

JOHN EAKIN
v.
AMERICAN BATTLE MONUMENTS COMMISSION, et al

**Attachment 1 to Plaintiff's Motion for Leave to File First Amended Complaint for
Damages, Declaratory Judgment and Injunctive Relief**

**Plaintiff's Proposed First Amended Complaint for Damages, Declaratory Judgment and
Injunctive Relief**

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

JOHN EAKIN)
9865 Tower View Road)
Helotes, Texas 78023)

Plaintiff,)

SA-12-CA-1002 FB (HJB)

v.)

AMERICAN BATTLE MONUMENTS)
COMMISSION and 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, individually and in his)
official capacity as Deputy to the Commander)
for External Relations and Legislative Affairs,)
Joint POW/MIA Accounting Command,)
THOMAS D. HOLLAND, Joint POW/MIA)
Accounting Command, individually, and)
KELLY K. MCKEAGUE, Joint POW/MIA)
Accounting Command, individually)

Defendants)

**FIRST AMENDED COMPLAINT FOR DAMAGES, DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

1. This is an action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq* and the Fifth Amendment to the U.S. Constitution in response to the U.S. Government’s unlawful withholding of agency action and due process in fully and correctly

accounting for a deceased WWII era Army servicemember and others whose remains were not identified by the U.S. Government and buried as an unknown. 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 number 717. His remains were not individually identified and his family was told that his remains were “non-recoverable.” Ultimately, they were 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 or conduct DNA sequencing to identify the remains. Defendants have concealed documents, filed superseded and misleading documents with this Court, and systematically denied Plaintiff’s right to due process. Accordingly, Plaintiff seeks injunctive and other appropriate relief acknowledging that the remains identified as Unknown X-816 (“X-816”) are those of Private Arthur H. “Bud” Kelder and that his survivors have the right to possess such remains for burial as they may direct. Plaintiff further seeks monetary damages for denial of due process by federal officials.

I.
PARTIES

2. Douglas Arthur Kelder, Nephew of Arthur H. Kelder is the person designated by the Department of Defense to direct disposition of the remains of Arthur H. Kelder. Due to medical disability, Douglas Kelder has designated Plaintiff as his Attorney in Fact for all purposes regarding the disposition of the remains of Arthur H. Kelder. Ex. 26 (Power of

Attorney to John Eakin) 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...” Further, Defendants have tortuously interfered with Plaintiff’s constitutionally protected right to due process as concerns his right to possess and bury the remains of a family member and Defendants are liable to Plaintiff for appropriate damages. Plaintiff is thus a proper plaintiff under the Administrative Procedure Act, 5 U.S.C. § 702 and the United States Constitution as set out in *Davis v. Passman*, 442 U.S. 228 (1979).

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; Chuck Hagel, in his official capacity as Secretary of Defense; Johnie E. Webb, individually and 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 or officials of 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. Also, Defendants Johnie E. Webb; Thomas D. Holland; and Kelly K. McKeague, senior executives of the Joint POW/MIA Accounting Command, have individually violated Plaintiff’s constitutionally protected rights to

due process while acting under color of legal authority and are personally responsible to Plaintiff for damages incurred.

II.
JURISDICTION AND VENUE

4. 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 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. §§ 1501-1513, Army Regulation 638-2 and agency policies. Additionally, this civil action is brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and *Davis v. Passman*, 442 U.S. 228 (1979).

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. Dr. Richard R. Souviron, DDS, an employee of the Miami-Dade County Medical Examiner and recognized expert in the field of identification of skeletal remains, has opined that unidentified remains X-816 are those of Arthur H. Kelder. Ex. 23

9. Rick Stone, former JPAC Deputy Chief of WWII Investigations, a twenty-five year veteran law enforcement officer with two appointments as the Chief of Police in major cities, investigated the case of X-816 while a member of JPAC and determined that Arthur H. Kelder is a most likely match to unidentified remains X-816. Ex. 22

10. The skeletal remains of 14 men were recovered from the Cabanatuan POW Camp #1 cemetery grave number 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

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

12. 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

13. 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

14. 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

15. 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

16. 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

17. 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

18. 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 Service members known to have been recovered from Cabanatuan Grave 717. Ex. 2 (Eakin Affidavit), Ex. 14 (DNA collection Press Release)

19. 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)

20. 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)

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

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

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

24. The complete Cabanatuan Burial Report was a significant factor in the identification of more than 1,500 remains recovered from the Cabanatuan Cemetery. Ex. 4 (ID memo)

25. 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

26. 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

27. 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

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

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

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

31. The tooth charts contained in IDPF X-816 (Ex. 15D) indicate that gold dental inlays originally present were removed or disappeared while the remains were in the custody and control of the U.S. Government.

