

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

JOHN A. PATTERSON, JOHN BOYT, §  
JANIS FORT, RUBY ALSBURY, §  
RAYMOND BRUNTMYER, §  
JUDY HENSLEY, and DOUGLAS KELDER, §

*Plaintiffs,* §

v. §

Civil Action No. SA-17-CV-467-XR

DEFENSE POW/MIA ACCOUNTING §  
AGENCY; KELLY MCKEAGUE, §  
in his official capacity as Director of the §  
DPAA; U.S. DEPARTMENT OF DEFENSE; §  
JAMES MATTIS, in his official capacity as §  
Secretary of Defense; AMERICAN §  
BATTLE MONUMENTS COMMISSION; §  
and ROBERT DALESSANDRO, in his §  
official capacity as acting Secretary of the §  
American Battle Monuments Commission, §

*Defendants.* §

**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION**

**PROPOUNDING PARTIES:** John A. Patterson ("Patterson"), John Boyt ("Boyt"), Janis Fort ("Fort"), Ruby Alsbury ("Alsbury"), Raymond Bruntmyer ("Bruntmyer"), Judy Hensley ("Hensley"), and Douglas Kelder ("Kelder") (collectively "Plaintiffs")

**RESPONDING PARTIES:** Defense POW/MIA Accounting Agency ("DPAA"), Director of the DPAA Kelly McKeague, United States Department of Defense, Secretary of Defense James Mattis, American Battle Monuments Commission ("ABMC"), and acting Secretary of the ABMC Robert Dalessandro (collectively "Defendants")

**SET NUMBER:** One

## **REQUESTS TO PRODUCE AND INSPECT**

Plaintiffs request that, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendants respond within 30 days of service to the following requests in accordance with the definitions and instructions provided herein.

### **I. DEFINITIONS**

1. When applicable, words not defined in this section shall be defined in accordance with Local Rule CV-26(b).

2. “Defendants,” “You,” “Your,” and “Yours” means and refers to Defendants, which includes Defendants’ officers, directors, employees, agents, representatives, predecessors, successors, assigns, subsidiaries, and/or affiliates.

3. “Relating to,” and any derivative thereof, means containing, constituting, considering, comprising, discussing, regarding, describing, reflecting, studying, commenting or reporting on, mentioning, analyzing, or referring, alluding, or pertaining to, in whole or in part.

4. “Document” means any written, recorded, or graphic material of any kind, whether prepared by you or by any other person, that is in your possession, custody, or control. The term includes agreements; contracts; letters; telegrams; inter-office communications; memoranda; reports; records; instructions; specifications; notes; notebooks; scrapbooks; diaries; plans; drawings; sketches; blueprints; diagrams; photographs; photocopies; charts; graphs; descriptions; drafts, whether or not they resulted in a final document; minutes of meetings, conferences, and telephone or other conversations or communications; invoices; purchase orders; bills of lading; recordings; published or unpublished speeches or articles; publications; transcripts of telephone conversations; phone mail; electronic-mail; ledgers; financial statements; microfilm; microfiche; tape or disc recordings; and computer print-outs.

The term "document" also includes electronically stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The term "document" includes all drafts of a document and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original. The term also includes information stored in, or accessible through, computer or other information retrieval systems (including any computer archives or back-up systems), together with instructions and all other materials necessary to use or interpret such data compilations.

Without limitation on the term "control" as used in the preceding paragraph, a document is deemed to be in your control if you have the right to secure the document or a copy thereof from another person.

5. The terms "each" and "every" include the term "each and every." "Any" shall include the term "any and all."

6. The singular of words includes the plural and the plural includes the singular. Masculine, feminine, or neuter pronouns include the other gender(s).

7. The terms "and," "or," "and/or" are meant to be inclusive and refers to both either as well as both persons and things identified.

8. "Including," means including, but not limited to.

