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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

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

Case No. CV 09-0037-CW

**[PROPOSED] INJUNCTION
 AND JUDGMENT PURSUANT
 TO THE COURT'S SUMMARY
 JUDGMENT ORDER**

Complaint filed January 7, 2009

PLAINTIFFS' PROPOSED INJUNCTION

1
2 WHEREAS, the Court has granted Plaintiffs summary judgment that Defendant
3 Department of the Army has an ongoing duty to warn members of the class about newly acquired
4 information that may affect their well-being now and in the future as it becomes available, and
5 good cause appearing therefor;

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

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

15 2. This injunction applies only to information that may affect the well-being of test
16 subjects that has been acquired by the Department of the Army and/or its agents since June 30,
17 2006. Specifically, as the Court has ruled, that information to be provided to each test subject
18 includes:

- 19 a. The nature, duration, and purpose of the testing undergone by that
20 particular test subject;
21 b. The method and means by which the testing was conducted;
22 c. The inconveniences and hazards reasonably to be expected by that test
23 subject as a result of participation in the testing; and
24 d. The effects upon their health which may possibly come from such
25 participation.

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

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

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

- 3 a. describing the efforts it has undertaken to locate the Newly Acquired
4 Information as of the Entry Date from the various sources of information
5 available to it, which may include, but are not limited to, such sources as
6 the Chem-Bio Database, the Mustard Gas Database, the Chemical,
7 Biological, Radiological & Nuclear Defense Information Analysis Center
8 (“CBRNIA”) Database and other related databases created in conjunction
9 with Battelle Memorial Institute, and the Defense Technical Information
10 Center (“DTIC”) repository;
- 11 b. confirming whether Newly Acquired Information has been found and
12 describing generally its nature;
- 13 c. explaining the plan it has in its discretion developed for transmitting Newly
14 Acquired Information to the class members entitled to notification,
15 including the methods intended for notification which may include direct
16 mail, online notice, and/or publication notice;
- 17 d. committing to transmit the Newly Acquired Information as of the Entry
18 Date to those class members no later than ninety (90) days from the Entry
19 Date, and outlining its plan to do so; and
- 20 e. outlining the plan and policies it has in its discretion developed for
21 (i) periodically collecting and transmitting Newly Acquired Information
22 that becomes available to it after the Entry Date and (ii) providing any
23 necessary update reports to the Court regarding such future efforts.

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

25 Dated: _____

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

PLAINTIFFS' PROPOSED JUDGMENT

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

IT IS HEREBY ADJUDGED AS FOLLOWS:

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

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

IT IS SO ORDERED AND ADJUDGED.

Dated: _____

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

DEFENDANTS' STATEMENT AND PROPOSED FINAL JUDGMENT**INTRODUCTION**

1
2
3 In its July 24, 2013 Order, the Court granted summary judgment to Defendants on all of
4 Plaintiffs' claims, except for a portion of their Administrative Procedure Act ("APA") claim
5 against the Army concerning an ongoing "duty to warn." On that claim, the Court granted
6 summary judgment to Plaintiffs "to the extent that Plaintiffs seek to require the Army to warn
7 class members of any information acquired after the last notice was provided, and in the future,
8 that may affect their well-being, when that information becomes available." Dkt. 537 at 72. The
9 Court ordered the parties to "submit a joint proposed injunction and judgment that comply with
10 the terms of this order" within fourteen days of the entry of its order. *Id.* The Court further noted
11 that, if the parties were unable to agree to the form of an injunction and the judgment, the parties
12 shall "file a single form of each that shows the terms to which they were able to agree and their
13 separate proposals for the remaining terms." *Id.*

