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Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.
12 Greene, Jr.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO

16 VETERANS FOR COMMON SENSE and)
17 VETERANS UNITED FOR TRUTH,)

18 Plaintiffs,)

19 v.)

20 Hon. JAMES B. PEAKE, Secretary of)
Veterans Affairs, *et al.*,)

21 Defendants.)
22)
23)

No. C 07-3758-SC

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' AMENDED
DESIGNATION OF WITNESSES AND
LIST OF REQUIRED DOCUMENTS**

24 **Introduction**

25 It is unfortunate that even a process as simple and routine as scheduling witnesses for a
26 hearing becomes another platform for harsh invective from plaintiffs about defendants' purported
27 "paternalistic" actions and "total lack of cooperation." Defendants will not respond to this
28 posturing as it does nothing to advance the litigation. Instead, defendants provide the following

1 short response to the new arguments included in plaintiffs' latest filing, D.E. 143.

2 **1. Scope of the Hearing**

3 Having not identified the issues plaintiffs believe are presented by their preliminary
4 injunction hearing on the date requested by Court, plaintiffs now complain that defendants'
5 timely filed statement of issues is not to their liking. First, they state that whether a veteran's
6 right to health care is "constrained by funding . . . is a legal issue." D.E. 143 at 2:11. Defendants
7 agree. Whether a particular appropriation act "specifically mandated" how and on what
8 programs the funds are to be disbursed is a legal question. However, absence such a specific
9 appropriation act mandate, VA has the discretion to allocate its lump sum appropriation in the
10 manner that it concludes will best effectuate its mission of providing health care and benefits to
11 veterans. That too is a legal issue, as the Supreme Court has held that such resource allocation
12 decisions are committed to agency discretion by law under the APA, 5 U.S.C. § 701(a)(2). See
13 Lincoln v. Vigil, 508 U.S. 182 (1993). In its factual presentation, VA intends to explain the
14 various appropriations Congress has authorized in the last several years, and show what was
15 spent, what is forecast to be spent, and pursuant to which appropriations authority.

16 Second, regarding plaintiffs' list of relevant issues, they are certainly entitled to frame the
17 case as they see fit and present evidence they believe justifies the dramatic allegations in the
18 complaint. Testimony before Congress and reports prepared by the VA that plaintiffs maintain
19 support their position can be submitted.

20 However, plaintiffs are not entitled to list areas of inquiry outside the scope of this
21 motion. For example, plaintiffs would like the Court to rule on "whether *sufficient* funding is
22 available to provide mental health care to veterans." D. E. 143 at 3:4-5 (emphasis added). That
23 question is for the Legislature, not plaintiffs, defendants or even this Court to decide. On other
24 more relevant issues, plaintiffs have now identified several doctors, also plaintiffs' declarants,
25 whom they claim are competent to testify on the issues. It appears that the parties and their
26 experts agree that PTSD is a serious illness affecting veterans and the prompt and aggressive
27 treatment is essential.

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2. Plaintiffs' Request for Government Witnesses

Before addressing plaintiffs' heated complaints about their purported need for testimony by government witnesses and the production of VA documents prior to the preliminary injunction hearing, it should be recalled that before the Court's telephonic hearing with the parties on February 11, 2008, plaintiffs never expressed any need for, or interest in, an evidentiary hearing on their motion for preliminary injunction. Plaintiffs filed their motion for preliminary injunction on December 11, 2007 without notice of an intent to present live testimony nor did they seek expedited discovery to support their motion.¹ It is unexplained why plaintiffs now insist that they must be able to present the testimony of nearly twenty witnesses and have access to thousands of pages of documents in order to fairly present argument on their motion.

Second, the only basis for compelling testimony by witnesses at the hearing is by the issuance of a subpoena under Rule 45 and plaintiffs have not done so. There are geographic limits to the scope of service of a trial subpoena, Fed. R. Civil P. 45(b)(2), which do not permit a California Court to subpoena a witness in the District of Columbia. Johnson v. Land O' Lakes, Inc., 181 F.R.D. 388, 394 (N.D. Iowa 1998). Even if those limits do not apply when seeking the testimony of a "director" of a party, there is no authority to compel testimony of low level employees.² For that additional reason, plaintiffs are not entitled to seek the testimony of the following government witnesses:

- a. Belinda Flynn is an Assistant Inspector General for Auditing in the VA's Office of Inspector General; not only is Ms. Flynn a lower level employee, but the IG is statutorily independent of VA management.

