

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

**APPENDIX IN SUPPORT OF PLAINTIFFS’ RESPONSE TO
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56(c)(1) and Local Rule CV-7(d)(1), Plaintiffs John A. Patterson, John Boyt, Janis Fort, Ruby Alsbury, Raymond Bruntmyer, Judy Hensley, and Douglas Kelder (collectively the “Families”) submit the following summary of facts and exhibits in support of their Response to the Government’s¹ Motion for Summary Judgment. Many of the documents relevant to the facts of this case are already a part of the record and on file with the Court. This includes documents referenced in ECF 26-1, ECF 55, ECF 56, and ECF 61-1. Thus, the Families rely upon documents and evidence already a part of the record and on file with the Court, which are cited herein.

¹ Defense POW/MIA Accounting Agency (“DPAA”), Director of the DPAA Kelly McKeague, the United States Department of Defense (“DOD”), Secretary of Defense James Mattis, the American Battle Monuments Commission (“ABMC”), and Secretary of the ABMC William Matz (collectively the “Government”).

Index of Exhibits

In addition to the documents and evidence already on file with the Court, the Families also rely upon the following exhibits:

Declarations

1. Declaration of John Eakin
 - a. WWII Division Memo (Jan. 2012)
 - b. WWII Division Memo (Sept. 2010)
 - c. American Graves Registration Service Documents Concerning 1LT Nininger
2. Supplemental Declaration of John Eakin

Documents Concerning Private Kelder

3. DoD Case Summary for Kelder (2014)

Documents Concerning Private Morgan

4. DoD Case Summary for Morgan (Nov. 2014)
5. DoD Case Summary for Morgan (2018)
6. Hospital Records for Morgan
7. Report of Death for Morgan
8. Daily Death Records for Morgan
9. Certificate of Death for Morgan
10. Rosters of Burial for Morgan
11. X-files for Morgan (excerpts)

Documents Concerning Technician Fourth Class Bruntmyer

12. DoD Case Summary for Bruntmyer (Oct. 2011)
13. DoD Case Summary for Bruntmyer (Jan. 2018)
14. Daily Death Report for Bruntmyer
15. Report of Death for Bruntmyer
16. X-files for Bruntmyer (excerpts)

Documents Concerning Private First Class Hansen

17. DoD Case Summary for Hansen (July 2017)
18. Letter Home from Hansen (Feb. 7, 1942)
19. IDPF for Hansen (excerpts)

Documents Concerning First Lieutenant Nininger

20. DoD Case Summary for Nininger (June 2011)

21. IDPF for Nininger (excerpts)
22. Report of Interment
23. X-files for Nininger (excerpts)
24. Declassified Cheaney File (excerpts)

Documents Concerning Colonel Stewart

25. DoD Case Summary for Stewart (Sept. 2012)
26. Report of Death for Stewart
27. Silver Star Citation for Stewart
28. X-files for Stewart (excerpts)
29. Letter from Abie Abraham

Documents Concerning Brig. Gen. Fort

30. DoD Case Summary for Fort (Jan. 2018)
31. Affidavit by Ignacio Cruz
32. X-files for Fort (excerpts)

Discovery Responses

33. ABMC's Answers to Interrogatories (April 11, 2019)
34. DPAA's Answers to Interrogatories (April 11, 2019)

Communications

35. Letter from Eakin (Sept. 2014)
36. Photograph of Remains Disinterred from Grave 717
37. Email from Government Discussing Bode and DNA testing (July 2014)
38. Email from Government Discussing Cost of DNA testing (April 2014)
39. Email from Patterson (2014)

Introduction

This case concerns seven service members from World War II and their families. Each service member was buried as an “unknown” following the war. After years of waiting for the Government to take action, the Families filed this lawsuit to bring these service members home for a final and proper burial. The Families simply refuse to accept the idea that any man will be left behind as an “unknown” when there is significant evidence showing that man’s burial location. Originally, the Families and the Government disputed the burial location of all of the service members’ remains at issue. But that has changed during this litigation.

After being presented with the Families’ arguments and pleadings, the Government now agrees with many of the Families’ factual claims. The Families and the Government now agree on the burial location of four out of the seven service members (Kelder, Morgan, Bruntmyer, and Hansen). ECF 61-1 at 25-27 (agreeing that alleged graves are likely location of remains). Three of these service members’ remains have been disinterred (Kelder, Morgan, and Bruntmyer), and the Government has stated that it intends to disinter the fourth (Hansen). ECF 61-1 at 25-27. The Government has only officially recognized an identification of one of those service members (Kelder). ECF 26-7 at 8, 11.

For the other three service members in this case, there is still a dispute about their burial location (Nininger, Stewart, and Fort). The Families’ contend that the Government failed to properly consider significant evidence showing the location of these service members’ remains. As of now, the Government has not disinterred these three individual’s remains. The Government either refuses to take action on these specific remains at issue or has not responded to the respective family’s request. ECF 61-1 at 28 (Nininger – refusing to disinter), 31 (Stewart – have not made a decision for years), 33 (Fort – refusing to disinter). Thus, there is a material fact in

dispute between the parties concerning the location and/or identification of at least three of the service members at issue.

Statement of Facts

I. Service Members' Background

1. In December 1941, a full-scale Japanese invasion of the Philippines commenced. Alexander R. Nininger, Loren P. Stewart, Guy O. Fort, Robert R. Morgan, Lloyd Bruntmyer, David Hansen, and Arthur H. Kelder answered their country's call to duty and fought bravely for the freedoms we enjoy today. Each made the ultimate sacrifice. First Lieutenant Nininger and Colonel Stewart were killed in action. General Fort was executed by the Japanese after his capture and imprisonment. Private Morgan, Private First Class Bruntmyer, Private First Class Hansen, and Private Kelder died while being held in a prisoner of war camp.

