

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

JOHN EAKIN

Plaintiff,

v.

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

AMERICAN BATTLE MONUMENTS
 COMMISSION, *et al*

Defendants

Sally Hill Jones,

Plaintiff-Intervenors,

v.

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 servicemember 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 the American Battle Monuments Commission or Veterans Administration. Some remains were not identified due to insufficient evidence of identity; some were 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 either refused to disinter remains for identification or, unlike in those cases where they were presented with remains from more modern 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 servicemembers 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 identification and return of the remains of her family member 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 Sally Hill Jones, niece and designated next-of-kin (Plaintiff-Intervenor Exhibit 2, power of attorney) of Staff Sergeant Carl W. Holley, is a resident of Texas. Staff Sergeant Holley perished in the crash of a B24 bomber near Hong Kong. One set of recovered remains (designated as X-345) were not identified and were buried as an Unknown in the National Memorial Cemetery of the Pacific (Punchbowl). Defendants exhumed these remains in August, 2005 and unsuccessfully attempted to match them with one of the seven possible crewmembers not yet identified. These remains are currently in storage in Defendant's facility in Hawaii. Defendant's failure to identify these remains was due to their refusal to employ modern forensic techniques. Plaintiff-Intervenor desires the remains of her family member to be returned for burial as she may direct.

9. The Plaintiff-Intervenor, as the persons designated as Primary Next of Kin (PNOK) 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, 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. The Plaintiff is thus a proper plaintiff-intervenor under the respective statutes and the United States Constitution.

10. Defendants are the 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**

11. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the party 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.

12. The Plaintiff-Intervenor resides in the State of Texas, 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 Member

13. Staff Sergeant Carl W. Holley perished in the crash of a B24 bomber near Hong Kong. One set of remains (designated as X-345) which were recovered were not identified and were buried as an Unknown in the National Memorial Cemetery of the Pacific (Punchbowl). Defendants exhumed these remains in August, 2005 and unsuccessfully attempted to match them with one of the seven possible crewmembers not yet identified. These remains are currently in storage in Defendant's facility in Hawaii.

14. Unidentified remains X-345 are those of one or more of the seven crewmembers of B-24 "Sweepy Time Gal" which have not been recovered

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

15. The common law and/or statutes of the state of Texas recognizes the right of family members to direct the burial of deceased members of their family.

16. 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.

17. 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. Slocombe 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.**

18. 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).

19. 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).

19. Defendants' duty to account for missing service personnel is nondiscretionary.

20. 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.

21. 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.

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

23. It is possible to extract nuclear DNA from WWII era skeletal remains. (Plaintiff-Intervenor Exhibit 3, declaration of Jones)

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

25. 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 Member

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

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

28. 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.

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

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

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

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

33. Defendants do not routinely employ nuclear or “y” DNA in identification of remains.

34. Defendants do not routinely collect nuclear or “y” DNA reference samples.

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

36. There are approximately 8,637 WWII Unknowns.

37. There are approximately 841 Korean War Unknowns.

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

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

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

41. Defendants have concluded that mass disinterment for identification of all WWII unknowns is feasible.

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

42. 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.

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

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

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

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

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

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

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

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

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

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

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

54. Defendants' policies and practices concerning 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.

55. 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.

56. Defendants' policies and actions deprive family members of due process in claiming the bodies of deceased family members buried in cemeteries operated by the U.S. Government.

57. 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

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

59. 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 Servicemembers.

60. 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.

61. 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, are applied inconsistently, illegally discriminate against certain classes of missing personnel and deny due process guaranteed by the United States Constitution.

62. 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.

63. 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.

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

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

66. 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."

67. 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-Intervenors Have Exhausted All Administrative Remedies

68. On November 4, 2011, Army Human Resources Command informed Plaintiff Eakin 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.

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

**IV.
CAUSES OF ACTION**

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

70. The 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.

71. 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).

72. 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.

73. 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).

74. The remains of more than 9,400 deceased American servicemembers 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.

75. 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.

76. 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.

77. 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

78. Plaintiff 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

79. The 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.

80. 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.

81. 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.

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

83. 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).

84. The remains of more than 9,400 deceased American servicemembers 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.

85. Defendants have refused to fully employ modern forensic techniques to identify remains reasonably believed to be those of missing American Servicemembers 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.”

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

87. 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.

88. 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 Servicemembers 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.”).

89. 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 Families.

90. 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.

91. 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).

92. 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).

93. Having shown clear and compelling evidence that there is a “high probability of positive identification” of certain unidentified remains, Plaintiff-Intervenor is entitled to a declaratory judgment that Defendants confirm the identity of the X-345 remains or allow an independent agency to identify the remains using up-to-date technology.

D. Count Four: Injunctive Relief – Due Process

94. The 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.

95. 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 Servicemembers 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 Servicemembers who had not received an honorable burial as defined by Defendant’s own regulations.

96. Despite the request by Plaintiff-Intervenor, Defendants have refused to identify the remains identified as X-345 or allow an independent agency to identify the remains.

97. Defendants have systematically and deliberately infringed the due process rights of Plaintiff-Intervenor and others by their refusal to consider new evidence and use appropriate identification techniques.

98. 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.

99. 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).

100. 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

101. **WHEREFORE**, Plaintiff respectfully requests that this Court enter judgment in favor of the Plaintiff-Intervenor and against the Defendants and award the 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 if Defendants are unable to identify the unidentified remains of deceased American Servicemembers in a timely manner, that families have access to the remains for testing by an independent laboratory.

d. 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;

e. An order, 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;

f. An order, that Defendants shall promptly disinter for identification all unidentified remains upon a showing of a probability of their identification;

g. 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;

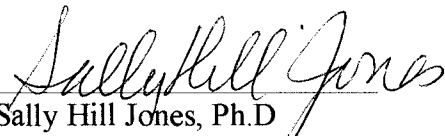
h. Permanent injunctive relief pursuant to Fed. R. Civ. P. 65 enjoining Defendants and their officers, employees, and agents from discriminatory or inconsistent policies in accounting, or failing to account, for missing personnel;

i. 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.

j. An award of fees and expenses.

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

Respectfully submitted,


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