

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

JOHN A. PATTERSON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 5:17-CV-00467
)	
DEFENSE POW/MIA ACCOUNTING)	
AGENCY, et al.,)	
)	
Defendants)	
)	

DECLARATION OF JOHN EAKIN

I, John Eakin, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I provide this declaration in response to erroneous and incomplete statements by the government concerning the identification of missing American Servicemembers and to assist the court in properly assessing my qualifications and methods.

I - EXPERIENCE

2. I am unaware of any academic courses or other training specifically related to World War II military burial practices or convincing U.S. Government agencies to fulfill their moral and legal obligations to return human remains for burial as directed by their families. However, my more than thirty years of experience as an investigator and consultant for attorneys, underwriters and government agencies have prepared me as well as one can be. Over the last ten years, I have made a diligent and effective effort to educate myself in the specific issues now before this court. A member of my family, PVT Arthur H. "Bud" Kelder, is a subject of this litigation and was the original motivation for

this avenue of study. Additionally, as a military veteran, I consider Private Kelder and all other missing servicemembers to be my brothers and I am determined that they should be properly honored for their service. I am determined that no man should be left behind.

3. In 2009, I became aware that Private Kelder was erroneously buried as one of 3,744 Unknowns buried in the Manila American Cemetery. I obtained ante-mortem information on PVT Kelder that showed a unique and positive match with a specific set of unidentified remains. When the Department of Defense refused to consider this obvious evidence of his identity, I began collecting documents on all WWII era burials of unidentified remains, consulting with other knowledgeable MIA family members, and educating myself in the burial and retrieval processes.

4. At that point, no unidentified remains had been recovered from the Manila American Cemetery since approximately 1952. Nor am I aware of any evidence that such exhumations were even contemplated by Defendants. The refusal by the Department of Defense to further investigate left me no alternative other than to file suit *pro se* in this Court to obtain the files on identified and unidentified remains. (SA-10-cv-00784-FB). These files are known as Individual Deceased Personnel Files (IDPF) and X-files. Through this litigation, I obtained not only the files relevant to the wrongful burial of my family member, but also the files pertaining to more than 10,000 WWII Unknowns. I diligently reviewed every page of more than 4,000 of these files and indexed pertinent information. Review of these files revealed not only details of individual burials, but also documented the processes and procedures in effect at the time, which were used by the American Graves Registration Service. I also collected many other documents such as burial rosters and, where appropriate, consolidated them in to

electronic databases to allow correlation and retrieval. Other civil researchers approached me to obtain these files and they shared their experience and sources with me. I have also read and analyzed literature that focuses on the burial processes and procedures that were used during and after World War II, such as Abie Abraham, *Oh, God, Where Are You?*, Vantage Press; 1st edition (1997); Abie Abraham, *The Ghost of Bataan Speaks*, Vantage Press; 2nd Edition (1971); and John E. Olson, *O'Donnell, Andersonville of the Pacific*, 1st Edition (1985). I have also studied and reviewed reports and papers prepared by Dr. Mildred Trotter, who worked for the AGRS, such as the following: Trotter, Mildred; Gleser, Goldine C. (December 1952). "Estimation of stature from long bones of American Whites and Negroes". *American Journal of Physical Anthropology*. 10 (4): 463–514.10.1002/ajpa.1330100407; Trotter, Mildred; Gleser, Goldine C. (March 1958). "A re-evaluation of estimation of stature based on measurements of stature taken during life and of long bones after death". *American Journal of Physical Anthropology*. 16 (1): 79–123. 10.1002/ajpa.1330160106. Abie Abraham and Mildred Trotter's work is still relied upon to this day and is often cited by the DPAA in its case memorandums.

5. My experience is not unlike that of the government personnel who have provided opinion testimony in this case except that I have thirty years of investigative experience rather than an academic degree in an unrelated field. My specialized and self-directed research on World War II era burials appears to have covered a slightly longer period of time than the government's expert and is more narrowly concentrated on identification of "unidentified" remains. I consider myself to be at least as qualified to address the issues involved in this case as the government's designated expert.

