

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

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

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; JOHN
BRENNAN, Director of the Central
Intelligence Agency; UNITED
STATES DEPARTMENT OF DEFENSE;
CHARLES T. HAGEL, Secretary of
Defense; UNITED STATES DEPARTMENT
OF THE ARMY; JOHN M. MCHUGH,
United States Secretary of the
Army; UNITED STATES OF AMERICA;
ERIC H. HOLDER, Jr., Attorney
General of the United States;
UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS; 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 SUMMARY
JUDGMENT (Docket
No. 490) AND
GRANTING IN PART
AND DENYING IN
PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT (Docket
No. 495)

Plaintiffs Vietnam Veterans of America, Swords to Plowshares:
Veterans Rights Organization, Bruce Price, Franklin D. Rochelle,
Larry Meirow, Eric P. Muth, David C. Dufrane, Tim Michael Josephs,
William Blazinski and Kathryn McMillan-Forrest move for partial
summary judgment, holding that Defendants U.S. Department of
Defense and its Secretary Charles T. Hagel (collectively, DOD) and
the U.S. Department of the Army and its Secretary John M. McHugh

United States District Court
For the Northern District of California

1 (collectively, Army) have legal obligations under the
2 Administrative Procedures Act (APA) to provide notice and medical
3 care to test subjects. Plaintiffs do not seek summary judgment on
4 any of their class or individual claims against the remaining
5 Defendants or on any of their other claims against the DOD and the
6 Army. Defendants United States of America; U.S. Attorney General
7 Eric Holder; the Central Intelligence Agency and its Director John
8 Brennan (collectively, CIA); the DOD; the Army; and the U.S.
9 Department of Veterans Affairs and its Secretary Eric K. Shinseki
10 (collectively, DVA) oppose Plaintiffs' motion and move for summary
11 judgment on all of Plaintiffs' individual and class claims against
12 them.¹ Having considered the papers filed by the parties and
13 their arguments at the hearing, the Court GRANTS in part and
14 DENIES in part Plaintiffs' motion and GRANTS in part and DENIES in
15 part Defendants' cross-motion.

16 BACKGROUND

17 "Military experiments using service member[s] as subjects
18 have been an integral part of U.S. chemical weapons program,
19 producing tens of thousands of 'soldier volunteers' experimentally
20 exposed to a wide range of chemical agents from World War I to
21 about 1975." Patterson Decl., Ex. 3, Docket No. 491-3,
22 VET001_015677. "On June 28, 1918, the President directed the
23 establishment of the Chemical Warfare Service (CWS)." Gardner
24 Decl., Ex. 1, Docket No. 496-1, PLTF014154. CWS was originally
25 part of the War Department and became part of the U.S. Army on
26 _____

27 ¹ Pursuant to Federal Rule of Civil Procedure 25(d), the Court
28 substitutes Director Brennan and Secretary Hagel in place of their
predecessors.

1 July 1, 1920. Gardner Decl., Ex. 16, Docket No. 496-22, 27-28.
2 At the end of World War I, CWS was consolidated at the Edgewood
3 Arsenal in Maryland. Id. In about 1922, "the CWS created a
4 Medical Research Division to conduct research directed at
5 providing a defense against chemical agents." Gardner Decl., Ex.
6 1, Docket No. 496-1, PLTF014154. Between 1920 and 1936, the
7 Medical Research Division continued to carry out experiments
8 regarding chemical warfare agents, including experiments that used
9 human subjects, mostly drawn from personnel working at Edgewood
10 Arsenal. Gardner Decl., Ex. 16, Docket No. 496-22, 28.

11 "Formal authority to recruit and use volunteer subjects in
12 [chemical warfare] experiments was initiated in 1942." Gardner
13 Decl., Ex. 1, Docket No. 496-1, PLTF014154. By the end of World
14 War II, "over 60,000 U.S. servicemen had been used as human
15 subjects in this chemical defense research program." Gardner
16 Decl., Ex. 16, Docket No. 496-22, 1. "At least 4,000 of these
17 subjects had participated in tests conducted with high
18 concentrations of mustard agents or Lewisite in gas chambers or in
19 field exercises over contaminated ground area." Id. Human
20 subjects were used in these tests to test the effectiveness of
21 protective clothing, among other things. Id. at 31. The most
22 common tests were patch, or drop, tests, in which a drop of an
23 agent was put on the arm, to "to assess the efficacy of a
24 multitude of protective or decontamination ointments, treatments
25 for mustard agent and Lewisite burns, effects of multiple
26 exposures on sensitivity, and the effects of physical exercise on
27 the severity of chemical burns." Id.
28

1 After the conclusion of World War II, the CWS's research
2 programs were scaled down and little research was conducted
3 between 1946 and 1950. "From 1955 to 1975, thousands of U.S.
4 service members were experimentally treated with a wide range of
5 agents, primarily at U.S. Army Laboratories at Edgewood Arsenal,
6 Maryland." Patterson Decl., Ex. 3, Docket No. 491-3,
7 VET001_015677; see also Answer to Fourth Am. Compl. ¶ 5 (admitting
8 "that the DOD used approximately 7,800 armed services personnel in
9 the experimentation program at Edgewood Arsenal"). During this
10 time period, the focus of the human testing was on newer chemical
11 agents that were "perceived to pose greater threats than sulfur
12 mustard or Lewisite," including nerve gases and psychoactive
13 drugs. Gardner Decl., Ex. 16, Docket No. 496-22, 46; see also
14 Answer to Fourth Am. Compl. ¶ 5 (admitting that the "DOD
15 administered 250 to 400 chemical and biological agents during the
16 course of its research at Edgewood Arsenal involving human
17 subjects"). Between 1954 and 1973, about 2,300 individuals, who
18 entered military service as conscientious objectors and ninety
19 percent of whom were Seventh Day Adventists, were used as human
20 subjects in experiments to test biological agents at Fort Detrick
21 in Frederick, Maryland. Gardner Decl., Ex. 12, Docket No. 496-18,
22 183.

23 The Department of Defense no longer tests live agents on
24 human subjects. Gardner Decl., Ex. 4 (Depo. of Anthony Lee),
25 Docket No. 496-6, 45:1-46:8. Human testing of chemical compounds
26 at Edgewood Arsenal was suspended on July 28, 1976, although
27 "protective suit tests" continued to take place between 1976 and
28 1979. Gardner Decl., Ex. 7 (Decl. of Lloyd Roberts), ¶ 4.

1 Various memoranda and regulations were intended to govern
2 these experiments. In February 1953, the Secretary of Defense
3 issued the Wilson Directive to the Secretaries of the Army, Navy
4 and Air Force. Patterson Decl., Ex. 4, Docket No. 491-4, C-001.
5 In it, he informed them that "the policy set forth will govern the
6 use of human volunteers by the Department of Defense in
7 experimental research in the fields of atomic, biological and/or
8 chemical warfare." Id. The Wilson Directive stated, "The
9 voluntary consent of the human subject is absolutely essential,"
10 and provided,

11 This means that the person involved should have legal
12 capacity to give consent; should be so situated as to be
13 able to exercise free power of choice, without the
14 intervention of any element of force, fraud, deceit,
15 duress, over-reaching, or other ulterior form of
16 constraint or coercion; and should have sufficient
17 knowledge and comprehension of the elements of the
18 subject matter involved as to enable him to make an
19 understanding and enlightened decision. This latter
20 element requires that before the acceptance of an
21 affirmative decision by the experiment subject there
22 should be made known to him the nature, duration, and
23 purpose of the experiment; the method and means by which
24 it is to be conducted; all inconveniences and hazards
25 reasonably to be expected; and the effects upon his
26 health or person which may possibly come from his
27 participation in the experiment.

20 Id. at C-001-02. It further stated, "Proper preparation should be
21 made and adequate facilities provided to protect the experimental
22 subject against even remote possibilities of injury, disability,
23 or death." Id. at C-003. The memorandum provided, "The
24 Secretaries of the Army, Navy and Air Force are authorized to
25 conduct experiments in connection with the development of defense
26 of all types against atomic, biological and/or chemical warfare
27 agents involving the use of human subjects within the limits
28 prescribed above." Id. The Secretary of Defense warned that the

1 addressees "will be responsible for insuring compliance with the
2 provisions of this memorandum within their respective Services."

3 Id.

4 A June 1953 Department of the Army memorandum, CS: 385,
5 repeated the requirements set forth in the Wilson Directive and
6 further stated, "Medical treatment and hospitalization will be
7 provided for all casualties of the experimentation as required."
8 Patterson Decl., Ex. 5, Docket No. 491-5, VVA 024544.

9 These requirements were codified in Army Regulation (AR) 70-
10 25, which was promulgated on March 26, 1962 and later reissued in
11 1974. See Gardner Decl., Exs. 47, 48, Docket Nos. 496-55, 496-56.
12 Both versions set forth "[c]ertain basic principles" that "must be
13 observed to satisfy moral, ethical, and legal concepts." Gardner
14 Decl., Ex. 47, Docket No. 496-55, 1; Gardner Decl., Ex. 48, Docket
15 no. 496-56, 1. Like the earlier memoranda, the regulations
16 provided, "Voluntary consent is absolutely essential," and stated,

17 The volunteer will have legal capacity to give consent,
18 and must give consent freely without being subjected to
19 any force or duress. He must have sufficient
20 understanding of the implications of his participation
21 to enable him to make an informed decision, so far as
22 such knowledge does not compromise the experiment. He
23 will be told as much of the nature, duration, and
24 purpose of the experiment, the method and means by which
25 it is to be conducted, and the inconveniences and
26 hazards to be expected, as will not invalidate the
27 results. He will be fully informed of the effects upon
28 his health or person which may possibly come from his
participation in the experiment.

24 Gardner Decl., Ex. 47, Docket No. 496-55, 1; Gardner Decl., Ex.
25 48, Docket No. 496-56, 1. The regulations also mandated,
26 "Required medical treatment and hospitalization will be provided
27 for all casualties." Gardner Decl., Ex. 47, Docket No. 496-55, 2;
28 Gardner Decl., Ex. 48, Docket No. 496-56, 2.

1 On August 8, 1979, Army General Counsel Jill Wine-Volner
2 issued a memorandum to various high-level Army officials,
3 entitled, "Notification of Participants in Drug or
4 Chemical/Biological Agent Research." Patterson Decl., Ex. 6,
5 Docket No. 491-6, VET123-084994-95. In the memorandum, Wine-
6 Vollner asked for input regarding the creation of a program to
7 "notify those individuals who were not fully informed participants
8 and may have suffered injury or be subject to a possible injury."
9 Id. at VET123-084994. She stated that "the legal necessity for a
10 notification program is not open to dispute" and that the Army may
11 be held to have a legal obligation to notify those who are still
12 adversely affected by their prior involvement in its testing
13 programs. Id. In a subsequent memorandum issued on September 24,
14 1979, Wine-Volner advised the Director of the Army Staff, "If
15 there is reason to believe that any participants in such research
16 programs face the risk of continuing injury, those participants
17 should be notified of their participation and the information
18 known today concerning the substance they received." Patterson
19 Decl., Ex. 7, Docket No. 491-7, VET017-000279. This was to take
20 place "regardless of whether the individuals were fully informed
21 volunteers at the time the research was undertaken." Id.

22 On October 25, 1979, John R. McGiffert, Director of the Army
23 Staff, issued a memorandum to establish "Army Staff
24 responsibilities for review of past Army research involving
25 possible military applications of drug or chemical/biological
26 agents," with the objective "to identify and notify those research
27 participants who may face the risk of continuing injury."
28 Patterson Decl., Ex. 8, Docket No. 491-8, VET030-022686. The

1 memorandum provided, "In the event that long-term hazards of a
2 substance are not known, The Surgeon General (TSG) should continue
3 to monitor research developments, and if at some future time more
4 information makes it necessary to take some action, TSG should
5 recommend appropriate action, including notification." Id. at
6 VET030-022687. On November 2, 1979, the Army informed Congress of
7 this notification plan and the plan of the Surgeon General to ask
8 the National Academy of Sciences to assist in reviewing the
9 effects of the drugs and agents. Patterson Decl., Ex. 9, Docket
10 No. 491-9, VET030-022692-93.

11 On December 11, 1981, the Army published in the Federal
12 Register a proposed amendment to a record keeping system. 46 Fed.
13 Reg. 60,639. The proposed system, to become effective on January
14 11, 1982, was called the "Research and Experimental Case Files"
15 and maintained records for individuals who were "[v]olunteers
16 (military members, Federal civilian employees, state prisoners)
17 who participated in Army tests of potential chemical agents and/or
18 antidotes from the early 1950's until the program ended in 1975."
19 Id. The purpose of the system was for use by "the Department of
20 the Army: (1) to follow up on individuals who voluntarily
21 participated in Army chemical/biological agent research projects
22 for the purpose of assessing risks/hazards to them, and (2) for
23 retrospective medical/scientific evaluation and future scientific
24 and legal significance." Id.

25 On June 30, 1986, the Army proposed the creation of a new
26 record system entitled the "Medical Research Volunteer Registry."
27 51 Fed. Reg. 23,576. Included in the system were "[r]ecords of
28 military members, civilian employees, and non-DOD civilian

1 volunteers participating in current and future research sponsored
2 by the U.S. Army Medical Research and Development Command." Id.
3 Among the purposes of the system were to "assure that the U.S.
4 Army Medical Research and Development Command (USAMRDC) can
5 contact individuals who participated in research
6 conducted/sponsored by the Command in order to provide them with
7 newly acquired information, which may have an impact on their
8 health," and to "answer inquiries concerning an individual's
9 participation in research sponsored/conducted by USAMRDC." Id.
10 AR 70-25 was not listed among the authorities for the maintenance
11 of the system.

