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

JOHN EAKIN Plaintiff, v. AMERICAN BATTLE MONUMENTS COMMISSION, *et al* Defendants	§ § § § § § § § § § §	CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)

PLAINTIFF'S MOTION TO LIFT STAY AND FOR PARTIAL SUMMARY JUDGMENT ON ISSUE OF DUE PROCESS

Plaintiff John Eakin, pro se, respectfully submits this motion to lift the Court's stay of this case and for partial summary judgment on the issue of due process, pursuant to Fed. R. Civ. P. 56. As discussed below, there is no genuine dispute as to any material fact regarding the legal claims presented herein and Plaintiff is entitled to judgment as a matter of law. Alternatively, Plaintiff requests judgment on the pleadings under Fed. R. Civ. P. 12(c).

Defendants have failed to use every available resource to complete the disinterment and DNA testing as quickly and efficiently as possible as ordered by this Court. Defendant's apparent inability to identify the subject remains, meet their own projected timeframes for identification or even provide complete and truthful status reports provide reason to return this case to the Court's active docket.

In support of Plaintiff's motion for partial summary judgment on the issue of due process the Court is respectfully referred to the accompanying Statement of Material Facts as to Which There is no Genuine Dispute.

I. INTRODUCTION

This case stems from Plaintiff's attempts to recover the remains of a family member who perished in a WWII prisoner of war camp and was buried as an Unknown in the Manila American Cemetery constructed by Defendant U.S. Department of Defense (DoD) and currently operated by Defendant American Battle Monuments Commission (ABMC). Plaintiff is the designated primary next-of-kin and has the right to direct burial as provided for by Illinois law. Illinois is the home of record of the deceased, his permanent residence prior to entry in to military service and where he intended to return after military service. (Pl. Ex. 25)

Plaintiff has provided evidence showing beyond doubt that the unidentified remains known as X-816 are those of his family member. This has been confirmed by subsequent exhumation and testing by Defendants which requires a high probability of identification. (Supp AR, Doc. No. 2, ECF No. 13)

In 2011, Plaintiff first petitioned for consideration of new evidence under Army Regulation 638-2. Defendants refused to consider this new evidence on (the false) grounds that the Army Regulation had been superseded by Federal Statute. Army Regulation 638-2 currently exists unchanged and no such legislation has been passed. (Pl. Ex. 9, 10, 11, 12)

There currently exists no published statute, regulation or policy under which families can present evidence of identity or recover the remains of their deceased family members for burial as they may direct. (Report No. DODIG- 2015-001, Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Community), dated Oct 17, 2014, page 25) [1]

[1] http://www.dodig.mil/pubs/documents/DODIG-2015-001.pdf (last viewed Jan 3, 2015)

Defendants concede their obligation to return the identified remains of deceased servicemembers to their families for burial, but contend they have no obligation to officially identify the remains. (Mot. Dismiss ECF No. 47 at 7)

Plaintiff brought this action seeking a declaratory judgment that certain unidentified remains were those of his family member and also that Defendant's actions had deprived Plaintiff of procedural due process in seeking return of the remains. Plaintiff further requested injunctive relief in the form of clear, unambiguous, standards for disinterment and identification of unidentified remains.

Defendants filed an incomplete Administrative Record with this Court which withheld the reports and recommendations of at least four of Defendant's own investigators who all supported Plaintiff's contention that the subject remains were those of his family member. (Plf Mo Compel Comp of Admin Record, ECF No. 15)

Rather than produce in discovery the remains in question for DNA testing by independent experts, Defendants peremptorily exhumed the remains and suggested Plaintiff's claims were moot. Defendant's initial DNA testing and analysis has confirmed only that Plaintiff's presumptive identifications of the remains are correct. However, Defendants' status reports indicate they have encountered difficulty in individually associating the remains to specific individuals due to their outdated testing protocols. DNA testing, which Defendants initially forecast to be completed in 90 to 120 days remain incomplete with no projected date for completion. (Suggestion of Mootness & Fletcher Decl ECF No. No. 64 and 64-1)

