

EXPERT OPINION REPORT OF JOHN J. EAKIN

Court: United States District Court – Western District of Texas
Case Number: 5:17-CV-00467
Case Name: *John A. Patterson, et al., v. Defense POW/MIA Accounting Agency, et al.*
Date: September 14, 2018

Resume

John J. Eakin, 9865 Tower View Rd., Helotes, Texas 78023
Phone: 210-695-2204 - Email: jeakin@airsafety.com

1965 to 1974 U.S. Army. Discharged with the rank of Staff Sergeant E6. Served overseas tours in West Germany (2) and Viet Nam (2). Originally trained at the Ordnance Guided Missile School, Redstone Arsenal, AL. Most assignments were in the administrative or wholesale logistics fields. Notable assignments included:

- Supply Technical Staff, National Inventory Control Point, Army Missile Command, Redstone Arsenal, AL
- Operations Sergeant, Directorate of Supply, Long Binh Depot, Vietnam
- Procurement Officer, U.S. Embassy, Saigon, Vietnam

1974 - 1984 - Conducted various agricultural aviation, flight training, corporate transport and commercial air carrier operations utilizing fixed-wing aircraft. Certificated by the Federal Aviation Administration as:

- Airline Transport Pilot
- Airframe & Powerplant Mechanic
- Flight Instructor, single/multi-engine aircraft, instruments
- Ground Instructor, advanced and instrument

1985 to present - Self-employed as consultant/investigator. Services are provided to law firms, aviation underwriters and major aircraft manufacturers. Clients include National Academy of Science, U.S. Department of Transportation and the U.S. Justice Department, Fraud Division.

During my research work, I have testified via deposition or declaration many times and have been designated as an expert witness on several occasions. Within the last four years I recall only one expert witness designation and that was for the plaintiff in:

- Cause No. 2014-34635; Nathan S. Ates, Individually and as Personal Representative of the Estate of Joyce A. Ates, Deceased; Sonia Ates and Nathan M. Ates v. Robinson Helicopter Company, Inc., Helicopter Services, Inc., and the Estate of Christopher Yeager; In the 11th Judicial District Court of Harris County, Texas

On July 28, 2017, a verdict for the Plaintiff was entered and damages totaling \$7,258,100 were awarded.

2009 to present - Began researching the loss of a family member who died in a WWII POW camp and whose remains were never returned to his family for burial. This unpaid research grew to include all WWII and Korean War military personnel missing-in-action.

Experience and Qualifications Concerning Accounting for Missing Servicepersonnel

My research on WWII MIA's and Unknowns has involved four lawsuits filed in the Western District of Texas, two to obtain documents under the Freedom of Information Act and two petitions for Writ of Mandamus to obtain unidentified remains. This litigation has resulted in the disinterment and potential identification of several hundred missing American Servicemembers. To the best of my knowledge, my research has all been proven to be correct and has caused the U.S. Government to make changes in the way unidentified remains are accounted for.

The first such litigation was a *pro se* Freedom of Information suit to obtain records pertaining to the death of a missing family member, Pvt. Arthur H. "Bud" Kelder, who died in a WWII POW camp in the Philippines. Defendants concealed digital files and demanded an excessive price for reproduction of the requested files. Ultimately, judgment was entered in favor of the government on the cost waiver issue and digital copies of all Xfiles (Personnel files on unidentified remains) and certain Individual Deceased Personnel Files (IDPF) were provided to Plaintiff.

Eakin v. United States Department of Defense et al, SA-10-cv-00784-FB-NSN

The records obtained through the Freedom of Information Act and additional information I had obtained elsewhere provided evidence far beyond the standard originally required for identification of remains. When Defendants refused to consider the evidence or act on my request for disinterment of my family member, I petitioned *pro se* for a Writ of Mandamus. The remains of fourteen unaccounted for American Servicemembers were disinterred in response to my discovery request. To date, the partial remains of Plaintiff's family member and seven other missing military personnel have been positively identified by Defendants. Of the fourteen military personnel originally interred in the Cabanatuan POW Camp #1 cemetery grave 717, there were ten men buried in the Manila American Cemetery and four who had been erroneously identified and shipped to the wrong families for burial in the U.S.