12 Both record systems were amended several times during the
13 1980s. On May 10, 1988, the Army published a proposed change,
14 which changed the name of the "Medical Research Volunteer
15 Registry" to "Research Volunteer Registry" and expanded it to
16 encompass research conducted by the U.S. Army Chemical Research,
17 Development and Engineering Center (CRDEC). 53 Fed. Reg. 16,575.

18 On August 8, 1988, the Army issued an updated version of AR
19 70-25, which became effective on September 30, 1988.² Gardner
20 Reply Decl., Ex. 87, Docket No. 513-13, 1. Among other changes,
21 this version added a provision stating,

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

25 ² Until Defendants filed their reply brief, the parties apparently
26 did not realize that there were versions of AR 70-25 released in
27 1988 and 1989, and instead focused their analysis on the 1990
28 version. The parties have represented these versions were
"substantively identical for the purposes of the issues in this
case." Defs.' Reply, Docket No. 513-1, 8 n.8; see also Hr'g Tr.,
Docket No. 523, 4:21-5:2.

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. To accomplish this, the
6 MACOM [(major Army Commands)] or agency conducting or
7 sponsoring research must establish a system which will
8 permit the identification of volunteers who have
9 participated in research conducted or sponsored by that
10 command or agency, and take actions to notify volunteers
11 of newly acquired information. (See a above.)

12 Id. at 5. Section a, which was referred to in this passage,
13 requires that MACOM commanders and organization heads "[p]ublish
14 directives and regulations for . . . [t]he procedures to assure
15 that the organization can accomplish its 'duty to warn.'" Id. at
16 5. The regulation also required the Army to create and maintain a
17 "volunteer database" so that it would be able "to readily answer
18 questions concerning an individual's participation in research"
19 and "to ensure that the command can exercise its 'duty to warn.'"
20 Id. at 18. It mandated, "The data base must contain items of
21 personal information, for example, name, social security number
22 (SSN), etc., which subjects it to the provisions of The Privacy
23 Act of 1974." Id. It further provided, "Volunteers are
24 authorized all necessary medical care for injury or disease that
25 is a proximate result of their participation in research." Id. at
26 4. The regulation also required that informed consent be given in
27 accordance with appendix E. Id. at 6, 20. Appendix E included,
28 among other things:

E-3. Description of the study

A statement that the study involves research. An
explanation of the purpose of the study and the expected
duration of the subject's participation. A description
of the procedures to be followed. An identification of
any experimental procedures. A statement giving
information about prior, similar, or related studies
that provide the rationale for this study.

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E-4. Risks

A description of any reasonably foreseeable risks or discomforts to the subject.

E-5. Benefits

A description of the benefits, if any, to the subject or to others that may reasonably be expected from the study. If there is no benefit to the subject, it should be so stated.

. . .

E-9. Subject's rights

A statement that--

a. Participation is voluntary.

. . .

Id. at 12. The definition for "human subject" included, with limited exceptions, a "living individual about whom an investigator conducting research obtains data through interaction with the individual, including both physical procedures and manipulations of the subject or the subject's environment." Id. at 20.

In 1989 and 1990, AR 70-25 was again updated. Gardner Decl., Ex. 49, Docket No. 496-57, i; Gardner Reply Decl., Ex. 88, Docket No. 513-14, 1. The 1990 version added a provision stating that the regulation applied to "Research involving deliberate exposure of human subjects to nuclear weapons effect, to chemical warfare agents, or to biological warfare agents." Gardner Decl., Ex. 49, Docket No. 496-57, 1.

On November 21, 1990, the name of the "Research Volunteer Registry" was changed to the "Medical Research Volunteer Registry." 55 Fed. Reg. 48,671. At that time, its system identification number was changed to "A0070-25DASG." Id.

1 On September 24, 1991, the Army proposed changes to both the
2 "Research and Experimental Case Files" and the "Medical Research
3 Volunteer Registry" record systems. 56 Fed. Reg. 48,179-81,
4 48,187. At that time, both were kept materially the same as the
5 earlier versions.

6 In 1991, the DOD issued regulations addressing the protection
7 of human test subjects. 56 Fed. Reg. 28,003 (codified at 32
8 C.F.R. §§ 29.101-124). These regulations adopted some of the
9 basic principles of informed consent set forth in the Wilson
10 Directive. See 32 C.F.R. § 219.116.

11 On December 1, 2000, the Army proposed the deletion of the
12 "Research Volunteer Registry," stating that its records "have been
13 incorporated" into a new system of records, the "Medical
14 Scientific Research Data Files." 65 Fed. Reg. 75,249. This new
15 records system was also given the system identifier of "A0070-25
16 DASG." Id. AR 70-25 was identified among the authorities for the
17 maintenance of that records system. Id. The purposes of the new
18 data system included, "To answer inquiries and provide data on
19 health issues of individuals who participated in research
20 conducted or sponsored by U.S. Army Medical Research Institute of
21 Infectious Diseases, U.S. Army Medical Research and Development
22 Command, and U.S. Army Chemical Research, Development, and
23 Engineering Center," and to "provide individual participants with
24 newly acquired information that may impact their health." Id.
25 Among the categories of people whose records were included in the
26 new system were "individuals who participate in research sponsored
27 by the U.S. Army Medical Research and Development Command and the
28 U.S. Army Chemical Research, Developments, and Engineering Center;

1 and individuals at Fort Detrick who have been immunized with a
2 biological product or who fall under the Occupational Health and
3 Safety Act or Radiologic Safety Program.” Id. Information in the
4 database “may specifically be disclosed . . . [t]o the Department
5 of Veteran Affairs to assist in making determinations relative to
6 claims for service connected disabilities; and other such
7 benefits.” Id.

8 In 2002, Congress passed section 709 of the National Defense
9 Authorization Act for Fiscal Year 2003 (NDAA), Pub. L. No. 107-
10 314, Div. A, Title VII, Subtitle A, § 709(c), 116 Stat. 2458 (the
11 “Bob Stump Act”), which required the Secretary of Defense to work
12 to identify projects or tests “conducted by the Department of
13 Defense that may have exposed members of the Armed Forces to
14 chemical or biological agents.”

15 The DOD has issued two memoranda releasing veterans in part
16 or in full from secrecy oaths that they may have taken in
17 conjunction with testing. The first, issued by former Secretary
18 of Defense William Perry in March 1993, releases

19 any individuals who participated in testing, production,
20 transportation or storage associated with any chemical
21 weapons research conducted prior to 1968 from any non-
22 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.

23 Gardner Decl., Ex. 42, Docket No. 496-50, VVA 025766-67.

24 The second, issued by the Office of the Deputy Secretary of
25 Defense on January 11, 2011, after the instant litigation began,
26 does not have a date restriction and states,

27 In the 1990s, several reviews of military human subject
28 research programs from the World War II and Cold War

1 eras noted the common practice of research volunteers
2 signing "secrecy oaths" to preclude disclosure of
3 research information. Such oaths or other non-
4 disclosure requirements have reportedly inhibited
5 veterans from discussing health concerns with their
6 doctors or seeking compensation from the Department of
7 Veterans Affairs for potential service-related
8 disabilities.

9 . . .

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

23 . . .

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

Gardner Decl., Ex. 53, Docket No. 496-61, VET021-000001-02.

The DVA processes service-connected death or disability
compensation (SCDDC) claims of class members. To establish that a
death or disability is connected to a veteran's participation in
the testing programs for the purposes of SCDDC claims, individuals
seeking survivor or disability benefits must establish that "it is
at least as likely as not that such a relationship exists."

Plaintiffs contend that the DVA participated in some capacity
in some of the other Defendants' testing programs. Plaintiffs
also argue that the DVA engaged in human testing of similar
substances, including LSD and Thorazine.

1 Defendants have undertaken some efforts to contact and
2 provide notice to participants in the testing programs. In 1990,
3 the DVA contacted 128 veterans who participated in World War II
4 mustard gas testing; Defendants do not provide evidence of what
5 information these individuals were provided then. Gardner Decl.,
6 Ex. 15, DVA014 001257. In recent years, the DVA, using databases
7 compiled by DOD and its contractor, Batelle Memorial Institute,
8 sent notice letters to certain individuals who participated in
9 some WWII and Cold War era testing programs. For the first round
10 of letters related to WWII era testing, which were sent in 2005,
11 DOD identified approximately 6,400 individuals who had been
12 exposed to mustard gas or other agents during WWII and compiled a
13 database with 4,618 entries. Starting in March 2005, the DVA sent
14 letters to approximately 319 individuals or their survivors for
15 whom DVA could find current contact information. These letters
16 stated in part,

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

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

27 In response to the passage of the Bob Stump Act, DOD began in
28 2004 to search for Cold War era test information. In addition, in
2004 to search for Cold War era test information. In addition, in
29 April 2005, members of Congress on the House Veterans' Affairs
30 Committee requested that the DVA provide written notice to the
31 living veterans who participated in the test programs at Edgewood

1 Arsenal and Fort Detrick. DOD created a database of information
2 about Cold War era test veterans with, among other things,
3 information on the substances they were exposed to, the dose and
4 the route of administration, and where the information was
5 available. The information came primarily from the test
6 participant files for each person. DOD provided this information
7 to the DVA for use in making service-connected health care and
8 disabilities determinations. In December 2005, the DOD began
9 providing DVA with the names of test subjects and continued to do
10 so after that when new information was located. As of the present
11 time, the DOD has given the DVA the names of 16,645 Cold War era
12 test subjects. The DVA has sent letters to each veteran in the
13 database for whom it could locate current contact information,
14 which at present totals about 3,300 individuals.

15 Defendants did not include in the letters to Cold War era
16 test subjects the names of the chemical or biological agents to
17 which the participants were exposed or information that was
18 tailored to the individual recipient. Defendants explain that
19 they did not do so for several reasons, including that it would
20 have taken too long, the information provided by the DOD to the
21 DVA was changing, the DVA did not want to send veterans inaccurate
22 information, alarm them or make them think they would suffer
23 adverse effects if these were unlikely.

24 The letters sent to the Cold War era test subjects by the DVA
25 stated,

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

1 "You may provide details that affect your health to your
2 health care provider. For example, you may discuss what
3 you believe your exposure was at the time, reactions,
4 treatment you sought or received, and the general
5 location and time of the tests. On the other hand, you
6 should not discuss anything that relates to operational
7 information that might reveal chemical or biological
8 warfare vulnerabilities or capabilities."

9 . . .

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

15 The letter also provided information about obtaining a clinical
16 examination from the DVA and contacting the DVA to file a
17 disability claim. If individuals called DOD's 1-800 number
18 provided in the letter, they could obtain further information
19 about the tests and staff at the hotline would, at least
20 sometimes, refer them to an Army FOIA officer who had the
21 authority to copy and send them their own individual test files;
22 since requests were tracked starting in 2006, the Army has
23 received approximately 114 such requests. Gardner Decl., Ex. 29,
24 Docket No. 496-37, 16:18-17:4. The DVA also included a fact sheet
25 from the DOD. The DVA's expert in chemical agent exposures
26 recognized that this fact sheet "has some significant
27 inaccuracies."

28 Defendants have also engaged in other types of outreach to
past test participants. The DOD has placed some information on
its public website, including general information about the
testing conducted, the contents of the Perry memorandum and
information about how to contact the DOD's 1-800 hotline for
additional information. DVA's website also contains some
substantive information about the WWII and Cold War era testing

1 programs. The DOD and DVA have also held briefings for some
2 veteran service organizations.

3 LEGAL STANDARD

4 Summary judgment is properly granted when no genuine and
5 disputed issues of material fact remain, and when, viewing the
6 evidence most favorably to the non-moving party, the movant is
7 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
8 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
9 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
10 1987).

11 The moving party bears the burden of showing that there is no
12 material factual dispute. Therefore, the court must regard as
13 true the opposing party's evidence, if supported by affidavits or
14 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
15 815 F.2d at 1289. The court must draw all reasonable inferences
16 in favor of the party against whom summary judgment is sought.
17 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
18 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
19 F.2d 1551, 1558 (9th Cir. 1991).

20 Material facts which would preclude entry of summary judgment
21 are those which, under applicable substantive law, may affect the
22 outcome of the case. The substantive law will identify which
23 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
24 242, 248 (1986).

25 Where the moving party does not bear the burden of proof on
26 an issue at trial, the moving party may discharge its burden of
27 production by either of two methods:

1 The moving party may produce evidence negating an
2 essential element of the nonmoving party's case, or,
3 after suitable discovery, the moving party may show that
4 the nonmoving party does not have enough evidence of an
5 essential element of its claim or defense to carry its
6 ultimate burden of persuasion at trial.

7 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
8 1099, 1106 (9th Cir. 2000).

9 If the moving party discharges its burden by showing an
10 absence of evidence to support an essential element of a claim or
11 defense, it is not required to produce evidence showing the
12 absence of a material fact on such issues, or to support its
13 motion with evidence negating the non-moving party's claim. Id.;
14 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
15 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If
16 the moving party shows an absence of evidence to support the non-
17 moving party's case, the burden then shifts to the non-moving
18 party to produce "specific evidence, through affidavits or
19 admissible discovery material, to show that the dispute exists."
20 Bhan, 929 F.2d at 1409.

21 If the moving party discharges its burden by negating an
22 essential element of the non-moving party's claim or defense, it
23 must produce affirmative evidence of such negation. Nissan, 210
24 F.3d at 1105. If the moving party produces such evidence, the
25 burden then shifts to the non-moving party to produce specific
26 evidence to show that a dispute of material fact exists. Id.

