

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,

*Plaintiffs,*

v.

DEFENSE POW/MIA ACCOUNTING  
AGENCY, et al.,

*Defendants.*

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

**PLAINTIFFS’ REPLY IN SUPPORT OF ADVISORY TO COURT CONCERNING  
THE PRODUCTION AND EXAMINATION OF REMAINS**

The Families<sup>1</sup> file this Reply to the Government’s<sup>2</sup> response, ECF No. 43.

**I. The Remains are Those of the Families’ Deceased Relatives – DNA Testing Will Elicit the Truth**

The Families’ claims have proven to be reliable and accurate in the past. *See Eakin v. American Battle Monuments Commission, et al.*, SA-12-CA-1002-FB-HJB. Additionally, the Government has admitted that most of the Families’ claims are likely true:<sup>3</sup>

- “Cabanatuan Common Grave 407 is the likely original location of the remains of . . . Private First Class David Hansen.” ECF No. 31 at 11-12.

<sup>1</sup> John A. Patterson (“Patterson”), John Boyt (“Boyt”), Janis Fort (“Fort”), Ruby Alsbury (“Alsbury”), Raymond Bruntmyer (“Bruntmyer”), Judy Hensley (“Hensley”), and Douglas Kelder (“Kelder”) are referred herein collectively as the “Families.”

<sup>2</sup> 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 Secretary of the ABMC William Matz are referred herein collectively as the “Government.”

<sup>3</sup> *See also* ECF No. 43 at 4 n.2 (the Assistant Secretary of Defense for Manpower and Reserve Affairs recently approved disinterment of graves associated with Cabanatuan Graves 704 and 822).

- “Cabanatuan Common Grave 704 is the likely original location of the remains of . . . Technician Lloyd Bruntmyer.” ECF No. 31 at 11.
- “Cabanatuan Common Grave 822 is the likely original location of the remains of . . . Private Robert Morgan.” ECF No. 31 at 12.
- “Cabanatuan Common Grave 717 is the likely original location of the remains of . . . Private Arthur Kelder.” ECF No. 31 at 12.

The Government primarily disputes the material facts asserted by the Families in regards to only three sets of remains, which shows again why this discovery must take place - it will ultimately help the parties ascertain material facts in litigation and elicit the truth. The Government also attempts to turn this discovery dispute into a trial on the entire merits of the case, which is improper. While the Families contend that sufficient evidence exists to support the identification of the remains at issue, a DNA test will add further confirmation.

- Records show that remains X-1130 are those of 1LT Nininger. Identification was recommended five times, but disapproved because of an erroneously calculated ante-mortem height of the remains.
- Records show that remains X-3629 are those of COL Stewart. Originally, the evidence was so compelling that investigators requested COL Stewart’s dental records for comparison. Unfortunately, the request misspelled the name as “Stuart” rather than “Stewart.” The proper dental records were never obtained.
- Records show that remains X-618 are those of BG Fort. The Governor of the Philippine province of Misamis Oriental confirmed that the remains were those of BG Fort.

If the Government wishes to continue to dispute these material facts, then discovery must go forward to elicit the truth. Furthermore, if the Government claims that the DNA testing and inspection of three sets of remains will interfere with its entire operation, which uses more than \$100 million annually of the taxpayers' money, then the Government has truly failed. It is still a mystery as to why the Government refuses to work with service members' families to identify the remains of fallen soldiers from World War II.

## **II. Pvt. Kelder's Case is the Perfect Example of Why this Discovery is Necessary**

In 2012, a lawsuit was filed to obtain the remains of Pvt. Arthur H. "Bud" Kelder. *Eakin v. American Battle Monuments Commission, et al.*, SA-12-CA-1002-FB-HJB. After the Government was ordered by the court to comply with a discovery request, the Government unilaterally disinterred the remains of Pvt. Kelder and removed the remains to a laboratory in Hawaii. Pvt. Kelder's family was denied the opportunity to participate in the examination of the remains. As of this date, more than four years after Pvt. Kelder's remains were disinterred, the family has only received three bones despite nearly complete skeletal remains having been recovered. In the present case, Pvt. Kelder's family is still seeking the return of the balance of his remains for a proper burial in a family plot. The Government's identification of these three bones confirms the Families' assertion that the remains' identity can be confirmed. Additionally, Pvt. Kelder's case shows how poorly the Government has handled this operation and how little progress has been made after more than four years.

## **III. The Families Simply Need Temporary Access to the Remains, Not Custody**

The Government repeatedly argues that the Families are attempting to completely take over DPAA's entire operation, which is an extreme exaggeration of the discovery that is sought. Again, this is a discovery request. The Families primarily requested **temporary access** to the remains for

an inspection and DNA testing while the remains stayed in the custody and care of the Government. *See* ECF 28 at 12. The discovery sought does not displace or bypass any alleged statutory authority. Despite the Government's claims, it does not have a monopoly on performing DNA testing and identifying remains.<sup>4</sup> For example, PFC Lawrence Gordon's remains were identified without assistance from the Government's accounting agency. After a DNA test was performed by an independent lab, the Government accepted the fact that the remains had been identified by the independent researcher. *See* News Release attached as Exhibit A. Thus, the idea that only the Government can conduct DNA testing or identify remains is false.