Eakin v. American Battle Monuments Commission, et al, SA-12-CA-1002-FB-HJB

As other researchers and family members of MIA's became aware of the existence of the records now in my possession they requested copies. In the process, I obtained a considerable volume of additional documents concerning identification and burial of deceased American military personnel.

Much of this data was input in to databases similar to those I created in my aviation mishap work. These resources have made it possible for me to quickly research the records pertaining to unidentified remains and provide a likely identification. A number of these unidentified remains have since been disinterred and identified.

Over the years, I have been contacted by and shared research information with several hundred families of MIA's. This work has consumed a considerable amount of my time. I am happy to share this information with families of MIA's and I have not received one penny of compensation for my work.

In 2016, I became aware that additional Individual Deceased Personnel Files had been digitized by Defendants and I found it necessary to file an additional FOIA suit to obtain them. That case is currently pending before Judge Lamberth who has ordered the defendants to provide these files to me.

Eakin v. United States Department of Defense, SA-16-cv-00972-XR

During the above referenced litigation and as part of my personal research I have reviewed and cataloged every file pertaining to the 3,744 unidentified human remains then buried in the Manila American Cemetery. I have corresponded with or interviewed hundreds of other researchers and family members of MIA's. I consider myself to be at least as knowledgeable as anyone in the world concerning the burial and identification of deceased American Servicemembers who died during the Battle of Bataan and subsequent imprisonment as POW's.

**Opinions and Summary of Proposed Testimony
Patterson et al v. POW/MIA Accounting Agency, et al**

I provide the following information in support of my opinions concerning the identification of the seven servicemembers who are the subjects of this litigation:

BRUNTMYER

It is my opinion and I agree with the DPAA's assessment that the commingled remains recovered from Cabanatuan Communal Grave 704 include those of Lloyd Bruntmyer. My findings are based, in part, on the relevant IDPFs and burial records. This case relies upon the same proven data sources which were the factual basis for the recovery of Cabanatuan Common Grave 717.

MORGAN

It is my opinion and I agree with the DPAA's assessment that the commingled remains recovered from Cabanatuan Communal Grave 822 include those of Robert Morgan. My findings are based, in part, on the relevant IDPFs and burial records. This case relies upon the same proven data sources which were the factual basis for the recovery of Cabanatuan Common Grave 717.

HANSEN

It is my opinion and I agree with the DPAA's assessment that the commingled remains recovered from Cabanatuan Communal Grave 407 include those of David Hansen. My findings are based, in part, on the relevant IDPFs and burial records. This case relies upon the same proven data sources which were the factual basis for the recovery of Cabanatuan Common Grave 717.

KELDER

Defendants have confirmed that the remains of Pvt Arthur H. "Bud" Kelder have been identified among the commingled remains recovered from Cabanatuan Communal Grave 717. While the commingled remains from Cabanatuan Communal Grave 717 have each consisted of virtually complete skeletal remains. Plaintiff's complain that the remains returned to them for burial are incomplete. Based on Defendants' representations, exhibits, and public statements, my opinion is that Defendants' facilities and techniques are inadequate in capability and capacity to properly reassociate and timely return these remains to their families for burial.

STEWART

It is my opinion that the remains designated as Manila #2 X-3629, which are currently buried in Manila American Cemetery Grave N-15-19, are likely those of U.S. Army Colonel Loren P. Stewart, service number O-005881. At the time of his death, COL Stewart was commanding elements of the Philippine Scout regiments who were engaged in fierce ground combat near where these remains were recovered.