Defendant's status reports indicate that they have chosen to rely primarily on mitochondrial DNA testing, a type of DNA testing useful only as an exclusionary tool and which does not provide a conclusive match to a family reference sample. Defendants' have either

chosen not to employ nuclear DNA testing or have limited capability in their in-house laboratory as this type of DNA testing in other laboratories is typically completed in ten days or less and provides a conclusive match to appropriate family reference samples. (Status Reports 1 thru 4, ECF No. 85, 87, 88, 93)

In an effort to explain their delay in identification, Defendant's have claimed that the skeletal remains were treated with embalming compounds for which there is no documented record of use prior to the Korean War. (ECF No. 87 ¶ 3, 88 ¶ 3) (H.E.C. Koon, Diagnosing post-mortem treatments which inhibit DNA amplification from US MIAs buried at the Punchbowl, Forensic Sci Intl, (2007))

Additional families have informally petitioned this Court for similar relief as recognized by the District Court's Order. One family has moved to intervene on similar grounds that they have been denied due process. (Order ECF No. 86, Mo Intervene, ECF No. 90) Relief providing for due process in the form of enforceable standards for disinterment of remains for identification would likely resolve these other cases as well as remaining issues in this case and contribute to judicial economy.

II. PROCEDURAL HISTORY

Plaintiff's original complaint was filed in this Court on October 18, 2012. Defendants moved to dismiss Plaintiff's complaint on grounds of standing, *inter alia*. This Court addressed the issues raised by Defendants' motion and allowed Plaintiff to file an amended complaint. Defendants again moved to dismiss Plaintiff's complaint on essentially identical grounds despite their having been addressed by this Court.

Due to the pending motions to dismiss, Defendants have not answered Plaintiff's amended complaint.

Plaintiff then moved for and was granted permission to conduct document discovery. On May 5, and May 13, 2014, Plaintiff served Defendants with interrogatories, requests for production and requests for admissions. In addition to documents, Plaintiff requested production for independent DNA testing of the remains then interred in the Manila American Cemetery.

On July 8, 2014, Defendants suggested to this Court that Plaintiff's complaint was moot because they had peremptorily decided to exhume the remains of all ten Unknowns originally buried in Cabanatuan POW Camp Cemetery Grave number 717.

An order of stay and administrative closure has been entered by this Court pending completion of identification of the remains.

The Court has received letters from other non-party families seeking similar relief. A motion to intervene is currently pending.

III. DEFENDANTS HAVE FAILED TO DILIGENTLY PURSUE IDENTIFICATION OF THE REMAINS

On August 12, 2014, this Court entered an Order of Stay and Administrative Closure in this case. (ECF No. 84). The Court ordered Defendants to file an advisory every thirty days informing the Court of the status of their efforts to identify the remains originally buried in Cabanatuan Grave 717. The Court further "INSTRUCTED" Defendants "to use every available resource to complete the disinterment and DNA testing as quickly and as efficiently as possible." Defendants have done neither and Plaintiff moves this Court to lift the stay in order to consider his Motion for Partial Summary Judgment on the Issue of Due Process.

The status reports filed by Defendants (ECF No. 85, 87, 88, 93) speak for themselves and demonstrate an attempt to obfuscate and confuse the reader while providing minimal factual information.

These status reports leave unanswered such basic questions as the names of the individuals for whom some remains have been identified. Further, they strongly suggest that the remains of the four individuals previously identified and returned to their families were found among the ten Unknowns exhumed from the Manila cemetery. These status reports paint a picture of Defendants efforts to collect family reference samples as being in complete disarray and the DNA testing to be poorly organized and using antiquated equipment and procedures.

Defendants have claimed that the remains were treated with an embalming compound which has interfered with their ability to extract DNA. However, there is no documented evidence of the use of embalming compounds prior to the Korean War era. And where these treatments were used it is obvious from the white powder coating on the remains which signal the use of alternative extraction processes, yet Defendants apparently initially ignored the signs of this chemical treatment (if actually present). (H.E.C. Koon, Diagnosing post-mortem treatments which inhibit DNA amplification from US MIAs buried at the Punchbowl, Forensic Sci Intl, (2007))

Most troubling is that Defendants are relying primarily upon the use of mitochondrial DNA testing rather than the use of more advanced nuclear DNA testing which would provide conclusive matches in a matter of days.

