UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. SA-17-CV-467-XR
	§	
DEFENSE POW/MIA ACCOUNTING AGENCY, et al.,	§	
	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Families[1] oppose the Government's[2] motion for summary judgment and memorandum in support, ECF 61, and file this Response in opposition to the motion. The Families will show that (1) there remains issues of material fact in this case and (2) the Government fails to establish any of its arguments as a matter of law. Thus, the Government is not entitled to judgment on any of the claims.

Introduction

In deciding the Government's Motion for Summary Judgment, this Court is ultimately presented with two straightforward issues:

- **First, Fourth, and Fifth Amendment Claims**. This Court previously concluded that the Families sufficiently stated claims under the First, Fourth, and Fifth Amendment. Here, the Government reasserts the same arguments that the Court previously rejected and asks the Court to reverse its prior decision. Should the Court reverse its holding that the

[1] Plaintiffs John A. Patterson, John Boyt, Janis Fort, Ruby Alsbury, Raymond Bruntmyer, Judy Hensley, and Douglas Kelder (collectively the "Families").

[2] 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").

Families sufficiently stated their Constitutional Due Process, Fourth Amendment, and Free Exercise claims?

- **APA Claims**. The Administrative Procedure Act ("APA") gives individuals the right to a full evidentiary hearing on the record to challenge the deprivation of liberty or property. 5 U.S.C. § 554. Here, the Government has possession of service members' remains, those remains are alleged relatives of the Families, and no hearing of any sort allows the Families to claim the remains for burial. Should this Court dismiss all of the Families' APA claims as a matter of law?

Because the Government relies on disputed facts, the motion also raises the question of whether a genuine dispute about relevant facts exists that bars the Government's motion.

Essentially, the Government wants a court to declare that the families of fallen World War II service members have no rights or privileges concerning the final burial of their loved ones. But this is something that this Court must not allow. The Government must provide the next of kin a fair opportunity to claim the remains of their loved ones so that they can provide these fallen heroes with a proper burial in accordance with their families' beliefs.

Summary of Argument

The Government's motion should be denied because it simply rehashes the same arguments made in its previous motion for judgment on the pleadings. The Court already concluded that the Families sufficiently stated their Constitutional Due Process, Fourth Amendment, and Free Exercise claims. As for the Administrative Procedure Act ("APA"), the Government did not file a certified administrative record for any of the cases at issue, which precludes its motion as a matter of law. But, even if the Court considered its arguments without a certified administrative record, the evidence already on file with the Court shows that the Government has violated the APA by not following procedures required by law and unreasonably delaying action. Because the Government ducked the issue of the procedures

required by the Due Process Clause and APA, the Government's summary-judgment motion does not pass muster.

Adoption and Incorporation of Previous Briefing

The Government's memorandum in support of its summary-judgment motion mostly repeats and restates arguments previously asserted in its memorandum in support of its motion for judgment on the pleadings, ECF 31, and reply in support of motion for judgment on the pleadings, ECF 36. In fact, the memorandum supporting the Government's summary judgment motion is entitled "Memorandum in Support of Defendants' Motion for Judgment on the Pleadings." ECF 61 at 3. The only argument that contains any notable changes concerns the Families' Administrative Procedure Act claims, but the substance of the argument remains the same. The Families responded to all of the Government's arguments in prior briefing, and the Court concluded that the Government's arguments repeated here should be rejected. Thus, the Families hereby respond to the Government's motion for summary judgment by adopting and incorporating, as if fully set forth herein, the facts and arguments in the Families' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, ECF 33. Additionally, in support of their Response, the Families also rely on the arguments herein, the attached Appendix and exhibits, all documents previously filed with the Court, and any oral argument granted by the Court, which show that the Government's summary-judgment motion lacks merit.

Facts

Pursuant to Local Rule CV-7(d)(1), the Families hereby incorporate by reference the summary of facts and the exhibits referenced in the attached Appendix. A majority of the documents and files necessary for the resolution of this motion are already on file with the Court and are cited and relied upon by the Families in their opposition to the Government's motion.

Legal Standard

Summary judgment is improper unless "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Government, as the moving party, bears the burden of proving that no factual issues exist. *Knight v. Kellogg Brown*, 333 Fed. Appx. 1, 6 (5th Cir. 2009). This burden cannot be satisfied by conclusions or unsupported factual allegations. *Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1564 (11th Cir. 1989) ("In passing upon a motion for summary judgment, a finding of fact which may be inferred but not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists."). "In determining whether that burden has been met, the court is required to resolve all ambiguities and credit all factual inferences that could be drawn in favor of the party against whom summary judgment is sought." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986)); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) ("the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."); *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 456 (5th Cir. 2005).

"If there is any evidence in the record that could reasonably support a jury's verdict for the nonmoving party, summary judgment must be denied." *Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 315–16 (2d Cir. 2006) (internal quotation marks and citation omitted); *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 353 (5th Cir. 2014). In addition, determinations of the weight to accord evidence or assessments of the credibility of witnesses are improper on a motion for summary judgment, as such are within the sole province

of the jury. *Hayes v. New York City Dep't of Corr.*, 84 F. 3d 614, 619 (2d Cir. 1996). Furthermore, the Government "bears the responsibility of informing the district court of the basis for the motion." *Id.* at 323. Grounds for summary judgment not specified in the motion are considered waived. *Costello v. Grundon*, 651 F.3d 614, 629 (7th Cir. 2011).

Argument

In order to obtain summary judgment, the Government must establish both that there is no genuine dispute as to any relevant fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Government's showing as to these matters is defective because it has failed to (1) establish that there is no genuine dispute as to any relevant fact and (2) establish that it is entitled to judgment as a matter of law.

I. The Government's Motion for Summary Judgment Must be Denied Because the Government Relies on Disputed Facts

Again, the Government must establish that there is no genuine dispute as to any relevant fact. The Government's showing as to this matter is defective because the Government's motion depends on establishing, as an undisputed fact, that the Government does not have possession of the remains at issue and that it cannot be determined by the trier of fact. ECF 61 at 9. While the Government concedes that the location of most of the service member's remains is likely known, the Government's argument relies on a showing that they just don't know for sure whether or not some of the remains at issue are who the Families allege they are. Plts.' Appx. ¶3-6 (still conducting analysis on remains it has disinterred). But the Government's factual conclusions conflict with its own evidence and are disputed by the Families. *Id.* at ¶9-15 (dispute location of remains for Nininger, Stewart, and Fort). Additionally, there are factual disputes regarding the reasonableness of the Government's actions. *Id.* at ¶32-35, 38.

The Government has conceded in its Statement of Facts that the location of the remains of Technician Lloyd Bruntmyer, Private Robert Morgan, Private First Class David Hansen, and Private Arthur Kelder has likely been established. ECF 61-1 at ¶¶109, 113, 117, and 121 (the Government officially admitted the identification of some of Private Kelder's remains years ago, but is still conducting analysis). It has expressly stated that the graves Plaintiffs alleged their relatives were buried in are the "likely original location of the remains." *Id.* This would seem to imply that the Government has admitted that it has possession of the Families' relatives' remains. While the ABMC had possession of all of these remains, the DPAA has taken possession of all but Private First Class David Hansen's remains. Unfortunately, the Government has not provided these particular families with sufficient information about any disinterment or provided them with an opportunity to participate or observe the Government's handling of the disinterred remains. More information is provided for each of these service members in the attached Appendix containing Plaintiffs' Statement of Facts and Response, which explains in more detail the material facts in dispute regarding these cases.

For the three other service members, the Government has refused to act so far. For First Lieutenant Nininger, the Government states that the DPAA believes there is a low likelihood that disinterment would lead to the remains designated as X-1130 being identified as 1LT Nininger. ECF 61-1 at ¶130. It has simply concluded that the historical evidence is not strong enough to establish that the remains designated as X-1130 are those of 1LT Nininger. ECF 61-1 at ¶130. For Colonel Loren Stewart, the DPAA has not reached a decision yet as to whether it will disinter remains X-3629. ECF 61-1 at ¶154. However, it does appear that it intends to recommending disinterment because it believes an identification could be made. ECF 61-1 at ¶156. Finally, for Brigadier General Guy Fort, the DPAA has recommended against disinterment

because the DPAA has chosen to believe statements made by Imperial Japanese war criminals rather than the Governor of a Philippine province and our allies. ECF 61-1 at ¶171. A more thorough examination of each of these cases and disputed facts is provided within this Response and in Plaintiffs' Statement of Facts, as well as previous filings, ECF 56. Plts.' Appx. at ¶9-15; Ex. 1 at 7-17.

As for 1LT Nininger, his remains were exhumed from a grave near where he was known to have perished. ECF 56-1 at 10; Ex. 21 at 6-7; Ex. 23 at 12. The exhumation was directed by U.S. Army Master Sergeant Abie Abraham. Ex. 23 at 12; ECF 56-1 at 10; ECF 61-1 at 29. 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 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. 23 at 12; Ex. 56-1 at 10-11; ECF 61-1 at 29. The original investigators recommended that the X-1130 remains be identified as 1LT Nininger five times. ECF 26-2 at 24-28; ECF 26-3 at 3-5; 56-1 at 11; Ex. 1-C. All evidence supported the identification, except for a height estimate that has been proven inaccurate. ECF 19 at 8; ECF 56-1 at 11. Even the Government admits that the height estimates used at the time were inaccurate. ECF 61-1 at 18. Thus, accepting all factual inferences that can be drawn in favor of the Families, a reasonable trier of fact could find that the X-1130 remains are more likely than not those of 1LT Nininger.