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

DISCUSION

24
25 Injunctive relief "does not automatically issue upon a finding of liability." *Apple Inc. v.*
26 *Psystar Corp.*, 673 F. Supp. 2d 943, 948 (N.D. Cal. 2009). "When it is awarded, equitable relief
27 must be carefully tailored to 'be no more burdensome to the defendant than necessary to provide
28 complete relief to the plaintiffs.'" *Sierra Forest Legacy v. Sherman*, Nos. 2:05-cv-00205, 2:05-cv-

1 00211, 2013 WL 1627894, at *6 (E.D. Cal. Apr. 15, 2013) (quoting *Califano v. Yamasaki*, 442
2 U.S. 682, 702 (1979)). Plaintiffs have the burden of establishing entitlement to injunctive relief.
3 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This is true even where injunctive
4 relief is sought after a finding of liability. *See Apple Inc.*, 673 F. Supp. 2d at 948. As discussed
5 below, Defendants submit that prospective injunctive relief is inappropriate.

6 ***Defendants' Views on Plaintiffs' Proposed Injunction***

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

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

23 *Id.* at 8-9.

24 In other words, Plaintiffs drew a clear distinction between the "nature" and "methods and
25 means" of the testing, on the one hand, and "the inconveniences and hazards" and "the effects
26 upon [the test subject's] health or person, which may possibly come from his participation in the
27 experiment," on the other. It is only these later two categories of "Notice" — *e.g.*, the "duty to
28

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

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

19
20 ¹ Relatedly, Plaintiffs’ proposed injunction seeks to impose obligations upon the Department of
21 Defense (“DoD”) despite the Court’s dismissal of all claims against that agency. *See* Dkt. 537 at
22 44 (“Because the Court dismissed the claim based on the Wilson Directive and found no basis for
23 enforcing CS: 385 and AR [70-25] against the DoD, the Court grants judgment in favor of the
24 DoD on this claim in its entirety.”). Specifically, Plaintiffs’ proposed injunction seeks to obligate
25 the Army to provide “newly acquired information that may effect their well being” concerning
26 tests that were “sponsored, overseen, directed, funded, and/or conducted by the Department of
27 Defense or any branch thereof.” *See* Pls’ Proposed Injunction at ¶ 1. There is no legal basis to
28 obligate the Army to exercise a duty to warn concerning any tests that were conducted by a
service branch other than the Army. Similarly, Plaintiffs’ proposed injunction states that it
“applies only to information that may affect the well-being of test subjects that has been acquired
by the Department of the Army and/or Department of Defense since June 30, 2006.” *Id.* at ¶ 2.
Again, there is no legal basis to obligate the Department of the Army to exercise a “duty to warn”
based upon newly discovered information by the Department of Defense. Accordingly, Plaintiffs’
attempt to include the Department of Defense within the terms of their proposed injunction is
inappropriate.

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

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

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

4 Plaintiffs’ injunction thus goes well beyond the narrow relief they can obtain under
5 section 706(1) and, indeed, highlights why, as discussed below, the “duty to warn” language in
6 the 1988, 1989 and 1990 versions of AR 70-25 is not properly the subject of a section 706(1)
7 claim in the first instance. As the Court correctly noted in its summary judgment decision, “[a]
8 claim under § 706(1) can be maintained ‘only where there has been a genuine failure to act.’
9 *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). The Ninth
10 Circuit ‘has refused to allow plaintiffs to evade the finality requirement with complaints about the
11 sufficiency of an agency action ‘dressed up as an agency’s failure to act.’” *Id.* (quoting *Nevada v.*
12 *Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)).” Dkt. 537 at 42. Accordingly, the Court
13 rejected Plaintiffs’ claim “to the extent that Plaintiffs seek to require the DOD and Army to
14 provide notice to each class member which discloses on an individual basis the substances to
15 which he or she was exposed, the doses to which he or she was exposed, the route of exposure
16 and the known effects of the testing,” because such a claim “is not brought properly under
17 § 706(1).” Dkt 537 at 43. Plaintiffs’ proposed injunction, which seeks to require the Court (and
18 Plaintiffs) to oversee the Army’s implementation of a “duty to warn” is thus impermissible given
19 the APA claim brought by Plaintiffs in this case.