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

33. 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

34. 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

35. 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

36. 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

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

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

39. The family of Arthur H. Kelder was not requested to provide ante-mortem dental records.

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

41. 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, illegally discriminate against certain classes of missing personnel and deny due process guaranteed by the United States Constitution.**

42. 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)

43. 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)

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

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

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

47. Unidentified remains X-816 were moved from Ft. McKinley Military Cemetery grave N-11-101 to 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. This disinterment and reburial was for the convenience of the government and was authorized by administrative decision. Ex. 15D

48. Graves in the Manila American Cemetery operated by Defendant ABMC were opened and the remains therein were relocated to other nearby grave sites simply for the purpose of presenting a uniform appearance of the cemetery.

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

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

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

52. 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 was reported in the 1999 Annual Report issued by the Defense POW / Missing

Personnel Office. Ex. 8 (DPMO 1999 Annual Report) This policy remains in effect and charged 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.”

53. 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 JPAC) with the responsibility of evaluating cases which would lead to a high probability of positive identification.

54. 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) provides for disagreement with a CILHI decision regarding disinterment, or regarding prioritization of cases, to be appealed to the Deputy Assistant Secretary of Defense for Defense Prisoner of War and Missing Personnel Affairs Office.

55. Defendants policy on disinterment of unidentified remains for identification is that a decision to disinter remains that are classified as ‘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)

56. 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.

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

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

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

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

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

D. Plaintiff has exhausted all administrative remedies

62. On June 21, 2011, Plaintiff, with power of attorney of the primary next-of-kin of Arthur H. Kelder, Douglas Arthur 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)

63. 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)

64. 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)

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

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

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

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

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

69. Defendants have made no effort to account for Arthur H. Kelder since January 25, 1951. Ex. 16F

70. 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)

71. 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)

72. In the course of the meeting attended by Plaintiff on February 26, 2012, Defendant Johnie E. Webb asserted that there was no evidence to support further investigation and that his agency would not further investigate the identity of unidentified remains X-816 Manila #2. Ex. 2 (Eakin Affidavit)

F. Certain Defendants’ have intentionally denied Plaintiff the right of due process guaranteed by the United States Constitution.

73. Arthur H. Kelder was a resident of the State of Illinois, entered military service from the State of Illinois, and intended to return to the State of Illinois upon completion of his military service. Ex. 25 (Kelder Letter expressing intention to return to Illinois)

74. The Common Law of the State of Illinois recognizes a right arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial. *Courtney v. St. Joseph Hospital*, 149 Ill. App.3d 397 (1986) 500 N.E. 2d 703

75. Agencies of Defendant Department of Defense have recognized Douglas Arthur Kelder as the Primary Next of Kin of Arthur H. Kelder, and the person authorized to direct the disposition of the remains of Arthur H. Kelder.

76. Douglas Arthur Kelder has appointed Plaintiff as his Attorney-in-Fact for all purposes related to the disposition of the remains of Arthur H. Kelder, as authorized by 10 U.S. Code § 1501(d) and Army Regulation 638-2, paragraph 4-6. Ex. 26 (Power of Attorney)

77. Plaintiff has the right to act for the Person Designated to Direct Disposition (PADD) of the remains of Arthur H. Kelder, Douglas Arthur Kelder

78. Defendants have a duty to account for missing service personnel under the Missing Service Personnel Act, 10 U.S.C. §§ 1501-1513; Army Regulation 638-2; 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).

79. Defendants duty to account for missing service personnel is non-discretionary.

80. On or about February 21, 2012 and prior to his meeting with Plaintiff, Defendant Webb ordered an investigation concerning the identification of the remains of Arthur H. Kelder and subsequently received JPAC investigative reports indicating that disinterment for the purpose of identification was warranted. Ex. 22 (Stone Decl)

81. Defendant Webb, on or about February 26, 2012, with knowledge that evidence existed to support further investigation of the identity of unidentified remains X816 as those of Arthur H. Kelder, falsely and intentionally informed Plaintiff that further investigation was not warranted and that no further appellate process or hearing was available to him. Ex 2 (Eakin Decl)

