

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

VIETNAM VETERANS OF AMERICA;  
SWORDS TO PLOWSHARES, Veterans  
Rights Organization; TIM MICHAEL  
JOSEPHS; WILLIAM BLAZINSKI;  
BRUCE PRICE; FRANKLIN D.  
ROCHELLE; LARRY MEIROW; ERIC P.  
MUTH; DAVID C. DUFRANE;  
KATHRYN MCMILLAN-FORREST,  
*Plaintiffs-Appellants–  
Cross-Appellees,*

v.

CENTRAL INTELLIGENCE AGENCY;  
JOHN BRENNAN, Director of the  
Central Intelligence Agency; UNITED  
STATES DEPARTMENT OF DEFENSE;  
ASHTON CARTER, Secretary of  
Defense; UNITED STATES  
DEPARTMENT OF THE ARMY; JOHN  
M. MCHUGH, Secretary of the Army;  
UNITED STATES OF AMERICA;  
UNITED STATES DEPARTMENT OF  
VETERAN AFFAIRS; ROBERT A.  
MCDONALD, Secretary of Veterans  
Affairs,  
*Defendants-Appellees–  
Cross-Appellants.*

Nos. 13-17430  
14-15108

D.C. No.  
4:09-cv-00037-  
CW

OPINION

Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

Argued and Submitted  
September 11, 2014—San Francisco, California

Filed June 30, 2015

Before: J. Clifford Wallace, Mary M. Schroeder,  
and William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher;  
Partial Concurrence and Partial Dissent by Judge Wallace

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## SUMMARY\*

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### **Veterans Affairs**

The panel affirmed in part and reversed in part the district court's judgment and injunction entered in an action brought by veterans organizations, and individuals who were subjects in chemical and biological weapons experiments conducted by the United States military, seeking declaratory and injunctive relief against federal agencies.

The panel agreed with the district court that the U.S. Army had an ongoing duty under Army Regulation 70-25 to provide former test subjects with newly available information

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

relating to their health, and that this duty was judicially enforceable under § 706(1) of the Administrative Procedure Act. The panel held that the district court did not abuse its discretion in entering its injunction to enforce that duty.

The panel also agreed with the district court that the Army had an ongoing duty to provide medical care. The panel disagreed with the district court's denial of relief on the ground that the Department of Veterans Affairs provided medical care that to some degree duplicated the care the Army was obligated to provide. The panel held that the district court could not, in the absence of mootness, categorically deny injunctive relief to former volunteer subjects seeking necessary medical care because some former subjects may be entitled to receive medical care from another government agency. The panel vacated the district court's summary judgment for the government on this claim and remanded to the district court.

Judge Wallace joined the majority in affirming the district court's judgment and injunction compelling the Army to comply with Army Regulation 70-25's clear regulatory mandate, but wrote separately in concurrence because he did not join the majority's analysis of regulatory history to support its textual analysis. Judge Wallace dissented from the majority's conclusion that Army Regulation 70-25 also contained a command that the Army provide medical care to former research volunteers. He would affirm the district court's summary judgment against plaintiffs on their claims for medical care, but on the alternative ground that their claim was not judicially enforceable under § 706(1) of the Administrative Procedure Act.

**COUNSEL**

James Patrick Bennett, Eugene G. Illovsky, Benjamin F. Patterson (argued), and Stacey Michelle Sprengel, Morrison & Foerster LLP, San Francisco, California, for Plaintiffs-Appellants-Cross-Appellees.

Melinda L. Haag, United States Attorney, Stuart F. Delery, Assistant Attorney General, Charles W. Scarborough (argued), Brigham John Bowen, Anthony Joseph Coppolino, and Mark B. Stern, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Defendants-Appellees-Cross-Appellants.

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**OPINION**

W. FLETCHER, Circuit Judge:

From the inception of the United States' chemical weapons program during World War I until the mid-1970s, the United States military conducted chemical and biological weapons experiments on human subjects. In these experiments, tens of thousands of members of the United States armed services were intentionally exposed to a range of chemical and biological agents.

Plaintiffs are veterans' organizations and individuals who were subjects in these experiments. They filed an individual and class action complaint seeking declaratory and injunctive relief against the Department of Defense ("DOD"), the Army, the Central Intelligence Agency ("CIA"), and the Department of Veterans Affairs ("VA"). The class comprises "[a]ll current or former members of the armed forces, who, while

serving in the armed forces, were test subjects” in these experimentation programs. Two of Plaintiffs’ claims, brought under § 706(1) of the Administrative Procedure Act (“APA”), are at issue in this appeal. Plaintiffs claim, first, that the Army has unlawfully failed to notify test subjects of new medical and scientific information relating to their health as it becomes available. They claim, second, that the Army has unlawfully withheld medical care for diseases or conditions proximately caused by their exposures to chemicals during the experiments.

On cross-motions for summary judgment, the district court held that Army Regulation 70-25 (“AR 70-25”) imposes on the Army an ongoing duty to notify former test subjects of relevant new health information as it becomes available. The court issued an injunction requiring the Army to comply with that duty. The court held, further, that AR 70-25 imposes on the Army an ongoing duty to provide medical care, but the court declined to compel the Army to provide such care on the ground that Plaintiffs could seek medical care from the VA.

We affirm in part and reverse in part. We agree with the district court that the Army has an ongoing duty under AR 70-25 to provide former test subjects with newly available information relating to their health, and that this duty is judicially enforceable under § 706(1). We also agree with the district court that the Army has an ongoing duty to provide medical care. However, the district court denied relief on the ground that the VA provides medical care that to some degree duplicates the care the Army is obligated to provide. We disagree with the district court that relief should have been denied on this ground.

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