

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,

*Plaintiffs,*

v.

DEFENSE POW/MIA ACCOUNTING

AGENCY, et al.,

*Defendants.*

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

**PLAINTIFFS’ REPLY IN SUPPORT OF  
PLAINTIFFS’ CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Families<sup>1</sup> file this Reply in support of their Cross-Motion for Partial Summary Judgment against the Government<sup>2</sup>, and would show the Court as follows:

**I. The Government’s Current Scheme Fails to Provide Families with an Adequate Process to Claim their Relatives’ Remains**

Again, for purposes of the Families’ procedural due process claim before the Court, the merits of their substantive claims are not at issue. Instead, it is the lack of a fair process that has been provided to the Families that is at issue. *See Caine v. Hardy*, 943 F.2d 1406, 1411 (5th Cir. 1991) (“Procedural due process considers not the justice of a deprivation, but only the means by which the deprivation was effected.”). The Families’ injury is not the liberty or property that was

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

<sup>2</sup> 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”).

taken from them, “but the fact that it was taken without sufficient process.” *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 222 (5th Cir. 2012).

**A. A Fundamental Purpose of Providing Procedural Due Process is to make an Individual feel that the Government has Dealt with him Fairly**

A procedural due process claim is based on an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance. “The provision of adequate due process not only helps to prevent unwarranted deprivations, but also ‘serves the purpose of making an individual feel that the government has dealt with her fairly.’” *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 226 (5th Cir. 2012) (quoting *Williamson County Reg'l Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) (describing paramount importance of a “feeling of just treatment” by the government). Here, the Families do not feel that they have been dealt with fairly. Information has been withheld, either purposefully or negligently. *See* Ex. 21 at 2-3; Plts.’ Appx. at 20-21; ECF 68 at 23 (claiming that 1LT Cheaney’s file had not been “rediscovered” when DPAA made final decision to not disinter 1LT Nininger’s remains). And at other times, families have felt like the Government actively worked against them. Ex. 39 at 2 (“I must tell you that we feel discieved [*sic*].”). Each Family is willing to wait their turn, but the lack of any functional or practical process has left them in administrative limbo without any feelings of just treatment by the Government.

**B. The Constitution Entrusted the Judiciary with Protecting Individuals from Deprivations of Due Process**

“[B]ecause of the importance to organized society that procedural due process be observed,” the Supreme Court has consistently explained that the right to procedural due process is “absolute.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And it is the judiciary’s responsibility

to protect individuals from state deprivation without due process of law. As explained by the Supreme Court:

Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

*Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 163. Consequently, the Families are asking this Court to exercise its judgment and correct the lack of a fair process provided to the Families.

**C. The ABMC has no Process Whatsoever for Families**

The ABMC has conceded that it has no process or procedure for next of kin to request disinterment and/or possession of a relatives' remains. As of the date of this filing, First Lieutenant Alexander Nininger and Brigadier General Fort are still buried in a temporary grave in an ABMC cemetery. Even though there is significant evidence showing the specific grave where these two service members are buried, their families have no process or opportunity to ask the ABMC for possession of the remains for a proper and final burial,

The Government claims that, even though the ABMC has possession of service members' remains, it is not required to provide any due process to next of kin because the DoD can request disinterments from the ABMC. ECF 68 at 51-52 (statute cited by the Government simply says that the DoD has a right to disinter a body if it is necessary). But, even if the DoD has permission to request disinterment when it finds it is necessary, the ABMC cannot act outside the limits set forth in the Constitution. Again, no matter how commendable the ABMC's goals are, it cannot pursue them in an unconstitutional manner. Some type of procedure must be provided by the ABMC to next of kin to claim a relative's remains.

**D. The DoD and DPAA also Failed to Provide Next of Kin Adequate Process**

The Government claims that the DoD's ability to disinter remains for subsequent identification analysis satisfies any requirements under the Due Process Clause. In support of this argument, the Government asserts that the Families have two chances to contact the DPAA about their case – (1) family update meetings and (2) disinterment requests to the DoD.

According to the DPAA, family update meetings are designed to keep the public informed about the Government's "worldwide mission to account for those still missing" and to discuss information about current research being done on specific cases. *Events*, DEFENSE POW/MIA ACCOUNTING AGENCY, <https://www.dpaa.mil/Families/Family-Events/> (last visited June 19, 2019). While family update meetings may be helpful to provide information to the public about the status of the DPAA's general efforts, it does not adequately protect next of kin's procedural due process rights. A general information meeting is not enough to protect the interests implicated by the Government's actions.