2. A more detailed description of each service member's service and death is provided below and in the attached Declarations. *See* Ex. 1 at 4-7 (discussing Cabanatuan cases), 7-17 (discussing Nininger, Stewart, and Fort); Ex. 2 (discussing Nininger and Stewart cases).

A. Private Kelder, Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen

3. U.S. Army Private Arthur H. "Bud" Kelder - Private Kelder served in the Medical Department of the U.S. Army during World War II. Ex. 3 at 1 (DoD Case Summary for Kelder, 2014).² The American forces surrendered in the spring of 1942, and Private Kelder eventually ended up in captivity at the Cabanatuan prisoner camp. *Id.* at 2. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan

² DoD Case Summaries are cited to show that many background facts concerning the service members are not in dispute. But the Families do not agree with all of the conclusions in the DoD case summaries concerning the location and/or identity of remains.

prisoners. *Id.* Private Kelder was admitted to the hospital twice for treatment of malaria and diphtheria before he died of pellagra on November 19, 1942. He was buried in Grave 717. *Id.* (“it is clear that he . . . was buried by his fellow prisoners in grave 717”); ECF 63-12 at 2 (DPAA identified portions of Private Kelder, which were all from grave 717). The remains associated with Grave 717 buried at the Manila American Cemetery were disinterred in 2014. ECF 61-1 at 27. In 2015, the Government recognized that the circumstantial evidence, along with laboratory analysis, established that Private Kelder was buried in Grave 717, and some of his remains were officially identified by the DPAA. ECF 26-7 at 8, 11.

4. Private Robert R. Morgan - Private Morgan served with the 7th Material Squadron, 5th Air Base Group in the Pacific Theater during World War II. Ex. 4 at 1 (DoD Case Summary, Nov. 2014); Ex. 5 at 1 (DoD Case Summary, 2018). Private Morgan participated in the defense of Bataan, but was forced to surrender on April 8, 1942. Ex. 4 at 1; Ex. 5 at 1. He would survive the infamous Bataan Death March, and eventually ended up in captivity at the Cabanatuan prisoner camp. Ex. 4 at 1-2; Ex. 5 at 1-2. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. Ex. 4 at 2; Ex. 5 at 2. In early July 1942, Private Morgan developed beriberi and dysentery. Ex. 6 at 3 (hospital records). Ex. 4 at 2; Ex. 5 at 2. After suffering for months, at 6:00 PM on January 1, 1943, Private Morgan succumbed to his condition in the Cabanatuan 1st Branch Station hospital. Ex. 7 at 2 (Report of Death); Ex. 8 at 3 (Daily Death Records); Ex. 9 at 3 (Certificate of Death). He was buried in Grave 822. Ex. 4 at 2; Ex. 5 at 2; ECF 61-1 (“Grave 822 is the likely original location of . . . Private Robert Morgan.”); Ex. 10 at 3 (roster of burials); *see also* Ex. 11 (X-files related to Morgan). The remains associated with Grave 822 were disinterred by the DPAA in November 2018. ECF 63-3 at 8.

5. Technician 4th Class Lloyd Bruntmyer - Technician Fourth Class Bruntmyer served in the 7th Material Squadron, 5th Air Base Group in the Pacific Theater of Operations during World War II. Ex. 12 at 1 (DoD Case Summary, Oct. 2011); Ex. 13 at 1 (DoD Case Summary, Jan. 2018). TEC4 Bruntmyer was captured by the Japanese on April 9, 1942. Ex. 12 at 1; Ex. 13 at 1. He would survive the infamous Bataan Death March and eventually ended up in captivity at the Cabanatuan prisoner camp. Ex. 12 at 1; Ex. 13 at 1. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. Ex. 12 at 1; Ex. 13 at 1. TEC4 Bruntmyer died of inanition at 8:45 a.m. on November 1, 1942 while in Barrack 2, Hospital Area, at Cabanatuan POW Camp #1, Luzon Island, Philippine Islands. Ex. 14 at 1 (Daily Death Report); Ex. 15 at 3 (Report of Death). He was buried in Grave 704, which was located in Plot 7, Grave 4 of the Cabanatuan #1 Cemetery. Ex. 15 at 3 (Report of Death); 61-1 at 25 (“Grave 704 is the likely original location of the remains of . . . Technician Lloyd Bruntmyer.”); *see also* Ex. 16 (X-Files related to Bruntmyer). The remains associated with Grave 704 were disinterred by the DPAA in November 2018. ECF 63-3 at 8.

6. Private First Class David Hansen - Private First Class Hansen was a member of Headquarters Squadron, 27th Bombardment Group, and was stationed in the Philippines at the outbreak of World War II in the Pacific. Ex. 17 at 1 (DoD Case Summary, July 2017); ECF 63-17 at 53 (DoD Case Summary, Jan. 2018). A letter that he sent home shows what these men endured and how desperately they wanted to be reunited with their family. Ex. 18 (letter home, Feb. 7, 1942). Just after sending his letter home, PFC Hansen was captured by the Japanese in the spring of 1942. Ex. 17 at 2; ECF 63-17 at 54. He would survive the infamous Bataan Death March into captivity at the Cabanatuan prisoner camp. Ex. 17 at 2; ECF 63-17 at 54.

Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. PFC Hansen became ill and was admitted to the Cabanatuan camp hospital, suffering from dysentery and malnutrition. Ex. 17 at 2-3; ECF 63-17 at 54-55. He succumbed to illness at 1730 hours on June 28, 1942. Ex. 17 at 3; ECF 63-17 at 55; Ex. 19 (IDPF for PFC Hansen). The burial records from the Camp show that he was buried in Grave 407 in the Cabanatuan camp cemetery. Ex. 17 at 1; ECF 63-17 at 53; ECF 61-1 at 26 (“Grave 407 is the likely location of the remains of . . . Private First Class David Hansen.”); *see also* Ex. Q19(IDPF for Hansen). The DPAA is “finalizing” a recommendation to disinter the remains associated with Grave 407. ECF 63-3 at 9.

