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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

Hearing Date:	March 14, 2013
Time:	2:00 pm
Courtroom:	2, 4th Floor
Judge:	Hon. Claudia Wilken

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on March 14, 2013, at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom 2, 4th Floor, Oakland, California 94612, Defendants will, and hereby do, move the Court for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on all claims raised and remaining in Plaintiffs' Fourth Amended Complaint.

This Cross-Motion for Summary Judgment is based on this Notice of Cross-Motion, the Memorandum of Points and Authorities filed herewith, the accompanying Declaration of Joshua E. Gardner, attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this cross-motion.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

FEDERAL RULES

REGULATIONS

INTRODUCTION

By this class action concerning military chemical and biological research programs terminated decades ago, Plaintiffs seek myriad forms of relief against the Government. Each of Plaintiffs' claims suffers from numerous fatal flaws under settled principles of constitutional and administrative law. Plaintiffs' "Notice" claim improperly seeks to have this Court impose Plaintiffs' implausible reading of Department of Defense and Army (collectively, "DoD") regulations and memoranda on those agencies through the exceedingly narrow judicial review mechanism of section 706(1) of the Administrative Procedure Act ("APA"). That claim is not reviewable under the APA and lacks merit. Plaintiffs' effort to obtain health care from DoD, rather than through the comprehensive Department of Veterans Affairs' ("VA") system established by Congress for such care, likewise is unreviewable under the APA and lacks merit. Plaintiffs' constitutional claims, which rely primarily on Plaintiffs' skewed reading of DoD's own regulations and internal memoranda, are similarly baseless and should be dismissed. Plaintiffs' individual claims for releases from so-called "secrecy oaths" allegedly administered by DoD and the Central Intelligence Agency ("CIA") should be rejected for numerous reasons, including lack of standing and a complete absence of factual support. And Plaintiffs' facial bias claim alleging that the VA is somehow inherently incapable of adjudicating test participants' benefits claims likewise lacks any merit and should be summarily rejected. In the end, Plaintiffs' lawsuit amounts to no more than an inappropriate attempt to micromanage (or completely overhaul) comprehensive government programs through the courts. Because this extensive and long-running suit lacks a basis in law or fact, summary judgment in favor of Defendants is appropriate.

STATEMENT OF FACTS

Although Plaintiffs have styled much of this lawsuit as one challenging agency *delay* in the performance of a discrete legal obligation, it is undisputed that the Government has engaged in decades-long efforts to reach out to test participants and assess their health. These substantial and ongoing efforts are summarized below.

A. Overview of Test Programs

Plaintiffs' claims relate to at least three distinct test programs.[1] The first occurred during and shortly after WWII, and primarily involved the administration of mustard agents and lewisite to test protective equipment. Ex. 1 at PLTF 014154. The second distinct test program began in approximately 1955, when the Army began to recruit volunteers to participate in the testing of a wide variety of different chemical substances. *Id.* These tests were designed to examine how to develop protective measures against chemical warfare agents. Ex. 2 (Tr. 446:4-12). Although the precise number of Cold War-era test participants is unknown, it is estimated that approximately 7,000 service members participated.[2] The Army suspended testing of chemical compounds on human volunteers on July 28, 1976. Ex. 7 at ¶ 4; Ex. 1 at PLTF 014154.[3] The third distinct test program involved the testing of biological agents, primarily on approximately 2,300 Seventh Day Adventists who were conscientious objectors, from approximately 1954 until 1973. Ex. 12 at 183. DoD no longer conducts testing on humans using live agents. Ex. 4 (Tr. 45:1-46:16).

B. Government Outreach Efforts

1. Historic Outreach Efforts

The government has extensively followed up with the test participants in each of these three distinct testing programs to assess their health over time.[4] These studies generally did not detect adverse long-term health consequences resulting from participation in the test programs.[5]

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[1] Although Plaintiffs sought to certify a class of service members from 1922 to the present based upon the allegation that 1922 was the "inception" of the program, Dkt. 346 at 1-2, Plaintiffs have failed to adduce any evidence that DoD or the Army conducted chemical or biological tests on service members prior to World War II or after the Cold War era. Accordingly, any relief that the Court may grant for class-wide claims should necessarily exclude pre-WWII and post-Cold War service members.

[2] *See* Ex. 5 at VET004_001772 (determining, based upon five different reports, that between 1955 and 1975, 6,992 volunteers were available for the Cold War-era testing, with 3,425 individuals actually used in agent tests); Ex. 11 at VET013_005006 ("[s]ome 6,720 volunteers participated in the Army tests"); Ex. 7 at ¶ 5 (stating that DoD possesses 6,723 personnel records concerning testing of chemical agents at Edgewood Arsenal and 1,116 personnel records relating to testing at other locations, such as Fort Bragg, Fort Benning, Fort McClellan, and Dugway Proving Ground).

[3] From 1976 to 1979, 52 volunteers participated in protective suit tests. *See* Ex. 7 at ¶ 4.

[4] *See, e.g.*, Ex. 8; Ex. 9 at 154 (noting that as of August 22, 1977, DoD had completed medical examinations on 127 of the known Cold War-era test participants; 176 had been contacted and agreed to an examination; 146 had been located, but had not made a decision as to whether to be

2. Current Outreach Efforts

a. WWII-Era Test Programs

In 1990, VA conducted outreach to WWII-era test participants, using names it had collected from DoD. Ex. 15 at DVA014 001257. Because of limited contact information, however, VA was able to contact only 128 veterans at that time. *Id.* In 1991, at the VA's request, the Institute of Medicine ("IOM") initiated a study regarding the WWII-era test program, which culminated in the January 1993 publication entitled *Veterans at Risk: The Health Effects of Mustard Gas and Lewisite* ("*Veterans at Risk*"), Ex. 16. The purpose of the report was "to survey the medical and scientific literature on mustard agents and Lewisite, asses the strength of association between exposure to these agents and the development of specific diseases, identify gaps in the literature, and recommend strategies and approaches to deal with any gaps found." *See*

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examined, 22 were deceased; 39 refused examination, and DoD was in the process of locating 177 additional participants); Ex. 10 at VET001_009581, VET001_009598 (noting that the study "attempted to contact every individual for whom present addresses could be obtained and invite them to enter one of three Army medical centers for evaluation," and that, ultimately, of the original 686 individuals identified as LSD recipients at Edgewood Arsenal, 220 subjects were examined directly, and an additional 100 had returned completed medical history questionnaires); Exs. 1, 6, 11; Ex. 11 at VET013 005018-19 (a voluminous three-volume study assessing the health effects of all Cold War-era test participants and involving a survey sent to 4,996 locatable individuals, of which 4,085 test participants responded); Ex. 16 at pp.382-383 (discussing participation by test participants in public hearings); Ex. 12 at 183 (noting that a total of 358 former biological test participants agreed to complete a self-administered questionnaire that inquired about, among other things, their health status, ongoing clinical symptoms, and signs); Ex. 13 at JK23_0028310 (reflecting outreach with health surveys to 4,022 locatable test subjects).

[5] *See* Ex. 8 at VET147 002362 ("Subjects who received drugs in the human volunteer program at Edgewood Arsenal did not experience long term physical or psychological effects."); Ex. 10 at VET001 009582 ("the majority of the subjects evaluated did not appear to have sustained any significant damage from their participation in the LSD experiments; and in those cases where there were abnormalities either by history or by examination, LSD could not generally be identified conclusively as the causative agent because of the many confounding variables which could not be controlled"); Ex. 1 at PLTF 014151; Ex. 6 at PLTF 014442-46; Ex. 11 at VET013_005037-40; Ex. 12 at 187 ("no adverse impact on the overall health of the Project Whitecoat volunteers could be conclusively attributed to their participation" in the biological tests); Ex. 13 at JK23_0028316 (concluding that there were "few statistically significant differences in current" health between those who participated in tests involving anticholinesterase and a control group who was not exposed to those substances, and that those exposed to anticholinesterase had a lower rate of attention problems than the control group, but a higher rate of sleep disturbances); Ex. 16 at 216, 220 (suggesting increased risk of health effects from WWII chamber exposures to mustard gas and recommending further studies); Ex. 14 at DVA012 001497 (concluding that the levels of mustard gas exposure experienced by WWII veterans, which were sufficient to cause skin reaction, "were not associated with any increased risk of cause specific mortality").

Ex. 16 at *vi*.[6] Among other things, the IOM concluded that, as a general scientific proposition, there was a causal connection between exposure to mustard agents and certain health conditions (although not necessarily from the exposures in the testing program), that a causal relationship was suggested as to other health conditions, and that there was insufficient evidence to establish a causal relationship between certain other health conditions and exposure. *Id.* at 4-5. The IOM recommended that VA institute a program to identify participants in the WWII-era testing so that the individuals could be notified of their exposures. *Id.* at 6. The IOM also concluded that "there may be many exposed veterans and workers who took an oath of secrecy during WWII," and recommended that these veterans be released from any secrecy oath taken at the time. *Id.* at 7.

Partially in response to *Veterans at Risk,* DoD began its investigation into the WWII-era test programs. Ex. 17 (Tr. 16:1-12). DoD employee Martha Hamed was the project lead from 1992 until 1995 for DoD's efforts to identify test subjects who had been used in mustard gas and Lewisite tests. *Id.* (Tr. 15:20-25, 16:8-12). Ms. Hamed's office was tasked with going to various facilities to identify the names of test participants, assembling a database containing the names as they were obtained, and providing the information to VA so that VA could contact the veterans and validate their benefits claims. *Id.* (Tr. 49:2-15, 260:11-261:2). Ms. Hamed was specifically directed "to do everything we could to try to find the information to expedite [veterans'] being able to get their benefits." *Id.* (Tr. 261:4-11). At the outset, Ms. Hamed did not expect to find many names of test participants because a large number of WWII-era records were destroyed during a 1970s fire at the National Personnel Records Center. *Id.* (Tr. 189:6-190:4). In addition, the names of test subjects often were not recorded, but were instead referred to simply as "observers" or "subjects." *Id.* (Tr. 190:9-13).

[6] The IOM held public hearings and sent letters of invitation to every veteran who had contacted the offices of then-U.S. Congressman Porter Goss. Ex. 16 at 62. The VA also sent announcements to each individual who had a claim pending with the VA for alleged injuries from exposure to mustard agents or Lewisite. *Id.* Twenty veterans appeared in person to present statements, and others provided statements through the mail or by telephone. *Id.* at 62-63 & App. G. Press coverage generated by the hearing resulted in statements being provided by additional veterans, and 257 veterans provided information about their experience as test subjects and health effects. *Id.* at 63 & App. G.

To further facilitate this investigation, DoD contracted with Battelle Memorial Institute ("Battelle") to assist in the identification of test participants. Ex. 17 (Tr. 119:6-12). DoD asked Battelle to provide any information that they could find, including the names of test participants, from a variety of sites where mustard agents or Lewisite were tested, produced, transported or stored, and DoD provided the results of these Battelle searches to VA. *Id.* (Tr. 120:21-121:4, 122:15-17). Ultimately, DoD identified 6,400 service members and civilians who were exposed to mustard agents and other chemical substances during WWII. *See* Ex. 18 at 2, 9. DoD created an Access database containing the names of the WWII-era test participants that they were able to locate and shared this database with the VA. Ex. 17 (Tr. 74:4-76:5, 194:5-10); Ex. 19 (Tr. 159:12-160:3, 164:11-25). Due to the nature and age of the available records, however, a number of database entries lacked complete personally identifying information, such as complete names, service numbers and social security numbers. Ex. 3 (Tr. 186:1-25).

The WWII-era portion of the database has 4,618 entries. Ex. 2 (Tr. 111:8-17). Upon obtaining whatever current contact information it could through the use of matches against VA's databases and the Internal Revenue Service, VA began sending WWII-era test participant notice letters in March 2005. Ex. 20; Ex. 15 at DVA014_001259. Those letters indicated that the recipient was exposed to mustard agents or Lewisite while serving in the military; the locations where such exposures took place; a discussion of compensation for full-body exposure, including presumptions of service connection; a discussion of disabilities that may result from full-body exposure; a discussion of the release from any purported "secrecy oath"; and contact information for both the VA to file a claim and the DoD to obtain information about the testing. Ex. 20.

VA has sent a notice letter to every veteran in the database for whom VA could find current contact information, which currently includes approximately 319 WWII-era test participants. Ex. 21 (Tr. 49:11–19, 220:6–20). One predominant reason that this number is relatively small is that these early test participants were identified only by service number, rather than social security numbers. This makes it extremely difficult to find current contact information. Ex. 2 (Tr. 192:8-24). VA's ability to send out notice letters to WWII-era test

participants is further limited by DoD's inability to locate complete information regarding the test participants and the fact that some veterans have died. Ex. 22 (Tr. 233:5-10).

DoD's efforts to identify WWII-era test participants have been comprehensive; as Ms. Hamed explained: "You can't get blood out of a turnip. If the information was not there to be found, it didn't matter how many people were looking for it." Ex. 17 (Tr. 243:9-17). "[W]e exhausted sources of finding records for the names of mustard gas and lewisite people, because they simply were not there, and the records were burned in St. Louis, so we did not have the personnel records." *Id.* (Tr. 253:15-21, 253:15-24) ("[W]e looked everywhere there were records kept that we were aware of . . ."); Ex. 19 (200:17-25) ("I think we were very successful in what we did. . . . [W]e looked under every rock we could find out there looking for records and, you know, did our best to locate records.").

b. Cold War-Era Test Programs

Beyond the government's substantial historic outreach efforts, *see supra* notes 4-5, the current efforts to search for Cold War-era test information began in the 2003-04 timeframe. Ex. 23 (Tr. 27:20-24, 135:2-13). One of the reasons DoD renewed its investigation was because of section 709 of the National Defense Authorization Act for Fiscal Year 2003 (the "Bob Stump Act"). Ex. 23 (Tr. 135:14-136:4). The Bob Stump Act provided that "the Secretary of Defense also shall work with veterans and veterans service organizations to ***identify*** other projects or tests conducted by the [DoD beyond Project 112/SHAD] that may have exposed members of the Armed Forces to chemical or biological agents." Ex. 24 (emphasis added). (The Act did not require DoD to ***notify*** test participants.) In February 2004, DoD began developing plans to implement this requirement. Ex. 75.

DoD also reinitiated efforts to identify Cold War-era test participants due to the recommendations contained in a May 2004 GAO Report, which suggested that DoD expand its search for test participants beyond Project 112/SHAD. Ex. 25 at VET001_015060-62. DoD issued a task order to Battelle in September 2004 to identify service members and civilian personnel who might have been exposed to chemical and biological agents outside of Project

112/SHAD. Ex. 2 (Tr. 288:7-11, 326:6-20). Battelle conducted a broad search[7] over a number of years, costing many millions of dollars, for personally identifiable information about test subjects, and that search has largely been completed. Ex. 4 (Tr. 72:25-73:11); Ex. 2 (Tr. 145:17-20).

Starting in November 2004, VA and DoD began meeting regularly to discuss notification efforts for the Cold War-era test participants. Ex. 27; Ex. 28. At the outset, both agencies agreed that DoD would be responsible for identifying test participants, and VA would locate and notify them to the extent possible. Ex. 22 (Tr. 14:3-8); Ex. 2 (Tr. 56:11-24, Tr. 62:4-17); Ex. 28. This division of responsibility was logical because DoD, as the entity that conducted the tests, was the subject matter expert on the tests, while outreach efforts related to veteran populations fell within the VA's responsibility. Ex. 22 (Tr. 24:23-25:6); Ex. 2 (Tr. 62:18-63:7) ("[I]t was logical that the notifying agency would be the one that would have the legal authority to provide care to that individual. And for the majority of these individuals, DoD would not have a legal authority to provide care to them" because they were not military retirees.); Ex. 21 (Tr. 86:15–87:8).

Just as it did with the WWII-era test program, DoD created a database of information about Cold War-era test veterans, including, among other things, the substances exposed to, dose, and route of administration, where this information was available. Ex. 23 (Tr. 113:4-15); Ex. 2 (Tr. 168:7-22). This information comes primarily from the test participant files for each veteran. Ex. 2 (Tr. 319:22-25).[8] The purpose of the database is to allow VA to make service-connected health care and disability determinations for test participants. Ex. 2 (Tr. 321:12-17).

DoD had monthly meetings with Battelle in which Battelle would provide information that DoD would review and then pass on to VA. Ex. 23 (Tr. 78:21-25); Ex. 4 (Tr. 27:16-28:13).

[7] The GAO was satisfied with DoD and Battelle's strategy of going to the sites identified and the process of identifying the documents found at each site. Ex. 4 (Tr. 61:17-25).

[8] A typical test file includes the individual's unit of origin, a consent form for audiovisual use of the individual's image by the Army, a testing consent form, a summary sheet of the test plans and agent which the individual was administered, psychological test information, medical treatment information or lab results, if those were generated while the individual was on post, a test plan summary providing information about the tests, and oftentimes a writing by the individual describing his experiences after the testing. Ex. 29 (Tr. 44:19-45:22). If an individual suffered a severe reaction during the test program and had to be hospitalized, that would be reflected in the test file for that participant. Ex. 29 (Tr. 55:8-15).

DoD also provided VA with updates of the database as well as the actual test records that Battelle had located. Ex. 23 (Tr. 130:4-131:2); Ex. 3 (Tr. 65:1-7); Ex. 2 (Tr. 105:13-106:11). In December 2005, DoD provided VA with the names of 1,012 individuals, Ex. 30 at VET007_001419, and continued to provide names thereafter as new data became available. VA routinely utilized both internal and external resources to obtain address information for the veterans provided by DoD. Ex. 22 (Tr. 102:1-3, 103:7-22); Ex. 21 (Tr. 50:6-56:15, 231:4-15).