As for Colonel Stewart, his remains were also later discovered by Master Sergeant Abie Abraham and designated as Manila #2 X-3629. Ex. 28 at 8; Ex. 29; ECF 63-8 at 10. 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. 1 at 16. After reviewing the information available, Sergeant Abraham concluded that the remains were those of Colonel Stewart. Ex. 29; 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 2-7 ("BTB Col. Stuart" and Dental Chart referencing "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. Thus, accepting all reasonable inferences that can be drawn in favor of the Families, a reasonable trier of fact could find that the X-3629 remains are more likely than not those of Colonel Stewart.

As for Brig. Gen. Fort, 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. Ex. 31 at 1. 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. Ex. 31 at 1; ECF 63-9 at 22. Additionally, a Filipino soldier told Governor Cruz that he personally saw Brig. Gen. Fort bayoneted and killed. Ex. 31 at 1; 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. Ex. 31 at 1-2; Ex. 32 at 2; 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. The remains were ultimately buried in Manila American Cemetery Grave L-8-113. ECF 19 at 10; ECF 26 at 11; 56-1 at 16. Thus, accepting all reasonable inferences that can be drawn in favor of the Families, a reasonable trier of fact could find that the X-618 Leyte #1 Cemetery remains are more likely than not those of Brig. Gen. Fort.

These issues of fact – whether the Government has possession of the remains at issue and whether the service members' remains have been, or can easily be, located and/or identified - form a primary basis for several of the Families' claims. Again, the Court must view the Families' evidence in the light most favorable to the Families. *See Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587. All reasonable inferences should be drawn in favor of the Families. *See Anderson*, 477 U.S. at 255. Furthermore, beside the significant evidence already available, with the advance in science, the location and/or identity of the remains are the type of facts susceptible of quick and simple proof – DNA testing. However, in this case, rather than engage in discovery that would disclose to both parties significant evidence concerning the factual allegations asserted by the parties, the Government brought this motion relying on a few of its employees' opinions before it has obtained results from DNA testing. As the DPAA is now reportedly conducting DNA testing on the majority of the remains at issue, it would be premature for the Court to grant summary judgment against the Families. Accordingly, the motion must be denied because the Government relies upon disputed facts and is premature

A. Unfortunately, The Government Again Confuses the Relief Sought

Just like its previous Motion for Judgment on the Pleadings, the Government attempts to restate the Families' claims as requesting something other than what is stated in the pleadings.

Once again, the Government alleges that "this case is not about refusing to return identified remains to family members for burial." ECF 61 at 29. This ignores a crucial part of the relief sought by the Families in their Complaint, which is for the possession of their family members' remains for purposes of providing a proper burial. *See* ECF 19 at 19. It also ignores that the Families are asking the Court to provide them with adequate procedural due process – next of kin must be provided an opportunity to be heard so that they can claim their loved ones' remains. Again, this is an attempt to escape the obvious dispute of material facts concerning the Government's possession of the service members' remains. The Court should not allow the Government to transform the Families' claims into something they are not.

II. The Government's Arguments Concerning the Families Due Process, Fourth Amendment, and Free Exercise Claims Are Nearly Identical to the Arguments Raised in its Motion for Judgment on the Pleadings and Should be Rejected Again

If the Court compares the Table of Contents of the Government's summary judgment motion (ECF 61 at 4) and the motion for judgment on the pleadings (ECF 31 at 4), the headings are the exact same for all the Families' Due Process, Fourth Amendment, and Free Exercise claims. Just like the headings, the briefing in the motion for summary judgment also appears to be mostly the same as the briefing in the motion for judgment on the pleadings. The Government once again claims that the Families have failed to state a claim, but does not appear to sufficiently challenge the underlying merits of the Families' claims.

A. The Families Have Sufficiently Stated a Constitutional Due Process Claim

Again, the Government repeats the same arguments that it previously made. The Court already found that the Families sufficiently stated a procedural and substantive due process violation claim. Accordingly, the Families refer the Court to its previous order, ECF 51 at 9, and adopt, as if fully set forth herein, the facts and arguments in the Families' Response in

Opposition to Defendants' Motion for Judgment on the Pleadings, ECF 33. Specifically, the Families adopt, as if fully set forth herein, the facts and arguments located at ECF 33 at 7-20 in response to the Government's arguments concerning this claim. Additionally, the Families adopt the facts and arguments asserted in their cross-motion for partial summary judgment that related to their procedural due process claim. Nonetheless, the Families will add to their previous filings and briefing.

Next of kin have a property and liberty interest in the remains of their relatives for purposes of providing a final burial, and those interests are entitled to protection under the Due Process Clause. Unfortunately, these interests have been interfered with by the Government without sufficient due process. The ABMC has not provided any procedure for next of kin to request or claim the remains of their loved ones. Likewise, the DoD and DPAA have not provided a sufficient procedure or process for next of kin.

If a governmental decision or action ***implicates*** an individual's interest in property or liberty, then the right to some kind of hearing becomes paramount. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). Here, an interest is implicated because the Families have a property interest in the remains of their deceased relatives that is protected by the Due Process Clause. "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. *Id.* at 572. Indeed, the Supreme Court has explained that "property" is a "broad" and "majestic" term. *Id.* at 571. It is among the great constitutional concepts that was "purposely left

to gather meaning from experience" and "relates to the whole domain of social and economic fact." *Id.* (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

As previously briefed in this case (*see* ECF No. 33), numerous courts of appeals, including the Fifth Circuit, have considered the issue of what property interest a person has in a deceased relative and have recognized that state laws have created some form of a property interest in the deceased person's remains.[3] Our society has historically placed a premium value on protecting the dignity of the human body in its final disposition. *See Newman,* 287 F.3d at 798. Indeed, "the property interests of next of kin to dead bodies are firmly entrenched in the 'background principles of property law,' based on values and understandings contained in our legal history dating from the Roman Empire." *Id.* at 797. These property interests make sense because "[p]roperty rights serve human values" and "[t]hey are recognized to that end." *Id.* at 798.

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[3] *See Arnaud v. Odom*, 870 F.2d 304, 308-09 (5th Cir. 1989) (holding that "Louisiana has indeed established a 'quasi property' right of survivors in the remains of their deceased relatives"); *Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936) (next of kin has right to possess, preserve, and bury relative's remains); *Whaley v. County of Ruscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (holding that the next of kin have a constitutionally protected property interest in the dead body of a relative, an interest that includes the right to possess the body for burial); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (holding that the aggregate of rights granted by the state of Ohio to next of kin rises to the level of a "legitimate claim of entitlement" that is protected by the due process clause); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796-797 (9th Cir. 2002) (holding the exclusive right of next of kin to possess bodies of deceased family members created property interest entitled to due process protection); *Bynum v. City of Magee, Miss.*, 507 F. Supp. 2d 627, 638 (S.D. Miss. 2007) ("Under Mississippi law, deceased's next of kin and relatives have a due process property interest, or quasi-property interest, to custody or possession of the body for burial."); *Martin v. Kim*, 2:03 CV 536, 2005 WL 2293797, at *1 (N.D. Ind. Sept. 19, 2005); *Mansaw v. Midwest Organ Bank,* 1998 WL 386327, *4 (W.D. Mo.1998) (holding that in Missouri next of kin have a property interest in the disposal of a deceased person's body); *Crocker v. Pleasant,* 778 So.2d 978, 988 (Fla. 2001) (holding that "in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition").

Multiple independent sources recognize a next of kin's property interest in their relatives' remains for the limited purpose of providing a final burial. *See Travelers Ins. Co.*, 82 F.2d at 801. First, there is a deeply rooted common law principle, applicable in all jurisdictions, establishing the next of kin's entitlement to possess, control, and bury the remains of their loved ones. *See Newman*, 287 F.3d at 790. Second, each Plaintiff resides in a state that recognizes and accepts this same common law principle and has accepted some form of the Uniform Anatomical Gift Act that several courts of appeals Circuits have relied on. *See* ECF No. 51 at 6-7 and ECF No. 19 at 16-17 (citing case law from each state at issue); California - Cal. Health & Safety Code §§ 7102, 7150.40 *et seq.*; Rhode Island - R.I. Gen. Laws §§ 5-33.2-24, 23-18.6.1 *et seq.*; Texas - Tex. Health & Safety Code Ann. §§ 711.002, 692A.001 *et seq.*; New Mexico - N.M. Stat. Ann. §§ 24-6B-1 *et seq.*, 61-32-19; Wisconsin - Wis. Stat. Ann. §§154.30, 157.06. Finally, Federal courts have established a common law principle recognizing the next of kin's entitlement to possess, control, and bury the remains of their loved ones. *See Newman*, 287 F.3d at 795-98. It is a core common law right. The Fifth Circuit has concluded that "the right to possess, preserve, and bury [remains] belongs . . . to the next of kin." *Travelers Ins. Co.*, 82 F.2d at 801. Furthermore, multiple Courts, including those cited in the previous footnote, have concluded that this right is entitled to due process protection. *See Bynum*, 507 F. Supp. 2d at 638. Accordingly, it is established as a matter of law that next of kin have a legitimate due process property interest in the remains of their deceased relatives for burial.