For example, the Government cites in support of this argument the fact that Plaintiff Bruntmyer attended a Family Member Update meeting in 2011 and presented information concerning his case. ECF 68 at 51. Approximately eight years have passed since this meeting took place, and Plaintiff Bruntmyer is still waiting for complete relief. Despite telling the DPAA where his relative's remains were buried long ago, the DPAA only recently disinterred his relative's remains after this lawsuit was filed. Plaintiff Bruntmyer's case is a perfect example of the lack of procedural protection provided to next of kin by the Government. A family member should not be forced to file a lawsuit and wait nearly a decade to find out whether the Government will return a relative's remains.

As for the DoD's disinterment request scheme, it also fails to provide adequate process for next of kin.<sup>3</sup> The Government claims it is enough because (1) a next of kin can submit a request, (2) the DPAA will analyze the case, and (3) the assessment will be considered by a senior staff assistant in the Office of the Secretary of Defense, who decides whether a disinterment request should be approved or denied. But the reality is that this scheme is not fair and does not provide any meaningful protection to next of kin seeking to bury the remains of their loved ones. The primary problems with the DoD's current scheme include:

- The next of kin has no fair or meaningful opportunity to present evidence or call witnesses to support their claims.
- There is no fair or meaningful opportunity to confront or refute the DPAA's analysis and evidence – the DPAA refuses to even show a next of kin a copy of its recommendation in response to a disinterment request before the Assistant Secretary of Defense makes a decision. *See* ECF 68 at 30.
- A next of kin receives no formal hearing, even though the DPAA and DoD are making individualized adjudications about specific facts and individuals.
- The current lack of any sufficient process has allowed the DPAA to arbitrarily ignore requests for disinterment for years. *See* Plts.' Appx. at ¶29; Ex. 4; Ex. 12 (showing Government had knowledge of location of remains but did not take any action for years).
- The next of kin has no opportunity to appear before the Assistant Secretary of Defense before a decision is made in response to a disinterment request.

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<sup>3</sup> The Government also now relies on Army Reg. 638-2 as evidence that it has a process to claim remains, but this goes against its previous argument that Army Reg. 638-2 has no application in this case. ECF 68 at 53.

- At times, the Government has refused to accept information or help offered by a next of kin. *See* Ex. 1 at 4 (Government refused to consider evidence that family tried to present, which proved to be accurate).
- There is no opportunity to present witnesses or expert opinions to support a next of kin's claims or rebut the DPAA's conclusions.
- A next of kin cannot appeal any final decision or inaction.
- The Government's inaction or failure to act cannot be challenged to any authority.
- There is no neutral decision maker that is free of any prejudgment on the key factual and legal merits of the next of kin's allegations – the Assistant Secretary of Defense will be biased towards accepting the view of its own employees.

**E. The *Mathews* Balancing Test Weighs Strongly in Favor of Adding Additional Procedures**

Further, the *Mathews* factors weigh strongly in favor of the additional procedures that the Families seek.

- **Private Interests at Stake:** First, the Government shockingly discounts and minimizes the private interest at stake, and its contention that a family's interest in burying the remains of their loved one is a "latent interest" should be rejected. Again, providing a proper and final burial for our fallen heroes is obviously extremely important - not just to the families of the fallen service member, but to our society as a whole.
- **Risk of Erroneous Deprivation:** Second, even though the Government claims that the status quo has not been changed, the current scheme has proven to be insufficient to protect families from erroneous deprivations. The Government has

erroneously withheld remains from families and/or misidentified remains numerous times (the Kelder and Cheaney cases are recent examples).

- **Government's Interest:** Finally, the Government's interests at stake will not be negatively impacted by additional procedural safeguards. The Government has not presented any evidence that additional procedural requirements will add a costly burden. Also, a primary purpose of providing a process for next of kin is to make sure that remains of service members are returned to the right family. Likewise, additional procedural safeguards will help maximize the DPAA's ability to account for the service members. Next of kin will finally be able to be involved in a fair process that allows them to supply their evidence and refute inaccurate statements or conclusions. They would no longer be left in administrative limbo.

Thus, additional procedural safeguards should be provided, and the Families have established as a matter of law that the ABMC, DoD, and DPAA violated the Due Process Clause.

