

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY bn
DEPUTY CLERK

JOHN EAKIN
9865 Tower View Road
Helotes, Texas 78023

Plaintiff,

)
)
)
)
) CASE NUMBER:
)

v.

SA12CA1002 FB

AMERICAN BATTLE MONUMENTS
COMMISSION and MAX CLELAND,
in his official capacity as Secretary of
the American Battle Monuments Commission

U.S. DEPARTMENT OF DEFENSE,
LEON E. PANETTA, in his official
capacity as Secretary of Defense,
W. MONTAGUE WINFIELD, in his official
capacity as Deputy Assistant Secretary of
Defense for POW/Missing Personnel Affairs,
and JOHNIE E. WEBB, in his official capacity
as Deputy to the Commander for External
Relations and Legislative Affairs,
Joint POW/MIA Accounting Command,

Defendants

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq* in response to the U.S. Government's unlawful withholding of agency action to fully and correctly account for a deceased WWII era Army servicemember and others whose remains were not recovered. Subsequent to World War II the U.S. Army Graves Registration Service identified some, but not all, of the remains recovered from a POW camp cemetery at Cabanatuan, Nueva Ecija Province, Philippine Islands, in which the remains of Private Arthur H.

Kelder were known to be one of fourteen interred in Grave 717. His remains were not individually identified and were determined to be “non-recoverable”. They were ultimately interred in the Fort McKinley Military Cemetery near Manila as an unknown. All records pertaining to these remains were classified and restricted from public access until recently. Through related litigation in this Court and other research, Plaintiff obtained the records necessary to conclusively identify the remains of his family member. Defendants have arbitrarily and capriciously refused to consider this new evidence. Additionally, Defendants advertise their ability to identify human remains by use of DNA sequencing, yet they refuse to do so in Plaintiff’s and similar cases despite the obvious applicability of the technique to this case. Accordingly, Plaintiff seeks a declaratory judgment that this Court has weighed the evidence and finds that the remains identified as Unknown X-816 (“X-816”) are those of Private Arthur H. “Bud” Kelder. Plaintiff further seeks injunctive and other appropriate relief, including the correction of agency records, grave markers and other memorials on behalf of his family member and those similarly situated.

I.
PARTIES

2. Plaintiff John Eakin is a relative of Private Arthur H. “Bud” Kelder, a member of the U.S. Army who died November 19, 1942 while a prisoner of the Imperial Japanese Army and whose remains are presently interred as an “unknown” in the Manila American Cemetery in the Republic of the Philippines. Plaintiff is “suffering legal wrong because of agency action” and is “adversely affected or aggrieved by agency action within the meaning” of 10 U.S.C § 1509, which provides that the Secretary of Defense “shall implement a comprehensive, coordinated, integrated, and fully resourced program to account for persons ... who are unaccounted for ...

from World War II....” Plaintiff is thus a proper plaintiff under the Administrative Procedure Act, 5 U.S.C. § 702.

3. Defendants are the American Battle Monuments Commission, Max Cleland, in his official capacity as Secretary of the American Battle Monuments Commission (collectively, “ABMC”), U.S. Department of Defense, Leon E. Panetta, in his official capacity as Secretary of Defense, Johnie E. Webb, in his official Capacity as Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command, and W. Montague Winfield in his official capacity as Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs (collectively, “DoD”). Defendants are federal agencies headquartered in Arlington, VA. Each Defendant is either an agency of the United States or an officer or employee of an agency of the United States and has acted or failed to act in an official capacity and under color of legal authority. 5 U.S.C. § 702. They are thus proper defendants under the Administrative Procedure Act.

II. **JURISDICTION AND VENUE**

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1331. This Court has authority to order declaratory relief under 28 U.S.C. §§ 2201 and 2202 because there is a live controversy between Plaintiff and Defendants. This Court has authority to issue a Writ of Mandamus under 18 U.S.C. § 1361 because Plaintiff seeks a Writ requiring Defendants to comply with the Administrative Procedure Act, 5 U.S.C. §§ 701-706 and other duties as specified at 10 U.S.C. §§ 1501-1509

5. Plaintiff resides in Helotes, Bexar County, Texas, therefore venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(3) and 5 U.S.C. § 703.

