

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

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, *et al*

Defendants

CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)

John A. Patterson,

Plaintiff-Intervenor,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, MAX CLELAND,
in his official capacity as Secretary of
the American Battle Monuments Commission;
U.S. DEPARTMENT OF DEFENSE;
CHUCK HAGEL, 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 in Intervention

COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, and
Mandamus Act, 28 U.S.C. § 1361 in response to the unlawful withholding of agency action and

due process in fully and correctly accounting for a deceased WWII era Army service member and others whose remains were not identified by the U.S. Government and buried as Unknowns.

INTRODUCTION

2. Subsequent to World War II the U.S. Army Graves Registration Service recovered the remains of tens of thousands of deceased U.S. Military personnel from temporary cemeteries, isolated graves and often where they fell on the battlefield. Efforts to identify the remains were generally successful and most were returned to their families for burial in the United States or were interred in huge overseas cemeteries now operated by Defendant ABMC. Some remains were not identified due to insufficient evidence of identity; some not identified correctly due to gross negligence by military personnel. Ultimately, those remains not identified were interred as Unknowns in overseas cemeteries and the records classified as defense secrets and restricted from public access.

3. Families of the missing were sent a form letter telling them that the remains of their family member were “non-recoverable” and they were assured that, “[S]hould any additional evidence come to [the government’s] attention indicating that ... remains [were in their] possession, [the families] would be informed immediately.”

4. With the passage of time, the records were automatically declassified and discovered by the families of the missing. Review of the records showed that many Unknowns could have been previously identified; many could be identified with minimal additional investigation; and, nearly all could now be identified through the use of modern technology.

5. In an effort to avoid public embarrassment, the U.S Government has refused to disinter remains for identification and, unlike in those cases where they were presented with remains from more recent conflicts, used outdated, non-scientific techniques such as

anthropological examinations and mitochondrial DNA testing while falsely claiming to show that the U.S. Government was doing everything possible to account for missing service members from all wars.

6. Through related litigation in this Court, family members have gained access to the records necessary to locate the graves of their missing family members. To avoid compliance with Plaintiff's discovery requests, the U.S. Government has exhumed the remains shown to be those of Private Arthur H. "Bud" Kelder and nine other Unknowns originally buried with him.

7. Accordingly, Plaintiff-Intervenor now joins Plaintiff's original lawsuit seeking the return of the remains of their family members and appropriate relief declaring that Defendants are obligated to identify unidentified remains in their possession when reasonably possible to do so and to insure that the families of the missing are afforded due process in presenting new evidence and recovering the remains of their missing family members who died in service to the United States.

I. **PARTIES**

8. Plaintiff-Intervenor former State Senator John Alexander Patterson, nephew and primary next-of-kin of Lieutenant Alexander R. "Sandy" Nininger, Jr. is a resident of Rhode Island. Lieutenant Nininger lost his life in the Battle of Bataan on January 12, 1942 and was awarded the Congressional Medal of Honor for his actions. He was buried in the church yard at Abucay, Province of Bataan, Philippine Islands. At the conclusion of hostilities, his remains were recovered by US Military authorities and recommended for identification. The identification was disapproved due to a false indication of skeletal height and the remains were buried in the Manila American Cemetery where they now reside in Grave J-7-20. Plaintiff-Intervenor Patterson has actively searched for his Uncle's remains for more than forty years and

until recently was unaware that he was buried as an Unknown. Plaintiff-Intervenor desires the remains of his family member to be returned for burial as he may direct.

9. Plaintiff-Intervenor, as the person designated as Primary Next of Kin (PNOK) is “suffering legal wrong because of agency action” and are “adversely affected or aggrieved by agency action within the meaning” of 10 U.S.C. § 1509, Army Regulation 638-2 and agency directives which require the Department of Defense to aggressively seek out the remains of missing service personnel and return them to their families for burial. Plaintiffs are thus proper plaintiff-Intervenor under the respective statutes and the United States Constitution.