6. I believe my knowledge of World War II era burials and recoveries in the Philippines is at least equal to that of anyone in the world. My sources and techniques have been validated and accepted by the U.S. Government as shown by their decision to make additional Cabanatuan recoveries modeled upon my work.

II - FACTS RELEVANT TO UNIDENTIFIED PERSONNEL WHO ARE THE SUBJECTS OF THIS LITIGATION

A - Cabanatuan POW Camp Cemetery Communal Grave # 717 - Kelder

7. The Department of Defense continued to refuse consideration of the evidence establishing the identity of certain unidentified remains as those of PVT Kelder and I petitioned this court *pro se* for a Writ of Mandamus ordering identification of the remains. (SA-12-cv-1002-FB-HJB). Defendants objected strenuously and for every conceivable reason to prevent any disinterments from the Manila American Cemetery. In July, 2014, the court ordered the government to produce the remains for identification. In January, 2015, Defendants produced partial remains that they determined were those of PVT Kelder.

8. Due to improper processing of the remains by military contractors, the remains of my family member were substantially commingled with those of the total of fourteen men originally buried in Common Grave # 717 at the Cabanatuan POW camp. After nearly five years since the remains were exhumed, the Department of Defense has successfully identified only partial remains of only eight of the fourteen men associated with that common grave despite having retrieved virtually anatomically complete remains of each of the fourteen men.

9. During my investigation and litigation of these cases, I have consulted with a number of experts in the field of identification of human remains. Nearly all of them have expressed surprise and dismay at the ineffective manner in which Defendants have proceeded in these efforts. In some cases, these consultants expressed their opinion that it appeared that Defendants were deliberately avoiding accounting for unidentified remains by their arbitrary constraints on the process and by failing to employ modern scientific techniques to identify the remains.

10. One example of Defendant's deliberate obstruction of recovery and identification efforts is their refusal to adhere to their own processes such as the 1995 study by the Defense Science Board (ECF Doc 31-6, Def Exh S ¹) that continues to serve as their basic scientific validation for the use of DNA in identification of remains. This now nearly one-quarter century old study endorsed and approved the use of then state of the art mitochondrial DNA (mtDNA) for identification of human remains, then went on to describe the advantages of the use of what it termed "nuclear DNA" (nucDNA, distinct from Y-STR DNA) and directed that should the technology to extract nucDNA become available in the future, the Department of Defense should shift to what it termed a DNA lead identification process. The report went on to provide a detailed description of an outreach program employing nucDNA. Despite the fact that nucDNA has become the standard for identification of remains and is used by the Armed Forces DNA Identification Laboratory (AFDIL) for identification of current loss remains, DoD continues to refuse to employ it for WWII era losses.

¹ Report of the Defense Science Board Task Force on the Use of DNA Technology for Identification of Ancient Remains.
<https://apps.dtic.mil/docs/citations/ADA301521>, last viewed March 22, 2019

11. Since Defendant's 2015 validation of my sources and techniques by confirming the identification of Private Arthur H. "Bud" Kelder and other servicemembers originally buried in Cabanatuan POW Camp Cemetery Communal Grave # 717, Defendants have used my techniques and data sources to exhume approximately two hundred (200) other American Servicemembers who perished in the Cabanatuan POW Camp. The majority of these cases were instigated by family members of these missing persons whom I have assisted. While Defendants have been unable to identify a significant number of these remains due to their limited laboratory capacity and capability, I am unaware of any errors in the research of these graves that was supplied to Defendants. I consider these successful identifications to have validated my sources and processes. I further consider the excessive and unnecessary delay in identification of these remains to be unacceptable and evidence of their inability to properly account for more than a token number of missing American Servicemembers each year. Since more advanced identification techniques are routinely employed elsewhere, I have to suspect that Defendants' lack of competence in the recovery process is deliberate and intended to discourage requests for disinterment.