27 If the moving party does not meet its initial burden of
28 production by either method, the non-moving party is under no
obligation to offer any evidence in support of its opposition.
Id. This is true even though the non-moving party bears the
ultimate burden of persuasion at trial. Id. at 1107.

DISCUSSION

Defendants assert that there is no legally enforceable duty under the APA to provide notice to past test subjects. They also argue that the Court lacks subject matter jurisdiction over Plaintiffs' APA claim for medical care for class members and contend that there is no statutory authority for the DOD or the Army to provide the care requested and no duty to do so created by the various memoranda or regulations. They further argue that the class members have no constitutional entitlement to notice or health care. Defendants also seek summary judgment on Plaintiffs' claims against the CIA and DOD regarding secrecy oaths. Finally, they seek summary judgment on Plaintiffs' "biased adjudicator" claim against the DVA.

I. APA claims regarding notice and medical care

Title 5 U.S.C. § 702, the judicial review provision of the APA, "permits a citizen suit against an agency when an individual has suffered 'a legal wrong because of agency action'" Rattlesnake Coalition v. United States EPA, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting 5 U.S.C. § 702). For § 702 claims, 5 U.S.C. § 706 "prescribes standards for judicial review and demarcates what relief a court may (or must) order." Rosemere Neighborhood Ass'n v. United States EPA, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009). When a plaintiff asserts an agency's failure to act, a court can grant relief by compelling "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Plaintiffs' claims in the Fourth Amended Complaint against the DOD and the Army assert that, under the APA, they are required to provide class members with notice of their exposures and known

1 health effects, and medical care as set forth in the agencies' own
2 policies. By notice, Plaintiffs mean "notice to each test
3 participant regarding the substances to which he or she was
4 exposed, the doses to which he or she was exposed, the route of
5 exposure (e.g., inhalation, injection, dermal, etc.) and the known
6 or potential health effects associated with those exposures or
7 with participation in the tests." Mot. at 1 n.1.

8 A. Claim for notice

9 1. Whether the regulations and memoranda have the "force of
10 law"

11 Defendants contend that the Wilson Directive, CS: 385 and AR
12 70-25 "lack the force of law." Defs.' Corrected Reply, Docket No.
13 513-1, 3.

14 A "'claim under § 706(1) can proceed only where a plaintiff
15 asserts that an agency failed to take a discrete agency action
16 that it is required to take.'" Sea Hawk Seafoods, Inc. v. Locke,
17 568 F.3d 757, 766 (9th Cir. 2009) (quoting Norton v. S. Utah
18 Wilderness Alliance, 542 U.S. 55, 64 (2004)) (emphasis in
19 original). "Discrete" actions include providing "rules, orders,
20 licenses, sanctions, and relief." Hells Canyon, 593 F.3d at 932.
21 A discrete action is legally required when "the agency's legal
22 obligation is so clearly set forth that it could traditionally
23 have been enforced through a writ of mandamus." Id. (citing
24 Norton, 542 U.S. at 63). "The limitation to required agency
25 action rules out judicial direction of even discrete agency action
26 that is not demanded by law (which includes, of course, agency
27 regulations that have the force of law)." Norton, 542 U.S. at 65
28 (emphasis in original).

1 In its January 19, 2010 and May 31, 2011 orders resolving
2 Defendants' motions to dismiss, the Court recognized that "Army
3 regulations have the force of law." Docket No. 59, 15; Docket No.
4 233, 9; see also Kern Copters, Inc. v. Allied Helicopter Serv.,
5 Inc., 277 F.2d 308, 310 (9th Cir. 1960) (stating that "Army
6 regulations have the force of law"). Defendants nonetheless
7 contend that "not all regulations possess the force of law" and
8 that AR 70-25 was promulgated pursuant to 10 U.S.C. §§ 3013 and
9 4503, which are "housekeeping" statutes, merely authorizing day to
10 day internal operations, so this regulation cannot serve as the
11 basis for Plaintiffs' APA claims. Defs.' Opp. and Cross-Mot.,
12 Docket No. 495, 16-17; Defs.' Corrected Reply, Docket No. 513-1,
13 4-5. Defendants have previously made similar arguments. In their
14 motion to dismiss Plaintiffs' third amended complaint, Defendants
15 argued that the 1962 version of AR 70-25 was promulgated pursuant
16 to 5 U.S.C. § 301, which was a housekeeping statute, and thus
17 could not create a benefits entitlement. The Court rejected this
18 argument, stating "there is nothing in AR 70-25 (1962) or
19 Plaintiffs' complaint to suggest that the regulation was issued
20 pursuant to section 301." Docket No. 233, 10.

21 In support of their new argument, Defendants rely primarily
22 on Chrysler Corporation v. Brown, 441 U.S. 281 (1979), in which
23 the Supreme Court considered whether certain regulations
24 promulgated by the Department of Labor's Office of Federal
25 Contract Compliance Programs (OFCCP) had the force of law. In
26 that case, the Court said, "In order for a regulation to have the
27 'force and effect of law,' it must have certain substantive
28 characteristics and be the product of certain procedural

1 requisites.” Id. at 302. It distinguished between “substantive
2 rules” that “affect[] individual rights and obligations” and
3 “interpretive rules, general statements of policy, or rules of
4 agency organization, procedure, or practice.” Id.; see also Vance
5 v. Hegstrom, 793 F.2d 1018, 1022 (9th Cir. 1986) (explaining that
6 substantive rules “implement existing law, imposing general,
7 extrastatutory obligations pursuant to authority properly
8 delegated by Congress,” whereas “[i]nterpretive rules clarify and
9 explain existing law or regulations” and “are issued without
10 delegated legislative power and go more to what the administrative
11 officer thinks the statute or regulation means”) (internal
12 quotation marks and citations omitted). The Court stated, “That
13 an agency regulation is substantive, however, does not by itself
14 give it the ‘force and effect of law.’” Chrysler, 441 U.S. at
15 302. Because the “legislative power of the United States is
16 vested in the Congress, . . . the exercise of quasi-legislative
17 authority by governmental departments and agencies must be rooted
18 in a grant of such power by Congress and subject to limitations
19 which that body imposes.” Id. The Court rejected the argument
20 that the requisite grant of legislative authority for the
21 regulations at issue in that case could be found in 5 U.S.C.
22 § 301, which the Court labeled a “housekeeping statute.” Id. at
23 309-10. A “housekeeping statute” is “simply a grant of authority
24 to the agency to regulate its own affairs . . . authorizing what
25 the APA terms ‘rules of agency organization, procedure or
26 practice’ as opposed to ‘substantive rules.’” Id.

27 Defendants concede that “AR 70-25 may appear to contain
28 substantive rules.” Defs.’ Opp. and Cross-Mot., Docket No. 495,

1 16. They argue however that, because it was issued under 10
2 U.S.C. §§ 3013 and 4503, which they contend are housekeeping
3 statutes, AR 70-25 was not promulgated pursuant to a specific
4 statutory grant of authority sufficient to create enforceable
5 rights.

6 Defendants are correct that AR 70-25 was promulgated under 10
7 U.S.C. §§ 3013 and 4503. The 1988, 1989 and 1990 versions state,
8 in Appendix G under section G-1, titled "Authority,"

9 The Secretary of the Army is authorized to conduct
10 research and development programs including the
11 procurement of services that are needed for these
12 programs (10 USC 4503). The Secretary has the authority
13 to "assign detail and prescribe the duties" of the
14 members of the Army and civilian personnel (10 USC
15 3013).

16 Patterson Decl., Ex. 2, Docket No. 491-2, 13 (1990 version);
17 Gardner Reply Decl., Ex. 88, Docket No. 513-14, 17 (1989 version);
18 Gardner Reply Decl., Ex. 87, Docket No. 513-13, 17 (1988 version).
19 Appendices to the 1962 and 1974 versions, which provided "opinions
20 of The Judge Advocate General" to "furnish specific guidance for
21 all participants in research using volunteers," made similar
22 statements. Gardner Decl., Ex. 47, Docket No. 496-55, 4 (1962
23 version); Gardner Decl., Ex. 48, Docket No. 496-56, 4 (1974
24 version).³

25 The former § 4503, which was originally enacted in 1950 as
26 section 104 of the Army and Air Force Authorization Act of 1949,
27 64 Stat. 322, 5 U.S.C. § 235a and eventually repealed in 1993,
28 _____

³ The Judge Advocate General opined that the authority for the
regulation was 10 U.S.C. §§ 3012(a) and 4503. Gardner Decl., Ex.
47, Docket No. 496-55, 4 (1962 version); Gardner Decl., Ex. 48,
Docket No. 496-56, 4 (1974 version). In 1986, Public Law 99-433
redesignated 10 U.S.C. § 3012 as 10 U.S.C. § 3013.

1 provided in relevant part, "The Secretary of the Army may conduct
2 and participate in research and development programs relating to
3 the Army, and may procure or contract for the use of facilities,
4 supplies, and services that are needed for those programs." 10
5 U.S.C. § 4503 (1992). Section 3013 sets forth the
6 responsibilities and authority of the Secretary of the Army,
7 including to "assign, detail, and prescribe the duties of members
8 of the Army and civilian personnel," and to "prescribe regulations
9 to carry out his functions, powers, and duties under this title."
10 10 U.S.C. § 3013(g).⁴

11 In their reply, Defendants represent that, in Schism v.
12 United States, 316 F.3d 1259 (Fed. Cir. 2002), the Federal Circuit
13 "expressly" found that 10 U.S.C. § 3013 cannot serve as the
14 "statutory basis authorizing DoD to provide ongoing medical care
15 for former service members because it would usurp Congress'
16 authority to control the purse strings for medical care." Defs.'
17 Reply, Docket No. 513-1, 5.

18 However, the Federal Circuit did not so hold in Schism. In
19 that case, the court considered the enforceability of oral
20 promises of military recruiters, made under the direction of
21 supervisors, to new recruits that, if they served on active duty
22 for at least twenty years, they and their dependents would receive
23 _____

24 ⁴ A predecessor version of this statute, which was enacted as
25 section 101 of the Army Organization Act of 1950 and appeared at
26 U.S.C. § 181-4, provided in part that "the Secretary of the Army
27 may make such assignments and details of members of the Army and
28 civilian personnel as he thinks proper, and may prescribe the
duties of the members and civilian personnel so assigned; and such
members and civilian personnel shall be responsible for, and shall
have the authority necessary to perform, such duties as may be so
prescribed for them."

1 free lifetime medical care. Id. at 1262. The principal question
2 before the court was whether the oral promises made to the
3 plaintiffs were within the authority of the Air Force Secretary
4 under 5 U.S.C. § 301. Id. at 1263. The court held that, pursuant
5 to Chrysler, § 301 “merely authorize[d] housekeeping” and not “the
6 right to make promises of lifetime health care.” Id. at 1279-81.
7 The court also addressed the plaintiffs’ argument that “the
8 Commander-in-Chief’s inherent power in combination with 10 U.S.C.
9 §§ 3013, 5013, and 8013--which authorize the positions and
10 enumerate the duties of the Secretaries of the Army, Navy, and Air
11 Force respectively--authorized the recruiters’ promises.” Id. at
12 1287-88. The court found that the President, as Commander-in-
13 Chief, did not have such inherent authority, because “[u]nder
14 Article I, § 8, only Congress has the power of the purse” and thus
15 such a conclusion would encroach Congress’s constitutional powers
16 to appropriate funding. Id. at 1288. The court did not apply
17 this reasoning to 10 U.S.C. § 3013, which was not applicable to
18 the plaintiffs in that case, who were Air Force retirees. Id. at
19 1289. The court found that 10 U.S.C. § 8013, the corresponding
20 statute for the Secretary of the Air Force, did not authorize the
21 recruiters’ promises because the versions relevant to the
22 plaintiffs there did not include “‘recruiting’ in the enumerated
23 powers” and, even if they did, “the Secretary’s authority to
24 conduct recruiting does not carry with it the broad authority to
25 make promises that bind future Congresses to appropriate funding
26 for free lifetime care.” Id.

27 This case is distinguishable from Schism. Here, at the time
28 that AR 70-25 was promulgated, there was a statutory provision, 10

1 U.S.C. § 4503, that expressly authorized the Secretary of the Army
2 to conduct research and development and to "procure or contract
3 for the use of facilities, supplies, and services that are needed
4 for those programs." 10 U.S.C. § 4503. Title 10 U.S.C. § 3013(g)
5 gave the Secretary the power to prescribe regulations to carry out
6 his functions, powers and duties under that title, including
7 § 4503. Thus, Congress delegated to the Secretary of the Army the
8 authority to contract for services needed to carry out research
9 and to implement regulations to do so. There is no reason that
10 this would exclude adopting a regulation promising to provide
11 volunteers with medical treatment associated with injuries or
12 illnesses that result from participation in testing. Therefore,
13 because AR 70-25 is a substantive rule and was promulgated under
14 10 U.S.C. §§ 3013 and 4503, statutory grants of authority
15 sufficient to create enforceable rights, it created duties that
16 are enforceable against the Army under the APA.

17 The parties also dispute whether the Wilson Directive and CS:
18 385 can create duties that are enforceable under § 706(1) of the
19 APA. The Ninth Circuit has created

20 a two-part test for determining when agency
21 pronouncements have the force and effect of law:

22 "To have the force and effect of law, enforceable
23 against an agency in federal court, the agency
24 pronouncement must (1) prescribe substantive rules--not
25 interpretive rules, general statements of policy or
26 rules of agency organization, procedure or practice--and
27 (2) conform to certain procedural requirements. To
28 satisfy the first requirement the rule must be
legislative in nature, affecting individual rights and
obligations; to satisfy the second, it must have been
promulgated pursuant to a specific statutory grant of
authority and in conformance with the procedural
requirements imposed by Congress."