10. Defendants are the American Battle Monuments Commission; Max Cleland, in his official capacity as Secretary of the American Battle Monuments Commission; U.S. Department of Defense; Chuck Hagel, 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; Johnie E. Webb, in his official Capacity as Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command. Each Defendant is either an agency of the United States or an officer or employee of an agency of the United States.

II. **JURISDICTION AND VENUE**

17. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 28 U.S.C. §§ 1331 and 2201. This Court has authority to order declaratory relief under 28 U.S.C. §§ 2201 *et seq* 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 their duties as specified at 10 U.S.C. §§ 1501-1513, Army Regulation 638-2 and agency policies.

18. Plaintiff -Intervenor resides in Rhode Island, therefore venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C).

III. FACTS

A. Certain Unidentified Remains Are Those of Plaintiff-Intervenor's Family Members

19. Lieutenant Alexander R. "Sandy" Nininger, Jr. lost his life in the Battle of Bataan on January 12, 1942 and was awarded the Congressional Medal of Honor for his actions. He was originally buried in the church yard at Abucay, Province of Bataan, Philippine Islands. At the conclusion of hostilities, his remains were recovered by US Military authorities and recommended for identification. The identification was disapproved due to a false indication of skeletal height and the remains were buried in the Manila American Cemetery where they now reside in Grave J-7-20 near the grave of Pvt Arthur H. Kelder.

B. Next-of-kin have a common law right to possess the remains of deceased family members for the purpose of burial.

26. The common law and/or statutes of the state of Rhode Island, Montana, Texas, Illinois, Kentucky and Florida recognizes the right of family members to direct the burial of deceased members of their family.

27. Agencies of Defendant Department of Defense have recognized Plaintiff-Intervenor as the primary next-of-kin (PNOK) and person authorized to direct disposition (PADD) of the remains of their respective family member.

28. The rights of family members to possess the remains of their deceased family members for burial is acknowledged by the following federal statutes and Department of Defense regulations, *Inter alia*.

- 10 USC § 1481
- 10 USC §§ 1501-1513

- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts
- Department of Defense Instruction Number 1300.18 January 8, 2008 Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures
- (CJCS) Joint Publication 4-06, Mortuary Affairs 12 October 2011,
- U.S. Army Regulation 638-2
- U.S. Department of the Army Pamphlet 638-2
- Under Secretary of Defense Walter B. Slocomb memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3).

C. Defendants Are Obligated to Make All Reasonable Efforts to Identify Remains in Their Custody.

29. Defendants have a duty to timely account for or identify missing service personnel under the Missing Service Personnel Act, 10 U.S.C. §§ 1501-1513; Army Regulation 638-2; and/or, Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3).

30. Defendants' obligation to identify the remains of missing service members is supported by the following Department of Defense regulations, *Inter alia*:

- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts, ¶ 4.1
- (CJCS) Joint Publication 4-06 Mortuary Affairs 12 October 2011, ¶ 2
- U.S. Army Regulation 638-2, ¶¶ 2-17, 8-1, 8-2, 8-9, 8-10
- U.S. Army Field Manual FM 4-20-65 (FM 10-286), Identification of Deceased Personnel, ¶¶ 1-1, 1-8
- Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3).

31. Defendants duty to account for missing service personnel is nondiscretionary.

32. Defendants avoid identification of more than a token number of unidentified remains from past conflicts by the use of out-dated and deliberately ineffective technology such as anthropology and/or mitochondrial DNA.

33. While Defendants employ the use of various types of nuclear DNA testing to confirm the identity of casualties from current conflicts, different technologies are employed to identify casualties from past conflicts.

34. Defendants do not routinely use nuclear DNA testing to identify casualties from past conflicts.

35. Defendants primarily use mitochondrial DNA testing to identify casualties from past conflicts.

36. It is possible to extract nuclear DNA from WWII era skeletal remains.

37. Defendants have admitted they are obligated to return identified remains to the family for burial as directed by the family.