III.
RELATED LITIGATION

6. On September 28, 2010, Plaintiff filed a related complaint in this court, Eakin v. U.S. Department of Defense, SA10CA0748-FB, seeking records under the Freedom of Information Act. Records obtained during and subsequent to that litigation form the basis for this complaint.

IV.
FACTS

A. Unidentified remains X-816 are those of Arthur H. Kelder

7. Dr. David R. Senn, DDS, DABFO, a recognized expert in the field of identification of skeletal remains, has opined that unidentified remains X-816 are those of Arthur H. Kelder. Ex. 1 (Senn Report)

8. The skeletal remains of 14 men were recovered from the Cabanatuan POW Camp #1 cemetery grave 717. One set of remains were immediately identified as BAIN on the basis of the burial record and identification tags found with the remains. The other remains were designated as X-812 thru X-824 Manila #2. Ex. 15A thru 15J

9. The original reports of interment stated that the remains could be any of the following personnel: HANSCOM, RUARK, COLLINS, SIMMONS, GUTIERREZ, LOBDELL, NICHOLS, WAID, KELDER, KOVACH, HIRSCHI, or OVERBY. Ex. 15A thru 15J, Ex. 16A thru 16N

10. Unidentified remains X-813 Manila #2 were later identified as HANSCOM on the basis of the Cemetery burial record and ante-mortem military dental records. These remains were buried in the continental United States as directed by the next-of-kin. Ex. 16D

11. Unidentified remains X-817 Manila #2 were later identified as GUTIERREZ on the basis of the Cemetery burial record and ante-mortem military dental records. These remains were buried in the continental United States as directed by the next-of-kin. Ex. 16C

12. Unidentified remains X-819 Manila #2 were later identified as NICHOLS on the basis of the Cemetery burial record and ante-mortem military dental records. These remains were buried in the continental United States as directed by the next-of-kin. Ex. 16I

13. The identifications of BAIN, HANSCOM, GUTIERREZ and NICHOLS were based on the Cabanatuan burial roster and at least one individually identifying feature such as an identification tag (dog tag) or a tooth chart comparison. Ex. 16A, 16D, 16C, 16I, Ex. 4

14. Unidentified remains X-815 Manila #2 (later designated X-4857 Manila Mausoleum) was recommended for identification as OVERBY. This recommendation was disapproved and these remains were buried in the US Military Cemetery, Ft McKinley as an unknown. Ex. 16J, Ex. 15C

15. Unknowns X-812, X-814, X-816, X-818, X-820 thru X-824 (all Manila #2) were recommended for group identification as COLLINS, RUARK, SIMMONS, KOVACH, LOBDELL, HIRSCHI, KELDER, WAID, YORK. This recommendation was disapproved and these remains were individually buried in the US Military Cemetery, Ft McKinley as unknowns. Ex. 15A thru 15J, Ex. 16A thru 16N

16. The US Army Human Resources Command, Past Conflicts Repatriation Branch (Army Casualty Office) has obtained Family Reference Samples (DNA) from the families of each of the Servicemembers known to have been recovered from Cabanatuan Grave 717. Ex. 2 (Eakin Affidavit), Ex. 14 (DNA collection Press Release)

17. The Chief of the Army Casualty Office has recommended that all ten Cabanatuan Grave 717 unknowns be disinterred for identification if any of them are disinterred. Ex. 2 (Eakin Affidavit)

18. Approximately 950 deceased American servicemembers originally interred in the Cabanatuan POW Camp Cemetery are currently classified as non-recoverable and are buried in the Manila American Cemetery as unknowns. Ex. 2 (Eakin Affidavit)

19. The Cabanatuan Burial Report indicates that Arthur H. Kelder was one of fourteen (14) men interred in Cabanatuan Grave 717. Ex. 3 (Burial Roster)

