

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

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VIETNAM VETERANS OF AMERICA, *et al.*,  
  
Plaintiffs,  
  
v.  
  
CENTRAL INTELLIGENCE AGENCY, *et al.*,  
  
Defendants.

Case No. CV 09-0037-CW (JC)

**DECLARATION OF MICHAEL E. KILPATRICK, M.D.**

I, Dr. Michael E. Kilpatrick, declare as follows:

1. I am Deputy Director, Force Health Protection and Readiness Programs, for the Office of Deputy Assistant Secretary of Defense for Force Health Protection and Readiness with the Department of Defense. I was reassigned to this position in October 2011, after having previously served in this position. I previously have served as a medical advisor to the Office of the Special Assistant for Gulf War Illness and, in 2007, was named as director, Military Health System Strategic Communications. In 2000, I was selected to the Senior Executive Service.
2. As Deputy Director, I am responsible for, among other things, the coordination of efforts across nine programs to improve, protect and sustain service member health and resilience, as well as to ensure optimal mission performance across global military activities and operations. I also am responsible for leading strategic communications efforts for Force Health Protection and Readiness and other Health Affairs/TRICARE Management Activity Programs. As Deputy Director, I report to Deputy Assistant Secretary of Defense Dr. George Peach Taylor, Jr.
3. In connection with my responsibilities as Deputy Director, I am generally familiar with this litigation brought by Plaintiffs against various federal agencies, including DoD, and I am able to determine whether certain predecisional documents contain deliberative process materials, the public disclosure of which would chill the decision-making process. In addition, I was a

1 Department of Defense and Department of the Army (collectively, "DoD") Rule 30(b)(6)  
2 designee over a wide variety of topics over three days of deposition.

3 4. During my tenure at DoD, the efforts to identify veterans who participated in chemical  
4 and biological testing have been of significant interest to many different parties, including  
5 Congress, other Executive Branch agencies, veterans service organization, and others. As part of  
6 this interest, DoD policy makers are often called to explain decisions and actions taken by the  
7 Department in its identification efforts, which is particularly challenging given the complexity of  
8 the issues involved.

9 5. Based upon my review and personal consideration of each document, I hereby formally  
10 assert the deliberative process privilege on behalf of DoD for the following 215 documents,  
11 which are potentially responsive to Plaintiffs' requests for production of documents.

12 6. The following 38 documents identified on DoD's privilege log include emails and draft  
13 meeting minutes between VA and DoD regarding the consideration of efforts to notify veterans  
14 exposed to chemical and biological substances: 141, 142, 143, 144, 145, 146, 147, 148, 149, 150,  
15 151, 152, 153, 154, 183, 184, 185, 186, 187, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221,  
16 222, 223, 224, 225, 226, 227, 228, 229 and 289. DoD needs to be allowed to gather information,  
17 consult, and deliberate with other Executive Branch agencies about the potential notification of  
18 veterans without fear that those preliminary deliberations would be subject to public scrutiny. It  
19 would chill the policymaking process if these tentative views were subject to public scrutiny.  
20 These documents are email chains and attachments discussing the possibility of conducting  
21 outreach to veterans who participated in the Cold War-era test program at Edgewood Arsenal and  
22 predate the final decision regarding outreach efforts. The attachments are drafts of the January  
23 30, 2006 meeting minutes of the DoD/VA Deployment Health Working Group that predate the  
24 final version of those meeting minutes. The purpose of the DoD/VA Deployment Health  
25 Working Group is to provide a forum in which DoD and VA can consider policy options and  
26 share information and expertise on issues concerning service member and veteran health issues.  
27 The members of this working group would be substantially less likely to propose and consider a  
28 wide range of possible options regarding health issues if they knew that such discussions would

1 be subject to public disclosure. This chilling effect would diminish the utility of the working  
2 group and, ultimately, the ability of DoD and VA to address health issues concerning service  
3 member and veteran populations. Each of these documents reflect the various views and  
4 opinions of DoD and VA employees regarding the possibility of VA notifying veterans, and  
5 predates the final decision that VA notify veterans. The documents, which are works-in-progress,  
6 not final versions, were prepared to enable DoD and VA employees to make decisions about  
7 whether and how to provide notice to veterans who were exposed to chemical and biological  
8 substances and to identify the implications of various options. Disclosure of the documents  
9 would reveal preliminary judgments subject to further refinement and revision. If the documents  
10 were released, DoD employees likely would hesitate to participate in the exchange of ideas and  
11 discussion such as the ones that are reflected in these documents. As a result, disclosure would  
12 undermine DoD's ability to make a reasoned decision, free of fear of public scrutiny of non-final  
13 ideas. A final version of the January 30, 2006 meeting minutes of the DoD/VA Deployment  
14 Health Working Group previously has been produced to Plaintiffs at VET103\_000054-08.

