

JOHN J. EAKIN  
November 29, 2018,

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

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

ORAL DEPOSITION OF  
JOHN J. EAKIN  
NOVEMBER 29, 2018

ORAL DEPOSITION OF JOHN J. EAKIN, produced as a witness at the instance of the Defendant and duly sworn, was taken in the above-styled and numbered cause on the 29th day of November, 2018, from 9:00 a.m. to 2:15 p.m., before Vanessa P. Pompa, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of United States Attorney's Office, 601 N.W. Loop 410, Suite 600, San Antonio, Bexar County, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

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1 APPEARANCES

2  
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15 and

16 Ms. Jacquelyn M. Christilles  
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20 ALSO PRESENT:

21 Theodore Lorenz,  
22  
23 John J. Eakin,  
24 the Witness; and  
25 Vanessa P. Pompa, CSR

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1 JOHN J. EAKIN,

2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 By Mr. Thorp:

5 Q. Good morning, Mr. Eakin. Can you state your  
6 name for the record.

7 A. John Eakin.

8 Q. Thank you. I did it wrong again.

9 A. Don't worry about it. Whatever you want to  
10 call me.

11 Q. You've been asked by plaintiffs to provide  
12 expert testimony in this case, correct?

13 A. That's right.

14 Q. And you prepared an expert reported dated  
15 September 14, 2018?

16 A. Yes, sir.

17 Q. How many times have you been deposed before?

18 A. I have no idea. Dozens.

19 Q. So you understand the procedure for a  
20 deposition?

21 A. I do.

22 Q. I'll ask questions, you respond to your best  
23 ability to understand the question. Your counsel may  
24 interpose objections but go ahead and answer it unless  
25 he tells you not to. Do you have any reason that you

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1 cannot provide full and accurate answers today?

2 A. No, sir.

3 Q. And if you don't understand my question please  
4 ask me to rephrase. I'll do my best to ask you a  
5 question you understand. Fair enough?

6 A. Sounds fair.

7 Q. Are you under the influence of any substances  
8 or medicines that could impair your ability to  
9 understand my questions or give full and accurate  
10 answers today?

11 A. No.

12 MR. SPRAGUE: I have some clients I would  
13 recommend that they take the Fifth on that question but  
14 I think you're all right.

15 Q. Did you do anything to prepare for this  
16 deposition?

17 A. I reviewed a lot of the documents that are  
18 involved in it.

19 Q. In preparing for this deposition did you notice  
20 any errors in your report?

21 A. I don't think there's any errors. There may be  
22 some things that -- that today I would state differently  
23 but I don't think there's any material errors.

24 Q. Well, I'm sure we can get into that as we --

25 A. I'm sure we --

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1 Q. -- go through. You're being proffered by  
2 plaintiffs as an expert. In what fields relevant to  
3 this case do you have expertise?

4 A. I've been an investigator working for various  
5 law firms, underwriters, government agencies for the  
6 last 30 years. I've been doing primarily aviation  
7 accident analysis but it's very similar to what's  
8 involved here. And then for the last -- well, since  
9 2009 I have studied the X-file IDPFs on World War II  
10 MIAs. Originally I got into it because a family member  
11 was an MIA. Over the course of that, I guess nine  
12 years, this is the fourth litigation that I've been  
13 involved in. The first three I did it pro se, two FOIA  
14 cases to get the documents that bring us here today.  
15 And another case which I guess we'd term it a mandamus  
16 case to retrieve the remains of my family member and  
17 some others. Out of this work I've dealt with a number  
18 of real experts on the issue. And along the way from  
19 time to time, for instance, Judge Biery termed me an  
20 expert in the Kelder case. So I think I have pretty  
21 significant expertise in this particular area because  
22 it's so similar to what I've been doing in my day job  
23 for the last 30 years.

24 Q. So how would you characterize the field of your  
25 expertise? You've described some of the pieces of your

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1 expertise. I'm just trying to get a label for the  
2 field. I mean it's not aviation accidents. Like when  
3 you were providing analysis there that was the field of  
4 your expertise as an investigator there. So what's the  
5 filed of your expertise?

6 A. I think the similarity here is whenever you're  
7 dealing with an investigation you're peeling back the  
8 onion to get to the truth and that's what I'm best at.  
9 My aviation expertise deals primarily with building and  
10 searching data bases to retrieve factual data on  
11 aircraft accidents. And it's no different than in this  
12 case, there's a lot of data that's relevant and a lot of  
13 data that's not so relevant.

14 Q. So you view your expertise as an investigator  
15 to be able to distinguish between relevant and  
16 irrelevant information then, to correlate --

17 A. For want of a better term I like yours.

18 Q. So you've talked about building a data base.  
19 So you have a data base of IDPFs that you've built out  
20 of your FOIA requests and additional research. Is that  
21 what you were describing?

22 A. Well, we have a number of data bases. If you  
23 think -- it depends on how you're gonna define data  
24 base, of course. We have several terabytes of these  
25 data files, but then in addition I've been through all

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1 of the files primarily from Manila but also from some of  
2 the other mortuary facilities. And I've been through  
3 those files and cataloged them so I can go in and, you  
4 know, if we're looking for all of the records on someone  
5 who is buried in Cabanatuan grave 717 we can pull them  
6 up without going through several terabytes of data.

7 Q. You catalog them electronically?

8 A. Well, mainly we enter them into an electronic  
9 data base.

10 Q. So your expertise is as an investigator  
11 generally, and you've worked with these IDPFs, I think  
12 your report also references talking to family members  
13 about other researchers?

14 A. Yes.

15 Q. Were there any other researchers that you  
16 consulted in connection with this report or with these  
17 seven cases?

18 A. Not in conjunction with this report.

19 Q. Investigators who would have information  
20 relevant to these seven cases?

21 A. I talk to so many people every day I can't say  
22 who I talked to specifically on these cases here.

23 Q. Do you have any education or training that  
24 specifically supports the expertise you've asserted  
25 here?



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1           A.    The last fifty years of investigations and  
2 military service and everything else has gone into what  
3 I do.

4           Q.    You referenced earlier that a judge referred to  
5 you as an expert.  Were you specifically qualified an  
6 expert -- as an expert by that judge using formal legal  
7 factors?

8           A.    I don't think so.  He just referred to me as an  
9 expert.  I don't remember exactly what his question was  
10 but he called me up to the lectern and said Mr. Eakin,  
11 you're the expert on these files, and we discussed 'em  
12 at length.

13          Q.    So how does your expertise go beyond repeating  
14 what the documents themselves say?

15          A.    We --

16          Q.    Because it seems as you've described that  
17 you're --

18          A.    Sure.

19          Q.    Part of what you've done is gotten a fast way  
20 to get to the right documents?

21          A.    Right.

22          Q.    So how does your expertise go beyond -- once  
23 we've got to the right documents how does your expertise  
24 go beyond sort of repeating what the documents say?

25          A.    I think the real skill in any investigation is

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1 after you have the data sorting out the good data from  
2 the not so good data.

3 Q. And how do you do that?

4 A. Very slowly. You just have to compare it with  
5 the known facts.

6 Q. Do you have any expertise as a historian of the  
7 Philippine Campaign?

8 A. Just as an amateur.

9 Q. Have you read specific books about it?

10 A. I have quite a collection of books on the  
11 Philippine Campaign.

12 Q. Could you name any that come to mind?

13 A. The first two, the obvious ones in this regard  
14 would be The Ghost of Bataan and The Ghost of Bataan  
15 speaks by Abie Abraham who is the guy who retrieved the  
16 X-1130 remains.

17 Q. Anything else that comes to mind?

18 A. Those are probably the obvious ones that --

19 Q. In addition to IDPFs have you reviewed general  
20 files on Cabanatuan graves -- yeah, on --

21 A. Everything I could get.

22 Q. Could you describe that, what does that  
23 involve?

24 A. I'm not trying to be evasive but there's --

25 Q. Yeah, I understand. I'm just trying to pare it

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1 down.

2 A. Yeah. There's a lot of material online,  
3 there's various forums, you know, online forums that the  
4 history of the Philippine Campaign is discussed.  
5 There's some people online that are pretty sharp and  
6 know a lot in the way of details.

7 Q. In your request for files have you requested --  
8 have you received files in addition to IDPFs that are  
9 more generally about the recovery process in the  
10 Philippines or Cabanatuan in particular or anything like  
11 that?

12 A. I have. I'm trying to think what I've got.  
13 There were several FOIAs over the years and offhand I  
14 can't tell you what was contained in them.

15 Q. Do you recall specifically consulting any of  
16 those more general files in preparing this report?

17 A. Not specifically.

18 Q. Does your expertise include odontology?

19 A. No.

20 Q. So you have no expertise in reading and  
21 comparing dental charts?

22 A. No.

23 Q. Does your expertise include forensic  
24 anthropology?

25 A. Absolutely not.

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1 Q. So you don't have expertise in examining or  
2 identifying human remains?

3 A. No.

4 Q. Does your expertise include laboratory  
5 accreditation?

6 A. We've done some research on that but I can't  
7 claim to be an expert.

8 Q. Laboratory design?

9 A. No.

10 Q. Organizational efficiency?

11 A. No.

12 Q. Does your expertise include DNA analysis?

13 A. No.

14 Q. So you don't have expertise regarding DNA  
15 testing methodology?

16 A. I know just enough to be dangerous.

17 Q. Selection of samples?

18 A. No.

19 Q. Selection of testing methods?

20 A. No.

21 Q. So you referenced four lawsuits. How is  
22 that -- which I think is the three FOIA -- or two FOIA  
23 and the mandamus action in this lawsuit, right?

24 A. Right.

25 Q. How did those lawsuits contribute to your

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1 expertise?

2 A. Well, they -- they obtained the documents that  
3 are why we're here today. Without those documents I  
4 don't think grave 717 would have been litigated and I  
5 don't think we'd be here today.

6 Q. I'm gonna mark this as Exhibit 1. That's your  
7 report.

8 MR. THORP: Here's a copy for you.

9 (Exhibit 1 marked)

10 Q. On the last page of your report -- If you'll  
11 turn to the last page -- you state: I have not served  
12 as an expert witness at trial or by deposition in any  
13 other case in the last four years.

14 A. I don't think that's completely accurate as --

15 Q. I wanted to ask, you referenced --

16 A. Earlier on --

17 Q. -- on your resume --

18 A. -- we disclosed.

19 Q. -- on the first page -- so I just wanted you to  
20 explain. Just provide --

21 A. I think that was just poorly worded.

22 Q. Okay. So turning to the first page on the  
23 bottom bullet on your resume you reference a 2014 case  
24 in which you served as an expert.

25 A. Right.

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1 Q. And you testified by deposition or at trial in  
2 that case?

3 A. By deposition.

4 Q. Okay. Just trying to clear up the ambiguity.  
5 So you've testified not just by deposition, you  
6 testified as an expert in a number of cases, right?

7 A. Yes.

8 Q. So you're familiar with the concept of stating  
9 a distinct opinion as an expert that's going to be used  
10 in the court case?

11 A. Right.

12 Q. So let's go through. And I'd like you to state  
13 each opinion that you're asserting as an expert in this  
14 case. Leave out the reasons, the background. So I'd  
15 like a listing of the opinions and then we'll walk  
16 through them through the rest of the day.

17 A. Okay.

18 Q. So please state every opinion that you've  
19 reached in this case. And this isn't a memory test, so  
20 if you end up wanting to glance at your report that's  
21 fine. I just want to get these distinct before we walk  
22 through them.

23 A. Okay, we're covering a lot of material here so  
24 let me be as concise as I can. In my opinion Bruntmyer  
25 is or was buried in Cabanatuan grave 704.

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1 Q. Okay, so that is your first opinion?

2 A. Right. Morgan is buried or was buried in grave  
3 822 Cabanatuan.

4 Q. Okay.

5 A. Hansen was buried in grave 407 at Cabanatuan.

6 Q. Okay.

7 A. Kelder was buried in grave 717 at Cabanatuan.  
8 Stuart is currently buried in grave N-15-19 at the  
9 Manila American Cemetery. And his remains were  
10 designated as Manila number 2 xray 3629.

11 Q. If I can pause you right there. By xray you're  
12 referring to just the letter X?

13 A. X, right, I'm sorry. I'm trying to make it  
14 easy for you.

15 Q. Go on.

16 A. General Fort was buried in Manila American  
17 Cemetery Grave L-8-113. And his remains were designated  
18 as X-618. And Nininger, it's my opinion that the  
19 remains designated as X-1130 Manila number 2 are those  
20 of Alexander R. Nininger.

21 Q. So we'll go through your reasoning for each of  
22 those conclusions. Are there any other overarching  
23 opinions that you're offering as an expert in this case?

24 A. We'll probably find some more but I think those  
25 are the basics that we can talk about.

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1 Q. Are you offering an opinion today that the  
2 remains of Bruntmyer, Morgan and Hansen are at Manila  
3 American Cemetery in the graves for unknowns associated  
4 with the common graves you referenced?

5 A. Well, at or were. I don't know if they've been  
6 disinterred. It's my understanding that they've been  
7 recommended for disinterment and, you know, the process  
8 is ongoing. I don't know the status as of today.

9 Q. Are you offering an opinion that the remains of  
10 these six service members, setting aside Kelder, have  
11 already been identified?

12 A. Officially identified or identified by me? I  
13 don't understand what you're asking.

14 Q. Let's go with identified by the government.

15 A. No, I don't believe they have been.

16 Q. Have you identified them?

17 A. Well, it's my opinion that these individuals  
18 are buried in these graves as the unknown that we  
19 referenced.

20 Q. Is it your position that they are likely or  
21 that in your view that you have conclusively established  
22 that these are the remains?

23 A. I'm as certain as I can be short of actually  
24 examining the remains.

25 Q. That speaks to your degree of certainty, it



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1 doesn't really answer the question. Are you indicating  
2 that these are likely the remains or are you certain  
3 that each of these remains is the service member you've  
4 identified?

5 A. I think we're splitting hairs here but let me  
6 put it this way, after World War II during the, let's  
7 call it the identification phase in the late forties,  
8 there was a certain standard for identification of  
9 remains. Basically they had to have two items of  
10 evidence. It could be the location where the remains  
11 were recovered and that location was associated with  
12 that individual. And the second piece could be a dog  
13 tag or dental or a number of different things. I'm more  
14 certain today -- I'm more certain than they could have  
15 been back then. Does that answer your question? I'm  
16 trying here.

17 Q. Yeah, it helps. Let's pause and talk about  
18 what you just said. You talked about a standard during  
19 that identification phase.

20 A. Uh-huh.

21 Q. What's your basis for the description you  
22 provided of that standard, where did you get that?

23 A. From the X-files. I may have -- I may have  
24 seen it referenced.

25 Q. The X-files indicated the standard that was

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1 required for identification?

2 A. Well, you can tell by the information in the  
3 X-files.

4 Q. So you inferred the standard from the --

5 A. Well, I don't remember if I've seen it written  
6 specifically or not. I could have but I have no idea  
7 where it would have been.

8 Q. But as you sit here today you don't  
9 specifically recall seeing it in writing?

10 A. No, I don't.

11 Q. So you may have inferred it from the documents  
12 themselves?

13 A. I could have but there was probably more to it.

14 Q. So you believe that you're more certain with  
15 identifications than the standard that was used for at  
16 least some identifications in the 1940s. Your caution  
17 in answering my certainty question suggests that you  
18 view this on a scale, is that fair to say? That  
19 likelihood certainty are not binary but are kind of on a  
20 sliding scale of assurance?