20. The Cabanatuan Burial Report has been authenticated and admitted in multiple judicial proceedings. Ex. 4 (ID memo)

21. The Cabanatuan Burial Report was the basis for identification of BAIN, HANSCOM, GUTIERREZ and NICHOLS. Ex. 4, 16A, 16D, 16C, C16I

22. The complete Cabanatuan Burial Report was a significant factor in the identification of more than 1500 remains recovered from the Cabanatuan Cemetery. Ex. 4 (ID memo)

23. The accuracy of the burial report and correlation with Grave 717 is shown by the identifications of BAIN, HANSCOM, GUTIERREZ and NICHOLS. Ex. 4, 16A, 16D, 16C, C16I

24. The field recommendation to identify the unidentified remains relied upon the Cabanatuan Grave 717 burial report. Ex. 15A thru 15J

25. Only the tooth charts of unidentified remains X-816 and X-819 Manila #2 match the tooth pattern of Arthur H. Kelder. Ex. 15A thru 15J, Ex. 16A thru 16N

26. The tooth charts contained in X-files X-812, X-814, X-815, X-818, X-820 thru X-824 Manila #2 do not indicate the presence of any gold dental inlays. Ex. 15A, 15B, 15C, 15E, 15F thru 15J

27. The tooth charts of X-816 indicate the presence of gold dental inlays. Ex. 15E

28. Arthur H. Kelder was known to have gold dental inlays. Ex. 6A/B (Kelder Statements)

29. There is no evidence or mention of comingling contained in X-files X-812 thru X-824. Ex. 15A thru 15J

30. Family reference samples (DNA) pertaining to Arthur H. Kelder have been provided to the U.S. Army Casualty Office. Ex. 2 (Eakin Affidavit)

31. Family reference samples (DNA) pertaining to all unidentified remains recovered from Cabanatuan Grave 717 have been provided to the U.S. Army Casualty Office. Ex. 2 (Eakin Affidavit)

B. U.S. Army Graves Registration Service Personnel failed to properly identify Kelder's remains

32. There is no evidence in the records of RUARK, COLLINS, SIMMONS, LOBDELL, YORK, KELDER, KOVACH, HIRSCHI, or OVERBY that the U.S. Army at any time attempted to obtain civilian ante-mortem dental records for these persons. Ex. 16B, 16E thru 16H, 16J thru N

33. The remains of RUARK, COLLINS, SIMMONS, LOBDELL, LOBDELL, WAID, KELDER, KOVACH, HIRSCHI, and OVERBY were determined to be non-recoverable because remains believed to be theirs and recovered from Cabanatuan Grave 717 could not be individually identified. Ex. 16B, 16E thru 16H, 16J thru N

34. The Individual Deceased Personnel Files and X-files pertaining to Cabanatuan Grave 717 were classified and restricted from public access until approximately 2009. Ex. 15A thru 15J, 16A thru 16N

35. The family of Arthur H. Kelder was not informed that the U.S. Army had recovered his remains. Ex. 16F

36. The family of Arthur H. Kelder was told that his remains were non-recoverable. Ex. 16F

37. Defendants are aware that the identification of a number of WWII remains were incorrect.

38. Defendants are aware that a number of WWII remains were returned to the wrong families for burial.

C. Defendants' Policies pertaining to unknowns have not been properly adopted, are applied inconsistently and illegally discriminate against certain classes of missing personnel

39. Defendants have issued a policy memorandum dated December 16, 2010 which provides that identifying the remains of unknowns already recovered and buried with honor in U.S. national cemeteries at home and abroad must take a lower priority than the recovery of other unknowns. Ex. 7 (Prioritization Memo)

40. Adoption of Defendants policy on prioritization of remains recovery was not published in the Federal Register and comments from the public were not solicited.

41. Defendants' December 16, 2010 policy on prioritization of remains recovery places the highest priority on recovery of remains that have not received an honorable burial. Ex. 7 (Prioritization Memo)

42. There is no evidence to indicate that unidentified remains X-816 received an honorable burial as defined by DoD regulations. Ex. 15D

43. Defendants policy on prioritization of remains recovery virtually precludes accounting for unknowns interred in U.S. Military Cemeteries.