38. Defendants have asserted that they have no obligation to identify remains.

D. U.S. Army Graves Registration Service Personnel failed to Properly Identify the Remains of Plaintiff-Intervenor's Family Members

35. The Individual Deceased Personnel Files and X-files pertaining to the family members of Plaintiff-Intervenor were classified and restricted from public access until approximately 2009.

36. The families of Plaintiff-Intervenor were not informed that the U.S. Army had recovered remains which were potentially those of their missing family members.

37. The families of Plaintiff-Intervenor were told that the remains of their missing family members were "non-recoverable."

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

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

40. Defendants currently possess circumstantial, anatomical and scientific evidence which provide a high probability of positive identification of unidentified remains when used in conjunction with nuclear DNA matching.

41. There are more than nine-hundred-fifty (950) unidentified remains recovered from Cabanatuan POW camp cemetery currently interred as unknowns.

42. Many of the unidentified remains recovered from the Cabanatuan POW camp cemetery could likely be identified through use of currently available forensic technology such as nuclear DNA testing.

43. Defendants have routinely used mitochondrial DNA matching to identify human remains for more than fifteen years.

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

45. Mitochondrial DNA is an exclusionary investigative tool which does not provide conclusive proof of identity when used without other circumstantial evidence.

46. Defendants routinely employ mitochondrial DNA sequencing in the identification of WWII era remains.

47. Defendants do not routinely employ nuclear or "y" DNA in identification of remains.

48. Defendants do not routinely collect nuclear or "y" DNA reference samples.

49. Unlike mitochondrial DNA, various types of nuclear DNA can provide conclusive evidence of identity.

50. There are approximately 8,637 WWII Unknowns.

51. There are approximately 841 Korean War Unknowns.

52. In each of the last ten years, Defendants have averaged less than seventy-five annual identifications of deceased American Servicemembers from past conflicts.

53. Defendants have a congressionally mandated goal to identify the remains of at least 200 American Servicemembers by 2015.

54. Defendants do not expect to accomplish the congressionally mandated goal of 200 identifications per year by 2015.

55. Defendants have concluded that mass disinterment for identification of all WWII unknowns is not feasible.

56. Defendants have designated a "Disinterment Working Group" to plan for disinterments from cemeteries operated by the U.S. Government.

F. The individual Defendants have acted to deprive Plaintiff-Intervenor and all others similarly situated of their right to due process.

59. Prior to the identification of the Vietnam Unknown buried at Arlington National Cemetery as the remains of Lt Michael Blassie, Defendants stated that those remains could not be identified.

60. Prior to the identification of the remains of PFC Lawrence Gordon, Defendants stated that those remains could not be identified.

61. The memorandum issued by Walter B. Slocombe, subject: Disinterment Policy for the Purpose of Identification, dated May 13, 1999, requires that there be a high probability of positive identification before unidentified remains may be disinterred for identification.

62. Prior to the exhumation of X816 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

63. Prior to the exhumation of X812 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

64. Prior to the exhumation of X814 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

65. Prior to the exhumation of X815 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

66. Prior to the exhumation of X818 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

67. Prior to the exhumation of X820 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

68. Prior to the exhumation of X821 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

69. Prior to the exhumation of X822 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

70. Prior to the exhumation of X823 Manila #2, on August 28, 2014, Defendants asserted that those remains could not be identified.

71. Prior to the exhumation of X824 Manila #2, on August 28, 2014, Defendants stated that those remains could not be identified.

72. On January 28, 2013, Thomas Holland, Central Identification Laboratory Scientific Director, signed a memorandum for the JPAC Commander concerning the identification of unidentified remains X816 as those of Arthur H. Kelder. This memorandum contains conclusions and recommendations not supported by the most current investigative reports. (Supp AR page 2)

73. The memorandum issued by Walter B. Slocombe, subject: Disinterment Policy for the Purpose of Identification, dated May 13, 1999, directs that CILHI (a JPAC predecessor) select appropriate cases for disinterment for identification.

