

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

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NUMBER: SA-12-CA-1002-FB-HJB
	§	
AMERICAN BATTLE MONUMENTS	§	
COMMISSION, et al	§	
	§	
Defendants	§	
	§	

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ OBJECTION TO MAGISTRATE’S
ORDER GRANTING PLAINTIFF’S MOTION TO VACATE APPOINTMENT OF
PRO BONO COUNSEL AND ALLOWING PLAINTIFF LEAVE
TO FILE MOTION TO COMPEL *PRO SE***

Plaintiff, *pro se*, files his response to Defendants' Objection to Magistrate's Order Granting Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel and Allowing Plaintiff Leave to File Motion to Compel *pro se*.

Defendant's objection appears to be simply a restatement of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, or, in the Alternative, for Summary Judgment (ECF Doc. No. 54). Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, or, in the Alternative, for Summary Judgment (ECF Doc. No. 50) is incorporated in this response as if set out in full.

Plaintiff continues to contend that Defendant's objections were previously addressed by this Court's Report and Recommendation of United States Magistrate Judge (ECF Doc. No. 30) and Order Concerning Report and Recommendation of the United States Magistrate Judge and Further Orders of the Court (ECF Doc. No. 34) which were issued in response to Defendants' (first) Motion to Dismiss, or, in the Alternative, for Summary Judgment. (ECF Doc. No. 14-1)

For the purposes of standing and jurisdiction, Defendants rely *inter alia*, on their contention that they have no obligation to timely identify unidentified remains and that families have no right to possess remains until they are identified. (Defendant's Objection, ECF Doc. No. 78 at 4) While Defendants apparently concede that families have a (quasi-) property right or right to possess the remains for burial, they claim that right does not become effective until they, and only they, determine the identity of the remains and that they have no obligation to even consider new evidence.

However, in their Suggestion of Mootness and Motion to Stay Discovery (ECF Doc. No. 64) Defendants assert that Plaintiff's claims have become moot immediately because Defendants have decided to exhume the remains (prior to identification of the remains). (ECF Doc. No. 78 at 6). Defendants claim at that point to have accomplished all that Plaintiff requested. ("[Exhumation] is exactly the relief plaintiff sought from defendants, and moots this case.")(ECF Doc. No. 64 at 3) This misstates the fact that Plaintiff's First Amended Complaint (ECF Doc. No. 39) does not request exhumation of the remains. Rather, Plaintiff's First Amended Complaint simply asks this Court to declare that unidentified remains X816 are those of Private Arthur H. Kelder based on the overwhelming evidence of the identity of the remains. (*Id* at ¶¶ 137-141)

Plaintiff objects to Defendant's suggestion of mootness as premature in that it would moot and dismiss this litigation based only on Defendant's unenforceable statement of intent to disinter and attempt to identify the remains. An attempt which Plaintiff believes to be poorly planned and unlikely to be successful. Plaintiff would concur with the suggestion of mootness only upon identification of the remains either as, or as not, the remains of Arthur H. Kelder.

Adequate Evidence is Before the Court to Declare the Identity of the X816 Remains

To resolve the ambiguity, Plaintiff Moves the Court to reconsider Plaintiff's Motion for Declaratory Judgment¹ (ECF Doc. No. 24) which asks this Court to weigh the evidence presented and declare that unidentified remains X816 are those of Arthur H. Kelder. Defendant's unilateral decision to disinter the subject remains,² rather than producing them in discovery, infers Defendant's recognition that the evidence of identity meets Defendant's long standing policy on disinterment for identification.

"This memorandum provides policy to guide decisions regarding the disinterment of remains of U.S. servicemen previously buried in grave sites marked 'unknown.'

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.

A decision to disinter 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."
[emphasis added]

Undersecretary of Defense Walter B. Slocombe memorandum, May 13, 1999 (Supp. Admin Record at 000003)

Plaintiff believes Defendant's decision to exhume the remains infers recognition of the evidence supporting the identification of X816 as Arthur H. Kelder and is submitted in further support of Plaintiff's Motion for Declaratory Judgment.

¹ Plaintiff's Motion for Declaratory Judgment (contained within docket no. 24) was dismissed for lack of standing and subject matter jurisdiction without consideration of the merits. (Order ECF Doc. No. 34 at 18)

² Exhumation of unidentified remains X816 and nine (9) other unidentified remains originally interred in Cabanatuan Grave 717 is scheduled to begin approximately August 12, 2014. (Notice ECF Doc. No. 79)

Identification of Remains is Inherent in Defendant's Duty to Account for Pvt Kelder

While Defendants concede that Private Kelder's remains have been recovered to a memorial cemetery in the Philippines (ECF 47 at 4) and there is a high probability of positive identification (Supp. Admin Record at 000003 and ECF Doc. No. 79), Defendants aver that “accounting” does not include an obligation to identify remains and therefore, absent a duty to identify remains, this suit fails on sovereign immunity; fails to state a claim for relief; and, the next-of-kin lacks standing. (ECF Doc. No. 78 at 4)

Perhaps most disingenuous of Defendant’s claims is that while they do not deny their obligation to “account” for Private Kelder, Defendants parse the term “account” so as to exclude any obligation to identify remains and therefore they have no obligation to return any remains until they are identified. (Mot. Dismiss ECF Doc. No. 47 at 7, ECF Doc. No. 78 at 4)

Identification of remains is inherent in any requirement to account for or recover remains.

The term “accounted for”, with respect to a person in a missing status, means that—

(B) the remains of the person are recovered and, *if not identifiable through visual means as those of the missing person, are identified* as those of the missing person by a practitioner of an appropriate forensic science; or [emphasis added]

10 U.S.C. § 1513(3)

Defendants own publications and directives include identification as an inherent component of the recovery and accounting process:

"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..."

DoD Directive 1300.22E, ¶ 4(a),

"[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..."

Joint Publication 4-06 ¶ 2d

"Recovery. The Army will search for, recover, segregate, and **identify** remains of eligible decedents (see chap 8)."

Army Regulation 638-2, ¶ 2-17

"Responsible commanders (see para 8-3) will take appropriate action to search for, recover, and **identify** remains of eligible deceased personnel."

Id., ¶ 8-1

"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..."

Id., ¶ 8-2

"[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."

Id., ¶ 8-4

"Deceased personnel must be **identified** as quickly as possible by employing all well-known means and scientific resources."

Id., ¶ 8-9a

Any reasonable reading of Defendant's obligation to account for missing American Servicemembers includes their obligation to identify remains when it is reasonably possible to do so.

SUMMARY

Defendants argue that this lawsuit is moot immediately upon their decision to exhume the remains, (ECF Doc. No. 64 at 1) then they argue that Plaintiff has no right to the remains until they are identified (Defendant's Motion to Dismiss ECF Doc. No. 78 at 5) and ultimately, that

Defendants have no obligation at all to identify the remains of deceased or missing American Servicemembers. (*Id.* at 4)

Plaintiff, having petitioned this Court to declare the identification of the X816 remains based on the existing documentary evidence, believes dismissal is appropriate only upon identification either by this Court or successful forensic examination of the remains. Therefore, Plaintiff asks this Court to declare that reasonable efforts to identify remains are inherent in Defendants' obligation to account for missing or deceased servicemembers and that unidentified remains X816 are those of Arthur H. Kelder and should be immediately returned to Plaintiff for permanent burial.

Further, Plaintiff accedes to Defendant's request that Plaintiff's Motion to Compel be stricken (ECF Doc. No. 78 at 1) and asks the Court to allow Plaintiff to withdraw his Motion to Compel on the basis that, the Court having now ruled, the motion is moot.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, 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:

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