1 River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071 (9th
2 Cir. 2010) (quoting United States v. Fifty-Three (53) Eclectus
3 Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982)); see also Rank v.
4 Nimmo, 677 F.2d 692, 698 (9th Cir. 1982) (same).

5 Defendants argue that these documents do not meet either of
6 the requirements described in River Runners. First, they contend
7 that there is nothing in these documents that sets forth
8 substantive rules that demonstrate a binding obligation and that
9 they were instead general statements of agency policy and
10 procedure. Defs.' Opp. and Cross-Mot., Docket No. 495, 14-16. In
11 response, Plaintiffs point to the language in the memoranda that
12 they say "is indicative of a binding commitment (setting forth
13 what the agency 'will' or 'shall' do)." Pls.' Reply and Opp.,
14 Docket No. 502, 2-3. Both parties rely on Norton v. Southern Utah
15 Wilderness Alliance, 542 U.S. 55 (2004). Plaintiffs point out
16 that, in Norton, the Supreme Court suggested that even an agency's
17 "plan," which is less formal than regulations, may "itself
18 create[] a commitment binding on the agency," at least where there
19 is a "clear indication of binding commitment in the terms of the
20 plan." Id. at 69-70. Defendants respond that, in Norton, the
21 Court found that the statement in the plan that the agency "'will'
22 take this, that, or the other action" was insufficient to create a
23 binding commitment, absent other supporting evidence.

24 As Plaintiffs point out, there is clear language in both
25 memoranda that demonstrates that their dictates were intended to
26 be mandatory. In the Wilson Directive, the Secretary of Defense
27 stated that the participation of human volunteers in testing
28 "shall be subject" to the conditions that he set forth in the

1 memorandum, and authorized the Secretaries of the Army, Navy and
2 Air Force to conduct experiments using such subject only "within
3 the limits" that he had prescribed. Patterson Decl., Ex. 4,
4 Docket No. 491-4, C-001-3. He also informed the Secretaries of
5 the Army, Navy and Air Force that they would be required to
6 "insur[e] compliance" with these dictates within their agencies.
7 Id. at C-003. CS: 385 similarly stated that these requirements
8 "must be observed" and described obtaining of informed consent as
9 a "duty and responsibility." Patterson Decl., Ex. 5, Docket No.
10 491-5, VVA 024538. Unlike in River Runners, the dictates of these
11 policies and the conditions for the use of human subjects
12 contained therein were not waivable and could not be modified on a
13 case-by-case basis. Cf. River Runners, 593 F.3d at 1071-72.
14 Further, the policies did not simply govern internal procedures.
15 Instead, they proscribed obligations on the part of Defendants
16 toward individuals whom they used to test chemical and biological
17 agents. As such, they manifestly "affect[] individual rights."
18 Chrysler, 441 U.S. at 302.

19 Second, Defendants argue that these memoranda were not
20 promulgated pursuant to any specific grant of authority from
21 Congress. They state that "at least one court has expressly held
22 that the Wilson Memorandum lacks the force of law because "[t]here
23 simply is no nexus between the [Wilson Memorandum] and a
24 corresponding delegation of legislative authority by the United
25 States Congress." Defs.' Reply, Docket No. 513-1, 4 (quoting In
26 re Cincinnati Radiation Litig., 874 F. Supp. 796, 827 (S.D. Ohio
27 1995)) (brackets in original). In Cincinnati, the plaintiffs
28 cited two bases for the authority of the Wilson Directive: the

1 inherent authority of the President; and 5 U.S.C. § 301. 874 F.
2 Supp. at 826-27. The court, citing Chrysler, 441 U.S. at 304,
3 rejected the proffered arguments and found no nexus with a grant
4 of authority from Congress. Cincinnati, 874 F. Supp. at 826-27.
5 At the hearing on this motion, Defendants argued that, because
6 Plaintiffs had characterized CS: 385 as "a continuation" of the
7 Wilson Directive, it should fail on the same basis. Docket No.
8 523, 34:25-35:4.

9 Plaintiffs have not cited any statutory grant of power from
10 Congress to the Secretary of Defense under which he promulgated
11 the Wilson Directive and none is apparent from the face of the
12 document itself. Accordingly, they have not met their burden to
13 show that the Wilson Directive has the procedural requisites to
14 have the force and effect of law.

15 In contrast, CS: 385 clearly identifies its statutory
16 authorization on its face. Like the 1962 and 1974 versions of AR
17 70-25, CS: 385 contains an opinion from the Judge Advocate General
18 pointing to 5 U.S.C. §§ 235a and 181-4, the predecessors to 10
19 U.S.C. §§ 3013(g) and 4503, as granting the Secretary of the Army
20 the authority to conduct research and to make such assignments to
21 Army and civilian personnel as he deems proper. Patterson Decl.,
22 Ex. 5, Docket No. 491-5, VVA 024540. Accordingly, Plaintiffs have
23 shown that the requirements in River Runners are satisfied as to
24 CS: 385 and therefore it, as well as AR 70-25, can be enforced
25 through the APA.

26 2. Content and nature of the duty to notify

27 Defendants contend that, even if they were binding, the
28 Wilson Directive, CS: 385 and all versions of AR 70-25 do not

1 compel them to issue the particular form of "notice" that
2 Plaintiffs seek. They point out that the memoranda and
3 regulations do not mandate disclosure of the particular pieces of
4 information that Plaintiffs identify. Thus, they argue that no
5 such legal obligation is set forth clearly enough to be legally
6 binding upon them. They also contend that any ongoing duty to
7 warn created by the most recent iterations of AR 70-25 is not owed
8 to class members who participated in experiments before these
9 versions were issued.

10 Each document, the Wilson Directive, CS: 385 and all versions
11 of AR 70-25, contains similar language providing that informed
12 consent must be obtained from test subjects and that such consent
13 includes being told the "nature, duration, and purpose" of the
14 testing, "the method and means by which it is to be conducted,"
15 "all inconveniences and hazards reasonably to be expected," and
16 the effects upon health or person which may possibly come from
17 participation. Although Defendants suggest that this does not
18 appear in the most recent versions of AR 70-25, it does appear in
19 Appendix E thereof. See Gardner Reply Decl., Ex. 87, Docket No.
20 513-13, 15; see also id. at 20 (setting forth definition of
21 informed consent, which "includes, when appropriate, those
22 elements listed in appendix E of this regulation"). Defendants
23 are correct that the wording of the regulations does not support
24 the exact definition of "notice" that Plaintiffs have put forth
25 here. However, this does not mean that the regulations do not
26 support the duty to provide some notice, specifically that listed
27 in the first sentence of this paragraph.
28

1 The parties dispute whether Defendants have a “continuing
2 duty to provide updated information as it is acquired.”
3 Defendants argue that the regulations, except the most recent
4 versions of AR 70-25, address only the notice that researchers
5 were required to provide to subjects in order to provide informed
6 consent before participating in a test and do not create any
7 ongoing obligation to provide notice to test subjects after
8 testing was completed. As Defendants contend, the manner in which
9 these documents are written does support that they are directed at
10 the provision of informed consent prior to participation in the
11 experiments. See First Order on Mot. to Dismiss, Docket No. 59
12 (“The 1962 version of AR 70-25 mandated the disclosure of
13 information so that volunteers could make informed decisions.”).
14 Further, Plaintiffs do not point to anything in the regulations
15 issued prior to 1988 that compels a contrary conclusion.

16 The most recent versions of AR 70-25 from 1988 through 1990
17 do contain a duty to warn that is manifestly and unambiguously
18 forward-looking in nature. In discussing the 1990 version of AR
19 70-25 in the order on Plaintiffs’ motion for class certification,
20 the Court observed that, “by its terms, the section in the 1990
21 regulation regarding the duty to warn contemplates an ongoing duty
22 to volunteers who have already completed their participation in
23 research.” Class Cert. Order, Docket No. 485, 40; see also
24 Gardner Reply Decl., Ex. 87, Docket No. 513 13, 5 (1988 version of
25 AR 70-25, with the provision regarding the “duty to warn,” which
26 exists “even after the individual volunteer has completed his or
27 her participation in the research”).
28

1 It is less clear whether this ongoing duty is owed to
2 individuals who participated in experiments before 1988 or whether
3 it is limited to only those who might have done so after AR 70-25
4 was revised in 1988. Although the provision uses the past tense
5 and addresses the creation of a system that will allow the
6 “identification of volunteers who have participated in research”
7 so that they can be notified of newly acquired information, it
8 does not make clear whether it contemplates that the system would
9 include the volunteers who participated before it was created or
10 if it would include only those who volunteered for research after
11 it was created, to allow them to be provided with additional
12 information in the future, after they had completed their
13 participation. Gardner Decl., Ex. 49, Docket No. 496-57, 5. As
14 the Court previously noted, there is nothing in these documents
15 that “limits these forward-looking provisions to those people who
16 became test volunteers after the regulation was created.” Class
17 Cert. Order, Docket No. 485, 39-40. However, there is also
18 nothing that clearly requires that these provisions apply to those
19 who became test volunteers before they were created. Although,
20 as the Court also previously observed, “the definition for human
21 subject or experimental subject” contained in the 1988, 1989 and
22 1990 versions included, with limited exceptions, “a living
23 individual about whom an investigator conducting research obtains
24 data through interaction with the individual, including both
25 physical procedures and manipulations of the subject or the
26 subject’s environment,” and did not explicitly “exclude
27 individuals who were subjected to testing prior to the date of the
28

1 regulations," id. at 40, this definition also did not clearly
2 include these individuals.

3 Defendants argue that, in the face of ambiguous regulations,
4 the Court must defer to their reasonable interpretation of their
5 own regulations. The Rule 30(b)(6) witness for the Department of
6 Defense and the Army testified that "this change in AR 70-25 has
7 an effective date of 1990, and it was not meant to retroactively
8 go back for all Army research conducted prior to that date
9 primarily because the system to effect duty to warn would have to
10 be done at the time of research being conducted." Gardner Decl.,
11 Ex. 2, Docket No. 496-4, 151:6-11.⁵ He also testified that, in
12 order "[t]o be able to effect a duty to warn at the time a
13 research program is established," the MACOM commander is required
14 "to establish a system to do that, to develop the roster and the
15 location of those individuals." Id. at 139:19-140:1. He further
16 testified that this "has to be part of the informed consent
17 process at the beginning of any research study" and "I do not see
18 how you can retrofit this requirement in completed studies." Id.
19 at 143:1-14. He opined, "If there is no such system in place, I
20 don't see how it's possible for anyone to effect a duty to warn
21 for events that happened when such a system was not established.
22 In other words, prior to 1990." Id. at 140: 8-12.

23 Generally, "agencies' interpretations of their own
24 regulations are entitled to deference, even when their
25 interpretation of statutes is not." Price v. Stevedoring Servs.
26

27 ⁵ As previously noted, neither Plaintiffs nor Defendants were
28 aware of the 1988 and 1989 versions of AR 70-25 until Defendants
filed the final brief on the instant cross-motions.

1 of Am., 697 F.3d 820, 828 (9th Cir. 2012); see also Christopher v.
2 SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (noting
3 that, under Auer v. Robbins, 519 U.S. 452 (1997), deference is
4 “ordinarily” given to “an agency’s interpretation of its own
5 ambiguous regulation”). However, “this general rule does not
6 apply in all cases.” Christopher, 132 S. Ct. at 2166. “Deference
7 is undoubtedly inappropriate, for example, when the agency’s
8 interpretation is ‘plainly erroneous or inconsistent with the
9 regulation,’” or “when there is reason to suspect that the
10 agency’s interpretation ‘does not reflect the agency’s fair and
11 considered judgment on the matter in question.’” Id. (citations
12 omitted). “This might occur when the agency’s interpretation
13 conflicts with a prior interpretation, . . . or when it appears
14 that the interpretation is nothing more than a convenient
15 litigating position, . . . or a post hoc rationalization advanced
16 by an agency seeking to defend past agency action against attack.”
17 Id. (internal quotation marks, citations and formatting omitted).

18 Where a court declines to give an interpretation Auer
19 deference, it accords the agency’s “interpretation a measure of
20 deference proportional to the ‘thoroughness evident in its
21 consideration, the validity of its reasoning, its consistency with
22 earlier and later pronouncements, and all those factors which give
23 it power to persuade.’” Christopher, 132 S. Ct. at 2169 (quoting
24 United States v. Mead Corp., 533 U.S. 218, 228 (2001)). This
25 amount of consideration will “vary with circumstances” and may be
26 “near indifference,” such as has been given in some cases when
27 considering an “interpretation advanced for the first time in a
28

1 litigation brief.” Mead, 533 U.S. at 228 (citing Bowen, 488 U.S.
2 at 212-13).

3 Plaintiffs argue that the Court should not credit Defendants’
4 explanation and testimony because it is a “post-hoc
5 rationalization” and a “litigation argument.” Pls.’ Reply and
6 Opp. to Defs.’ Cross-Mot., Docket No. 502, 16. Defendants respond
7 that the reason they have advanced this explanation for the first
8 time here is that no one has attempted previously to interpret the
9 regulation in the way that Plaintiffs do. Defendants also argue
10 that the creation of the separate Medical Research Volunteer
11 Registry and Research and Experimental Case Files systems supports
12 their interpretation.