On April 28, 2005, members of the House of Representatives' Veterans' Affairs Committee ("HVAC") requested that VA, not DoD, provide written notice to living veterans who participated in DoD test programs. *See* Ex. 31; *see also* Ex. 32 (HVAC press release indicating that VA notification effort "was in response to an April 28, 2005 request . . . from [HVAC Committee members]"). On February 2, 2006, HVAC staffers verbally requested that VA and DoD expedite their Cold War-era database analyses and notify some test participants by July 4, 2006. Ex. 33. By that time, DoD had been able to certify participation by 4,446 Cold War-era veterans, and VA had located an address for approximately 2,000 presumed living veterans. *Id.*[9]

VA began sending notice letters to veterans who participated in the Cold War-era tests on June 30, 2006. Ex. 34. The purpose of these letters was to inform the service members about the tests and what to do if they had health concerns, and the letters included a fact sheet and a set of frequently asked questions about the tests prepared by DoD. *Id.* DoD and VA agreed at the outset that VA would prepare the notice letter and DoD would prepare the fact sheets and information about the test program that accompanied the VA letter. Ex. 2 (Tr. 63:3-25).[10] The VA notice letter

[9] By the end of 2006, DoD had sent the names of approximately 6,700 Cold War-era test participants to VA. *See* Ex. 35.

[10] There are multiple reasons why VA did not send individualized letters to veterans tailored to their specific tests, including: (1) it would have taken too long to meet the congressionally requested deadline if particularized notice letters and fact sheets for the hundreds of different chemical and biological agents had to be generated; (2) the information VA was receiving from DoD was changing and being refined over time given DoD's on-going search efforts, and the agencies sought to avoid sending veterans inaccurate information; (3) an effort to avoid making the letters alarmist; and (4) the desire to avoid "cuing" veterans into believing they had adverse health outcomes based upon receipt of the letter, when available evidence indicated that such outcomes were unlikely. Ex. 22 (Tr. 85:25-86:18). Ex. 23 (Tr. 61:15-21, 97:2-5, 190-191, 234); Ex. 2 (Tr. 369:1-18); Ex. 21 (Tr. 117:10-118:2, 118:21-119:20, 126:5-127:13). Instead, the government determined that the best course of action was for VA to send a general letter with an

provided a toll-free number for veterans to contact DoD with any questions about the tests or concerns about disclosing classified information. Ex. 34.[11] The VA notice letter further indicated that VA was offering a free clinical examination to recipients of the letter. *Id.* The letter further stated that if veterans believed they suffer from a chronic health problem as a result of the testing, they should call a VA toll-free number to speak to a VA representative about filing a disability claim, and that they could also contact a local veterans service organization for assistance. *Id.* The DoD fact sheet and FAQ provided additional factual information about the tests. *Id.*

By September 2006, VA had sent more than 1,800 notification letters to Cold War-era test participants. Ex. 36. Currently, the Cold War-era portion of the database has approximately 16,645 entries. Ex. 2 (Tr. 111:8-17).[12] VA has sent a notice letter to every test participant in the

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attached DoD fact sheet and FAQ that provided general information about the tests, and referring the veteran to DoD for more information about his specific tests (and to VA for a health exam). Ex. 21 (Tr. 140:3–141:24); Ex. 23 (Tr. 62:1-8, 97:6-12).

[11] DoD's 1-800 number is intended to answer questions veterans may have had about the tests, including test substances, locations and dates. Ex. 22 (Tr. 84:21-85:7). A number of veterans have utilized DoD's 1-800 number, as reflected in the call-in logs. *See* Ex. 37. At one point, DoD received calls several times a week from veterans who wanted to know if they are in the DoD database. If they are in the database, DoD refers them to VA for follow-up and asks for the veteran's current address so that VA can send the veteran a notice letter. Ex. 2 (Tr. 106:12-107:5). When test participants call the hotline, if DoD has information concerning their tests, DoD provides that information verbally and provides a printout, if requested, containing information about their tests. Ex. 23 (Tr. 57:12-25). In addition, the call center can assist veterans in obtaining their test files. Ex. 3 (Tr. 70:8-21).

Dee Dodson Morris, the DoD employee responsible in the mid-2000s for the investigation into the testing program, spoke on the phone to "well over 100 veterans" who were either referred to her from the hotline or who called her directly, and this included some who claimed to be test participants. Ex. 23 (Tr. 13:21-25,15:17-23, 26:12-27:2, 52:17-53:8, 55:8-19). In addition, the staff at the hotline would refer test participants to Lloyd Roberts, who is an Army Freedom of Information Act ("FOIA") officer and has the authority to copy and send the veterans their test records. Ex. 23 (Tr. 58:22-59:4); Ex. 29 (Tr. 15:14-20, 25:8-11). In the past 5 years alone, approximately 114 test participants have requested their service member test files from Mr. Roberts. Ex. 29 (Tr. 16:18-17:4). Mr. Roberts estimates that, beyond the last five years, approximately 400 Edgewood test participants have requested their test files. Ex. 29 (Tr. 18:24-19:7). As evidence that VA and DoD's outreach efforts have been successful, in 2007—soon after VA and DoD began sending out the notification letters—there were approximately double the number of FOIA requests from Edgewood test participants than in previous years. Ex. 29 (Tr. 65:4-13). If an individual sought information from the hotline, DoD "would customize the information we had for what they had participated in and been exposed to." Ex. 23 (Tr. 61:3-14).

[12] Of the approximately 16,645 entries in the Cold War-era portion of the database, 1,037 reflect individuals who were accidentally exposed to chemical agents, either in the storing, transporting, or administering of those agents. Ex. 2 (Tr. 111:8-22). The approximately 16,645 entries also include some pre-1955 testing. *Id.* (Tr. 111:8-112:8). In addition, there may be duplicates on these lists, such as both a "J. Smith" and a "John Smith"; in the absence of

database for whom VA can find identifying information, which at this point includes approximately 3,300 individuals. Ex. 76 (Tr. 75:24 -79:4).

DoD employee Anthony Lee explained that "we're actually getting very little return on investment lately. All the low-hanging fruit was done years ago. But we're trying to do the best we can." Ex. 4 (Tr. 59:20-24). "Pretty much every time we find some place that has names, if they do anything, they may only improve some of the names we have in the database. We're not really getting any new names. So I actually think we're done." *Id.* (Tr. 61:10-14). Despite these exhaustive efforts to identify test participants, DoD still lacks some information necessary to document fully every individual's exposure history. Ex. 2 (Tr. 678:3-12). Due to incomplete records, some details of exposures are not known for particular individuals. Ex. 2 (Tr. 678:16-19).

Beyond the VA notice letters and accompanying DoD fact sheets and FAQs, the government has engaged in other outreach efforts. For example, DoD has developed a website so that interested individuals can obtain information about the test programs.[13] That website, located at http://mcm.fhpr.osd.mil/cb_exposures/cb_exposures_home.aspx, contains detailed information about both the WWII-era tests and the Cold War-era chemical and biological tests, including copies of, among other things, GAO reports, IOM reports, congressional testimony, and DoD briefings and reports. The website also contains frequently asked questions on a number of topics, and provides both a phone number and address so that veterans may verify or obtain information about their participation in the tests, including obtaining a copy of their test file. Ex. 29 (Tr. 19:10-15).[14]

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additional information such as a date of birth or service number, it is unknown whether this is the same person. *Id.* (Tr. 53:11-54:1).

[13] VA also maintains a website which contains substantive information concerning the WWII-era and Cold War-Era test programs. *See* http://www.warrelatedillness.va.gov/WARRELATEDILLNESS/education/exposures/edgewood-aberdeen.asp.

[14] DoD has also held briefings for, among others, veterans service organizations (VSOs), including Plaintiffs' class representative VVA. Ex. 23 (Tr. 150:4-13). Those briefings are publicly available on the DoD website. *See, e.g.*, http://mcm.fhpr.osd.mil/cb_exposures/briefings_reports.aspx. VA also briefed VSOs concerning the test program. Ex. 22 (Tr. 161:1-17).

ARGUMENT

I. SUMMARY JUDGMENT AND APA STANDARDS

"Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of that party, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012); Fed. R. Civ. P. 56. "APA cases are typically decided via summary judgment." *Weber v. U.S. Dep't of State*, No. 12-000532, 2012 WL 3024751, at *5 (D.D.C. July 25, 2012) (granting summary judgment in case brought under both sections 706(1) and 706(2) of the APA); *see Independence Mining Co. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997) (holding that standards for mandamus and section 706(1) relief are "in essence" the same and that "[w]hether the elements of the mandamus test are satisfied is a question of law"). In addition, because facial constitutional challenges such as Plaintiffs' claim against the VA "do not depend upon the development of a 'complex and voluminous' factual record," such challenges are properly resolved on summary judgment. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987)).

Not all alleged failures to act by an agency are remediable under section 706(1) of the APA. *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 61 (2004). Rather, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original). Accordingly, Article III courts may not review under the APA "broad programmatic attacks" or discrete agency action that is not demanded by law. *Id.* at 64-66 (rejecting APA challenge where a statute provided a mandatory object to be achieved, but also provided the agency with "a great deal of discretion in deciding how to achieve it"). General deficiencies in compliance "lack the specificity requisite for agency action" reviewable under the APA. *Id.* at 66; *Ecology Ctr, Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (holding that failure to conduct duties in strict compliance with regulations does not create an actionable section 706(1) claim). In addition, where the manner of its action is left to the agency's discretion, the court "has no power to specify what the action

must be." *SUWA*, 542 U.S. at 65. These limitations on judicial review seek to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66, 67 ("If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.").

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' NOTICE CLAIM UNDER THE APA AS A MATTER OF LAW

Plaintiffs ask this Court to compel DoD to provide a very specific type of "Notice" to test participants years after the test program concluded, which they define as: information concerning the service members' participation in the test programs; the substances and doses exposed to; the route of exposure; and the known or potential health effects associated with both exposure to those particular substances and in general participation in the test program, with a "continuing duty to provide updated information as it is acquired" (hereinafter "Notice"). *See* Dkt. 490 at 1 n.1. While they seek such relief under Section 706(1) of the APA, it is undisputed that DoD has engaged in substantial outreach efforts to test participants over the years, including providing them with much of the very information Plaintiffs seek. It is thus clear that Plaintiffs' true complaint is with the sufficiency of action DoD has already taken, and such a claim is not cognizable under Section 706(1). Plaintiffs attempt to identify a number of documents and regulations that they contend impose a discrete, nondiscretionary legal obligation on DoD to provide the very specific and particular Notice they seek, but examination of those documents makes plain that they do not impose such an obligation that this Court can enforce under the exacting mandamus-like standards of Section 706(1). Because Plaintiffs' dispute with the sufficiency of DoD's outreach efforts is not cognizable under Section 706(1), and because they have identified no source of authority that imposes a discrete legal obligation on the DoD or the Army to provide Notice as they have defined it, Defendants are entitled to summary judgment.

A. Plaintiffs' Claimed Notice Obligation Under The APA Fails As A Matter of Law.

1. Plaintiffs' true challenge is to the sufficiency of DoD's outreach efforts, and that claim is unreviewable under Section 706(1).

Section 706(1) of the APA "provides jurisdiction to 'compel agency action unlawfully withheld or unreasonably delayed.'" *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983 (9th Cir. 2006) (quoting *SUWA*, 542 U.S. at 61). As Section 706(1) provides a "limited exception to the finality doctrine," the Ninth Circuit has instructed that jurisdiction is allowed under that provision only when "there has been a *genuine* failure to act." *Ecology Ctr.*, 192 F.3d at 926. Accordingly, the Ninth Circuit "has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Id.* (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)).

Plaintiffs' claim runs directly contrary to this prohibition. Plaintiffs seek a very particularized "Notice," which they define as information pertaining to an individual test participant's participation in the test program, the substances and doses administered, the route of exposure, and any known or potential long-term health effects associated with their tests or participation in the program. Yet Plaintiffs do not and cannot dispute that DoD has already undertaken substantial outreach efforts to test participants. Plaintiffs' true complaint is with the *sufficiency* of those outreach efforts, and such a claim is not cognizable under Section 706(1).

As detailed above, the government has already engaged in substantial follow-up efforts with test participants and provided much of the very information contained in Plaintiffs' definition of "Notice." It has conducted multiple follow-up studies to determine whether any long-term health effects may be associated with any of the substances used in the test program, and those studies generally have not detected any such health consequences. It provided a letter to test participants for whom contact information could be found notifying them that they may have participated in tests, providing them with a means to obtain additional information about their particular testing, and informing them of DoD's conclusion about the potential of long-term health effects. Ex. 34. It further made available the NRC study and other documents addressing information about the testing program and veteran health on its website, and the VA did the same.

And in fact, numerous veterans *have* obtained their test files, which contain the information in DoD's possession about the details of their test participation (including substances, doses, route of administration, etc.). While Plaintiffs may disagree with the *manner* in which DoD has conducted outreach to test participants, or the *conclusions* DoD has reached with respect to long-term health effects, those are complaints about action DoD has taken, not a "genuine failure to act." Under well-established precedent, such complaints are not cognizable under 706(1), and the Court should therefore grant summary judgment to Defendants on this claim.

2. Plaintiffs cannot identify a nondiscretionary legal obligation requiring DoD to provide the detailed "Notice" they seek.

a. The 1953 Wilson Memorandum

Plaintiffs' Notice claim under Section 706(1) also fails as a matter of law because they cannot identify any nondiscretionary legal obligation requiring DoD to provide the particular form of "Notice" that they have defined. Plaintiffs first seek to rely on the Wilson Memorandum for such an obligation, but for a number of reasons, that document cannot form the basis of Plaintiffs' Notice claim under Section 706(1). As an initial matter, the Wilson Memorandum, which provides a general statement of policy, lacks the requisite force of law and therefore may not impose a discrete, nondiscretionary obligation that can be enforced through Section 706(1). *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979); *SUWA*, 542 U.S. at 69. Indeed, Plaintiffs tacitly concede this point in their brief, as they contend only that AR 70-25 is a regulation that has the force of law, Dkt. 490 at 11, and fail to make similar claims about the Wilson Memorandum (or, for that matter, CS: 385). Accordingly, Plaintiffs' APA claims based upon the Wilson Memorandum (and CS: 385) should be dismissed.

Furthermore, the Wilson Memorandum plainly does not impose a discrete legal obligation to provide the specific Notice Plaintiffs seek. The Wilson Memorandum authorized the service branches to "actively participate in all phases of the [chemical and biological test] program," and required, among other things, that "[p]roper ***preparation*** should be made and adequate facilities should be provided to protect the experimental subject against even remote possibilities of injury, disability or death." Ex. 45 at C-001-03 (emphasis added). In addition to this prospective

requirement, the Wilson Memorandum required the "informed consent" of the test participant at the time of the testing, which required, among other things, that the participant have

> [s]ufficient knowledge and comprehension of the elements of the subject matter involved as ***to enable him to make an understanding and enlightened decision***. This later element requires that ***before*** the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Id. at C-001 (emphasis added). Nothing in this language creates ***any*** ongoing legal obligation to provide information to test participants, much less the particular Notice as Plaintiffs have defined it. The plain language of the Wilson Memorandum requires only that sufficient information be provided to test subjects to enable them to make informed decisions as to whether to participate in the tests, not any continuous obligation lasting years after the tests took place. Such after-the-fact notification efforts by definition could not contribute to a service member's decision whether to participate in the test program in the first instance. Further, the memorandum prohibited research "where there [was] an *a priori* reason to believe that death or disabling injury [would] occur," and required researchers "to terminate the experiment at any stage . . . if [there was] probable cause to believe . . . that a continuation of the experiment [was] likely to result in the injury, disability, or death to the experimental subject." Ex. 45 at C-002-03. Nothing in this language or elsewhere contemplates ongoing notice obligations, much less Plaintiffs' "Notice."[15] Accordingly, the Wilson Memorandum cannot serve as a basis for Plaintiffs' Notice claim under 706(1).

b. CS: 385

Nor can Plaintiffs rely on CS: 385 as imposing a nondiscretionary legal obligation to provide the particular form of Notice they would like to obtain. Not only does CS: 385 not

[15] Even if the Court were to conclude that the Wilson Memorandum created a discrete, non-discretionary obligation to provide Notice, there is nothing in that document to support the conclusion that it applies to class members who participated in tests that occurred before the issuance of the document. Given that the portion of the Wilson Memorandum relied upon by Plaintiffs to support their Notice obligation concerns the provision of information in order to effectuate informed consent ***before*** participation in the tests, there is no basis to conclude that the document could apply retroactively or cover testing that occurred before 1953.

possess the force of law, but it also mirrors the same language as that identified in the Wilson Memorandum regarding informed consent at the time of the test program. *See* Ex. 46 at 2.a.(1). Nor is there any indication that CS: 385 could apply to class members who participated in tests before 1953. For the reasons discussed above concerning the Wilson Memorandum, CS: 385 does not require the Army to provide Notice to former test subjects decades after the testing.[16]

c. The 1962 and 1974 Version of AR 70-25

Plaintiffs similarly cannot locate the source of a discrete, nondiscretionary legal obligation on the part of the Army to provide Notice to test participants years after the completion of the test program in the 1962 or the 1974 versions of AR 70-25. Like the Wilson Memorandum and CS: 385, both the 1962 and 1974 versions of AR 70-25 discuss "[c]ertain basic principles" that researchers were required to observe in the conduct of experiments. *See* Exs. 47, 48. For example, AR 70-25 provides certain categories of information to test participants ***before*** testing so that the participant may make an informed decision as to whether to participate in the test programs:

> Voluntary consent is absolutely essential.
>
> (1) The volunteer will have legal capacity to give consent, and must give consent freely without being subjected to any force or duress. He must have sufficient understanding of the implications of his participation ***to enable him to make an informed decision***, so far as such knowledge does not compromise the experiment. He will be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected, as will not invalidate the results. He will be fully informed of the effects upon his health or person which may possibly come from his participation in the experiment.