7. In sum, these men survived the initial fighting of World War II and the infamous Bataan Death March. ECF 19 at 10-12; ECF 26 at 12-15. But each one ultimately succumbed to disease and malnutrition while confined in Cabanatuan POW camp. ECF 19 at 10-12; ECF 26 at 12-15.

8. At the conclusion of hostilities, the U.S. Army Graves Registration personnel exhumed the remains from the camp cemetery and, while some service members were identified immediately, many of the remains were buried as “unknowns” at the Manila American Cemetery, including the remains of the service members in this case. ECF 61-1 at 7. Due to improper processing of the remains by military contractors, many remains were substantially commingled with other service members’ remains. *See* ECF 26 at 16.

B. First Lieutenant Alexander R. “Sandy” Nininger

9. First Lieutenant Nininger served in the 1st Battalion, 57th Infantry Regiment, Philippine Scouts, in the Pacific Theater during World War II. Ex. 20 at 1 (DoD Case Summary for Nininger, June 2011). After fighting began, 1LT Nininger’s Battalion was positioned in an

area that did not come under heavy attack. *Id.* So, he voluntarily attached himself to Company K, 3rd Battalion, 57th Infantry Regiment, a company that was engaged in intense fighting with the enemy and under constant attack. *Id.* In the ensuing hand-to-hand combat, 1LT Nininger alone forced his way deep into enemy territory. *Id.* Despite running out of ammunition and being injured, 1LT Nininger could not be restrained and he proceeded to use his bayonet as he charged the enemy. *Id.* at 2. On January 12, 1942, a wounded 1LT Nininger was finally attacked and killed by three bayonet-wielding Japanese. *Id.* Reports state that those three Japanese lay dead beside him. *Id.* He was posthumously awarded the Medal of Honor for his actions against the enemy. *Id.*; ECF 19 at 8; ECF 26 at 7.

10. At the conclusion of hostilities, 1LT Nininger's remains were exhumed from a grave near where he was known to have been killed. ECF 56-1 at 10; Ex. 21 at 6-8 (IDPF). The exhumation was directed by U.S. Army Master Sergeant Abie Abraham. ECF 56-1 at 10; ECF 61-1 at 29. Master Sergeant Abraham was personally selected by General MacArthur to direct the retrieval of American remains from the Province of Bataan. ECF 63-3 at 5. The remains later designated as Manila #2 X-1130 were immediately recorded by Master Sergeant Abraham as 1LT Nininger based on his interviews of the Filipino gravedigger who had prepared the graves for five Americans in the Abucay cemetery. Ex. 22 (Report of Interment); Ex. 56-1 at 10-11; ECF 61-1 at 29; Ex. 23 at 12 (X-Files for X-1130).

11. The remains were transported to a temporary cemetery. During the initial identification process, a board of officers at the Philippine Command recommended identifying the X-1130 remains as those of 1LT Nininger. Ex. 1-C at 3 (recommended identification); ECF 63-6 at 11; Ex. 23 at 2-12 (X-1130 remains associated with Nininger for years). The Philippine Command stated that 1LT Nininger's remains were recovered and originally believed to be

known as belonging to 1LT Nininger. Ex. 1-C at 3. They also recognized that 1LT Nininger was the first Medal of Honor winner in World War II. *Id.* The evidence supported this recommendation, except for an estimated height (this estimate was inaccurate). *Id.* at 4 (dental chart compares favorably to 1LT Nininger); ECF 55-13 at 75; ECF 61-1 at 30. On five different occasions, the Philippine Command recommended to the Department of the Army that it should formally identify the X-1130 remains as those of 1LT Nininger, but this was disapproved because of the inaccurate height estimates. ECF 55-13 at 76, 100-101; ECF 61-1 at 30; ECF 63-6 at 11, 13-14; ECF 63-7 at 4-6. The remains are currently buried as “unknown” in Manila American Cemetery Grave J-7-20. ECF 19-9; ECF 26 at 9.

C. Colonel Loren P. Stewart

12. U.S. Army Colonel Loren P. Stewart entered service in 1917 and commanded the 51st Infantry Regiment of the 51st Infantry Division (Philippine Army), U.S. Army Forces in the Far East, in the Pacific during World War II. Ex. 25 at 1 (DoD Case Summary for Stewart). Following the Japanese invasion, Colonel Stewart helped organize an improvised counterattack. *Id.* at 2. At some point during the night of the counterattack (January 13, 1942), Col. Stewart was killed by machine-gun fire while on a reconnaissance patrol. Ex. 26 (Report of Death for Stewart). He was awarded the Silver Star for this action. Ex. 27 (Citation for Silver Star). Fortunately, the men he fought with were able to recover his remains. Ex. 25 at 3 (case summary). But his loss was disastrous blow and his Regiment never recovered. *Id.*

13. Just like with 1LT Nininger, Colonel Stewart’s remains were later discovered by Master Sergeant Abie Abraham and designated as Manila #2 X-3629. Ex. 29 (Letter from Abie Abraham); ECF 63-8 at 10; Ex. U at 26 (X-files associated with Stewart/X-3629). Sergeant Abraham explained that he knew Colonel Stewart very well and spent a week trying to locate