B - Cabanatuan POW Camp Cemetery Communal Graves
704 - Bruntmyer and # 822 - Morgan

12. Examples of Defendants use of my data sources and approach to accounting for certain missing American Servicemembers is very well illustrated by the three communal grave cases that are the subject of this litigation - Grave 704, Bruntmyer, Grave 822, Morgan and Grave 407, Hansen. Upon commencement of this litigation, Defendants quickly reversed their prior objections to disinterment of the men originally buried in the Cabanatuan POW Camp cemetery communal graves 704 and 822 and

recommended that they be disinterred. The individual graves of the original occupants of graves 704 and 822 were exhumed in November, 2018 and the remains transferred to Defendants identification laboratory. I consider these disinterments to be further validation of my investigations and endorsement by the government of my research.

C - Cabanatuan POW Camp Cemetery Communal Grave # 407 - Hansen

13. However, the DPAA continued to refuse to disinter the original occupants of communal grave 407 on the grounds that THEY were unable to obtain sufficient family reference samples (DNA samples from family members) to meet the ARBITRARY 60% standard they had set before proceeding with disinterments. (These additional FRS are required only because Defendants refuse to invest in the modern DNA technology that is in standard use elsewhere.) In response, I used my sources and available data to locate contacts for each of the families for which a FRS was required to meet Defendants' ARBITRARY standard. At my suggestion, one of the involved families shared this contact information with Defendants' office responsible for obtaining FRS. Defendants have now informed the court that their recommendation, presumably for disinterment, will go forward.

D - Individual Remains

14. Just as the burial roster prepared by the POW's was key in identification of remains from Cabanatuan, an estimated thirty percent to forty percent of all of the 3,744 unidentified remains buried in the Manila American Cemetery have an associated or Believed-to-Be (BTB) name associated with them.

15. In general, World War II era identification of remains required a minimum of two items of evidence such as a burial record or dog tag and agreement of other evidence such as dental and height information with ante-mortem data. In many, many cases - including those of Nininger and Stewart - the actual identity was known, but other substantiating evidence, usually dental or height, was not in agreement, or not available. My review of the files on unidentified remains found that many remains were subjected to multiple instances of "processing" by mortuary personnel including charting of the teeth. More often than not, dental charts were not recognizable as the same person from one examination and charting to the next.² I attribute this to the rudimentary techniques available and the untrained personnel doing the charting. In addition, repeated transportation and examination had caused many teeth to be dislodged and often lost completely. Most disgustingly, any teeth containing silver or gold were not shown on subsequent charts and had obviously been stolen, therefore calling in to question the security and handling of the remains.

² *Footnote to 18 January 2012 WWII Division Memo, Defendants response to Plaintiff's First Request for Production, Bates numbers DPAA0001127 and DPAA0000159*
"Lieutenant Colonel Abel and Dr. Mildred Trotter, both of whom had extensive prior experience in the identification laboratories of the Pacific theater, reviewed the Cabanatuan remains available in Hawaii and then moved on to the Philippines where they found that the identifications being put forward to the Memorial Division could not be further substantiated by studying the remains and the accompanying paperwork at the same time. Dr. Trotter was dismayed to learn the history of burials, disinterments, identifications, and reburials of the Cabanatuan casualties. She found the remains to be in a terribly eroded state, first from being buried and left in ground sodden with water for several years, and then from being handled too often during processing. She emphatically reported the remains to be "jumbled beyond belief," "eroded much beyond a state that [could] be illustrated on a black-out chart," and in "such a state of deterioration that evidence on which identification depends had been largely obliterated." Lieutenant Colonel Abel noted particular problems with the dentition. He found that the dental present with the remains did not match the tooth charts recorded in the file. Dr. Trotter and Lieutenant Colonel Abel declared the project a failure and recommended it be ended."