#### **IV. The Advisory Illustrates What All the Families Can Do for the Discovery to Occur, Not What They Must Do**

The Advisory provided information about additional steps in the identification process to help illustrate to the Court the entire process. Because this discovery is critical to this case and necessary, the Families are willing to perform any step that the Court finds they must take to complete the inspection and testing – such as transporting the remains. The Families recognize that it is within the Court's discretion to determine how the discovery should be conducted, and have attempted to provide the Court with as much information as possible. While the Advisory included information about how the remains could be transported or cared for, the Families still believe that the most reasonable solution is for the Government to transport and maintain custody of the remains while providing the Families with access to conduct the necessary inspection. The Families sincerely hoped that the Government would work with them to reach a reasonable

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<sup>4</sup> The statute cited by the Government simply states that the Armed Forces Medical Examiner “may conduct a forensic pathology investigation to determine the cause or manner of death of a deceased person.” 10 U.S.C. § 1471(a). The cause of death is not at issue. Also, the statute uses the word “may” and does not forbid others from identifying deceased individuals.

solution. However, the Government has refused to work with the Families in any way whatsoever, which is why the Families have offered the additional information.

**V. The Majority of the Government's Response is Misplaced and Inappropriate**

The majority of the Government's response attacks the merits of the Families' claims and should be disregarded. Most of the Response has nothing to do with the information contained in the Advisory. The Government chose not to explain why they are unwilling to work with the Families to resolve this discovery dispute. Nor did the Government show that any part of the process outlined to the Court is inappropriate. Instead, the Government focuses on furthering an argument in support of its Rule 12(c) motion, and the Families object to the consideration of Sections II and III because it is improper briefing not related to the discovery request at issue.

**VI. Answering Questions About the Process**

**A. How will the DNA Sampling & Testing Take Place?**

When the Families are provided access to the remains, the Families' DNA expert, BodeCellmark, will direct the extraction of DNA from the remains. To do this, a small sample will be cut out from the skeletal remains and sent back to a laboratory for testing. For example, if appropriate, a sample may be cut from a femur bone or a tooth may be used. Once the expert has access to the remains, the appropriate sample will be taken from the skeletal remains. The Government can participate in the process and verify that an appropriate sample is cut - the Government can even perform the required extraction itself if it wishes to. This would eliminate any of the Government's concerns regarding the proper selection of samples or contamination. Additionally, before any extraction takes place, the experts can confirm that the cut will not preclude a subsequent test from being performed. The results from the DNA test will then be compared with reference samples obtained from family members of the deceased.

B. What Happens to the Remains after Discovery is Complete?

When the discovery is complete, the Families contend that it will remove any doubt that the remains are those of their family members. Presumably, the Government would concede that the Families' claims are true and allow the Families to provide a proper burial. If the Government does not concede after the discovery, then the lawsuit will proceed to trial. Again, the Families believe that it is best for the Government to maintain custody of the remains while this discovery is conducted. After the discovery is completed, the Government will be able to continue caring for the remains while the lawsuit is pending. For example, the Government disinterred Pvt. Kelder's remains over four years ago and is still maintaining custody to this day. If the Families' claims were to fail, then the Government will presumably either continue to attempt to identify the remains or reinter the remains. Of course, the Government has repeatedly advised that they intend to disinter all of the unidentified remains at Manila American Cemetery, so this action alone does not appear to unfairly prejudice or harm the Government. The Government has not presented any evidence to the Court that this discovery would cause any undue burden. Further, the Government should not consider caring for the remains of deceased service members to be a burden.

C. How much will this Discovery Cost?

The ultimate cost of this discovery depends on what the Court finds will be allowed and the Families responsible for. If the Court determines that this discovery is proper, the Families can provide a detailed estimate for each part of the discovery process that they will be responsible for and documentation showing that the necessary services have been retained or can be funded. If necessary, the discovery order could be contingent upon such a showing. It is quite possible that the majority, if not all, of what the Families will be responsible for will be provided pro bono. Nonetheless, the Families are prepared to cover the cost of the DNA testing and inspection.

**VII. The Government's Claim that the Standard for Disinterment has not been met is Without Merit**

Finally, the Government is attempting to require the Families to prove their entire case before allowing any discovery to take place. This approach is nonsensical and would preclude most plaintiffs from ever being able to conduct discovery. Additionally, the Government's claim that the Families have not met the supposed standard required for disinterment is misplaced. For example, upon information and belief, in October 2017, a person who identified himself as Roderigo D. Balagtas, Defense POW/MIA Field Investigation NCOIC, presented himself at the Catholic Church in Abucay, Bataan, Republic of the Philippines and removed remains from a tomb at the Catholic Church in Abucay, Bataan, Republic of the Philippines on the basis that some anonymous person had placed a marker on the tomb identifying it as that of 1st Lieutenant Alexander Nininger. There was no documentation as to the identity of the remains other than the plaque on the tomb. The Government removed the remains to Hawaii without proper permits and without the permission of the Church. The Government's subsequent analysis of the remains showed them to be of Filipino descent and not those of the American soldier awarded the first Medal of Honor of WWII. It appears that the Government's standards for disinterment are whatever they wish them to be at the time.

**CONCLUSION**

This is a discovery dispute. It is not a summary judgment hearing or trial. The Families are not obligated to present all of their evidence or prove each claim. They are entitled to conduct discovery that will elicit the truth and promote justice. Accordingly, the Families respectfully request that the Court grant the Families' Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination.

Dated: August 24, 2018

Respectfully submitted,

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

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**ATTORNEYS FOR PLAINTIFFS**



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 24th day of August 2018, a true and correct copy was delivered as follows:

<p><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</p>	<p>Via Electronic Delivery: <b>X</b>                  Certified Mail, Return Receipt Requested:                  United States Regular Mail:                  Overnight Mail:                  Via Facsimile Transmission:                  Via Hand-Delivery:</p>
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/s/ John T. Smithee, Jr.

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