82. On February 1, 2013, Defendants filed an administrative record containing an investigative memo dated January 14, 2011, subject: Philippines JPAC Incident 425 – Cabanatuan Grave 717. (AR page 199, CM/ECF document 23-1) This J2 Memo had been superseded by later investigative reports prepared by Rick Stone which were omitted from the Administrative Record filed with the Court and not otherwise acknowledged to this Court or Plaintiff. (Ex. 21, CM/ECF document 23-1)

83. On January 28, 2013, Defendant Holland signed a memorandum for the JPAC Commander concerning the identification of unidentified remains X816 as those of Arthur H. Kelder. This memorandum relies on superseded investigative material and contains conclusions and recommendations not supported by the facts and which should have been known to Defendant Holland. (Supp AR page 2)

84. On January 30, 2013, Defendant McKeague signed a memorandum for the Deputy Assistant Secretary of Defense for POW/Missing Personnel Office, subject: Philippines Joint POW/MIA Accounting Command Incident 425. This memorandum forwarded the memorandum of Defendant Holland based on superseded investigative reports and contained conclusions and recommendations not supported by the facts and which should have been known to Defendant McKeague. (Supp AR page 1)

85. By failing to act in accordance with the memorandum issued by Walter B. Slocombe, subject: Disinterment Policy for the Purpose of Identification, dated May 13, 1999 and instead either verbally denying Plaintiff's petition for consideration of new evidence or by forwarding the decision to the designated appellate authority for an original decision, Defendants Webb, Holland and McKeague have deprived Plaintiff of due process.

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

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

88. 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.

89. 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.

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

90. 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

91. 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)

92. 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)

93. 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)

94. Defendant JPAC currently has more than seven hundred (700) sets of human remains stored in their laboratory pending identification. At the current rate of identifications, these seven hundred plus sets of human remains constitute more than a nine year backlog.

V. CAUSES OF ACTION

A. Count One: Administrative Procedure Act

95. Paragraphs 1-94 are incorporated by reference herein.

96. 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)

97. Defendants have a self-acknowledged common law duty to return the remains of deceased service members to their families for burial. There is no alternative administrative process to allow family members to retrieve the remains or challenge the actions, or inactions, of Defendants.

98. 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, Army Regulation 638-2 and Department of Defense policy 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

99. Paragraphs 1-97 are incorporated by reference herein.

100. 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)

101. Defendants' policy of prioritization of recovery of the remains of "unknowns" is in conflict with 10 U.S.C. § 1501(a)(4), Army Regulation 638-2 and Department of Defense policy which requires that such policies apply uniformly throughout the Department of Defense for recovering and identifying missing persons or their remains.

102. 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.

103. 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, 10 U.S.C. §§ 1501-1509, Army Regulation 638-2 and Department of Defense policy

104. 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.

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

106. 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

107. Paragraphs 1-105 are incorporated by reference herein.

108. 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).

109. 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).

110. Accounting for missing persons, including their remains, is not a discretionary act under 10 U.S.C. § 1501 *et seq.*, Army Regulation 638-2 or Department of Defense policy. 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.

111. 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)

112. 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.

113. Plaintiff has shown compelling evidence that unidentified remains X-816 are those of Private 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 declaratory judgment that the X-816 remains are those of Pvt Kelder. 28 U.S.C. § 2201.

D. Count Four: Writ of Mandamus

114. Paragraphs 1-112 are incorporated by reference herein.

115. 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.

116. Accounting for missing persons, including their remains, is not a discretionary act. 10 U.S.C. §§ 1501(a)(6), 1509(a), Army Regulation 638-2 and agency policies all require action to account for missing persons, including their remains.

117. Defendants owe a clear nondiscretionary duty to take all practical efforts to identify the remains of Private 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, Army Regulation 638-2 and agency policy.

118. 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.

119. 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.

120. 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.").

E. Count Five: Due Process

121. Paragraphs 1-119 are incorporated by reference herein.

122. Arthur H. Kelder was a resident of the State of Illinois until his death.

123. Upon the death of Arthur H. Kelder, the common law of the State of Illinois granted to his survivors the right and obligation to possess his remains for proper burial as determined by such survivors.

124. Defendants have individually and collectively frustrated survivors right to due process necessary to exercise their right and obligation to possess for burial the remains of Arthur H. Kelder. Such actions were deliberate and wrongfully done under color of Federal authority and in violation of Federal statutes, regulations and policies.

125. Defendants have intentionally inflicted emotional distress on the survivors of Arthur H. Kelder.

126. Defendants have filed incomplete, false and misleading documents in an attempt to frustrate judicial enforcement of Plaintiff's Constitutional rights. Defendant's actions have inflicted unnecessary expense and delay in enforcement of Plaintiff's rights.