44. Defendants policy on prioritization of remains recovery discriminates against the families of deceased military personnel whose remains have been recovered, but not identified.

45. Defendants issued a policy on disinterment of unidentified remains for identification which was reported in the 1999 Annual Report issued by the Defense POW / Missing Personnel Office. Ex. 8 (DPMO 1999 Annual Report)

46. Defendants policy on disinterment of unidentified remains for identification is that a decision to disinter remains that are marked 'unknown' must be based on sufficient circumstantial and anatomical evidence which when combined with current forensic science techniques would lead to a high probability of positive identification. Ex. 8 (DPMO 1999 Annual Report)

47. Defendants currently possess circumstantial, anatomical and scientific evidence which provide a high probability of positive identification of unidentified remains X-816 as Arthur H. Kelder.

48. Defendants' accounting for missing personnel buried as unknowns is not constrained by lack of resources.

49. A missing persons counsel has not been appointed to represent Arthur H. Kelder.

D. Unidentified remains X-816 have not received an honorable burial

50. After disinterment from the Cabanatuan POW Cemetery, unidentified remains X-816 were interred in Manila Cemetery #2 grave 2-20-2485 on January 12, 1946. Ex. 15D (X-816)

51. Unidentified remains X-816 were disinterred from Manila Cemetery #2 and reinterred in the AGRS Mausoleum on an unknown date. Ex. 15D

52. Unidentified remains X-816 were disinterred for identification from the AGRS Mausoleum Hangar 810, Bay F, Crypt 1987 on December 15, 1947 and reinterred on August 12, 1948. Ex. 15D

53. Unidentified remains X-816 were transported by truck to the U.S. Military Cemetery, Ft. McKinley, Philippine Islands on February 21, 1950. Ex. 15D

54. Unidentified remains X-816 were interred in Ft. McKinley Military Cemetery grave N-11-101 on February 21, 1950. Ex. 15D

55. Unidentified remains X-816 were moved from Ft. McKinley Military Cemetery grave A-12-195 on February 11, 1952 to fill a grave formerly occupied by unidentified remains X-2063 Manila #2 who was disinterred and shipped to the zone of the interior as part of a group burial (Cabanatuan Project). Ex. 15D

56. No evidence exists that the remains designated as X-816 received any type of religious or military honors or ceremony when they were interred or disinterred from the Cabanatuan POW Cemetery, Manila Cemetery #2, Manila Mausoleum, or Ft McKinley Military Cemetery. Ex. 15D

57. Only unidentified remains were selected to fill vacated graves in the Ft. McKinley Military Cemetery.

58. Unidentified remains designated X-816 did not receive the ceremony or honors considered an honorable burial under regulations issued by Defendants. Ex. 15D

59. Unidentified remains X-816 have been subjected to repeated disinterment and movement for the convenience of the government. Ex. 15D

E. Defendants have refused to act or have withheld action to identify the remains of Arthur H. Kelder

60. Arthur H. Kelder is considered to be in “missing status” as defined at 10 U.S.C. § 1513(3)(B).

61. Except for efforts in response to Plaintiff’s inquiries beginning in 2009, defendants have made no effort to account for Arthur H. Kelder since January 25, 1951. Ex. 16F

62. The case of Arthur H. Kelder has never been subject to a status review by Defendants.

63. On February 26, 2012, DPMO conducted a family briefing in Addison, Texas. In advance of this family briefing, Plaintiff contacted the Past Conflicts Repatriation Branch of Army Human Resources Command (Army Casualty Office) and requested that a meeting be arranged during this family briefing with personnel in a position to order or deny further investigation of the case of Arthur H. Kelder. In response to this request, Plaintiff met with Defendant Johnie E. Webb, Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command; Charles Henley, Director of External Affairs, DPMO; and, Greg Gardner, Chief, Past Conflicts Repatriations Branch, Casualty and Mortuary Affairs Operations Center, U.S. Army Human Resources Command (Army Casualty Office). Each of these persons affirmed that they were the “decision makers” for their respective agencies and that they had authority to act for their agency with regard to the identification of Arthur H. Kelder. Ex. 2 (Eakin Affidavit)