21 A. I wouldn't -- I wouldn't term it that way.

22 Q. How would you describe it?

23 A. It's my opinion that these unknowns are who I  
24 think they are.

25 Q. For example -- in your report, for example, you

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1 said it's my opinion the remains designated X-1130 are  
2 likely those of Lieutenant Nininger. I'm just trying to  
3 understand how that likelihood relates to the assertion  
4 in the litigation that the remains have already been  
5 identified.

6 A. I think I could write that same sentence with  
7 or without the word likely. And I'm not trying to be  
8 argumentative --

9 Q. Yeah.

10 A. -- and I'm not trying to put too fine a point  
11 on it but that's the way I wrote it that day but you're  
12 asking me how certain I am. I'm about as certain as can  
13 be. Now, I think there -- anything can happen. It can  
14 be Santa Clause in that grave but I think it's very,  
15 very, very likely that that's Nininger in that grave.

16 Q. You maintain a website called the Bataan  
17 Missing, is that right?

18 A. That's right.

19 Q. On there you have written that these remains  
20 are obviously those of Nininger, Stewart and Fort?

21 A. I don't know if I have but I certainly could  
22 use those words. They're obvious to me.

23 Q. It's obvious even though it could be Santa  
24 Clause in that grave?

25 A. Well, the sun may shine today too, you know, we

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1 don't know for sure.

2 Q. So the -- so the likelihoods and certainty of  
3 obviousness is not a hundred percent?

4 A. You're splitting hairs with me now. I'm as  
5 certain as I can be, as I said, short of actually  
6 disinterring those remains and examining them.

7 Q. How surprised would you be if we disinterred --  
8 if one of these remains were disinterred and found out  
9 not to be the service member you've indicated?

10 A. I'd be very surprised.

11 Q. Do you expect to do any additional work to  
12 support the proffered opinions and conclusions you've  
13 asserted in your report?

14 A. If it's needed.

15 Q. Have you been asked to do any additional work  
16 to buttress your expert report in the future in this  
17 case?

18 A. We've caught up as of this morning.

19 Q. Could you describe your assignment in this case  
20 from plaintiffs' counsel.

21 A. I don't know that there was ever a distinct  
22 assignment but I've tried to assist wherever I can and  
23 share whatever information I have with counsel.

24 Q. Did you instigate this lawsuit?

25 A. I did my best to find the best cases and put

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1 the people together. These family members have gotten  
2 to be my friends. And when a lot of people found out  
3 that I've been successful in recovering the remains of  
4 Bud Kelder, my cousin, they came to me and asked me what  
5 they could do. And I can't count the number of people  
6 that want to do the same thing. But these cases in  
7 particular I recommended because I think they're  
8 excellent cases to resolve some of the -- some of the  
9 issues involved in the MIA campaign.

10 Q. Do you also draft filings in the case?

11 MR. SPRAGUE: Does he do what? I'm sorry.

12 Q. Do you also draft filings in the case?

13 MR. SPRAGUE: Draft filings?

14 A. Such as?

15 Q. The legal filings that were put on the  
16 documents.

17 A. No.

18 MR. SPRAGUE: The pleadings.

19 A. You flatter me but we've got some pros involved  
20 here.

21 Q. Did plaintiffs' counsel provide you with any  
22 assumptions to use as an expert?

23 A. No.

24 Q. This may feel a little redundant but certainly  
25 we talked about your field --

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1 A. What a surprise.

2 Q. -- your field of expertise. I'd like you to  
3 describe the methodology you use in performing your  
4 investigative analysis.

5 A. You're familiar with Occam's razor?

6 Q. Yes, but state it for the record. State your  
7 understanding.

8 A. That's my favorite problem solving technique is  
9 Occam's razor, a philosophical or problem solving  
10 principle that says that the simplest solution is  
11 usually the correct solution. I don't know that I can  
12 define what I do any better than that.

13 Q. Is your methodology something that is accepted  
14 in your -- generally accepted as a sufficient method in  
15 your investigative field?

16 A. I guess it's accepted enough that I've made a  
17 hell of a good living for the last 30 years. People  
18 come to me and ask me to work for them so I guess that  
19 speaks for itself.

20 Q. To apply Occam's razor you need the relevant  
21 set of information, right?

22 A. Okay.

23 Q. I'm asking you. Is that right?

24 A. It sounds reasonable.

25 Q. So if you were applying -- looking for the

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1 simplest solution without all of the facts that could  
2 lead to erroneous conclusions, right?

3 A. Sure.

4 Q. If someone else was performing the analysis  
5 you've performed how would you check their reliability  
6 and accuracy?

7 A. I don't know how you would set up a QC process  
8 on something like this. You kind of have to start from  
9 scratch.

10 Q. And by QC you mean quality control?

11 A. Yes.

12 Q. So someone else would have to basically  
13 recreate everything you did, it would be difficult to  
14 just look over your shoulder, is that what you're  
15 saying?

16 A. I think that in general if you want to go  
17 through the data items that I've considered and those  
18 that I've discarded we could do that. And you might  
19 come to the same conclusion, you might come to a  
20 different conclusion. I would hope that you would come  
21 to the same conclusion when you looked at the same data.

22 Q. You said you've been retained as an expert in  
23 -- many times over the years. Have you ever been  
24 disqualified as an expert by a court?

25 A. Never.

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1 Q. The methodology you described does it have an  
2 error rate or is there any way to know how likely it is  
3 that you're mistaken using your evidence?

4 A. Oh, I think a lot of this is as much art as  
5 science and it's not something that lends itself to a  
6 rate evaluation.

7 Q. When you're looking through these files and  
8 reaching your conclusions what standard are you  
9 applying? Essentially your understanding of the  
10 original standard that was applied, some other standard,  
11 what standard are you using to reach your conclusions?

12 A. Whatever it takes to convince me. As an  
13 investigator when I go into something like this I'm  
14 looking for the truth. I obviously have a great  
15 personal connection with these MIAs. And I feel that I  
16 owe them my best. So if there's a standard that's what  
17 it is.

18 Q. With whom did you discuss the case in preparing  
19 your report?

20 A. I don't know that I discussed the case with  
21 anyone in particular as far as preparing the report  
22 went. I mean the report was basically my work product.  
23 John Smithee looked it over. He probably corrected a  
24 few things but it's my work.

25 Q. Did you -- You referenced talking to each of



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1 the families of these service members, I guess before  
2 the litigation was filed. Were those conversations  
3 relevant to the report?

4 A. Okay, now we're talking about drafting this  
5 piece of paper or are we talking about --

6 Q. Reaching your --

7 A. -- everything that goes --

8 Q. -- opinions. Reaching your opinions.

9 A. Sure, the family members had to provide a lot  
10 of input.

11 Q. Any other individuals that you sought input  
12 from in reaching your conclusions, specific conclusions  
13 in this case?

14 A. There's a number of investigators, a number of  
15 people that do the same thing, that wish to account for  
16 MIAs. And, you know, I'm sure I talked to a number of  
17 people about these cases.

18 Q. Do you recall anyone that provided information  
19 that was specifically relevant to these seven cases?

20 A. Probably the primary person that I had the most  
21 association with is Jed Henry.

22 Q. Can you spell that?

23 A. J-e-d, H-e-n-r-y.

24 Q. And how would information from him have been  
25 relevant to these seven cases?

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1 A. Oh, just in discussing them and sorting out the  
2 details. He did provide me one of the files that I  
3 think is critical to this case.

4 Q. And what file was that?

5 A. That was the Cheaney classified file.

6 Q. Now declassified, I presume?

7 A. Well, hopefully. You know, we call it the  
8 classified file just to distinguish it from the never  
9 classified file.

10 Q. And do you know where he received the file  
11 from?

12 A. FOIA.

13 Q. Any other specific documents or information you  
14 received from others that are specifically relevant to  
15 these seven cases?

16 A. There certainly could be but I don't know what  
17 they might be. There's a lot of documents that are --  
18 well, a lot of documents. I can't tell you where every  
19 one of them came from.

20 Q. Yeah. So let's talk as best you recall about  
21 the sort of materials you used. I think in the report  
22 you reference IDPFs and burial records. So the IDPFs  
23 are the individual deceased personnel files for the  
24 service members, right?

25 A. Right.

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1 Q. And then there's also the X-files, the file for  
2 unknown remains?

3 A. Well, just to be clear the X-files are  
4 IDPFs/293 files --

5 Q. For unknowns?

6 A. -- but they pertain to unidentified remains  
7 so --

8 Q. Yes. And then you also referred to burial  
9 records. By that were you referring to something other  
10 than these items in this case?

11 A. Right, I'm glad you -- I'm glad you brought  
12 that up. One of the -- one of the key documents in all  
13 the Cabanatuan research that I did was the master burial  
14 roster that the POWs maintained in the POW camp. This  
15 file was buried, you know, in the camp somewhere hidden  
16 from the Japanese. It was maintained in secret because  
17 the POWs were not allowed to maintain these records and  
18 they buried it. And you can see on it today that it has  
19 watermarks, it's torn, it's in pretty poor shape. The  
20 copy that I have is a photocopy which appears to be  
21 taken from a microfiche copy. Most of the pages are  
22 black with white text as you would expect microfilm,  
23 microfiche copies to be.

24 It was interesting how we came across this  
25 file. Several years ago when I was first getting

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1 started in this work the American Defenders of Bataan  
2 and Corregidor have a -- or had a newsletter called the  
3 Quan, Q-u-a-n. And in going through back issues of the  
4 Quan I found a notice that someone had put in there, the  
5 guy's name was Al Simms and he was looking for  
6 information on his brother. His brother's name was --  
7 it wasn't Simms, it was Sinowitz, Raymond Sinowitz. And  
8 he had died in the Cabanatuan POW camp under  
9 circumstances similar to the death of my cousin Bud  
10 Kelder.

11 So I found this request for information on  
12 him. I called Al Simms and we had a great visit. And  
13 just in the course of the conversation he mentioned that  
14 he had a copy of the burial roster. And I asked him for  
15 a copy and he sent it to me. It's about 50 pages long.  
16 And it was actually compiled -- I know now that it was  
17 compiled from at least five or six different sources  
18 such as death certificates that were signed in the camp,  
19 personal property records, hospital records. There were  
20 a number of source files that were consolidated in this  
21 master burial roster. It was all very neatly typed. It  
22 included --

23 Q. Can I pause you right there?

24 A. Sure.

25 Q. I think we may have a copy here. Let's mark

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1 this as Exhibit 2. And you'll find this as tab 8, I  
2 believe, in your copy. You can have this copy here once  
3 she marks the exhibit.

4 (Exhibit 2 marked)

5 A. Yeah, this is the same.

6 Q. Okay. So here, go ahead and use this. So what  
7 I've handed you, Exhibit 2, is the death report of  
8 Cabanatuan. It's also tab 8 in the binders we were  
9 using yesterday.

10 A. May I ask how many pages are here so I don't  
11 have to go through and count them? Is this complete  
12 or --

13 Q. I believe -- This is a complete copy of the  
14 document as I understand it.

15 A. Okay, I understand that or just from memory I  
16 think there are 50 odd pages.

17 Q. Your copy is doublesided. I think that's --

18 A. It doesn't look -- It could be. Okay. Anyhow,  
19 you know --

20 Q. This looks like the documents you referred to.

21 A. It appears to be the same -- the same document.

22 Q. Okay. Go ahead with what you were describing  
23 about compiled from multiple sources. So what's your  
24 understanding about when this compilation was put  
25 together?

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1 A. Sometime before Cabanatuan was liberated.

2 Q. And what's your source for your understanding  
3 of how the documents were compiled?

4 A. Well, it's pretty obvious that it extends to  
5 the last day of occupancy at the camp, I believe. And  
6 when you -- I don't think this is complete. There's not  
7 enough numbers here. Anyhow, it's in chronological  
8 sequence of the deaths. And -- The copy that I have  
9 anyhow extends right up to, you know, 1944, '45,  
10 whenever the camp was liberated. And I don't know who  
11 told me the story of the roster being buried and then  
12 recovered afterwards but I've seen references to that in  
13 a number of places and, you know, certainly in the  
14 X-files. Because quite often in the X-files data will  
15 be extracted obviously from this roster, because it  
16 reads verbatim, and inserted in the X-files.

17 Q. We may talk about that a little more, but for  
18 now I was just trying to determine what materials you --  
19 documents you used specifically in reaching your  
20 conclusions here. We talked about the IDPFs both for  
21 the service members and the unknowns, the burial records  
22 such as this one. Are there other more general burial  
23 records to which you referred in reaching your  
24 conclusions?

25 A. Yeah, there's other records as well. I

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1 remember at one of the meetings I had with Heather  
2 Harris, one of the DPAA historians, we talked about  
3 this. And she said yes she knew of the existence of  
4 this burial roster but they didn't have a copy because  
5 the copy that was in the archives was so delicate they  
6 wouldn't even let them photograph it. I don't know if  
7 they've since --

8 Q. At what point do you believe that conversation  
9 occurred?

10 A. It had to be at one of the family briefings  
11 that I attended.

12 Q. I assume you've probably attended a number over  
13 the years. Are we talking 20 years ago, ten years ago,  
14 last year?

15 A. They don't invite me anymore so it had to be in  
16 the 2010, 2012 era.

17 Q. After the deposition would you be willing to  
18 provide a copy of the roster as you understand it so we  
19 can -- the one you were using in your report?

20 A. For --

21 Q. Just --

22 A. To be put to work? I mean to actually be used?  
23 I'll do anything if it will facilitate bringing these  
24 guys back. If it's for litigation you're on your own,  
25 brother.

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1 Q. Well, it's information that you used in  
2 compiling your report so it's relevant to the basis for  
3 your opinions.

4 A. Oh, okay.

5 Q. That's why I'm asking.

6 A. Yeah, if this isn't complete I'll --

7 Q. I just want to make sure we're comparing --

8 A. -- look it over. And as I say, there are also  
9 -- there's source data that fed into this. And from  
10 that I've been able to reconstruct several of the  
11 missing pages in this burial roster.

12 In addition, when you go through this  
13 roster you'll find that there's tons of phonic  
14 spellings, typos, about what you'd expect from an Army  
15 clerk. And having been an Army clerk I think I can  
16 speak to the quality of Army clerk work. And I  
17 transcribed all this data and used relational data bases  
18 to compare against other data bases such as the ABMC  
19 data base. There's several other data bases. There's a  
20 NARA POW database. There's a NARA -- N-A-R-A --  
21 database of deaths. Anyhow, I was able to compare and  
22 purify the data. And where it was either illegible or  
23 missing I could use some software tricks to bring out  
24 that data.

25 Q. So you have a cleaned up version of this that's



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1 corrected to the extent that you've been able to do so?

2 A. Yes.

3 Q. And that's what you used for cross-referencing  
4 the common graves?

5 A. It's a basic research tool for Cabanatuan.

6 Q. Have you reviewed any of the government's  
7 efforts to do similar things over the years?

8 A. The government hasn't been anxious to share.  
9 I've made the offer and no one from the government is  
10 interested.