20 ***Defendants’ Additional Views Regarding Injunctive Relief***

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

1 duty to warn is only triggered if, in the exercise of the agency’s scientific judgment, it determines
2 that the newly acquired information *may* affect the well-being of test participants. Because the
3 “duty to warn” contained in AR 70-25 is necessarily predicated on a scientific and discretionary
4 judgment by the Army, the actual exercise of that duty may form neither the basis for a section
5 706(1) claim nor the basis for a prospective injunction. *See In re Consol. U.S. Atmospheric*
6 *Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (recognizing the highly discretionary nature of a
7 “duty to warn” of newly discovery information concerning health effects in the context of an
8 FTCA claim).

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

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

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

27 In addition, the inherently discretionary duty to warn contained in the 1988, 1989, and
28 1990 versions of AR 70-25 counsel against the imposition of a prospective injunction under
Federal Rule of Civil Procedure 65(d), which requires that “[e]very order granting an injunction”
must “state its terms specifically,” and “describe in reasonable detail — and not by reference to

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

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

9 *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (footnotes and citations omitted); *Atiyeh v.*
10 *Capps*, 449 U.S. 1312, 1317 (1981) (staying district court injunction pending appeal
11 because the language in the injunction directing prison officials to accomplish a reduction
12 of “at least 250” by a certain date “falls short of this specificity requirement”); *Columbia*
13 *Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1048 (9th Cir. 2013) (holding that portions
14 of an injunction were too vague to be enforceable under Rule 65, including, among other
15 provisions, a prohibition from “soliciting or targeting a user base generally understood, in
16 substantial part, to be engaging in infringement . . .”); *Union Pacific R.R. Co. v. Mower*,
17 219 F.3d 1069, 1077 (9th Cir. 2000) (vacating district court’s imposition of an injunction
18 because the injunction failed to provide guidance regarding how the enjoined party should
19 determine what particular information is confidential or privileged”).

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

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

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

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

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

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

1 *Id.* at 33. The Court elsewhere held that AR 70-25 was “less clear whether this ongoing duty is
2 owed to individuals who participated in tests before 1988 or whether it is limited to only those
3 who might have done so after AR 70-25 was revised in 1988;” *id.*, observed that AR 70-25 “does
4 not make clear” that it applies to individuals who participated in tests before 1988; *id.*, and that
5 language in the 1988, 1989 and 1990 versions of AR 70-25 “did not clearly include” individuals
6 who participated in tests before 1988. *Id.* at 33 -34. Ultimately, the Court determined that AR 70-
7 25 was ambiguous as to whether it applied to individuals who were test participants before the
8 regulation was amended and settled on the interpretation that it found “more persuasive.” *Id.* at
9 34, 39. Given that the Court found that AR 70-25 is ambiguous as to whether the “duty to warn”
10 applies to the class members, AR 70-25 cannot create a sufficiently clear legal duty to give rise to
11 an injunction (or liability, for that matter) under APA section 706(1).

12 Finally, because the Court based its conclusion that the Army had a “duty to warn” on its
13 interpretation of AR 70-25, it logically follows that the only injunction that would be consistent
14 with that holding would be an injunction that required the Army to abide by AR 70-25. Yet courts
15 have expressed substantial concerns about entering such “follow-the-law” injunctions. The Ninth
16 Circuit has recognized “the well established principle of federal law that administrative agencies
17 are entitled to a presumption that they ‘act properly and according to law.’” *Kohli v. Gonzales*,
18 473 F.3d 1061, 1068 (9th Cir. 2007) (quoting *Fed. Comc’ns Comm’n v. Schreiber*, 381 U.S. 279,
19 296 (1965)); *See also United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (“The
20 presumption of regularity supports the official acts of public officers, and, in the absence of clear
21 evidence to the contrary, courts presume that they have properly discharged their official duties.”)
22 (internal citations omitted).