64. In the course of the meeting attended by Plaintiff on February 26, 2012, Defendant Johnie E. Webb asserted that it was within his authority to order further consideration of the new evidence that unknown X-816 was the remains of Arthur H. Kelder. Ex. 2 (Eakin Affidavit)

65. In the course of the meeting attended by Plaintiff on February 26, 2012, Defendant Johnie E. Webb asserted that his agency would not further investigate the identity of unidentified remains X-816 Manila #2. Ex. 2 (Eakin Affidavit)

66. Neither Plaintiff, nor the primary next-of-kin of Arthur H. Kelder, Douglas Kelder, have received notice of any action under 10 U.S.C. § 1509 pertaining to Arthur H. Kelder. Ex. 2 (Eakin Affidavit)

67. Neither Plaintiff, nor the primary next-of-kin of Arthur H. Kelder, Douglas Kelder, have received notice that new information has been added to the personnel file of Arthur H. Kelder; a Missing Persons Counsel has been appointed; or, that a board of officers will be convened to consider new information of the identity of unknown X-816 Manila #2. Ex. 2 (Eakin Affidavit)

68. It has been nearly seventy (70) years since the death of Arthur H. Kelder and nearly sixty (60) years since Defendants have acted to identify his remains. Ex. 16F

69. There are approximately nine-hundred-fifty (950) unidentified remains recovered from Cabanatuan POW camp cemetery currently interred as unknowns. Ex. 2 (Eakin Affidavit)

70. The unidentified remains recovered from the Cabanatuan POW camp cemetery could likely be identified through use of currently available forensic technology.

71. Defendants now possess information regarding Arthur H. Kelder and unidentified remains X-816 which equals or exceeds that which Defendants used to identify BAIN, HANSCOM, GUTIERREZ and NICHOLS.

72. Defendants have routinely used DNA matching to identify human remains for more than fifteen years. Ex. 14

73. DNA technology was responsible for positive identification and removal from Arlington National Cemetery of the Viet Nam Unknown in 1998. Ex. 14

F. Plaintiff has exhausted all administrative remedies

74. On June 21, 2011, Plaintiff, with power of attorney of the primary next-of-kin of Arthur H. Kelder, Douglas Kelder, petitioned the Department of the Army Human Resources Command under Army Regulation 638-2 to consider new, not previously considered, evidence which identifies unidentified remains X-816 as those of Arthur H. Kelder. Plaintiff submitted followup letters on September 12, 2011 and November 3, 2011. Ex. 9 (Army Petition)

75. On November 4, 2011, Army Human Resources Command responded that that they no longer had jurisdiction under Army Regulation 638-2 to consider the case of Arthur H. Kelder and that under new legislation only the Department of Defense, Defense Prisoner of War/Missing Persons Office (DPMO) had such authority. Army Human Resources Command further stated that they had provided Plaintiff's petition and newly submitted evidence of the identity of unknown X-816 to both the DPMO and the Joint Prisoner of War/Missing in Action Accounting Command. Ex. 10 (Army Response)

76. U.S. Army Regulation 638-2, *Care and Disposition of Remains and Disposition of Personal Effects*, is dated 22 December 2000 and effective 22 January 2001. This edition

superseded Army Regulation 638-2, dated 9 February 1996. This regulation remains current without published change. Ex. 11 (AR 638-2)

77. On November 23, 2011, Plaintiff submitted additional evidence, not previously considered, of the identity of unknown X-816 to the DPMO. Ex. 12 (DPMO Petition)

78. Plaintiff has received no response to his November 23, 2011 correspondence submitted to DPMO. Ex. 2 (Eakin Affidavit)

79. Plaintiff has exhausted all administrative remedies concerning identification of unknown X-816 as the remains of Arthur H. Kelder.