11 Q. I'm gonna mark this as Exhibit 3.

12 (Exhibit 3 marked)

13 This is in yours as tab 9. This is a  
14 document titled Chronological Listing of Deceased by  
15 Accountable Burial Period. Here's a copy so you can --

16 A. Okay.

17 Q. Let's keep these in a stack. Is this a  
18 document that you've seen before?

19 A. I don't know. I've seen a number of different  
20 versions of these. These are the cemetery rosters and  
21 they evolved over time. You know, I've never found 'em  
22 that useful. And I generally don't use 'em in my  
23 research.

24 Q. Does this look like an attempt to do what  
25 you've done in sort of taking that death roster and --

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1 A. No.

2 Q. -- having the data corrected?

3 A. No. What I did was completely different.

4 Q. Why don't you --

5 A. I think this was maintained at the cemeteries.

6 And generally from what I've seen it's -- it's a grave

7 roster but it looks like someone has gone through and

8 tried to -- tried to --

9 Q. Do you see that there's a column for identified  
10 and unidentified. And then on the left side there is  
11 the time of death?

12 A. Uh-huh. Yes.

13 Q. So this is kind of information similar to  
14 what's on the death report that we talked about as  
15 Exhibit 2?

16 A. Okay. It's not --

17 Q. So basically in doing your work you worked from  
18 other sets of data bases but not from a document like  
19 this?

20 A. Right. You know, I've seen these rosters. I  
21 don't know that I've seen this particular roster, you  
22 know, but I've seen this form a number of times. And  
23 it's just not really useful to me anyhow.

24 Q. So for the purposes of this case and this  
25 report, in addition to the death roster you used your

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1 data base that you compiled from various sources, your  
2 sanitized version of the death roster, correct?

3 A. It's a primary tool to me.

4 Q. And you may not specifically recall exactly  
5 what the underlying sources were when you were preparing  
6 this report because you referred to your data base?

7 A. Okay.

8 Q. Is that what you're -- is that what you're  
9 telling us today?

10 A. It sounds like it. I'm not sure I follow.

11 Q. A reasonable approximation?

12 A. Yeah, that's a basic tool.

13 Q. Are there any other documents you specifically  
14 referred to in preparing your report other than what  
15 we've already discussed?

16 A. There were a number of different source data  
17 that went into all these things. I don't know if you  
18 wanna --

19 Q. Yeah, setting aside sort of the source data for  
20 how you got -- for example, the updated version of the  
21 death roster, I think we've kind of covered the general  
22 description.

23 A. I don't want to bore you with too many details.

24 Q. Right. Any other specific documents that you  
25 referred to even if they're sort of like composite

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1 documents now? But I'm just trying to get a set of  
2 documents that you specifically referred to in compiling  
3 this report.

4 A. Typically when a family comes to me -- and I  
5 average probably one inquiry a week from one family that  
6 usually they find me on the Bataanmissing.com website.  
7 And I'll get an email from them saying, you know, my  
8 cousin, brother, whoever died at Cabanatuan or wherever,  
9 and do you have any information on him, his name is.  
10 And sometimes they'll have a service number. And like  
11 sometimes they don't know if they died in Cabanatuan or  
12 a death march or where but I'll take whatever  
13 information they give me. Usually the first place I go  
14 is to the Cabanatuan death roster or burial roster. If  
15 I don't find them there there are other data bases, the  
16 ABMC which is useful because it will in general identify  
17 who's still missing if they're listed on the tablets as  
18 missing.

19 Q. And that's publically available through  
20 ancestry.com, right?

21 A. Well, I FOIA'd this from ABMC when they sent me  
22 a data file. And there's other data bases as well, the  
23 POW database, the World War II data base, these sorts of  
24 things. And I'll come up with whatever information I  
25 can find on 'em.

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1           In some cases -- well, once I have a name  
2 I'll search my drive for any files specifically on them,  
3 whether it's an IDPF or in some cases if I have a  
4 searchable PDF the X-file may come up. Sometimes I'll  
5 find a name that I'm looking for in someone else's file.  
6 So there's a number of places that we can obtain this  
7 data. And usually I can get back to a family the next  
8 day and give them a little closure finally.

9           Q. But do you recall any specific initial  
10 documents that you used for these seven cases?

11          A. I don't know if there was anything out of the  
12 ordinary for them or not.

13          Q. Okay, let's walk through your report and talk  
14 more specifically --

15                   THE WITNESS: I think I'm gonna need a --

16                   MR. THORP: Certainly. We can take a  
17 break right now.

18                               (Recess from 9:57 to 10:12)

19          Q. Okay, we'll go back on the record. Let's go  
20 back to Exhibit 1, your expert report.

21          A. Okay.

22          Q. I think it's open in front of you. If you'll  
23 turn to page 5. I think it's tab 2 in the binder if you  
24 want to follow, unless you pulled it out. Oh, you have  
25 a copy. Okay, under the Bruntmyer heading you say: I

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1 agree with the DPAA's assessment that the commingled  
2 remains recovered from Cabanatuan Communal Grave 704  
3 include those of Lloyd Bruntmyer. Is that right?

4 A. Yes.

5 Q. On what basis do you say that it's DPAA's  
6 assessment that the remains recovered from 704 include  
7 Bruntmyer?

8 A. I think that was in something that -- in the  
9 defendant's file.

10 Q. That the government had concluded that he was  
11 recovered from that common grave or that he was likely  
12 buried there?

13 A. I -- It was probably in reference to the  
14 statement that DPAA had made a recommendation for  
15 disinterment of this grave and --

16 Q. Okay, so you're characterizing the  
17 recommendation for disinterment?

18 A. Well, it said that they -- they obviously  
19 agreed with my conclusion that Bruntmyer was in that  
20 grave because they recommended disinterment.

21 Q. And it's also your opinion that Bruntmyer,  
22 Morgan and Hansen are buried in the graves of unknown  
23 service members associated with each of these common  
24 graves?

25 A. Yes, each of the respective graves.

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1 Q. Are buried in connection with the remaining  
2 unknown graves associated with those? I'm sorry, the  
3 remaining unknowns -- Sorry, that question was poorly  
4 phrased. I guess let's just talk about it using --  
5 let's just use Hansen as an example.

6 A. Okay.

7 Q. On what basis do you conclude that Private  
8 First Class Hansen was buried in common grave 407?

9 A. I can't tell you exactly but I can tell you in  
10 general what I would have relied on. Number one would  
11 have been the burial roster --

12 Q. The death report?

13 A. -- that we just looked at. Number two I'm sure  
14 we had an X-file on someone from that grave. Typically  
15 the X-file would contain a list of everyone who was in  
16 there. So that would have been -- that was redundant to  
17 the burial roster but just another source of the same  
18 data. We may have had IDPFs on -- perhaps on that man,  
19 perhaps on someone else from that grave, but all of  
20 these bits and pieces fit together and tell us that  
21 Hansen or Morgan or Bruntmyer is in that grave.

22 Q. And all of that depends on the initial  
23 recordkeeping about who died, on what day they died and  
24 what common grave people that died that day were put in?

25 A. Not necessarily.

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1 Q. What other sort of information would lead to  
2 the identification of where he was from -- where he was  
3 buried?

4 A. If the X-file --

5 Q. So let's talk -- we're not talking  
6 hypothetically, we're talking specifically about your  
7 conclusion --

8 A. Okay.

9 Q. -- that PFC Hansen.

10 A. Maybe we should pull out some of the X-files  
11 for Hansen or Morgan or Bruntmyer and just see what's in  
12 those X-files.

13 Q. So you don't recall -- as you sit here today  
14 you don't recall specifically what bases?

15 A. Oh, absolutely not. There's been hundreds of  
16 these.

17 Q. So there's nine unknowns associated with common  
18 grave 407. So you'd be talking about the nine X-files  
19 for those -- for those graves?

20 A. Right, the X-files and --

21 Q. And PFC Hansen's IDPF.

22 A. Well, not necessary his. One of the things  
23 that you have to realize in all of these files is these  
24 were all pre-copy machine files. And today we have so  
25 much paper. Back then everything was carbon paper. So



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1 if you had nine unknowns and someone made a document  
2 with six carbons you were gonna have three or four of  
3 these files that wouldn't get a copy of that document,  
4 okay? So you need to have all of the X-files and all of  
5 the IDPFs to hopefully put together a complete file.

6 Q. And you believe that you did that with regard  
7 to each of the Cabanatuan individuals in this case?

8 A. Well, that would be typical.

9 Q. But you don't recall whether you compiled a  
10 complete set to use?

11 A. I don't remember. I felt certain that once the  
12 litigation was filed we'd get a complete administrative  
13 record and any gaps would be filled in.

14 MR. SPRAGUE: Here's Hansen.

15 Q. So you're referring to Exhibit 2. Can you give  
16 me the Bates number of the page you're referring to.

17 MR. SPRAGUE: It's on 0332. He's number  
18 461 in the left-hand column. I don't know what the  
19 left-hand column means but that's the roster number.  
20 Private David C Hansen, is that the guy?

21 THE WITNESS: That's him.

22 Q. I'm sorry, just a moment.

23 MR. SPRAGUE: 27th bomb squad.

24 THE WITNESS: What's the date? 6-26,  
25 yeah.

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1 Q. So June 26th of 1942?

2 A. That's the date of death.

3 MR. SPRAGUE: No -- Yeah, it looks right.

4 THE WITNESS: June is the important thing.

5 MR. SPRAGUE: Okay.

6 MR. THORP: Sorry, which line item did you  
7 say?

8 MR. SPRAGUE: 461 up towards the top.

9 Q. And from this information how would you  
10 determine what common grave would be associated?

11 A. You really can't from this. Prior to 1 August  
12 of '42 -- in fact, if you flip a few more pages and get  
13 up to, you know, the later burials later on they  
14 included a grave number on this burial roster. Most of  
15 the lines on the burial roster prior to 1 August did not  
16 include the grave numbers. Some did but the majority  
17 did not. And so in that case you have to go to other  
18 sources to determine what grave is at issue here.

19 Q. What's your understanding of how graves were  
20 assigned for folks who died in Cabanatuan at this time?

21 A. They weren't assigned. They dug a hole where  
22 the Japanese guard told them to dig a hole. And it was  
23 different every day. In general particularly in the  
24 early days of Cabanatuan they jumped around in the  
25 cemetery. I've read reports that said that the stench

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1 was so terrible that they couldn't stand being in the  
2 same place so they'd go to the other end of the cemetery  
3 and dig the common grave there. So they weren't really  
4 assigned, it was just kind of a random thing, everyone  
5 that was buried during the 24 hour reporting period.  
6 And reporting periods varied from noon to noon. Later I  
7 think it was 5 to 5 or something like that. That, you  
8 know, everyone that died during that period would go  
9 into a single communal grave.

10 Q. So what's your basis for concluding that Hansen  
11 was buried in this -- in common grave 407, essentially  
12 the fact that he died in the right time period, as  
13 recorded as having died in that time period?

14 A. That's a clue but there's a number of other  
15 places that I could have looked as we've gone through  
16 and the X-files quite often list who's in that grave.

17 Q. But they're working from a -- they're just  
18 compiling the same information, right, they're working  
19 from the death roster?

20 A. Who is?

21 Q. The AGRS folks compiling the X-file, right?

22 A. No, not necessarily.

23 Q. Where else would -- how else would they be  
24 determining who was in a specific grave?

25 A. Well, the death certificates usually had the

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1 grave number on them. They just weren't putting them on  
2 this consolidated roster up until 1 August but  
3 there's a number of other --

4 Q. Do you have --

5 A. -- places.

6 Q. Do you have the death certificates?

7 A. It's probably in the X-file or the IDPF but,  
8 you know, I can't tell you. I'm not trying to jerk you  
9 around here but all of these are a little bit different,  
10 you know, and I'm trying to give you the general process  
11 that we used to find them. You know, if I was at my  
12 computer we could bring this up in ten minutes and I  
13 could take you right through it. If you have an X-file  
14 or several X-files from grave 407 we can probably find  
15 it. It's up to you if you want to sort through it.

16 Q. We may be able to -- maybe we'll look through  
17 it on a break.

18 A. Is it really relevant.

19 Q. Yeah. Isn't it possible that Hansen did not  
20 die on the day indicated by the death certificate or  
21 death roster?

22 MR. SPRAGUE: Objection, form.

23 Q. Is it possible that he, that he Hansen did not  
24 die on the day indicated here in the death report?

25 A. Anything is possible. I think it's highly

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1 unlikely though because from what we've found that death  
2 roster is very, very accurate with the caveat that  
3 there's a number of typos and omissions and things. But  
4 once we got the data cleaned up there's very few errors  
5 in that data. And if you do find an error I'm sure it's  
6 going to be sorted out once you get through all the rest  
7 of the data because this burial roster doesn't exist in  
8 a vacuum. There are, you know, supporting documents, a  
9 number of X-files and IDPFs that support it.

10 Q. Isn't it possible that Hansen was not buried in  
11 common grave 407 but instead somewhere else in that  
12 cemetery?

13 A. I think that's what I just answered. And I  
14 don't know.

15 Q. Well, the first question was whether he didn't  
16 die on the day indicated. And, like, even if he did die  
17 on the day indicated couldn't he have been buried -- I  
18 mean it could have been the last death in that time  
19 period but ended up being buried with the group for the  
20 next day, right?

21 A. That could have happened.

22 Q. And if that happened he wouldn't likely be  
23 among the remains that are associated with common grave  
24 407 now, right?

25 A. How likely that is I don't know. I'd have to

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1 see the other information because like I say, that  
2 burial roster doesn't exist in a vacuum. There are  
3 other documents quite often, sometimes not but generally  
4 there are documents that support that. So I can't tell  
5 you that the day or the grave number would have affected  
6 finding him without having all of the data.

7 Q. Are you aware that one individual recorded by  
8 the death roster as being buried in the group for common  
9 grave 407 was actually identified in common grave 1009  
10 buried the following day?

11 MR. SPRAGUE: Objection, form.

12 Q. Go ahead and answer. Are you aware of that?

13 A. I -- I don't know whether I am or not. It's  
14 been so long since I've worked specifically on this  
15 grave that I just can't give you the details about a  
16 specific grave. They all run together, you know,  
17 there's over 300 of these graves and --

18 Q. 300? I thought it was like 3000 that were  
19 buried.

20 A. No, I'm talking about communal graves. There's  
21 3744 unknowns that were buried in Cabanatuan -- or in  
22 Manila. There's, I want to say, 2655 deaths at  
23 Cabanatuan. And something over a thousand of those were  
24 unknowns.

25 Q. But the 300 you're referring to the number of

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1 common graves?

2 A. The communal graves, yes, sir.

3 Q. So we've been talking about whether -- what it  
4 takes to determine that Hansen was buried in a  
5 particular common grave. Now let's take the step to how  
6 we get -- so this is going from that common grave to  
7 being buried at Manila cemetery now associated with  
8 common grave 407. What's your basis for concluding that  
9 Hansen's remains made it from that common grave to now  
10 these -- to among these nine unknowns, to these nine  
11 sets of unknown remains buried at Manila associated with  
12 common grave 407? Are you simply reporting that records  
13 indicate that Manila American Cemetery has nine graves  
14 of unknown remains associated with common grave 407?