It should be noted that the Government's interpretation of *Arnaud v. Odom* is incorrect. 870 F.2d 304 (5th Cir. 1989). In *Arnaud*, the Fifth Circuit found that Louisiana jurisprudence had established a "quasi-property" right of survivors in the remains of their deceased relatives. *Id.* at 308. The Court concluded that this right qualified for protection under the Due Process Clause.

Id. Other district courts within the Fifth Circuit have also found that this quasi property right is entitled to due process protection. *See Bynum v. City of Magee, Miss.*, 507 F. Supp. 2d 627, 638 (S.D. Miss. 2007) ("Under Mississippi law, deceased's next of kin and relatives have a due process property interest, or quasi-property interest, to custody or possession of the body for burial."). Moreover, many other circuit courts of appeals, which are cited above have reached a similar conclusion and have provided detailed analysis. A more detailed look at those cases can be found in the Families' Cross-Motion for Partial Summary Judgment. On the other hand, the Government has not found any federal circuit courts of appeals that have reached a conflicting conclusion.

1. Federal Law is not the Only Source of the Property Interest at Stake

The Government asserts a nearly identical argument concerning whether state law or federal common law should apply. Compare ECF 61 at 32-35 and ECF 31 at 29-31. It erroneously argues that no jurisprudence from any state should be considered. When a court asks whether a next of kin has a right to bury a relative's remains, it looks to the law of where the next of kin resides, together with core common law rights. *See Arnaud*, 870 F.2d at 308; *Newman*, 287 F.3d at 790; *Brotherton*, 923 F.2d at 482; *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984); *Bynum*, 507 F. Supp. 2d at 638. It is the next of kin's interest that is at stake.

None of the cases cited by the Government hold that the law where the remains are currently located should be exclusively applied. Thus, it is proper for this court to consider the jurisprudence from each respective state that a Plaintiff resides in. This jurisprudence should be considered in addition to the general common law principle recognizing the next of kin's right to bury, which has been consistently defended by the judiciary. *See Travelers Ins. Co. v. Welch*, 82

F.2d 799, 801 (5th Cir. 1936) (next of kin has right to possess, preserve, and bury relative's remains); *Newman*, 287 F.3d at 796.

The Government relies on the same state court opinions as it did in its previous motion for the proposition that this court should only consider the state code of where the remains are currently located. First, the opinions cited by the Government do not support that argument. The two cases concern probate matters and merely point out that a court in one state could not order a disinterment in another. *Unger v. Berger*, 76 A.3d 510, 516 (Md. Ct. Spec. App. 2013) (state probate court could not order disinterment in another state); *In re Estate of Medlen*, 677 N.E.2d 33, 37 (1997) (same). Neither case involved the federal government or the Due Process Clause. Second, to reach this conclusion, the Government would necessarily have to admit that the location and identity of all of the Remains is known. Third, this contention is nonsensical because it would allow the Government to move a person's property to another location outside of a state where the law may be more favorable to the Government. For example, several of the remains have been moved to Hawaii – so does the Government believe that Hawaii's state law should now apply? Finally, if the "most significant relationship" test does apply, then the jurisdictions with the most significant relationship are where the Families currently reside. It is the Families' rights that are being deprived – that is the right to receive and bury their relative's remains. The Families are not necessarily required to establish a property right in the remains themselves. Instead, the Families need only to establish a cognizable life, liberty, and/or quasi-property right to bury the remains. [4] Thus, the jurisdictions where the Families reside have the most significant relationship to the substantive interest that is at stake.

[4] This key distinction is vitally important because the Government's arguments and case law focus on a complete right to remains as they were without mutilation. In doing so, the

a. Each State Acknowledges a Property Interest

As explained above, each state in which a Plaintiff resides recognizes the next of kin's right to bury a relative's remains. Here, the Families reside in Rhode Island, California, Texas, New Mexico, and Wisconsin. The Government does not dispute that Rhode Island, Texas, and New Mexico have established in their jurisprudence the next of kin's right to bury a relative's remains and consider it a quasi property right.[5] Instead, the Government merely disputes whether the interest recognized in those states qualifies as a property interest protected by Due Process. Again, this argument fails because the Fifth Circuit has concluded that the interests, if recognized by the state, do qualify for protection under the Constitution. *See Arnaud*, 870 F.2d at 308.

As for California and Wisconsin, the Government contends that those states do not recognize a property interest in remains. These contentions fail. Contrary to the Government's argument, "California courts recognize 'a quasi-property right to its possession . . . for the limited purpose of determining who shall have its custody for burial." *Shelley v. County of San Joaquin*, 996 F. Supp. 2d 921, 927 (E.D. Cal. 2014). This has been consistently recognized in California. *Spates v. Dameron Hosp. Assn.*, 114 Cal. App. 4th 208, 221, 7 Cal. Rptr. 3d 597, 608 (2003) (courts have recognized "quasi-property right in the body of a deceased for purposes of burial or other disposition"). Even the cases cited by the Government recognize that there is a quasi property right for the purposes of burial. *See Perryman v. County of Los Angeles*, 153 Cal. App. 4th 1189, 63 Cal. Rptr. 3d 732, 739 (2007), review granted and opinion superseded, 171 P.3d 2 (Cal. 2007) (listing numerous cases recognizing quasi property right).

Government's attacks have missed their mark. All that is needed is a cognizable right to bury the remains.

[5] Case law showing this jurisprudence is cited in the Amended Complaint. Doc. 19 at 16-17.

For Wisconsin, the Government cites *Scarpaci v. Milwaukee County*, where the Wisconsin Supreme Court stated that: "The law is clear in this state that the family of the deceased has a legally recognized right to entomb the remains of the deceased family member in their integrity and without mutilation." 96 Wis.2d 663, 292 N.W.2d 816, 820 (1980). The court found that the basis for damages in a mutilation case is a violation of a personal right to bury the body. *Id.* However, this does not mean that there is no cognizable property interest. Again, whether an interest is labeled as "quasi property" or something else, like a personal right, is not dispositive. "[T]he identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the state." *Newman*, 287 F.3d at 797. As discussed above, in *Whaley*, the Sixth Circuit held that there was a constitutionally protected property right to corneas of deceased relatives even though the state had repeatedly emphasized that recovery for violation of the rights of next of kin "is not for the damage to the corpse as property." *Whaley*, 58 F.3d at 1116 (quoting *Keyes v. Konkel*, 78 N.W.2d 649, 649 (1899)).[6] Even if Wisconsin does not label the right as "quasi property," the state does recognize a next of kin's right to bury a relative's remains, which has been found to be a cognizable right entitled to due process protection. *See Whaley*, 58 F.3d at 1116.

Accordingly, case law from each jurisdiction, along with the statutes cited therein, recognizes a substantive interest establishing a next of kin's right to bury a relative's remains.

b. Federal Common Law Also Establishes the Right to Bury a Relative's Remains

[6] The Government also cites *Olejnik v. England* in support of its positon. 147 F. Supp. 3d 763, 773 (W.D. Wis. 2015). There the court found that parents did have the right to control final disposition of a decedent's remains. However, while there was a legally recognized interest in a body's remains under Wisconsin law, the court did not find that it was a constitutionally protected property right. This case addresses a separate issue – whether the right rises to the level of a legitimate claim or entitlement protected by the Due Process Clause - and contradicts the law within the Fifth, Sixth, and Ninth Circuit.

Even if no state jurisprudence applied, Federal courts have established a common law principle recognizing the next of kin's entitlement to possess, control, and bury the remains of their loved ones. *See Newman,* 287 F.3d at 795-98. It is a core common law right. The Fifth Circuit has found that "the right to possess, preserve, and bury [remains] belongs . . . to the next of kin, who may maintain an action for a deprivation of the right of sepulcher or a mutilation of the body." *Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936). Consequently, if the Government's claim were true that federal common law applied, their argument would still fail because the federal common law recognizes the Families' entitlement to bury their relatives' remains. *See id.* There is no federal statute contradicting the common law's application to this case. Instead, every policy and regulation supports the position that the remains must be returned to the Families for proper burial.