13 Defendants’ arguments are not persuasive. As to their first
14 point, that they have not previously interpreted the regulation
15 does not mean that whatever interpretation they put forward now
16 must be adopted. Instead, this simply means that there is no
17 prior interpretation against which their current understanding can
18 be compared to determine whether they have maintained a consistent
19 position or not. Further, there is substantial reason to suspect
20 that Defendants’ current interpretation of AR 70-25 does not
21 reflect the Army’s fair and considered judgment on the matter.
22 According to their own briefs and admissions, they have developed
23 this interpretation only in the context of this litigation. See
24 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)
25 (“Deference to what appears to be nothing more than an agency’s
26 convenient litigating position would be entirely inappropriate.”);
27 see also Fed. Labor Relations Auth. v. United States Dep’t of
28 Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (explaining reasons

1 for reluctance to defer to agency counsel's litigating positions,
2 including that "a position established only in litigation may have
3 been developed hastily, or under special pressure, or without an
4 adequate opportunity for presentation of conflicting views").
5 They did so in a context that suggests that they were under
6 special pressure to take this position to further the defense of
7 this action. Further, the record also suggests that Defendants'
8 position was developed quickly and without a careful consideration
9 of AR 70-25 (1988) and the context in which it was issued and
10 developed. Notably, the agency representative upon whose
11 interpretation Defendants rely was mistaken about the date on
12 which the operative parts of the regulation were amended,
13 suggesting that he did not have a clear understanding of the
14 context in which these changes were made.

15 Further, the explanation put forward by the DOD and Army's
16 Rule 30(b)(6) witness is simply not accurate. He reasons that the
17 commander must develop the database containing the test subjects
18 information at the beginning of the research study in order to
19 have the necessary information to carry out the duty to notify in
20 the future, if new information is uncovered later about the
21 possible effects of a test. However, although it may be easier to
22 make such a database at the outset, it is also possible to create
23 one after the fact, using whatever information is available, as
24 the DOD in fact attempted to do when it created the database for
25 the DVA's notice letters.

26 Finally, Defendants' argument regarding the file systems is
27 flawed. Their explanation of the development of the Medical
28 Research Volunteer Registry supports that their proffered view is

1 a post-hoc rationalization of the development of AR 70-25 and its
2 meaning. Defendants contend that “the Army intentionally created
3 the Medical Research Volunteer Registry required by AR 70-25
4 (1990) to contain information about volunteers participating only
5 in current or future research, not tests completed decades ago.”
6 Defs.’ Opp. and Cross-Mot., Docket No. 495, 21. They also argue
7 that, in contrast, “in a separate notice published the same day,
8 the Army described” the Research and Experimental Case Files
9 database as including the past volunteers; Defendants suggest that
10 this separate database was not created pursuant to AR 70-25. Id.
11 at 20-21; Defs.’ Reply, Docket No. 513-1, 8-9. However, the
12 Medical Research Volunteer Registry predated even the 1988
13 revision to AR 70-25 and thus was not created solely to fulfill
14 the requirement of that regulation. AR 70-25 also was not cited
15 as among the authorities for that Registry until it was replaced
16 in 2000 by the Medical Scientific Research Data Files system. The
17 description for the new database created in 2000 removed the
18 language that referred to “current and future research” that had
19 appeared in the description for the Medical Research Volunteer
20 Registry. Compare 58 F.R. 10,002, with 65 F.R. 75,250. Further,
21 some stated purposes of the new Medical Scientific Research Data
22 Files system created in 2000 included “[t]o answer inquiries and
23 provide data on health issues of individuals who participated in
24 research conducted or sponsored by” the Army and to “provide
25 individual participants with newly acquired information that may
26 impact their health.” This language does not limit those included
27 in the Medical Scientific Research Data Files to those who would
28 be test subjects in the future; instead, the use of the past tense

1 suggests that it could encompass individuals who participated in
2 research in the past. In addition, nothing about AR 70-25
3 mandates that only one record system be created. A stated purpose
4 of the Research and Experimental Case Files database was "to
5 follow up on individuals who voluntarily participated in Army
6 chemical/biological agent research projects for the purpose of
7 assessing risks/hazards to them," which is consistent with an
8 ongoing duty to notify them of such risks and hazards.

9 Accordingly, under the circumstances described above, the
10 Court finds that deference to Defendants' position on this issue
11 is not warranted.

12 Having considered the plain language of AR 70-25, the Court
13 concludes that Plaintiffs' argument--that the duty to warn is
14 properly interpreted as applying on an on-going basis, not just as
15 part of the pre-experiment consent process, and is owed to service
16 members who became test subjects before 1988--is more persuasive.
17 This is consistent with the text itself, including the statement
18 that this duty is owed to individuals who have "participated" in
19 research, not just to those who will participate in such research.
20 This is also supported by the addition to the 1990 version of AR
21 70-25, which made clear that the regulation applied to research
22 involving "deliberate exposure of human subjects to nuclear
23 weapons effect, to chemical warfare agents, or to biological
24 warfare agents." The DOD, including the Army, represents that it
25 does not "still conduct human experimentation with chemical and
26 biological warfare agents" and that its research programs
27 "involving human subjects do not involve the exposure of these
28 subjects to chemical or biological warfare agents" any longer.

1 Gardner Reply Decl., Ex. 86, Docket No. 513-12, 2; see also Defs.’
2 Opp. and Cross-Mot., Docket No. 495, 2 (representing that the
3 “Army suspended testing of chemical compounds on human volunteers
4 on July 28, 1976” and that the program involving testing of
5 biological agents on humans ended in 1973). Because the Army did
6 not--and does not--engage in such ongoing testing, there would
7 have been no reason to add this language to AR 70-25 in 1990 if
8 the regulation did not encompass those who had already become such
9 test subjects.

10 Accordingly, the Court concludes that Defendants’ duty to
11 warn test subjects of possible health effects is not limited to
12 the time that these individuals provide consent to participate in
13 the experiments. Instead, Defendants have an ongoing duty to warn
14 about newly acquired information that may affect the well-being of
15 test subjects after they completed their participation in
16 research. This ongoing duty is owed to individuals who became
17 test subjects prior to the time that the 1988 revision was issued.

18 3. Sufficiency of action versus failure to act

19 Defendants contend, because “it is undisputed that DoD has
20 engaged in substantial outreach efforts to test participants over
21 the years,” both alone and in collaboration with the DVA, it is
22 “clear that Plaintiffs’ true complaint is with the sufficiency of
23 action DoD has already taken,” which is not cognizable under
24 § 706(1) of the APA. Defs.’ Opp. and Cross-Mot., Docket No. 495,
25 12; Defs.’ Reply, Docket No. 513-1, 2.

26 Plaintiffs respond that the Court should not “reverse its
27 ruling that Plaintiffs have stated a cognizable notice claim under
28 APA section 706(1).” Id. at 16 (citing Order on First Mot. to

1 Dismiss, Docket No. 59, 14-16). They also contend that there is
2 no dispute that the outreach actions were not taken "pursuant to
3 the applicable regulations," citing testimony by Defendants'
4 witnesses that the outreach efforts were not conducted in order to
5 comply with AR 70-25. Pls.' Reply and Opp. to Defs.' Mot., Docket
6 No. 502, 15 n.13. They further argue that Defendants have made no
7 showing that DVA's efforts can be substituted for those of the
8 Army or DOD, which have their own duty to provide notice.

9 Finally, Plaintiffs contend that they are challenging Defendants'
10 failure to act and not the sufficiency of their outreach efforts.

11 Although the Court found when ruling on a motion to dismiss
12 that Plaintiffs stated a cognizable claim, Defendants have now
13 made a summary judgment motion on this issue and Plaintiffs must
14 raise a material dispute of fact in support of their claim, not
15 merely state a cognizable claim. Further, in the order cited by
16 Plaintiffs, the Court did not address the challenge raised by
17 Defendants here. Plaintiffs' argument that Defendants themselves
18 did not identify AR 70-25 as the legal impetus for past outreach
19 efforts is unavailing. Under this logic, even if Defendants had
20 taken all of the outreach steps that Plaintiffs maintain that they
21 should have, they could nonetheless be found to have failed to act
22 and be compelled to make redundant efforts.

23 Plaintiffs are correct that the notice letters were sent by
24 the DVA to veterans for whom addresses could be located, not by
25 the DOD or the Army. As the Court noted in resolving the motion
26 for class certification, the DOD and the Army acknowledged that
27 the letters were from the DVA and that they could advise the DVA
28 on the content but could not require the DVA to make particular

1 changes to them. Class Cert. Order, Docket No. 485, 23, 51. The
2 Court concluded that, as a result, the class representatives'
3 receipt of these letters did not undermine their standing to
4 challenge the DOD's and the Army's failure to notify. Id. at 23.
5 The Court found that this did not make certification under Rule
6 23(b)(2) inappropriate. Id. at 51. However, the Court has not
7 ruled on the current issue, whether Plaintiffs' challenge is to
8 the sufficiency of agency action rather than to a lack of agency
9 action.

10 The APA limits judicial review to "[a]gency action made
11 reviewable by statute and final agency action for which there is
12 no other adequate remedy in a court." 5 U.S.C. § 704. For an
13 action to be "final" under the APA, it "must mark the consummation
14 of an agency's decision-making process" and "must be one by which
15 rights or obligations have been determined, or from which legal
16 conclusions will flow." Bennett v. Spear, 520 U.S. 154, 177
17 (1997) (internal quotation marks and citations omitted). Review
18 of an agency's failure to act may be considered an exception to
19 the final agency action requirement. See 5 U.S.C. § 706(1)
20 (allowing a reviewing court to "compel agency action unlawfully
21 withheld or unreasonably delayed"). A claim under § 706(1) can be
22 maintained "only where there has been a genuine failure to act."
23 Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922,
24 926 (9th Cir. 1999). The Ninth Circuit "has refused to allow
25 plaintiffs to evade the finality requirement with complaints about
26 the sufficiency of an agency action 'dressed up as an agency's
27 failure to act.'" Id. (quoting Nevada v. Watkins, 939 F.2d 710,
28 714 n.11 (9th Cir. 1991)).

1 Here, Plaintiffs challenge the decision of the DOD and Army
2 to have the DVA send the notice letters to former servicemen with
3 information about their testing, in addition to arguing that the
4 notice letters themselves were insufficient for a variety of
5 reasons. It is undisputed that the DOD and Army participated in
6 the preparation of the DVA's letters and accompanying information,
7 although they did not have final say over the content of the
8 letters. Thus, the challenge here is to how Defendants carried
9 out their duty, not whether they did so at all. Accordingly, to
10 the extent that Plaintiffs seek to require the DOD and Army to
11 provide notice to each class member which discloses on an
12 individual basis the substances to which he or she was exposed,
13 the doses to which he or she was exposed, the route of exposure
14 and the known effects of the testing, this claim is not brought
15 properly under § 706(1).

16 However, Plaintiffs also challenge the refusal of the Army to
17 carry out its ongoing duty to warn, that is, after the original
18 notice, and in the future, to provide test subjects with
19 information that is learned subsequently that may affect their
20 well-being. There is no material dispute of fact that the Army is
21 not doing this on an ongoing basis. Unlike the other aspects of
22 their claim, here Plaintiffs do not challenge the sufficiency of
23 agency action and properly attack the Army's failure to act.
24 Defendants have not provided evidence that they have sent any
25 updated information to test subjects since the DVA sent the notice
26 letters and do not acknowledge any intent or duty to do so.

27
28

1 4. Conclusion

2 For the reasons set forth above, the Court grants in part
3 both Plaintiffs' motion for summary judgment and Defendants'
4 cross-motion in part and denies them in part. Because the Court
5 dismissed the claim based on the Wilson Directive and found no
6 basis for enforcing CS: 385 and AR 90-75 against the DOD, the
7 Court grants judgment in favor of the DOD on this claim in its
8 entirety. The Court also grants summary judgment in favor of the
9 Army to the extent that Plaintiffs seek to challenge its original
10 notice efforts. However, the Court summarily adjudicates in favor
11 of Plaintiffs that the Army has an ongoing duty to warn and orders
12 the Army, through the DVA or otherwise, to provide test subjects
13 with newly acquired information that may affect their well-being
14 that it has learned since its original notification, now and in
15 the future as it becomes available.

16 B. Claim for medical care

17 1. Monetary damages

18 Defendants argue that they are entitled to summary judgment
19 on Plaintiffs' claim for medical care because it is in fact a
20 claim for money damages, not for equitable relief, and thus the
21 APA's waiver of sovereign immunity is inapplicable. Defendants
22 acknowledge that the Court considered this argument previously and
23 rejected it, but argue that the prior decision should be
24 reconsidered. They rely on two out-of-circuit cases which they
25 contend held that "claims similar to the medical care claim
26 against DOD are essentially claims for money damages and therefore
27 not cognizable under the APA." See Defs.' Opp. and Cross-Mot. at
28 28-29 (citing Schism v. United States, 316 F.3d 1259, 1273 (Fed.

1 Cir. 2002); Jaffee v. United States, 592 F.2d 712, 715 (3d Cir.
2 1979)). Defendants raised the same argument in the briefing
3 related to their second motion to dismiss and Plaintiffs' motion
4 for class certification and cited the same cases therein.

5 As noted above, in Schism, the Federal Circuit held that
6 compensation of members of the military, including claims for
7 benefits that were compensation for services rendered, was
8 governed by statute and not contract. 316 F.3d at 1273. There,
9 the plaintiffs were seeking comprehensive free lifetime health
10 care coverage premised on an implied-in-fact contract based on
11 oral promises for such coverage made at the time that they were
12 recruited. The Federal Circuit stated that "full free lifetime
13 medical care is merely a form of pension, a benefit received as
14 deferred compensation upon retirement in lieu of additional cash,"
15 and thus there was "no meaningful difference between the
16 retirement benefits that the Supreme Court has identified as
17 beyond the reach of contracts and the full free medical care at
18 issue" in that case. Id. at 1273. On that basis, the court
19 concluded that there were no valid contracts. Id. at 1274. The
20 present case, however, is not about a benefit as a form of
21 deferred compensation for past military service. Instead, it is
22 about whether the government has a duty to pay for medical care to
23 address ongoing suffering caused by military testing.

