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

Attorneys for DEFENDANTS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

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

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

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

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

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

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

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

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

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

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

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

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

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

Here, any alleged constitutional claims regarding notice and health care did not survive the Court's January 19, 2010 order granting in part and denying in part Defendants' motion to dismiss Plaintiffs' Second Amended Complaint. Dkt. No. 252 at 5-6 (citing Dkt. No. 59). As this Court recognized in that Order (and as Plaintiffs do not dispute), "Defendants move[d] to dismiss Plaintiffs' Second Amended Complaint (SAC) ***in its entirety*** for lack of subject matter jurisdiction and for failure to state claim." Dkt. No. 59 at 1 (emphasis added). With respect to Plaintiffs' notice claim, Defendants argued that "Plaintiffs have no constitutional right to government information." Dkt. No. 57 at 21. At the time, Plaintiffs ***agreed*** with Defendants' position and represented to the Court that they "***do not seek relief based on . . . a constitutional right to information.***'" Dkt. No. 43 at 24 (emphasis added). Rather, Plaintiffs argued that their notice claim was based only upon Defendants' "own duties and regulations," and that their health care claim was "based on Defendants' obligation to provide medical care as required by their own duties and regulations." *Id.* Accordingly, this Court concluded that "Plaintiffs' claims concerning Defendants' failure to provide medical care and proper notice of the experiments' health effects arise under 5 U.S.C. § 706(1)." Dkt. No. 59 at 18.[2]

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

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

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

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

III. Plaintiffs' APA Claims Are Limited To Post-1953 Testing.

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

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

Dated: October 7, 2011

Respectfully submitted,

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

/s/Joshua E. Gardner
JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8470
E-mail: joshua.e.gardner@usdoj.gov