9. "Unknown" or "Not Identified" refers to any human remains the identity of which Defendants contend is unknown or which have been designated by Defendants as non-recoverable. This includes remains currently interred in a designated cemetery or stored in a designated identification laboratory.

10. “Knowns” refers to any human remains the identity of which has been determined by Defendants, correctly or incorrectly.

11. “X numbers” or “X files” are the reference numbers assigned to allegedly unidentified remains or the documents pertaining to them.

12. References to the following named deceased military personnel include the associated X numbers and graves as indicated:

a. Fort, Guy O., O1005, Brigadier General  
Leyte #1 X618, Manila Maus X2322, Ft. McKinley grave L-8-113

b. Stewart, Loren P., O5881, Colonel  
Manila #2 X3629, Manila Maus X1298, Ft. McKinley grave N-15-19

c. Nininger, Alexander R., O23761, 1st Lieutenant  
Manila #2 X1130, Manila Maus X4685, Ft. McKinley grave J-7-20

13. References to the following named deceased military personnel or grave numbers include, but is not limited to, the listed persons, remains (X numbers) or grave numbers provided below the respective names:

a. Cabanatuan Grave 407, Hansen, David C. 16006593, Private First Class

Cabanatuan C751	Manila #2 X1960	Manila Maus X4538	Ft. McKinley grave H-11-107
Cabanatuan C752	Manila #2 X1961	Manila Maus X4539	Ft. McKinley grave B-15-168
Cabanatuan C753	Manila #2 X2028	Manila Maus X4540	Ft. McKinley grave A-8-60
Cabanatuan C754	Manila #2 X2029	Manila Maus X4541	Ft. McKinley grave A-14-15
Cabanatuan C755	Manila #2 X2031	Manila Maus X4543	Ft. McKinley grave N-2-185
Cabanatuan C756	Manila #2 X2030	Manila Maus X4542	Ft. McKinley grave B-5-138
Cabanatuan C757	Manila #2 X2032	Manila Maus X4544	Ft. McKinley grave D-14-159
Cabanatuan C758	Manila #2 X2033	Manila Maus X4545	Ft. McKinley grave D-1-26
Chmielewski, Raymond	39677368		Ft. McKinley grave ML-H-5-125
Garrison, Russell S.	39006535		Ft. McKinley grave ML-N-3-66
Kintz, Frank J. Jr.	6583375		Ft. McKinley grave ML-L-4-80
Mumford, William M.	11020601		Ft. McKinley grave ML-B-12-18
Edwards, Wade	39602557		Ft. McKinley grave ML-B-5-18
Hudson, Isaac L.	6397156		Ft. McKinley grave ML-H-4-98
Duncan, William J.	17030911		Ft. McKinley grave HN-Q-1-268
Bartlett, Arnold L.	11015710		Identified
Curry, John M.	W2101050		Identified
Agren, Harold E.	O381592		Identified

Williams, James R.	20843487	Identified
Heggemeier, Paul A.	6856582	Identified
Cavender, Robert B.	17030324	Identified
Craig, Clement D.	18010396	Identified
Marx, Clyde F.	16003014	Identified
Bright, Jack R.	18029826	Identified
Pheil, Raymond C.	13024675	Identified
Tipton, Verl J.	14037510	Identified
Bolton, Lewis B.	14029519	Not Identified
Hansen, David C.	16006593	Not Identified
Worley, Heber R.	19057074	Not Identified
Wrigley, Harry G.	365177	Not Identified
Kramer, Kenneth L.	19016258	Not Identified
Webb, Malcolm S.	5047087	Not Identified
Nelson, Norman L.	19028268	Not Identified
Curd, Charles W.	11009103	Not Identified
Lynch, Condia	14047096	Not Identified