16. Even more distressing than Defendants' reliance on demonstrably unreliable dental evidence is the government's continued insistence on the comparison of ante-mortem height with the estimated skeletal height. Defendants frequently and selectively cite statements by Mildred Trotter, an anthropologist who directed operations in their Schofield Barracks, Hawaii mortuary facility after WWII. However, they apparently deliberately ignore the academic papers she published in the 1950's in which she demonstrated that the tables used during the World War II era were severely flawed, having been based on a 19th Century French population and were in no way relevant to a 20th Century population of American Servicemen. Her further research demonstrated the unreliability of the measurements made in the various mortuary facilities which often were not equipped with the specialized fixtures necessary to properly measure the skeletal remains.³

17. I choose, therefore, unlike Defendants, to generally disregard most dental charts and skeletal height estimates in the absence of additional substantiating evidence. The government's selective reliance on such suspect evidence taints any conclusion they may reach.

³ Trotter, Mildred; Gleser, Goldine C. (December 1952). "Estimation of stature from long bones of American Whites and Negroes". *American Journal of Physical Anthropology*. 10 (4): 463–514. [10.1002/ajpa.1330100407](https://doi.org/10.1002/ajpa.1330100407).
Trotter, Mildred; Gleser, Goldine C. (March 1958). "A re-evaluation of estimation of stature based on measurements of stature taken during life and of long bones after death". *American Journal of Physical Anthropology*. 16 (1): 79–123. [10.1002/ajpa.1330160106](https://doi.org/10.1002/ajpa.1330160106).

(a) - Individual Remains - First Lieutenant Alexander Nininger

18. The case of First Lieutenant Alexander Nininger is a classic for several reasons. Because his award of the Medal of Honor came at a dire time in American history, he became even more of a celebrity than most Medal of Honor recipients and after the war, the Army was determined that the identification of his remains should be beyond reproach. Additionally, several other young officers perished in the same battle and were buried under similar circumstances and multiple members of Congress pressured the military to retrieve their remains. Adding to the confusion, the burials occurred during a battle so intense that the Regimental Commander, Lt Col. George S. Clarke, suffered a breakdown and was found cowering in his dugout. He was relieved of his command and evacuated from the area via the last submarine to leave the island of Corregidor.

19. At the conclusion of hostilities, remains believed to be those of Nininger were exhumed from a grave near where he was known to have perished. The exhumation was directed by U.S. Army Master Sergeant Abie Abraham. Sergeant Abraham had many years of experience in the Philippines, had been a POW at Cabanatuan, and was personally selected by General Macarthur to direct the retrieval of American remains from the Province of Bataan. While Sergeant Abraham's documentation of remains was sometimes lacking, his work retrieving remains and his dedication to the men were well documented in two books he later authored, *Oh, God, Where Are You?* and *The Ghost of Bataan Speaks*. The remains later designated Manila #2 X-1130 were immediately recorded by Sergeant Abraham as Nininger based on his interview of the Filipino

gravedigger who had prepared the graves for five Americans in the Abucay (village) cemetery in January 1942.

20. These remains were transported to temporary cemetery Manila #2 where they were buried and the usual identification process was conducted. The contemporaneous identification process supported, and a recommendation was made by a board of officers at the Philippine Command, that remains X-1130 be identified as those of 1LT Alexander Nininger. All evidence supported the recommendation except that the estimated height of the remains was substantially less than the known height of Lt Nininger and the U.S. Army's Office of the Quartermaster General disapproved the recommendation on that basis. In subsequent correspondence, the Philippine Command recommended to the Department of the Army, an unprecedented five times, that remains X-1130 be formally identified as Nininger.

21. While officials in Manila and Washington argued about the identification of X-1130, information provided by Colonel Clarke was conveyed through one of the families to then Congressman Richard Nixon who shared it with the Army officials who in turn directed the Philippine Command to investigate Clarke's information. Clarke's information was obviously self-serving, perhaps to repair his damaged reputation for cowardice and almost certainly false in that most historical accounts of the battle indicate that Clarke was not in the area when Nininger was killed. (Although some accounts indicate that he could have been.)

22. At this point, all efforts to retrieve Nininger's remains came completely off the tracks. Local commanders, who had previously recommended X-1130 be identified as Nininger, were directed to make multiple investigations of an area in which there was

no reason to believe Nininger had been buried except Clarke's demonstrably false information. Each successive investigation, in obvious attempts to satisfy the demands of higher authorities, created new information which generally was in conflict with previously obtained information.