I base my opinion on a number of factors, beginning with the statement of a witness to the burial who described it as the burial of a Colonel of a Philippine Scout regiment. This was convincing enough to the recovery personnel that all the subsequent Reports of Interment indicate the remains are believed to be those of a Colonel of the 57th Infantry (PS) named Stuart and who died in January 1942 at Abucay Hacienda, Abucay, Bataan, Philippines. Stuart is a common misspelling of Stewart and is much more common than Stewart.

The standard for identification of remains required two items of evidence. A burial roster or witness statement was generally adequate as the first, but corroborating evidence, most commonly a dental match, was also required. It was very common for the remains of soldiers who had not been in the service for very long and who had had no dental care from the military to not be identified. However, a man of this age almost certainly would have received dental care in a military facility however no records were obtained. I find it very likely that dental records were not obtained because a common misspelling of STEWART was listed.

I have done extensive data searches of both death records and records of missing service personnel and have found no other person named Stuart or Stewart who died in the area in 1942. I also found that Loren Stewart was the only Colonel or Lt Colonel (who might also be addressed as Colonel) or person named Stuart or Stewart who died in the Abucay Hacienda area. I found no other candidate person who fits the known facts.

I find it convincing that not only were the recovery personnel confident in the identification of these remains, but the circumstantial evidence removes all doubt that these are not the remains of COL Loren Stewart.

FORT

It is my opinion that the remains designated as X-618, which are currently buried in Manila American Cemetery Grave L-8-113, are likely those of U.S. Army Brigadier General Guy O. Fort;

I base my opinion on the sworn statement of the Hon. Ignacio S. Cruz attesting to his belief that the remains he turned over were in fact the remains of BG Fort. Governor Cruz was head of the Misamis Oriental provincial government and was himself held as a prisoner by the Japanese. His statement is highly detailed, consistent with all other information and very credible. Examination of the remains found that these could be BG Fort's remains and provided no evidence to indicate otherwise.

NININGER

It is my opinion that the remains designated as X-1130, Manila #2, currently buried in Manila American Cemetery Grave J-7-20, are likely those of U.S. Army First Lieutenant Alexander R. Nininger Jr.

The primary documents supporting my opinion and upon which I have relied are:

The Individual Deceased Personnel Files (IDPF) of the following individuals:

Compton, John C.	O-413755	1LT	68 Pages
Green, Arthur W.	O-395411	1LT	60 Pages
Maynard, David W.	O-384762	1LT	2 files, 127 and 94 Pages
Nininger, Alexander R. Jr.	O-023761	1LT	137 Pages
Wilson, Kenneth L.	O-398233	1LT	90 Pages
Cheaney, Ira B.	O-23965	1LT	187 Pages (Unclassified Section) 43 Pages (Classified Section)
Manila_2_RP_X-1051			39 Pages
Manila_2_RP_X-1052			32 Pages
Manila_2_RP_X-1063			15 Pages
Manila_2_RP_X-1130			87 Pages

Factual Information from Official Documents:

Compton, Green, Maynard, Nininger and Wilson were killed in action on 11/12 Jan 1942 in an engagement at Mabatang, Bataan, PI. All five were buried in the Abucay Churchyard, Abucay, Bataan, Philippines.

Cheaney was killed in action on 30 January 1942 at Quinauan Point near the town of Agloloma. (This location is approximately 30 miles from Abucay.) This was nineteen days after the engagement at Mabatang in which Compton, Green, Maynard, Nininger and Wilson died. This was ten days after the town of Abucay was occupied by the Japanese. Cheaney's remains were identified by his commanding officer and a graves registration officer then interred by that graves registration officer in the Miravelles cemetery. Cheaney could not have been buried in the Abucay Churchyard.