b. Cabanatuan Grave 704, Bruntmyer, Lloyd R. 19048914, Technician 4th Class  
 Manila #2 X0605, Manila Maus X4557, Cabanatuan C195, Ft. McKinley grave H-12-110  
 Manila #2 X0672, Manila Maus X4552, Cabanatuan C196, Ft. McKinley grave H-11-147  
 Manila #2 X0673, Manila Maus X4553, Cabanatuan C197, Ft. McKinley grave H-11-146  
 Manila #2 X0675, Manila Maus X4554, Cabanatuan C199, Ft. McKinley grave H-11-144  
 Manila #2 X0676, Manila Maus X4555, Cabanatuan C200, Ft. McKinley grave H-11-134  
 Manila #2 X0677, Manila Maus X4556, Cabanatuan C201, Ft. McKinley grave H-10-129  
 Manila #2 X0678, Manila Maus X4557, Cabanatuan C202, Ft. McKinley grave H-10-130  
 Manila #2 X3156, Manila Maus X2454A/B, Cabanatuan C198, (erronously designed Manila  
 Cem #2 X694), Ft. McKinley grave H-8-146  
 Manila Mausoleum X4551

Bruntmyer, Lloyd R.	19048914	Not Identified
Erwin, Kennith G.	18049796	Not Identified
Clark, Walter	19053642	Not Identified
Doyash, Harold W.	USMC	Not Identified
Winters, Charles B.	6664117	Not Identified
Smith, Harry J.	6671009	Not Identified
Hennessy, Harland	32092573	Not Identified
Calkins, William K.	19020998	Not Identified
O'Hara, Thomas W.	32115031	buried about Dec 7, 1949, Long Island National Cemetery, Farmingdale, NY
Blaho, Paul	7022718	buried about Dec 20, 1947, Irwin Union Cemetery, Irwin, PA

c. Cabanatuan Grave 717, Kelder, Arthur H. 36016623, Private  
 Nichols, Harvey A. 7009171 partial remains stored at DPAA CIL  
 Gutierrez, Juan E. 20843125 partial remains stored at DPAA CIL  
 Hanscom, Lawrence 6137280 partial remains stored at DPAA CIL

Bain, Daniel C.	33035131	partial remains stored at DPAA CIL
Collins, Fredrick G.	6578818	partial remains stored at DPAA CIL
Simmons, George G.	19019886	partial remains stored at DPAA CIL
York, George S	Civilian	partial remains stored at DPAA CIL
Kovach, John	20500764	partial remains stored at DPAA CIL
Hirschi, Harold S.	19038407	partial remains stored at DPAA CIL
Lobdell, Lloyd J.	20645267	partial remains stored at DPAA CIL
Overbey, Evans E.	13035026	partial remains stored at DPAA CIL
Ruark, John W.	278681	partial remains stored at DPAA CIL
Waid, Charles M.	19049058	partial remains stored at DPAA CIL
Kelder, Arthur H.	36016623	partial remains stored at DPAA CIL

Cabanatuan Cemetery unknowns C272 thru C284 inclusive

Manila #2 unknowns X812 thru X824 inclusive

Manila Mausoleum unknowns X4849 thru X4858

Manila American Military Cemetery, formerly known as Ft. McKinley Cemetery, graves N-2-69, N-14-78, L-14-49, A-12-195 11, C-5-78, N-5-187, C-9-78, N-14-93, N-11-97, N-11-190

Cabanatuan Burial Roster # 2267 thru 2279 inclusive

d.	Cabanatuan Grave 822, Morgan, Robert R., 18025313, Private		
Manila #2 X470	Cabanatuan C72	Manila Maus X4094	Ft. McKinley grave C-12-83
Manila #2 X471	Cabanatuan C73	Manila Maus X4095	Ft. McKinley grave N-6-187
Manila #2 X472	Cabanatuan C74	Manila Maus X4096	Ft. McKinley grave H-7-135
Manila #2 X473	Cabanatuan C75	Manila Maus X4097	Ft. McKinley grave N-13-187
Walker, James M.	2368077	Not Identified	
Pruitt, Blanchard E.	18060257	Not Identified	
Morgan, Robert R.	18025313	Not Identified	
Schopp, Erwin H.	17012216	Not Identified	
Wood, Allen W.	37025869	Identified	

## II. INSTRUCTIONS

1. Plaintiff reserves the right to conduct destructive and/or consumptive testing on documents and tangible things produced to Plaintiff. The time, place, and proposed test protocol will be provided to Counsel for Defendants at least fourteen (14) days in advance of any such testing.