24 Defendants also renew their argument that this case is
25 "strikingly similar" to the claim brought in Jaffee. In that
26 case, the plaintiff alleged that, while he was serving in the Army
27 in 1953, he was ordered to stand in a field near the site of an
28 explosion of a nuclear device, without any protection against the

1 radiation, and without his knowledge of or consent to the risks.
2 Jaffee, 592 F.2d at 714. On behalf of himself and a putative
3 class of all soldiers who were ordered to be present at the
4 explosion, he sought an order requiring the United States to warn
5 class members of the medical risks that they faced and to provide
6 or subsidize medical care for them. Id. The Third Circuit found
7 that "the request for prompt medical examinations and all medical
8 care and necessary treatment, in fact, is a claim for money
9 damages." Id. at 715. It noted that the plaintiff "requests a
10 traditional form of damages in tort compensation for medical
11 expenses to be incurred in the future." Id. It stated that "his
12 complaint seeks an injunction ordering either the provision of
13 medical services by the Government or payment for the medical
14 services," and that thus "payment of money would fully satisfy
15 Jaffee's 'equitable' claim for medical care." Id. The court also
16 found that the payment of money could not satisfy the claim
17 regarding warning of medical risks. Id. In another case, United
18 States v. Price, 688 F.2d 204 (3d Cir. 1982), the Third Circuit
19 found appropriate the funding of a diagnostic study to assess the
20 public health threat posed by contamination and abatement because,
21 "though it would require monetary payments," it "would be
22 preventative rather than compensatory" and was intended as "the
23 first step in the remedial process of abating an existing but
24 growing toxic hazard which, if left unchecked, will result in even
25 graver future injury." Id. at 212. The Third Circuit
26 subsequently explained the principle derived from Jaffee and Price
27 to be "that an important factor in identifying a proceeding as one
28 to enforce a money judgment is whether the remedy would compensate

1 for past wrongful acts resulting in injuries already suffered, or
2 protect against potential future harm.” Penn Terra, Ltd. v. Dep’t
3 of Environmental Resources, 733 F.2d 267, 276-277 (3d Cir. 1984).
4 Here, Plaintiffs have not conceded, as the plaintiff in Jaffe did,
5 that their claim for medical care could be fully remedied by money
6 damages, and Defendants have not shown that it could be. Further,
7 they seek to end purported ongoing rights violations and harm, not
8 compensation for harms that took place completely in the past.
9 Future medical treatment for ills suffered as a result of
10 participation in human experimentation can be seen as preventing
11 future potential harm and suffering.

12 Accordingly, the Court denies Defendants’ motion for summary
13 judgment on this basis.

14 2. DVA medical care available to veterans

15 Plaintiffs seek a declaration that the DOD and the Army have
16 a duty to provide them with medical care and an injunction
17 requiring these agencies to provide examinations, medical care and
18 treatment and to establish policies and procedures governing
19 these. This Court has provided judicial review of Plaintiffs’
20 claims and found that AR 70-25 entitles them to medical care for
21 disabilities, injuries or illnesses caused by their participation
22 in government experiments. The only remaining question is whether
23 Plaintiffs are entitled to choose which government agency ought to
24 provide care.

25 The Court will not enjoin one government agency to provide
26 health care when another agency has been congressionally mandated
27 to do so. The DVA, through its Veterans Health Administration, is
28 charged with providing “a complete medical and hospital service

1 for the medical care and treatment of veterans.” 38 U.S.C.
2 § 7301(b). Congress has mandated that it provide hospital care
3 and medical services “to any veteran for a service-connected
4 disability.” 38 U.S.C. § 1710.⁶ Thus, a “veteran who has a
5 service-connected disability will receive VA care provided for in
6 the ‘medical benefits package’ . . . for that service-connected
7 disability,” even if that veteran is “not enrolled in the VA
8 healthcare system.” 38 C.F.R. § 17.37(b). When receiving care
9 for service-connected disabilities, veterans are not subject to
10 any copayment or income eligibility requirements. 38 C.F.R.
11 §§ 17.108(d)(1), (e)(1), 17.111(f)(1), (3).

12 If a veteran disagrees with a decision made by the DVA about
13 benefits or service-connection, the veteran may appeal the
14 decision to the Board of Veterans’ Appeals. 38 U.S.C. § 7105.
15 Thereafter, decisions of the Board of Veterans’ Appeals can be
16 appealed to the Court of Appeals for Veterans Claims. 38 U.S.C.
17 § 7252.

18 Plaintiffs have not provided any evidence of a material
19 dispute of fact that class members cannot access the DVA health
20 care system or that they are denied compensation for their
21 service-connected injuries. Plaintiffs assert in their response
22 that the Court has previously noted that Plaintiffs’ ability to
23 seek health care from the DVA “does not necessarily relieve the
24 DOD and the Army from being required independently to provide
25 medical care, particularly because Plaintiffs may be able to
26 establish that the scope of their duty may be different than that

27 _____
28 ⁶ “Disability” is defined as “a disease, injury, or other physical
or mental defect.” 38 U.S.C. § 1701(1).

1 of the DVA.” Pls.’ Reply, Docket No. 502, 18 (citing Class Cert.
2 Order, Docket No. 485, 25). However, Plaintiffs have not offered
3 any evidence to support that the duty of DOD and the Army is in
4 fact any broader than that of the DVA. Plaintiffs contend that,
5 even if class members are eligible for medical care from the DVA,
6 “they are not receiving this medical care from the DVA.” Pls.’
7 Post-Hearing Resp., Docket No. 519, 1. This, however, does not
8 undermine the fact that class members can challenge the DVA’s
9 failure to provide medical care through the statutorily-created
10 appeals scheme. In addition, although Plaintiffs suggest that the
11 quality of medical care provided by the DVA is inferior to that of
12 the DOD and the Army, they have not shown any systematic exclusion
13 or inadequate care of their class, or that the class is unable to
14 address any inadequacies through the DVA system.

15 To the extent that Plaintiffs argue that the DVA medical care
16 is a “rationing system,” apparently referring to the fact that not
17 all veterans may enroll in the DVA’s comprehensive medical care
18 program, no such rationing is imposed on the duty of the DVA to
19 provide no-cost care to veterans for service-connected
20 disabilities.⁷ Plaintiffs also speculate, “It is possible that
21 _____

22 ⁷ In addition to providing veterans with medical care for service-
23 connected disabilities, the DVA offers eligible veterans a
24 “medical benefits package” of basic and preventive care that
25 includes outpatient and inpatient medical, surgical, and mental
26 health care, prescription drugs coverage, emergency care,
27 comprehensive rehabilitative care and other services. 38 C.F.R.
28 § 1738(a). To receive the medical benefits package, a veteran
must generally be enrolled in the DVA health-care system. 38
C.F.R. §§ 17.36(a), 17.37. Veterans who qualify for enrollment
are placed into one of eight priority groups. 38 C.F.R.
§ 17.36(b). Assignment to a priority group involves a
consideration of factors including income and a percent rating
that attempts to quantify the decrease in veterans’ earning

1 many class members are not even eligible for DVA medical care,"
2 id. (citing 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12), but provide no
3 evidence that there are any such class members.

4 To the extent that Plaintiffs argue that the organizational
5 Plaintiffs are unable to bring their medical care claims through
6 the DVA system, this argument is unavailing. Plaintiffs have not
7 shown that either of these organizations has its own right to
8 medical care. Further, to the extent that the organizational
9 Plaintiffs are asserting the rights of the members of their
10 organizations, those members can seek care through the DVA for any
11 disabilities, injuries or illnesses suffered as a result of
12 participation in the experimentation program. The organizational
13 Plaintiffs may not prevail on claims here that their members
14 cannot prevail upon directly.

15 The Court has found that AR 70-25 entitles Plaintiffs to
16 medical care for any disabilities, injuries or illnesses suffered
17 as a result of participation in the experimentation program.
18 However, this Court will not enjoin the DOD or the Army to provide
19 health care, because the DVA is required to do so. Plaintiffs
20 have not shown that the DVA systematically fails to offer them
21 care. Although there may be general dissatisfaction and

22 capacity based on their service-connected disability. 38 C.F.R.
23 §§ 4.1, 17.36(b). The Secretary determines, based on the
24 "relevant internal and external factors, e.g., economic changes,
25 changes in medical practices, and waiting times to obtain an
26 appointment for care," which priority groups will actually be
27 eligible for enrollment. 38 C.F.R. § 17.36(b), (c). Presently,
28 the DVA enrolls veterans in all priority categories, except those
in subcategories (v) and (vi) of priority category eight, which
consists of "Noncompensable zero percent service-connected
veterans" and "Nonservice-connected veterans" who do not meet
certain income guidelines or moved from a higher priority
category. 38 C.F.R. § 17.26(b) (8), (c) (2).

1 individual erroneous results, Plaintiffs and the class members can
2 seek medical care through the DVA and challenge denial of care
3 through the statutory scheme prescribed by Congress.

4 II. Constitutional claims

5 In their cross-motion, Defendants also seek judgment on
6 Plaintiffs' constitutional claims against the DOD and the Army
7 related to notice and health care. Plaintiffs have not moved for
8 summary judgment on these claims.

9 Defendants argue that there is no constitutional right for
10 access to government information, so Plaintiffs' constitutional
11 claim for notice fails, and that there is no constitutional right
12 to free health care, so Plaintiffs' claim for health care fails.
13 Defendants further contend that no court has ever granted a
14 request for continuing health care based on a violation of a
15 substantive due process right to bodily integrity. In a footnote,
16 they also state, "Because Plaintiffs cannot identify any
17 substantive entitlement to Notice or health care under the APA or
18 Constitution, their procedural due process claims regarding the
19 alleged absence of any procedures to challenge the deprivation of
20 Notice and health care should be dismissed." Defs.' Opp. and
21 Cross-Mot. at 43.

22 Plaintiffs argue that Defendants did not move on their actual
23 Constitutional claims and so the burden of production never
24 shifted to Plaintiffs. Thus, they contend Defendants should not
25 be granted summary judgment on those claims.

26 As summarized in the class certification order, Plaintiffs
27 asserted the following constitutional claims against the DOD and
28 the Army in this case:

1 (2) under the Fifth Amendment, that these Defendants'
2 failure to provide class members with notice, medical
3 care and a release from secrecy oaths violated their
substantive due process liberty rights, including their
right to bodily integrity;

4 (3) under the Fifth Amendment, that these Defendants'
5 failure to provide class members with any procedures
6 whatsoever to challenge this deprivation violated their
7 procedural due process rights;

8 (4) under the Fifth Amendment, that these Defendants'
9 failure to comply with their own regulations and
10 procedures regarding notice and medical care deprived
11 class members of their due process rights; and

12 (5) under the First and Fifth Amendment, that the
13 failure to provide a release from secrecy oaths
14 prevented class members from filing claims for benefits
15 with the DVA and thereby violated their right of access
16 to the courts.

17 Docket No. 485, 10 (numbering in original). Of these claims, the
18 Court certified only one claim, that brought under the Fifth
19 Amendment for Defendants' failure to comply with their own
20 regulations, to proceed on a class-wide basis. The Court denied
21 certification as to the other constitutional claims.

22 In their motion, Defendants clearly address Plaintiffs'
23 second claim for deprivation of substantive due process rights,
24 including the right to bodily integrity, the third claim for
25 violation of their procedural due process rights by depriving them
26 of their protected interest without providing them with procedures
27 by which to challenge the deprivation, and the fifth claim
28 regarding access to the courts. Defs.' Opp. and Cross-Mot.,
Docket No. 495, 41-43 & n.42, 49-50. Plaintiffs do not respond
substantively to Defendants' challenges to these claims, asserting
incorrectly that Defendants ignore these claims. See, e.g., Pls.'
Reply and Opp., Docket No. 502, 21, 23 n.22. Accordingly, the

1 Court grants Defendants' motion for summary judgment on the
2 second, third and fifth claims against the Army and DOD.

3 Plaintiffs also dispute that Defendants properly moved on the
4 fourth claim. Defendants made clear in the notice of their motion
5 that they moved "on all claims raised and remaining in Plaintiffs'
6 Fourth Amended Complaint." Defs.' Opp. and Cross-Mot., Docket No.
7 495; see also id. at 1 (arguing that "Plaintiffs' constitutional
8 claims," without any limitation, "are similarly baseless and
9 should be dismissed"). Defendants also argued that "Plaintiffs
10 cannot identify any substantive entitlement to Notice or health
11 care under the APA or the Constitution" and thus "their procedural
12 due process claim regarding the alleged absence of any procedures
13 to challenge the deprivation of Notice and health care should be
14 dismissed." Defs.' Opp. and Cross-Mot., Docket No. 495, 43 n.42.
15 In their reply, they further explained that not "every violation
16 of a regulation amount[s] to a violation of an individual's due
17 process rights," that Plaintiffs cannot show the agency
18 regulations at issue here have themselves created a constitutional
19 right to those procedures and thus that there is no constitutional
20 claim for violation of those regulations. Defs.' Reply, Docket
21 No. 513-1, 15.