74. The memorandum issued by Walter B. Slocombe, subject: Disinterment Policy for the Purpose of Identification, dated May 13, 1999, directs that disagreements with a CILHI (a JPAC predecessor) decision to prioritize or disinter remains for identification may be appealed to the Deputy Assistant Secretary of Defense for POW/MIA affairs.

75. The Central Identification Laboratory (CIL) component of JPAC has rejected or refused to consider multiple case files recommending further action to account for a MIA service member based on non-substantive defects such as formatting or punctuation and without consideration of the factual contents of the file.

76. The Central Identification Laboratory refused consideration or further action on JPAC incident 425 without consideration of the factual issues involved.

77. Defendants' policies and practices concerning accounting for the remains of "unknowns" do not allow appeal of Department of Defense decisions nor an alternative means of recovery of remains by family members.

78. No statute or regulation expressly allows family members a means to identify and recover the remains of a family member interred as an unknown in a cemetery operated by Defendant ABMC.

79. No statute or regulation expressly allows family members to appeal or otherwise dispute a government agency's refusal to identify or return remains interred as an unknown in a cemetery operated by Defendant ABMC.

80. Defendants' policies and actions deprive family members of due process in claiming the bodies of deceased family members buried in overseas cemeteries operated by Defendant ABMC.

81. The following regulations pertain to exhumations from cemeteries operated by the U.S. Government:

- Arlington National Cemetery – 32 CFR § 553.19 & Army Regulation 290-5, ¶2-10
- Army Post Cemeteries – Army Regulation 210-190, ¶ 2-14
- Department of the Interior, National Cemetery - 36 CFR § 12.6
- Department of Veterans Affairs, National Cemeteries – 38 CFR § 38.621

82. No statute or regulation published in the Code of Federal Regulations prescribes a process for family members to request an exhumation from a cemetery operated by Defendant ABMC.

83. No statute or regulation published in the Code of Federal Regulations prescribes a process for family members to petition for identification of unidentified remains.

84. No statute or regulation published in the Code of Federal Regulations prescribes a process for family members to petition for consideration of new evidence concerning the identification of the remains of deceased American service members.

85. No directive or policy issued by Defendants prescribes a process for family members to petition for consideration of new evidence concerning the identification of the remains of deceased American Servicemembers.

86. No statute, CFR regulation, or directive issued by Defendants prescribes an appellate process whereby family members can appeal a denial or constructive denial of a request to return the remains of a missing family member.

G. The agency Defendants have issued policies pertaining to unknowns which have not been properly adopted, or applied inconsistently, illegally and they discriminate against certain classes of missing personnel and deny due process guaranteed by the United States Constitution.

87. 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.

88. Defendants' December 16, 2010 policy on prioritization of remains and recovery places the highest priority on recovery of remains that have not received an honorable burial.

89. There is no evidence to indicate that unidentified remains interred in the Manila American Cemetery operated by Defendant ABMC received an honorable burial as defined by DoD regulations.

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

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

92. Unidentified remains buried in the Manila American Cemetery operated by Defendant ABMC have been routinely moved for the purposes of landscaping and to present a uniform appearance of the cemetery. These disinterments and reburials were for the convenience of the government and were authorized by administrative decision.

93. Only unidentified remains were selected to fill vacated graves in the Manila American Cemetery operated by Defendant ABMC.

94. Under Secretary of Defense Walter B. Slocombe issued a memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3) This policy remains in effect and charges the Department of Defense with making the fullest possible accounting of personnel missing in action and stated that, “Advances in forensic sciences, specifically the use of mitochondrial DNA (mtDNA), now make it possible to identify certain remains previously interred yet unidentified.”

95. The memorandum issued by Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification, (Supp AR page 3) designates The Central Identification Laboratory-Hawaii (CILHI) (now part of Defendant JPAC) with the responsibility of evaluating cases which would lead to a high probability of positive identification.

H. Plaintiff-Intervenor Has Exhausted All Administrative Remedies

96. On November 4, 2011, Army Human Resources Command informed Plaintiff that the administrative process for consideration of new evidence set out in Army Regulation 638-2 was no longer valid and that petitions submitted under such provision would not be considered.