Colonel Stewart's grave. Ex. 29; ECF 63-8 at 10. Finally, an informant approached Sergeant Abraham and provided him with detailed information about the burial of an American Colonel. Ex. 29; ECF 63-8 at 10. The information provided was consistent with other known facts. For example, Colonel Stewart was the only Colonel killed in that area. Ex. 29; ECF 63-8 at 10. Additionally, no other possible candidates with the last name Stewart or Stuart died in the area. Ex. 29; ECF 63-8 at 10. After reviewing the information available, Sergeant Abraham concluded that the remains were those of Colonel Stewart. ECF 63-8 at 10. Unfortunately, while Sergeant Abraham properly documented the identity of the remains, he misspelled Colonel Stewart's last name as "Stuart." ECF 61-1 at 32-33; Ex. 28 at 2-8 (Dental Chart referencing "Stuart" and statement saying X-3629 is believed to be the remains of Col. "Stuart"). This resulted in recovery personnel requesting the wrong dental records. Without the dental records confirming the identification, the remains were buried as "unknown" in Manila American Cemetery Grave N-15-19. ECF 19 at 9; ECF 26 at 10.

D. Brigadier General Guy O. Fort

14. U.S. Army Brigadier General Guy O. Fort enlisted in the U.S. Army in 1899. Ex. 30 at 1 (DoD Case Summary for Fort). He first received a commission in the Philippine Constabulary in 1904 and rose steadily through the ranks. *Id.* He was said to be a "regular Daniel Boone who spoke every native dialect of Mindanao." *Id.* Subsequently, he was promoted to command the 81st Division of the Philippine Army. *Id.* After fighting began, Brig. Gen. Fort organized the Moro Bolo Battalion as an auxiliary of the Philippine Army, which would later become a guerrilla force. *Id.* On May 6, 1942, General Wainwright ordered the surrender of all U.S. forces in the Philippines. *Id.* While Brig. Gen. Fort eventually complied with the order on May 27, 1942, he still commanded guerrilla forces in the Philippine Islands when he was taken

prisoner by enemy forces. *Id.* at 2; ECF 19 at 10; ECF 26 at 10. The Japanese tried to force Brig. Gen. Fort to order the guerilla forces to surrender, but he refused to cooperate. Ex. 30 at 2. While the Japanese were torturing the General, the General shouted: “You may get me but you will never get the United States of America.” ECF 63-9 at 21. Subsequently, the Japanese executed him because he refused to help. *Id.* He was the only American-born general officer executed by the Japanese. ECF 26 at 10; *see also* Ex. 32 at 3 (X-files for Fort/X-618).

15. The Governor of Misamis Oriental Province, Ignacio S. Cruz, provided a sworn statement recounting the execution and burial of General Fort by the Japanese as retaliation. Ex. 31; ECF 63-9 at 21-22. Governor Cruz’s sworn statement was supported by his conversation with Lt. Kito of the Japanese army, as well as information he received from Dr. Vicente Velez and a Filipino Cook. Moreover, Governor Cruz questioned a caretaker of the grounds surrounding the house where Brig. Gen. Fort was reportedly executed, and the information he was told supported his conclusions. ECF 63-9 at 22. Additionally, a Filipino soldier told Governor Cruz that he personally saw Brig. Gen. Fort bayoneted and killed. ECF 63-9 at 21. As a result of his investigation and communications with the Philippine Army Headquarters, Governor Cruz had Brig. Gen. Fort’s grave dug up and turned the remains over to the American Grave Registration Service. ECF 63-9 at 22. General Fort’s remains were later designated as X-618 Leyte #1 Cemetery. ECF 63-9 at 21-22; ECF 61-1 at 33. Charles Vanderbilt, working for the AGRS, examined the remains and concluded that the remains could be those of Brig. Gen. Fort. Ex. 32 at 8. The identification checklist and dental records did not exclude Brig. Gen. Fort as a candidate. *Id.* at 10. Further, 2nd Lieutenant Charles G Waple, Jr. signed a certification accepting the remains from Ignacio S. Cruz as those of Brig. Gen. Fort. *Id.* at 2. The remains were ultimately buried in Manila American Cemetery Grave L-8-113. ECF 19 at 10; ECF 26 at 11.

II. Who Has these Service Members' Remains Now? The ABMC and DPAA

A. ABMC

16. The ABMC is an independent agency that is responsible for maintaining and administering American military cemeteries abroad, including the Manila American Cemetery. *See* Exec. Order No. 10057, 14 Fed. Reg. 2585 (May 14, 1949), *as amended* Exec. Order 10087, 14 Fed. Reg. 7287 (Dec. 3, 1949); 36 U.S.C. § 2101, *et seq.* Today, no statute forbids the disinterment or exhumation of remains from ABMC cemeteries. But, unlike other military cemeteries, the ABMC has no process for families of service members to request exhumation or disinterment of remains. *See* Army Regulation 290-5, ¶2-10. The ABMC simply “has no family disinterment request policy.” Ex. 33 at 9, 12 (ABMC “has no policy that allows a next of kin to request disinterment or claim unidentified remains.”). It also appears to have no position on whether next of kin have the right to obtain possession of the remains of their deceased relatives interred at Manila American Cemetery for purposes of providing a burial. *Id.* at 10-11. Instead, the ABMC states that it defers to the DoD on matters relating to disinterment of remains from the cemeteries that it administers. *Id.* at 7. If a family submits a disinterment request to the ABMC, the ABMC tells the family to contact the DoD service casualty office.