23 As numerous courts have recognized, “[i]njunctive orders that broadly order the enjoined party
24 simply to obey the law and not violate the statute are generally impermissible.” *NLRB v. U.S.*
25 *Postal Serv.*, 486 F.3d 683, 691 (10th Cir. 2007); *see Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d
26 1312, 1316 (Fed. Cir. 2004). An injunction to follow the law is particularly inappropriate in a
27 case brought against a government agency because it could potentially subject the agency to
28 charges of contempt for every alleged failure to comply and would deprive the agency of the

1 framework Congress created for adjudicating such claims under the Administrative Procedure
2 Act. *Cobell v. Norton*, 392 F.3d 461, 475 (D.C. Cir. 2004) (holding that under an order to obey
3 the law, “defendants would be subject to contempt charges for every legal failing, rather than
4 simply to the civil remedies provided in the APA”); see *NLRB v. Express Pub. Co.*, 312 U.S. 426,
5 435–36 (1941) (“[T]he mere fact that a court has found that a defendant has committed an act in
6 violation of a statute does not justify an injunction broadly to obey the statute and thus subject the
7 defendant to contempt proceedings if he shall at any time in the future commit some new
8 violation unlike and unrelated to that with which he was originally charged”). Accordingly,
9 because the Court’s order finding liability based on its interpretation of AR 70-25 could only give
10 rise to an inappropriate follow-the-law directive, the Court should not enter an injunction in this
11 case.

12 ***Defendants’ Proposed Judgment***

13 For the foregoing reasons, and in light of the broad, open-ended language in AR 70-25,
14 Defendants submit it would be inappropriate to enter a prospective injunction, with the possibility
15 of contempt for failure to abide by such an injunction, based upon the Court’s finding that AR 70-
16 25 creates a “duty to warn” class members. Accordingly, pursuant to the Court’s July 24, 2013
17 Order, Defendants propose an alternative form of judgment that we believe would be appropriate
18 under the circumstances should the Court determine to enter judgment against the Army over
19 Defendants’ objections. As noted above, by the submission of this alternative form of judgment,
20 the Defendants do not consent to the entry of any judgment against them in this case for any relief
21 (including the alternative judgment), and we continue to oppose the Court’s liability
22 determination on which any such judgment would be based. Defendants have submitted this
23 alternative form of judgment solely to set forth their view, discussed herein, that only limited
24 relief would be available to Plaintiffs in any event under the Court’s contested decision finding
25 liability and applicable law. Any judgment entered against Defendants (including the alternative
26 form of judgment) would then be subject to appeal by Defendants.³

27
28 ³ On page 44 of its summary judgment Order, the Court stated that “[b]ecause the Court dismissed the claim based on the Wilson directive and found no basis for enforcing CS: 385 and

- 1 7. Plaintiffs' claim for a declaration that any secrecy oaths are invalid and claim for an
2 injunction requiring Defendants to notify Plaintiffs that they have been released from such
3 oaths is dismissed with prejudice.
- 4 8. Plaintiffs' claim against the Department of Veterans Affairs is dismissed with prejudice.
- 5 9. The Court declares that the Army has an obligation under the 1988, 1989 and 1990
6 versions of AR 70-25 to warn class members who participated in Army testing of any
7 information acquired after the last notice was provided, and in the future, that may affect
8 their well-being, when that information becomes available.

9 IT IS SO ORDERED AND ADJUDGED.

10 DATE: _____

11 _____
12 CLAUDIA WILKEN
13 United States District Chief Judge
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1 **PLAINTIFFS' STATEMENT REGARDING "DEFENDANTS' STATEMENT AND**
2 **PROPOSED FINAL JUDGMENT"**

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

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

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Dated: August 6, 2013

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

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

/s/ Eugene Illovsky
EUGENE ILLOVSKY