Ex 47 at 4.a.(1), Ex. 48 at 4.a.(1) (emphasis added).

As an initial matter, AR 70-25 lacks the force of law and thus may not serve as the basis for a section 706(1) claim. Congress never intended the statutory bases for AR 70-25 to create any substantive rights. Even though AR 70-25 may appear to contain substantive rules, this is insufficient to confer enforceable rights on individuals such as the Plaintiffs. "That an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.' The

[16] Because CS: 385 and AR 70-25 are ***Army*** documents, they may not serve as the basis for any legal obligation on the part of the Department of Defense. Ex. 2 (Tr. 422:4-22, 513:19-514:14); Ex. 17 (Tr. 172:22-173:1, 175:10-14, 201:21-25).

legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress . . . .” *Chrysler*, 441 U.S. at 302. The Supreme Court in *Chrysler* considered whether Congress had explicitly granted such legislative authority when it enacted 5 U.S.C. § 301. The Court concluded in the negative, describing Section 301 as follows: “It is indeed a ‘housekeeping statute,’ authorizing what the APA terms ‘rules of agency organization procedure or practice’ as opposed to ‘substantive rules.’” *Id.* at 310. Therefore, Congress enacts certain statutes merely to allow an agency to “regulate its own affairs,” and regulations created under those statutes cannot carry the force of law. *Id.* at 309. The Court thus concluded that the agency’s regulations purporting to limit the Trade Secrets Act could find no justification in a “housekeeping” statute such as Section 301. *Id.* at 309-10 & n.39.

Relying on *Chrysler*, other courts have also refused to enforce rights stemming from agency decisions purportedly made under 5 U.S.C. § 301. *See, e.g.*, *Schism*, 316 F.3d 1259, 1281 (Fed. Cir. 2002) (en banc); *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1255-56 (8th Cir. 1998). But although courts have most commonly invoked this doctrine in cases involving Section 301, it can apply to other laws as well. *See Hartman v. Nicholson*, 483 F.3d 1311, 1315-16 (Fed. Cir. 2007) (characterizing a VA regulation as “merely a housekeeping provision” that could not create any substantive rights).

Here, *Chrysler* and its progeny compel the conclusion that AR 70-25 lacks the force of law and thus cannot serve as the basis for a 706(1) claim. The Army promulgated AR 70-25 pursuant to its statutory authority under 10 U.S.C. §§ 3013 and 4503.[17] Like 5 U.S.C. § 301, these statutes solely “empower[] an agency, in this case a military department, to regulate its day-to-day internal operations.” *Schism*, 316 F.3d at 1281. Thus, regardless of whether AR 70-25’s rules appear “substantive,” Congress never delegated its legislative authority to the Army to create any

[17] Congress repealed 10 U.S.C. § 4503 in 1993. *See* 107 Stat. 1705 (1993). In 1990, it read, in relevant part, as follows: “The Secretary of the Army may conduct and participate in research and development programs relating to the Army, and may procure or contract for the use of facilities, supplies, and services that are needed for those programs.” 10 U.S.C. § 4503 (2002).

substantive rights. Sections 3013 and 4503 were merely "housekeeping statutes," and AR 70-25 thus lacks the "force and effect of law." *Chrysler*, 441 U.S. at 302. Plaintiffs thus cannot enforce AR 70-25 through an APA action.[18] *SUWA*, 542 U.S. at 65, 69.

Moreover, the fact that Plaintiffs have to define what they mean by "Notice" strongly counsels against any conclusion that AR 70-25 expressly requires Notice in a manner that could be compelled by this Court under mandamus-like 706(1) standards. Dkt. 490 at 1 n.1. Plaintiffs discern from the words "nature" and "methods and means" of the testing a requirement to provide specific information about the "exposure, substances tested, route of exposure, and dose," and they equate the provisions of AR 70-25 concerning "the inconvenience and hazards" and "the effect upon [the participant's] health or person which may possibly come from his participation in the experiment" with a requirement to provide information regarding "potential health effects, including updated information as it becomes available." *See* Dkt. 490 at 8. Such interpretive reaches demonstrate that AR 70-25 does not expressly and unequivocally require the type of Notice that Plaintiffs maintain is "non-discretionary" in this case.[19]

Finally, even if the Court were to conclude that the 1962 and 1974 versions of AR 70-25 somehow created a non-discretionary obligation to provide "Notice," there is nothing within these Army regulations to support the conclusion that they could apply to test subjects who participated in testing before the effective date of those regulations. Accordingly, at a minimum the claims of class members who participated in tests before 1962 should be dismissed with prejudice.

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[18] Furthermore, even with respect to information that could be provided to a test participant before a test, this language vested substantial scientific discretion and judgment as to how much could be disclosed, as it did not require test administrators to reveal so much as to "compromise the experiment" or "invalidate the results." Ex 47 at 4.a.(1), Ex. 48 at 4.a.(1). Because this provision expressly provides for the exercise of such judgment and discretion, it plainly cannot serve as a basis for compelling the single, detailed, across-the-board Notice Plaintiffs seek.

[19] In its decision on Defendants' motion to dismiss Plaintiffs' Second Amended Complaint, the Court noted that the language about informed consent contained in AR 70-25 (1962) "support[s] a claim under section 702 for which the Court could compel discrete agency action" because it "mandated the disclosure of information so that volunteers could make informed decisions." Dkt. 59 at 15. Respectfully, because the language identified by the Court is limited to the provision of information to test participants ***before*** the test began to enable the participant to make an informed decision as to whether to participate in the tests, this language cannot form the basis of a non-discretionary legal obligation on the part of the Army to provide information to former test participants decades ***after*** the testing took place.

d. The 1990 Version of AR 70-25

1) The 1990 version of AR 70-25 does not apply to tests that occurred before its effective date.

Plaintiffs contend that the 1990 version of AR 70-25, which contains for the first time an explicit "duty to warn," either applies retroactively or otherwise covers testing that occurred decades earlier, and thus imposes an obligation to provide the particular Notice they ask this Court to enforce under 706(1).[20] *See* Dkt. 346-1 at 3 (contending that one of the common legal issues is "[w]hether the obligations contained in the 1990 version of AR 70-25 apply retroactively"); Dkt. 490 at 9 ("Defendants' legal duty to provide Notice extends to *all* test subjects – regardless of whether testing took place before or after the promulgation of regulations mandating Notice."). This argument fails for at least two reasons.

First, AR 70-25 (1990) expressly states that its effective date is February 24, 1990, thereby precluding retroactive application. *See United States v. Gomez-Rodriguez*, 77 F.3d 1150, 1153-54 (9th Cir. 1996) (holding that plain language of effective date precluded retroactive application of statute). Because the 1990 version of AR 70-25 does not clearly and unambiguously establish a retroactive Notice obligation on the part of the Army for former volunteer service members whose tests concluded decades earlier, Plaintiffs cannot overcome the presumption against retroactive application of regulations. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 207-08 (1998); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

Second, it is clear from the context of AR 70-25 (1990) that its "duty to warn" is tied to research that took place ***after*** its 1990 effective date. In considering the scope and meaning of the

[20] The fact that AR 70-25 (1990) contains an explicit forward-looking "duty to warn" further supports the conclusion that neither the 1962 nor the 1974 versions of AR 70-25, which did not include this provision, requires such a "duty to warn." *United States v. Sevrrino*, 316 F.3d 939, 955 (9th Cir. 2003) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)) ("'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'"). In addition, AR 70-25 (1990) does not contain the language Plaintiffs rely upon for their Notice obligation regarding the identification of the substance, dose, and mode of administration as contained in the 1962 and 1974 versions of that directive (*e.g.*, "He will be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected, as will not invalidate the results."). Rather, AR 70-25 (1990) provides that "[v]olunteers are given adequate time to review and understand all information before agreeing to take part in a study." *See* Ex. 49 at 3-1.j.

"duty to warn," it is critical to consider AR 70-25 as a whole and the context in which the "duty to warn" arises in that Army regulation. *See Jones v. United* States, 527 U.S. 373, 389 (1999) (language must be read in context and a phrase "gathers meaning from the words around it"); *Deal v. United States*, 508 U.S. 129, 132 (1993) (noting the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Unlike the two prior versions of AR 70-25, the January 1990 version for the first time identified a "duty to warn," and provided that: "[c]ommanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in the research." Ex. 49 at 3-2.h.[21] However, section 3-2.a makes clear that this "duty to warn" relates to tests occurring after the effective date of the 1990 version of AR 70-25: "To accomplish this [duty to warn], the [major Army Commands] MACOM or agency conducting or sponsoring research must 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 (See *a* above)." *Id.* Notably, section "*a*" provides prospective obligations for MACOM commanders and organization heads, such as the publication of directives and regulations for, among other things, "[t]he procedures to assure that the organization can accomplish its 'duty to warn.'" Ex. 49 at 3-2.a.(1)(b).

Plaintiffs contend that the requirement in AR 70-25 (1990) that the Army create a "Volunteer Data Base" supports their interpretation that AR 70-25 imposes an on-going Notice obligation for participants in testing that took place before the effective date of AR 70-25 (1990). Dkt. 490 at 9-10. In fact, the opposite is true, as demonstrated by the applicable system of records notice (required by the Privacy Act) for that database. In pertinent part, the notice stated that the

[21] The "duty to warn" is not part of the DoD regulation on the protection of human subjects, and the Army is the only service branch that has a directive concerning a "duty to warn," which appears for the first time in AR 70-25 (1990). Ex. 2 (Tr. 138:15-23).

categories of individuals covered by the "Medical Research Volunteer Registry" developed pursuant to AR 70-25 (1990) included "[r]ecords of military members, civilian employees, and non-Department of Defense civilian volunteers participating in ***current and future research*** . . ." 56 Fed. Reg. 48,168-03, 48,187 (Sept. 24, 1991) (emphasis added). By contrast, in a separate notice published that same day, the Army described the system of records that would become the Cold War-era test participant database as covering "[v]olunteers . . . who participated in Army tests of potential chemical agents and/or antidotes from the early 1950's until the end of the program ended in 1975." *See* 56 Fed. Reg. at 48,180. It is thus evident by this comparison that the Army intentionally created the Medical Research Volunteer Registry required by AR 70-25 (1990) to contain information about volunteers participating only in current or future research, not tests completed decades ago.

At the very least, AR 70-25 (1990) is ambiguous as to whether it creates a duty to provide any kind of information contemplated by the "duty to warn" to individuals who participated in research prior to the promulgation of the updated regulation in 1990. "When the meaning of regulatory language is ambiguous, the agency's interpretation of the regulation controls so long as it is reasonable." *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011) (quotations and citations omitted). An agency's interpretation of its regulations is reasonable if it "sensibly conforms to the purpose and wording of the regulations." *Id.* (citations omitted). "Such agency interpretations can be controlling even if advanced for the first time in a legal brief." *Id.* (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011)).

The Army's reasonable interpretation of AR 70-25 (1990) is that the "duty to warn" is part of the "informed consent process at the beginning of any research study," and that the "duty to warn" cannot be retrofit for research studies completed before 1990. Ex. 2 (Tr. 143:1-14).[22] As the Army's Rule 30(b)(6) designee explained, "[t]o be able to effect a duty to warn at the time a

[22] Dr. Kilpatrick served as both the Department of Defense and Department of the Army Rule 30(b)(6) designee. Ex. 2 (Tr. 115:2-16).

research program is being established, this process would have to be established, and I think that that is very clearly stated in the sections that you have already pointed out. What the MACOM commander's responsibility is [ ] to establish a system to do that, to develop the roster and the location of those individuals." Ex. 2 (Tr. 139:19-140:1). Accordingly, "[i]f there is no such system in place, I don't see how it's possible for anyone to effect a duty to warn for events that happened [in the past] when such a system was not established. In other words, prior to 1990." Ex. 2 (Tr. 140:8-12, 151:6-11) (explaining that "this change in AR 70-25 has an effective date of 1990, and it was not meant to retroactively go back for all Army research conducted prior to that date primarily because the system to effect duty to warn would have to be done at the time of research being conducted"). As the Army's Rule 30(b)(6) designee further explained, "[t]here's nothing in place for testing chem-bio or other testing done prior to 1990. Subsequent to 1990 there is a process in place for maintaining the informed consent, maintaining the patient information, information about the test, all of the criteria that we saw in the data elements." Ex. 2 (Tr. 170:23-171:3). Research regulations prior to 1990 did not require compiling such data for research participants because long-term notification was not contemplated or required.

The Army's interpretation is consistent with the language of AR 70-25 and reflects the fair and considered judgment of the Agency. If the Court determines that AR-70-25 is ambiguous regarding the scope of the duty to provide Notice, it should defer to the Army's reasonable interpretation of its regulation. *See Chase Bank*, 131 S.Ct at 880.

2) The effectuation of a "duty to warn" involves highly discretionary judgment calls that are not reviewable under the APA.

Furthermore, the "duty to warn" contained for the first time in the 1990 version of AR 70-25 cannot be enforced under Section 706(1) because it inherently provides the Army with substantial discretion to use its judgment to determine when and how to effectuate such a duty. *See SUWA*, 542 U.S. at 66 (rejecting APA challenge where a statute provided a mandatory object to be achieved, but also provided the agency with "a great deal of discretion in deciding how to achieve it"). AR 70-25 (1990) requires the Army to "provide [test participants] with any newly acquired information ***that may affect their well-being*** when that information becomes available."

See Ex. 49 at 3-2.h (emphasis added). The predicate to triggering this "duty to warn" is the necessarily discretionary scientific judgment as to when certain information "may affect" a test participant's "well-being."

Indeed, the Ninth Circuit has recognized the highly discretionary nature of a "duty to warn" of newly discovery information concerning health effects. *See In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987). In *Atmospheric Testing*, plaintiffs brought an FTCA action claiming that the government breached a duty to warn radiation test participants of the dangers to which they may have been exposed. *Id.* at 996. The Ninth Circuit concluded that such a duty fell squarely within the "discretionary function" exception to the FTCA because: "any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not known. A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants." *Id.* at 997. The policy that underlies the FTCA's "discretionary function" exception and the limitations upon judicial review contained in section 706(1) are similar: to avoid excessive judicial entanglement in the inner workings and discretionary decision-making of the Executive branch. Because the "duty to warn" contained in AR 70-25 (1990) vests substantial discretion in Army officials to determine when and under what circumstances that duty is triggered, relief under the APA is foreclosed.

3. None of the other sources identified by Plaintiffs supports their claimed "Notice" obligation.

While it appears from the "Argument" section of their brief that their APA Notice claim is based solely upon the Wilson Memorandum, CS: 385, and the three versions of AR 70-25, *see* Dkt. 490 at 8-12, in a section entitled "Defendants' Own Regulations and Directives Set Forth Their Legal Obligations," Plaintiffs also discuss hree 1979 Memoranda, the 1993 Perry Memorandum ("Perry Memo"), and the Bob Stump Act, *see* Dkt. 490 at 3-5. Although unclear

from their brief, if Plaintiffs are in fact arguing that the three 1979 Memoranda, the Perry Memo, and the Bob Stump Act themselves impose a discrete legal obligation to provide "Notice" that is enforceable under Section 706(1), such a claim should be rejected. Indeed, as discussed below, these documents actually contradict Plaintiffs' APA arguments.

First, the August 8, 1979 memorandum neither can form the basis for an APA 706(1) claim nor support Plaintiffs' interpretation of the claimed source of Defendants' Notice obligations. That memorandum, which lacks the force of law, *see SUWA*, 542 U.S. at 65 (holding that section 706(1) may not be used to enforce regulations that lack the force of law), discusses the "legal necessity" for a notification program not based upon AR 70-25 or any other regulation, but rather based upon the Department of Justice's July 17, 1979 OLC memorandum, Ex. 38 at VET123_004994. The Court previously has recognized that the "DOJ's conclusion was based on state tort law, which Plaintiffs now assert is not the basis for their claim," and which could not form the basis for an APA 706(1) claim. *See* Dkt. 233 at 6-7.

Second, the September 1979 Army memorandum similarly may neither form the basis for an APA 706(1) claim nor support Plaintiffs' alleged "Notice" obligation. That memorandum, likewise lacking the force of law, reflected comments solicited as a result of the August 1979 memorandum, and provided "broad guidance" concerning an outreach program. Ex. 39 at VET017_000279. That guidance included the following conditional statement: "***If*** there is reason to believe that any participants in such research programs face the risk of continuing injury, those participants ***should*** be notified of their participation and the information known today concerning the substances they received." *Id.* (emphasis added). The September 1979 memorandum noted that the "determination of risk of continuing injury will require a medical determination," and further stated that "[t]he Surgeon General should be asked to consider whether medical examinations would be medically beneficial or desirable in any particular case." *Id.* The September 1979 memorandum stated that "[t]he foregoing guidance is intentionally quite broad. In undertaking this notification effort, a number of details remain to be resolved, and minor issues continue to arise. These matters should be resolved within the Staff, relying upon the sound and reasonable judgment of the appropriate staff officers." *Id.* at VET017_000280. This memorandum

thus reflects general statements of policy involving the exercise of substantial discretion, and accordingly is not reviewable under section 706(1) of the APA. *See Chrysler Corp.*, 441 U.S. at 301-02; *SUWA*, 542 U.S. at 69 (holding that internal agency memoranda that indicated that an agency would take "this, that, or the other action" was not a binding commitment that could be compelled under section 706(1)). In addition, this memorandum reflects the significant medical judgment and discretion inherent in determining the scope of any type of outreach efforts and medical care and, therefore, cannot form the basis for a nondiscretionary obligation that can be compelled under the mandamus-like standards of section 706(1). *See SUWA*, 542 U.S. at 66.