22 In response, Plaintiffs rely on cases in which courts have
23 held that agencies are bound to follow their own regulations and
24 that failure to do so may violate the due process clause.
25 However, Defendants are correct that such a failure does not
26 always amount to a constitutional violation. See United States v.
27 Caceres, 440 U.S. 741, 752-753 (1979) (finding no constitutional
28 violation where the IRS "admittedly" failed to follow its own

1 regulations, on the basis that it was not "a case in which the Due
2 Process Clause is implicated because an individual has reasonably
3 relied on agency regulations promulgated for his guidance or
4 benefit and has suffered substantially because of their violation
5 by the agency"). Plaintiffs have not shown that here.

6 Accordingly, Defendants' motion for summary judgment on
7 Plaintiffs' constitutional claims is granted.

8 III. Secrecy oath claims

9 Defendants move for summary judgment on Plaintiffs'
10 individual claims against the DOD, the Army and the CIA based on
11 secrecy oaths.

12 A. Claims against the CIA

13 Defendants argue that the CIA is entitled to summary judgment
14 on Plaintiffs' individual secrecy oath claims against that agency
15 for a number of reasons. First, they contend that Plaintiffs can
16 produce no evidence that the CIA ever administered secrecy oaths
17 to any individual Plaintiff or VVA member. Second, they assert
18 that the claims are moot because the CIA provided a sworn
19 declaration in June 2011 attesting that the individual Plaintiffs
20 and identified VVA members did not give secrecy oaths to the CIA
21 and releasing them from any secrecy oath that they believed that
22 they might have with the CIA. Finally, they argue that the CIA
23 cannot release individuals from a secrecy oath administered by the
24 DOD or the Army.

25 Plaintiffs do not dispute that they cannot provide any
26 evidence that the CIA administered secrecy oaths or that
27 declaratory relief against the CIA that addressed the validity of
28 DOD or Army secrecy oaths would be ineffective. They also concede

1 that they have received all relief that they desired on this claim
2 in relation to the individuals released by the CIA through the
3 June 2011 declaration. They state that this extends to their
4 entire claim against the CIA, “[i]n light of the CIA’s statement
5 that the secrecy oath release encompasses all VVA members,” and
6 that they “submit that claim to the Court.” Pls.’ Reply and Opp.,
7 Docket No. 502, 36.

8 Defendants reply that Plaintiffs mischaracterized their
9 response. They state that the 2011 declaration encompassed only
10 the VVA members who were identified by name therein and did not
11 encompass an additional twenty-seven VVA members whom Plaintiffs
12 identified as having been test participants for the first time six
13 months after the close of discovery.

14 Irrespective of whether those additional twenty-seven VVA
15 members were released from any possible secrecy oaths through the
16 2011 declaration, the Court grants Defendants’ motion for summary
17 judgment on the secrecy oath claim against the CIA. Plaintiffs
18 have not produced any evidence that any secrecy oaths were
19 administered by the CIA, or are fairly traceable to the CIA,
20 involving any Plaintiff or VVA member, including those twenty-
21 seven individuals who were identified later.

22 B. Claims against the DOD and the Army

23 Defendants also move for summary judgment on the secrecy oath
24 claims against the DOD and Army. Defendants argue that Plaintiffs
25 have not presented any evidence that they or the VVA members
26 currently feel restrained by any such oath and that Defendants
27 have issued two memoranda releasing them already. They contend
28 that, as a result, Plaintiffs lack standing to pursue this claim.

1 Plaintiffs respond that the Court already has rejected this
2 argument when it refused to hold that certain Plaintiffs and VVA
3 members lacked standing at the class certification stage.
4 However, as Defendants point out, Plaintiffs presently have the
5 burden to establish that there is at least a genuine issue of
6 material fact as to standing of each Plaintiff. See Dep't of
7 Commerce v. U.S. House of Representatives, 525 U.S. 316, 329
8 (1999) ("To prevail on a Federal Rule of Civil Procedure 56 motion
9 for summary judgment . . ., mere allegations of injury are
10 insufficient. Rather, a plaintiff must establish that there
11 exists no genuine issue of material fact as to justiciability or
12 the merits.").

13 Plaintiffs assert that "it is clear that" they "'could
14 benefit from equitable relief that would invalidate the secrecy
15 oaths altogether." Pls.' Reply and Opp., Docket No. 36. However,
16 in the instant motion, they have not cited any evidence to support
17 that they or the VVA members still suffer ongoing effects of the
18 oaths, such as fear of prosecution. At the hearing, Plaintiffs
19 cited the evidence regarding Dufrane relied upon by the Court in
20 the class certification order, but do not address the arguments
21 raised by Defendants regarding the other individuals.

22 In the class certification order, the Court noted that
23 Plaintiffs had offered "evidence that Dufrane testified that he
24 continued to feel bound by the secrecy oath to some extent" and
25 that there was no evidence cited that showed that Defendants had
26 communicated an unconditional release to him. Class Cert. Order,
27 Docket No. 485, 28-29. Defendants again offer testimony from
28 Dufrane's deposition, in which he stated he did not think that he

1 was allowed to talk about his experiences at Edgewood Arsenal
2 "completely" because he had been told not to talk about some
3 aspects of what happened and that he still felt constrained by the
4 secrecy. See Docket No. 496-64, 92:1-94:16. He went on to state,
5 however, that there was nothing in his memory that he could
6 identify that he wants to talk about but is unable to. Id. at
7 94:17-23. In addition, Defendants have now offered evidence that
8 Dufrane had seen the 1993 Perry memorandum prior to his
9 deposition. As quoted above, that memorandum provided a full and
10 unconditional release from any secrecy oath that had been given.
11 In light of the facts that a full release was communicated to
12 Dufrane, and that there is nothing in particular that he presently
13 feels that he is prevented from speaking about, although he feels
14 generally constrained, he will not receive a benefit from a
15 further declaration "that Plaintiffs are released from any
16 obligations or penalties under their secrecy oaths." Fourth Am.
17 Compl. ¶ 183. Finally, Plaintiffs do not offer any response to
18 Defendants' argument that there can be no showing of future threat
19 of prosecution because there have not been any such enforcement
20 actions in the past.

21 Accordingly, the Court grants Defendants' motion for summary
22 judgment on the secrecy oath claims against the DOD and the Army.

23 IV. Claim that DVA is a biased adjudicator of benefits claims

24 Defendants seek summary judgment on Plaintiffs' claims
25 against the DVA for biased adjudication of their benefits claims.

26 Defendants argue that 38 U.S.C. § 511 deprives this Court of
27 jurisdiction over this claim because it bars consideration of the
28 relief that Plaintiffs seek. They also argue that Plaintiffs

1 cannot establish a genuine issue of material fact as to whether
2 DVA was involved in the testing programs at issue here. Finally,
3 they contend that Plaintiffs cannot make a sufficient showing that
4 the DVA was an inherently biased adjudicator of their benefits
5 claims.

6 A. Section 511

7 Defendants have previously argued on two occasions that § 511
8 deprives this Court of jurisdiction to hear this claim, and on
9 both occasions, the Court has rejected the argument. See Docket
10 No. 177, 8-11; Docket No. 485, 31-34. Defendants contend that
11 they are now making a new argument, which the Court has not
12 addressed: that the relief sought by Plaintiffs cannot be granted
13 under § 511. Plaintiffs respond simply that the Court's prior
14 decisions were correct and do not address Defendants' purportedly
15 new argument.

16 Section 511 provides,

17 The Secretary shall decide all questions of law and fact
18 necessary to a decision by the Secretary under a law
19 that affects the provision of benefits by the Secretary
20 to veterans or the dependents or survivors of veterans.
21 Subject to subsection (b), the decision of the Secretary
22 as to any such question shall be final and conclusive
23 and may not be reviewed by any other official or by any
24 court, whether by an action in the nature of mandamus or
25 otherwise.

26 38 U.S.C. § 511(a).

27 In granting Plaintiffs leave to amend assert this claim
28 against the DVA, the Court acknowledged that § 511 "precludes
federal district courts from reviewing challenges to individual
benefits determinations, even if they are framed as constitutional
challenges." Docket No. 177, 8. At that time, the effect of
§ 511 on claims that "purport not to challenge individual benefits

1 decisions, but rather the manner in which such decisions are
2 made," had not been addressed by the Ninth Circuit. Id. Thus,
3 the Court reviewed several decisions from other circuit courts of
4 appeals that did address this issue. Id. at 9-11 (discussing in
5 detail Broudy v. Mather, 460 F.3d 106 (D.C. Cir. 2006); Beamon v.
6 Brown, 125 F.3d 965, 972 (6th Cir. 1997)). Applying the standards
7 set forth in Broudy and Beamon, the Court held,

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

17 Docket No. 177, 11.

18 Defendants later moved for leave to file a motion for
19 reconsideration of this order, asserting that the Ninth Circuit's
20 recent decision in Veterans for Common Sense v. Shinseki, 678 F.3d
21 1013 (2012), compelled a different result. The Court rejected
22 this argument, finding that "Veterans for Common Sense does not
23 require reconsideration of the Court's prior conclusion." Docket
24 No. 485, 33. This Court explained,

25 In that case, two nonprofit organizations challenged
26 delays in the provision of care and adjudication of
27 claims by the DVA and the lack of adequate procedures
28 during the claims process. The court found that the
challenges to delays were barred by § 511, because to
adjudicate those claims, the district court would have

1 to examine the circumstances surrounding the DVA's
2 provisions of benefits to individual veterans and
3 adjudication of individual claims. Id. at 1027-30.
4 However, after discussing the decisions reached by other
5 circuits in Broudy, Beamon and several other cases, the
6 court concluded that it did have jurisdiction over the
7 claims seeking review of the DVA's procedures for
8 handling benefits claims at its regional offices. Id.
9 at 1033-35. In so holding, the court stated that,
10 unlike the other claims, this claim "does not require us
11 to review 'decisions' affecting the provision of
12 benefits to any individual claimants" and noted that the
13 plaintiff "does not challenge decisions at all." Id. at
14 1034.

8 In Veterans for Common Sense, the Ninth Circuit explained,

9 A consideration of the constitutionality of the
10 procedures in place, which frame the system by which a
11 veteran presents his claims to the VA, is different than
12 a consideration of the decisions that emanate through
13 the course of the presentation of those claims. In this
14 respect, VCS does not ask us to review the decisions of
15 the VA in the cases of individual veterans, but to
16 consider, in the "generality of cases," the risk of
17 erroneous deprivation inherent in the existing
18 procedures compared to the probable value of the
19 additional procedures requested by VCS. . . . Evaluating
20 under the Due Process Clause the need for subpoena
21 power, the ability to obtain discovery, or any of the
22 other procedures VCS requests is sufficiently
23 independent of any VA decision as to an individual
24 veteran's claim for benefits that § 511 does not bar our
25 jurisdiction.

18 678 F.3d at 1034. In its prior order, this Court found that "the
19 Ninth Circuit considered some of the same authority and applied a
20 similar standard as this Court did in its earlier order," and thus
21 concluded that it "would have reached the same conclusion if it
22 had had the benefit of the decision in Veterans for Common Sense
23 at that time." Docket No. 485, 34.

24 Defendants now argue that the Court's assessment of the
25 "manner in which the VA determines benefits eligibility . . .
26 plainly implicates 'decisions that relate to benefits
27 determination.'" Defs.' Opp. and Cross-Mot. at 52. However, like
28 the claim for which the Ninth Circuit found jurisdiction in

1 Veterans for Common Sense, evaluating whether the risk of actual
2 bias is too high to be constitutionally tolerable is “sufficiently
3 independent of any VA decision as to an individual veteran’s claim
4 for benefits that § 511 does not bar” this Court’s jurisdiction.
5 See 678 F.3d at 1034.

6 To the extent that Defendants now contend that Veterans for
7 Common Sense does not allow the Court to issue the relief that
8 Plaintiffs seek, the Court rejects this argument. In that case,
9 in addressing the plaintiff’s claim that delays in the provision
10 of mental health care violated the APA and the Constitution, the
11 Ninth Circuit noted that

12 in order to provide the relief that VCS seeks, the
13 district court would have to prescribe the procedures
14 for processing mental health claims and supervise the
15 enforcement of its order. To determine whether its
16 order has been followed, the district court would have
17 to look at individual processing times. . . . [I]t would
18 embroil the district court in the day-to-day operation
19 of the VA and, of necessity, require the district court
20 to monitor individual benefits determinations.

21 Id. at 1028.

22 Here, Plaintiffs seek a declaration that the DVA’s decisions
23 regarding entitlement to SCDDC and medical care are “null and
24 void” and an “injunction forbidding defendants from continuing to
25 use biased decision makers to decide their eligibility” for
26 benefits. Fourth Am. Compl. ¶¶ 233-34; see also id. (seeking “a
27 plan to remedy denials of affected claims for SCDDC and/or
28 eligibility for medical care based upon service connection”). To
the extent that Plaintiffs request that the Court reverse the past
benefits determinations made by the DVA--or at least the denials--
their claims are not “sufficiently independent” of any VA decision
on an individual veteran’s claim for benefits. Accordingly, to

1 the extent that Plaintiffs seek an order vacating all past
2 benefits determinations and requiring that they be re-adjudicated,
3 the Court finds that it lacks jurisdiction to do so.
4 However, Plaintiffs also ask that the Court issue "an order
5 directing the DVA . . . to devise procedures for resolving such
6 claims that comply with the due process clause, which involve, at
7 a minimum, an independent decision maker, all to be submitted to
8 the Court for advance approval." Id. at ¶ 234. Monitoring
9 compliance with such a plan as to adjudications of future claims
10 would not require the Court to look at individual benefits
11 determinations, but rather to consider who will adjudicate the
12 claims. Plaintiffs' request is similar to that permitted by the
13 Ninth Circuit in Veterans for Common Sense because it involves the
14 "consideration of the constitutionality of the procedures in
15 place, which frame the system by which a veteran presents his
16 claims to the VA," and not the "consideration of the decisions
17 that emanate through the course of the presentation of those
18 claims." 678 F.3d at 1034. Thus, the Court has jurisdiction to
19 consider Plaintiffs' claim for prospective injunctive and
20 declaratory relief.