97. Plaintiff-Intervenor has exhausted all administrative procedures to recover the remains of his family member.

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

98. The unidentified remains complained of herein are currently interred in the Manila American Cemetery, a World War II United States Military Cemetery constructed by the U.S. Army and located at the former Ft. McKinley (now Ft. Bonifacio) near Manila, Philippines.

99. Operation and control of the Manila American Cemetery and Memorial, including the cemetery records, were 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.

100. Defendant ABMC is tasked by statute and executive order with the responsibility to operate the Manila American Cemetery. This mission includes an obligation to properly memorialize all graves.

101. 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.

102. Defendant ABMC has custody and control of all graves in cemeteries operated by that agency including the right and ability to disinter remains buried in such cemeteries.

IV. CAUSES OF ACTION

A. Count One: Declaratory Judgment – Families Have an Absolute Right to Possession of the Remains of Their Family Members

104. Plaintiff-Intervenor hereby restates and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint in Intervention and Plaintiff's First Amended Complaint.

105. 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).

106. An actual case and controversy exists between the parties that may be adjudicated by this Court consistent with U.S. Constitution, Art. III, § 2, cl. 1.

107. 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).

108. The remains of more than 9,400 deceased American service members remain unidentified after more than half a century. Many of these personnel can be identified simply through examination of existing records. Other remains can be identified by comparison with DNA reference databases.

109. Defendants have a clear nondiscretionary duty to recover, identify and return to their families the remains of deceased WWII military personnel. Yet, Defendants have made little progress in identifying those buried as "unknowns" despite the passage of more than 60 years; advanced forensic technology; and, even additional evidence provided by family members and others.

110. Surviving family members of deceased American service personnel have an absolute right to possess the remains of their family members for burial according to common law of the respective States and the Fourth and Fifth Amendments to the U.S. Constitution.

111. The rights of family members to possess the remains of their family members for burial is acknowledged by the following federal statutes and Department of Defense regulations, *Inter alia*.

- 10 USC § 1481
- 10 USC §§ 1501-1513
- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts
- Department of Defense Instruction Number 1300.18 January 8, 2008 Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures
- (CJCS) Joint Publication 4-06, Mortuary Affairs 12 October 2011, ¶2
- U.S. Army Regulation 638-2
- U.S. Army Pamphlet 638-2

112. Plaintiff-Intervenor is entitled to a declaratory judgment confirming the rights of family members of missing service personnel to possess such remains for burial as they may direct and that Defendants have exhibited a lack of diligence in identification of unidentified remains recovered from the battlefield.

B. Count Two: Mandamus Act – Identification and Return of Remains

113. Plaintiff-Intervenor hereby restates and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint in Intervention and Plaintiff's First Amended Complaint.

114. The Mandamus Act, 28 USC § 1361, provides for United States district court jurisdiction to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff when no other adequate legal remedy is available. The power of a district court to compel official action by mandatory order is limited to the enforcement of nondiscretionary, plainly defined, and purely ministerial duties.

115. Defendants have a self-acknowledged common law duty to return the remains of deceased service members to their families for burial. The obligation to identify the remains of missing Servicemembers is inherent in the obligation to return them to their families for burial.

116. There is no alternative statutory or administrative process to allow family members to retrieve the remains or challenge the actions or inactions of Defendants.

117. Defendants non-discretionary obligation to identify the remains of missing service members is acknowledged by the following Department of Defense regulations, *Inter alia*:

- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts, ¶ 4.1
- (CJCS) Joint Publication 4-06 Mortuary Affairs 12 October 2011, ¶¶ 1-2d, 2
- U.S. Army Regulation 638-2, ¶¶ 2-17, 8-1, 8-2, 8-4, 8-9, 8-10
- U.S. Army Field Manual FM 4-20-65 (FM 10-286), Identification of Deceased Personnel, ¶¶ 1-1, 1-8
- Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3).