15 A. You're asking me to be very specific about  
16 where each of these guys are buried and I can't do that  
17 without looking at the files. If you want to pull out  
18 all of the X-files and IDPFs for that grave if you can't  
19 identify them well, you know, I'll come back tomorrow  
20 and, you know, I'll research it and tell you. But in  
21 general we can figure out what communal grave these guys  
22 were in. Sometimes we can't. It all depends on what  
23 files we have. I have probably 98 or 99 percent of the  
24 X-files. And it's not my fault that I don't have the  
25 rest of them. The IDPFs we've been fighting about

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1 those. Last night I got a drive from Ms. Kruger with  
2 327 gigabytes of additional IDPFs that I haven't dumped  
3 in my drive yet. So what went into this particular  
4 research working up this grave I can't tell you.

5 Q. Okay. Let's just walk through the  
6 possibilities.

7 MR. THORP: Please don't just hand the  
8 witness documents. That's not helpful at this point.

9 MR. SPRAGUE: Yeah, sure it is because  
10 you're asking for stuff --

11 MR. THORP: We can take a break and do it  
12 but it's inappropriate for you to just be handing  
13 documents to a witness that I'm questioning.

14 MR. SPRAGUE: Put whatever you want on the  
15 record. I just handed him a document that -- where the  
16 government says PFC Hansen is believed to be buried in  
17 grave 407. So you can dance with him all you want but  
18 it's your conclusion, you the government's conclusion  
19 that the man is in 407. So you're wasting an awful lot  
20 of time, Counsel.

21 MR. THORP: Well, you've put your view on  
22 the record. Please take the document back for now and  
23 we can deal with it when you're --

24 MR. SPRAGUE: For the record we're talking  
25 about DPAA0001361.



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1 MR. THORP: So you can ask him -- When  
2 it's your turn you can ask him any questions you like  
3 about the documents you choose.

4 Q. I'm not trying to sort of pin you down without  
5 showing you a few documents but I'm just trying --

6 MR. SPRAGUE: Objection, sidebar.

7 Q. Let's just walk through the possibilities.  
8 It's possible that the recovery team, the grave service  
9 recovery team that went to Cabanatuan, did not match the  
10 precise contours of common grave 407 when they conducted  
11 the disinterment, that's possible, right?

12 MR. SPRAGUE: Objection, form.

13 A. Anything is possible, you know, I'm not going  
14 to speculate on what could have been or what couldn't.

15 Q. It's --

16 A. We have documents that tell us where these guys  
17 were buried. If you don't want to use the documents,  
18 you know, we're wasting time here just playing --  
19 playing hypothetical games.

20 Q. Do you recall how many service members were  
21 associated with common grave 407?

22 A. No, I don't.

23 Q. Would it surprise you if I said it was 26?

24 A. Okay, that would be typical for that time  
25 period.

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1 Q. And are you aware that there are nine  
2 unknowns -- or that there are nine unknown sets of  
3 remains associated with this common grave?

4 A. I don't know what the numbers are.

5 Q. Let me -- I'll just go to a document that you  
6 guys prepared.

7 MR. THORP: Mark this for the record.

8 (Exhibit 4 marked)

9 Q. This is tab 5 in your binder. This is  
10 plaintiff's request for production in which you  
11 define -- if you turn to page --

12 A. 5?

13 Q. I guess we're doing Hansen so 4. This  
14 identifies a number of X-files and identified service  
15 members. So there are a significant number of  
16 identified service members from this common grave,  
17 right?

18 A. There appear to be.

19 Q. It's possible that Hansen's remains were  
20 misidentified and sent home as one of these other  
21 service members, correct?

22 A. You're asking me to speculate.

23 Q. No, I'm asking -- I'm not asking --

24 A. I told you, you know, if you want to use the  
25 word possible anything is possible. It could be Santa

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1 Claus in there for all I know, but that's not consistent  
2 with the things that we do know about that grave.

3 Q. In your report you reference that there are  
4 discrepancies in the government's initial identification  
5 effort including misidentifications, right?

6 A. Yes.

7 Q. So it's not a remote possibility that given  
8 remains were misidentified and sent home with someone  
9 else?

10 MR. SPRAGUE: Objection, form.

11 A. Are we agreeing that the government screwed  
12 this process up really badly?

13 Q. I'm referring to your own characterization.

14 MR. SPRAGUE: We'll stipulate that --

15 Q. But go ahead. I'm just asking you questions.  
16 Go ahead and answer them.

17 A. I think they made a hash out of this whole  
18 identification process.

19 Q. So it's possible that Hansen's remains are not  
20 among the nine remains left at Manila American Cemetery  
21 but are buried in the United States somewhere as one of  
22 these other service members --

23 MR. SPRAGUE: Objection, form.

24 Q. -- correct?

25 A. I have no information that would lead me to

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1 think that specifically. But if you want to talk about  
2 possibilities we can talk about possibilities all day.

3 Q. And it's also possible that Hansen's remains  
4 were commingled with other remains when they were  
5 reviewed at the Manila Mausoleum and didn't end up with  
6 the sets that got buried as the remains from common  
7 grave 407, right --

8 MR. SPRAGUE: Objection, form.

9 Q. -- that's also possible?

10 A. If you're saying that it's likely that the  
11 remains were commingled I'll agree with that statement.

12 Q. Here I was speaking specifically to commingled  
13 with remains that were not from 407. So once they're at  
14 the mausoleum and they're doing the identification  
15 effort is it possible that they got commingled further  
16 from amongst themselves with remains from other common  
17 graves?

18 MR. SPRAGUE: Objection, form.

19 A. Yeah, I don't think we have any information  
20 that would make us think that that's a possibility. It  
21 appears -- it appears -- you know, this is something we  
22 don't know for a fact but it appears that when they  
23 processed these remains at the Manila Mausoleum, and we  
24 do know that they were using untrained contract civilian  
25 embalmers to process. For some reason, and I don't know

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1 why, but I've been told by several people that the  
2 Philippine Command would not allow anthropologists into  
3 the command. And they relied on these contract  
4 embalmers and they made a mess of the remains. I don't  
5 remember who told me but I've been told that they tried  
6 to make up sets of remains based on color and texture in  
7 the bones. And I think what we've learned from grave  
8 717 is consistent with that, that these remains were  
9 extensively commingled within the communal grave. I  
10 have nothing that would make me think that multiple  
11 communal graves were commingled. Is that clear?

12 Q. Yeah.

13 A. Okay.

14 Q. What assumptions did you make in conducting  
15 your analysis -- in reaching your conclusions about  
16 Private Hansen?

17 A. I'd have to see all of the documents to tell  
18 you what the assumptions were. I try to avoid things  
19 that are likely or possible and rely on things that are  
20 known facts.

21 Q. Would you say that there was a standard that  
22 you applied in concluding that PVC Hansen is buried as  
23 an unknown in the Manila American Cemetery?

24 A. Well, the standard was was I convinced that he  
25 was, was it consistent with what we had seen in all of

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1 these other graves.

2 Q. Did you consider and rule out the possibility  
3 that his remains are not among the nine sets of unknowns  
4 associated with common grave 407 that are buried at  
5 Manila American Cemetery?

6 A. I'm convinced that they are.

7 Q. Do you agree that DPAA should not disinter  
8 remains until it has family reference samples sufficient  
9 to identify the service members likely to be located in  
10 the common grave?

11 A. No. I think that's a piss poor way to operate.

12 Q. Why is that?

13 A. The current process is what I've heard  
14 described as an anthro led process which requires  
15 basically a circumstantial identification be made before  
16 they ever do any DNA testing.

17 Q. How does that apply to this, the Cabanatuan  
18 common graves that are being disinterred once they have  
19 sufficient family reference samples?

20 A. Do what?

21 Q. So your anthro first discussion doesn't seem to  
22 apply to these Cabanatuan common graves that are being  
23 disinterred once they have sufficient family reference  
24 samples for each common grave.

25 A. The differences between an anthro led DNA

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1 process -- an anthro led identification process and a  
2 DNA led identification process is with the DNA led  
3 identification process we build a data base of family  
4 reference samples and then go in and sample the remains  
5 and just match 'em up and we don't need anthros.

6 Q. So you would propose that anthropology be left  
7 out of the identification process?

8 A. I think there's a place for anthros but in  
9 general the world standard everywhere except at DPAA is  
10 a DNA led process.

11 Q. Are you offering this as a -- these opinions as  
12 an expert, do you have expertise in the practices around  
13 the world on --

14 A. No, this is my observation from talking to a  
15 lot of real experts and reading extensively. And I can  
16 find no other place in the world -- a good for instance,  
17 take the World Trade Center disaster, Hurricane Katrina.  
18 Those were comparable to Cabanatuan in that, you know,  
19 there was roughly 3000 deaths at each of them. And they  
20 didn't use this anthro led process. They went in, they  
21 did nuc DNA, compared 'em to the family reference  
22 samples and they got them sorted out in short order.

23 The way that DPAA is going about this --  
24 now, I don't know what DPAA's motivation is but I can  
25 tell you that it appears that they want everybody to die

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1 first.

2 Q. A few minutes ago you suggested that a better  
3 system would be to collect family reference samples for  
4 all the relevant individuals and then go to cemetery  
5 remains and conduct DNA testing and compare it to the  
6 samples. Is that what you said?

7 A. That sounds like what I was --

8 Q. It sounds like a fair description of what you  
9 were meaning?

10 A. Yeah, I think we're agreeing on something  
11 finally.

12 Q. I'm merely trying to characterize your -- make  
13 sure I understand your statement. Are you aware that  
14 DoD has no family reference samples that would permit  
15 Private First Class Hansen to be identified by DNA  
16 testing?

17 A. They have -- They have none or they --

18 Q. No eligible family references.

19 A. -- or they don't have any that fit in in their  
20 process?

21 Q. What are you aware of?

22 A. I don't know where they stand on the collection  
23 of FRS for that grave. They don't share that  
24 information with anyone including the families.

25 Q. But the families have to submit reference



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1 samples, right? I mean you're in contact with -- you  
2 said that you were in contact with the plaintiffs, the  
3 family members.

4 A. Well, one family, not necessarily all the  
5 families involved.

6 Q. And do you understand what types of family  
7 relationships are required to provide useable DNA  
8 samples?

9 A. According to something that the family has  
10 filed, I think it was in the expert testimony of  
11 defendants' experts. In there it basically described  
12 using any type of DNA that they could get, whether it  
13 was Y-STR, mitochondrial, autosomal or whatever.  
14 According to that they could use, you know, whatever  
15 they could get. That's -- that's all I know about their  
16 process. They're not very transparent.

17 Q. Let's turn back to your report at the bottom of  
18 page 5. Again this is Exhibit 1, I believe. You say  
19 that the commingled remains from Cabanatuan communal  
20 graves 717 have each consisted of virtually complete  
21 skeletal remains.

22 A. Yes.

23 Q. What was your basis for that statement?

24 A. Photos.

25 Q. Tell me what you mean.

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1 A. Photographs of the remains when they were  
2 recovered from the Manila cemetery.

3 Q. Oh, so you mean that the remains disinterred in  
4 2014 --

5 A. That's when 717 was disinterred.

6 Q. -- looked virtually complete to you?

7 A. Yes.

8 Q. But you've also said that they turned out to be  
9 highly commingled?

10 A. Yes.

11 Q. So a complete skeleton is not one person?

12 A. There were ten complete sets there but they had  
13 a lot of interchanged parts.

14 Q. Can you read the last sentence of that Kelder  
15 paragraph.

16 A. Based on Defendants' representations, exhibits,  
17 and public statements, my opinion is that Defendants'  
18 facilities and techniques are inadequate in capability  
19 and capacity to properly reassociate and timely return  
20 these remains to their families for burial.

21 Q. Are you stating this as a formal opinion as an  
22 expert or just your personal observation?

23 A. That's my opinion.

24 Q. Are you offering that as an expert opinion in  
25 this case?

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1 A. You're gonna have to decide where I'm an expert  
2 and where I'm a --

3 Q. Actually I think your --

4 A. You know, this is above my pay grade.

5 Q. Do you believe that you have the expertise to  
6 offer that as an expert, as a conclusion that the court  
7 can rely on?

8 A. I have seen facts that lead me to believe and  
9 cause me to be confident that statement's true.

10 Q. But earlier you testified that you don't have  
11 the background to be an expert in laboratory science.

12 A. No, but if you ask me is it day or night I can  
13 look out the window and I can tell you it's a little  
14 foggy but it's daytime.

15 Q. So your observation is an observation that  
16 anyone in your position should be able to draw without a  
17 background or expertise, is that what you're saying?

18 A. I think it's very obvious. It's been -- Those  
19 remains were exhumed in 2014 and they haven't gotten  
20 them sorted out yet. Now is it capacity or capability  
21 that's -- or both that's causing 'em to have so much  
22 problem. You know, that's four years this past August  
23 that they've had those remains. And so far, as far as I  
24 know, they've only identified partial remains of only  
25 eight of the 14. They don't even have the 13th man out

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1 of the ground yet.

2 Q. I think that's subject to a court's control  
3 actually.

4 A. Well, you know --

5 Q. He didn't have any living relatives so it's up  
6 to the court to give that permission.

7 A. I understand. And it seems like it could have  
8 been rolled into this litigation and handled a lot more  
9 quickly or rolled into the original Kelder case but, you  
10 know, you don't tell me how to investigate and I won't  
11 tell you how to practice law. How's that?

12 Q. I'm gonna move on to Lieutenant Nininger.

13 MR. THORP: Anybody need a break?

14 Q. It's your conclusion that the remains  
15 designated as X-1130 are likely those of Army Lieutenant  
16 -- Army First Lieutenant Alexander Nininger, is that  
17 right?

18 A. That's my opinion.

19 Q. And what's your basis for that opinion?

20 A. Primarily the X-1130 X-file but you can't look  
21 at that in a vacuum. There were -- I'm sure you know  
22 this, there were five young officers that died over a  
23 two day period during that battle. There was Nininger,  
24 there was Maynard, there was Compton, Wilson and Green.  
25 And then there was a sixth who died several weeks later

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1 that's also associated with these five. His name is Ira  
2 Cheaney. And you have to look at all of these files,  
3 all six of them plus, you know, everything else to get a  
4 picture of the true circumstances for burial of 1130.

5 Q. Are you relying primarily on multiple witnesses  
6 reporting that Nininger was buried around the church  
7 yard -- let me say in the vicinity of the church yard?

8 A. No.

9 Q. What specifically links X-1130 and Nininger?

10 A. From the day they dug him up they said it was  
11 Nininger.

12 Q. Do you have any knowledge of why they made that  
13 association?

14 A. I think that's one of the things that we're  
15 never going to know. There's statements in the file but  
16 why those people made those statements we don't know.  
17 We'll never know, they're all dead.

18 Q. Do you place significant weight on the  
19 association that was made in the disinterment report?

20 A. I place significant weight on the totality of  
21 the evidence that's there.

22 Q. Earlier you said that your role as an  
23 investigator is to weigh the credibility of individual  
24 pieces of evidence to build a composite picture. So I'm  
25 asking whether the association made -- which you I think

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1 referenced specifically in your report -- made on the  
2 day that X-1130 was disinterred is something that you're  
3 giving significant weight in your analysis?