The primary technique being used by Defendants is mitochondrial DNA (mtDNA) testing which is an exclusionary tool used in conjunction with other circumstantial evidence to identify skeletal remains through a process of elimination of all other possibilities. It is time consuming, expensive and does not provide a conclusive match to a reference sample. The only advantage of the use of mtDNA testing is that in some cases DNA can be extracted from highly degraded remains or when the testing equipment is less than state of the art.

Nuclear DNA (nucDNA) testing is as unique as a fingerprint and is shared only by identical twins. Testing is less expensive and may often be completed in as little as five days, as was shown in the identification of PFC Lawrence Gordon, another WWII era Unknown identified by a non-government DNA laboratory in May 2014.

Defendants projected that their DNA testing would be complete in 90-120 days (Fletcher Decl ECF No. 64-1 ¶ 11)

The ten Unknowns, including X-816, were exhumed from the Manila American Cemetery on August 28, 2014. Upon exhumation, the remains were promptly transported via military aircraft to the Central Identification Laboratory (CIL) located in Honolulu, HI. 149 samples were cut from the bones and forwarded to the Armed Forces DNA Identification Laboratory at Dover AFB, DE.

Transporting the remains directly to Dover AFB, as for current casualties, would have avoided mutilation of the remains and reduced the delay in transporting samples and communicating results between two widely dispersed laboratories.

Defendants originally informed this Court that DNA testing would require 90 to 120 days to accomplish, a time well exceeding the five days demonstrated by a non-government laboratory in a similar WWII MIA case.

Defendants have substantially exceeded the estimated time provided to this Court and have provided no further date of estimated completion.

Defendant's apparent inability to identify the subject remains, meet their own projected timeframes for identification or to even provide complete and truthful status reports provide reason to return this case to the active docket. Defendants have failed to use every available

resource to complete the disinterment and DNA testing as quickly and efficiently as possible as ordered by this Court.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party seeking summary judgment has the initial burden of showing that there is no genuine issue of material fact. (See *Adicks v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S. Ct. 1598 (1970); *Zozlow v. MCA Distributing Corp*., 693 F.2d 870, 883 (9th Cir. 1982)). Once the moving party has met its burden by presenting evidence that would entitle the moving party to a directed verdict at trial, the burden shifts to the responding party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. (*Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-51 (1986); see also *Cal. Arch. Bldg. Prod., Inc., v. Franciscan Ceramics, Inc*., 818 F.2d 1466, 1468 (9th Cir. 1987)).

A material fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. (*Anderson*, 477 U.S. at 248 - 249, *see also SEC v. Seaboard Corp.,* 677 F.2d 1301, 1306 (9th Cir. 1982)). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986) (quoting *First National Bank of Arizona v. Cities Service Co*., 391 U.S. 253, 289 (1968))).

"[T]he dispute about a material fact is "genuine" ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." (*Anderson*, 477 U.S. at 477). There is no such dispute regarding any fact underlying Plaintiff's procedural due process claim. Each can be found in Defendants' own records or the public record. And, as discussed at length

below, given those facts and the overwhelming law in his favor, no reasonable fact finder could return a verdict for Defendants on Plaintiff's procedural due process claim, which is as simple as it is certain: Defendants have no published policy or procedure under which families can submit new evidence of identity or petition for the return of the remains of a deceased family member buried in an overseas ABMC cemetery.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*quoting Richardson v. Belcher*, 404 U.S. 76, 80-81 (1971); *Richardson v. Perales,* 402 U.S. 389, 401-402 (1971); *Flemming v. Nestor,* 363 U.S. 603, 611 (1960)) Courts "examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, [and] the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citation omitted). Unlike *Mathews*, where the adequacy of due process was in question, in this case Plaintiff has been afforded no due process at all because Defendants have no policy except informal policies to deny identification and return of all unidentified remains.

IV. ARGUMENT

[The Supreme Court] consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. (*Mathews* at 333) The initial determination [requires] something more than an *ex parte* proceeding before a court clerk. (*Id*. at 334) The very essence of due process is "the opportunity to be heard before an impartial decision maker" (*Goldberg v. Kelly* 397 U.S. 254, 269) and that the "decisionmaker's conclusion

as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing." (*Id*. at 271)

1. Defendants concede that families have a right to possession of the identified remains of their family members, but argue that they have no obligation to identify remains.