118. The remains of more than 9,400 deceased American service members remain unidentified after more than half a century. Many of these personnel can be identified simply through examination of existing records. Other remains can be identified by comparison with Defendants' existing DNA database.

119. Defendants have refused to fully employ modern forensic techniques to identify remains reasonably believed to be those of missing American service members despite regulations to the contrary:

a. DoD Directive 1300.22E, Paragraph 4(a), "It is DoD policy that...[t]he remains of deceased DoD-affiliated or covered person, consistent with applicable law and regulation, who die in military operations...shall be recovered, identified, and returned to families as expeditiously as possible..."

b. DoD Directive 2310.07E, paragraph 4.1, "It is DoD policy that...[a]ccounting for personnel lost as a result of hostile acts is of the highest national priority."

c. Joint Publication 4-06 supports and implements DoD Directive 1300.22E. Chapter 1, paragraph 2d, requires, "[e]very reasonable effort will be made to identify human remains and fully account for unrecovered human remains of US military personnel...who die in military operations..." Chapter 2 of this publication is dedicated to an entire scheme to recover remains and requires throughout that the geographic combatant commanders conduct "tentative identification."

d. Army Regulation 638-2, Paragraph 2-17a states, "*Recovery*. The Army will search for, recover, segregate, and identify remains of eligible decedents (see chap 8)."

e. Army Regulation 638-2, Paragraph 8-1, states, "Responsible commanders (see para 8-3) will take appropriate action to search for, recover, and identify remains of eligible deceased personnel. The Joint Pub 4-06, Joint Tactics, Techniques, and Procedures for Mortuary Affairs in Joint Operations provides procedures for search and recovery of remains."

f. Army Regulation 638-2, Paragraph 8-2 states in pertinent part, "No specific limitations exist on the amount that can be spent to search for, recover, and identify eligible deceased personnel cited in table 2-1..."

g. Army Regulation 638-2, Paragraph 8-4 states in pertinent part, "[Commander Personnel Command renamed as Human Resources Command] will provide technical assistance when identification of remains cannot be established by the responsible commander. This does not, however, relieve the commander of responsibilities for taking all steps possible to identify remains."

h. Army Regulation 638-2, Paragraph 8-9a, states, "Deceased personnel must be identified as quickly as possible by employing all well-known means and scientific resources."

i. Army Regulation 638-2, Paragraph 8-10 refers to Mitochondrial DNA (mtDNA) as a means of identification. Subparagraph a(1) states, "mtDNA comparison will be used as a means to identify or exclude remains when other identification techniques are impracticable."

j. Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3) states. "The Department of Defense is charged with making the fullest possible accounting of personnel missing in action. Advances in forensic sciences, specifically the use of mitochondrial DNA (mtDNA), now make it possible to identify certain remains previously interred yet unidentified."

120. Defendants have refused to consider new evidence not previously considered of the identity of unidentified remains.

121. Defendants have a clear nondiscretionary duty to recover, identify and return to their families the remains of deceased WWII military personnel. Yet, Defendants have made little progress in identifying those buried as "unknowns" despite the passage of more than sixty (60) years; advanced forensic technology; and, even additional evidence provided by family members and others.

122. Defendants owe Plaintiff, Plaintiff-Intervenor and others similarly situated a clear nondiscretionary duty to consider all available evidence and employ all reasonable forensic techniques to identify the remains of deceased American service members and return their remains to their families for burial as they may direct. As a direct and proximate result of Defendants' failure to consider all evidence of identity and to act accordingly, Plaintiff and others have been irreparably harmed and continue to suffer ongoing irreparable harm. Because

Plaintiff and others have “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.”).

123. Further, Plaintiff, Plaintiff-Intervenor and others similarly situated are entitled to clear and unambiguous policies and procedures, timely applied and enforced, under which they can seek the identification and return of their deceased family members. When reasonable evidence exists of the identity of either an individual or group of unidentified remains and suitable family reference samples are available for comparison, said remains should be timely disinterred for identification and all reasonable forensic means of identification employed. Upon any such showing that individual or group remains are associated with a specific identity or identities and that appropriate family reference samples can be obtained, Defendants should immediately appoint missing person’s counsel in accordance with 10 U.S.C. §§ 1503(f), 1505(c)(2) to represent the interests of the missing persons.