23. Thirty years of investigative experience has taught me that evidence should be evaluated according to the quality of substantiating evidence, or lack thereof. While Defendants claim that "contemporary witnesses stated that Nininger was buried in the churchyard or immediately outside it..." (ECF Doc 55 at 9), only LTC Anders' stated that he was present at Nininger's burial and that he was buried in the Abucay Churchyard. Anders' statement was a "clarification" of an earlier statement, was not taken verbatim, and in my opinion "waffles" on the facts. He provides no corroborating evidence and other witnesses who were known to be in the area at the time Anders claims Nininger was buried have no recollection of the burial. Considering that a battle was in progress, I wouldn't fault Anders for not having perfect recall of details of a burial when asked eight years later, but I don't find his sole recollection to be creditable because there is absolutely no other evidence to support it and much reason to disbelieve it. Additionally, the X-1130 remains were recovered from a location approximately 650 meters from the location identified by Anders, near enough that they might be considered to be within the acceptable margin of error when describing the location.

24. Ander's statement was obtained by Vogl who obviously gave it little weight as he concluded that Nininger was probably buried at West Point. Yet, Defendants base their conclusion as to the location of Nininger's remains upon this single discredited statement. When the suspect information provided many years later by

colonels Clarke and Anders is discounted, the contemporaneous identification by the local command that Nininger is X-1130 is the only rationally acceptable answer in that it is totally plausible and conforms to all known facts. The local command's identification recommendation was a judicial type proceeding based upon the accepted regulations and procedures that required all information and evidence to be reviewed by a local board of officers and who ultimately concluded that the X-1130 remains were those of Nininger. Washington's initial rejection of the board's recommendation was solely due to the inclusion of inconsistent skeletal height information that subsequent research proved to be false. There was so much command influence, that any evidence obtained after the injection of Colonel Clarke's information should be disregarded.

25. Considering that the board of officers appointed by the local command to assess the evidence that unidentified remains X-1130 were those of Lt Nininger had access to all evidence, including information likely no longer available, as well as witnesses, I give substantial weight to the conclusion and recommendation of the board of officers in their original and supplemental reports. (Nininger IDPF, at 119-120 and 111-112, Bates # DPAA0002223, DPAA0002224 and DPAA0002215, DPAA0002216)

26. A further wrinkle in an already overly complex case is the Army's subsequent investigation of the deaths of Lt's Nininger and Cheaney. In the summer of 2018, I obtained a file that contained a classified annex to the Individual Deceased Personnel File of 1LT Ira Cheaney. This file had not previously been produced to Plaintiffs by the Defendant. This classified portion of Lt Cheaney's IDPF detailed the Army's 1950 - 1951 investigation of the deaths of Cheaney and Nininger. The investigation concluded that the remains buried at the U.S. Military Academy at West

Point could not be those of Cheaney and were likely either Nininger or Maynard. The file was ultimately closed and the file classified SECRET. The only fitting description of this file is that it shows a deliberate cover-up by the U.S. Government and attempt to deceive the families of the military personnel involved. (ECF 55-8, Exh 25 is an excerpt of this previously classified IDPF annex)

27 This file has been shared with all of the families involved and the Army has recently agreed to disinter the remains buried at West Point as those of Lt Cheaney.

28. When I was deposed by counsel for the Defendants, I was presented with a portion of this now declassified annex to the Cheaney IDPF. I immediately noticed that the file was incomplete and had been apparently "sanitized" since the most important pages had been removed. I refused to answer any questions based upon this incomplete exhibit, but I offered to provide counsel with a complete copy of the file which I would be happy to discuss. Counsel declined to address the complete file I offered.

29. A simple review of the X-1130 file chronologically from the date of recovery of the remains until Washington directed the investigation be shifted to the area of the Abucay Churchyard based on Clarke's erroneous information, will provide a convincing narrative. Once Clarke's information concerning the Abucay Churchyard was injected into the investigation, it became confused beyond repair. Review of the classified annex to the Cheaney IDPF documents the Army's efforts to avoid disclosure of their incompetence in the burial and recovery of remains from the Battle of Bataan and casts doubt upon all of their actions in this matter.