17. A brief background of interments at ABMC cemeteries is particularly helpful for this case. Originally, pursuant to Public Law 80-368, the next of kin of fallen service members from WW2 could choose to have remains either (1) interred in overseas military cemeteries now controlled by the ABMC or (2) returned to the United States. If the next of kin chose option number 1 and elected for burial to take place in the overseas cemetery, then the burial was generally considered permanent. *See* Pub. L. No. 80-368; ECF 31-1 at 222-227 (Report to Congress on Issues Related to Requests for Disinterment of Remains Buried in Overseas

Military Cemeteries, Sept. 29, 2005).³ But, if the deceased's next of kin was not given the opportunity to make a final burial decision, then interment is not considered final. *See* ECF 31-1 at 222-227 (Report to Congress on Issues Related to Requests for Disinterment of Remains Buried in Overseas Military Cemeteries, Sept. 29, 2005). For example, two service members buried in an ABMC cemetery were disinterred after more than 40 years because the Army did not provide the next of kin with disposition information. Years later, the Army acknowledged that it should have asked the next of kin for disposition instructions and the remains were disinterred. *See* ECF 31-1 at 222-227; 36 U.S.C. § 2104 (armed forces have ability to exhume or re-inter a body if it is deemed necessary).

18. The ABMC currently has possession of 1LT Nininger, Col. Stewart, Brig. Gen. Fort, and Private First Class Hansen's remains, which are buried at Manila American Cemetery.

B. The DoD and DPAA

19. Unlike the ABMC, the DPAA is an agency within the Department of Defense. It was purportedly established pursuant to Section 1509 of Title 10, U.S.C., as the DoD's office responsible for accounting for missing personnel from past conflicts. *See* DoD Directive 5110.10, Defense POW/MIA Accounting Agency (Jan. 13, 2017). This became necessary because Congress ordered the DoD to start bringing our heroes from World War II back home for proper burial, which the DoD had refused to consistently do on its own for decades. *See* ECF 61-1 at 13 ("Until October 2009, DoD had no statutory obligation to account for missing personnel from World War II."). The DoD imposes on the DPAA an exhaustive list of regulations and policies that set forth specific requirements and standards. The DPAA claims that

³ Pub. L. No. 80-368 was repealed by Pub. L. No. 89-554 (Sept. 6, 1966) and is no longer in effect. No statute or law prohibits disinterment from an ABMC cemetery.

its mission is to provide the fullest possible accounting for missing personnel and is “committed and willing to do all we can to assist each other, thereby strengthening our collective ability to partner with family organizations, veterans, public and private entities, foreign governments, and academia to achieve our mission.” Defense POW/MIA Accounting Agency, *Vision, Mission, Values*, available at <https://www.dpaa.mil/About/Vision-Mission-Values/>.

20. Similar to the ABMC, the DPAA and DoD do not provide any type of hearing or sufficient process for a next of kin to request the disinterment or possession of a relative’s remains. When asked to describe how a next of kin can request disinterment of remains, the Government was unable to describe any type of process. Ex. 34 at 13-14. Additionally, if the DPAA and DoD refuse to return remains to a next of kin, there is no opportunity to appeal any decision to another federal agency or decision maker. *Id.* at 28-29. Finally, when asked to provide a list of family organizations that the DPAA advertises that it has partnered with to achieve its above-described mission, it failed to provide the name of even one organization. *Id.* at 17.

21. The DPAA and DoD currently have possession of Private Kelder, Private Morgan, and Tech 4 Bruntmyer’s remains, but the ABMC is ultimately responsible for caring for these remains.

C. Legislative Involvement

22. Despite the Government’s apparent position in this lawsuit, Congress never intended for the DPAA to have a monopoly on the recovery of service members’ remains from World War II. No statute provides the DoD or DPAA with such exclusive rights. In fact, other statutes enacted by Congress reveal the opposite. For example, Congress has authorized the reimbursement of expenses incurred by an individual who has recovered, cared for, and disposed

of the remains of a service member. 10 U.S.C. § 1482. Moreover, the statute that the DPAA was purportedly established by was intended to only cover “missing persons” deprived of due process. 10 U.S.C. § 1509. As expressed by Senator Dole and others, the statute was meant to provide relief to individuals declared dead solely because of the passage of time. *See* 140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12220, S12221, 1994 WL 449837 (“This bill attempts to ensure that missing members of the Armed Services . . . are fully accounted for by the Government and that they are not declared dead solely because of the passage of time.”); (“The evidence is clear that some men from WWII, the Korean War, the Cold War and the Vietnam War were declared dead when they were not dead but alive.”).

23. It is obvious that Congress wanted to protect the families of service members from Government violation of Due Process when it enacted 10 U.S.C. § 1509. As stated by Sen. Dole:

The legislation would establish new procedures for determining the whereabouts and status of missing persons. Additionally, the bill provides for the appointment of counsel for the missing, ensuring that the Government does not disregard their interests and affording the missing due process of law. By ensuring access to Government information and making all information available to hearing officers, while providing for protection of classified information, the proposal also attempts to remove the curtains of secrecy which often seem to surround these cases. Additionally, the missing person's complete personnel file is made available for review by the family members. Moreover, the legislation attempts to protect the interests of the missing person's immediate family, dependents, and next of kin, allowing them to be represented by counsel and to participate with the boards of inquiry. **It is our hope that by allowing more participation by the family, requiring legal representation of the missing, and permitting Federal court review of all determinations, we will establish fundamental fairness for all concerned.**

140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12220, 1994 WL 449837 (emphasis added).

24. Another supporter of the statute commented that individuals were being sent into “administrative limbo” and that it was “[n]o wonder so many families think Government decisions are arbitrary and capricious.” 140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12222, 1994 WL 449837. As shown in the Families’ Cross-Motion for Summary Judgment, the DPAA and DoD have failed to do what Congress demanded it do - provide families with fundamental fairness and due process - and its current policies have sent thousands of families into “administrative limbo.”

III. Families of the Service Members

25. The Plaintiffs in this case are the next of kin of the seven service members in this case. ECF 19 at 3-5; ECF 26 at 4-6. They have struggled for years now to bring our heroes from World War II back home.