21 B. DVA's purported bias "The crux of Plaintiffs' claim"
22 against the DVA is that, "because the DVA allegedly was involved
23 in the testing programs at issue, the agency is incapable of
24 making neutral, unbiased benefits determinations for veterans who
25 were test participants," which "renders the benefits
26 determination process constitutionally defective." Pls.' Reply
27 and Opp., Docket No. 502, 23 (quoting Class Cert. Order, Docket
28 No. 485, 32).

1 "There are two ways in which a plaintiff may establish that
2 he has been denied his constitutional right to a fair hearing
3 before an impartial tribunal." Stivers v. Pierce, 71 F.3d 732,
4 741 (9th Cir. 1995). "In some cases, the proceedings and
5 surrounding circumstances may demonstrate actual bias on the part
6 of the adjudicator." Id. "In other cases, the adjudicator's
7 pecuniary or personal interest in the outcome of the proceedings
8 may create an appearance of partiality that violates due process,
9 even without any showing of actual bias." Stivers, 71 F.3d at 741
10 (citations omitted); see also United States v. Oregon, 44 F.3d
11 758, 772 (9th Cir. 1994) (stating that the plaintiffs "must show
12 an unacceptable probability of actual bias on the part of those
13 who have actual decisionmaking power over their claims"); Exxon
14 Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994) ("the
15 Constitution is concerned not only with actual bias but also with
16 'the appearance of justice'"). "In attempting to make out a claim
17 of unconstitutional bias, a plaintiff must 'overcome a presumption
18 of honesty and integrity' on the part of decisionmakers."
19 Stivers, 71 F.3d at 741. "He must show that the adjudicator 'has
20 prejudged, or reasonably appears to have prejudged, an issue.'"
21 Id.; see also Caperton v. A. T. Massey Coal Co., 556 U.S. 868,
22 883-884 (2009) ("In defining these standards the Court has asked
23 whether, 'under a realistic appraisal of psychological tendencies
24 and human weakness,' the interest 'poses such a risk of actual
25 bias or prejudgment that the practice must be forbidden if the
26 guarantee of due process is to be adequately implemented.'")
27 (citation omitted).

28

1 Plaintiffs argue that the DVA as an agency appears to be
2 biased because it was involved in the testing at issue here.
3 Plaintiffs have offered evidence that a CIA memorandum identified
4 the DVA as among the suppliers of chemicals used for tests, which,
5 when conducted on humans, were carried out jointly with the Army
6 and Edgewood Arsenal. Plaintiffs also offer evidence, which
7 Defendants do not dispute, that the DVA separately carried out
8 human testing using some of the same substances that were used in
9 the testing programs at issue here, including LSD, mescaline,
10 thiorazine, atropine and scopolamine. However, accepting all of
11 Plaintiffs' evidence as true, this is not sufficient to support a
12 conclusion that the probability of bias or prejudice on the part
13 of all of the DVA adjudicators was "intolerably high," so as to
14 result in a constitutional violation. Withrow v. Larkin, 421 U.S.
15 35, 57 (1975). Plaintiffs have not offered evidence to show that
16 the substances that the DVA provided to Defendants were actually
17 used at all, much less that they were used on humans who were
18 service members. In addition, the DVA's involvement did not
19 necessarily mean that its adjudicators would have an interest in
20 deciding claims in an inherently biased fashion. As Defendants
21 point out, Plaintiffs' evidence shows that, after the DVA began
22 receiving claims for benefits related to LSD testing, it
23 proactively sought to learn more about the long-term effects of
24 the drug in order to adjudicate the claims. See Patterson Reply
25 Decl., Ex. 22, Docket No. 503-9, DVA135 000062. This suggests
26 that the DVA sought to resolve such claims properly, not that it
27 sought to avoid responsibility for providing care. Further,
28 Plaintiffs have not demonstrated that there is any connection

1 between the DVA's participation in the testing and the
2 adjudicators at the agency who actually resolve their disability
3 claims. As Defendants point out, these claims are adjudicated by
4 the Veterans Benefits Administration, an arm of the DVA separate
5 from the Veterans Health Administration, the arm of the agency
6 which conducted research into the same substances as used in the
7 testing programs at issue. See United States v. Oregon, 44 F.3d
8 at 772 (characterizing plaintiff's proffered evidence of bias by
9 the Oregon Department of Justice as "fairly weak" where, among
10 other things, plaintiff had not shown that any officials involved
11 in the prior actions it contended showed bias would be involved in
12 the challenged adjudication). The evidence Plaintiffs offer here
13 is too meager to support the existence of an appearance of bias
14 that permeates the entire agency.

15 This conclusion is consistent with Ninth Circuit precedent,
16 in which the court rejected claims of institutional bias where
17 there was insufficient evidence to support that the adjudicative
18 body itself, as opposed to an affiliated person or agency, was
19 biased. In United States v. Oregon, the Klamath Tribe challenged
20 the state of Oregon's administrative procedures for determining
21 water rights. 44 F.3d at 771. The Tribe argued that the Oregon
22 Department of Justice, which provided legal advice to the Oregon
23 Water Resources Department (OWRD), the agency charged with
24 adjudicating their claims, had previously taken litigating
25 positions against the Tribe's water rights. Id. The Ninth
26 Circuit rejected the claim, finding that the Tribe had not shown
27 that the ODOJ would have "any significant role to play in the
28 adjudication or any impact on its outcome" and thus had failed to

1 show "an unacceptable probability of actual bias by the actual
2 decisionmakers." Id. at 772. Similarly, in a recent case, the
3 court considered a claim by a landowner who asserted that the
4 hearing procedures employed by the Assessment Appeals Board for
5 Orange County, when considering his challenge to the County
6 Assessor's valuation of his property and assessment of property
7 taxes, violated his due process rights. William Jefferson & Co.
8 v. Bd. of Assessment & Appeals No. 3 for Orange Cnty., 695 F.3d
9 960, 961-62 (9th Cir. 2012). He argued that "the Board's
10 procedures created the appearance of unfairness" because the Board
11 was advised by an attorney who worked in the same office as the
12 attorney representing the Assessor. Id. at 963-65. The court
13 noted that, even if there were evidence that the Board's attorney
14 advisor "was biased in favor of the Assessor, which there is not,"
15 such evidence was not necessarily sufficient by itself to
16 "conclude that the adjudicating body--the Board itself--was
17 biased." Id. at 965. As in these cases, even if there were some
18 evidence of bias by some departments or individuals at the DVA,
19 there is no evidence of bias by the DVA adjudicators of the claims
20 at issue here.

21 Plaintiffs also argue that the DVA "manifested its inherent
22 bias." Pls.' Reply and Opp., Docket No. 502, 27. Plaintiffs
23 contend that the DVA has disseminated misinformation about the
24 testing, which evidences its inherent bias. They argue that
25 various documents, including the letter and fact sheet that the
26 DVA sent to veterans about the substances and health effects, a
27 training letter sent to DVA regional offices specifying rules for
28 adjudicating benefits claims and a letter sent to clinicians

1 examining veterans, all included inaccuracies and
2 misrepresentations, including that a particular study "found no
3 significant long term health effects in Edgewood Arsenal test
4 subjects." They also argue that there is evidence that the DVA
5 deviated from its own normal claim adjudication procedures in
6 deciding these claims, and from the operative regulations, by
7 giving the DOD the sole authority to validate whether an
8 individual participated in any chemical or biological testing,
9 instead of making a decision based on the entirety of the evidence
10 in the record. They contend that this evidences bias. They state
11 that, because the DOD did not provide this verification for many
12 people, many claims for service connection were denied.

13 Defendants respond that Plaintiffs' purported evidence of
14 bias in the DVA's adjudicatory system is irrelevant because the
15 Court allowed Plaintiffs to bring a claim alleging that the DVA
16 was an inherently biased adjudicator, not a claim of actual bias.
17 They also argue that the evidence Plaintiffs submit cannot be
18 reviewed by the Court under § 511.

19 Plaintiffs reply that § 511 is not an evidentiary
20 exclusionary rule. However, in Veterans for Common Sense, the
21 court did look at the type of inquiry that the district court
22 would have to carry out in resolving the claims, when deciding if
23 the cause of action itself was barred under that section. For
24 example, in resolving the cause of action regarding delayed
25 processing of mental health claims, the court said that "the
26 district court would have no basis for evaluating [the argument
27 that the average processing time was too long] without inquiring
28 into the circumstances of at least a representative sample of the

1 veterans whom VCS represents; then the district court would have
2 to decide whether the processing time was reasonable or not as to
3 each individual case.” 678 F.3d at 1027. To the extent that
4 Plaintiffs invite the Court to examine the reasons that individual
5 service members’ claims were denied or the evidence that was
6 submitted to show that an injury was service-connected in
7 particular cases, see e.g., Pls.’ Reply and Opp., Docket No. 502,
8 30, such evidence does fall into the category of which the Ninth
9 Circuit disapproved.

10 Further, even if the Court could properly consider all of the
11 evidence submitted by Plaintiffs, they have not made a sufficient
12 showing that these materials reveal that there is actual bias or a
13 substantial appearance of bias on the part of the DVA
14 adjudicators. Plaintiffs argue that the DOD fact sheet that
15 accompanied the DVA notice letter showed bias because it included
16 what a DVA representative believed to be an inaccuracy and because
17 the letter itself purportedly discouraged veterans from seeking
18 care. However, although the statement in the fact sheet may have
19 been mistaken, it was the result of a reasonable difference of
20 scientific opinion and does not manifestly reveal a bias on behalf
21 of the DVA, which was not its author, or of the DVA’s
22 adjudicators. Further, the DVA’s letter did not discourage
23 veterans from coming to the DVA for care; instead, it directly
24 encouraged them to do so. Plaintiffs also argue that certain DVA
25 training letters to clinicians show bias because they stated that
26 studies showed no “significant” long-term health or physical
27 effects from participation in testing. However, as with the DOD
28 fact sheet, these statements reflect a difference of scientific

1 opinion as to what constitutes "significant" effects, a debate
2 that is consistent with the evidence that has been presented to
3 the Court. Finally, to the extent that Plaintiffs contend that
4 the DVA diverged from its normal procedures by depending on the
5 DOD to "to validate whether an individual participated in any
6 chemical or biological test," this argument is also unpersuasive.
7 Defendants have offered evidence that, in other contexts, the DVA
8 does depend on the DOD to provide it with details of veterans'
9 service to be used in adjudicating claims, such as when and in
10 what manner the individual served, and this is sometimes specified
11 in written DVA regulations. It is rational for the DVA to accept
12 the DOD's service records as reliable indicators of whether a
13 person making a claim actually served in the military and in what
14 context. This is not inconsistent with, or an abdication of, the
15 DVA's obligation to consider "all pertinent medical and lay
16 evidence" and to base its determination on "review of the entire
17 evidence of record" when resolving a claim of service-connection.
18 38 C.F.R. § 3.303(a).

19 Accordingly, because Plaintiffs have failed to raise a
20 material dispute of fact that there was an appearance of bias or
21 an unconstitutionally high probability of actual bias on the part
22 of the DVA adjudicators, Defendants' motion for summary judgment
23 on this claim is granted.

24 CONCLUSION

25 For the reasons set forth above, Plaintiffs' motion for
26 partial summary judgment is GRANTED in part and DENIED in part,
27 and Defendants' cross-motion for summary judgment is GRANTED in
28 part and DENIED in part.

1 The Court rules as follows:

2 (1) The DOD and the Army are granted summary judgment on:

3 (a) all APA claims for notice, except to the extent that
4 Plaintiffs seek to require the Army to warn class members of any
5 information acquired after the last notice that may affect their
6 well-being when that information has become available and in the
7 future; (b) all APA claims for medical care; (c) the claim that,
8 under the Fifth Amendment, these Defendants' failure to provide
9 Plaintiffs with notice, medical care and a release from secrecy
10 oaths violated their substantive due process liberty rights,
11 including their right to bodily integrity; (d) the claim that,
12 under the Fifth Amendment, these Defendants' failure to provide
13 Plaintiffs with any procedures whatsoever to challenge this
14 deprivation violated their procedural due process rights; (e) the
15 claim that, under the Fifth Amendment, these Defendants' failure
16 to comply with their own regulations and procedures regarding
17 notice and medical care deprived Plaintiffs of their due process
18 rights; and (f) the claim that, under the First and Fifth
19 Amendment, the failure to provide a release from secrecy oaths
20 prevented Plaintiffs from filing claims for benefits with the DVA
21 and thereby violated their right of access to the courts.

22 (2) The DOD, the Army and the CIA are granted summary
23 judgment on Plaintiffs' claims seeking a declaration that the
24 secrecy oaths are invalid and an injunction requiring Defendants
25 to notify Plaintiffs that they have been released from such oaths.

26 (3) Defendants' motion for summary judgment on Plaintiffs'
27 claim against the DVA is granted.

28

1 (4) Plaintiffs' motion for summary judgment on the APA
2 notice claim is granted to the extent that Plaintiffs seek to
3 require the Army to warn class members of any information acquired
4 after the last notice was provided, and in the future, that may
5 affect their well-being, when that information becomes available.

6 The Court VACATES the final pretrial conference and trial
7 dates. An injunction and judgment shall enter.

8 IT IS SO ORDERED.

9
10 Dated: 11/19/2013

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