4 A. Let me make a suggestion, if I could. If you  
5 don't like it well, okay. I want you to know everything  
6 I know about this case because I think when you know  
7 everything that I know you're going to agree with my  
8 opinions. Rather than doing this piecemeal, which I  
9 find confusing -- you're confusing me and I thought I  
10 knew this data. Why don't you let me take you through  
11 that file and let's sort out -- I can tell you what data  
12 I think is credible and what data I think is smoke. If  
13 you'd like to do that I think that -- I think that --

14 Q. Let's do it that way off the top of your head  
15 for now.

16 A. I can't. That file is much too large to do it  
17 off the top of my head.

18 Q. Well, let's look at what you've described from  
19 the file from your report starting on page 7.

20 MR. THORP: And I guess let's mark this as  
21 Exhibit 5.

22 (Exhibit 5 marked)

23 Q. This is in your binder as tab 15. This is  
24 X-1130. If you flip to the second to the last page,  
25 Bates number ending 3851 you'll see a disinterment

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1 report. I think this is the document you're referring  
2 to that made an association with Nininger on the -- when  
3 these remains were disinterred, is that correct?

4 A. Probably so.

5 Q. If you look at the top of this -- I think the  
6 next page is a different document. If you look at the  
7 top of this document it reports the disinterment of an  
8 unknown American from Abucay, grave number 9, Soldiers  
9 Row. Do you see that? We're looking at this document  
10 (indicating).

11 A. Oh, this one. Okay.

12 Q. Disinterred on January 8th, 1946. Do you see  
13 that on that page?

14 A. Okay.

15 Q. And below that on the middle of the page it  
16 says possibly Nininger and it says in grave X-1130.

17 A. Right.

18 Q. Is this what you were referring to as the  
19 association of Nininger made on the day of disinterment?

20 A. I think this is the first document that was  
21 made when they disinterred him. And they said it was  
22 Nininger right from the very beginning.

23 Q. Well here it says possibly Nininger, right?

24 A. Okay.

25 Q. And you have no specific knowledge of why they

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1 made that association --

2 A. I would --

3 Q. -- at this time?

4 A. I would guess that it was based on this next  
5 page where the gravedigger says that he buried five  
6 Americans but I don't know. This recovery was made by  
7 Abie Abraham. You'll see his name on this 3852 page.  
8 He did most of the identification -- are you familiar  
9 with Abie?

10 Q. Go ahead, describe it for the record.

11 A. He did most of the identifications in Bataan.  
12 He had fought in the battle of Bataan. In fact, he was  
13 fighting in this area, in the Abucay Hacienda area, he  
14 was intimately familiar with it. And in his books you  
15 can trace his travels around Bataan collecting remains.  
16 He started right there because that was the place that  
17 he knew. He must have known something. The old guy --  
18 you know, when you read his books he's quite a  
19 character. And he did a hell of a job doing a nasty job  
20 but he didn't document things very well. I've looked at  
21 a lot of X-files on remains that he collected and  
22 sometimes the place of location is no more precise than  
23 the province. You know, you just have to slap your  
24 forehead when you read some of his stuff but with that  
25 said he generally is pretty accurate. He knew his



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1 stuff. He had been there when these guys died, he cared  
2 about these guys and he's all we've got. So if he says  
3 that this was Nininger it's very likely that he had a  
4 good basis for that. And all we can do at this point is  
5 trust in what he was doing.

6 Q. Do either of these two pages indicate that  
7 X-1130 was recovered from the church yard?

8 A. Absolutely not.

9 Q. Instead they both say Abucay Cemetery, right?

10 A. That's right.

11 Q. What is your basis for concluding that these  
12 were recovered from the church yard?

13 A. I don't think I concluded that.

14 Q. On page 8 of your report, the second paragraph  
15 at the top you say: Grave nine behind South wall of the  
16 Abucay Church and Grave Nine, Soldiers Row, Abucay  
17 Cemetery are one and the same location. Is that your  
18 conclusion in this case?

19 A. No, that's not my conclusion. Let's back up.  
20 The heading that that falls under is Factual Information  
21 from Official documents, right?

22 Q. So this is your interpretation of the official  
23 documents?

24 A. No, this is a listing of factual information  
25 from official documents. This is not my conclusion.

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1 Q. Okay. So this is your -- or it could be  
2 characterized as an assumption.

3 A. Okay --

4 Q. You accept that representation of that  
5 document?

6 A. -- now this particular paragraph that you  
7 reference where it says grave nine behind the south wall  
8 of the Abucay Church and Grave Nine, Soldiers Row, one  
9 and the same location, that was taken from a letter in  
10 the X-1130 file.

11 Q. I think rather from Nininger's - I'm sorry, go  
12 ahead. Go ahead with yours.

13 A. No, that was taken from X-1130. It was from --  
14 that was a statement by the Philippine Command in  
15 response to an inquiry from the Memorial Division.

16 Q. Can you go ahead and try to find it for us? It  
17 should be in the document in front of you.

18 A. Okay, if you go to DPAA3825. Now go to 3823,  
19 it's the same one but a better copy. And you also need  
20 to look at 3822. 3823 is the basic correspondence.  
21 3822 is an endorsement to that.

22 Q. So 3823 is a letter dated February 17th, 1949  
23 from the Memorial Division of the Quartermaster  
24 General's office asking whether the two grave locations  
25 are the same, is that right?

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1 A. That's right.

2 Q. And 3822 is a response dated April 1st, 1949  
3 stating the Philippines Command's view that they are the  
4 same, is that correct?

5 A. Would you like me to read it?

6 Q. I'm asking you whether your understanding of  
7 this document is that it's the Philippine Command's  
8 conclusion that they are the same?

9 A. That's what it says.

10 Q. So we'll note that your report is off by one  
11 year. You describe it as a document from 1948 so you'll  
12 have that for your reference.

13 A. Thank you.

14 Q. I didn't catch that until today. So you have  
15 taken that as fact because it's stated in this document  
16 for purposes of your analysis, is that correct?

17 A. It's included because I think it goes to  
18 understanding all of the confusion about cemetery and  
19 church yard. There was a -- it was a mess. I believe  
20 that the terms often were used interchangeably, yeah,  
21 you know, because there was a cemetery at the church  
22 yard. So, you know, you could think well, okay, one  
23 person might describe the church yard as the cemetery,  
24 somebody else would describe it as no, that was the  
25 cemetery cemetery plot down the road but actually it's

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1 irrelevant.

2 Q. Why is it irrelevant?

3 A. It doesn't make any difference. We've got  
4 X-1130 and the only part of X-1130 that depends on  
5 location -- yeah, okay -- the only part of the  
6 identification of 1130 is just -- you know, the only  
7 important part is that these remains were found in the  
8 Abucay area. Whether they were found at the church yard  
9 or 650 meters over in the town cemetery really doesn't  
10 make any difference to our conclusion because it could  
11 be either one.

12 Now, if you want to get into it the only  
13 evidence that these remains were found in the church  
14 yard originated with Colonel Clarke. And that opens up  
15 a whole other issue which I don't know if you're ready  
16 to go there.

17 Q. Let me unpack that.

18 A. Okay.

19 Q. You said the only evidence that these remains  
20 were found in the church yard comes from Colonel Clarke.  
21 So let's separate it out. Colonel Clarke has statements  
22 about where Nininger was buried but doesn't say anything  
23 specific about where these remains were recovered,  
24 right? So this is a separate question --

25 A. Isn't that the same?

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1 Q. Those are two very different things, right,  
2 where someone was buried and where these remains were  
3 taken from are two different questions that we're trying  
4 to correlate.

5 A. You mean where he died. He died in the  
6 Mabatang area which is north of Abucay. And then the  
7 discrepancy in all the accounts is were they buried at  
8 the Abucay church yard/cemetery or were they buried in  
9 the Abucay town cemetery/cemetery.

10 Q. Let's unpack this a little bit. You do agree  
11 that there is a town cemetery that's separate from the  
12 church yard --

13 A. About 650 meters to the --

14 Q. About half a mile?

15 A. Okay.

16 Q. Is that fair?

17 A. I think that's what it works out to be.

18 Q. And so you said what matters is that X-1130 was  
19 recovered from the Abucay area. So why have you focused  
20 on X-1130 rather than other unknowns from the Abucay  
21 area? Because there are other unknowns from that area,  
22 right?

23 A. Well, you're getting into another issue here.  
24 If we're talking about the church yard versus the  
25 cemetery --

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1 Q. No, I'm now just talking about the Abucay --

2 A. Okay, what I was talking about and my response  
3 that I think you were trying to recharacterize was the  
4 church yard cemetery issue. And what I'm trying to  
5 explain is that it's really irrelevant. Now, obviously  
6 if these remains were found in Manila, you know, they  
7 couldn't be Nininger but they're from the Abucay area.  
8 And I don't think that it makes any difference whether  
9 they were in the cemetery or whether they were in the  
10 church yard. The only evidence that they were in the  
11 church yard and what caused all the commotion and all of  
12 the reinvestigations and the redigging of the church  
13 yard came from Colonel Clarke. And the Army made an  
14 official conclusion that Clarke's information was  
15 erroneous, bogus and fraudulent.

16 Q. Isn't it possible that the initial association  
17 on the day of disinterment of our grave number nine was  
18 linked to Nininger solely by Colonel Clarke having  
19 written a letter that indicated Nininger was buried in  
20 grave number nine?

21 A. No, you haven't done the timeline. If you do  
22 the timeline you'll see where the Quartermaster General  
23 in the Memorial in the Department of the Army sent that  
24 information to the Philippine Command. And it was  
25 subsequent to the disinterment and the comment that it

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1 was possibly Nininger. They arrived -- you know,  
2 according to the dates they arrived at the conclusion  
3 that it was possibly Nininger long before Clarke's  
4 information was ever introduced into the command.

5 Q. Can you turn in the X-file to 3830.

6 A. Okay.

7 Q. Do you see the -- what's tagged Army personnel  
8 graves --

9 A. Yes.

10 Q. -- on that? Is it your understanding that  
11 X-1130 would correspond with grave number nine in  
12 this --

13 A. I don't --

14 Q. -- south wall of the church?

15 A. I don't think anyone can conclude that they  
16 came from there. Most of the conclusions that were  
17 reached in this file as to the location were erroneous.

18 Q. So why have you focused on grave X-1130 rather  
19 than other unknown remains from the broader Abucay area?

20 A. It doesn't have anything to do with the  
21 location, okay. And I have looked at all of the graves  
22 in this area. And we know from this statement taken by  
23 good old Master Sergeant Abie Abraham that there were  
24 five Americans buried in the Abucay town cemetery and  
25 when they --

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1 Q. But none of the other four --

2 A. Let me finish.

3 Q. I'm sorry, go ahead.

4 A. When they were disinterred they immediately  
5 concluded that this one was Nininger. They weren't all  
6 disinterred the same day either. But when they got to  
7 the one that they designated as 1130 they concluded that  
8 it was Nininger. Now, what they based that conclusion  
9 on I don't know.

10 Q. So what -- other than that what else supports  
11 your conclusion that this is Nininger rather than  
12 another unknown from the Abucay area?

13 A. Oh, you want to get into the whole thing? We  
14 need to go through the whole file then because we have  
15 to sort out all of the bogus data as well as the good.  
16 You want to go through it page by page?

17 Q. I don't really want to spend two days going  
18 through this but I'm just asking --

19 A. But you asked me the question. And in order to  
20 answer the question that's what we've gotta do.

21 Q. What other pieces of information -- I'm not  
22 asking -- there's pieces of information that you say --  
23 that you discredit and say I don't trust that. But I'm  
24 asking for what other pieces of information support your  
25 conclusion -- not the later analysis and people's -- and



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1 sort of what you say the confusion of how this was  
2 proposed. But what other fact, what other data, what  
3 other pieces of information support the conclusion that  
4 this is Nininger other than the additional --

5 A. Okay, I'll try but, you know, we're trying to  
6 cover a lot of data here.

7 Q. There's a lot of documents, there's not really  
8 that much data.

9 A. Well, maybe that's part of the problem but, you  
10 know, I've got a stack of notes on this. And, you know,  
11 I'm not confident that I'm gonna get everything but I  
12 think I can give you the basics, okay? Number one --  
13 and we have to dispose of the height issue first. The  
14 height issue is bogus.

15 Q. And what is your expertise to opine on height  
16 estimates?

17 A. I think it's pretty well known that to  
18 determine the height of skeletal remains you have to be  
19 working from data from a similar population. In this  
20 case in here -- and we can find it if you want -- there  
21 are two pages that show the calculated height of 1130.  
22 You're familiar with it or you want me to find it?

23 Q. You can just characterize it.

24 A. Okay. It doesn't say in there what calculation  
25 method they used. It appears to be Rollet, R-o-l-l-e-t

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1 but it could be Broca, Pearson or Prozman which were  
2 also methods that they used to calculate these remains.  
3 But Rollet was most common. And I guess that's what it  
4 was. All of these guys based their height tables on an  
5 1880 era French population. Now, in Rollet's case --

6 Q. Well, let's just assume that there are flaws  
7 with Rollet's methodology.

8 A. Okay. All I'm asking you is to just let's  
9 disregard the height issue for now. If you want to come  
10 back --

11 Q. Since you brought it up I just have a question  
12 about it.

13 A. Okay.

14 Q. Are you aware of modifications that have been  
15 made in that estimation since the 1940s?

16 A. Oh, the state of the art has advanced  
17 tremendously but we're looking at something that was  
18 done in 1946, okay. And we don't know how those remains  
19 were measured, we don't know how eroded they were  
20 because there's no -- no --

21 Q. So you disregarded the height estimation?

22 A. I disregarded the height estimate. If you  
23 disregard the height estimate you'll find the -- there  
24 were actually five recommendations from the field to  
25 Department of the Army that these remains be --

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1 Q. So, I've been --

2 A. Let me finish, please.

3 Q. Sorry, go ahead.

4 A. That these remains be identified as Nininger.

5 The first one -- and this was prior to any input from

6 Clarke. In the first one Department of the Army, the

7 Quartermaster General came back and disapproved the

8 recommendation of identification based on the height.

9 And if you continue on through this file you'll find --

10 and this is the only file out of the literally

11 thousands, there's 3744 files from Manila and there's

12 several thousand more that I've been through. And this

13 is the only one, the only file that I have seen where

14 the Philippine Command, the field commander made more

15 than one recommendation for identification. And when

16 you follow the correspondence through here they got

17 into -- they almost had -- I don't know of a better term

18 than a pissing match. Washington and Manila were at

19 total odds over this. And Manila was adamant that 1130

20 was the remains of Nininger and Washington wasn't buying

21 it. And that leads us to why.

22 Q. So let's break that down.

23 A. Okay.

24 Q. You indicate in your report on page 8 that the

25 first of these was the Philippine Command memo updated

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1 December 8th, 1948. I've also found their  
2 recommendations dated April 26th, 1949 and March 7th,  
3 1950. I only find three. You've said five. Can you  
4 show me the five in the file? It's in front of you.

5 A. They are buried, I'll grant you that. I have  
6 some notes here that I brought for --

7 MR. SPRAGUE: No pun intended.

8 Q. So why don't we come back to that after lunch.

9 A. Yeah. I'll sort them out but I'm gonna have to  
10 use some notes.

11 Q. That's fine.

12 A. There are actually four board recommendations.  
13 And then in conclusion there's a letter. And we can  
14 probably find that letter here and you've probably seen  
15 it. The letter basically says it's the opinion of this  
16 command, and that's what I'm counting as the fifth  
17 recommendation. The opinion of this command that this  
18 is Nininger, and if you ain't buying it let us know as  
19 soon as possible because we're tired of messing with  
20 you.

21 Okay, here we go, 3786, paragraph (6), In  
22 view of the above, it is the opinion of this  
23 Headquarters that the remains of unknown 4685 -- and  
24 that's Manila Mausoleum 4685 which is the same as  
25 X-1130 -- are in reality those of Lt. Nininger. The

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1 board proceedings are being returned herewith for a  
2 recommendation.