A. Private Kelder’s Family

26. Around 2009, Private Kelder family discovered documents showing where Private Kelder’s remains were located. The family contacted the DoD to try to claim the remains of Private Kelder. But, the DoD and ABMC refused to consider any of the families’ evidence or provide any type of hearing for the family to claim Private Kelder’s remains. Ex. 35 at 3 (2014 letter to Government). Private Kelder’s family had no other choice but to file a lawsuit against the ABMC and DoD (along with the DPAA’s predecessor) in 2012. *See Eakin v. American Battle Monuments Commission, et al.*, No. SA-12-cv-1002-FB-HJB.

27. After several years of litigation, the DoD and ABMC finally disinterred Private Kelder’s remains in 2014. ECF 61-1 at 27. The next year, the Government officially recognized that Grave 717 contained Private Kelder’s remains, but his family only received a skull, three long bones, and a few other minor bones for burial. ECF No. 26 at 15. Five years have passed

since the Government disinterred Private Kelder's remains. Even though the remains recovered from Grave 717 were virtually anatomically complete, the Government only provided the Kelder family partial remains. Ex. 36 (photograph showing all of the remains disinterred and associated with Grave 717). The DPAA should have provided the Kelder family with frequent updates, but failed to provide even that. Instead, the Kelder family feels left in administrative limbo waiting for the Government to return all of their loved ones' remains.

28. The Government's ineffective efforts has shocked the Kelder family. It has become readily apparent that the Government has failed to employ the most modern scientific techniques. Ex. 37; Ex. 38 (emails from Government). For example, the Government released its own report stating that it should pursue a DNA lead identification process focused on expanding nuclear DNA testing. *See* ECF 31-6 (Report of the Defense Science Board Task Force on the Use of DNA Technology for Identification of Ancient Remains) available at <https://apps.dtic.mil/dtic/tr/fulltext/u2/a301521.pdf>. But, 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, the DoD continues to refuse to employ it for World War II era losses. Indeed, members of the Government's accounting community have recognized that they focused on the wrong techniques and should have pursued other more efficient and effective testing techniques all along. Ex. 37 (recognizing that Bode is far superior to own DNA testing laboratory).

B. Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen's Families

29. Similar to the Kelder family, the families of Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen discovered documents showing where their relatives' remains were located at Manila American Cemetery. Just like with the Kelder case, they were

not allowed to present evidence supporting their claims at a hearing. Nor did they receive any process from the ABMC to claim their relatives' remains. They were left with no other choice but to file this lawsuit. Records show that the DoD has been aware about the connection between Grave 822 and Private Morgan since at least 2014. *See* Ex. 4. They also show that the DoD has been aware of the connection between Grave 704 and TEC4 Bruntmyer since 2011. *See* Ex. 12. Nonetheless, the Government refused to take action before this lawsuit was filed.

30. A year after the lawsuit was filed, the Government finally agreed to disinter Private Morgan and Technician 4th Class Bruntmyer's remains. ECF 61-1 at 25-26. Those disinterments reportedly took place in November of 2018. ECF 61-1 at 25-26. Unfortunately, the Government's actions lack transparency, which results in a shortage of information. The families have no idea when they will receive the results of the DPAA's analysis of the remains. For all they know, they may not hear anything from the Government for years. The family members grow older each year, and many do not have five years to wait for the DPAA's completion of a "historical analysis" that satisfies the DPAA's arbitrary standards for identification - especially when a simple DNA test could resolve any identification disputes between the parties.

31. The Government has recently stated that it plans to disinter Private First Class Hansen's alleged remains. ECF 61-1 at 26-27. But no one outside of the Government knows when that disinterment will occur. The Government initially refused to disinter the remains associated with Private First Class Hansen's communal grave because it was unable to obtain enough family reference samples for DNA testing to meet its arbitrary standard. Once the Families discovered that this was the reason why the Government refused to act, the Families' consulted John Eakin, who then obtained contacts for each of the families for which a family reference sample was required to meet the arbitrary standard. ECF 56-1 at 7. The Government's

own summaries show that it made no progress for months in obtaining reference samples on its own. Ex. 17 at 5 (2017); ECF 63-17 at 57 (2018). Fortunately, the Government apparently used this information that the Families provided and plan to disinter Private First Class Hansen's remains. ECF 61-1 at 27. Still, the family has no idea when the Government will take action or provide an update on their case. The family resides in administrative limbo.

C. 1LT Nininger's Family

32. Again, just like the other families in this lawsuit, 1LT Nininger's family attempted to claim the remains of their loved one, but did not receive any opportunity or hearing to present their evidence to the Government. Instead, the family had to file this lawsuit. With today's technology, the Government's refusal to conduct DNA testing on the X-1130 remains makes no sense. Although the simplest (and most efficient) way to resolve the disagreement about the identity of the remains is DNA testing, the Government's decision shows that it has no intention of disinterring the X-1130 remains.

33. Despite 1LT Nininger being the first recipient of the Medal of Honor from World War II, his family has not sought priority of his identification. Ex. 21 at 4-5 (medal of honor description); Ex. 39 (email from family to Government). Instead, the family waited patiently for action and skipped no one. But now they feel deceived by the same Government that 1LT Nininger died fighting for. Ex. 39 at 1-2. Records related to 1LT Nininger's identification were left hidden and classified to cover up information and other mistakes. Ex. 21 at 2-3 (Patterson asking for Cheaney file, but being falsely told there were no classified portions relating to his uncle); *see* ECF 56-1 at 13 (discussing concealment of Cheaney file); Ex. 24 at 6-14 (declassified Cheaney file discussing Nininger). And at other times, the family has felt like the Government has actively worked against them. Ex. 39 at 2. 1LT Nininger's family simply wants to bring him

home for a proper burial, and are willing to do what is required to climb out of the administrative limbo they are stuck in.