C. **Count Three: Declaratory Judgment – Identification of Unidentified Remains as Those of Missing Members of Plaintiff-Intervenor’s Family.**

124. Plaintiff-Intervenor hereby restates and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint in Intervention and Plaintiff’s First Amended Complaint.

125. 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).

126. 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).

127. Having shown clear and compelling evidence that there is a “high probability of positive identification” of certain unidentified remains, Plaintiff-Intervenor are entitled to a declaratory judgment confirming that said remains meet Defendants standards for disinterment for identification and should be disinterred for identification.

D. Count Four: Injunctive Relief – Due Process

128. Plaintiff-Intervenor hereby restates and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint in Intervention and Plaintiff’s First Amended Complaint.

129. On December 16, 2010, Defendants issued a policy memorandum, subject: Policy Guidance on Prioritizing Remains Recovery and Identifications. This policy memorandum conflicts with Defendant’s statutory and common law obligation to recover, identify and return to family members the remains of deceased American Servicemembers. This policy

memorandum used the term “received an honorable burial” as an euphemism for unidentified remains of American service members and directed that such unidentified remains would be considered as a lower priority for recovery and identification. Not only did this policy effectively proscribe the recovery and identification of unidentified remains, but it was also used to justify Defendant’s refusal to recover and identify unidentified remains of American service members who had not received an honorable burial as defined by Defendant’s own regulations.

130. Despite repeated request by Plaintiff-Intervenors, Defendants have rejected or ignored evidence of the identity of certain unidentified remains.

131. Defendants have systematically and deliberately infringed the due process rights of Plaintiff-Intervenor and others by their refusal to consider new evidence.

132. Defendants have established multiple, sometimes contradictory, processes and procedures for those seeking the return of the remains of their family members. Requests are denied based upon unpublished and arbitrary conditions known to only selected agency personnel.

133. 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).

134. Plaintiff, Plaintiff-Intervenor and others similarly situated are entitled to injunctive relief declaring their rights to due process in seeking the return of family members who died in defense of the United States. These rights include clear, unambiguous standards for disinterment, identification, appeal and reasonable limits on the time to perform each as well as the right to be treated honestly and forthrightly by officials of the U.S. Government.

V.
PRAYER FOR RELIEF

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

- a. An order, declaring that family members have an absolute right to possess for burial the remains of members of their family who perished during military service;
- b. An order, declaring that Defendants are timely required to identify the previously unidentified remains of deceased American Servicemembers when it becomes reasonably feasible to do so using any available forensic technology;
- c. An order, that Defendants shall promptly act to consider new evidence of the identity of unidentified remains when such evidence becomes available from any source;
- d. An order, that Defendants shall promptly act to identify the remains of all deceased service members 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, that Defendants shall promptly disinter for identification all unidentified remains upon a showing of a probability of their identification;

f. An order, that Defendants shall promptly act to update the policy contained in the "Slocombe Memo" to incorporate the latest and most appropriate technologies for identification of human remains recovered from past conflicts and to codify such policy as a permanent directive binding on each Defendant agency;


g. Permanent injunctive relief pursuant to Fed. R. Civ. P. 65 enjoining Defendants and their officers, employees and agents from discriminatory or inconsistent policies in accounting, or failing to account, for missing personnel;

h. Permanent injunctive relief pursuant to Fed. R. Civ. P. 65 ordering Defendants and their officers, employees and agents to immediately and fully provide due process to all persons seeking the return of the remains of family members currently interred as unknowns in cemeteries operated by the U.S. Government.

i. An award of attorney fees and expenses.

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

Respectfully submitted,



Hon. John Alexander Patterson, *pro se*
721 North Quidnessett Road
North Kingston, RI 02852
Tel: 401-885-7776
Email: pattj@cox.net