80. No further administrative process is available to Plaintiff to recover the remains of his family member.

G. Defendants are responsible for operation of the Manila American Cemetery and for accounting for missing military personnel

81. Unidentified remains X-816 are currently interred in the Manila American Cemetery, Grave A-12-195, a World War II United States Military Cemetery constructed by the U.S. Army and located at the former Ft. McKinley near Manila, Philippine Islands. Ex. 15D

82. Operation and control of the Manila American Cemetery and Memorial, including the cemetery records, was transferred from the U.S. Army to Defendant American Battle Monuments Commission by Public Law 368, 80th Congress and Executive Order 10057 of May 14, 1949. Defendant ABMC is responsible for all functions of administration pertaining to this cemetery. Ex. 13 (Executive Order)

83. Defendant ABMC is tasked with Operation of the Manila American Cemetery which includes an obligation to properly memorialize all graves. 36 U.S.C. §§ 2105, 2106 & Ex. 13 (Executive Order)

84. The U.S. Army, a subordinate command of Defendant U.S. Department of Defense, has the right to re-enter the Manila American Cemetery and Memorial for the purpose of making exhumations or reinterments as necessary. Ex. 13 (Executive Order)

V.
CAUSES OF ACTION

A. Count One: Administrative Procedure Act

85. Paragraphs 1-84 are incorporated by reference herein.

86. The Administrative Procedure Act (APA) provides for judicial review of federal agency actions. 5 U.S.C. §§ 701-706. Under the APA, a court may hold unlawful and set aside federal agency action – including the “failure to act” – when it is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §§ 551(13), 701(b)(2), 706(2)(A), (C).

87. Defendants have a self-acknowledged duty to return the remains of deceased service members to their families for burial. These family members have no alternative administrative process to retrieve the remains or challenge the actions, or inactions, of Defendants.

88. Defendants’ failure to timely address the new, not previously considered, evidence of the identity of unidentified remains X-816 presented both by Plaintiff and by another government agency for consideration under 10 U.S.C. §§ 1501-1509 amounted to agency action unlawfully withheld and was arbitrary, capricious, and otherwise contrary to law within the meaning of 5 U.S.C. § 706.

B. Count Two: Administrative Procedure Act

89. Paragraphs 1-84 are incorporated by reference herein.

90. The Administrative Procedure Act (APA) provides for judicial review of federal agency actions. 5 U.S.C. §§ 701-706. Under the APA, a court may hold unlawful and set aside federal agency action when it is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §§ 551(13), 701(b)(2), 706(2)(A), (C).

91. Defendants’ policy of prioritization of recovery of the remains of “unknowns” is in conflict with 10 U.S.C. § 1501(a)(4) which requires that such policies apply uniformly throughout the Department of Defense for recovering and identifying missing persons or their remains.

92. 10 U.S.C. § 1501(a)(6) requires the Deputy Assistant Secretary of Defense for Prisoner of War/Missing Personnel Affairs to provide an activity to account for all missing personnel and to perform the complete range of missions of the activity without provision for prioritization or discrimination in the recovery or accounting for remains of missing personnel.

93. Defendants’ publication of “policy guidance” on prioritizing remains recovery and identification constitutes a rulemaking under 5 U.S.C. §§ 551(4), 553 without compliance with 5 U.S.C. 553(c).

94. Defendants’ use of criteria such as honorable burial to determine which remains will and will not be accounted for exceeded Defendants’ statutory authority, is arbitrary, capricious, an abuse of discretion and is in conflict with 5 U.S.C. § 706 and 10 U.S.C. §§ 1501-1509

95. Despite the lack of any evidence that unidentified remains X-816 received an honorable burial as defined by 10 USC § 1491 and Defendant DoD's internal regulations, said remains were not prioritized for recovery and accounting in accordance with Defendants' policy to prioritize the accounting of unidentified remains which had received an honorable burial. Defendants' inconsistent use of and non-compliance with their "policy guidance" on prioritizing remains recovery and identification is arbitrary, capricious and otherwise contrary to law within the meaning of 5 U.S.C. § 706.