D. Colonel Stewart's Family

34. Colonel Stewart's family has tried to claim the remains of their loved one, but they have not had any hearing or sufficient process to present the evidence that they have. So, the filing of this lawsuit became necessary. For years now, Colonel Stewart's family has wondered when the DPAA would act and disinter remains X-3629. The DPAA disclosed on April 11, 2019, that it has drafted a recommendation in favor of disinterment of the remains designated as X-3629. ECF 61 at 28. It turns out that the DPAA has had a disinterment memorandum prepared since at least January of 2018. ECF 63-17 at 67. This disinterment memorandum has sat in agency limbo for well over a year now. ECF 63-17 at 67.

E. Brig. Gen. Fort's Family

35. General Fort's family has also tried to claim the remains of their loved one, but they have not had any hearing or sufficient process to present the evidence that they have. The filing of this lawsuit became necessary. For years now, General Fort's family has wondered when the DPAA would act and disinter remains X-618. Based on recent filings, it appears that the Government refuses to disinter the remains and is pursuing different theories.

IV. The Problems Created by the Government's Failures

36. The families want to provide the above-named service members with a proper burial in accordance with their beliefs. *See* ECF 19 (explaining the relief sought). Unfortunately, the Government has failed to provide adequate relief to the families of our fallen heroes from World War II. Many cases were ignored for decades. It was not until 2014 that the DoD started to disinter remains associated with Cabanatuan to return them to their families. *See* ECF 63-17 at

56 (referring to Cabanatuan Grave 717 (Private Kelder's burial location)). And that only took place after Private Kelder's family filed a lawsuit against the Government. In other cases, the Government misidentified service members' remains and transferred them to the wrong families for burial. ECF 26-7 at 14-16; ECF 26 at 17. For example, the Government knew for more than fifty (50) years that remains buried at West Point as 1st Lt. Ira B. Cheaney were not actually those of 1st Lt. Cheaney. ECF 63-4 at 4-12; Ex. 24 at 5 (stating in 1950 that "remains presently buried in the West Point Academy Cemetery as 1/Lt Ira B. Cheaney Jr., 0-23965, are not those of Lt. Cheaney."). But it was not until just a few weeks ago that those remains were disinterred for testing. ECF 63-16 at 2-3. And this is not the only case of misidentification. Numerous examples show that the Government has failed to effectively fulfil its mission to recover and identify service members' remains from World War II, and the DoD has faced significant criticism for its inadequate performance. *See* ECF 10-2; ECF 10-3 (GAO report discussing DoD's failures in effectively accounting for deceased service members). Unfortunately, the individual cases before the Court in this case are not unique.

37. In all of the cases at issue, even the Government would admit that there exists at least some evidence supporting the Families' claims as to the identity and/or location of the remains at issue. But it is the Government's position that it will not return remains to a next of kin until it performs DNA testing. Even though that is its position, instead of going directly to DNA testing at the outset, the Government chooses to focus on using an antiquated approach that only applies DNA testing at the end. This results in families having to wait years before receiving results. *See* ECF 61-1 at 17 (historical analysis, anthropologist review, and odontologist review before DNA testing); ECF 61-1 at 28-35. As admitted by the Government's Laboratory Manager, its DNA testing facility has limited capacity and has a significant backlog.

ECF 63-12 at 3 (“DPAA has to wait a long time to receive results on samples submitted to AFDIL.”). This casts significant doubt on whether the Government has the ability to meet the Congressional mandate of 200 identifications per year. The Government’s own staff has discussed its failure to pursue the best DNA testing technology and recognized that an outside company (Bode) is superior. Ex. 37; Ex. 38.

V. Conclusion of Facts and Questions Relevant to Case

38. Thus, the primary problems created by the Government’s actions (or inaction) can be summed up as follows:

- The Kelder family has waited nearly a decade to receive all of Private Kelder’s remains (their first lawsuit was filed in 2012, years after they tried to contact the DoD). ECF 19 at 2 (citing litigation). Private Kelder was disinterred in 2014, yet the Government is still examining the remains with no end in sight. ECF 61-1 at 27. If families were allowed to hire private contractors to conduct DNA testing, cases could be resolved in a matter of months, not years, for a fraction of the cost.
- It has taken years for other families in this case to even receive a response from the Government. How many more years will it take for the results of any examination performed by the DPAA to be delivered to a family?
- The families have significant evidence showing the location of their relatives’ remains, including the X-files, IDPFs, historical reports, sworn statements, and witness statements, but the Government refuses to take any action or allow the families themselves to take action.
- The ABMC has no process, published rules, or policies allowing families to claim a relative’s remains.

- The DoD and DPAA have promulgated no regulations in the Federal Register or Code of Federal Regulations allowing families to claim a relative's remains.
- The DoD and DPAA's current policy (1) fails to provide families with sufficient process, (2) conceals information from families, and (3) places families in "administrative limbo."
- The Government has refused to prioritize DNA testing, which has caused significant delays for families that simply want to bring their relatives home for a proper burial in accordance with their beliefs.

Specific Responses to Government's Statement of Facts (ECF 61-1)

In addition to the above Statement of Facts, the Families also specifically respond to the individually numbered paragraphs in the Government's summary of facts, ECF 61-1, as follows:

- 1-6 – The Families do not dispute the Government's summary of the Army Graves Registration Service, except for any differences asserted in Plaintiffs' Statement of Facts.
- 7-12 – The Families do not dispute the accuracy of the statements in these paragraphs.
- 13 – The Families disagree with the Government's legal conclusion that burials in overseas military cemeteries are permanent and that disinterments are conducted only with military approval. Pub. L. No. 80-368 was repealed by Pub. L. No. 89-554 (Sept. 6, 1966) and is no longer in effect. No statute or law prohibits disinterment from an ABMC cemetery. Additionally, the ABMC has disinterred remains in the past as a part of beautification projects.
- 14 – The Families lack sufficient information to form an opinion on whether the ABMC began to regularly receive DoD requests for disinterment in 2015.