Moreover, it is highly doubtful that a state or government entity could alter the Families' property interest as suggested in the Government's motion. As stated by one court:

> Because the property interests of next of kin to dead bodies are firmly entrenched in the "background principles of property law," based on values and understandings contained in our legal history dating from the Roman Empire, [a state] may not be free to alter them with exceptions that lack "a firm basis in traditional property principles."[7]

Indeed, for more than a century, courts have protected families from attempts by the government to deprive families of the remains of their relatives. For example, the Indiana Supreme Court held that a city council could not "seize upon existing private burial grounds, make them public,

[7] *Newman*, 287 F.3d at 797-98 (quoting *Phillips v. Washington Legal Found*, 524 U.S. 156, 165-68 (1998); *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J. concurring) ("[T]here are limits on governmental authority to abolish `core' common-law rights.").

and exclude the proprietors from their management." *Bogert v. City of Indianapolis*, 13 Ind. 134, 136, 138 (1859). The court commented that "the burial of the dead can [not] . . . be taken out of the hands of the relatives thereof" because "we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." *Id.*

2. Whether the Government Has Possession of the Service Members' Remains is a Material Fact in Dispute

The Government argues that the Families have no legitimate claim because it believes the remains at issue have not been located and/or identified. As an initial matter, this argument is fatal to the Government's motion because it shows that there is a material fact in dispute. Further, this argument is belied by the Government's admission that it believes the location of the remains of Robert Morgan, Lloyd Bruntmyer, David Hansen, and Arthur Kelder has likely been established. Doc. 61 at ¶¶109, 113, 117, and 121. Finally, the Government's discussion of future property interests is irrelevant, and incorrect, because it once again ignores the issue of fact that is in dispute regarding the location and/or identity of the remains. It also ignores the fact that the Government has already acknowledged that Private Kelder's remains have been identified. Moreover, the next of kin's right to bury a relative's remains could not possibly be considered a future interest. It is something that would vest immediately upon death. The right exists whether or not a government authority officially recognizes the identity of the relative.

As this Court knows, it is up to the trier of fact to decide whether the Families' factual allegations should be accepted as true. The evidence before the Court shows that there is significant proof showing that the location of the remains can be determined. Consequently, it

would be improper for the Court to grant summary judgment when there is a material fact in dispute that is supported by evidence.

3. The Property Interest is not Too Contingent to be Cognizable

The Government again contends that there is no property interest because the remains were previously interred at a military cemetery. ECF 61 at 36. This argument is nonsensical because the Government has unilaterally disinterred the majority of the remains at issue and intends to eventually disinter all of the remains at issue. This is not a permanent resting place for the remains. The Government fails to cite any case law from a federal court supporting its position, and instead relies upon inapplicable case law that does not discuss temporary burials. Furthermore, the Government has stated that it is of the highest national priority to account for service members and that they will be returned to their families. DoD Directive 2310.07 § 1.2(a) (Apr. 12, 2017); DoD Directive 1300.22, Mortuary Affairs Policy § 3 (Oct. 30, 2015). This completely contradicts the Government's argument that the temporary burial terminates the Families' rights. Finally, the Government's continued discussion of the Families' discovery request for DNA testing is irrelevant for purposes of this motion.

4. The Families Have a Cognizable Liberty Interest

The Government ignores the Families' claimed liberty interest and failed to properly brief this issue. Therefore, any argument that the Families lack a cognizable liberty interest has been waived for purposes of this motion. Nonetheless, the Families will show that they also have a liberty interest.

Just like "property", "liberty" must be construed broadly. *Roth*, 408 U.S. at 571. While courts have struggled to interpret exactly what is a "liberty" interest, the Supreme Court once explained that a liberty interest should be recognized when the asserted liberty interest has

traditionally been protected by society, is "rooted in history," and its "tradition is evident." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). Without doubt, it denotes the freedom to enjoy privileges long recognized as essential to the orderly pursuit of happiness by free men. *Roth*, 408 U.S. at 572.

Here, next of kin also have a liberty interest that is implicated by the Government's actions – next of kin are unable to choose how and where the remains of their deceased relatives will be buried. The liberty to bury our relatives and loved ones is deeply rooted in our history. *See Newman*, 287 F.3d at 796 (duty to provide final disposition of remains is "deeply rooted in our legal history and social traditions."). Its tradition is evident. *Id.* Furthermore, as shown in the case law cited in the above-section, it has been protected by society dating back to the Roman Empire. *See Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 235-36, 1872 WL 3575 (1872) (citations omitted) (reviewing civil law of ancient Rome); *see also Bogert v. City of Indianapolis*, 13 Ind. 134, 136, 138 (1859) ("the burial of the dead can [not] . . . be taken out of the hands of the relatives thereof . . . ."). Accordingly, next of kin have a legitimate liberty interest that is entitled to procedural due process protection. *See Michael H.*, 491 U.S. at 122. Without this liberty interest, next of kin would be denied the freedom to enjoy privileges long recognized as essential to the orderly pursuit of happiness by free men. *See Roth*, 408 U.S. at 572.

5. The Government Has Interfered with the Families' Interests

The Government has possession of the remains of more than 3,700 service members buried at Manila American Cemetery that it has unilaterally determined are "unknowns." ECF 31 at 10. Among those remains that were or are buried at Manila American Cemetery, are the remains at issue in this case (the Government reports that three of the remains at issue have been

disinterred and moved to a laboratory in Hawaii, and it intends to disinter an additional grave at issue). The Government does not dispute that it has possession of the remains that the Families contend are those of their family members. But the ABMC has provided no process or procedure for next of kin to request disinterment and possession of a relative's remains for burial. Ex. 33 at 9, 12. Likewise, the DoD and DPAA have taken possession of several remains at issue but have not provided next of kin with any procedural rights to claim or request possession of remains for burial. Ex. 34 at 13-14. Consequently, the Government is interfering with the Families' interests at stake in this lawsuit. By maintaining possession of these remains, the Government is depriving the Families of their right to request or claim their relative's remains for burial. Of course, it is understandable why the Government initially took possession of these remains. But there is no excuse for failing to provide next of kin with a process or procedure to request disinterment or possession of their relatives' remains for burial. At the very least, the Families' ability to exercise their right to claim their relative's remains is unjustly limited by the Government's current policies.

The Government also attempts to cast all of the blame on the Imperial Japanese. It claims that the Imperial Japanese, as a third-party, is who deprived the Families of their cognizable interest. This argument is another attempt to sidestep the issues of fact in dispute and ignores the actual relief that is being sought by the Families. The Imperial Japanese do not have possession of the service members' remains. On the other hand, the Government does have possession of the remains and refuses to allow the Families to provide a proper burial. It makes no sense for the Families to assert a claim against the Imperial Japanese. The present injury complained of is being caused by the Government's current actions and/or inaction. Further, the Families' Due Process claims do not seek to impose a duty on the Government to go out and identify service

members. This ignores the Families' claim that the Remains have been located. Demanding the Government to stop depriving a recognized interest is not a request for assistance. It is a demand to stop violating constitutionally protected rights.

6. The Families are Entitled to Reasonable Due Process, Which They Have Not Received

The Government contends that the Families cannot show that they are entitled to any additional process. ECF 61 at 40. This argument lacks merit.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the ABMC and DPAA, as administrative agencies, provide the Families with a fair and impartial adjudicatory proceeding - both in appearance and in reality - that is free of any prejudgment on the key factual and legal merits of the allegations. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) ("The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer."). In particular, procedural due process must be provided when potential fact issues exist concerning a specific individual. See *id.*

The ABMC does not have any process or procedure whatsoever for next of kin to request disinterment or possession of relative's remains for burial. Likewise, the DPAA and DoD also lack any type of hearing or formal process that allows next of kin to receive fair adjudication. If it wishes, the DPAA can take years to respond to a next of kin's request for disinterment or it can choose to simply ignore the request without any consequences. *See* Plts.' Appx. at ¶29; Ex. 4; Ex. 12 (showing that Government had knowledge of location of remains, but did not take any action for years). While next of kin can submit a request to the DPAA for an identification to be recognized by the DPAA and DoD, a next of kin still does not have any procedure to claim the remains of their loved one. There is no opportunity for a formal hearing, no opportunity to

present witnesses and evidence in support of a case, no opportunity to confront the Government's evidence and witnesses, no written final decision by the ABMC, and no right to appeal any final decision or inaction. *See* Ex. 1 at 4 (Government refused to consider evidence that family tried to present, which proved to be accurate). Additionally, there is not "timely" relief provided to next of kin. It has been years since Private Kelder was disinterred, and the Government still refuses to return the balance of his remains to the next of kin. At bottom, the Government arbitrarily and capriciously decides whether to respond to a request from a family member. The complete lack of any meaningful hearing for family members to obtain the remains of their loved ones violates the Due Process clause.

In sum, the Government appears to take the position that it can do whatever it likes with the remains of service members that it unilaterally declares are "unknown" without providing next of kin with any opportunity for a hearing. But the Government's position is wrong. As discussed in more detail in the Families' Cross-Motion for Summary Judgment, every individual adjudication by the ABMC and DPAA must be accompanied with adequate procedures.

7. The Government Refuses to Return the Remains to Their Families Without Sufficient Justification

The Government argues that the Families' substantive due process claim fails because the deprivation of the Families' rights was not in an arbitrary and capricious manner. The Government is refusing to allow a family to bury a relative that died fighting for the United States in World War II against the Imperial Japanese. The Government's motion does not pinpoint any justification for why it should not return located remains. Indeed, assuming the Families' factual allegations are true, this is certainly official conduct that shocks the conscious. While the question of whether to disinter completely unknown remains may be debatable, whether to allow families to bury located remains is not. Thus, the factual allegations, taken as

true, together with all reasonable inferences in their favor, sufficiently allege a substantive violation of the Due Process Clause. *See Martin*, 2005 WL 2293797, at *7-8 (refusing to dismiss next of kin's substantive due process claim).