Third, the October 1979 Army Memorandum cannot serve as the basis for Plaintiffs' section 706(1) Notice claim. That memorandum simply tasks the Army as the service branch responsible for implementing the broad guidance contained in the September 1979 memorandum, and states that "[p]articipants in those projects ***who are considered by medical authority*** to be subject to the possible risk of a continuing injury are to be notified," and noted that the Army Surgeon general "***should*** continue to monitor research developments, and if at some future time more information makes it necessary to take some action, [the Surgeon General] ***should recommend*** appropriate action, including notification." Ex. 40 at VET030_022687 (emphasis added). As with the August and September 1979 memoranda, this memorandum lacks the force of law and reflects substantial discretion—based on the contingency of potentially pertinent medical literature in the future—vested in the Army Surgeon General in deciding how to assess potential adverse health effects and implement the plans described in that memorandum. The October 1979 memorandum thus may not support Plaintiffs' section 706(1) Notice claim.

Fourth, the November 1979 Memorandum for Record similarly cannot provide the basis for Plaintiffs' section 706(1) Notice claim. In that memorandum, the Army notified Congress that

> [t]he Army Surgeon General is planning to request the National Academy of Sciences (NAS) to assist in review of available data on compounds/agents tested ***to determine*** if there may be risk of continuing injuries to individuals who may have been exposed to them. ***If*** there is reason to believe that participants in a research program conducted by the Army face risk of continuing injury, the Army will notify those participants of the information concerning the substances received. In addition, The Surgeon General, in consultation with the NAS, will ***determine*** if medical examinations or other follow up efforts would be medically beneficial in

> any particular case. If so, the Department of the Army ***will consider*** undertaking those efforts."

Ex. 41 at VET030_022693 (emphasis added).[23] For the same reasons discussed above, the November 1979 memorandum lacks the force of law, vests substantial discretion and judgment in the Army Surgeon General, and thus may not serve as the basis for Plaintiffs' APA claim.

Finally, neither the Perry Memo nor the Bob Stump Act supports Plaintiffs' claimed obligations under the APA; in fact, the opposite is true. The Perry Memo, which lacks the force of law and is therefore unreviewable under the APA, simply discusses the tasking of the secretaries of the service branches to "initiate procedures" to ***identify*** "[i]nformation on the location, chemicals tested, and dates of each chemical weapons research program." Ex. 42 at VET001_011182.[24] Congress similarly instructed DoD in the Bob Stump Act to ***identify***, rather than ***notify***, test participants. Ex. 24. Congress is presumed to know the state of the law, *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979), and had Congress believed that DoD had an existing legal obligation to provide Notice to Plaintiffs, it would have had no reason to enact legislation imposing a ***lesser*** duty only to identify test participants. The repeated assessments of DoD's outreach efforts conducted by the GAO, which is an arm of Congress, *see Nat'l Assoc. of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 17, 21 (D.D.C. 2009), underscore the correctness of this view: In neither its 2004 nor its 2008 assessment of DoD and VA's outreach efforts did the GAO identify any mandatory Notice duty akin to that pressed by Plaintiffs. *See* Exs. 18, 25. The reason for this is simple: such a duty did not exist. Accordingly, these documents may not form the basis for Plaintiffs' APA Notice claim.[25]

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[23] The Army Surgeon General did in fact request that the NAS review the available data and assess whether the test participants were at risk of long-term health effects. The results of that NAS investigation are found in the comprehensive three-volume study entitled *Possible Long-Term Health Effects of Short-Term Exposure to Chemical Agents*. *See* Exs. 1, 6, 11.

[24] Contrary to Plaintiffs' claim that the Perry Memo somehow obligated the military branches to "identify the names of test participants," the Perry Memo states that it was declassifying "the name, service or social security number, and military unit of each individual known to have participated in a chemical weapons research or testing program" for those service members who participated in tests before 1968. *See* Ex. 42 at VET001_011181.

[25] Plaintiffs contend that the 1991 issuance of a regulation adopting the "Common Rule" codified the basic principles of the Wilson Memorandum. *See* Dkt. 490 at 5. Notably, the

Notably, Plaintiff VVA's pre-litigation statements are consistent with the understanding that DoD does not have an existing legal obligation to provide Notice to test subjects. For example, in the March/April 2008 and November/December editions of the VVA publication "The Veteran," VVA published a notification inviting veterans to contact DoD at the toll-free number identified in the VA notice letter, and indicated that "[i]t is DoD's responsibility to collect and validate chem/bio exposures to service members while on active duty and to maintain these databases. It is the responsibility of VA to inform veterans about their exposures and the benefits to which they may be entitled, and to advise these veterans of procedures to follow if they have health concerns." *See* Exs. 43, 44.

B. Even If The Court Concludes That DoD Or The Army Has A Discrete, Mandatory Obligation To Provide Notice, It May Only Order Limited Relief.

The question whether any of the documents or regulations Plaintiffs rely upon imposes a nondiscretionary legal obligation on DoD or the Army to provide Notice as Plaintiffs have defined it is a pure legal question that is appropriately resolved on summary judgment. If the Court concludes that there is such an obligation that can be enforced under Section 706(1), only limited relief may be ordered. As the Supreme Court has explained, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65. Accordingly, while the Court could conceivably compel DoD to make a new determination and consider new information if it found that a duty existed and DoD had unreasonably delayed in meeting its obligations to satisfy that duty, it could not, under Section 706(1), review the substantive determinations DoD has made (about long-term health effects, for example) or order DoD to reach a specified conclusion as to whether new information may affect the well-being of research volunteers or how it must effectuate a "Notice" obligation. That determination is left to the judgment of the agency and is not reviewable under

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statutory basis for that regulation is 5 U.S.C. § 301, which, as discussed, both the Supreme Court and the Ninth Circuit have recognized is a "housekeeping" statute and regulations promulgated thereunder lack the force of law. *See Chrysler Corp.*, 441 U.S. at 310 (cited by *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 777 (9th Cir. 1994)); *See* 32 C.F.R. § 219.

section 706(1). Because this is a pure legal issue, and in light of the Court's limited authority to order specified relief, no trial on this claim would be appropriate.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' APA CLAIM FOR HEALTH CARE

The parties do not dispute the general proposition that, subject to the availability of appropriations, the federal government has a legal obligation to provide health care to veterans who can establish service-connected disabilities. Rather, the parties dispute ***which*** federal agency has the obligation (or even the authority) to provide a particular class of veterans with health care. Plaintiffs contend that they are entitled to lifetime health care from DoD and the Army, regardless of when a test participant's claimed injury may have manifested, and in addition to their entitlement to seek health care under VA's comprehensive statutory and regulatory scheme.

Plaintiffs' APA claim for health care fails for at least four independent and dispositive reasons. First, the Court lacks subject matter jurisdiction to adjudicate Plaintiffs' claim for health care because it is a claim for money damages that is not cognizable under the APA. Second, because VA's comprehensive statutory and regulatory health care scheme for veterans provides an adequate remedy for Plaintiffs, there is no waiver of sovereign immunity for Plaintiffs' APA health care claim. Third, there is no statutory authority that permits either DoD or the Army to provide health care for non-retiree veterans who claim injuries based upon tests that occurred decades ago. Finally, the plain language of the Army regulations identified by Plaintiffs does not support their contention that they create an unambiguous, discrete legal obligation to provide health care enforceable in a Section 706(1) claim.

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' APA Claim For Health Care.

1. Plaintiffs' claimed entitlement to health care is a claim for money damages.

This Court lacks jurisdiction over Plaintiffs' APA claim for health care because, no matter how Plaintiffs label it, it is a claim for money damages and thus may not be brought under the APA. *See Schism*, 316 F.3d at 1273 ("In our view, however, full free lifetime medical care is

merely a form of pension, a benefit received as deferred compensation upon retirement in lieu of additional cash.");[26] *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979).

The APA's waiver of sovereign immunity does not extend to claims seeking money damages. *See* 5 U.S.C. § 702; *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 929 (9th Cir. 2009). The Supreme Court has held that, even where a claim is styled as one for injunctive relief, where the claim is a means to seeking monetary damages, it may not be brought under the APA. *See Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 263 (1999) (holding that claim for equitable lien constituted a claim for "monetary damages" that was not cognizable under the APA because "its goal is to seize or attach money in the hands of the government as compensation for the loss resulting from the default of a prime contractor").

Indeed, the plaintiffs' claim in *Jaffee* is strikingly similar to the claim for health care brought by Plaintiffs in this case. *Jaffee* involved a putative class action brought by service members who had been exposed to radiation during their service and sought an injunction compelling DoD to provide them long-term medical care. 592 F.2d at 714. The Third Circuit affirmed the district court's dismissal of the plaintiffs' claim for lack of subject matter jurisdiction, and held that "[w]e agree with the Government that the request for prompt medical examinations and all medical care and necessary treatment, in fact, is a claim for money damages. A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." *Id.* at 715 (citing *Int'l Eng'g Co. Div. of A-T-O, Inc. v. Richardson*, 512 F.2d 573 (1975); *Warner v. Cox*, 487 F.2d 1301, 1304 (5th Cir. 1974)). The Third Circuit went on to explain that "Jaffee requests a traditional form of damages in tort

[26] In its class certification decision, this Court distinguished *Schism* on the basis that Plaintiffs in this case are not seeking medical care as a form of deferred compensation. Dkt. 485 at 26. Respectfully, that distinction is immaterial to the question of whether the remedy Plaintiffs seek is, in essence, one for money damages. In *Schism*, the plaintiffs brought their claim under the Little Tucker Act and sought the amounts that they had paid for medical care from 1995 to the present, as well as an order that would "provide [them] and their dependents the unlimited free medical care to which they allegedly contracted." 316 F.3d at 1265, 1267 (citation omitted). The Federal Circuit concluded that this was a claim for money damages. *Id.* at 1273. The fact that Plaintiffs in this case are seeking a prospective order requiring DoD to provide similar free medical care on a forward-looking basis for injuries that allegedly occurred decades ago does not change the conclusion that the relief Plaintiffs seek is monetary in nature.

compensation for medical expenses to be incurred in the future" and noted that the "payment of money would fully satisfy Jaffe's 'equitable' claim for medical care." *Id.*[27]

As in *Jaffee*, Plaintiffs' claim under the APA for long-term medical care is necessarily a claim for money damages against DoD and the Army. Notably, many class members have explicitly acknowledged this, as they previously have brought suit under the Federal Torts Claims Act ***for money damages*** seeking medical care from DoD and the Army based upon their participation in the test program.[28] Because such claims are not cognizable under the APA, Plaintiffs' "equitable" claim under the APA for free, lifetime medical care from DoD and the Army must be dismissed for lack of subject matter jurisdiction.

2. Plaintiffs cannot establish a waiver of sovereign immunity for their medical care claim because the VA's comprehensive statutory scheme provides an adequate remedy.

Even if the Court concludes that Plaintiffs' claim for medical care is not one for money damages, Plaintiffs still cannot establish a waiver of sovereign immunity because they have an

[27] The Court noted in its class certification order that in a decision after *Jaffee*, the Third Circuit held that an important factor to consider in determining whether a claim is for money damages is whether the relief sought is for past or future injures. Dkt. 485 at 26 (citing *Penn Terra, Ltd. v. Dep't of Envtl. Res., Pa.*, 733 F.2d 267, 276-77 (3d Cir. 1984)). In *Penn Terra*, the Third Circuit distinguished between two types of claims for relief in *Jaffee*—one for "prompt" medical care and examinations in the future, and one to commission a study and warn individuals about possible health outcomes. 733 F.2d at 276. The *Penn Terra* court reaffirmed the holding in *Jaffee* that a claim for medical examinations and health care is, regardless of how plaintiffs style it, a claim for money damages, but that a request that a defendant commission a study to effectuate a duty to warn is properly regarded as injunctive relief. *Id.* at 276-77. In this regard, the *Penn Terra* court's discussion of prospective versus retrospective relief was plainly limited to the "duty to warn" claim, as the health care claim in *Jaffee* was based upon future examinations and health care. Accordingly, Defendants respectfully disagree with the Court to the extent it has concluded that *Penn Terra* somehow undermines or otherwise limits the central rationale in *Jaffee* regarding a claim for medical care as one seeking monetary relief.

[28] *See, e.g.*, *Price v. United States*, No. 02:06-cv-153, 2007 WL 2897891 (E.D. Tenn. Sept. 27, 2007) (denying claim brought by plaintiff Bruce Price against the United States for failing to notify him of health effects of tests and to provide health care); *Dufrane v. United States*, No. 99-cv-2093 (N.D.N.Y. 2000) (tort claim based upon Edgewood participation brought by plaintiff David Dufrane); *Sweet v. United States*, 687 F.2d 246 (8th Cir. 1982) (affirming judgment against veteran who sought monetary damages and claimed he was administered LSD as a test subject at Edgewood Arsenal and alleged that Army failed to notify him of substance or provide him with health care); *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981) (affirming dismissal of claim brought by veteran who claimed he was administered LSD as a test subject at Edgewood Arsenal, and alleged a violation of the FTCA for the Army's "failure to debrief and monitor him after the test"); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980) (claimed violation under FTCA for failure to provide follow-up examinations).

adequate remedy in the VA's comprehensive statutory and regulatory health care system. The Ninth Circuit has recognized that, to waive sovereign immunity under the APA, a plaintiff must establish that "an adequate remedy for its claims must not be available elsewhere." *Park Place Assoc., Ltd.*, 563 F.3d at 929. Because a comprehensive statutory and regulatory scheme ensures that veterans may obtain health care from the VA, Plaintiffs cannot meet their burden of establishing a waiver of sovereign immunity because they have an adequate remedy elsewhere.

"The mission of the VA is to provide health care and services for veterans and their families." *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (citing Pub. L. No. 97-306, § 409(a), 96 Stat. 1429, 1446) ("It is the policy of the United States that the [VA] – '(1) shall maintain a comprehensive, nationwide health-care system for the direct provision of quality health-care services to eligible veterans . . .'"); *White v. Principi*, 243 F.3d 1378, 1381 (Fed. Cir. 2001) (recognizing VA's "comprehensive statutory and regulatory scheme for the award of veterans' benefits"); *Addington v. United States*, 94 Fed. Cl. 779, 782 (2010) (noting that "Title 38 of the United States Code sets forth a comprehensive adjudicatory scheme for making veteran benefits determinations" and that the Veterans' Judicial Review Act, 38 U.S.C. §§ 7251-7299 "makes clear the intent of Congress that veteran benefit determinations be made through a unique statutory process subject to judicial review in statutorily designated federal courts"). *Cf. Thomas v. Principi*, 394 F.3d 970, 975 (D.C. Cir. 2005) (rejecting *Bivens* claim against individual VA employee because "the administrative process created by Congress provides for a comprehensive review of veterans' benefits disputes") (quotation marks and citation omitted); *Olson v. Cragin*, 46 F.3d 1143 (9th Cir. 1995) (same).

The Third Circuit's second, en banc decision in *Jaffee v. United States* is instructive on this issue. In rejecting a claim for health care against DoD arising directly under the Constitution, the Third Circuit found persuasive the "existence of alternative remedies"; namely, the fact that "[s]oldiers injured incident to military service are assured free medical care and limited compensation regardless of fault" under the VA's comprehensive health care scheme. 663 F.2d 1226, 1236 (3d Cir. 1981) (en banc); *see also Gaspard v. United States*, 713 F.2d 1097, 1102-03 (5th Cir. 1983) (rejecting FTCA remedy for veteran service member who had taken part in

atmospheric testing because "the remedies of the Veterans Benefits Act are meant to be exclusive, and the need for a strong and capable military overwhelms the factors supporting recovery [of damages]," and stating that "[i]njuries of armed forces personnel, whether resulting in personal injury claims or constitutional claims, are meant to be covered by the compensation scheme of the Veterans Benefits Act").[29]

Here, it is undisputed that the VA provides comprehensive health care to veterans such as Plaintiffs in this case. *See, e.g.*, 38 U.S.C. § 1710 (medical care for service-connected disability). If the VA denies health care to which Plaintiffs believe they are entitled, there is a statutorily prescribed judicial review scheme of such denials. Given this comprehensive statutory and regulatory system for health care, Plaintiffs cannot establish that they lack an adequate remedy for their health care claims elsewhere. *See Park Place Assoc., Ltd.*, 563 F.3d at 929.

B. There Is No Statutory Authority For Either DoD Or The Army To Provide Long-Term Health Care To Non-Retiree Veterans Decades After Their Military Service.