- 15 -16 – The ABMC does have an agreement with the DoD to permit the DoD to perform disinterments.
- 17-23 – In general, the Families do not dispute the Government’s account of the history of the Missing Service Personnel Act (“MSPA”), except to the extent that it conflicts with the Families own Statement of Facts concerning the MSPA.
- 24-27 – These paragraphs simply quote the MSPA. The statute speaks for itself.
- 28-29 – The Families disagree with the Government’s limited interpretation of the judicial review available by the MSPA. This is discussed in more detail in the Families briefing. Although the MSPA allows for review of some specific decisions, this does not preclude the review of other decisions. ECF 51 at 14.
- 30-34 – The Families do not dispute the statements in these paragraphs, except to the extent that it conflicts with the Families own Statement of Facts
- 35 – The Families contend that the DoD always had the legal obligation to account for service members from World War II and bring them back home to their next of kin for a proper burial.
- 36-38 –The Families lack sufficient information to form an opinion on the statements in these paragraphs.
- 39 – The Families dispute the claim that enough resources have been provided to regularly meet the Congressional requirement of 200 identifications per year, as explained in more detail in their Statement of Facts.
- 40-41 - The Families lack sufficient information to form an opinion on the statements in these paragraphs, but will note that the Government had previously failed to identify 200 service members in a year prior to 2018.

- 42-45 – The Families agree that the DPAA hosts meetings several times during each year that allow families to learn more about the DPAA’s operations. They also agree that next of kin are sometimes able to receive additional information about a service member.
- 46-59 – The Families do not dispute the Government’s summary of some of its regulations and policies, except to the extent that it conflicts with the Families own Statement of Facts and arguments contained in its Response to the Government’s Motion for Summary Judgment.
- 60 – The Families agree that physical evidence can be helpful to exclude a candidate. But the physical evidence must be proven to be reliable.
- 61-63 – The Families do not know what the Government means by “stature estimation.” Stature estimates used by investigators following World War II were based on inaccurate measurements. *See* ECF 19 at 8.
- 64-67 – These paragraphs contain opinions, and no factual response is required.
- 68 – This paragraph appears to add requirements not specified in DoD and DPAA’s regulations.
- 69-77 – The Families agree that the DPAA uses an anthropological lead identification process instead of focusing on using DNA analysis at the beginning.
- 78-82 – These paragraphs contain opinions about the Armed Forces DNA Identification Laboratory (“AFDIL”). Nothing needs to be added for purposes of the motions before the Court, except to add that the Government’s own employees have suggested that a private company focusing on DNA testing is far superior.
- 83-91 – The Families do not dispute the statements in these paragraphs in general, but do disagree with (1) the Government’s statement that AR 638-2 is limited or inaccurate and

(2) that remains cannot be provided to next of kin until the Armed Forces Medical Examiner makes a decision.

- 92-95 – The Families do not dispute the statements in these paragraphs, except to the extent that they conflict with the Families’ pleadings and briefing before the Court.
- 96 – The four service members that were prisoners of war and initially buried at Camp Cabanatuan were buried with other service members that died the same day they did.
- 97-98 – The records relied upon by the Families have proven to be accurate. For example, the Kelder case has shown that the records relied upon by the Families in this case are accurate. Therefore, most challenges raised by the Government can be overcome.
- 99-103 – The Families do not dispute the statements in these paragraphs.
- 104-105 – It is believed that disinterments associated with Camp Cabanatuan did not begin until 2014.
- 106 – The Families do not dispute this statement.
- 107 – 108 – The Families do not dispute these statements in general, except as stated in their Summary of Facts and supporting Declarations cited therein.
- 109-112 – The Families agree that Technician Lloyd Bruntmyer was buried in Grave 704, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.
- 113-116 - The Families agree that Private Robert Morgan was buried in Grave 822, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.

- 117-120 - The Families agree that Private First Class David Hansen was buried in Grave 407, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.
- 121-128 - The Families agree that Private Arthur Kelder was buried in Grave 717, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.
- 129-135 – The Families do not dispute the statements in these paragraphs.
- 136-152 – The Families dispute the Government’s conclusions, and refer the Court to their statements of fact concerning 1LT Nininger. The Families do not agree that the Government’s refusal to disinter 1LT Nininger’s remains is reasonable. The Families do agree with paragraph 144’s statement that the AGRS repeatedly recommended identifying the X-1130 remains as 1LT Nininger, but disagree that they primarily relied upon Col Clarke’s letter. The basis for the Families’ position is detailed in their Statement of Facts. *See also* Ex. 1 at 10-16.; Ex. 2.
- 153-169 – The Families dispute the Government’s conclusions, and refer the Court to their statements of fact concerning Col. Stewart. The Families do not agree with the Government’s decision to exclude Col. Stewart as a candidate for comparison to the X-3629 remains, which are those of Col. Stewart. The basis for the Families’ position is detailed in their Statement of Facts. *See also* Ex. 1 at 15-16; Ex. 2.
- 170-186 - The Families dispute the Government’s conclusions, and refer the Court to their statements of fact concerning Brig. Gen. Fort. The Families do not agree that the Government’s refusal to disinter Brig. Gen. Fort’s remains is reasonable. The basis for the Families’ position is detailed in their Statement of Facts. *See also* Ex. 1 at 16-17.

- 187-195 – The Families do not dispute these statements, except to the extent that they conclude that the remains at issue have not already been located and/or identified.

Dated: May 10, 2019

Respectfully submitted,

/s/ John T. Smithee, Jr.

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