(b) - Individual Remains - Colonel Loren Stewart

30. The remains designated as Manila #2 X-3629 were recovered by the same Master Sergeant Abie Abraham who recovered remains X-1130 believed to be those of Nininger. (ECF Doc 55-9, Def Exh 29 & 30) As discussed above, Sergeant Abraham was no stranger to the Philippines or the area in which X-3629 were found. During the Battle of Bataan, he had been assigned to the U.S. Army's 31st Infantry Regiment which was on the flank of COL Stewart's 57th Infantry Regiment (PS). One of Sergeant Abraham's qualifications for the job of directing recovery of remains was that he had lived in the Philippines for many years; he was married to a Filipina woman; and, he spoke the local languages. In 1981, MSG Abraham wrote to the Plaintiff, the Grandson of COL Stewart. Exh 30 to Declaration of Gregory J. Kupsky, Sgt. Abraham Letter. (ECF Doc 55-9 at 25). In this letter, he relates that he was personally acquainted with Colonel Stewart and spent a week trying to locate his grave. He was directed to the remains by a local inhabitant who told him that the remains were buried by Scouts from the 57th Regiment and they said it was their Colonel. Since an infantry regiment of that era would only have had a single officer of the rank of Colonel, Sergeant Abraham knew immediately the identification of the remains and documented them as Col Stewart. Unfortunately, while he properly documented the identity of the remains, he spelled the name STUART rather than STEWART. Subsequent documents contained in the X-3629 file show that dental records were requested for one named STUART. Without dental or other records to confirm the identification the remains were determined to be unidentifiable and were buried as an Unknown as were most unidentified remains for whom dental records were unavailable.

31. I have searched the electronic records of deaths during the Battle of Bataan and Loren Stewart was the only officer of the rank of O5 or O6 (either of whom would have been addressed as Colonel) who perished in Bataan during this time period. Additional searches of persons named STUART or STEWART find no other possible candidates.

(c) - Individual Remains - Brigadier General Guy O. Fort

32. As in the above individual cases, the case of Brigadier General Ford revolves around the investigators' review and weighting of all the available evidence. However, in this case conflicting testimony can be evaluated according to the circumstances of the witness. On the one hand was a sworn statement by Provincial Governor Cruz of Misamis Oriental Province who himself had been a prisoner. His sworn statement would indicate that he was an educated person and perhaps familiar with the provision of sworn testimony and its importance to the identification of the remains of a family's loved one. He had nothing to gain by giving or withholding his information and he provided substantial supporting information even if some of it was second hand. On the other hand was testimony provided by war criminals whose very lives depended on currying favor with their captors. Disregarding otherwise convincing information because it is second hand is inconsistent with most other Bataan identifications as many of the witnesses did not survive the war. Then, instead accepting unsubstantiated testimony from convicted war criminals whose very lives depended upon pleasing their captors just beggars belief.

33. I first became aware of this case during my review of all unidentified personnel files, a largely routine and tedious process. This case seemed so obvious, that I

was very surprised that the Department of Defense had not already followed up on this case and subjected it to DNA analysis.

III - INVESTIGATION METHODOLOGY

34. Defendants have objected to my expert testimony on the grounds that I have not demonstrated a scientific methodology to my investigations. I contend that Defendant's employment of a formulistic process to resolution of these cases demonstrates a simplistic and unrealistic approach to highly complicated and unique questions. To infer that a scientific methodology is necessary to resolve these cases is to perhaps overstate the difficulty of the task or excuse the seven decade delay in doing so. The difficulty in resolving these cases is not so much in analysis of the data, but in obtaining the data from government agencies apparently intent in preserving their monopoly on access to the data.