While Defendants do not deny their obligation to "account" for Private Kelder, Defendants aver that "accounting" does not include an obligation to identify remains and therefore they have no obligation to return any remains until they are identified. (Mot. Dismiss ECF No. 47 at 7)

Indeed, elsewhere, Defendants admit that, "[I]dentification of remains, [is] a necessary predicate to any return of such remains." (*Id*. at 36)

Just as the officials in Williamson and Bass were charged with administering Department of Agriculture programs, federal defense officials are charged with administering programs for identifying the remains of deceased military personnel. *Williamson v. United States Dep't of Agric*., 815 F.2d 368, 381 (5th Cir. 1987) (quoting *Bass v. United States Dep't of Agric*., 737 F.2d 1408, 1415 (5th Cir. 1984)). (Mag Rpt&Rec ECF No. 30 at 15)

> 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

10 USC § 1513(3)-Definitions

> **Treatment as Missing Persons**.—Each unaccounted for person covered by subsection (a) shall be considered to be a missing person for purposes of the applicability of other provisions of this chapter to the person.

10 USC § 1509(c)

This Court has previously addressed Defendant's argument that they have no obligation to identify remains.

> "For purposes of leave to amend, plaintiff has sufficiently alleged that *the Deputy Assistant Secretary of Defense has a duty with regard to identifying the remains of unaccounted-for members of the armed forces from World War II* and that, to the extent these duties are owed to private persons, he qualifies as acting primary next of kin." [emphasis added]

Order ECF No. 34 at 17

2. Plaintiff's Case is not Mooted by Defendant's Preemptive Exhumations.

Defendants have suggested that Plaintiff's case became moot upon their unilateral decision to preemptively disinter the remains rather than comply with Plaintiff's valid Requests for Production of documents and remains. (ECF No. 64)

Plaintiff's complaint did not seek exhumation of the X-816 remains. Rather, Plaintiff's complaint simply petitioned this Court to evaluate the evidence presented and declare that remains X-816 were those of Pvt Arthur H. Kelder.[2] Defendants can not moot this issue simply by claiming that Defendants intend to identify the remains at some undesignated time in the future. The only thing Defendants have proved to date is their inability to identify remains which should be relatively easy to identify if they used modern testing protocols.

Further, Defendants actions have resulted in concealing the remains and avoiding the independent testing proposed by Plaintiff in his Motion to Compel. (ECF No. 72 at 3). Such independent testing using nuclear DNA would likely have resolved the identification issue in a matter of days. Instead, Defendants, who had previously had nearly seventy years and failed to

[2] In addition to Plaintiff's original and amended complaints, Plaintiff also filed a Motion for Declaratory Judgment (ECF Doc. No. 24) specifically requesting a declaration of the identity of unidentified remains X-816 as those of Arthur H. Kelder. This motion was denied on other grounds.

identify the remains, have demonstrated their inability to do so within the additional time period they requested.

Defendants have been granted the time in which they claimed they would be able to identify the remains and they have failed. They have provided no explanation for their difficulties nor have they complied with the Court's instruction to appraise the court of the status of their examination. Just as they withheld investigative reports which supported Plaintiff's claims, they have provided bogus excuses for their inability to obtain DNA from the remains. Perhaps most importantly, they have refused to comply with the Court's instruction "to use every available resource to complete the disinterment and DNA testing as quickly and as efficiently as possible. (Order ECF No. 84 at 2)

Because of Defendant's refusal to comply with discovery, Plaintiff's litigation can not now be moot until all of the X816 remains are, or are not, confirmed to be those of Arthur H. Kelder and the possibility of commingling or missing portions are resolved.

Defendants, by their preemptive actions and failure to comply with a valid request to produce the remains, have continued to deprive Plaintiff of possession of the remains of his family member.

Defendants are responsible for numerous (and on-going) violations of Plaintiffs rights under the Due Process Clause. Plaintiff is therefore entitled to an effective remedy to prevent further violations.

