form only with respect to paragraphs 1 and 9 (pertaining to the APA notice claim) and paragraph 2 (which notes that Plaintiffs have moved for leave to seek reconsideration on their APA medical care claim).

Dated: August 6, 2013

JAMES P. BENNETT
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Attestation Pursuant to Civil Local Rule 5-1

I, Eugene Illovsky, am the ECF User whose ID and password are being used to file this document. I hereby attest that Joshua E. Gardner concurs in this filing.

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