2. Data primarily archived by Defendants in an electronic format must be provided to Plaintiff in a similar format usable by Plaintiff. All “electronically stored information” (ESI) must be forensically identical to the original including all metadata and dates of creation or modification.

Such data may be provided on portable hard disk drives, DVD's or other mutually agreeable format providing no data or information is modified or lost. Electronically stored data which requires proprietary software to access may be provided in a generic file format such as comma delimited (.csv) if complete data schema is provided which enable reconstruction of the table structure.

3. As used herein, the terms "Document" or "Documents" shall include "things" as well as "ESI." All documents, things and ESI responsive to a request should be produced, including, without limitation, each copy of an original that differs in any way from the original, whether such difference is caused by deletions, markings on the front or back, format, or any other cause.

4. While portable document format (.PDF) files are preferred in lieu of any other type of photographic reproduction or copy, the submission on any non-original document includes a waiver of any objection as to the authenticity of said electronic copy as true and original copies of the originals, should such copies be offered into evidence. Submission of such copies or reproductions shall constitute such a waiver and the submitting party is thereafter precluded from tendering an objection. Absent such waiver, only original documents should be submitted.

5. Documents and things produced in response to these requests shall be produced together with copies of file labels, dividers, and other identifying markers with which they were associated in the ordinary course of business.

6. Documents, things and ESI produced in response to these requests shall be produced in their entirety, without abbreviation or expurgation, and without redacting any portion therefrom.

7. Documents, things and ESI produced in response to these requests shall be specifically identified or described and further identified as to the request number to which it is responsive.

8. Documents, things and ESI produced in response to multiple requests shall indicate each and every request to which they are responsive.

9. Documents, things and ESI produced in response to these requests shall be produced in a form that renders the material intelligible, legible, and/or capable of reproduction.

10. If any request herein cannot be complied with in full, it shall be complied with to the extent possible, and you should explain why full compliance is not possible.

11. If there are responsive documents, things or ESI within your possession, custody, or control that are privileged or otherwise cannot be produced, please so state. For each such document, thing or ESI, please prepare and submit to Plaintiff a log identifying all information that you contend supports your claim that such information must be withheld, including, without limitation, the following: (a) the privilege(s) or reason(s) for withholding production; (b) the nature of the document or thing (letter, memorandum, handwritten notes, software, audio recording, etc.); (c) date; (d) author(s) and recipient(s); (e) each person to whom such information was available; (f) a general description of the subject matter; and (g) "Bates" or production control numbers. Provide said log at the time of production.

12. Documents, things and ESI produced in response to these requests may be responsive to more than one request. The presence of such duplication shall not be interpreted to narrow or limit the scope of each request. Where a document, thing or ESI is responsive to more than one request, only one copy may be produced. However, you must identify each request to which the duplicate document or thing is responsive.



13. If any requested document, thing or ESI is no longer in your possession, custody, or control, state in detail all of the reason(s) why and identify each such responsive document or thing by author, date, subject matter, addressee, audience, and/or recipient, the number of pages and, where applicable, any other indicator of volume or size.

14. These document requests are continuing so as to require supplemental production as required by the Federal Rules of Civil Procedure.

### **III. DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS REQUESTED**

You are requested to produce and permit Plaintiffs to inspect and copy and to test or sample the following documents, including electronically stored information, and tangible things:

1. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Alexander R. Nininger, including his medical records;
- b. The remains designated as X-1130 by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave J-7-20.

#### **RESPONSE TO REQUEST NO. 1:**

2. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Loren P. Stewart, including his medical records;
- b. The remains designated as X-3629 by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave N-15-19.