The Supreme Court has made it clear that where, as here, a Defendant suddenly ceases unconstitutional conduct after years of pursuing it and only after suit has been filed, a district court should issue a permanent injunction on behalf of the plaintiff to guard against a resumption of the misconduct. The law is a jealous mistress, and infidelity is not quickly forgotten. A

defendant's post-filing cessation of unconstitutional behavior, the Supreme Court has held, can render moot a request for injunctive relief only if "(1) it can be said with assurance that 'there is no reasonable expectation ...' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. '"*County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co*., 345 U.S. 629, 633 (1953)); *see also Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012) ("mere voluntary cessation of a challenged action does not moot a case. Rather a case becomes moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (citation omitted)), *cert. denied*, 133 S. Ct. 124 (2012)

Moreover, the burden of proof falls on the defendant to demonstrate "that there is no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.,* 345 U.S. at 636; *see also Strutton*, 668 F.3d at 556 ("The burden of showing that the challenged conduct is unlikely to recur rests on the party asserting mootness."). This burden of proof "is a heavy one." *County of Los Angeles,* 440 U.S. at 631; *see also Ctr. for Spec. Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (rejecting a claim for mootness made by state officials on the grounds that they did "not meet the heavy burden to show mootness."). A defendant cannot satisfy this burden merely by showing that the behavior has ceased. Rather, the defendant can prevail only by showing that the wrongful behavior has been *irrevocably* eradicated. *Gwaltney v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 66 (1987) (quoting *Unites States v. Phosphate Export Ass'n, Inc.,* 393 U.S. 199, 203 (1968)) ("The defendant must demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"); *see also Landford v. Sherman,* 451 F.3d 496, 503 (8th Cir. 2006) (holding that a case was not moot where the defendant remained free to return to his old ways).

If this lawsuit sought injunctive relief against an overcrowded jail and, in response to the lawsuit, the defendants constructed a much larger jail, plaintiffs' request for injunctive relief would likely become moot due to the immutable nature of the improvement. *See Bell v. Wolfish,* 441 U.S. 520, 542 n.25 (1979). On the other hand, where (as here) a defendant is free to return to his old ways at any time, then the defendant cannot possibly prove "with assurance" that the harm will not be repeated, and in that situation a permanent injunction must issue. *See City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982); *Green v. County School Board,* 391 U.S. 430, 438 (1968) (holding that the cessation of unconstitutional conduct will not render moot a request for injunctive relief unless the defendant proves that the illegal system has been eradicated "root and branch").

3. Defendants have no policy providing for due process to families in recovering the remains of their deceased family members.

The sad fact is that Defendants have deprived thousands of families of missing American servicemen of due process in the return of their family members. In about 1950, they sent each family of a missing serviceman a letter which concluded with the following promise:

> "After a detailed study of the negative results of the investigations and the pertinent facts regarding the case, the Department of the Army has been forced to conclude that the remains of your son are not recoverable. I wish to assure you that, should any additional evidence come to our attention indicating that his remains are in our possession, you will be informed immediately."

Kelder IDPF, Pl. Ex. 16F at 6. (Similar letters in other IDPFs Pl. Ex. 16A thru 16N)

Defendant's promise to share information was false when it was made, as they knew exactly where the remains were when those words were written, but they simply had not individually identified them for various reasons. Defendants have continued to conceal the remains for nearly seventy years. And even when family members provided the evidence

Defendants had negligently failed to obtain, Defendants refused to consider the new evidence or return the remains for burial by the family.

Defendants have intentionally deprived Plaintiff and thousands of other citizens of a process for them to present new evidence. Defendants have not simply refused to consider new evidence, they actively concealed evidence provided by their own employees which supported Plaintiff's position. (Plf Mo Complete Admin Record, ECF No. 15)

In 2011, Plaintiff formally petitioned under the provisions of Army Regulation 638-2 for consideration of new evidence concerning the identification of the remains of Arthur H. Kelder. (Pl. Ex. 9, 10, 11, 12) Defendants falsely responded that this provision of AR638-2 had been superseded by statute.