B. The Families Have Sufficiently Stated a Fourth Amendment Claim

Again, the Government repeats the same arguments that it previously made. The Court already found that the Families sufficiently stated a Fourth Amendment violation claim. Accordingly, the Families refer the Court to its previous order, ECF 51 at 20, and adopt, as if fully set forth herein, the facts and arguments in the Families' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, ECF 33. Specifically, the Families adopt, as if fully set forth herein, the facts and arguments located at ECF 33 at 20-21 in response to the Government's arguments concerning this claim. Nonetheless, the Families will add to their previous filings and briefing.

The interference with individual property rights may be found to breach more than one provision of the Constitution. *See Simi Inv. Co.. v. Harris County*, 236 F.3d 240, 248-49 (5th Cir. 2000). For example, a substantive due process or procedural due process claim "may be implicated simultaneously in various types of governmental actions that interfere with individual property rights," like a constitutionally unreasonable seizure claim. *See Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009). That is the case here.

"A seizure of property . . . occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). To sufficiently state a Fourth Amendment claim, the Families must assert that (a) there has been a meaningful interference with their property rights, which is (b) unreasonable or, if reasonable, then uncompensated. *Severance*, 566 F.3d at 501. Here, the Families asserted facts

showing that there has been a meaningful interference with their property rights, which is unreasonable. Specifically, the Government has control of the remains of their relatives and are refusing to allow the Families to provide a proper burial. As discussed above, the Families do have a cognizable property and/or liberty interest, which is entitled to protection under the Constitution.

The Government does not dispute that a meaningful interference has been alleged. Instead, the Government argues that, if the Families do have a cognizable property interest, the Government's seizure is reasonable. The Government is essentially asking the Court to declare that as a matter of law, any decision by the DPAA is per se reasonable. However, the factual allegations asserted by the Families show that the actions are unreasonable. Nonetheless, resolution of this dispute, and similar disputes regarding the reasonableness of the Government's behavior, would be inappropriate at this stage of the case because of the material facts in dispute. Additionally, even if it were appropriate, the Government fails to provide any specific reason why the Government's seizure of located remains is reasonable. Rather, the Government ignores the Families' claim that all of the remains have been located and/or identified. The Government also ignores that the balance of Pvt. Kelder's remains have already been disinterred and are currently being held in a government facility. Finally, the Government fails to argue that it is reasonable to seize located and/or identified remains. Consequently, this argument fails because it attacks a position not taken by the Families. The Families' factual allegations, taken as true, sufficiently allege unreasonableness.

Therefore, the Families have sufficiently stated a claim for relief under the Fourth Amendment because there is not a justifiable reason for the Government's meaningful interference.

C. The Families Have Sufficiently Stated a Free Exercise Claim

Again, the Government repeats the same arguments that it previously made. The Court already found that the Families sufficiently stated a Free Exercise claim. Accordingly, the Families refer the Court to its previous order, ECF 51 at 16, and adopt, as if fully set forth herein, the facts and arguments in the Families' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, ECF 33. Specifically, the Families adopt, as if fully set forth herein, the facts and arguments located at ECF 33 at 22-25 in response to the Government's arguments concerning this claim. Nonetheless, the Families will add to their previous filings and briefing.

The Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§2000bb–1(a), (b). Thus, for purposes of sufficiently stating a claim, the Families must allege that the Government has substantially burdened their exercise of religion.

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760, 189 L. Ed. 675 (2014). The exercise of religion "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc–5(7)(A). "And Congress mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Burwell*, 134 S. Ct. at 2762 (quoting §2000cc– 3(g)).

At issue here are regulations and policies promulgated by the Government, which place a substantial burden on the Families' exercise of religion by withholding the remains of the Families' relatives. The Families assert that they are entitled to bury their relatives' remains in accordance with their religious beliefs and moral principles. They have demonstrated that the Government has placed a substantial burden on their exercise of religion, which does not further a compelling governmental interest.[8] Even if it did further a compelling interest, it is not the least restrictive means of furthering that interest.

1. The Court Already Considered and Rejected the Government's Arguments

First, the Government claims that the Families lack standing to bring a Free Exercise claim. The Court rejected this argument and found that the Families have standing. ECF 51 at 16 ("The Court finds Plaintiffs have standing to bring Free Exercise claims based on their own religious beliefs.").

Second, the Government reasserts that the Families failed to plead a burden on the exercise of their religious beliefs. ECF 61 at 46. This argument was also rejected by the Court. ECF 51 at 16 ("Plaintiffs allege that their free exercise of their sincerely held religious tradition of burial has been burdened because the government refuses to return the remains of their relatives. Docket no. 19 at 32–33. These allegations are plausible on their face and meet the

[8] Numerous commentators have noted that government interference with the right to bury a relative's remains may violate the Free Exercise Clause. *See* Walter R. Echo-Hawk, Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws, NARF (1998), available at https://www.narf.org/nill/documents/nlr/nlr14-1.pdf ("Similarly, where state action is involved in the removal of remains or in withholding them from reburial by the affected Indian nearest next-of-kin, it seems clear that such interference with religious-based mortuary practices can create a cause of action under the Free Exercise Clause of the First Amendment.").

pleading requirements at this stage of litigation for both a Free Exercise claim and a RFRA claim. Plaintiffs state a valid claim for violation of the Free Exercise Clause and RFRA.").

Third, the Government reasserts that the Families claim the Government owes them affirmative actions. ECF 61 at 46. Once again, this confuses the causes of action that are being asserted against the Government. It also ignores the factual claims in the Families' Amended Complaint stating that the remains have been identified and/or located. The Families want to take the affirmative action necessary to bury their relatives' remains – not force the Government to do so. Nowhere in the motion does the Government contend that refusing to return identified remains is not a substantial burden. Accordingly, the Families have sufficiently stated a claim for relief.

Finally, the Government reasserts that the Families cannot establish a substantial burden. Again, the facts alleged in the Amended Complaint show that the Government has placed a substantial burden on the Families' exercise of religion. *See, e.g.*, *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 340 (Md. Ct. Spec. App. 1976) (holding that when a person has religious beliefs regarding the burial of a relative, the state may only abridge those practices by showing a compelling government interest because it is a substantial burden). Specifically, the Government is withholding the remains at issue from the Families, which denies them from burying their relatives in accordance with their sincere religious beliefs. This is the precise religious practice that is being substantially burdened. The Government does not appear to dispute that the Families have alleged that they have a sincere religious belief.

2. The Government Improperly Raises an Affirmative Defense Not Stated in its Answer

The Government attempts to assert the affirmative defense that its actions are in the furtherance of a compelling governmental interest and are the least restrictive means of

furthering that interest. This affirmative defense was not raised in the Government's Amended Answer. Thus, this argument should not be considered by the Court because the Government did not raise the defense in its pleadings and there is not fair notice.

3. Even if the Affirmative Defense is Considered, the Government's Actions Are Not in Furtherance of a Compelling Governmental Interest

The Government has failed to show that, as a matter of law, its actions are in the furtherance of a compelling governmental interest. The entire basis of the Government's affirmative defense is the factual claim that some of the remains at issue have not been identified or located. Any comparison to the case concerning the World Trade Center is inappropriate. Unlike this case, there the remains had not been individually located and/or identified or traced to specific graves. There were not temporary and specific graves involved. Additionally, any blame on the Imperial Japanese is also inappropriate. The Imperial Japanese are not currently withholding the remains from their families.

Oddly, the Government claims that families of service members are owed less under the Constitution from the Government than other private citizens. Despite these service members sacrificing everything for their country, the Government now argues that their families should not be able to provide them a proper burial. No reason is offered as to why the remains should not be returned for burial when it is the DPAA's obligation to return identified remains to their families for burial. This undermines the entire argument. Thus, the Government has failed to meet its burden.

4. Even if the Government Conclusively Showed that its Actions Are in the Furtherance of a Compelling Governmental Interest, it Failed to Allege that it is the Least Restrictive Means of Furthering that Interest

To defeat the Families' claim, the Government must establish, by way of affirmative defense, that it is using the least restrictive means of furthering the compelling governmental

interest. Here, the Government has failed to establish this defense because it has not properly raised it. The Government does not even assert that it has met its burden. Instead, it incorrectly argues that the Families have not shown that the Government's procedures are more restrictive than necessary. The Families do not have to prove that. Nevertheless, no reason is given as to why identified remains that have been located should not be returned to their families for proper burial. Thus, the Government has failed to establish that it is using the least restrictive means. Oddly, the Government claims that it serves a compelling interest by "conducting disinterments only upon concluding that identifications can swiftly be made." ECF 61 at 50. But the Government has made no "swift" identifications here - it has been more than five years since Private Kelder's remains were disinterred and almost six months since Private Morgan and Tech Bruntmyer's remains were disinterred. Plts.' Appx. at ¶3-5.

In sum, the Families have properly stated a claim for relief under the RFRA. Additionally, for the same reasons stated above, the Families have properly stated a claim for relief under the Free Exercise Clause because the Government has not shown that the burden serves a legitimate governmental interest.

III. The Government has Violated the APA

The Government argues that the Families "cannot show that Defendants have violated the Administrative Procedure Act." ECF 61 at 11. This is incorrect. Once again, the Government repeats many of the same arguments that it previously made. Accordingly, the Families refer the Court to its previous order, ECF 51 at 14-15, and adopt, as if fully set forth herein, the facts and arguments in the Families' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, ECF 33. Specifically, the Families adopt, as if fully set forth herein, the facts and

arguments located at ECF 33 at 30-36 in response to the Government's arguments concerning this claim. Nonetheless, the Families will add to their previous filings and briefing as follows.