Multiple reliable witnesses report that Nininger, Compton, Green, Maynard and Wilson were buried inside the wall of the Abucay Churchyard. (Anders, Pg6)

On 13 Feb 1946, Army Graves Registration personnel recovered remains from the Abucay Churchyard, Soldiers Row, Grave #9. (Report of Interment). These remains were immediately designated as Manila #2, X-1130 BTB Nininger, Alexander R. (X file X-1130)

Defendants' claim that, "The original disinterment record makes clear that X-1130 was taken from Grave 9 of the Abucay village cemetery, an entirely different location from

the church cemetery; the way the cemetery is identified is consistent with other remains taken from the village cemetery. This discrepancy, along with the height comparison and that the remains were "probably mongoloid," were likely the key reasons why the Office of the Quartermaster General rejected the association in 1949 and 1950." is contradicted by multiple sources.

Grave nine behind the South wall of the Abucay Church and Grave Nine, Soldiers Row, Abucay Cemetery are one and the same location. (Ref: 1st Endorsement - 1 Apr 48. "3. With reference to paragraph 3, basic letter, a further study of the case of Lt. Nininger resulted in the conclusion that the grave locations are the same....")

When the X-1130 remains were recovered, they were immediately identified as "X-1130 BTB [believed to be] Nininger, Alexander." This designation stayed with the remains regardless of any subsequent administrative change in the description of the recovery location. It is unknown what evidence the recovery personnel relied on in determining the BTB identity except the gravedigger's statement that he buried five Americans there. If they were working solely from Clarke's information they would have also identified Maynard who Clarke said was in grave #6.

COL George Clarke provided information to several of the families concerning the deaths of their sons. His information concerning Cheaney is obviously erroneous. His statement that the others were buried in the Abucay Churchyard is corroborated by others with knowledge. His information that Nininger was buried in Grave #9 is not corroborated and additional location information is not documented.

On 8 Dec 1948, a board of officers of the Philippine Command reviewed the available evidence and recommended that unidentified remains Manila #2, X-1130 be formally identified as those of 1LT Nininger, Alexander R. This recommendation was formally disapproved by the Memorial Division Washington, DC on the basis that "estimated height of remains not in agreement with Army records." (X file X-1130, Nininger IDPF pg 76) (28 Nov 49 - Nininger IDPF pg 38)

Over the next two years, on four more occasions the Philippine Command reiterated their recommendation that unidentified remains Manila #2, X-1130 be formally identified as those of 1LT Nininger, Alexander R. Each recommendation was disapproved by Washington and additional information was demanded.

In October of 1950, the Memorial Division of the Office of the Quartermaster General initiated an investigation of the facts of the concerning the identification of Cheaney and non-identification of Nininger. They concluded that the remains buried at West Point as Cheaney were not his and that further investigation should be conducted into the burials of the other five officers. There is no indication of further investigation. Neither is there any indication that the investigators were aware that X-1130 had been believed to be the remains of Nininger.

The Identification Branch recommended that reinvestigations be simultaneously conducted in the cases of Lts. Nininger, Green, Wilson, Maynard and Compton and that the West Point unknown be examined to determine if it could be Lt. Maynard or Nininger.

The portion of Cheaney's Individual Deceased Personnel File containing the Cheaney and Nininger investigations was classified SECRET and no further action was taken to properly account for either Cheaney or Nininger.

This level of classification as the second highest level of defense secret demonstrates how embarrassing this information was to the government and may partially explain the government's current reluctance to disinter remains.

The families of these men included several general officers and members of the news media. At least three members of congress had inquired on behalf of the families. Nininger was a celebrity as the recipient of the first Medal of Honor awarded in WWII. Public knowledge of the erroneous identification of Cheaney would have destroyed the credibility of all WWII identifications. This extraordinary attention may explain the Memorial Divisions' refusal to accept evidence of the identity of X-1130 which was far greater than required in any other similar case.

Ultimately, unidentified remains Manila #2, X-1130 were determined to be unidentifiable and were interred in Grave J-7-20 at the Manila American Cemetery.

Narrative:

The height issue is now known to be false and the result of incorrect calculations. In later years, it was proven that the tables used to calculate the estimated height of skeletal remains were seriously flawed. Numerous academic papers were published, many by none other than the Army's head anthropologist in the Pacific, Mildred Trotter, demonstrating that the height estimates from the WWII era were seriously flawed and significantly understated the true height.