15 7. The following 91 documents identified on DoD's privilege log are email discussions  
16 about the contents of the draft DoD Fact Sheet and Questions and Answers related to the Cold  
17 War-era test program, as well as multiple versions of drafts of each document and suggested red-  
18 lines and edits to each document: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25,  
19 27, 29, 30, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66,  
20 67, 68, 69, 70, 71, 72, 74, 75, 86, 87, 174, 188, 189, 190, 191, 239, 248, 249, 251, 252, 253, 255,  
21 256, 261, 262, 265, 266, 268, 269, 270, 271, 272, 274, 275, 276, 277, 278, 279, 280, 281, 282,  
22 283, 284, 285, 286, 287 and 288. These documents reflect deliberations and editorial  
23 commentary about the content of the Fact Sheet and Questions and Answers prepared by DoD.  
24 These draft documents are works-in-progress assembled for internal consideration and editing by  
25 DoD employees and its contractor, not final versions of the Fact Sheet and Questions and  
26 Answers, which post-date these drafts and which have been produced to Plaintiffs in this lawsuit  
27 at VET001\_014266. If released, these documents would reveal preliminary judgments that were  
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1 subject to further refinement and revision and would inhibit the ability of DoD to engage in a  
2 candid and robust exchange of ideas critical to making informed decisions.

3 8. The following 16 documents identified on DoD's privilege log are emails and drafts of the  
4 VA notice letter regarding World War II-era testing, including drafts containing deliberative red-  
5 line edits, as well as draft fact sheets: 32, 33, 34, 35, 36, 37, 38, 39, 127, 300, 301, 310, 311, 312,  
6 313 and 314. These documents reflect internal deliberations concerning the content of the draft  
7 VA notice letter and draft DoD fact sheet, and pre-date the final version of the VA notice letter  
8 concerning World War II-era testing that has been produced to Plaintiffs in this lawsuit at  
9 DVA006\_108759. In addition, the draft fact sheets were utilized in creating the information that  
10 appears on the DoD Force Health Protection and Readiness Chemical-Biological Warfare  
11 Exposures website, which may be accessed at <http://fhp.osd.mil/CBExposures>. It is important  
12 that DoD's employees be able to fully consider and exchange ideas, and the public disclosure of  
13 these preliminary discussions would stifle the free flow of such ideas.

14 9. The following 13 documents identified on DoD's privilege log are emails and draft  
15 documents, including duplicates, reflecting a potential DoD communication plan regarding the  
16 Cold War-era testing program: 28, 31, 73, 247, 250, 254, 257, 258, 259, 260, 263, 264 and 267.  
17 The ideas contained in these documents reflect the preliminary, candid internal deliberations of  
18 DoD employees which were not ultimately adopted, and pre-date DoD's creation of the Force  
19 Health Protection and Readiness Chemical-Biological Warfare Exposures website, which reflects  
20 some of DoD's outreach efforts. Agency employees would be reluctant to freely and candidly  
21 provide their preliminary views and opinions if they knew their internal deliberations, such as  
22 those reflected in these 13 documents, would be subject to public disclosure and scrutiny.

23 10. The following 43 documents identified on DoD's privilege log are emails, memoranda  
24 and drafts related to the VA Under Secretary for Health's Information Letter Regarding Potential  
25 Health Effects Among Veterans Involved in Military Chemical Warfare Agent Experiments  
26 Conducted From The 1950s To 1975, as well as drafts and comments upon drafts of the VA  
27 document entitled "Chemical Warfare Agent Experiments Among U.S. Servicemembers,"  
28 including drafts with deliberations reflected in red-lined edits: 77, 78, 79, 80, 81, 82, 156, 157,

