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United States Attorney  
Western District of Texas

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June 19, 2014

Via U.S. Mail

Jefferson Moore  
Attorney-at-Law  
8438 Fountain Circle  
San Antonio, Texas 78229

Re: Eakin v. American Battle Monuments Comm'n, et al.

Dear Jefferson:

Pursuant to our agreement, enclosed please find Defendants' Objections and Answers to Plaintiff's First and Second Requests for Admissions.

Sincerely,

ROBERT PITMAN  
UNITED STATES ATTORNEY

BY:

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SUSAN STRAWN  
Assistant United States Attorney

**RECEIVED**  
BY *JM* DATE *24 JUN 14*

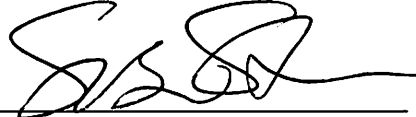
ANSWER: Defendants have made reasonable inquiry and can neither admit or deny this Request. To the extent an admission or denial is required, the Request is denied.

Defendants' records, included with the Administrative Record in this case, demonstrate that several attempts to identify X-816 were made by the American Graves Registration Service between 1945 and 1951. These efforts were not successful in identifying the remains. As a result of Plaintiff's request to defendants, beginning in 2010 defendants conducted a thorough review of the historical and forensic records concerning these remains, including the information

provided to defendants by Plaintiff related to PVT Arthur H. Kelder. Defendants' inquiry did not provide sufficient knowledge to admit or deny this Request.

Respectfully submitted,

**ROBERT PITMAN**  
United States Attorney



**SUSAN STRAWN**  
Tex. Bar No. 19374330  
Assistant United States Attorneys  
601 NW Loop 410, Ste 600  
San Antonio, TX 78216  
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Tel. (210) 384-7388  
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SStrawn@usa.doj.gov

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of June, 2014, I served the foregoing via first-class

U.S. Mail, on counsel for plaintiff:

Jefferson Moore  
Attorney-at-Law  
8438 Fountain Circle  
San Antonio, Texas 78229



**SUSAN STRAWN**  
Assistant United States Attorney

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS  
COMMISSION, et al.

Defendants.

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Civ. A. No. SA:12-cv-1002-FB-HJB

**DEFENDANTS' OBJECTIONS AND ANSWERS TO  
PLAINTIFFS' SECOND REQUEST FOR ADMISSION**

Pursuant to Federal Rule of Civil Procedure 36, defendants American Battle Monuments Commission, et al., by and through their undersigned attorneys, hereby object and respond to Plaintiff's Second Requests for Admission.

1. Admit or deny that family members of deceased U.S. military personnel have a right to possess for burial the remains of members of their family.

RESPONSE:

Defendants object to this Request because it calls for a legal conclusion and is therefore not within the scope of Fed. R. Civ. P. 36(1). Defendants further object because the request is vague and not capable of being answered as written because it depends on a wide variety of factual circumstances. These circumstances include, for example, whether the remains have been recovered, whether they have been previously buried, where they are buried, whether the Person Authorized to Direct Disposition of Remains (PADD) is a family member, etc. Further, defendants object because the request contains multiple undefined terms (including "U.S. military personnel," "family members," "right" and "possess for burial"), the definition of which

may affect the answer. Defendants also object on the grounds that this request is irrelevant, because any such right, if it exists, would apply only to identified remains, which are not the subject of this case.

Defendants will interpret this Request to refer to identified remains. Subject to the above objections and interpretation and to the extent an admission or denial is required, the request is denied. As a general matter, Section 1481 of Title 10 specifies those persons for whose remains the “Secretary concerned” may provide services including recovery, care and disposition. Section 1482 specifies that the PADD, regardless of relationship to the decedent, is entitled to direct the disposition of remains. There is no statutory right of “family members” to “possess [remains] for burial.” Although DoD’s current *policy* is to return or make disposition of remains as instructed by the PADD, there are exceptions to the policy including for certain burials at sea, where remains are contaminated, where recovery would endanger the living, where individual remains are so commingled as to make segregation unfeasible, and no doubt in other circumstances that defendants have failed to hypothesize.

With respect to identified remains that have been interred, there may be additional legal limits on the family’s (or next-of-kin’s) ability to possess remains, depending on the cemetery and other factors. For example, decisions of next-of-kin who chose to have a decedent interred overseas at the conclusion of World War II are final; family members are precluded by law from seeking to “possess” those remains.

2. Admit or deny that the U.S. Government is obligated to timely identify the remains of deceased U.S. military personnel.

RESPONSE:

Defendants object to this Request because it calls for a legal conclusion and is therefore not within the scope of Fed. R. Civ. P. 36(1). Further, defendants object because the request contains multiple vague and undefined terms (including “U.S. Government,” “obligated,” “timely” and “military personnel”). Defendants further object because the request is ambiguous, vague and not capable of being answered as written because the answer depends upon the interpretation of the request (for example, does the request refer to to an obligation to “timely” identify all remains – from the Revolutionary War forward -- or to “timely” identify specific remains after a current death?). The request is also not capable of being answered because it is appears to refer to an unqualified “obligation” but the answer depends on a wide variety of factual circumstances and necessarily requires qualifications based on reasonableness and other factors. Defendants further object to this request on the grounds of relevance, as the issue in this case is whether defendants have any legal obligation *to Plaintiff* to disinter *specific* remains to seek to identify them, which defendants deny.

Defendants will interpret this request to be limited to defendants’ legal obligation to “timely” identify the remains of all deceased U.S. military personnel from World War II buried as unknowns. Subject to the above objections and interpretation and to the extent an admission or denial is required, the request is denied. Following the cessation of hostilities in 1945, Congress authorized the Secretary of War to identify, and, when requested, repatriate American war dead and others who perished overseas. That effort was ended by Congress in 1951, finding that “further continuance” of the authority was “not necessary in the public interest.” 61 Stat. 779 (1947). In the 2010 National Defense Authorization Act, Congress authorized defendants to include World War II “unaccounted for” within the program to account for the unaccounted for from specified conflicts. However, this legislation does not create a legal obligation to identify

any particular unknowns from World War II or set any timelines for so doing. Rather, Congress set a goal of accounting for 200 “unaccounted for” personnel from all covered conflicts annually beginning in FY 2015, leaving it completely within defendants’ discretion to determine where to focus their accounting priorities.

3. Admit or deny the authenticity and receipt of attachment number 1, an email dated 28 Feb 2013 from Benjamin Toyama to Kelly McKeague, Bradford Byrnes and Samuel Locklear.

RESPONSE:

Admit.

Respectfully submitted,

**ROBERT PITMAN**  
United States Attorney

A handwritten signature in black ink, appearing to read "Susan Strawn", written over a horizontal line.

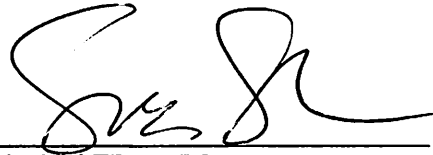
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I hereby certify that on the 20th day of June, 2014, I served the foregoing via first-class

U.S. Mail, on counsel for plaintiff:

Jefferson Moore  
Attorney-at-Law  
8438 Fountain Circle  
San Antonio, Texas 78229

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SUSAN STRAWN  
Assistant United States Attorney