#### **RESPONSE TO REQUEST NO. 2:**

3. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Guy O. Fort, including his medical records;
- b. The remains designated as X-618 Leyte #1 Cemetery by the U.S. Army Graves Registration; and
- c. Manila American Cemetery Grave L-8-113.

**RESPONSE TO REQUEST NO. 3:**

- 4. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:
  - a. The death and/or burial of Robert R. Morgan, including his medical records;
  - b. Cabanatuan Grave 822; and
  - c. All remains buried in Manila American Cemetery Graves located at Plot 2, Row 15, Manila No. 2.

**RESPONSE TO REQUEST NO. 4:**

- 5. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:
  - a. The death and/or burial of Lloyd Bruntmyer, including his medical records; and
  - b. Cabanatuan Grave 704.

**RESPONSE TO REQUEST NO. 5:**

- 6. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:
  - a. The death and/or burial of David Hansen, including his medical records; and
  - b. Cabanatuan Grave 407.

**RESPONSE TO REQUEST NO. 6:**

7. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to:

- a. The death and/or burial of Arthur H. Kelder, including his medical records; and
- b. Cabanatuan Grave 717.

**RESPONSE TO REQUEST NO. 7:**

8. All documents related to your current policies and/or rules concerning disinterment of unknown army service members.

**RESPONSE TO REQUEST NO. 8:**

9. All documents related to and/or discussing the recovery and/or identification of human remains from the Cabanatuan prisoner-of-war camp cemetery. This includes burial rosters, work plans, logs, death rosters, planning documents, correspondence, reports, logs of recoveries, photographs, and any related documents.

**RESPONSE TO REQUEST NO. 9:**

10. All documents, written or recorded statements, and communications to and/or from any party to this suit since January 1, 2010, concerning and/or discussing Plaintiffs' claims against Defendants.

**RESPONSE TO REQUEST NO. 10:**

11. All documents written or recorded statements, and communications to and/or from any third-party since January 1, 2010, concerning and/or discussing Plaintiffs' claims against Defendants.

**RESPONSE TO REQUEST NO. 11:**

12. All documents related to any complaints you have received in the past five years regarding the identification of unknown remains and/or the failure to identify unknown remains.

**RESPONSE TO REQUEST NO. 12:**

13. All e-mails, written communications, or other documents since January 1, 2010, that discuss and/or concern any of the Plaintiffs, the Plaintiffs' families, and/or the Plaintiffs' claims in this lawsuit.

**RESPONSE TO REQUEST NO. 13:**

14. If you contend that Plaintiffs have not already identified the location of the remains at issue in this lawsuit, produce all documents that you allege support your contention that the remains at issue have not been identified.

**RESPONSE TO REQUEST NO. 14:**

15. All records, memoranda, notations, statements, summaries, and all other documents or electronically stored information relating to the matter in controversy that you obtained from, or as a result of interviewing, any persons who purport to have knowledge of the matter in controversy.

**RESPONSE TO REQUEST NO. 15:**

16. All documents, family reference samples, and/or tangible things pertaining to human DNA obtained from family members that may assist in the identification of the remains described in Request No. 22, which can be found below.

**RESPONSE TO REQUEST NO. 16:**

17. Produce all documents and/or tangible things that include contact and/or genealogical information pertaining to relatives of each of the remains described in Request No. 22, below, or who can reasonably be associated with those remains.

**RESPONSE TO REQUEST NO. 17:**

18. All documents prepared by any person in connection with your response to these document requests.

**RESPONSE TO REQUEST NO. 18:**

19. Each document index you prepared in responding to these document requests.

**RESPONSE TO REQUEST NO. 19:**

20. All documents related to the recovery, identification, and/or disinterment of unknown remains from Manilla American Cemetery since January 1, 2017. You must supplement production to this request should new information becomes available.