3 MR. SPRAGUE: For reconsideration.

4 A. For reconsideration. And then they go on to  
5 say that: In the event that the resubmittal of our  
6 previous recommendation in the case of Lt. Nininger is  
7 not acceptable to your office, it is requested that this  
8 headquarters be advised as soon as practical to allow an  
9 early resolution of this case as nonrecoverable. Now --

10 Q. So let's turn back one page prior to 3785. And  
11 you see the date stamp near the top of 7 March 1950  
12 right under Headquarters Grave -- American Grave  
13 Registration Service.

14 A. Right.

15 Q. So I read this as a March 7, 1950  
16 communication. Do you agree?

17 A. Okay, this is a first endorsement to --

18 Q. So it's a response to a November 28, 1949  
19 letter?

20 A. Right.

21 Q. Which is also indicated at the top --

22 A. It appears to be, yes.

23 Q. Okay.

24 A. Now --

25 Q. So I'm interested in -- I have that one down as

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1 one of the ones I found.

2 A. Okay.

3 Q. So that's the last of my three. I would be  
4 interested in where your other two --

5 A. Okay, if you'll remind me next time we take a  
6 break I'll dig it out but I think it's significant. If  
7 you've been in the military and you've read some  
8 military correspondence you can read between the lines  
9 in this, they were just tired of messing with them.

10 Q. So in your view you rely more heavily on the  
11 Philippine Command's recommendation than the --

12 A. Absolutely.

13 Q. -- Quartermaster General's skepticism?

14 A. Absolutely. They were there, they knew all the  
15 things that we can never know today but they were there.  
16 And they were not only convinced, they went to the mat  
17 with their higher command. And now we can get into  
18 Cheaney and we can come up with a reasonable and a  
19 plausible reason why the higher command was so adamant  
20 about not accepting this.

21 Q. Go ahead.

22 A. Are you getting into Cheaney? This is a whole  
23 new issue. If you're ready to jump --

24 Q. No, let's --

25 A. I don't wanna --

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1 Q. -- leave it here before we add the Cheaney  
2 piece. So in your view reading between the lines you  
3 find the Philippine Command more credible -- more  
4 credible than the Quartermaster General -- than the  
5 Quartermaster General's offices?

6 A. It's not a matter of credibility. It's a  
7 matter that they have the facts and they were adamant  
8 that their facts were correct.

9 Q. Isn't it possible that they strongly -- that  
10 the Philippine Command strongly wanted to resolve this  
11 case and that the Quartermaster General's office was  
12 providing the quality control?

13 MR. SPRAGUE: Objection, form.

14 A. They're free to go with that possible stuff  
15 again --

16 Q. As an expert --

17 A. -- you know and --

18 Q. -- I can put hypotheticals to you.

19 A. Well, yeah, but I'm not gonna answer your  
20 hypotheticals unless I have some reason to believe that  
21 that's factual. I have no reason to believe that that's  
22 probable.

23 Q. But instead you've concluded that it's probable  
24 that the Philippine Command was accurate and that the  
25 Quartermaster General's office had some ulterior motive?

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1           A.    No.  We know that the Philippine Command had  
2  all the information.  It's obvious, they had it.  And it  
3  was the opinion of the command, they were on site.  If  
4  they had any -- any qualms, if there were any unresolved  
5  issues they were in a position to resolve them.  And yet  
6  they came up and said it's the opinion of this  
7  headquarters.  To me that's -- it doesn't get much  
8  better than that, you know, short of saying that  
9  Nininger's mother identifying him what do you want here.

10          Q.    Okay, why don't you go ahead and describe how  
11 you think Cheaney's file fits in with your analysis  
12 here.

13          A.    Are you familiar with the Cheaney file?  Do you  
14 have a copy of it?

15          Q.    Yes.  And you've described it in the -- in your  
16 report here.

17          A.    Do you have a copy of it?

18          Q.    Yes.

19          A.    I'll take you through it.

20          Q.    I'd rather have just a summary overview of how  
21 you think your understanding of Cheaney's file fits into  
22 this.  I mean, you've provided a summary here in your  
23 report.

24          A.    Without trying to characterize the entire file,  
25 because there's a lot of information here, it's a very



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1 detailed very credible narrative of the investigation by  
2 the office of the Quartermaster General. And they  
3 concluded that Ira Cheaney was not in Ira Cheaney's  
4 grave at West Point, and that it was most likely in  
5 their opinion that either Nininger or Maynard were  
6 buried in that grave. And then they went on to -- they  
7 documented that this was a coverup, this was nothing  
8 less than a coverup. You know, this is the kind of  
9 stuff that makes 60 Minutes today. This was a coverup,  
10 they went out of their way -- they sent a colonel out to  
11 visit all the witnesses and get their stories straight.  
12 I mean, all I can do is shake my head. And then --

13 Q. I'm sorry, let me pause you there --

14 A. No, no, no.

15 Q. I need to pause you because the record --  
16 you've said they multiple times and I'm not certain what  
17 time in history we're talking about. So let's break  
18 down what you've said so far. And I'm happy to sort of  
19 go on --

20 A. We're talking about the conclusions of the --  
21 the conclusions and recommendations contained in what  
22 I'm calling the classified Cheaney file, okay? And they  
23 sent this colonel out to get everyones' stories  
24 straight. It's just -- all I can do is shake my head.

25 Q. So by get stories --

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1           A.    They were not only doing a coverup, they were  
2   documenting that they were doing a coverup.  And this  
3   well explains their reluctance to accept the  
4   recommendation of the Philippine Command.

5           Q.    Let me break that down, let me try and  
6   understand what you're saying first.  By get their  
7   stories straight are you referring to them telling  
8   witnesses what to say or making sure they had an  
9   accurate version of the witnesses' recollection?

10          A.    I interpreted it as telling the witnesses what  
11   to say.

12          Q.    And why did you draw that conclusion?

13          A.    From the way it was written, from the words.

14          Q.    I'm sorry, I have too many sets of paper  
15   floating around here.

16          A.    We've got way too much paper here today.

17          Q.    Okay, let's mark this as Exhibit 6.

18                         (Exhibit 6 marked)

19          A.    I'll put this back on the pile.

20          Q.    This is an excerpt -- I'll just represent this  
21   is an excerpt from the declassified Cheaney file --

22          A.    Okay, this is the one --

23          Q.    -- produced --

24          A.    -- that was originally marked secret.

25          Q.    Let me finish speaking.

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1 A. Sorry.

2 Q. This is an excerpt from the declassified  
3 Cheaney file produced in discovery marked beginning  
4 DPAA004445. It is I believe a nine page document titled  
5 Intraoffice Reference Sheet that document created by a  
6 Captain Vogl documenting a series of conversations and  
7 communications. Are these the communications you were  
8 referring to as helping people get their stories  
9 straight?

10 A. This isn't complete.

11 Q. I mean this is an excerpt from -- this is a  
12 complete document from that file.

13 A. This is an excerpt. I don't know which pages  
14 are missing. I just know that --

15 Q. I'll represent this is a complete document from  
16 the file. There are other documents in the declassified  
17 file.

18 A. Oh, okay.

19 Q. If you turn to the back -- I'm sorry, I guess  
20 we'll start chronologically forward. The first date  
21 appears to be October 16, 1950. Do you see that?

22 A. This is on 4453?

23 Q. Yes.

24 A. The first date is 30 October --

25 Q. No, I'm sorry, on the first page.

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1 A. Oh, first page.

2 Q. I thought it was reverse chronological but it  
3 appears to be straight chronological. The first date is  
4 October 16, 1950.

5 A. Okay, there we go.

6 Q. Right? Is that correct?

7 A. Yes.

8 Q. And it indicates that Captain Vogl called  
9 Colonel Clarke?

10 A. That's right.

11 Q. And then there's a second conversation  
12 documented on October 23, 1950?

13 A. That's with Lieutenant Colonel Anders?

14 Q. Yes. Is that correct?

15 A. That's right.

16 Q. And the next page continues to describe the  
17 conversation with Colonel Anders. On the next page  
18 there's notations for October 24. And they describe  
19 conversations with Major John Olson, is that right?

20 A. That's right.

21 Q. And then a couple of pages forward on page 4449  
22 there begins a record for October 25, 1950 describing a  
23 conversation with Major Cecil Sanders, is that right?

24 A. Right.

25 Q. And then on page 4450 at the bottom it says:

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1 In order to clarify certain discrepancies furnished by  
2 Anders, Sanders and Olsen I again phoned Colonel Anders,  
3 is that right?

4 A. Right.

5 Q. And then the next page it also indicates that a  
6 Captain Eugene Anthony was contacted. And then on the  
7 following page that on the 27th of October they phoned  
8 Colonel Edmund Lilly, is that right?

9 A. Right.

10 Q. And then on the 30th of October phoned Mr. Fred  
11 Koenig?

12 A. Right.

13 Q. K-o-e-n-i-g. And then on the 31st of October  
14 Captain Vogl reports to the chief of his division the  
15 above reports of telephone conversations are submitted,  
16 is that right, on the last page?

17 A. Right. That's not the last page.

18 Q. The last page of this document, right?

19 A. Well, it's the last page of this document but  
20 it doesn't include the recommendations and conclusions  
21 of the document.

22 Q. Well, we can refer to the file and see whether  
23 there's -- what you're recalling may be a separate  
24 document than an intraoffice reference.

25 A. No, it was all the Cheaney file.

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1 Q. But a given file is not a given document,  
2 right?

3 A. No, it's like you said, this is an excerpt.  
4 And I'm just stating for the record that the excerpt --

5 Q. That there are --

6 A. -- doesn't contain the important stuff.

7 Q. So what I was trying to get at --

8 A. Okay.

9 Q. -- is that this document records that there was  
10 a number of telephone conversations.

11 A. That's right.

12 Q. Are these the telephone conversations that you  
13 were talking about when you said that the military  
14 went -- that the military went around to get people's  
15 stories straight, or are you referring to other  
16 conversations?

17 A. No, that's in the recommendations and  
18 conclusions that's missing from this.

19 Q. What is in the recommendations and conclusions?

20 A. The part where they were gonna get everyone's  
21 stories straight.

22 Q. So that they were recommending additional  
23 conversations with these individuals?

24 A. Yeah.

25 Q. And so you believe that -- on the basis of your

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1 recollection of that that this was a coverup?

2 A. There's no, well, believe. It's obvious. This  
3 is the -- this is the dictionary definition of a  
4 coverup.

5 Q. Does this document describe Captain Vogl's  
6 discovery that Colonel Clarke's recollections may not  
7 have been accurate?

8 A. It describes some of the investigative work  
9 that Captain Vogl did in compiling this but it's so  
10 incomplete that, you know, you left out the good stuff.  
11 You know, the mere fact that this was first marked  
12 confidential and then bumped up to secret. I'm sure  
13 you -- you're much more current on classified material  
14 than I am but it's -- and I'm sure even in 1950 it was a  
15 huge violation of the law to classify information as a  
16 defense secret just to avoid embarrassment to the  
17 Department of Defense.

18 Q. Have you held classification?

19 A. Yeah.

20 Q. You've held a clearance?

21 A. Yeah, a bunch of times.

22 Q. And what's the basis for -- are you opining as  
23 an expert about what would be a violation of the law?

24 A. No, it's a fact. If you track the executive  
25 orders back to 1950, the executive orders concerning

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1 defense information, it's a violation of the law to  
2 classify something that's not a defense secret. This  
3 doesn't affect the defense of the United States, this  
4 affects recovering those remains. You might call it for  
5 official use only. Back then they called it restricted  
6 but if I were to do this today, if I had classification  
7 authority and I were to classify this I'd go to jail --  
8 or I could go to jail for it.

9 Q. You said in your report that you give the file  
10 additional credence because it was classified secret?

11 A. They were obviously covering it up.

12 Q. So why do you give official credence to the  
13 document because it's classified?

14 A. I think it shows the importance of it.

15 Q. But how does it show the accuracy of it?

16 A. It shows how adamant they were about not  
17 revealing this information to the public.

18 Q. So if you view this information as credible why  
19 are you -- why do you associate Nininger with X-1130  
20 rather than with the remains buried at West Point?  
21 Doesn't this show that there are actually multiple  
22 possibilities for where Nininger is buried?

23 A. It's a possibility. My opinion is still based  
24 on the overwhelming evidence in the 1130 file and the  
25 related files, it's still my opinion that 1130 is



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1 Nininger.

2 Q. But it seems --

3 A. Excuse me. I think it's a distinct  
4 possibility, there, I'll use possibility this time.  
5 It's an official recognition by the Army that Nininger  
6 could be buried in Ira Cheaney's grave in West Point. I  
7 think it's more likely that it's Maynard which is  
8 consistent with the Army's viewpoint but I'm still  
9 convinced that 1130 is Nininger.

10 Q. So circling back, when we started talking about  
11 the X-1130 you noted the statement that Mr. Cunana --  
12 Cunanan buried five Americans --

13 A. Right.

14 Q. -- together. And you said you reviewed  
15 those -- the X-files for those burials?

16 A. I found four of them.

17 Q. And are you aware that the fifth was identified  
18 as McCurdy --

19 A. But McCurdy.

20 Q. -- that was recovered at the same time?

21 A. But McCurdy was recovered from the Maraville  
22 cemetery.

23 Q. That's your recollection?

24 A. McCurdy doesn't fit. McCurdy wasn't one of the  
25 five.

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1 Q. He wasn't one of the five that died but --

2 A. No, he wasn't one of the five buried with these  
3 guys, with Nininger, Maynard, Compton, Green or Wilson.

4 Q. Are there any pieces of data that limit your  
5 confidence in your opinion linking 1130 to Nininger,  
6 anything that weighs against it in the balance to you?  
7 Because you've said you've excluded a number of things  
8 as incredible and that you don't weigh them at all. Is  
9 there anything that weighs against it in the balance for  
10 you?

11 A. I'm concerned in a way, and this is not a  
12 factual thing, this is a gut feeling that I get when I  
13 go through the file. It almost appears as if some of  
14 those files have been sanitized to be consistent with  
15 this Cheaney coverup. I don't know that. I don't have  
16 any evidence to back it up, it's just a gut feeling.  
17 That's the biggest thing. I think there may be more and  
18 if there is more it would obviously support my opinion  
19 that 1130 is Nininger --

20 Q. Can you --

21 A. -- because there's no other reason for them to  
22 sanitize the file.

23 Q. So I don't understand your linkage at all. So  
24 could you explain how not identifying Nininger helps  
25 with the Cheaney coverup. It would seem that the

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1 opposite would be the case. Putting the Nininger case  
2 to bed as notification before the advent of DNA no one  
3 is going to be the wiser. So if in your view there was  
4 a coverup why wouldn't they confirm the identification  
5 of Nininger and put it to bed?

6 A. What?

7 Q. So someone wants the -- as you indicated the  
8 Philippine Command wanted to identify X-1130 as  
9 Nininger. In your view if the government was concerned  
10 about this misidentification of Cheaney and that coming  
11 out wouldn't the more logical view, the conclusion on  
12 the set of suppositions that they want this to be a  
13 coverup is just treat X-1130 as Nininger and be done  
14 with it. How does concluding that Nininger is  
15 unrecoverable support your view of a coverup with regard  
16 to Cheaney?