Even if Plaintiffs could establish a waiver of sovereign immunity, Plaintiffs' claim still must be dismissed because there is a lack of statutory authority to provide relief. "A soldier's entitlement to pay is dependent upon statutory right." *Bell v. United States*, 366 U.S. 393, 401 (1961); *see Schism*, 316 F.3d at 1268, 1272 (citing numerous Supreme Court cases in support of its holding that benefits for retired military personnel depend upon an exercise of legislative grace). A service member's putative right to benefits in the nature of compensation is determined solely by reference to the governing statutes. *United States v. Larionoff*, 431 U.S. 864, 869 (1977); *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985). "Congress has since 1884

[29] Notably, the Court in *Gaspard* rejected the contention that the plaintiff's inability to secure VA compensation somehow justified the ability to recover damages against DoD through either the FTCA or a *Bivens* remedy, and explained that it is the "existence of the VA comprehensive scheme, and not payment in fact, that lessens the justification for a *Bivens* remedy. We consider the congressionally-authorized military compensation system to be comprehensive and conclusive even when individual claimants may fall between the cracks of the implementing regulations." 713 F.2d at 1105 (citing *Scales v. United States*, 685 F.2d 970 (5th Cir.1982) (holding that *Feres* doctrine bars FTCA claims of service person's daughter even when Veterans Benefits Act allows no administrative remedy)).

repeatedly exercised its authority by enacting statutes that defined the breadth of health care authorized for members of the military and their dependents." *Schism*, 316 F.3d at 1268.[30]

This Court has previously held that the fact that 10 U.S.C. § 1074 authorizes medical care to certain service members under certain circumstances did not conflict with Plaintiffs' claim for injunctive relief in the form of medical care. Dkt. 59 at 17. Respectfully, the question before the Court is not whether DoD or the Army's provision of health care to Plaintiffs ***conflicts*** with a statute, but rather whether such care would be ***authorized*** by a statute in the first instance.

This is particularly true under an APA 706(1) claim. As discussed above, section 706(1) has extremely limited application, and its purpose "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221 (9th Cir. 2011) (quoting *SUWA*, 542 U.S. at 66). "The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [broad] congressional directives is not contemplated by the APA." *SUWA*, 542 U.S. at 67; *Gardner*, 638 F.3d at 1221. As the Ninth Circuit recently explained, "even if a court believes that the agency is withholding or delaying an action the court believes it should take, the 'ability to compel agency action is carefully circumscribed to situations ***where an agency has ignored a specific legislative command.***'" *Gardner*, 638 F.3d at 1221-22 (quoting *SUWA*, 542 U.S. at 67) (emphasis added).

Here, there is no statutory authority that authorizes DoD or the Army to provide free, lifetime health care for veterans who are not military or medical retirees and who claim injuries based upon tests conducted decades earlier.[31] Entitlement to DoD health care is governed by 10

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[30] In *Schism*, a former service member and his spouse claimed that the military was bound by the good faith promises made by recruiters to provide him and others who served on active duty for twenty years with free, lifetime health care. 316 F.3d at 1262. On *en banc* review, the Federal Circuit rejected plaintiffs' claim and held that in the absence of explicit statutory authority, the service branches lacked the authority to provide free lifetime health care. *Id.*

[31] DoD has the legal authority to provide health care only to active duty service members and their families, to retired military and their eligible family members, and to medically retired service members. That care can be provided either in the direct care system, in military treatment facilities, or in what DoD calls the "purchase care program," which is often referred to as

U.S.C. § 1074. In general, a "member of a uniformed service" is "entitled to medical and dental care in any facility of any uniformed service." 10 U.S.C. § 1074(a)(1). "Members of a uniformed service" includes those on active duty (10 U.S.C. § 1074(2)(A)); their dependents (10 U.S.C. § 1076(a)); retired and medically retired members (10 U.S.C. § 1074(b)(1)); and their dependents (10 U.S.C. § 1076(b)).[32] Under 10 U.S.C. § 1074(c)(1), however, which was enacted in 1984, Congress provided discretionary authority for the Secretary of Defense and Secretaries of the service branches to promulgate regulations establishing eligibility for health care not otherwise created by statute. That provision provides:

> Funds appropriated to a military department . . . may be used to provide medical and dental care to persons entitled to such care by law ***or regulations***, including the provision of such care . . . in private facilities for members of the uniformed services.

(Emphasis added). This authority is referred to as "Secretarial Designee" authority. *See* 32 C.F.R. § 108.3.

Beyond certain other narrow categories of eligibility,[33] there is no authority for the provision of health care to non-retiree veterans. DoD published an issuance under 10 U.S.C. § 1074(c)(1) on November 26, 2010, with an effective date of December 27, 2010. *See* 75 Fed. Reg. 72,682; 32 C.F.R. § 108. Entitled "Health Care Eligibility Under the Secretarial Designee Program and Related Special Authorities," the primary general statement of which provides:

> (a) General Policy. The use of regulatory authority to establish DoD health care eligibility for individuals without a specific statutory entitlement or eligibility ***shall be used very sparingly***, and ***only when it serves a compelling DoD mission***

TRICARE. Ex. 2 (Tr. 57:8-58:8). If individuals are disabled while on active duty, they have an option of getting both disability and health care from DoD. Ex. 2 (Tr. 58:9-22). In this respect, they may be medically retired. Ex. 2 (Tr. 58:9-22). Military retirees can qualify for both TRICARE and VA care. Ex. 2 (Tr. 59:3-7). For the vast majority of test participants, there would need to be either a change in regulation or statute to entitle them to TRICARE benefits and health care because they do not fall within these three categories of eligibility. Ex. 2 (Tr. 64:1-5). On the other hand, every person who leaves active duty and who has not been dishonorably discharged is potentially eligible for VA health care. *See, e.g.*, 38 U.S.C. §§ 1705, 1710.

[32] Beyond those categories, eligibility is substantially constrained. For example, non-active-duty reserve component members have limited eligibility. *See, e.g.*, 10 U.S.C. § 1074a.

[33] These other categories, which are inapplicable in this case, include cadets and certain members of the Senior Reserve Officers' Training Corp. (10 U.S.C. § 1074b); Persian Gulf veterans who have a "qualifying Persian Gulf symptom or illness" (10 U.S.C. § 1074e); and Medal of Honor recipients and their "immediate dependents" (10 U.S.C. § 1074h).

> ***interest.*** When used, it shall be on a reimbursable basis, unless non-reimbursable care is authorized by this part or reimbursement is waived by the Under Secretary of Defense (Personnel & Readiness) (USD(P&R)) or the Secretaries of the Military Departments when they are the approving authority.

32 C.F.R. § 108.4(a) (emphasis added).

In addition to the general policy of limiting this authority to be used "very sparingly" and only for "a compelling mission interest," the regulation includes another paragraph specifically relating to research volunteers, but authorizes medical care only during the pendency of the volunteer's involvement in the research program (though it "may be" specifically extended):

> (i) Research Subject Volunteers. Research subjects are eligible for health care services from MTFs to the extent DoD Components are required by DoD Directive 3216.02 to establish procedures to protect subjects from medical expenses that are a direct result of participation in the research. Such care is on a non-reimbursable basis and limited to research injuries (unless the volunteer is otherwise an eligible health care beneficiary). Care is authorized ***during the pendency of the volunteer's involvement in the research***, and may be extended further upon the approval of the USD(P&R). (Footnote omitted.)

32 C.F.R. § 108.4(i) (Emphasis added).

In addition, the limited Secretarial Designee authority for treating research subjects during the pendency of the research states that it is a function of a requirement in DoD Directive 3216.02. Since the issuance of that regulation, this Directive has been replaced by DoD Instruction 3216.02, "Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research," (Nov. 8, 2011), which states in pertinent part:

> a. DoD-Supported Research Involving Human Subjects. All non-exempt research involving human subjects shall, at a minimum, meet the requirement of section 219.116(a)(6) of Reference (c). The Common Rule does not require payment or reimbursement of medical expenses, provision of medical care, or compensation for research-related injuries.
>
> b. DoD-Conducted Research Involving Human Subjects. The DoD Components shall establish procedures to protect human subjects from medical expenses (***not otherwise provided or reimbursed***) that are the direct result of participation in DoD-conducted non-exempt research involving human subjects that involves more than minimal risk. Such procedures may consist of utilizing the Secretarial Designee program as described by section 108.4(i) of Reference (c) ***during the period of the human subject's involvement in the research***, which may be extended further upon the approval of the USD(P&R). DoD Components may supplement this Secretarial Designee procedure with additional procedures consistent with applicable authority. This requirement does not apply when the Department of Defense is supporting the research but is not engaged in the non-exempt research involving human subjects (*i.e.*, when the non-exempt research involving human subjects is performed solely by non-DoD institutions).

(Emphasis added).

Thus, as part of informed consent for any research in which DoD is involved, the prospective subject is to be informed whether any compensation or treatment for research injuries will be provided. For DoD-conducted research involving more than minimal risk, DoD requires some procedure to protect subjects from medical expense for research-related injury—if not otherwise provided or reimbursed—which could be the use of Secretarial Designee authority during the period of the human subject's involvement in the research.[34]

Accordingly, the authority for treatment of research-related injuries is limited: (1) to the duration of the research project (32 C.F.R. § 108.4(i)); (2) to eligibility for care not otherwise provided for (DoD Instruction 3216.02); and (3) to prospective research projects (32 C.F.R. § 108.4(i)). There is no statutory or regulatory support for the retroactive eligibility for health care for alleged research-related injuries that manifest many years after the test program concluded and that are already provided for under VA statutes and regulations. Because there is no statutory or regulatory basis for Plaintiffs' claimed entitlement to free, lifetime health care from DoD or the Army, Defendants are entitled to summary judgment as a matter of law.[35]

C. The Army Memorandum And Regulations Upon Which Plaintiffs Rely Do Not Support A Discrete, Mandatory Obligation To Provide Health Care

Plaintiffs' APA claim for health care also fails for the simple reason that Plaintiffs cannot identify a discrete legal obligation enforceable under Section 706(1) to compel either DoD or the Army to provide such care. First, Plaintiffs do not suggest that the Wilson Memorandum serves as

[34] The "not otherwise provided or reimbursed" provision in section 3216.02 underscores that this is for circumstances not already addressed under some other authority. For example, non-affiliated civilian volunteers for DoD-conducted research do not have a program of medical care for any research related injury, as contrasted with other groups that do, such as military members, retirees, civilian employees within the scope of employment, and veterans (from the VA for service-connected injuries). Further, because use of the Secretarial Designee authority is set forth as part of the informed consent process, it necessarily is prospective in nature.

[35] As noted above, Congress has expressly provided for Persian Gulf War veterans to obtain health care from DoD for certain illnesses or conditions associated with that conflict. *See* 10 U.S.C. § 1074(e). There is no comparable authority for DoD health care for test participants. While Plaintiffs are of course free to petition Congress to provide such authority, DoD cannot provide health care to test participants without it.

a basis for their health care claim. Dkt. 490 at 12-13. Rather, Plaintiffs' health care claim rests solely upon the Army's Memorandum CS: 385 and the three versions of Army regulation AR 70-25. Because DoD cannot be bound by Army memoranda or regulations, Plaintiffs' APA claim for health care against DoD should be dismissed for this reason alone.

Second, CS: 385 does not impose a "discrete" and "unambiguous" duty on the Army to provide Plaintiffs with free, lifetime health care. As an initial matter, as explained above, CS: 385 provides only a general statement of policy lacking the force of law and thus cannot support an APA 706(1) claim. *See Chrysler*, 441 U.S. at at 301-02. The limited protections implemented by CS: 385 included vesting responsibility for the planning and conduct of a test in a single physician; ensuring the availability of all equipment necessary to deal with an emergency situation arising during the testing; ensuring that the physician in charge has available on short notice during the testing competent consultants representing any of the specialties encountered; and providing that "[m]edical treatment and hospitalization will be provided for all casualties of the experimentation as required." *Id.*

When read in context, each of the four additional safeguards concern ensuring the safety of test participants ***during and immediately following the testing.*** If CS: 385 contemplated long-term health care for all test participants, one would expect that it would have provided a framework under which such broad-based health care would be administered. For example, if the Army truly believed that it was committing to a long-term obligation to provide health care to veterans, it would have needed to establish a system for applying for eligibility, an adjudication process, a due process appeals mechanism, a means to validate that an applicant was a research subject and for what project(s), an expert assessment of some sort to consider whether a current medical ailment has a causal relationship to an exposure or event that occurred decades before, and many other elements. The complete absence of an administrative apparatus to effectuate such an alleged legal requirement, and the lack of underlying statutory authorization for such health

care, supports the interpretation that the obligation to provide medical care only existed during the pendency of the testing.[36]

Third, AR 70-25 cannot serve as a basis for Plaintiffs' APA health care claim against the Army. Like CS: 385, the 1962 version of AR 70-25 stated that: "[a]s added protection for volunteers, the following safeguards will be provided:"… "c. Required medical treatment and hospitalization will be provided for all casualties." Ex. 47 at 5.c. This language is repeated in the July 1974 version of AR 70-25. Ex. 48 at 5.c. The 1990 version of AR 70-25 contains similar language and provides that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." Ex. 49 at 3-1.k. Importantly, as with CS: 385, each version of AR 70-25 was based upon the statutory authority to conduct research and to "assign, detail, and prescribe the duties" of the members of the Army. *See*, *e.g.*, Ex. 47 at App. ¶ 1; Ex. 48 at App. ¶ 1; Ex. 49 at App. G, G-1. Nothing in those statutes authorizes the military departments to provide free long-term health care for volunteer test participants who claim injuries decades after the conclusion of the test program.[37]

The Court previously concluded that "the language of" the 1962 version of AR 70-25 "does not require [the] conclusion" that the regulation does not cover health care over the course

[36] There is no statutory authority for the Army to provide free, lifetime health care for veterans who claimed injuries decades after they left military service. As explained in the opinion of the Judge Advocate General provided in connection with the Army's promulgation of CS: 385, the authority of the Secretary of the Army to conduct, engage and participate in research programs was derived from 5 U.S.C. § 235a (1950). *See* Ex. 46 at 3.a). The authority to make assignments, duties and details of members of the Army was derived from 5 U.S.C. §§ 181-184 (1950). *See* Ex. 46 at 3.a.. While these statutory provisions provided the underlying authority to conduct testing generally and to assign personnel as necessary to support the test projects, neither provided any authorization to provide free, long-term health care to veteran test participants whose injuries manifested decades after the test programs ended and decades after the participants had left military service.

[37] Plaintiffs contend that the duty to provide medical care is "linked to Defendants' ongoing duty to warn," and indicate that the 1990 version of AR 70-25 provides that "[t]he Surgeon General (TSG) will . . . [d]irect medical followup ***when appropriate***, on research subjects to ensure that any long-range problems are detected and treated." Dkt. 490 at 18 (citing AR 70-25 at 2-5(j) (emphasis added)). The fact that the requirement to direct medical followup is triggered only when the Surgeon General deems it "appropriate" means that such followup is exclusively a matter of the Surgeon General's scientific judgment and discretion, which, as explained above, renders that requirement insufficient to impose a uniform, mandatory obligation on the part of the Army to provide free, lifetime health care to Plaintiffs in this case.

of a test participant's lifetime, and that because the safeguards were put in place to protect a test participant's health, "the fact that symptoms appear after the experiment ends does not obviate the need to provide health care." Dkt. 59 at 17. Respectfully, because the "added protection" concerning medical treatment and hospitalization, when read in context, relates to treatment at the time of the tests, this language cannot serve as the basis for a discrete, non-discretionary duty to provide health care to test volunteers decades after their service. At best, this language is subject to more than one reasonable interpretation. Under these circumstances, there cannot be a discrete ministerial legal obligation that can be enforced under the mandamus-like standards of 706(1). *LanceSoft, Inc. v. U.S. Citizenship and Immigration Servs.*, 755 F. Supp. 2d 188 (D.D.C. 2010) (refusing to find ministerial, non-discretionary legal obligation where obligation was, at best, ambiguous).[38] This is particularly true where, for the reasons discussed above, an interpretation of CS: 385 and AR 70-25 that permitted free, lifetime health care to veteran test participants would not be authorized by statute, resulting in those regulations being *void ab initio.*[39]

IV. PLAINTIFFS CANNOT ESTABLISH ANY COGNIZABLE CONSTITUTIONAL ENTITLEMENT TO NOTICE OR HEALTH CARE

A. Supreme Court Precedent Forecloses Plaintiffs' Claimed Constitutional Right Of Access To Government Information

Plaintiffs claim that, beyond a right to Notice arising out of various DoD and Army regulations and memoranda, they have a constitutional right to the particular form of "Notice" that they have defined. But the Supreme Court has expressly rejected a constitutional right of access to government information. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). As the *Houchins* Court

[38] As discussed above in the "Notice" section, there is no basis to conclude that any of the sources of authority identified by Plaintiffs obligate DoD to provide health care to test participants who participated in tests before the effective date of those documents.

[39] There is no genuine issue of material fact regarding whether DoD has provided health care to test participants in the manner urged by Plaintiffs. *See* Ex. 50 (Defs' Resp. to Pls' Req. for Admissions No. 1). Accordingly, trial on this claim would be inappropriate.

explained: "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure or of access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or expedient." *Id.* at 14. The Court further held that "[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* (quotations and citation omitted)*; see also Mack v. Dep't of Navy*, 259 F. Supp. 2d 99, 110 (D.D.C. 2003) (rejecting constitutional right of access to information under the Sixth, Eighth and Fourteenth Amendments and holding that "[t]here is no inherent constitutional right of access to government information . . . as the existence of the Freedom of Information Act, and its host of exemptions, both amply demonstrate.") (citations omitted); *Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686, 697 (S.D. Ohio 2011) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.") (citing *Houchins*, 438 U.S. at 15-16 (Burger, C.J., plurality opinion)). Accordingly, Plaintiffs' claimed constitutional entitlement to Notice should be dismissed.