96. Defendants' policy on prioritization of recovery of the remains of "unknowns" is applied inconsistently and selectively.

97. Defendants actions and inactions regarding accounting for unknowns were for the obvious purpose of avoiding addressing the issue of unidentified remains and the consequent public embarrassment for their poor past performance, deceit, and incompetence.

C. Count Three: Declaratory Judgment

98. Paragraphs 1-84 are incorporated by reference herein.

99. Under the Declaratory Judgment Act, the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

100. Under the Declaratory Judgment Act, broad injunctive relief directed against a defendant government agency or official to remedy an ongoing violation of federal law even in the absence of a certified class is not overbroad. An injunction issued to correct a defendant's policy or practice which is unlawful, not only as to the named plaintiff but also as to others is reasonable. See, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163, 1770 (9th Cir. 1988); *Soto-Lopez v. N.Y. City Civil Serv.*

Comm'n, 840 F.2d 162, 168 (2d Cir. 1988); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981); *Galvin v. Levine*, 490 F.2d 1255, 1261 (2d Cir.), *cert. denied*, 417 U.S. 936 (1974). 154. *Smith & Usaha*, *supra* n. 120, at 120-23 & n.106 (collecting cases).

101. Accounting for missing persons, including their remains, is not a discretionary act under 10 U.S.C. § 1501 *et seq.* 10 U.S.C. §§ 1501(a)(6), 1509(a) provides for establishment of Defense Prisoner of War/Missing Personnel Office to account for personnel who are missing or whose remains have not been recovered from the conflict in which they were lost. This activity is required to be provided sufficient military and civilian personnel, and sufficient funding, to enable the activity to fully perform the complete range of missions of the activity.

102. The remains of more than 9,000 deceased American servicemembers lost in WWII remain unidentified. More than 950 of these were recovered just from the Cabanatuan POW camp cemetery. Many of these personnel can be identified simply through examination of existing records. Most other remains can be identified by comparison with Defendants' existing DNA database. Yet, Defendants refuse compliance with even the existing statutory requirements such as to appoint missing person's counsel to represent these deceased servicemembers. 10 U.S.C. § 1505(c)(2)

103. Defendants have a clear nondiscretionary duty to identify the remains of deceased WWII military personnel. 10 U.S.C. §§ 1471, 1501-1509. Yet, Defendants have made little progress in identifying those buried as "unknowns" despite the passage of sixty (60) years; advanced forensic technology; and, even additional evidence provided by family members and others.

104. Even after seventy (70) years, Defendants have made little or no progress toward resolving the identities of the remains recovered from Cabanatuan Grave 717 in violation of their duty to act. 10 U.S.C. §§ 1471, 1501-1509.

105. Plaintiff has shown compelling evidence that unidentified remains X-816 are those of Pvt Arthur H. Kelder, and in the absence of any effort by Defendants to address such evidence in the seventy years since the death of Pvt Kelder, Plaintiff is entitled to a declaration that the X-816 remains are those of Pvt Kelder. 28 U.S.C. § 2201.

D. Count Four: Writ of Mandamus

106. Paragraphs 1-84 are incorporated by reference herein.

107. Under the Mandamus Act, the court may “compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.

108. Accounting for missing persons, including their remains, is not a discretionary act. 10 U.S.C. §§ 1501(a)(6), 1509(a) provides for establishment of the Defense Prisoner of War/Missing Personnel Office to account for personnel who are missing or whose remains have not been recovered from the conflict in which they were lost. This activity is required to be provided sufficient military and civilian personnel, and sufficient funding, to enable the activity to fully perform the complete range of missions of the activity.

109. 10 U.S.C. §§ 1508 does not provide for, nor preclude, judicial review of actions other than a finding that a missing person is dead.

110. 10 U.S.C. § 1505(c)(2) requires appointment of missing person’s counsel.