17 A. Okay, you're -- let me put this back in the  
18 pile. You're -- I can't say you're missing the point  
19 but we haven't really talked about it this morning, how  
20 big these cases really were. You know, when I first got  
21 into the Nininger case I thought it was a hot potato  
22 because of the Medal of Honor. Now, keep in mind that  
23 Nininger not only received the first Medal of Honor of  
24 World War II, he received the acclamation of the  
25 country. This was a month after Pearl Harbor. The

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1 country was hurting, we needed a hero. And they made  
2 Sandy Nininger the hero for this country. He's a lot  
3 bigger than just the Medal of Honor. And if you read a  
4 little bit about him he was more than just a hero. He  
5 was known, he had a reputation at West Point as being --

6 Q. Nininger?

7 A. Nininger had a reputation of being just an  
8 outstanding citizen for want of a better term. He was  
9 everything that West Point epitomized. And today even,  
10 you know, the room where the honor committee meets is  
11 named the Nininger room. They thought that highly of  
12 them. There's a barracks at West Point named for him.  
13 This man was -- he was big.

14 And I thought that that was why DPAA was  
15 scared to death -- and you may disagree with that  
16 characterization -- but DPAA or DPMO was scared to death  
17 of Nininger. I thought that and I saw it in the Kelder  
18 case when we were being stonewalled on the  
19 identification of Bud Kelder. And Nininger's nephew  
20 John Patterson -- you know, John and I are close  
21 friends. And he was just chomping at the bit to get  
22 involved. And he called up the AUSA Susan Strong, who I  
23 don't know if she is still here or not. She was the  
24 AUSA on the Kelder case. Called her up and told her of  
25 his intention to ask the court to allow him to

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1 intervene. And, you know, this wasn't the first family  
2 that had asked to intervene. And, you know, all the  
3 others were pretty ho hum. When John Patterson called  
4 the AUSA within five days Bud Kelder was identified to  
5 get the case moving. In some cases JPAC had gotten the  
6 consulting -- you know, this is just one example of how  
7 they rushed through. They got the consulting  
8 anthropologist to buy off on their ID overnight, less  
9 than 24 hours, turned it around so that they could get  
10 the identification out in five days. That was just --  
11 Nininger certainly got the attention of DPAA and the  
12 DOJ --

13 Q. You surmise that because of the timing between  
14 Patterson's conversation and the identification?

15 A. It was pretty obvious. It was pretty obvious.  
16 And I had thought that, you know, that it was because of  
17 that that X-1130 wasn't identified but then when I --

18 Q. You're talking about reasons now or reasons in  
19 1950?

20 A. Reasons now.

21 Q. Okay. But I thought we were talking about  
22 1950.

23 A. When I received the -- what I'm calling the  
24 classified Cheaney file, not this excerpt that you have  
25 here, but when I got that complete file it explained

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1 things even better. It's not just the Medal of Honor  
2 that puckered people up, it was that coverup and the  
3 thought of 60 Minutes or someone getting ahold of that.

4 Q. But you've jumped to your assessment of current  
5 day reasons. I was asking you about reasons in 1950,  
6 'cause that's when you were saying there was the  
7 coverup. And I still don't understand how you connect  
8 the dots to get from a concern about covering up the  
9 misidentification of Ira Cheaney to how that supports a  
10 decision to conclude that Nininger is unrecoverable.

11 A. All of those cases are --

12 Q. Because this family, for example, would not be  
13 still present. John Patterson would not be pressing  
14 this matter if they had just said okay, X-130 is  
15 Nininger, bury him, nobody will be the wiser even if  
16 we're confident it's not Nininger. So if your view is  
17 just closing all loop holes for a coverup it would seem  
18 to lead to the opposite conclusion of concluding that  
19 X-1130 was unrecoverable -- I'm sorry, that Nininger was  
20 unrecoverable and was not X-1130. So can you try and  
21 connect your dots for me? I don't see the connection.

22 A. I don't even understand what your question is  
23 but let me respond this way, I've never seen DOJ/DPAA do  
24 the right thing to begin with so why would I think that  
25 they would have just identified Nininger --

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1 Q. I'm asking you about --

2 A. Well, let me finish --

3 Q. -- 1950 --

4 A. Why would I think that they would have done  
5 that just to resolve the thing. No, it makes no sense.  
6 Look, if you wanted to resolve this issue, if you wanted  
7 to account for these people we can get that done. We  
8 would be more than happy to work with you.

9 Q. So let me stop you right there, you're not  
10 answering my question.

11 A. Let me finish, please.

12 MR. SPRAGUE: He's asking you if you think  
13 it's possible they would have deceived another family to  
14 try to coverup for deceiving the first family.

15 A. And that's what I've tried to answer. I've  
16 never seen DOJ do the right thing. They -- It always  
17 works out that in these four cases that I've been  
18 involved in they do what's -- what's best for the  
19 government rather than what's the right thing.

20 Q. I'm just gonna try it one more time to get a  
21 straight answer.

22 A. Okay, I'll try --

23 Q. You have said --

24 A. -- to understand your question.

25 Q. -- that your understanding of the classified

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1 Cheaney file impacts your view of what happened, of why  
2 DoD decided in 1950 that Nininger was unrecoverable.  
3 Can you explain why the Cheaney file supports your  
4 understanding of why in 1950 the government reached what  
5 you believe to be the wrong conclusion.

6 A. I think if we had the entire Cheaney file here  
7 rather than just this excerpt it would be obvious.

8 Q. Well, you can tell me your understanding of how  
9 they link up, which is obviously very significant to  
10 you. I don't think --

11 A. There were -- There were so many factors at  
12 play here. This was let's call it a hot potato because  
13 this was the ultimate hot potato. We had these six  
14 families involved. One of them went to their  
15 congressman. A little historical trivia here, their  
16 congressman was Richard Nixon. At the time he was -- he  
17 was a pretty big deal, you know. He was involved in the  
18 McCarthy hearings and everything.

19 Q. So --

20 A. Well, let me finish now. That family got him  
21 involved. I forget who the other congressman was.  
22 There was at least one other congressman involved in  
23 that. Wilson's father I believe it was was the managing  
24 editor of the Omaha World Herald newspaper. I mean, it  
25 couldn't get worse for the Army. If they're gonna screw



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1 something up and they wanted to screw it up as badly as  
2 they could they would have done exactly what they did  
3 here.

4 Q. So let's talk -- so let me make sure that my  
5 recollection of the Cheaney file is accurate. Colonel  
6 Clarke wrote a letter to Cheaney's family and said that  
7 Cheaney was buried 12 -- a number of steps from the  
8 south door of the church at Abucay, does that sound --  
9 is that fair?

10 A. I think he did say that.

11 Q. Cheaney's family forwarded that letter to their  
12 congressman Richard Nixon who sent it to DoD. They went  
13 and started digging in what they understood to match  
14 those descriptions and found the body. Because it  
15 matched they identified that as Cheaney and sent him to  
16 be buried at West Point. Is that your understanding of  
17 how the record is described in the Cheaney file?

18 A. Yeah, Cheaney was --

19 Q. So he was identified based --

20 A. -- was identified very early in this process.

21 Q. And was identified based on Colonel Clarke's  
22 description in the letter to the family?

23 A. I think so. I can't swear to it at this point.

24 Q. And so then they later concluded, based on  
25 these conversations from the document we have as Exhibit

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1 6, that Cheaney could not have been buried at Abucay  
2 because it had been lost to the Japanese at least a week  
3 earlier?

4 A. That's right.

5 Q. So, therefore, the remains that they had  
6 identified based on Colonel Clarke's representations had  
7 been misidentified. So how does that lead them to  
8 decide that X-1130 is not Nininger? You haven't --  
9 you've said conspiracy but you haven't drawn any link  
10 for me between the two and I'm struggling to understand  
11 your reasons.

12 A. Well, because they said that in their  
13 opinion -- and I'm using the organizational their now.  
14 In their opinion it was more likely that it was Nininger  
15 or Maynard that was buried in Cheaney's grave. And they  
16 didn't want anything to do with it. They didn't want to  
17 deal with the Cheaney family, they didn't want to deal  
18 with the Nininger or Maynard families or Wilson, Green  
19 or Compton either.

20 Q. Okay. So --

21 A. And, you know, when they opened one of those  
22 cases they had to open all six of them. It was a mess.

23 Q. So your view is that all of those files were  
24 closed as unrecoverable because they didn't want to  
25 reopen the Cheaney case. Is that the bottom line?

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1           A.    I think that's a plausible explanation for why  
2 they -- the Quartermaster General was so adamant about  
3 not accepting the recommendation of the Philippine  
4 Command. The Philippine Command was pushing and for  
5 some reason the Quartermaster General wasn't buying it.

6           Q.    So --

7           A.    And they didn't have the information. They  
8 kept asking the Philippine Command for more information,  
9 more information, sending them out to dig up the church  
10 yard how many times. I lost count of how many  
11 expeditions they sent out there. And they kept doing it  
12 but they kept recommending. Now, you know, no matter  
13 how many times we dig this place up it's still 1130 is  
14 Nininger. Keep asking but you're going to keep getting  
15 the same answer is what they were telling them. And  
16 that's what I'm telling you too, it's the same answer.  
17 That's Nininger.

18                   MR. SPRAGUE: It's going on 12 o'clock  
19 guys.

20                   MR. THORP: Yeah, just a couple of more  
21 questions on Nininger and then we'll take a break.

22           Q.    So it's your view that there is no set of  
23 remains that is more likely to be Nininger than X-1130?

24           A.    That's correct.

25                   MR. THORP: I guess we'll leave it there

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1 for now.

2 (Recess from 11:55 to 1:01)

3 Q. Mr. Eakin, this morning you testified that you  
4 recalled five occasions in which the Philippine Command  
5 recommended that X-1130 be identified as Nininger.  
6 Let's go through exhibit -- sorry, let's see here,  
7 Exhibit 5, and see if we've identified the documents  
8 you're referring to. So first let's look at the Bates  
9 number at the bottom 3788. So 3788 to 89 appears to be  
10 a document dated November 28th, 1939 from Lieutenant  
11 Colonel Metz. Is this one of the documents you were  
12 referring to?

13 A. I believe so. I'm relying on your list there.

14 Q. Okay. But go ahead and look at the document --

15 A. Right.

16 Q. -- and see if it fits. And this references  
17 under point one on the first page of the memo it  
18 references two prior communications dated February 8 and  
19 April 26. And so that's where you getting two of those  
20 recommendations from, is that right?

21 A. Yes.

22 Q. Okay. And then now let's turn forward in the  
23 file to 3818. And this is a communication from Colonel  
24 Metz dated September 28, 1949. And it again references  
25 an April 26, 1949 recommendation?

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1 A. Yes.

2 Q. And then going to 3321 this is a document from  
3 the Philippine Command to the Quartermaster General's  
4 office dated May 5th, 1949. And this is a -- this is  
5 what, you're treating this as a further recommendation?

6 A. Yes, this also references a recommendation.

7 Q. This is a recommendation, right? I'm  
8 reiterating --

9 A. No, I don't think this is actually the board  
10 recommendation. A board recommendation would have  
11 multiple signatures on it.

12 Q. The middle of the paragraph says: A  
13 supplemental case history for the case of 2nd Lt.  
14 Nininger is forwarded herewith reiterating the previous  
15 recommendation, is that right?

16 A. Okay.

17 Q. Is that what it says?

18 A. Yes, sir.

19 Q. And then moving forward to 3825 this is a  
20 communication from Colonel Metz dated February 17, 1949  
21 referencing a December 8, 1938 recommendation, is that  
22 right?

23 A. Yes, it is.

24 Q. And from these documents collectively that's  
25 how you got to the idea that there were five

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1 recommendations?

2 A. Yes. I don't see any actual board  
3 recommendations in here but these are references to  
4 specific board findings.

5 Q. Thank you for that. I think we can set this  
6 aside. So let's talk about Brigadier General Fort.  
7 It's your opinion the remains designated as X-618 are  
8 likely those of U.S. Army Brigadier General Guy Fort, is  
9 that right?

10 A. That's right.

11 Q. And what's your basis for reaching that  
12 conclusion?

13 A. The statement of the provincial governor that  
14 is included in that X-file.

15 Q. That's your primary basis?

16 A. Yes.

17 Q. Do you have any -- other than sort of his  
18 statement do you have any other reason to associate  
19 X-6118 with Fort?

20 A. No, I find that statement very compelling, very  
21 credible.

22 Q. Let's mark the X-file for X-618 as Exhibit 7 it  
23 looks like we're up to.

24 THE REPORTER: Yes.

25 (Exhibit 7 marked)

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1 Q. Would you turn to Bates No. 3106.

2 A. I think there's a better copy on 3104, isn't  
3 there? A brighter. The same thing.

4 Q. I'm fine with that so we'll look at 3104. Is  
5 this a version of the statement from Ignacio Cruz that  
6 you're referring to?

7 A. Yes, it is.

8 Q. Did Mr. Cruz have personal knowledge of General  
9 Fort's execution at Cagayan? Well, let me back up a  
10 step.

11 A. I'm not sure that these are identical looking  
12 at the second page. I'm not gonna split hairs over  
13 them, I think they're the same thing but --

14 Q. Well, there are two different typed copies of  
15 it.

16 A. Okay. Whichever one you want me to use.

17 MR. SPRAGUE: What's the date on the  
18 second one?

19 Q. They're both dated the same so we can work from  
20 whichever one you want to use.

21 A. Whichever one is easier for you.

22 Q. It looks like, although the formatting differs,  
23 they tend to transcribe the same text but at some point  
24 we can compare them. Let's just go with 3104 through  
25 05.

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1 A. That's fine.

2 Q. But let's take a step back. Are you aware of  
3 where X-618 was recorded as being recovered from?

4 A. Just what it -- whatever information is in this  
5 file is all that I have on this case.

6 Q. Can you go to the last two pages, 3128 and 29.

7 A. The report Of Interment?

8 Q. Yes. Do you see at the bottom it says it was  
9 an isolated burial recovered, and he uses grid  
10 coordinates to a map of Mindanao?

11 A. Yes.

12 Q. Are you familiar with the Island of Mindanao?

13 A. Not very.

14 Q. Does the city of Cagayan de Oro sound familiar?

15 A. I've heard of it.

16 Q. But this records sort of by map coordinates of  
17 Mindanao where the remains were recovered from, right?

18 A. Yes, that's what that --

19 Q. And then we have this statement from  
20 Mr. Ignacio Cruz that we've been looking at -- that we  
21 started looking at on 3104. And this starts by saying  
22 that he's a resident of Cagayan, a city of Mindanao. Is  
23 that -- I guess you're not familiar with Mindanao. Let  
24 me show you something else. If you go -- let me show  
25 you, it's in the X-file. Let's go to 3109 on the same



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1 file. This appears to be a partial map of the Island of  
2 Mindanao. It says near the bottom it says Map of  
3 Mindanao, Series of 1941.

4 A. Okay.

5 Q. Do you see a location marked as Cagayan?

6 A. Yes, I do.

7 Q. If you Goggle -- I'll represent that if you  
8 Google Cagayan de Oro now you'll find a city of the same  
9 name still there.