1 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 173, 176, 177, 179, 180, 181, 182,  
2 202, 203, 204, 205, 207, 208, 210, 211, 230, 231, 232, 233, 242, 243, 244 and 245. These  
3 documents predate the Information Letter that the VA publicly disseminated, the final version of  
4 which was previously produced to Plaintiffs (VVA-VA 009880-009883), as well as the final  
5 version of the VA document entitled "Chemical Warfare Agents," which was previously  
6 produced to Plaintiffs at VET001\_015675. These documents plainly reflect the give-and-take  
7 that is critical for making informed decisions. Disclosure of these draft versions of the  
8 information letter and the accompanying VA document, emails and memoranda would stifle the  
9 free and candid exchange of ideas and suggestions by DoD employees and its contractors which  
10 are necessary to informed decision-making by DoD. If these documents were publicly disclosed,  
11 DoD's employees and its contractors would be much less likely to explore a wide range of  
12 possibilities for fear that such consideration would be subject to premature public scrutiny. It is  
13 important that DoD's employees and contractors explore and consider a wide range of options so  
14 that DoD's decision makers can make the best decisions possible.

15 11. The following 5 documents identified on DoD's privilege log are an email and draft  
16 internal DoD fact sheets concerning Cold War-era field testing of chemical and biological  
17 substances and testing at Dugway Proving Grounds: 83, 84, 85, 238 and 240. The fact sheets,  
18 marked as "drafts," contain deliberative materials and predate the information that appears on the  
19 DoD Force Health Protection and Readiness Chemical-Biological Warfare Exposures website,  
20 which may be publicly accessed at <http://fhp.osd.mil/CBExposures>. These draft documents  
21 reflect the preliminary consideration and selection of facts, and necessarily involves the  
22 intertwining of opinion and fact. Public disclosure of these drafts likely would chill DoD's  
23 employees and its contractors from exploring and considering a wide range of possibilities,  
24 thereby reducing the overall effectiveness of those outreach efforts. It is of critical importance to  
25 the agency that its employees and contractors provide decision makers with all possible options,  
26 free of fear of premature public disclosure, so that the agency can make the best possible  
27 decisions.

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1 12. The following 4 documents identified on DoD's privilege log are duplicate emails and  
2 draft DoD responses to questions posed by VA concerning World War-II era chemical exposures:  
3 42, 43, 296 and 297. These documents were prepared by a DoD contractor for consideration by a  
4 DoD employee and reflect internal deliberations regarding the World War II-era testing program.  
5 It is my understanding that DoD ultimately decided not to provide VA with a final written  
6 response to these questions. Public disclosure of these internal deliberations would greatly chill  
7 candid consideration of all possible options in response to another agency's questions, and  
8 ultimately may hinder effective communication among agencies.

9 13. The following 4 documents identified on DoD's privilege log are duplicate emails and  
10 attachments, prepared by a former DoD contractor, providing his views and posing questions as  
11 to the types of information that potentially could be considered for verifying exposure during  
12 World War II and Cold War-era chemical and biological testing: 40, 41, 298 and 299. These  
13 attachments reflect deliberative ideas, comments and questions of a contractor that pre-date the  
14 final decision by DoD regarding the determination of exposure to chemical and biological  
15 substances during World War II and the Cold War. While DoD certainly values the contributions  
16 of its contractors, decisions regarding issues such as the ones addressed in these documents  
17 ultimately are made by DoD employees. DoD depends upon its contractors to think creatively  
18 and broadly to problem solve, particularly in complicated areas such as this one. If those internal,  
19 pre-decisional deliberations were subject to public scrutiny, those contractors would be  
20 substantial more reluctant to freely share their ideas and proposals, which would greatly degrade  
21 the ultimate decision-making process.

22 14. Document 135 on DoD's privilege log is an email and attachments reflecting deliberations  
23 and the provision of information to an attorney with the DoD Office of General Counsel  
24 necessary to the rendering of legal advice concerning the possible issuance of an updated  
25 memorandum releasing service members from any purported secrecy oaths to which they believe  
26 they may have been subject. This email pre-dates the final version of the January 11, 2011  
27 Memorandum concerning releases from purported secrecy oaths, which has previously been  
28 produced to Plaintiffs in this case at VET021\_000001-2. Public disclosure of this email would

1 necessarily chill the free flow of information by DoD employees and their counsel necessary for  
2 the provision of legal advice. I have been informed by the Department of Justice that it has also  
3 asserted the attorney-client privilege over this document.

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5 I declare under penalty of perjury that the foregoing is true and correct. Executed in Falls  
6 Church, Virginia, on March 15, 2012.

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8 Dr. Michael E. Kilpatrick  
9 Deputy Director  
10 Force Health Protection and Readiness Programs  
11 Office of Deputy Assistant Secretary of Defense for  
12 Force Health Protection and Readiness  
13 United States Department of Defense  
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