However, these height discrepancies observed during the identification process were not uncommon, and in most cases, were disregarded if significant other evidence of identity existed.

In this case, each time Washington disapproved a recommendation they requested additional evidence or investigation. Clearly, they would not be satisfied by the usual standard of proof required in other cases. By the same token, the Philippine Command was absolutely convinced that X-1130 was the remains of Nininger. Five identical recommendations and five disapprovals was entirely unprecedented. Without question, other factors were involved in the disapproval of these multiple recommendations.

The classified portion of the Cheaney IDPF was prepared subsequent to the material contained in the X-1130 file. It is highly credible and convincing. It summarizes and

compares information from multiple witnesses and highlights any discrepancies in their testimonies. It is consistent with the known facts. I give the file additional credence because it was classified as SECRET, the second highest level of classification of defense secrets. The truth was highly embarrassing and the Army obviously did not want the contents to become public knowledge.

While the contents of this file had absolutely no relation to national security, and classifying the contents as such was a serious violation of the law and Army regulations, it further illustrates the value placed on the information and the extreme potential for embarrassment to the government if it were released to the public.

When the obviously incorrect height estimate is discounted, the overall picture becomes much clearer and there is no evidence that argues against identification of X-1130 as the remains of Alexander Nininger.

DISINTERMENT OF UNIDENTIFIED REMAINS, GENERALLY

I will also testify about disinterment generally, and explain the potential for embarrassment to the government. This information is based on a general review of IDPF's and X-files of unidentified remains.

Approximately, forty percent of the X-files I have reviewed are associated with a particular person or persons. These are generally cases involving either a lack of corroborating evidence or false evidence such as an estimate of height calculated using inaccurate scientific methods. Identification of these remains could be resolved relatively easily using modern scientific techniques. However, in a great number of cases, identification of unidentified remains is likely to reveal that prior identifications of other remains were incorrect. This would greatly embarrass the government.

I am also aware of cases in which current government officials were aware of incorrect identifications, yet they actively sought to avoid proper identification of the remains.

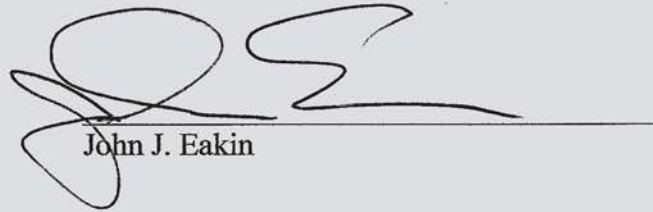
In the post WWII years, each military mortuary facility accumulated a large volume of "extra" human remains. In some cases, a set of skeletal remains might be found to have an additional arm or leg. In other instances, additional portions of already identified remains would be recovered. These bones were designated as "CIL portions" (Central Identification Lab) and placed in storage.

Little to no effort was made to identify these CIL portions. Ultimately, when each mortuary facility was to be closed, these CIL portions were placed in caskets packed full of like portions (leg bones, rib bones, etc.) and buried as a single Unknown in an overseas military cemetery. Dozens of these packed caskets exist in most cemeteries operated by the American Battle Monuments Commission. The files on these CIL caskets are overprinted with, "Not to be considered for WWII Unknown. "These CIL portions are identifiable using modern scientific techniques, but such identifications would, without

doubt, reveal many, many incorrect identifications. I conservatively estimate that these CIL portions could account for 5,000 or more missing American Servicemembers.

COMPENSATION/PRIOR TESTIMONY/PUBLICATIONS

I never accept compensation for my MIA research and I am not receiving any compensation for my testimony in this case. I have not served as an expert witness at a trial or by deposition to any other case in the past four years. No publications authored by me have been published in the last ten years. The case files, reports, and IDPFs relied upon are public records and the Defendants are already in possession of such documents.



John J. Eakin