35. My methodology includes reviewing the relevant IDPFs and X-files for each particular case. If there are burial records or reports, I will also analyze those documents and take them into account. I then consider the case notes and any other reports that have been prepared concerning the specific remains at issue. Next, I use my knowledge concerning previous identification processes and procedures to determine why an identification may not have been originally made or why certain data in a file is unreliable. I also rely upon literature and reports covering the identification processes used in World War II to help me determine which data is reliable. In sum, I consider the IDPFs, X-files, case notes, historical research, and knowledge about the AGRS to determine whether the evidence as a whole supports identification. The application of this methodology to the cases at issue is explained in more detail above for each specific case.

36. Beginning in 2009, the first MIA case I worked on was that of my family member, Private Arthur H. "Bud" Kelder. The Army Casualty Office was kind enough to provide me with a copy of his Individual Deceased Personnel File upon my request. However, they were unable or unwilling to provide me with the related files even though they were cross-referenced therein. I was required to file suit under the Freedom of Information Act to obtain all the related files on the burial and recovery efforts pertaining to PVT Kelder.

37. Subsequent to the Kelder case, I set about compiling electronic databases of the data I had obtained in the Kelder case and other FOIA actions in order to provide better access to the data. When the Bruntmyer, Morgan and Hansen Plaintiffs in this case first inquired about their missing family members, I was able to quickly analyze the data available to me to determine what grave they had been buried in; who else had been buried in that grave; and, the status of their remains. While I believe that the government's requirements for disinterment and identification are unduly burdensome and intentionally designed to discourage requests for return of remains, I helped each family to navigate the government bureaucracy based on lessons learned from the Kelder investigation. Defendants' announcement that they disinterred the men associated with graves 704 and 822 in November, 2018, and have recommended disinterment of grave 407 seems to validate my methodology.

38. The Nininger, Fort and Stewart cases meet or exceed the post-war "two items of evidence" or the modern "more-likely-than-not" standard for identification. No pseudo-scientific methodology is required, only an honest desire to resolve apparent conflicts in the available information. Defendant's recent decision to exhume the remains

previously identified as those of 1LT Ira Cheaney and erroneously buried at the U.S. Military Academy, West Point, NY appears consistent with my analysis of the Nininger case.

IV - GOVERNMENT EXPERTS' OPINIONS ARE NOT SUPPORTED BY THE EVIDENCE

39. The government's unrelenting reliance upon the use of discredited dental and skeletal height evidence and accepting at face value suspect testimony demonstrates not just flawed investigation methodology, but suggests an intention to deceive. It is my opinion that Defendants' processes and procedures are intended to support inaction rather than actual identification of remains.

40. Defendants' refusal to adopt modern scientific techniques as prescribed in their own validation documents and the limited capacity and capability of their DNA laboratory evidences an intention to limit the number of unidentified remains returned to their families for burial.

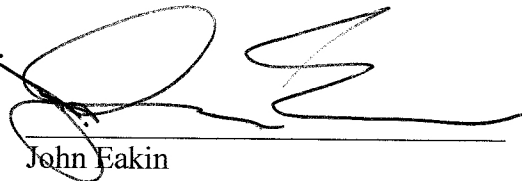
41. Defendants' statements such as, "The only direct link between 1LT Nininger and X-1130 is Colonel Clarke's unreliable reference to "Grave No. 9." Kupsky Decl. ¶ 21. (ECF 55 at 9) cause me to wonder if they have even read the file and are aware that the recommendation of a board of officers was directed to the Memorial Division on five occasions.

42. Defendants regulation DTM-16-003 mandates that "DPAA research must 'indicate[] that it is more likely than not that DoD can identify the remains.'" (ECF 55 at 6) I believe that the evidence concerning the above three individuals substantially exceeds this "more likely than not" standard and the remains should be disinterred for identification.

43. While the facts of this case do not involve complex scientific or technical information, they do comprise a very large volume of material, much of which is of a confusing and contradictory nature. It took me several months and many conversations with other knowledgeable experts to form the opinions I have stated above. I believe that the above discussion demonstrates to the court that I have the knowledge, experience and understanding to assist the court in properly assessing and weighing the evidence.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of March, 2019.



John Eakin