B. Plaintiffs Have Failed To Identify Any Authority Supporting A Constitutional Right To Health Care From The DoD Or The Army

Plaintiffs' claimed constitutional right to health care from DoD and the Army fails because they cannot identify any legal authority for such a right. "There is, of course, no general constitutional right to free health care." *Reynolds v. Wagner*, 128 F.3d 166, 173 (3d Cir. 1997) (Alito, J.); *see Harris v. McRae*, 448 U.S. 297, 318 (1980) (refusing to "translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation" for certain medical services). Limited exceptions to this rule do arise in cases of governmental confinement.[40] *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (prisoners); *Youngberg v.*

[40] Even then, the required health care need not necessarily be free. *Reynolds*, 128 F.3d at 174.

Romeo, 457 U.S. 307, 324 (1982) (involuntarily committed mental patients); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (arrestees injured during police apprehension). But nothing in these or any other cases supports the broad, freestanding Fifth Amendment right to health care that Plaintiffs appear to claim.

Not only does the law not currently recognize a constitutional right to health care, there is no sensible basis for expanding the Fifth Amendment's scope to include such a right in these circumstances. "[W]e 'have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). This reluctance is particularly appropriate because Plaintiffs seek to impose *an affirmative obligation* on the government. Plaintiffs' claim simply ignores the fact that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (U.S. 1989).

If Plaintiffs instead purport to base this claim on an unconstitutional violation of their bodily integrity, health care represents an unprecedented and inappropriate remedy. It is true that the Supreme Court has recognized a substantive due process right to bodily integrity in certain contexts far removed from those present here. *See, e.g.*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 849 (1992). But it appears that no federal court has done what Plaintiffs here propose: remedy an alleged constitutional wrong with a grant of continuing health care under the guise of injunctive relief.

Plaintiffs have crafted their claim as one for novel injunctive relief because Supreme Court precedent forecloses the true relief they seek. As noted above, they cannot characterize the health care they desire as a form of monetary damages, for then sovereign immunity would bar their claim. And they cannot even state a cognizable claim for damages to begin with. *See Feres v. United States*, 340 U.S. 135, 146 (1950) (barring FTCA claims by servicemen alleging injuries

incident to their military service); *United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (precluding courts from inferring *Bivens* actions in such cases).

Notably, the *Stanley* Court reached its decision in a case involving the test program that is at issue in this case. *See Stanley*, 483 U.S. at 671. In *Stanley*, a test participant who allegedly was administered LSD brought both an FTCA and a *Bivens* action and alleged negligence in the administration, supervision, and subsequent monitoring of the testing program. *Id.* at 671-72. The Court, out of concern for the military's day-to-day operations and decisionmaking, declined to allow the ex-serviceman to maintain a *Bivens* cause of action. *Id.* at 682; *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."). Plaintiffs cannot sneak their otherwise barred claim for health care through the back door by disguising it as an injunction.[41]

Finally, even if health care were a proper form of injunctive relief, Plaintiffs cannot properly obtain an injunction to cure alleged past constitutional violation. In *Stanley*, Justice Brennan recognized this as an inherent limitation on injunctive relief: "Of course, experimentation with unconsenting soldiers, like any constitutional violation, may be enjoined *if and when discovered*. An injunction, however, comes too late for those already injured; for these victims, 'it is damages or nothing.'" *Stanley*, 483 U.S. at 690 (Brennan, J., concurring in part and dissenting in part) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)) (emphasis added). Because their health care claim stems from alleged ***past*** due process violations, prospective injunctive relief is unavailable

[41] Plaintiffs recognize that their true challenge lies in tort rather than in the APA. As discussed above, Plaintiffs' complaint had sought a declaration that the *Feres* doctrine was unconstitutional. Dkt. 486, p. 1, n.1. The Court rejected this claim and held that it lacked subject matter jurisdiction over the claim that a Supreme Court decision was unconstitutional. Dkt. 59 at 8. Plaintiffs' effort to get around the *Feres* doctrine by manufacturing an APA or constitutional claim in place of what is plainly a tort claim should be rejected.

to remedy it. If they call it damages, *Feres* and *Stanley* foreclose it. If they label it an injunction, they are simply too late. Either way, they are not entitled to health care as a remedy.[42]

V. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT REGARDING PLAINTIFFS' CLAIM CONCERNING PURPORTED "SECRECY OATHS"

Plaintiffs contend that participants in the test program were administered secrecy oaths that "not only interfered with participants' ability to obtain health care and other necessary services, but to seek redress or assert claims." Dkt. 486 ¶ 158; *see* Dkt. 59 at 12 (finding standing for Plaintiffs' secrecy oath claim given allegations that the oaths "prohibit the individual Plaintiffs from seeking treatment and counseling for the harm inflicted by the experiments"). Plaintiffs have conceded that they have no evidence that the CIA administered secrecy oaths, and they have identified no authority under which the CIA could provide relief for secrecy oaths allegedly administered by DoD. Additionally, Plaintiffs have neither identified evidence that DoD administered secrecy oaths to the named Plaintiffs ("Individual Plaintiffs") or the individual members of VVA identified by Plaintiffs ("VVA Members") nor demonstrated that any of these individuals currently are restrained and harmed by such oaths.[43] Accordingly, summary judgment is warranted.

A. The CIA Is Entitled To Summary Judgment On Plaintiffs' Secrecy Oath Claim

Plaintiffs' secrecy oath claim against the CIA fails for three reasons. First, notwithstanding the fact that there is no factual or legal basis for the claim, the CIA has provided a sworn declaration stating that the Individual Plaintiffs and VVA Members do not have secrecy oaths with the CIA and further stating that they were released from any secrecy oath that they ***believed*** they had with the CIA, rendering the claim moot. The CIA stated in its June 2011 declaration that: "To resolve any lingering uncertainty that may be in the minds of the Individual Plaintiffs or the VVA Members, the CIA wishes to make abundantly clear that (a) it has no record

[42] Because Plaintiffs cannot identify any substantive entitlement to Notice or health care under the APA or the Constitution, their procedural due process claim regarding the alleged absence of any procedures to challenge the deprivation of Notice and health care should be dismissed.

[43] The Court declined to certify a class concerning alleged secrecy oaths. Dkt. 485 at 41-44. Accordingly, Defendants discuss the claims of the Individual Plaintiffs and VVA Members.

of having any type of enforceable non-disclosure agreement, to include any oral agreements, with them; and (b) to the extent the Individual Plaintiffs or VVA Members continue to believe that they are subject to any type of non-disclosure agreement with the CIA, they are hereby released from that agreement and any obligations or penalties related thereto by the CIA." Ex. 51 ¶ 7. Because Plaintiffs cannot identify any live controversy against the CIA that is redressable by the Court, the sole claim against this agency should be dismissed. *See Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) (stating that a claim becomes moot "when an administrative agency has performed the action sought by a plaintiff in litigation," thereby eliminating the ability of a federal court "to grant effective relief").

Second, Plaintiffs have failed to identify even a scintilla of evidence to support their contention that the CIA administered secrecy oaths to any of the Individual Plaintiffs or VVA Members. Indeed, despite the extensive discovery in this case, Plaintiffs conceded that they "do not currently have facts identifying specific circumstances where the [CIA] directly administered secrecy oaths to Plaintiffs." Ex. 52 (Pls' Resp. to Interrog. No. 7). Furthermore, each of the Individual Plaintiffs and VVA Members has admitted that they lack any knowledge of the CIA's involvement in their tests or the CIA's administration of secrecy oaths. *See* Ex. 54 (Tr. 136:23-137:2); Ex. 55 (Tr. 32:20-33:2); Ex. 56 (Tr. 171:18-172:1); Ex. 57 (Tr. 222:10-13); Ex. 58 (Tr. 115:4-7); Ex. 59 (Tr. 284:7-16); Ex. 60 (Tr. 137:10-138:4); Ex. 61 (Tr. 71:17-72:13); Ex. 62 (Tr. 64:6-11); Ex. 63 (Tr. 48:4-6); Ex. 64 (Tr. 92:9-12).[44] Additionally, the CIA has provided sworn declarations indicating that the CIA's reasonable search of its records did not reveal any evidence

[44] Fact discovery closed in this case on December 23, 2011. Dkt. 331. More than six months later, Plaintiffs submitted "supplemental and amended" discovery responses in which they identified approximately 27 additional members of Plaintiff VVA who allegedly were test participants. *See* Ex. 65 (7/27/11 Resp. to Interrog. No. 19). Nearly one year after the close of fact discovery, Plaintiffs supplemented their discovery responses again and identified two additional members of VVA who allegedly were test participants. *See* Ex. 66 (12/3/12 Resp. to Interrog. No. 19). Plaintiffs' attempts to supplement their discovery are untimely. *See Walker v. T-Mobile USA*, 298 Fed. Appx. 665, 667 (9th Cir. 2008) (affirming district court's exclusion of evidence that was not timely included in supplemental interrogatory). In any event, Plaintiffs have done no more than list names of alleged test participants: they have failed to put forward any evidence demonstrating that these newly identified individuals were administered secrecy oaths by the Army or the CIA when these individuals were test participants, or that they believe they are still restricted in any manner in their ability to discuss their participation in the test program.

of administration of secrecy oaths to the Individual Plaintiffs or VVA Members. Ex. 51 at ¶¶ 5-6. Accordingly, the CIA concluded "that no such agreements exist between the CIA and the Individual Plaintiffs" or "between the CIA and the VVA Members." *Id.* Thus, there is no genuine factual dispute about the CIA's lack of involvement in the alleged administration of secrecy oaths and this claim should be dismissed.

Third, while Plaintiffs contend that the CIA could be liable for secrecy oaths allegedly administered by DoD, they have identified no legal authority for the proposition that the CIA can afford relief for actions taken by an entirely different government agency. Even if the Court were to assume that DoD had administered secrecy oaths as part of the test programs, the CIA could not release Plaintiffs from secrecy oaths administered by DoD. *See Clouser v. Espy*, 42 F.3d 1522, 1535 (9th Cir. 1994) ("[P]laintiffs have cited no authority for the proposition that one agency may promulgate regulations that bind another agency in that way."); *see also Reed v. Reno*, 146 F.3d 392, 397 (6th Cir. 1998) (stating that the DOJ "is not bound by the definitions set forth in the regulations promulgated by the OPM" where the relevant statute had not granted OPM the authority to promulgate definitions to which other agencies would be bound).

B. Plaintiffs' Claim Against DoD Regarding Secrecy Oaths Should Be Dismissed

Plaintiffs have failed to present any evidence that any of the Individual Plaintiffs or VVA Members currently feel restrained in any way from discussing their involvement in the test program with their health care provider or in pursuing claims for benefits or health care with the VA. Accordingly, Plaintiffs lack standing on this claim. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (plaintiffs have burden to establish standing at summary judgment stage, and mere allegations are insufficient).

As an initial matter, despite specifically looking for evidence of secrecy oaths, DoD has never found any written secrecy oaths for the Cold War-era tests.[45] Ex. 2 (Tr. 77:6-13); Ex. 23 (Tr. 209, 217-18); Ex. 29 (Tr. 28:3-7); Ex. 17 (Tr. 50:22-51:7); Ex. 19 (Tr. 109:14-18).

[45] Because none of the Individual Plaintiffs or VVA Members served during WWII, the discussion of secrecy oaths will be limited to the Cold War-era test programs.

Nevertheless, to address the possibility that secrecy oaths were administered, DoD issued the Perry Memo in March 1993, which released "any individuals who participated in testing . . . associated with any chemical weapons research conducted prior to 1968 from any non-disclosure restrictions or written or oral prohibitions (e.g., oaths of secrecy) that may have been placed on them." Ex. 42 at VET001_011171. The Perry Memo also ordered the initiation of procedures to release post-1968 chemical test participants from any non-disclosure agreements that may have been placed on them. *Id.* at VET001_011172.

Former DoD employee Martha Hamed, one of the drafters of the Perry Memo, understood that due to the Perry Memo "these people were now being released from [secrecy oaths], if they had taken one." Ex. 17 (Tr. 33:14-25, 38:16-19).[46] Similarly, Dee Dodson Morris, who administered DoD's outreach efforts to test participants, Ex. 23 (Tr. 13:21-25, 15:17-23, 26:12-20, 26:25-27:2), understood test participants would only be precluded from discussing "[f]acts or opinions based on the efficacy of their equipment or the results of a particular test that was being done as a large collective group." Ex. 23 (Tr. 206). The test participants "could talk about anything that happened to them personally, any way that they felt after a certain test occurred or while it was occurring, you know, whether they got sick afterwards, anything like that, that was fair game for them to talk to their doctors about." Ex. 23 (Tr. 207).

Because VA expressed concerns that veterans might still be reluctant to talk to health care providers, particularly for those test participants who were tested after 1968, DoD issued another memorandum in January 2011. *See* Ex. 53; Ex. 2 (Tr. 177:14-178:1). That memorandum released chemical and biological agent research volunteers from any non-disclosure restrictions to allow

[46] The Perry Memo was broadly distributed to everyone identified in the Perry Memo and to the VA. Ex. 17 (Tr. 43:6-11). In addition, Ms. Hamed mentioned the Perry Memo by name to veterans she spoke with. *Id.* (Tr. 44:7-9, 46:21-24). She told veterans that they had been released from any oaths of secrecy that they may have taken, and that they could discuss the tests with VA. *Id.* (Tr. 45:13-18). Ms. Hamed believes that she sent the Perry Memo directly to veterans. *Id.* (Tr. 47:5-7). In addition, the contents of the Perry Memo were placed on the publicly accessible FHP&R website and distributed to veteran service organizations ("VSOs"). Ex. 2 (Tr. 457:1-22); *see* http://mcm.fhpr.osd.mil/cb_exposures/faqs/general_faqs/08-09-08/how_much_information_can_i_divulge_about_my_exposure_since_i_signed_a_secrecy_oath.aspx. DoD also wrote brief statements regarding the Perry Memo. for inclusion in VSO magazines. Ex. 2 (Tr. 457:1-22).

them "to address[] health concerns and to seek[] benefits from [VA]," and provided that "[v]eterans may discuss their involvement in chemical and biological agent research programs for these purposes." Ex. 53 at VET021_000001. The memorandum expressly prohibits the "sharing of any technical reports or operational information concerning research results, which should appropriately remain classified." *Id.*[47] The 2011 memorandum was also made publicly accessible on DoD's website. *See* http://mcm.fhpr.osd.mil/cb_exposures/briefings_reports.aspx.[48]

Because each of the Individual Plaintiffs already has received the precise relief sought in the Fourth Amended Complaint—namely, a release from any purported secrecy oaths for purposes of communicating with their health care providers or to pursue a claim for health care or benefits from VA, *see* Dkt. 486 ¶ 158—they lack standing to bring their claims and such claims accordingly should be dismissed.

First, Plaintiffs Bruce Price and Eric Muth participated in tests before 1968. Ex. 60 (Tr. 38:23-24); Ex. 54 (Tr. 19:4-6). Pursuant to the Perry Memo, they have been released from any "secrecy oaths" that they allegedly had been administered and their claims should be dismissed.[49] Second, the January 2011 memorandum has released the remaining five Individual Plaintiffs and

[47] This limitation is based upon the concern that there is still some information, "particularly on the delivery of chemical and biological agents, that in the hands of the wrong people would essentially be a cookbook on how to do it because the information came from the period of time when there was an offensive program. That information would have nothing to do with an individual's health. It would have more to do with nozzle size, altitudes for delivery, that sort of thing." Ex. 2 (Tr. 455:5-456:3). There is no First Amendment right to disclose classified information. *See Wilson v. CIA*, 586 F.3d 171, 183-84 (2d Cir. 2009); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975). If Plaintiffs are seeking a declaration or injunctive relief allowing them to disclose classified information, such a request should be summarily rejected.

[48] In the Court's January 19, 2010 Order on Defendants' motion to dismiss, it noted that "a declaration concerning the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath, would redress their alleged injuries." Dkt. 59 at 12. In its class certification order, the Court similarly noted that Plaintiffs have argued that "Defendants lacked reasonable testing protocols to obtain informed consent, so that the secrecy oaths given by class members were void from the beginning." Dkt. 485 at 15. It is clear from a review of the informed consent form signed by the Plaintiffs that they are unrelated to any administration of secrecy oaths. Nothing in the informed consent form discusses any sort of non-disclosure obligation; accordingly, consideration of the informed consent form is irrelevant to a determination of the existence or continuing validity of any alleged secrecy oaths. *E.g.*, Ex. 67.

[49] Mr. Muth acknowledged that he has seen the DoD's website, which summarized the contents of the Perry Memo. Ex. 54 (Muth Tr. 61:13-62:25).

the VVA Members from any non-disclosure obligations that may have been imposed for the purposes of addressing any potential health concerns and for seeking benefits from VA. Perhaps more importantly, it is undisputed that the Individual Plaintiffs do not currently feel constrained in any way by any purported secrecy oaths that may have been administered forty years ago.