127. Plaintiff has been damaged in the amount necessary to disinter, identify, transport and properly bury the remains of Arthur H. Kelder and those interred with him. Defendants' actions have further damaged Plaintiff by their denial of due process and consequent necessity to obtain judicial enforcement of his rights.

128. No statutory cause of action exists and no available statutory cause of action exists to provide monetary compensation against the defendant.

129. No appropriate immunity can be raised by Defendants.

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. 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.

h. An award of Plaintiff's costs, compensatory and punitive damages, and reasonable attorneys' fees, as appropriate; and

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

Respectfully submitted,

/s/ John Eakin

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CONSOLIDATED PLAINTIFF'S EXHIBIT LIST¹

JOHN EAKIN v. AMERICAN BATTLE MONUMENTS COMMISSION, et al

- Ex. 1 Report of Dr. David Senn, DDS, DABFO
- Ex. 2 Declaration of John Eakin
- Ex. 3 Extract from Cabanatuan POW Camp Cemetery burial roster grave 717
- Ex. 4 Identification Memorandum, dated 12 Dec 46 & transcript
- Ex. 5 Identification Board Proceedings – Cabanatuan Grave 717
- Ex. 6A Statement of Ron Kelder
- Ex. 6B Statement of Doug Kelder
- Ex. 7 Policy Memo on Prioritization of Remains Recovery and Identifications
- Ex. 8 DPMO 1999 Annual Report – Policy on Disinterment for Identification
- Ex. 9 Petition to US Army for Consideration of New Evidence of Identity, Unknown X816
- Ex. 10 US Army Response to Exhibit 9
- Ex. 11 Extract from Army Regulation 638-2
- Ex. 12 Petition to DPMO for Consideration of New Evidence of Identity, Unknown X816
- Ex. 13 Executive Order 10057
- Ex. 14 Press releases and web pages concerning DNA collection for use in identification of the remains of deceased servicemembers
- Ex. 15A IDPF Unidentified Remains X-812_Manila2
- Ex. 15B IDPF Unidentified Remains X-814_Manila2
- Ex. 15C IDPF Unidentified Remains X-815_Manila2
- Ex. 15D IDPF Unidentified Remains X-816_Manila2
- Ex. 15E IDPF Unidentified Remains X-818_Manila2
- Ex. 15F IDPF Unidentified Remains X-820_Manila2
- Ex. 15G IDPF Unidentified Remains X-821_Manila2
- Ex. 15H IDPF Unidentified Remains X-822_Manila2
- Ex. 15I IDPF Unidentified Remains X-823_Manila2
- Ex. 15J IDPF Unidentified Remains X-824_Manila2
- Ex. 16A IDPF Bain_33035131
- Ex. 16B IDPF Collins_6578818
- Ex. 16C IDPF Gutierrez_20843125
- Ex. 16D IDPF Hanscom_6137280
- Ex. 16E IDPF Hirschi_19038407
- Ex. 16F IDPF Kelder_36016623
- Ex. 16G IDPF Kovach_20500764
- Ex. 16H IDPF Lobdell_20645267
- Ex. 16I IDPF Nichols_7009171
- Ex. 16J IDPF Overbey_13035026
- Ex. 16K IDPF Ruark_278681
- Ex. 16L IDPF Simmons_19019886
- Ex. 16M IDPF Waid_19049058
- Ex. 16N IDPF York_Civilian

¹ Digital copies available at <http://bataanmissing.com/EakinVABMC/files.htm>

EXHIBITS ADDED WITH PLF MO FOR DISCOVERY

- Ex. 17 Whitehouse order to withhold information of atrocities
- Ex. 18 Decl of Chambers
- Ex. 19 DPMO website – Xfiles to be digitized
- Ex. 20 DPMO 2013 budget

EXHIBITS ADDED WITH PLF REPLY TO MOTION TO COMPLETE DISCOVERY

- Ex. 21 Memorandum for Record – JPAC Incident 425
- Ex. 22 Declaration of Rick Stone

EXHIBITS ADDED WITH PLF MO FOR DECLARATORY JUDGMENT

- Ex. 23 Report of Dr. Richard R. Souviron, DDS, DABFO
- Ex. 24 Multiple Burial Reports Cabanatuan Grave 717

EXHIBITS ADDED WITH FIRST AMENDED COMPLAINT

- Ex. 25 Arthur Kelder Letter – expected to return to Illinois
- Ex. 26 Douglas Arthur Kelder Power of Attorney to John Eakin