The APA directs reviewing courts to compel agency action unlawfully withheld or unreasonably delayed and to hold unlawful and set aside agency action, findings, and conclusions that violate the law or are otherwise arbitrary and capricious. As explained below, the Government has violated the APA and review is appropriate.

A. The Government Has Failed to Comply with Section 553 of the APA

First, the Government has failed to comply with the APA by not promulgating its regulations concerning the disinterment of remains from World War II in the Federal Register or Code of Federal Regulations. *See* ECF 26 at 18. While the DoD has numerous rules and regulations related to accounting for missing personnel (discussed more below), none have been properly issued by notice and comment rulemaking as required by Section 553 of the APA.

B. The Government Has Failed to Observe Procedure Required by Law

Second, the Government has unlawfully refused and unreasonably delayed the return of the remains at issue to their families. Additionally, it has done so without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(D). Here, the Government has unilaterally made a formal or "on the record" adjudication concerning several of the Families' requests for disinterment and possession of their relatives' remains. While an agency is generally free to choose how to utilize its rulemaking policy, certain legal requirements nevertheless apply to adjudications. 5 U.S.C. §§554, 556-557. Formal adjudications require trial-like procedures and must be conducted before an administrative law judge or agency head. *Id.* For example, if an individual is denied a benefit under the Black Lung Benefits Act, that agency must provide an administrative law judge to oversee a formal hearing reviewing the case because it is a formal

adjudication. Here, the Families are being denied the right to bury their loved ones' remains on an individual basis. But a formal hearing or opportunity to refute the Government's conclusion has not been provided.

This failure also relates to the Government's failure to provide adequate procedural due process. As discussed above, the Families have a property and/or liberty interest at stake. But, even if we assume that the Government is entitled to use its discretion and there is no property interest created by state or common law, the Government must still provide sufficient due process. In determining whether a given agency rule or regime creates a property interest protected by the Due Process Clause, courts also look to the statutes and regulations governing the distribution of benefits. *See Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175 (2d. Cir. 1991). "Where those statutes or regulations 'meaningfully channel official discretion by mandating a defined administrative outcome,' a property interest will be found to exist." *Kapps v. Wing*, 404 F.3d 105, 113 (2d. Cir. 2005). "[T]he focus of the federal courts is on the adequacy of the procedures used to make that determination." *Id.* at 117.

Thus, to the extent that the Government's regulations mandate the return of a service member's remains to a next of kin that satisfactorily proves that they are eligible and have located their relative's remains, the next of kin "possess a property interest, protected by the federal Due Process Clause." *Id.* Again, the right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit. It is enough to invoke procedural

safeguards of the Fourteenth Amendment that a significant property interest is at stake . . . .”). The aim of proper procedures is to decide properly whether the next of kin has a legitimate claim of entitlement.

C. The Government’s Failure to Act Violates the APA

Agency action includes a failure to act. 5 U.S.C. § 551(13). Consequently, under certain circumstances, “agency inaction may be sufficiently final to make judicial review appropriate.” *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000). Those circumstances apply here.

In the present case, the Government has had possession of the remains at issue for more than 60 years. The law, as previously discussed, demands that the Government return the remains of a service member to his family for burial. But the Government has refused to act and has unreasonable delayed in taking any action. For example:

- Despite acknowledging that Private First Class David Hansen was most likely buried in Grave 407, the Government has refused to take any action to disinter his remains and provide them to his family. ECF 61-1 at 26.
- Despite having disinterred Private Kelder’s remains five years ago, the Government has refused to return the remaining balance of his remains to his family. ECF 61-1 at 27.
- Despite having disinterred Private Robert Morgan and Technician Lloyd Bruntmyer nearly six months ago, the Government has not provided any information to the Families about any testing or research.
- Despite having received a request for disinterment from Colonel Stewart’s next of kin many years ago, the Government has refused to answer whether it will disinter

the remains designated at X-3629. ECF 61 at 27 ("DPAA is still preparing its recommendation regarding Plaintiff John Boyt's request . . . .").

- The Government has failed to timely notify and provide the Families with all information concerning their relative's case, which the Government claims is required by statute. *See* 10 U.S.C § 1509(e)(2)(A); 10 U.S.C § 1505(c)(2). For example, the Government knew for years about the Cheaney file, but did not timely provide that information to the next of kin – Patterson. Ex. 21 at 2-3 (Patterson asking for Cheaney file, but being falsely told that there were no classified portions relating to his uncle). Another example is the Government not providing new information about the remains that have been disinterred and what it is doing with those remains. *See* Plts.' Appx. at ¶30-31.

The Families understand that there are other families that also want their loved ones returned. But there is no explanation as to why the Government has refused to act on any of the above-described matters in a reasonable time. If the Families were allowed to conduct DNA testing on their own, any doubts as to the identity of the remains could have been resolved in a matter of months. Instead, they have spent years now waiting for the Government to complete what it told the Families it would do – bring their loved one home for a proper burial. There simply has been no explanation as to why the Government has failed to act in these cases or refused to allow the Families to help.

D. This Court Already Concluded that the Government's Contention that APA Review is Unavailable is Incorrect

This Court previously rejected the Government's argument that APA review is unavailable. ECF 51 at 14. It found that the statute cited by the Government did not preclude judicial review. *Id.* Additionally, the Court found that "to the extent that the decision to disinter

or not is left to agency discretion, the DPAA has detailed policies for how to conduct its accounting mission, which provide the Court sufficient standards by which to evaluate the DPAA's action." *Id.* (citing DPAA Administrative Instruction No. 2310.01; Docket no. 31-1 at 164–91. Furthermore, the Court concluded that "at this stage the Court finds that APA review is available for Plaintiffs' First, Fourth, and Fifth Amendment constitutional claims because the Court finds no indication that Congress intended to preclude review of constitutional claims." *Id.* Accordingly, the Court has already concluded that the Government's arguments concerning reviewability should be denied. Nonetheless, out of an abundance of caution, the Families will address this issue should the Court choose to consider the Government's arguments a second time.[9]

This time, the Government's primary contention is that APA review is unavailable because the Court lacks sufficient statutory standards to evaluate the lawfulness of its actions and that its regulations do not provide a meaningful standard to apply. ECF 61 at 13. "[T]he agency discretion clause 'is a very narrow exception' to the principle of judicial review of administrative action." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 233 (5th Cir. 2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other*

[9] Even if review was not available under the APA, the Government's actions may still be reviewed for constitutionality outside of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). Indeed, "the judicial branch's power to enjoin unconstitutional acts by the government is inherent in the Constitution itself." *Hubbard v. EPA*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). In *Bell v. Hood*, the Supreme Court held that the "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution" is found in 28 U.S.C. §1331 (district courts have jurisdiction over all cases "arising under" federal law). Where the Government violates constitutional rights, "equity . . . provides the basis for relief—the cause of action, so to speak—in appropriate cases within the court's jurisdiction." S*immat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005).

grounds by Califano v. Sanders, 430 U.S. 99 (1977)). It applies in those rare instances where there is no law to apply. *Citizens to Preserve Overton Park*, 401 U.S. at 410 (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). "The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the committed to agency discretion by law exception unless the statutory scheme, taken together with other relevant materials provides absolutely no guidance as to how that discretion is to be exercised." *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015), *as revised* (Nov. 25, 2015). Even if there is a lack of statutory criteria, "[a]n agency's own regulations can provide the requisite 'law to apply.'" *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998) Additionally, "even if agency action is committed to its discretion by law, judicial review of *constitutional* claims is still available unless congressional intent to preclude review is clear." *Id.* (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (emphasis added).

1. There is Nothing Prohibiting APA Review of Constitutional Claims

The Government admits in a footnote that there is nothing prohibiting judicial review of constitutional claims under the APA. ECF 61 at 11. Therefore, even if the Government's contention that agency action is committed to its discretion by law is accepted as true, APA review would still be available for the Families' First, Fourth, and Fifth Amendment claims. *See id.* This alone defeats the Government's broad claim that APA review is not available.[10]

2. The Court has Sufficient Standards to Evaluate the Government's Actions (or Inaction)

[10] An agency is not entitled to deference to its interpretation of a statute that it is not charged with implementing, such as the APA. *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1436 (9th Cir. 1991). Additionally, "a reviewing court owes no deference to the agency's pronouncement on a constitutional question." *J.J. Cassone Bakery Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009) (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)).

Again, this Court already concluded that the DPAA has detailed policies for how to conduct its accounting mission, which provide the Court with sufficient standards by which to evaluate the DPAA's action. ECF 51 at 14. This is a correct holding because the Constitution and the Government's regulations require that next of kin be provided due process and that the remains of a service member be returned to their family for proper burial.[11]

As this Court already concluded, AI 2310.01 provides the Court sufficient standards by which to evaluate the DPAA's action. ECF 51 at 14. The Government admits that the instruction can provide constraints on the DPAA's process for recommending whether disinterment should occur – which is a part of the Families' challenge. And it is clear by the filings in this case that the Government is not following the process set forth in this instruction.