¹Plaintiffs did accept defendants' offer of January 15, 2008 to prioritize document production to focus on thirteen categories of documents plaintiffs considered relevant to the motion; defendants produced some 2000 pages approximately three weeks later.

²In Re: Vioxx Products Liability Litigation, 438 F.Supp. 2d 664 (E.D. La. 2006), relied upon by plaintiffs, involved a trial subpoena for Merck's "President for Human Health for Canada, Latin America, Japan, Australia and New Zealand." Id. at 664.

1 b. Kara Ziven is a Research Investigator with VA and as such has no management
2 authority.

3 c. Gary M. Baker is the Acting Chief Business Officer for VA Veterans Health
4 Administration.

5 d. Finally, Laurie E. Ekstrand is an employee of the Government Accountability Office –
6 an entity of the legislative branch and so totally outside the control of the VA.³

7 As noted , plaintiffs have made no effort to subpoena these officials; were they to do so,
8 defendants could present these objections, as well as others relating to burden and relevance,
9 through a motion to quash.

10 Only Michael Kussman, VA's Undersecretary of for Health, is a named party to this
11 action, but the proper official defendant in an APA action naming the VA as defendant is the
12 Secretary of Veterans Affairs, not his subordinates. In any event, as a senior VA official with
13 extensive responsibilities, Mr. Kussman has directed that his Principal Deputy, Gerald Cross,
14 provide relevant testimony. That is a reasonable substitution in this situation where a senior
15 official has been named as a defendant. See Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th
16 Cir. 1979) ("[h]eads of government agencies are not normally subject to deposition"). Accord
17 United States v. Morgan, 313 U.S. 409, 422 (1941).

18 3. Scheduling Witnesses

19 Again, plaintiffs try to avoid their obligation to put on an affirmative case to which
20 defendants can respond by proposing a witness schedule that puts defendants' key witnesses
21 ahead of most of plaintiffs' case and requires defendants' witnesses to appear in the order
22 plaintiffs prefer. Not only this unfair, but it is also infeasible. VA officials simply are not
23 available at plaintiffs' whim and cannot be expected to be available to testify twice on two
24 different days. Scheduling of witnesses is always an exercise that requires cooperation.
25 Plaintiffs utter refusal to even attempt to discuss the issue with defendants, makes the process

26
27 ³See United States v. Davis, 140 F.R.D. 261, 263 (D. R.I. 1992) (Rule 34 party discovery
28 cannot be sought against Congressional entities even where United States is party); see also
Chennareddy v. Bowsher, 935 F.2d 315, 319 (D.C. Cir 1991) (GAO is legislative branch
agency).

1 unduly complicated.

2 To avoid requiring the Court to arbitrate an issue that should not require its attention,
3 defendants suggests a simple solution. Plaintiffs should be directed to put on all of their
4 witnesses on Monday and Tuesday, March 3 and 4. (Plaintiffs report that all of their witnesses
5 are available on these days.) Defendants will have their witnesses available on Wednesday,
6 March 5 and 6 for their case and whatever questioning plaintiffs believe will bolster their
7 affirmative case.

8 **4. Discovery**

9 Plaintiffs complaints on discovery are misleading in their incompleteness. They continue
10 to argue that defendants have had 120 days to locate and produce documents without
11 acknowledging the stay granted by the Court that was dissolved on January 10, 2008. D.E. No.
12 93 at 6. They also complain that Privacy Act protected materials have not been produced when it
13 has been plaintiffs' inflexibility that has prevented production. It is *unlawful* absent an
14 appropriate Privacy Act protective order for defendants to disclose such material. Defendants
15 forwarded a proposed standard Privacy Act order to plaintiffs months ago, and reiterated their
16 willingness to join in a motion to the Court to issue such an order in January. Plaintiffs
17 insistence that a Privacy Act order be tied to their novel request to hide witness identities and
18 seek other extraordinary provisions has caused the impasse.

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2 As defendants have stated, VA and Department of Justice staff are working to get
3 another production of documents – in addition to the 2000 pages produced on February 4 -- to
4 plaintiffs by Wednesday, February 27 or Thursday, February 28, in time for use at the
5 preliminary injunction hearing. This task is obviously made more difficult by the scope of
6 plaintiffs' document requests for use at the hearing.

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10 Dated February 22, 2008

Respectfully Submitted,

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