**F. The Families are not Required to Prove Beyond any doubt that the Remains are those of their Relatives to Receive Procedural Due Process Protection**

The Government claims that the Families have no property or liberty interest at stake because the DoD has not officially identified the remains at issue. So, it follows that their argument is that there cannot be a property interest until the DoD says there is. This argument is all based on the assertion that the Families are required to prove, without any doubt whatsoever, that the remains at issue are those of their relatives. But the argument is misplaced and attempts to impose an impossible standard that could never be met. The DoD cannot be left to decide who has a constitutionally protected interest that is implicated by its actions. It also ignores the fact that the Government has officially recognized the identification of Private Kelder's remains.

Here, the Families are not required to prove with absolute certainty that the remains are those of their relatives to receive protection under the Due Process Clause. Instead, the Families only need to show that a property and/or liberty interest is implicated by the Government's action and/or inaction. The Families' right to procedural due process does not depend upon the merits of their substantive assertions. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And they are not required to provide an advance showing that they will surely prevail. *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). Simply showing that a significant property or liberty interest is at stake is enough to invoke the procedural safeguards of the Fifth Amendment. Such an interest is at stake for the Families – the right to bury the remains of a deceased relative. Because the Families' ability to exercise this right is unjustly limited by the Government's policies, the Court should provide the Families with adequate Due Process protection.

## **II. The Government Failed to show that the Families' Request for Declaratory Judgment is Improper**

In a footnote, the Government disputes a next of kin's right to possess the remains of a family member for purposes of burial. ECF 68 at 64. The Government has failed to adequately brief this issue, and instead focuses on arguments related to what it claims are unidentified remains. But that is not what the Families seek declaratory judgment for. Again, the Families respectfully request that this Court declare the rights of the Families and other next of kin in regard to their right to possess the remains of their family members for purposes of burial. Specifically, the Families move for judgment as a matter of law declaring that the Families and all other next of kin have a constitutional, statutory, and/or common law right to possess the remains of their family members for purposes of burial.



### **III. No Exception Applies to the APA's Notice and Comment Rulemaking Requirement**

The DoD and DPAA were required to promulgate its rules and regulations by notice and comment in the Federal Register. In response, the Government claims that the APA's notice and comment rulemaking requirement do not apply because a next of kin's request for disinterment and/or possession of a relative's remains that died more than 70 years ago is a military or foreign affairs function of the United States. ECF 68 at 12. But the exception asserted by the Government does not apply.

“The APA's notice and comment exemptions must be narrowly construed.” *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), as revised (Nov. 25, 2015) (internal quotations omitted); *Indep. Guard Ass'n of Nevada, Local No. 1 v. O'Leary on Behalf of U.S. Dept. of Energy*, 57 F.3d 766, 769 (9th Cir. 1995), amended by 69 F.3d 1038 (9th Cir. 1995) (“Congress intended the military function exception to have a narrow scope.”). Relevant case law shows “that the exception can be invoked only where the activities being regulated directly involve a military function.” *Indep. Guard Ass'n of Nevada, Local No. 1*, 57 F.3d at 770 (finding that exception did not apply to guards of facility used to test nuclear devices by military). Here, no military function is directly involved. The exception should not be stretched to apply to a next of kin's request for the remains of a relative buried in an ABMC cemetery.

### **IV. The Government Violated the APA by Failing to Provide Adequate Information to the Families**

The Government has also violated the APA by failing to provide adequate information to the Families, which it is required to do. *See* 10 U.S.C § 1509(e)(2)(A); 10 U.S.C § 1505(c)(2); DoD Directive 2310.07 (ECF 63-1 at 41). Many of the remains at issue have already been disinterred, but the Government has not provided the Families with sufficient information about

the progress, if any, in their respective cases. More than six months have passed since the most recent disinterments took place, but no information has been released to the Families about the results of any DNA testing or analysis in those cases. For two plaintiffs, the Government has acknowledged preparing memorandums and recommendations about their cases, but states that it will not release those documents at this time. *See* ECF 68 at 30. The Government does not deny that information is out there concerning these remains. But it does refuse to provide it to the Families. Thus, the Government has violated the APA by failing to provide adequate information to the Families concerning their relatives' cases.

### **CONCLUSION**

FOR THE REASONS STATED ABOVE, the Court should grant the Families' Cross-Motion for Partial Summary Judgment.

Dated: June 19, 2019

Respectfully submitted,

/s/ John T. Smithee, Jr.

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 19th day of June 2019, a true and correct copy was delivered as follows:

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