For example, the Government's policies state that "[r]eqests to disinter specific individual Unknowns submitted by family members of unaccounted for DoD personnel will be given high priority when compared to requests submitted by third parties and internal disinterment proposals." DPAA Administrative Instruction No. 2310.01; Docket no. 31-1 at 165. But now the Government is asserting in its motion that the Families' requests for disinterment should not be given any priority. This is just one example of how the Government has failed to follow its own regulations. *See* ECF 61 at 29 ("Plaintiffs cannot show that any regulation requires . . . prioritization of research regarding these servicemembers rather than others . . . ."). Similarly, the policies state that requests to disinter an Unknown must not be permanently deferred by the DPAA. DPAA Administrative Instruction No. 2310.01; Docket no. 31-1 at 165. However, the

[11] The Government argues that the Families have not claimed that the DPAA failed to follow DPAA Administrative Instruction (AI) 2310.01. This is incorrect. The Amended Complaint plainly states that the DPAA has abused its discretion and acted in an arbitrary and capricious manner by failing to observe required procedures, which necessarily includes the DPAA's own procedures.

DPAA has deferred from taking action for years now in regards to several requests for disinterment made by the Plaintiffs in this case. Likewise, the DPAA's researchers are required to complete a historical analysis and draft recommendation within 30 calendar days after receiving a request for disinterment, but this has not been complied with – we still don't have a copy of the draft recommendation for several plaintiffs. *See id.* at 176. Other examples of arbitrary and capricious action include the Government's policy that at least 60% of the persons associated with a common grave can be individually identified. *Id.* at 185. This is an arbitrary number that prevents families from being able to receive their relative's remains despite clear evidence showing where their loved one is buried.

Likewise, DoD Directive 2310.07 also provides the Court with standards that can be applied to consider whether the Government has complied with its regulations. The Directive explicitly states that its purpose is to "[e]stablish the manner in which the [Government] accounts for DoD personnel . . . from World War II . . . ." DoD Directive 2310.07; Doc. 63-1 at 39. Additionally, it provides that information pertaining to the Government's efforts to locate and identify remains of service members will be provided to the primary next of kin and immediate family members. *Id.* at 41. But the Government has failed to always provide sufficient information, which is another example of its failure to follow its own regulations.

The Government also refers to DoD Directive 1300.22, Mortuary Affairs Policy, which clearly states that it is the DoD's policy to return the remains of deceased service members to their families. Doc. 63-1 at 65-66. This is a clear rule that the Government cannot arbitrarily choose to ignore. It has been shown that it has failed to comply with this rule. For example, Private Kelder's remains have been withheld for more than four years after disinterment. ECF 61-1 at 27. It is also important to note that this Directive requires the Government to transport the

remains of fallen service members with reverence, care, priority, and dignity. Doc. 63-1 at 66. Additionally, the remains are required to be continuously escorted by a service member or a special escort. *Id.* However, it is believed that the remains of the service members that have been disinterred in this case are being held in crates at a Government facility, perhaps in a public area. *See* Ex. 35 at 2 (expressing concerns about remains being displayed in a public area). Due to the Government's secrecy, there is no way to know whether the remains of our fallen service members that have just now been disinterred are being treated properly.

Likewise, the Government refers to DoD Directive-type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains (July 10, 2018), ECF 63-2 at 3-15. It states that its purpose is to "provide standards and procedures for DoD disinterment from cemeteries administered by . . . the American Battle Monumnets Commission (ABMC), for identification purposes, of all unidentified human remains in graves marked 'unknown.'" *Id.* at 3. It claims that DoD "must have the scientific and technological ability and capacity to process the unknown remains for identification within 24 months after the date of disinterment." *Id.* at 5. But this standard has been violated in Private Kelder's case. Additionally, the Government's own witness casts doubt on whether the DoD has the ability and capacity to meet its own self-imposed deadline. ECF 63-12 at 3 ("DPAA has to wait a long time to receive results on samples submitted to AFDIL.").

Similarly, AR 638-2 and DoD Instruction 5154.30 help provide the standards that should be applied to this case. As the Government states in its motion, "AR 638-2 and DoD Instruction 5154.30 provide that a relative is the individual entitled to direct disposition of a service member's remains. ECF 61 at 33. The fact that the Government relies upon AR 638-2 to support

its argument concerning what policy should apply shows that its contention that AR 638-2 is irrelevant is unfounded.

In sum, the Government's own rules and standards provide the Court with sufficient standards to evaluate the lawfulness of its actions.

E. It is not Possible for the Court to Rule in the Government's Favor in Regards to Whether its Actions Were Reasonable Because the Government Has Failed to File a Certified Administrative Record for any of its Adjudications

The Government argues in its motion that its final decisions were reasonable. But it cannot establish as a matter of law that its refusal to disinter some of the remains at issue was reasonable because it has not presented the Court a certified administrative record.

More than *fifteen months* after the Families filed their Amended Complaint, the Government still have yet to file a certified administrative record for any of the individual plaintiff's cases. That failure – or tactical ploy – on the part of the Government precludes this Court from granting judgment as to the Government on the Families' claim that the Government has violated the Administrative Procedure Act. While the Court may grant summary judgment to the Families on their APA claims based on the limited APA arguments they have advanced regarding the process provided by the Government, which are based in part on the Constitution, the Court cannot grant judgment to the Government on the Families' APA claims as a whole – including the Families' contention that the Government's actions are arbitrary and capricious – until it is able to review "the whole record." 5 U.S.C. § 706; *see Miss. River Basin All. v. Westphal*, 230 F.3d 170, 174–75 (5th Cir. 2000); *see also Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 595 (N.D. Tex. 2002) ("In reviewing administrative agency decisions, the function of the district court is to determine whether as a matter of law, evidence in the administrative record permitted the agency to make the decision it did . . . ."). The Court

should not allow the Government to continue to delay the timely adjudication of the Families' APA claims by withholding a certified administrative record. The Court should proceed to resolve the Families' motion for summary judgment, and defer resolution of the Government's motion (if not mooted by the Court's disposition of the Families' motion) until the Government has filed a complete and certified administrative record with the Court. In this connection, the Court may wish to order the Government to file the record by a date certain.[12]

F. Even if the Court Does Consider Whether the Government's Disinterment Decisions Were Arbitrary or Capricious, the Government Fails to Establish that all of its Adjudications Were in Accordance with its Regulations and the Law

Next, the Government argues that it has not violated the APA because its actions are reasonable. Again, there is no certified administrative record before the Court, so there is no way for the Government to establish as a matter of law that its actions were reasonable.

The Government contends that it has taken four final actions. The Families agree that two of the Government's actions were reasonable – (1) the disinterment of Private Morgan (Grave 822) and (2) the disinterment of Technician Bruntmyer (Grave 704). Unfortunately, it took years for the Government to take action and the Government has been reluctant to share information with the families related to these service members, which violates the Government's self-imposed rules. *See* 61-1 at 11 (citing 10 U.S.C § 1509(e)(2)(A); 10 U.S.C § 1505(c)(2)). It appears that the remains were disinterred approximately 6 months ago, yet the Families have not heard anything about any analysis being done by the Government. If it is like the Kelder case, these families will have to wait years before they have closure, which is shocking because the DNA testing could be completed in a matter of a few months. As stated above, the Government's

[12] It is still likely that documents outside of the administrative record will need to be considered to fully evaluate the Families' claims. However, until a certified administrative record is filed by the Government, the Families will not be in a position to argue what else must be considered.

failure to actually return these remains to their families violates the law, as does its failure to provide any information to the families in a reasonable time.

As for the other two actions that the Government states are final, the Families maintain that the Government's refusal to disinter and return the remains of 1LT Nininger and Brig. Gen. Fort violate the APA because they are arbitrary, capricious, an abuse of discretion, unwarranted by the facts, contrary to the Families' constitutional rights, and not in accordance with law.

1. Refusal to Disinter 1LT Nininger

The Government claims that it did not violate the APA when it decided in 2016 to not disinter 1LT Nininger's remains, which have been designated as X-1130. According to its own regulations, the Government must disinter X-1130 if there is at least a 50 percent chance that an identification will be made. ECF 63-17 at 41. The Deputy Assistant Secretary of the Army stated that he was "not convinced that this standard has been met." ECF 63-17 at 41. His decision was based solely on a memorandum provided by the DPAA.

The memorandum prepared by the DPAA, which was the sole basis for disapproving the disinterment request, has numerous inconsistencies. ECF 63-17 at 42-52. For example, the memorandum states that the X-1130 remains were recovered from Abucay Churchyard, Soldier's Row, Grave #9. ECF 63-17 at 43. But the Government's own statement of facts now claims that the X-1130 remains were recovered from the Abucay Cemetery, not the Churchyard. ECF 61-1 at 28-29. Likewise, the memorandum claims that the X-1130 remains were first associated with 1LT Nininger based on the testimony of Colonel Clarke. ECF 63-17 at 44. This is incorrect. It was M/Sgt. Abie Abraham that made the initial association and directed the exhumation of the remains. Ex. 23 at 12; ECF 56-1 at 10; ECF 61-1 at 29. The X-1130 remains were immediately recorded by M/Sgt. Abraham as Nininger based on his interview of a Filipino gravedigger who

had prepared the graves for five Americans in the Abucay cemetery. Ex. 23 at 12; ECF 56-1 at 10-11. Similarly, the memorandum relies on unreliable testimony to conclude 1LT Nininger's burial location. ECF 56-1 at 12-13; ECF 63-17 at 44-45. Finally, the memorandum fails to make any reference to the Cheaney case file, which explains how the churchyard came to be investigated. Ex. 24 at 6-14. Accordingly, the Government failed to properly consider all of the relevant information and relied on false information. Thus, the Government's refusal to disinter violated the APA because it was arbitrary, capricious, and unwarranted by the facts.