111. Defendants owe a clear nondiscretionary duty to take all practical efforts to identify the remains of Pvt Arthur H. Kelder, and all other deceased military personnel, and to

return those remains for burial as directed by the primary next-of-kin. 10 U.S.C. §§ 1471(a), 1471(b), 1501-1509.

112. Defendants have the authority and obligation under 10 U.S.C. § 1471 to conduct a forensic pathology investigation to determine the identity of deceased military personnel whose identity is unknown. Such authority extends to exhumation for identification of unidentified human remains interred in cemeteries under the control of various U.S. Government agencies.

113. Defendants owe Plaintiff, and all others similarly situated, a clear nondiscretionary duty to take all practical efforts to correct the records and memorials under their control to properly reflect the identification of the remains of deceased military personnel under their custody and control. Public Law 368, 80th Congress and Executive Order 10057 of May 14, 1949.

114. Defendants owe Plaintiff a clear nondiscretionary duty to consider the evidence that unidentified remains X-816 are actually those of Pvt Arthur H. Kelder and to order that all records and memorials so reflect the identity of Pvt Kelder. 10 U.S.C. § 1509(a). Defendants not only refuse to acknowledge the existence of additional evidence of the identity of unidentified remains X-816, but refuse to employ modern forensic techniques they purport to use routinely. Despite the development of new forensic techniques, Defendants have made no effort to identify unidentified remains X-816 in approximately sixty years. As a direct and proximate cause of Defendants' failure to consider this evidence of identity and to act accordingly, Plaintiff has been irreparably harmed and continues to suffer ongoing irreparable harm. Because Plaintiff has "a clear right to the relief sought," Defendants have "a clear duty to do the particular act requested by the [Plaintiff]," and "no other adequate remedy is available," mandamus relief is warranted. *See In re First Federal Sav. And Loan Ass'n of Durham*, 860 F.2d 135, 138 (4th Cir.

1988) (finding writ of mandamus appropriate to order Secretary of Treasury to pay refund to taxpayer); *see also Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (holding that “common-law writ of mandamus, as codified in 28 U.S.C. § 1361,” is appropriate where plaintiff “has exhausted all other avenues of relief” and “the defendant owes him a clear nondiscretionary duty.”).

VI.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against the Defendants and award Plaintiff the following relief:

a. An order, pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 2201(a) holding that the human remains designated as X-816 and currently interred in the Manila ABMC Cemetery grave A-12-195 are those of Arthur H. Kelder and all U.S. Government records, markers and actions shall reflect such identity;

b. An order, pursuant to 5 U.S.C. § 553, 706, that Defendants policies concerning identification of unidentified remains were issued in violation of 5 U.S.C. § 503 and wrongfully discriminate against certain classes of family members;

c. An order, pursuant to 5 U.S.C. § 706, that Defendants shall promptly act to fully account for all deceased Servicemembers whose remains were determined to be non-recoverable when new evidence is obtained from any source which provides a high probability of positive identification;

d. An order, pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 1361, that Defendants shall promptly act to identify the remains of all deceased Servicemembers whose remains were determined to be non-recoverable when advances in forensic technology provide reasonable belief that such remains might be identified using technology not previously available;


e. An order, pursuant to 5 U.S.C. § 706 and 28 U.S.C. § 1361, that Defendants shall promptly disinter for identification all unidentified remains upon a showing of a probability of their identification or, in the event Defendants lack resources or the ability to proceed, provide alternative means for family members to act in their absence;

f. Permanent injunctive relief pursuant to Fed. R. Civ. P. 65 ordering Defendants and their officers, employees and agents to immediately and fully comply with 5 U.S.C. § 553 and 10 U.S.C. § 1501-1509 and enjoining discriminatory policies in selection of remains to be recovered or inconsistent application of policies concerning accounting for missing personnel;

g. An award of Plaintiff's costs and reasonable attorneys' fees, as appropriate; and

h. An award of any further relief to Plaintiff that this Court deems just, proper, and equitable.

Respectfully submitted,



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