For example, Mr. Blazinski does not feel inhibited in any way from sharing what he knows about Edgewood. Ex. 55 (Tr. 105:11-14). Similarly, Mr. Josephs does not believe he is precluded from publicly discussing his participation in the Edgewood test program. Ex. 57 (Tr. 169:19-22).[50] Mr. Dufrane, who had seen the Perry Memo before his deposition in this case, Ex. 56 (Tr. 134:31-135:10), has discussed his time at Edgewood with his current wife, *id.* (Tr. 83:23–85:4), other named plaintiffs in this case, *id.* (Tr. 12:16–13:5), a reporter for the Detroit Free Press, *id.* (Tr. 14:4–11), and members of Congress, *id.* (Tr. 88:12–89:4, 89:24–90:18). He testified that he felt he could talk about Edgewood in order to seek medical care and that he believed Edgewood was public knowledge, *id.* (90:22–91:7, 92:17–22), and he could not identify ***any*** information that he wished to discuss about the test programs but could not because of a secrecy oath, *id.* (93:21–94:23);[51] *see also* Ex. 58 (Meirow Tr. 26:20-27:8). In addition, plaintiffs Rochelle, Muth, Meirow and Dufrane have had substantial correspondence with a variety of Congressmen in which they have petitioned the government concerning the test program. *See* Ex.

[50] Mr. Josephs believes that the Edgewood test program is "common knowledge at this point." Ex. 57 (Tr. 169:19-170:3). He has spoken to his wife and family members about his experiences at Edgewood. *Id.* (Tr. 31:13-22). He has told his wife "everything" about his involvement at Edgewood, including the substances that he was tested with. *Id.* (Tr. 41:9-17). They have "discussed quite a few aspects of the various tests and the chemical agents that I was exposed to." *Id.* (Tr. 42:8-14). These discussions began in the 1970s. *Id.* (Tr. 42:22-23:4). In the last five years, he has also spoken to his doctors about his experiences at Edgewood. *Id.* (Tr. 32:1-8).

[51] Although Mr. Rochelle stated that he believed he was still somehow bound by a secrecy oath he was orally administered nearly 44 years ago, Ex. 59 (Tr. 166:1-167:4), he has spoken to his wife, coworkers, other test participants, his doctors, and the VA about his involvement in the test program. *Id.* (Tr. 20:15-21:2, 23:11-13, 23:15-18, 134:20-135:3, 135:6-13, 167:10-21, 169:7-10, 170:2-7, 170:15-172:22). In addition, Mr. Rochelle has written the President, the HVAC, and his senator concerning his involvement in the test programs. *Id.* (Tr. 191:6-192:22, Tr. 207:16, 208:8, Tr. 208:20-209:12). He has also provided interviews to newspapers and radio stations concerning his participation in the test programs. *Id.* (Tr. 24:12-27:10). Accordingly, Mr. Rochelle's claimed belief that he is somehow restrained from talking about the test program is contradicted by his own conduct.

52 (Pls' Response to Interrog. No. 18).[52] Similarly, with respect to the VVA Members, none of them believe they are restrained in any way from discussing their experiences at Edgewood. *See* Ex. 62 (Tr. 20:7–18, 53:10–15); Ex. 63 (Tr. 37:21-24); Ex. 64 (Tr. 52:7-17);[53] Ex. 61 (Tr. 21:21-24). Moreover, Plaintiffs cannot point to a single instance, in the more than sixty years since the beginning of the testing programs, where any government agency has sought to enforce any sort of alleged secrecy requirement based upon a test participant's disclosure regarding his involvement in the test program. Given the lack of *any* prior enforcement, the Individual Plaintiffs' and VVA Members' testimony that they do not feel constrained from discussing the test program, and the two affirmative releases by DoD, Plaintiffs cannot establish that they harbor a legitimate fear of prosecution based upon some sort of perceived non-disclosure obligation. *See Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1060 (2d Cir. 1991) (holding that plaintiff that was subject to a non-disclosure agreement had no reasonable fear of prosecution where he had spoken extensively about the subject-matter of his non-disclosure agreement); *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.").

Plaintiffs cannot establish any injury with respect to the alleged administration of secrecy oaths that is redressable by the Court. Plaintiffs' claims regarding secrecy oaths should thus be dismissed. *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) (holding that where, as here, Plaintiffs seek prospective injunctive relief, their failure to establish that they are "realistically threatened by a *repetition* of [the violation]" dooms their claims).

C. Plaintiffs' Access-To-Court Claim Should Be Dismissed

Plaintiffs allege that their perceived inability to discuss their participation in the test program impedes their ability to make claims for VA benefits and health care, and that this in turn

[52] Furthermore, Messrs. Rochelle, Blazinski and Josephs have recently provided interviews about their participation in the test programs to CNN. http://www.cnn.com/2012/03/01/health/human-test-subjects/index.html; http://www.cnn.com/2012/03/02/health/gallery-army-test-subjects-before-after/index.html.

[53] In addition, one VVA Member was allegedly a test participant in 1966-1967, Ex. 64 (Tr. 20:6-21:25), so he was released from any purported secrecy oath by the Perry Memo.

violates their alleged First Amendment right of access to court. Dkt. 486 ¶ 158. Even assuming that this could constitute a cognizable First Amendment claim, for the reasons discussed above, Plaintiffs are free to discuss their participation in the test programs with both their health care providers and with VA (consistent with their obligation not to disclose classified information), and the Individual Plaintiffs and other class members have obtained their test files from DoD and may provide those files to VA in support of their claims. Accordingly, Plaintiffs cannot show that their ability to make claims for benefits to VA is in any way meaningfully impaired, and this claim should be dismissed. Similarly, because the only claim brought by service organization Swords to Plowshares is based upon the claim that they allegedly have been impeded in the past in their ability to assist veterans in making VA claims based upon alleged secrecy oaths, Dkt. 486 ¶ 158, and because veterans are not currently restricted in their ability to discuss their involvement in the test program (subject to the requirement not to divulge classified information), Swords to Plowshares should be dismissed from this lawsuit.[54]

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' INHERENT FACIAL BIAS CLAIM AGAINST VA.

Plaintiffs contend that the ***entire VA*** is unconstitutionally biased against test participants because, as they allege, one component of one branch of the VA had some involvement in the test program 50 years ago and still conducts congressionally mandated testing of *some* of the same substances today. Due to this purported bias, they seek an order from this Court that would effectively overhaul Congress's scheme for adjudicating veterans' benefits for one particular class of veterans, perhaps even removing that critical function from the VA entirely. Congress plainly barred district courts from interfering with VA policies and procedures in this way in the Veterans Judicial Review Act ("VJRA"), 38 U.S.C. § 511. If Plaintiffs are dissatisfied with the statutes and regulations governing VA's adjudication of claims of veteran volunteer test subjects—the same

[54] Notably, even with respect to alleged past harm, Swords to Plowshares is unable to identify any specific individual who felt that he could not disclose information due to an alleged secrecy oath. Ex. 69 (8/24/11 Resp. to Interrog. No. 3) ("After a reasonable search of records available from that time period, and as a result of its general searches for documents responsive to other requests, Swords has not located records that identify these veterans.").

statutes and regulations used to adjudicate claims of non-test subjects—their recourse lies with Congress and the courts ***it*** empowered to review VA's procedures and regulations.

Even if such a claim could proceed here, Plaintiffs' claim of inherent bias fails at its initial step, because Plaintiffs cannot demonstrate VA's involvement in the test program. Moreover, they cannot establish that one VA component's testing of some of the same substances used in the test program gives rise to constitutionally impermissible bias of the ***entire VA*** against test participants. Finally, Plaintiffs' purported "evidence" of VA's bias is irrelevant to the narrow claim this Court allowed to go forward and is unreviewable under Section 511.

A. Section 511 Bars Plaintiffs' Due Process Claim Against VA.

Section 511 deprives the Court of subject matter jurisdiction to adjudicate Plaintiffs' claim that VA's adjudicators are biased.[55] Section 511 provides:

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

38 U.S.C. § 511(a). Central to reaching a proper interpretation of the preclusion-of-review provisions of the VJRA is the recognition that it was the product of Congress's dissatisfaction with judicial decisions, culminating in *Traynor v. Turnage*, 485 U.S. 535 (1988), that found ways to avoid the preclusion of judicial review contained in 38 U.S.C. § 211 (1970), the predecessor of Section 511. In the House report accompanying the VJRA, Congress lamented that "the Court's opinion in *Traynor* would inevitably lead to increased involvement of the judiciary in technical VA decision-making." H.R. Rep. No. 100-963, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803. Consequently, Congress tightened section 211's preclusion of review language, noting that "[t]he effect of this change is to broaden the scope of section 211," *id.* at 27, in a plain

[55] While the Court has previously held that Plaintiffs' due process claim is not barred by Section 511, *see* Dkt. 485 at 31–35, Defendants respectfully submit that a proper analysis of Plaintiffs' claim, and in particular the extraordinary relief they seek (an argument that has not yet been addressed by the Court), makes clear that this claim cannot proceed in this Court. Moreover, as explained below, Section 511 bars an inquiry into Plaintiffs' purported "evidence" of bias.

attempt to prevent federal district courts from entertaining precisely the sort of challenge that Plaintiffs bring here.[56] *See Larrabee v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992).

This Court should give effect to that congressional intent evidenced in the plain language of Section 511, which precludes this Court from reviewing any "questions of law and fact necessary to a decision by the Secretary *under a law that affects the provision of benefits* by the Secretary to veterans." *Id.* at 1499 (emphasis added).[57] Here, Plaintiffs ask that this Court revamp the very manner in which the VA determines benefits eligibility to one particular group of veterans. Such a claim plainly implicates "decisions that relate to benefits decisions," *Veterans for Common Sense v. Shinseki* (*VCS*), 678 F.3d 1013, 1025 (9th Cir. 2012) (en banc) (quotation marks and citation omitted), and it is thus precluded by Section 511.

The vast scope of the overhaul that Plaintiffs envision this Court undertaking is evident from the remedies they seek. They seek an injunction "forbidding defendants from continuing to use biased decision makers," Dkt. 486 ¶ 234—which, under Plaintiffs' extremely broad conception of bias discussed below, would disqualify the entire VA and require an outside entity to adjudicate veterans' claims for benefits without any hint of congressional authority for doing so. Plaintiffs also seek to have this Court order VA to "propose a plan to remedy denials of affected claims" for disability benefits, as well as to "devise procedures for resolving such claims

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[56] "The committee believes that it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits and the 94 Federal Districts. The committee also believes that the subject of veterans benefits rules and policies is one that is well suited to a court which has been vested with other types of specialized jurisdiction." H.R. Rep. No. 100-963 at 28.

[57] The Supreme Court provided crucial guidance on the scope of section 511 in an immigration case, where the Court had occasion to compare a differently-worded jurisdictional limitation in the Immigration and Naturalization Act (INA) to the predecessor of section 511. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). As in the case here, plaintiffs in that action sought to bring a systemic challenge to INS practices and procedures, and the government argued that a preclusion of review statute, § 210(e)(1) of the INA, barred the claim. The Court ultimately sided with the plaintiffs as a matter of statutory interpretation. But the Court tellingly noted that if Congress had wished to preclude challenges to system-wide policies, and not just individual decisions, that Congress "could have modeled § 210(e) on 38 U.S.C. § 211(a), which governs review of veterans' benefits claims, by referring to review 'on all questions of law and fact' under the [agency] legalization program." *Id.* at 494. This reasoning applies to this case *a fortiori*, because Section 511 effects an even broader preclusion of judicial review of decisions related to VA benefits than its predecessor did.

that comply with the due process clause." *Id.* In other words, Plaintiffs want this Court to order VA to go back and change benefits determinations it has already made, and to change the procedures for how it (or another independent entity) decides test participants' claims moving forward. Such expansive relief plainly falls within the preclusive scope of Section 511. *See VCS*, 678 F.3d at 1028 (finding plaintiff's claim precluded by Section 511 because "to provide the relief that VCS seeks, the district court would have to prescribe the procedures for processing mental health claims and supervise the enforcement of its order"). Devising any appropriate relief for the systemic violations that Plaintiffs allege here is appropriately vested in specialized courts with expertise to effectuate appropriate relief in the veterans benefits context. *Cf. Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2139–40 (2012).

This analysis does not change simply because Plaintiffs style their claim as one alleging inherent "facial" bias and disavow any challenge to individual benefits determinations. As *VCS* instructed, mere labels of such claims cannot disguise their true nature. *See* 678 F.3d at 1027. Plaintiffs do not contend, nor could they, that a veteran is precluded from raising before the Veterans Court a claim that his or her adjudicator is bias based upon the VA's alleged involvement in the Army test programs. *See, e.g.*, *Vaughn v. Shinseki*, 464 F. App'x 874 (Fed. Cir. 2012) (holding that veterans may raise claims of bias and conflict of interest at the Board, the Veterans Court, and the Federal Circuit); *see also Aronson v. Brown*, 14 F.3d 1578, 1581-82 (Fed. Cir. 1994). The fact that Plaintiffs seek to challenge ***all*** adjudications by VA for a particular veteran population is no less a review of "questions of law and fact necessary to a decision by the Secretary" than the review of a single claim brought by an individual veteran. Were Plaintiffs' interpretation correct, Section 511's jurisdictional bar would be rendered a nullity, as a plaintiff could simply style any challenge to agency action as a "facial" challenge and disavow any interest in reversing the benefits determination in his own case. Such interpretation would run directly afoul of Congress's intent to broadly limit district court review of decisions by the VA Secretary.

As this Court previously recognized, "[i]t is well-settled that section 511 precludes federal district courts from reviewing challenges to individual benefits determinations, even if they are framed as constitutional challenges." Dkt. 177 at 8 (citing *Tietjen v. U.S. Veterans Admin.*, 884

F.2d 514, 515 (9th Cir. 1989); *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 658 (D.C. Cir. 2010) (stating that § 511 bars suits in which plaintiffs challenge "whether the VA 'acted properly' in making a benefit determination"); *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997)). The relief Plaintiffs seek here goes to the heart of Section 511, and the Court should grant summary judgment for lack of subject matter jurisdiction.

B. Plaintiffs' Due Process Claim Against VA Fails As a Matter of Law.

1. Plaintiffs cannot establish a genuine issue of fact as to VA's alleged involvement in the Army test programs at issue in this case.

Plaintiffs assert that VA adjudicators cannot fairly and impartially adjudicate their benefits claims due to VA's alleged involvement in the test program at issue in this case. But Plaintiffs' theory fails at its predicate step: VA did not participate or provide substances or resources in connection with the Army's testing program. *See* Ex. 70 (VA's Resp. To Pls' Req. for Admission Nos. 38-41). And despite more than three years of discovery, including the production of over ***2 million pages*** of documents and approximately 40 depositions, Plaintiffs cannot put forth any evidence that contradicts that conclusion or creates a genuine issue of material fact as to whether VA was involved in the test programs. Because Plaintiffs can present no evidence establishing the factual basis for their Fifth Amendment claim against VA, summary judgment is appropriate. *See Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc).

Plaintiffs' allegation that VA was involved in the test program relies exclusively upon two documents, neither of which is a VA document, and neither of which supports their assertion. *See* Ex. 71; Ex. 72. These two CIA documents state that samples of drugs and chemicals for testing in the program were obtained from drug and pharmaceutical companies, government agencies (EARL, NIH, FDA, and VA), research laboratories, and other researchers. Ex. 71 at VET001_009265; Ex. 72 at VET001_009241. These documents further explain that the CIA's program was comprised of Projects OFTEN and CHICKWITT. *Id.* Project OFTEN involved the testing of behavioral and toxicological effects of drugs in animals and ultimately in humans, while Project CHICKWITT involved the acquisition of information and samples of new drug developments in Europe and the Far East. Ex. 73 at VET022_000076.

These two documents do not indicate what substances, if any, VA provided to the CIA, whether any such substances were actually used by the CIA, and, if so, whether the CIA administered these substances on animals or humans, or service members or civilians. Nor do they indicate whether VA was even aware of the purpose for which it may have provided any substances. Indeed, almost all of the Project OFTEN testing was conducted on animals, and the only tests potentially involving humans concerned the CIA's possible ***funding*** of tests involving one substance, EA-3167, rather than the CIA's administration of testing using any substances obtained from the VA. *See* Ex. 73 at VE0022_000076. As such, these two documents supply no basis for a genuine factual issue regarding VA involvement in the Army's test programs.[58]

2. Even if Plaintiffs' factual allegations were true, they do not demonstrate that VA is an inherently biased adjudicator of their claims for benefits.

Under well-established principles governing Fifth Amendment challenges to an allegedly biased adjudicator, Plaintiffs cannot show that the entire VA is inherently biased against granting them disability benefits solely due to VA's alleged participation in the test programs at issue or its conduct of testing generally that involves some of the same substances that were used. "[M]ost matters relating to judicial qualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948). To state a Fifth Amendment due process claim based on an inherently biased decisionmaker, Plaintiffs must prove that due to some pecuniary or personal interest in the case, "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883–84 (2009) ("In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies

[58] Plaintiffs' reliance upon a CIA document that describes testing conducted by the CIA on *veterans* at the VA Center in Martinsburg, West Virginia, is, on its face, outside the scope of this case because it does not concern *service members*. *See* Ex. 74. Plaintiffs have acknowledged that these tests are outside the scope of this suit, as they recharacterized their class definition to expressly exclude any tests that did not involve then-current service members, Dkt. 387 at 16-17, and the Court's definition of the class does not include non-service members. Dkt. 485 at 58. Accordingly, this document cannot support Plaintiffs' assertion that VA was involved in the Army's test programs at issue in this case.

and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" (quoting *Withrow*, 421 U.S. at 47)). It is Plaintiffs' burden to establish a disqualifying interest, *Schweiker v. McClure*, 456 U.S. 188, 196 (1982), and in attempting to do so they must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47; *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995).