It is astonishing that, despite the investigators back in the 1940s repeatedly (five times) requesting that X-1130 be identified as 1LT Nininger, the Government continues to refuse to perform a simple DNA test because it believes an estimated height makes it unlikely the remains are those of 1LT Nininger. It must be stressed that we are talking about a Medal of Honor recipient – the first from World War II. Ex. 1-C at 3. Nevertheless, the Government refuses to perform one DNA test (or allow the family to perform the test on their own) that would settle this matter once and for all.

Also, it should be noted that the Government focuses on the DoD's decisions regarding whether the DPAA should disinter the remains at issue. However, this ignores the primary problem with the Government's actions - withholding a service member's remains from his family. Here, the Government's own rules and regulations require the Government to return the remains of a service member to their next of kin for burial. *See, e.g.*, U.S. Army Regulation 638-2; U.S. Army Field Manual FM 4-20-65 (FM 10-286); DoD Directive 1300.22; DoD Directive 2310.07E. But the Government refuses to release possession of the remains to their next of kin. Even if there were no procedures in place, this action would violate the Constitution.

2. Refusal to Disinter Brig. Gen. Fort

For Brig. Gen. Fort, the Government recently advised his family that they refused to disinter remains X-618. ECF 61 at 23. Again, the Government focuses on the DoD's decisions regarding whether the DPAA should disinter the remains at issue. However, this ignores the primary problem with the Government's actions - withholding a service member's remains from his family. Here, the Government's own directives and regulations require the Government to return the remains of a service member to their next of kin for burial. *See, e.g.*, U.S. Army Regulation 638-2; U.S. Army Field Manual FM 4-20-65 (FM 10-286); DoD Directive 1300.22; DoD Directive 2310.07E. But the Government refuses to release possession of the remains to their next of kin. Even if there were no procedures in place, this action would violate the Constitution.

Beyond that, the Government's decision to not disinter the remains is arbitrary, capricious, and an abuse of discretion. The Government chooses to ignore a sworn statement by the Provincial Governor of Misamis Oriental Province who himself had been a prisoner. ECF 63-9 at 21-22. Instead, it concludes that Brig. Gen. Fort was "likely" executed in Dansalan. ECF 61 at 23. This conclusion relies primarily upon the testimony of Japanese war criminals and a couple of reports that U.S. service members had received from Moro guerrillas. ECF 61-1 at 34. This is unreasonable and is simply a self-serving conclusion. Governor Cruz's sworn statement acknowledges that Brig. Gen. Fort had been in Dansalan and taken around the town under guard, but left by plane before his execution. Ex. 32 at 3-4; ECF 63-9 at 21. The Government ignores that Brig. Gen. Fort was transported by plane in its memorandum to help support its conclusions. ECF 63-9 at 8.

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 investigated 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 bayonetted and killed. ECF 63-9 at 21. 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. 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. The Government simply disregards Governor Cruz's statement and state that all of the accounts "do not outweigh DPAA's evidence." ECF 61 at 23-24.

Despite all of this, after all these years, the Government refuses to disinter the X-618 remains or even conduct a simple DNA test. The Government's other reasons for not disinterring the remains are unreasonable as well. For example, the Government's estimated height difference of 2 inches is another example of the Government searching for any reason not to conduct disinterment. As discussed in the Col. Stewart case below, recorded height measurements for Col. Stewart ranged from 64.25 inches to 68.5 inches – they are not reliable. ECF 63-10 at 6; 61-1 at 18 (contending that while height measurements used by AGRS were inaccurate, they were not "wildly inaccurate"). Further, even today it is common for height to be exaggerated or inaccurate in records. The Government need only look at a college football roster to see that this is still a reoccurring problem today.

It seems that the Government could at least provide Brig. Gen. Fort's family with an opportunity to claim his remains or conduct DNA testing. Instead, the Government refuses to allow anything of the sort. A man that was executed and tortured by our enemy, is now buried as

unknown with his family left wondering why the Government will not give them a chance to prove their claim. In sum, the Government's actions in regards to Brig. Gen. Fort violate the APA.

3. Failure to Disinter Private First Class Hansen and Colonel Stewart

As discussed above, the Government has violated the APA by failing to act. The Government states that it is finalizing a recommendation for the disinterment of the remains associated with Grave 407, where Private First Class Hansen was originally buried. The Government cannot continue to sit on this recommendation. The Families have not been provided sufficient information regarding this recommendation and the Government has failed to take action that is required. It acknowledges that the location of Private First Class Hansen has likely been established as a fact, but it refuses to move forward. The Government's claim that Private First Class Hansen's family is not entitled to prioritization over any other DPAA case concerning the thousands of unknowns that the Government has failed to return to their families goes directly against its own rules. The Government's own rules state that "[r]eqests to disinter specific individual Unknowns submitted by family members of unaccounted for DoD personnel will be given high priority when compared to requests submitted by third parties and internal disinterment proposals." DPAA Administrative Instruction No. 2310.01; Docket no. 31-1 at 165.

Likewise, the Government is still "processing" Plaintiff John Boyt's request for Colonel Stewart's remains even though it has known about this case since at least 2012. Ex. 25 (memo from 2012); ECF 61 at 27. It claims that it needs another Family Reference Sample. This is an arbitrary and capricious requirement. If there is sufficient evidence to justify disinterment, then only one reference sample should be required. Families should not have to wait for the Government to take its time collecting additional reference samples.

Further, the Government's refusal to disinter the X-3629 remains is unreasonable. M/Sgt. Abraham was personally acquainted with Col. Stewart and spent a week trying to locate his grave. Plts.' Appx ¶12-13; ECF 63-8 at 10. M/Sgt. Abraham was directed to Col. Stewart's grave by a local inhabitant who told him that his remains were buried there by Philippine Scouts. ECF 63-8 at 10. M/Sgt. Abraham believed that these remains were those of Col. Stewart, as he was the only Colonel to be killed in that area. ECF 63-8 at 10. The remains were only sent to the American Cemetery as unknowns because no tags were found with the remains. ECF 63-8 at 10. Unfortunately, while the documents correctly stated that they were those of Col. Stewart, M/Sgt. Abraham misspelled his last name as "Stuart." Subsequent documents contained in the X-3629 file show that dental records were requested for one named "Stuart." ECF 61-1 at 32-33; Government's Exhibit 38. Consequently, the remains were buried as unknown.

The Government ignores all of this and refuses to act without any reasonable basis. It bases its decision on anthropological analysis, which only focuses on an estimated height using the Trotter MStats database. ECF 63-10 at 6. The Government claims that the X-3629 remains have an estimated height up to 65.6 inches. ECF 63-10 at 6. Even if we are to assume that height measurements in general are accurate, the record before the Court shows that Col. Stewart had recorded heights ranging from 64.25 inches to 68.6 inches. ECF 63-11 at 1-24. Therefore, there is no reason why the Government should use its height estimate as a reason to deny disinterment.

In sum, the Government's refusal to act or comply with Col. Stewart's family's request violates the APA.

4. The 1LT Ira Cheaney Case Shows that the Government Arbitrarily Picks Which Cases to Move Forward With

The 1LT Ira Cheaney case is an example showing that the Government has unreasonably delayed the return of the remains at issue. The Government has known since 1950 that the

remains that were identified and buried as 1LT Ira Cheaney could not possibly be him. Ex. 24; ECF 63-3 at 13. Even though the Government knew about this misidentification, it did nothing for years until families discovered the Government's hidden mistake after certain files were no longer classified.

1LT Cheaney's family discovered the fact that there had been a misidentification earlier this year. They submitted a disinterment request for the remains buried at West Point on February 4, 2019. ECF 63-16 at 2. On March 8, 2019, the disinterment request was approved. ECF 63-16 at 2-3. On April 16, 2019, the remains were exhumed and transferred to the DPAA. ECF 63-16 at 2-3. As the Court can see, the request was handled how it should have been handled. It took the Government 71 days to get approval and recover the remains for analysis and testing. There is no reason why the Families' requests should not have been answered and complied with in a similar timeframe. It appears that the Government prioritized this case over the other cases that it has so that it could try to fix the obvious and egregious mistake it had made. This shows that the Government has arbitrarily decided to withhold action for an unreasonable amount of time and could actually take action if it were willing.

Conclusion

For the reasons set forth above, as well as for the reasons stated in Plaintiffs' Response to Defendants' Motion for Judgment on the Pleadings and Plaintiffs' Cross-Motion for Partial Summary Judgment, the Government's motion for summary judgment should be denied.

Dated: May 10, 2019

Respectfully submitted,

/s/ John T. Smithee, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of May 2019, a true and correct copy was delivered as follows:

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