Defendants deny due process, and will continue to do this in the future, because they have no policy which requires them to provide due process in the return of deceased human remains. The importance of a written policy on this issue was discussed in a recent report by the Department of Defense Office of the Inspector General which stated:

> "The DoD lacks a Department-wide disinterment policy that facilitates the identification of the remains of the thousands of U.S. service personnel killed in past wars who remain buried as "unknowns."
> ....
> As a result, there has been confusion between the Services and resulting inaction within the accounting community organizations due to the lack of a clear definition of authorities and processes for disinterring missing personnel currently buried as "unknowns." Consequently, the DoD accounting community has been unable to pursue an aggressive plan for disinterring remains designated as "unknowns," preventing resulting MIA identifications and appropriate repatriations."

Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Community (Report No. DODIG- 2015-001), dated October 17, 2014, page 25 [3]

[3] http://www.dodig.mil/pubs/documents/DODIG-2015-001.pdf (last viewed Jan 3, 2015)

However, Defendants operations are so dysfunctional that even they can not determine if there is a policy or what it is. On February 15, 2013 Defendants filed with this Court a Supplemental Administrative Record which included Under Secretary of Defense Walter B. Slocombe memorandum, Dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification and represented to this Court that this was the currently existing policy concerning disinterment for identification of unidentified remains. (the so called "Slocombe Memo") (Supp Admin Record ECF No. 13, document 2). Defendants again asserted that the applicable policy was set forth in the "Slocombe Memo" in their Motion to Dismiss. (ECF No. 47 at 12)

Subsequently, on July 7, 2014 when Defendants felt they were better served to deny the existence of such a policy, they submitted the declaration of Kelly E. Fletcher which stated:

> "As discussed below, during this period, DPMO was processing disinterment actions involving remains from unidentified graves using an informal process, i.e., using procedures that had not been formalized by law, regulation of [sic] other issuance."

Fletcher Declaration, ECF No. 64-1, ¶ 6

In October 2014, the above referenced DoD IG report stated:

> "However, the DoD OIG assessment team could identify only one possible DoD disinterment policy statement, described in a 1999 memo written by a former USD(P). The policy memo is classified as a directive-type memorandum; however, according to DoD Instruction 5025.01, directive-type memorandums are effective for no more than six months from the date signed, unless an extension is approved by the Director of Administration and Management or it is subsequently incorporated into a DoD instruction. Therefore, even if USD(P) was once authorized to issue disinterment policy, the memorandum is no longer in effect since it was neither extended nor eventually incorporated into a DoD instruction."

Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Community (Report No. DODIG- 2015-001), dated October 17, 2014, page 25

In 2010, Defendants issued a policy memorandum titled Policy Guidance on Prioritizing Remains Recovery and Identification. (Pl. Ex. 7) This policy effectively denies identification of

Unknowns (which it euphemistically refers to as "previously recovered and unidentified remains") and suffers from the same lack of regulatory basis.

Although due process tolerates variances in procedure "appropriate to the nature of the case," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. . *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

"[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863) "Parties whose rights are to be affected are entitled to be heard.") This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment …" *Fuentes*, at 80-81 (1972) Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)

V. CONCLUSION

Defendants are responsible for numerous (and on-going) violations of Plaintiffs rights under the Due Process Clause. Plaintiff is therefore entitled to an effective remedy to prevent any further violations.

Defendants will likely contend that the Court should not grant any remedy to Plaintiff with respect to those practices that Defendants recently abandoned, regardless of how many years those practices existed, despite how tenaciously Defendants defended them in their motions to dismiss, despite the irreparable harm these practices have caused, despite how quickly Defendants could return to their old ways once this case ends, and despite the fact that Defendants abandoned these practices only after this lawsuit was filed and their motions to dismiss were denied. If Defendants make that request, it should be denied.

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); *BresgaI 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). Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action. "Meyer v. Brown & Root Const. Co., 661 F. 2d 369 (5th Cir 1981); see also *Gregory v. Litton Systems, Inc.,* 472 F.2d 631 (9th Cir. 1972)

For the reasons stated, the Court should grant Plaintiff's motion for summary judgment on his procedural due process claim. Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against the Defendants and award the Plaintiff appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2015, 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
Counsel for Defendants

And caused a copy to be sent, by U.S. Mail, to:

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/s/ *John Eakin*
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