Plaintiffs contend that VA adjudicators are inherently incapable of fairly adjudicating their claims based on two sources of alleged bias: because VA participated in some degree in the test programs at issue, and because VA has conducted other testing and medical research with ***some*** of the same substances that were used during the test programs. Plaintiffs' claim fails under either alleged source of bias.

The most fundamental defect in Plaintiffs' theory is that even if they could prove that VA participated in the test program or conducted its own testing with some of the same substances used in the test program, they cannot show any connection between those events and the VA adjudicators who actually determine whether the class members are entitled to disability benefits. *See United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994) ("In order to prevail in its claim, the Tribe must show an unacceptable probability of actual bias ***on the part of those who have actual decisonmaking power over their claims***.") (emphasis added). Adjudicators in the Veterans Benefits Administration ("VBA") are charged with determining whether veterans have demonstrated a service-connected injury, entitling them to monetary compensation and health care for such injury. *See* 38 U.S.C. § 306 (establishing the Under Secretary for Benefits as the head of VBA); 38 C.F.R. § 3.100(a) (providing the Under Secretary for Benefits with authority over personnel who make decisions under laws administered by VA governing the payment of monetary benefits to veterans and their dependents); *see also* 38 U.S.C. §§ 1710(a)(1) and (2)(A), 7701(a). On the other hand, Congress has mandated that the Veterans Health Administration ("VHA") conduct medical research related to the provision of care and treatment to veterans. *See* 38 U.S.C. § 7303(a)(1), (2) (requiring VHA to "carry out a program of medical research in connection with the provision of medical care and treatment to veterans," including "biomedical

research, mental health research, prosthetic and other rehabilitative research, and health-care-services research"). It is pursuant to this congressional mandate that VHA has conducted research that has involved some of the same substances as those used by the Army during the Army's testing programs. Plaintiffs cannot demonstrate any plausible basis for believing that ***VBA*** adjudicators harbor inherent bias against class members stemming from congressionally authorized medical research that an altogether different group of employees in ***VHA*** have conducted in an attempt to benefit veterans; indeed, Plaintiffs have adduced no evidence that VBA adjudicators are even ***aware*** of the nature of the testing conducted by VHA.[59]

Plaintiffs' theory necessarily boils down to a claim that the entire VA is inherently and unconstitutionally biased against all volunteer test participants' disability claims as a result of one VA component's alleged provision of some unidentified substances to CIA in connection with some unidentified test program, or that single component's congressionally mandated testing conducted with certain substances. But numerous courts have squarely rejected such extraordinarily broad assertions of bias as somehow infecting an entire agency or state entity, and have instead focused on whether plaintiffs can demonstrate apparent bias on the part of the *particular adjudicators* with decisionmaking authority. *See Cement Inst.*, 333 U.S. at 701 (rejecting a bias argument that would effectively disqualify the entire FTC from the proceedings at issue when Congress had provided for no such contingency).[60] This Court must reject

[59] As explained below, any suggestion of "imputed" knowledge cannot serve to infect an entire agency with bias based on the knowledge or actions of just a few of its members. But even if such a theory were plausible as a general matter, the Ninth Circuit has expressly held that in light of the "vast magnitude" of VA operations, "the knowledge of [one] branch of the [VA] should not be imputed to [another branch] of the parent body." *United States v. Willoughby*, 250 F.2d 524, 530 (9th Cir. 1957) (quoting *United States v. Sinor*, 238 F.2d 271, 276 (5th Cir. 1956)).

[60] *See also William Jefferson & Co. v. Bd. of Assessment & Appeals No. 3*, 695 F.3d 960, 965 (9th Cir. 2012) ("Our precedent therefore suggests that even if there were some evidence that Whaley was biased in favor of the Assessor, which there is not, that evidence might not be sufficient to conclude that the adjudicating body—the Board itself—was biased."); *Karpova v. Snow*, 497 F.3d 262, 271 (2d Cir. 2007) ("[W]hen it is the same office—rather than the same person—that performs multiple functions, due process is not violated."); *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 618 (2d Cir. 2004) (concluding that recusal of two SEC commissioners with previous involvement in subject matter of proceedings was sufficient to cure any potential appearance of bias and stating that "there is no basis upon which we can conclude that the Commission, as an institution, was somehow thereby disqualified from considering and ruling on the controversy"); *Oregon*, 44 F.3d at 772 ("Even assuming, *arguendo* that prior litigating

Plaintiffs' sweeping claim that would impute an alleged conflict of interest on the part of one component of the VA to an entirely distinct component—and by extension, the entire agency—without any plausible showing of an overlap between those conducting the tests and those adjudicating the disability claims.

But even if *some* connection could be drawn between VHA researchers and VBA adjudicators, the alleged sources of "bias" under Plaintiffs' theory do not rise to the level of a Fifth Amendment violation under well-established due process principles. To demonstrate a due process violation, Plaintiffs must show that the decisionmaker has a "direct, personal, substantial, pecuniary interest" in the outcome of the particular decision to be made. *See Stivers*, 71 F.3d at 743 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 825 (1986)). Plaintiffs have made no attempt to describe the nature of the interest they believe VA adjudicators have that make them biased against volunteer test participants' claims. *See, e.g.*, Dkt. 346 at 18 ("DVA has an interest in determining that there are no long-term health effects from the testing that it was involved with and conducted."). They can demonstrate no such interest because there is none, let alone one that rises to the level courts have recognized as inconsistent with due process.

While the government is aware of no precise analogue to the novel claim Plaintiffs bring here, their due process challenge is akin to one alleging that an agency that investigates and develops an initial view of facts and thereafter adjudicates decisions related to those facts is an inherently biased adjudicator. A plaintiff seeking to make a claim that the "combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry." *Withrow*, 421 U.S. at 47. In *Withrow*, a licensed physician who had performed abortions challenged the Wisconsin Medical Examining Board's suspension of his license, and argued that the fact that the Board both conducted the investigation and adjudicated his license suspension violated his

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positions reveal that ODOJ is biased against the Tribe's water rights claims, the Tribe must connect these prior actions to the tribunal that will adjudicate its claims."); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 (D.C. Cir. 1988) ("It would be a strange rule indeed that inferred bias on such a tenuous basis, and then presumed that the bias spread contagion-like to Commissioners who were not even called upon to consider the settlement offer.").

procedural due process. The Court rejected plaintiff's claim and held that "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." *Id.* at 55. Indeed, the Supreme Court has held that it did not give rise to an unconstitutionally disqualifying bias when commissioners of the FTC submitted a report to Congress opining that a particular practice amounted to price-fixing in violation of the Sherman Act because, in part, "the fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject." *Cement Inst.*, 333 U.S. at 700–01.

Just so here. Even if the VA participated in some capacity in the test programs 50 years ago—which it did not—or has conducted tests and research involving some of the same substances that were used in the test programs, that alone provides no reason to suspect that VA adjudicators' minds would be "irrevocably closed" as to the potential for health effects associated with substances used in the test program. There is "no logical inconsistency" or "incompatibility," *Withrow*, 421 U.S. at 57, between conducting medical research on the effects of certain substances and awarding disability benefits to claimants who were exposed to those substances—let alone claimants who were exposed to entirely different substances). And as noted above, Plaintiffs have offered no particular motive or interest that would impel such biased decisionmaking. In light of this failure and the "presumption of honesty and integrity in those serving as adjudicators," *id.* at 47, the Court "cannot require, as a matter of constitutional law, that administrative tribunals disqualify themselves for the most theoretical and remote of reasons," *MFS Secs. Corp.*, 380 F.3d at 620. Such a result "would do considerable violence to Congress' purposes in establishing a specialized agency," *Blinder*, 837 F.2d at 1107, to provide and care for our nation's veterans.[61] The Court should reject Plaintiffs' claim and grant VA summary judgment.

[61] Of course, Congress has long been aware of the test programs at issue in this case, as reflected in the numerous hearings conducted, the Bob Stump Act, and GAO reports, and it has directed VA to conduct medical research that has included investigation of some of the same substances used in the test programs. Yet Congress has not set up a special administrative tribunal

3. Plaintiffs' purported "evidence" of VA's bias is irrelevant and unreviewable.

Plaintiffs have often complained in this litigation about various VA documents, practices, and procedures, asserting that they constitute "evidence" of VA adjudicators' alleged bias against test participants. *See, e.g.*, Dkt. 346 at 18 ("[T]he evidence of the manifestation of DVA's bias is common to the class."); Dkt. 383 at 15 n.14 ("Plaintiffs may rely on DVA's policies and procedures as evidence of DVA's bias."); Dkt. 486 ¶¶ 227–231. This "evidence" is irrelevant to the due process claim that this Court allowed to go forward, the "crux" of which is that, "**because the DVA allegedly was involved** in the testing programs at issue, the agency is **incapable** of making neutral unbiased benefits determinations for veterans who were test participants." Dkt. 177 at 11 (emphasis added). In other words, as both the Court and Plaintiffs themselves have stated, Plaintiffs' claim is that VA is an ***inherently*** biased adjudicator of test participants' claims due to its alleged conflict of interest. *Id.*; Dkt. 113 at 6; Dkt. 485 at 10. The only evidence that is relevant to that claim is evidence pertaining to the possible source of that conflict of interest—whether VA participated in the test programs or conducts tests involving some of the same substances.[62] *See* Dkt. 485 at 44. Accordingly, any other "evidence" Plaintiffs have referenced has no relevance to the narrow constitutional question at issue, and the Court has no need to even consider it.

But even if such "evidence" could be considered theoretically relevant, Section 511 prohibits the Court from reviewing it to determine whether it reflects "bias" on the part of VA.

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for volunteer test participants' claims or taken any other action to indicate that it had any concern whatsoever about the VA's ability to fairly and impartially adjudicate test participants' disability benefits claims. The Supreme Court has held that courts owe substantial deference to Congress in the VA benefits context, even in the face of a procedural due process challenge. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319–20 (1985); *id.* at 334 (characterizing the evidence of the lack of adequate process in complex VA adjudications as "fall[ing] far short of the kind which would warrant upsetting Congress' judgment that this is the manner in which it wishes claims for veterans' benefits adjudicated"); H.R. Rep. No. 100-963, at 25 (1988) (noting that in performing functions related to the provision of veterans' benefits, the Secretary "operates in the context of continuous Congressional oversight").

[62] As mentioned above, it is undisputed that Plaintiffs' only such "evidence" consists of two documents from other agencies that provide *no* support for the notion that VA was involved in the test programs. Accordingly, there is no factual issue that would require further development at trial, and this claim is appropriately resolved on summary judgment.

When Plaintiffs attempted to challenge VA's procedures under the APA—including the very training letter that Plaintiffs now seek to rely on as "evidence" of bias—the Court correctly rejected those claims pursuant to Section 511 because such review would implicate "a decision on a question of law necessary to the provision of benefits." Dkt. 177 at 12. Yet Plaintiffs nonetheless argue that VA's policies and procedures somehow reflect "bias" toward volunteer test participants. *See* Dkt. 346 at 19 ("Plaintiffs will rely solely on evidence that is applicable across the class, including evidence of DVA's policies and procedures. . . ."). That Plaintiffs have now restyled their operative complaint away from a direct challenge to the adequacy of particular documents is irrelevant. Section 511 prevents the Court from reviewing "VA decisions that relate to benefits decisions," including "any decision made by the Secretary in the course of making benefits determinations," *VCS*, 678 F.3d at 1025 (quotation marks and citations omitted), and as Plaintiffs concede, their "evidence" consists of policy decisions made by the Secretary,[63] *see* Dkt. 346 at 18 ("DVA made a policy decision to send generic outreach letters to class members."). Plaintiffs would have this Court evaluate those policy decisions—including a training letter issued to VA adjudicators, notice letters sent to veterans, and information letters sent to clinicians—to determine whether they are accurate or inaccurate, honest or misleading, evidence of good faith or evidence of bias. Congress's very goal in enacting the VJRA was to preclude federal district court review of such decisions by the Secretary, and this Court should reject Plaintiffs' invitation to engage in such review.

Plaintiffs also allege that the relatively low grant rate of claims brought by veteran test participants somehow reflects that VA is a biased adjudicator. Dkt. 486 ¶¶ 229-230. Again, Plaintiffs' evidence regarding grant rates is unreviewable by the Court, as such review is

[63] *VCS* thus provides Plaintiffs no support with respect to the single claim it allowed to go forward. While that claim was at one point described as a challenge to VA's "procedures," the court made clear that the claim challenged the constitutionality of the VJRA itself; specifically, *Congress's* failure to include mechanisms for pre-decision hearings, subpoena and discovery power, and the retention of paid counsel. *See* 678 F.3d at 1033–34. In other words, the Court stressed, the plaintiff there did "not challenge decisions at all." *Id.* at 1034. Here, by contrast, Plaintiffs concededly ask this Court to review decisions that *VA* has actually made relating to the provision of benefits to volunteer test participants, and Section 511 forecloses such review.

prohibited by Section 511. Plaintiffs have disclaimed seeking review of any particular decision regarding VA's adjudication of benefits, yet Plaintiffs ask the Court to review those adjudications in the aggregate in an attempt to demonstrate that VA is a biased adjudicator. As *VCS* recognized, Plaintiffs cannot skirt Section 511's scope by aggregating or averaging their evidence regarding individual claims determinations. 678 F.3d at 1026–27 ("The fact that VCS couches its complaint in terms of *average* delays cannot disguise the fact that it is, fundamentally, a challenge to thousands of individual mental health benefits decisions made by the VA."). And just as in VCS, Plaintiffs' statistical aggregation "tells us nothing about the causes" for any of the denials of such claims, as the Court has "no basis for evaluating that claim without inquiring into the circumstances of at least a representative sample" of the claims. *Id.* at 1027. As Section 511 forbids inquiry into such circumstances, it prohibits consideration of such "evidence" of bias.

Even if the Court could consider such an aggregation of VA claims decisions, Plaintiffs' analysis fails to demonstrate that VA is a biased decisionmaker. The statistics upon which Plaintiffs rely in their complaint do not reflect bias. As a factual matter, the statistics in the "Outreach Activities" report Plaintiffs have cited were compiled by generating contemporaneous reports of VA's pending inventory of claims with an "end product" (EP) 683, which is simply a work management tool. *See* Ex. 26 (Defs' Resp. to Pls' Interrog. No. 19). Consequently, the "Outreach Activities" report does not purport to reflect an accurate statistical analysis of grant rates for test participants. Indeed, more accurate statistics indicate that of the 843 disability claims filed by test participants, 717 were granted and 193 were denied (several claimants claimed more than one disability). *See* Ex. 26 (Defs' Resp. to Pls' Interrog. No. 16). In other words, test participants were granted service connection for at least one claimed disability approximately 85% of the time. While it is not apparent from these statistics alone whether the test participants were granted service connection related to their participation in the test program, they do contradict any notion that test participants are victims of a general VA bias as compared to other veterans: as a measure of contrast, in fiscal year 2010, VA granted service connection for at least one disability in 56% of cases. *See* Ex. 26 (Defs' Resp. to Pls' Interrog. No. 20).

More fundamentally, VA **cannot** grant service connection absent evidence of a current disability, an in-service event or injury, and a nexus between the disability and the in-service event or injury, and it is a claimant's "responsibility to present and support a claim for [VA] benefits." 38 U.S.C. §§ 1110, 1131, 5107(a); *see Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009). Congress and courts have recognized that claims alleging disability due to prior exposure to chemical or biological agents or other environmental hazards are among the most difficult to substantiate, due to the lapse of time between the exposure and the health effect and scientific uncertainty regarding the effects of exposures. *See* Pub. L. No. 98-542, § 2(2), (12), 98 Stat. 2725 (1984) (finding that "[t]here is scientific and medical uncertainty regarding [the] long-term adverse health effects" of exposure to ionizing radiation or herbicides containing dioxin and that claims based on such exposure "(especially those involving health effects with long latency periods) present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service"); *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("Proof of direct service connection thus entails proof that exposure during service caused the malady that appears many years later. Actual causation carries a very difficult burden of proof."). If test participants are able to substantiate their service-connected disabilities at a lower rate than other veterans groups, then VA adjudicators are doing *precisely what they are required to do* if they grant benefits to such veterans at a lower rate. *See* 38 U.S.C. § 5107(a) (claimant has responsibility to present and support claim for VA benefits); c*f. Schweiker*, 456 U.S. at 196 n.9 (noting that HHS Secretary's attempts to limit overbilling and overutilization of health care services "simply shows that he takes seriously his statutory duty to ensure that only *qualifying* Part B claims are paid").[64]

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be denied and Defendants' Cross-Motion for Summary Judgment should be granted.

[64] It is for similar reasons that courts consistently hold that "[a]dverse rulings alone are not sufficient to require recusal, even if the number of such rulings is extraordinarily high." *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1224 (9th Cir. 1990).

Respectfully submitted,

January 4, 2013

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

[PROPOSED] ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 14, 2013
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

Defendants cross-moved for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on all remaining claims raised by Plaintiffs in this case. Plaintiffs moved for partial summary judgment regarding the alleged legal duty aspect of their Administrative Procedure Act claims concerning "Notice," as they define the term, and medical care.

This matter came before this Court for hearing on March 14, 2013, with all parties appearing through counsel. Having considered all the papers filed by the parties in connection with Defendants' cross-motion for summary judgment and Plaintiffs' motion for partial summary judgment, the parties' arguments at the hearing on these matters, the documents previously on file, and other matters on which the Court may properly take judicial notice, the Court hereby **GRANTS** Defendants' Cross-Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Partial Summary Judgment, having found there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law on all the remaining claims in this case.

IT IS SO ORDERED.

Date:_____ _____

Claudia Wilken
United States District Judge