**RESPONSE TO REQUEST NO. 20:**

21. All personnel files, including those described by 10 U.S.C. § 1506, concerning and/or related to the following persons or remains:

- a. Alexander R. Nininger;
- b. Loren P. Stewart;
- c. Guy O. Fort;
- d. Remains recovered from Cabanatuan Grave 822, including Robert R. Morgan;
- e. Remains recovered from Cabanatuan Grave 704, including Lloyd R. Bruntmyer;
- f. Remains recovered from Cabanatuan Grave 407, including David C. Hansen; and
- g. Remains recovered from Cabanatuan Grave 717, including Arthur H. Kelder.

**RESPONSE TO REQUEST NO. 21:**

22. You are requested to produce and permit Plaintiffs to inspect, examine, test (this includes DNA testing), and/or sample the following remains:

a. The remains designated as Manila #2 X-1130, Manila Maus X4685, Manila American Cemetery Grave J-7-20 or believed to be those of Nininger, Alexander R., O23761, 1st Lieutenant.

b. The remains designated as Manila #2 X-3629, Manila Maus X1298, Manila American Cemetery Grave N-15-19 or believed to be those of Stewart, Loren P., O5881, Colonel.

c. The remains designated as Leyte #1 X618, Manila Maus X2322, Manila American Cemetery Grave L-8-113 or believed to be those of Fort, Guy O., O1005, Brigadier General.

d. Any remains recovered from Cabanatuan Grave 822 that you claim have not been identified.

e. Any remains recovered from Cabanatuan Grave 704 that you claim have not been identified.

f. Any remains recovered from Cabanatuan Grave 407 that you claim have not been identified.

g. Any remains recovered from Cabanatuan Grave 717 that you claim have not been identified.

h. Any remains recovered from Cabanatuan Grave 717 that are being held in storage at an identification laboratory by Defendants or that have not been returned to their respective next-of-kin.

**RESPONSE TO REQUEST NO. 22:**

**IV. TIME, PLACE, AND MANNER FOR COMPLIANCE**

The production of the documents will take place within ten days of Defendants' response to the above requests. The documents will be produced at the Law Office of John True Smithee, Jr., whose mailing address is 1600 McGavock St., Suite 214, Nashville, TN 37203. The production

of the remains identified in Request No. 20 for inspection and testing will take place within 60 days of your receipt of these requests. As Defendants have indicated that they do not wish to give full possession of the remains to Plaintiffs, the remains will be produced and properly kept at a U.S. Army base and/or property located within 30 miles of San Antonio, Texas. The inspections, examinations, and testing will take place at a mutually agreed time once the remains are exhumed and produced. The inspections, examinations, and testing will be completed in a reasonable time.

DATED this 15th day of February, 2019.

Respectfully submitted,

/s/ John T. Smithee, Jr.

JOHN T. SMITHEE, JR. (*admitted pro hac vice*)  
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TN State Bar No. 36211  
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/s/ Ron A. Sprague

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 15th day of February 2018, a true and correct copy was delivered as follows:

<b>Galen Thorp</b> U.S. Department of Justice Civil Division, Federal Programs Branch 950 Pennsylvania Ave., NW Washington, DC 20530 202-514-4781 Email: galen.thorp@usdoj.gov ATTORNEY FOR DEFENDANTS	Via Electronic Delivery: <b>X</b> Certified Mail, Return Receipt Requested: United States Regular Mail: Overnight Mail: Via Facsimile Transmission: Via Hand-Delivery:
<b>Mary F. Kruger</b> United States Attorneys Office 601 NW Loop 410, Suite 600 San Antonio, TX 78216 210-384-7300 Fax: 210/384-7322 Email: mary.kruger@usdoj.gov ATTORNEY FOR DEFENDANTS	Via Electronic Delivery: <b>X</b> Certified Mail, Return Receipt Requested: United States Regular Mail: Overnight Mail: Via Facsimile Transmission: Via Hand-Delivery:

/s/ John T. Smithee, Jr.

\_\_\_\_\_  
John T. Smithee, Jr.