

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

JOHN EAKIN  
Plaintiff,

v.

AMERICAN BATTLE MONUMENTS  
COMMISSION, et al.  
  
Defendants

§  
§  
§  
§  
§  
§  
§  
§

§ CASE NUMBER: SA-12-CA-1002-FB (HJB)

**PLAINTIFFS’ REPLY TO DEFENDANTS’ OPPOSITION TO MOTION FOR LEAVE  
TO FILE FIRST AMENDED COMPLAINT**

Plaintiff John Eakin files this reply to Defendants’ Opposition to Plaintiff’s Motion for Leave to File Amended Complaint.

**I. Plaintiff is the Person Authorized to Direct Disposition of the Remains.**

Plaintiff is the person designated under U.S. Army Regulation 638-2, as the Person Authorized to Direct Disposition of Remains (PADD) and under the Missing Service Personnel Act (MSPA) as Primary Next of Kin (PNOK) for Private Arthur H. Kelder. (AR 638-2, ¶ 4-6, 10 U.S.C. § 1501(d)).

The Report and Recommendation of the U.S. Magistrate Judge (Mag. Report, ECF No. 30) filed in this case recognized the validity of such a designation at footnote 5 (Mag. Report at 8)

The MSPA further defines the term “primary next of kin” as blood relatives of the decedent and such definition includes Plaintiff in his own right. 10 U.S.C. § 1513(4) and U.S.C. § 1482(c)

Plaintiff was originally designated as the PADD/PNOK on August 11, 2011, prior to the filing of this lawsuit. (Pl. Ex. 9) The events complained of in this lawsuit occurred during the term of this designation. This original designation was indefinitely renewed and confirmed on June 19, 2013 to remove any question of Plaintiff's authority to act. (Pl. Ex. 26) This designation and Plaintiff's authority to act as PADD/PNOK was evidenced by Defendants' official correspondence and meetings with Plaintiff.

10 U.S.C. 1501(d) provides for the person first designated as PNOK to designate another individual to act on behalf of that individual as primary next of kin and directs the Secretary concerned to treat an individual so designated as if the individual designated were the primary next of kin for purposes of this chapter.

At the time of all events complained of in this lawsuit, Plaintiff was the designated PADD/PNOK and had the right to direct the disposition of the remains of Private Arthur H. Kelder. Plaintiff has no need to assert or represent the rights of any other person in this lawsuit since he is the PADD/PNOK recognized by all agencies of the U.S. Government as well as in his own right as a blood relative.

**II. This Court has jurisdiction for all of the amended complaint's counts.**

The Magistrate Judge previously reported that this Court lacked jurisdiction on certain counts due to Plaintiff's arguably questionable standing to bring this action in his own behalf. (Mag. Report at 9) Confirmation of Plaintiff's designation as PADD/PNOK removes any doubt concerning his standing to bring this lawsuit and provides an independent basis for jurisdiction which supports all counts.

In addition, Plaintiff's amended complaint adds an additional cause of action with an additional independent basis of jurisdiction.

**III. Plaintiff's due process claim is based in *Bivens* and not FTCA.**

As discussed above, Plaintiff has clear standing in his own right to bring his due process claims. Defendants' actions giving rise to these claims occurred either in this Court or elsewhere in the State of Texas and this Court has unquestioned jurisdiction over such claims.

Defendants' argument that these due process claims should be brought under the Federal Tort Claims Act are specious in that FTCA claims can not be brought against individual federal officials. "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14 at 20 (1980)

Additionally, Plaintiff's due process claims provide an additional independent basis for this Court's jurisdiction.

**IV. Conclusion**

Having until now addressed only procedural issues, Defendants response now raises factual issues. While Defendants are essentially correct in stating that this case is a "dispute between plaintiff and defendants over the likelihood of a successful identification should certain remains be disinterred." Defendants' averment that they have examined the evidence produced by Plaintiff and have reached a different conclusion regarding the strength of that evidence is intentionally deceptive.

Defendants have withheld from this Court their internal documents, which contrary to their averment, actually **support** the identification of remains X816 as those of Private Arthur H. Kelder. (Pl. Ex. 22 Decl of Rick Stone and Plf. Motion to Compel Completion of Admin Record) Defendants have ignored the independent testimony of three (3) experts – all of whom have previously been employed by Defendant JPAC – who have opined that remains X816 are

those of Private Arthur H. Kelder. (Pl. Ex. 1, 22, & 23, Expert Reports) And in so doing, Defendants have manufactured knowingly false documents; (Supp AR at 1 & 2, Holland & McKeague memos) ignored their agencies' policies; (Supp. AR at 5, Prioritization memo and Supp. AR at 3, Slocombe memo) and, intentionally denied Plaintiff's right to due process guaranteed under the Fifth Amendment to the United States Constitution.

Since Defendants have now characterized this dispute as simply a dispute over the likelihood of a successful identification of the remains designated as X816, Plaintiff submits that production of these remains for independent comparison of DNA with that of the available family reference samples would quickly dispose of essentially all issues set out in this lawsuit and result in significant judicial economy.

These unidentified remains have been exhumed and re-interred at least five (5) times solely for the convenience of the government and for purposes as inconsequential as landscaping the cemetery. These remains were stored in a government warehouse for more than eighteen (18) months and subjected to multiple examinations. While in the custody and control of the U.S. Government precious metal dental work was stolen from the remains.

Considering the U.S. Government's cavalier treatment of these remains in the past, it would be difficult for them to now argue that disinterment for identification would be burdensome or disrespectful. The facts of this case are simple and the evidence of the identity of remains X816 is overwhelming.

Plaintiff asks that his motion for leave to file an amended complaint be granted.

Respectfully submitted,

/s/ John Eakin

**John Eakin**, Plaintiff pro se  
9865 Tower View, Helotes, TX 78023  
Telephone: 210-695-2204  
Email: jeakin@airsafety.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of July, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Susan Strawn, Assistant United States Attorney  
601 NW Loop 410, Ste 600  
San Antonio, TX 78216  
Sstrawn@usa.doj.gov

/s/ John Eakin

**John Eakin**, Plaintiff pro se