10 A. I'll take your word for it.

11 Q. Do you see another city down at the bottom of  
12 the map called Dansalan?

13 A. Yes, I do.

14 Q. Do you understand those to be two different  
15 cities?

16 A. Yes, I do.

17 Q. Do you understand how far apart they are?

18 A. I don't see a scale on here but they appear to  
19 be a good distance apart.

20 Q. Would it surprise you that they're about  
21 50 miles apart?

22 A. I have no way of knowing.

23 Q. Okay. Do you see the large type at the top of  
24 the map, Misamis Oriental?

25 A. That's the name of the province.

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1 Q. Yeah. So turning back to 3104 to Mr. Cruz'  
2 affidavit do you see his description of himself as a  
3 resident of Cagayan Misamis Oriental?

4 A. Yes, I do.

5 Q. And that he describes himself as a prisoner of  
6 war under a garrison commander in the same location?

7 A. Yes.

8 Q. So is it your understanding that he was talking  
9 about events in Cagayan, in and around Cagayan?

10 A. I think the statement speaks for itself.

11 Q. I'm asking for your understanding.

12 A. Okay.

13 Q. As in okay as yes, that's what he's talking  
14 about?

15 A. Yes.

16 Q. Did Mr. Cruz as described in this affidavit  
17 have personal knowledge of General Fort's presence in  
18 Cagayan?

19 A. What it says in the statement, we can read the  
20 statement.

21 Q. Well, I assume you've read it so I want your  
22 understanding of did he have -- did he directly observe  
23 General Fort being in Cagayan, did Mr. Cruz?

24 A. I'll read the statement. Bear with me.

25 Q. Yeah, go ahead. I'll let you read it.

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1 A. You have to understand, you know --

2 Q. I understand you're looking at a lot of files.

3 A. And I don't look at them, you know, to memorize  
4 them on a regular basis.

5 Q. I'll give you -- Tell me when you're ready when  
6 you've reviewed the two page document.

7 A. Okay. (A brief pause had). Would you restate  
8 your question then, please.

9 Q. Yes. Did Mr. Cruz personally observe General  
10 Fort to be present in Cagayan?

11 A. I can't tell precisely. In some cases he says  
12 that Father Isaias Edralin told him something and then  
13 somewhere else he says that in Dansalan Lanao according  
14 to Captain Yamada he was taken around. It doesn't  
15 really specify whether he personally observed it,  
16 whether he was told it. It kind of goes in and out.

17 Q. Is it fair to say that it appears to be  
18 reporting what various people told him?

19 A. There is some of that. And I can't tell what  
20 it is second hand and what he personally observed.

21 Q. So point me to anything in this two page  
22 document that appears to you to be his personal  
23 observation. You just read it. Point me to anything in  
24 here that appears to be his personal observation or any  
25 line that seems ambiguous to you that could have been

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1 his personal observation.

2 A. My reading of --

3 MR. SPRAGUE: His personal observation of  
4 what? There's all sorts of personnel observations.

5 Q. I mean of -- Yeah, I need the question to be  
6 precise. Do you see anything in this document that  
7 appears to be Mr. Cruz' personal observation of facts  
8 rather than information received from another person?

9 A. In some cases he specifically states that  
10 someone else told him something. Other cases he's not  
11 specific. And I'm not gonna try and --

12 Q. So point me to any one of those that you think  
13 is not specific that could have been something that he  
14 personally observed in this document.

15 A. No, it --

16 Q. Just point me to the line of the document.

17 A. It says what it says.

18 Q. This deposition is about your interpretation of  
19 documents. Point me to anything in this document --

20 A. My interpretation is that --

21 Q. Please don't talk over me.

22 A. Yes.

23 Q. Please point me to anything in this document  
24 that you interpret as possibly being his statement of  
25 his personal observation rather than something he

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1 received from someone else.

2 A. My interpretation of this taken as a whole  
3 is -- it's not precise what he actually saw with his  
4 eyes and what he learned second hand. And I'm not gonna  
5 try and sort it out for him. If you wanted to depose  
6 him you could get him pinned down on what he actually  
7 saw and what he didn't but I can't do that at a  
8 distance.

9 Q. Okay. You're making this difficult for me but  
10 let's walk through the document.

11 A. I'm sorry if I am. It's not my intention.

12 Q. So the first paragraph reports that he -- after  
13 the preliminary matter in the affidavit the first  
14 paragraph says I was a prisoner of war, et cetera. He  
15 seems to be reporting his personal knowledge about  
16 himself, correct?

17 A. That's right.

18 Q. The second paragraph begins that as a prisoner  
19 of war my commanding officer was Captain Yamada, and  
20 then he describes Captain Yamada's position, correct?

21 A. That's right.

22 Q. In the next paragraph it says Captain Yamada  
23 related to me, meaning information he received from  
24 Captain Yamada?

25 A. That's right.

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1 Q. The following paragraph relates information  
2 that Captain -- sorry, that Father Isaias Ederlin  
3 reported to him. Oh, sorry, that Father Isaias Ederlin  
4 saw General Fort.

5 A. Okay.

6 Q. Is that what that says? Do you have any reason  
7 to believe that this paragraph was based on anything  
8 other than what Father Ederlin reported?

9 A. I have no way of knowing what it was based on.  
10 It says what it says.

11 Q. But how do you interpret -- I'm asking how you  
12 interpret it.

13 MR. SPRAGUE: Asked and answered.

14 A. I interpret it as a well written statement by  
15 an educated person, a government official who felt that  
16 it was important to memorialize what he said here. And  
17 I just take it at face value. I don't think there's any  
18 reason that he would make up something like this. And I  
19 find it completely credible. Whether -- as I've said  
20 before -- he saw it with his own eyes or it was related  
21 to him second, third, fourth hand I don't know and I'm  
22 not going to try and make that distinction.

23 Q. This affidavit was signed on July 15, 1947,  
24 right?

25 A. Okay.

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1 Q. Correct?

2 A. That's right.

3 Q. And it's regarding events that occurred five  
4 years earlier in 1942, right?

5 A. Okay.

6 Q. And it relays communications -- it relays his  
7 recollection of what a variety of people told him at  
8 some point between 1942 and 1947, correct?

9 A. That's right.

10 Q. And so without any attempt to deceive there  
11 could be a breakdown in recollection or communication at  
12 any point, right, what somebody told him could have been  
13 inaccurate, they could have remembered inaccurately.  
14 This document is largely the compilation of what a  
15 variety of other people told him?

16 A. I think it's just as likely if there was a  
17 breakdown there was a breakdown in the telling of the  
18 story. He obviously felt very strongly about this, he  
19 knew the facts, he remembered specific people and what  
20 they had told him. And he doesn't say and I saw this  
21 also, but he doesn't need to. It's a credible  
22 statement.

23 Q. Down to the bottom of that page, the paragraph  
24 there references to the caretaker at the Ateneo de  
25 Cagayan, it identifies him as a Felipe Dabalos. Do you

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1 see that?

2 A. Yes, I do.

3 Q. Strike that line of questioning, I didn't find  
4 the document. Does your opinion that X-618 is likely  
5 General Fort depend on General Fort being executed near  
6 Cagayan?

7 A. Not that specifically.

8 Q. If General Fort was executed 45 miles away  
9 would that undermine your conclusion that X-618 is  
10 General Fort?

11 A. If I knew that he was executed somewhere else?

12 Q. Yes, if it could be established.

13 A. It would have to be established and then I'd  
14 consider it.

15 Q. No, as a -- I'm asking this as a hypothetical.  
16 If that were established how would that affect your  
17 conclusion about 618?

18 MR. SPRAGUE: Objection, form.

19 A. You're asking me a hypothetical about a factual  
20 situation?

21 Q. Yes, that is what -- it's fair game for an  
22 expert. Assuming this set of -- this alternate set of  
23 facts, I'm not asking you to agree with it, how would  
24 that alternate set of facts affect your conclusion?

25 MR. SPRAGUE: I'll object to form. I



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1 don't think that's a proper question to ask.

2 A. I don't think that I can answer that either.

3 It just -- It says what it says.

4 Q. But you said that your expertise is weighing  
5 things as an investigator and to assess credibility.

6 And so if you had a basis to come to the conclusion that  
7 he was executed somewhere else, would that mean that it  
8 was less likely or unlikely or impossible that --

9 A. I don't mean to be a smartass here but if I'm  
10 basing this on you telling me I don't find it credible.

11 Q. No, I'm not telling you anything. I'm asking  
12 you --

13 A. But you just asked me to do that. And under  
14 the circumstances a verbal assertion from you as a  
15 hypothetical that's not credible. That's not something  
16 that's going to make me change my opinion.

17 Q. Did you -- In reaching your conclusion did you  
18 review the statements of the Japanese officers in the  
19 war crimes tribunals who were interrogated about the  
20 execution of General Fort?

21 A. I've seen some of those statements and I don't  
22 remember the details of them.

23 Q. They were not in this X-file, correct?

24 A. I don't know where I've seen them but I have  
25 seen them.

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1 Q. I attached them to the answer among other  
2 things.

3 A. It could have been.

4 Q. But did you review them in reaching your  
5 conclusion?

6 A. I've reviewed thousands and thousands of pages.  
7 I can't tell you specifically about --

8 Q. Did you weigh them in reaching your conclusion?

9 A. I weighed all the evidence that was available  
10 to me. If I overlooked something I obviously didn't  
11 include it.

12 Q. So do you recall that those officers while they  
13 disagreed about who performed the execution generally  
14 agreed and admitted that General Fort was executed in  
15 Dansalan Lanao?

16 A. Do I remember that they said that? That's  
17 vaguely familiar.

18 Q. Do you have any reason to think that the  
19 Japanese officers facing war crimes tribunals would have  
20 lied or been dishonest or inaccurate about the execution  
21 of an American -- where an American general was  
22 executed?

23 A. When I weigh the evidence provided by these  
24 admitted war criminals against the testimony of the  
25 provincial governor who didn't have anything to gain or

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1 lose I'm going to take the testimony of the provincial  
2 governor.

3 Q. Let's go to talk about Colonel Stuart. And I'm  
4 going to hand you X-3629 which we'll mark as Exhibit 8.

5 (Exhibit 8 marked)

6 And you'll find that as tab 23.

7 Q. If you go forward to Bates No. 4071 -- well, I  
8 guess you can just hold that location. I realize I  
9 didn't lay a foundation for where we are. Moving  
10 forward to Colonel Stuart it's your opinion the remains  
11 designated as X-3629 are likely those of U.S. Army  
12 Colonel Lawrence Stuart, right?

13 A. Very obvious.

14 Q. And what is your basis for reaching that  
15 conclusion?

16 A. The contents of the X-file.

17 Q. And more specifically are you referring to the  
18 statement by Ruben Caragay that's in front of you?

19 A. That's a portion of it.

20 Q. And in that statement he reports being told by  
21 unidentified Philippine scouts that they were burying an  
22 American colonel, is that right?

23 A. That's what's reported there.

24 Q. Who was Mr. Caragay?

25 A. Apparently he was the gravedigger or he was a

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1 gravedigger.

2 Q. I think you might be mixing up cases.

3 A. Okay. He went to the hacienda. Wasn't he the  
4 same one that dug the graves --

5 Q. I think you're --

6 A. Anyhow --

7 Q. In the Nininger case there was a signature from  
8 someone that dug graves. This one doesn't -- this  
9 statement doesn't appear to reference grave digging.

10 A. Okay, this guy was just a farmer in the  
11 hacienda area.

12 Q. And he went and observed someone buried?

13 A. He saw them.

14 Q. So is it possible that he misrecalled the rank  
15 of the American officer?

16 MR. SPRAGUE: Objection, form.

17 A. Anything's possible.

18 Q. And as a Philippine civilian --

19 A. I can't imagine though that -- again the  
20 statement was taken by a good old Master Sergeant Abie  
21 Abraham and he wasn't gonna make simple mistakes like  
22 that. If it was the colonel it was the colonel. If it  
23 was a lieutenant colonel he would have put lieutenant  
24 colonel.

25 Q. But this is a statement by Mr. Caragay in

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1 December of 1946, right?

2 A. But Abie was the interrogator.

3 Q. But the Philippine civilian may not have been  
4 familiar with American ranks, right?

5 A. Apparently he was familiar enough that he  
6 convinced Abie.

7 Q. I'm merely saying his recollection could have  
8 been mistaken.

9 A. Anything's possible. I don't think it's  
10 probable, though.

11 Q. Apart from his identification as a colonel  
12 being buried is there anything else that specifically  
13 links X-3629 to Colonel Stuart?

14 A. Sure.

15 Q. What else?

16 A. Somewhere in here they reach the conclusion  
17 that the name was Stuart, S-t-u-a-r-t.

18 Q. The document we were looking at was spelled  
19 that way.

20 A. No, but the one we're looking for is Stewart,  
21 S-t-e-w-a-r-t, right? They have assigned the name  
22 Stuart, S-t --

23 Q. For the record, do you want to identify the  
24 page you're looking at by Bates number.

25 A. This is just a random page that I picked here.

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1 It's 4061. And they have assigned the name Stuart,  
2 S-t-u-a-r-t to this page. And there may be some  
3 additional pages here on page 4059. This is BTB or  
4 believed to be Colonel Stuart, S-t-u-a-r-t. And I'm  
5 sure there are other references in there but --

6 Q. So there's a consistent --

7 A. -- it's about someone named Stuart and we can  
8 argue about the spelling.

9 Q. Okay. So from the beginning of this file  
10 there's an association made with a Colonel Stuart  
11 spelled S-t-u-a-r-t?

12 A. Right.

13 Q. How does that further support your association  
14 of the --

15 A. The first thing that I checked was all of the  
16 deaths in 1942 of anyone named any variation of a Stuart  
17 or any colonels. And this is the only possible  
18 candidate.

19 Q. Do you have any reason -- specific reason to  
20 believe that the spelling caused confusion rather than  
21 just being an errant spelling when throughout the file  
22 that we're referring to Lawrence Stuart?

23 A. I'm not sure I follow your question there.

24 Q. So you've suggested that -- I think your report  
25 suggests that perhaps one of the reasons that this

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1 X-file was not ultimately found to be Colonel Stuart was  
2 because of the misspelling of the name.

3 A. It appears to me that he was not identified  
4 because they didn't have that second piece of  
5 confirmatory evidence that we talked about earlier, in  
6 this case dental records. And if they had gone looking  
7 for his dental records based on an incorrect but common  
8 misspelling of his name they wouldn't have found his  
9 dental records. The same thing happened to my cousin.  
10 They didn't find his dental records and they didn't  
11 identify him.

12 Q. Have you since compared Colonel Stuart's dental  
13 records to the dental record from this X-file?

14 A. No, I don't get into the dental comparisons  
15 because I don't find them to be very accurate. They're  
16 -- they're pretty bogus.

17 Q. So let's just take that specifically.

18 A. Let me finish, please.

19 Q. Okay, go ahead.

20 A. I find most of the dental records in these  
21 X-files to be bogus. They're taken by untrained  
22 personnel. And in a lot of cases you'll find multiple  
23 copies of dental records for the same person where they  
24 were reprocessed multiple times. And in some cases  
25 there's no indication whatsoever that it's the same

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1 person. And I have to attribute that to the untrained  
2 personnel that were doing this. And I'm not putting  
3 them down, they had a tough job to do, but they just  
4 didn't do it very well. They didn't have xrays. These  
5 were just -- these were a text description practically  
6 of what dental information was available. And it just  
7 isn't useful for this purpose.

8 Q. So let me make sure I understand what you're  
9 saying. So, for example, I think back with regard to  
10 General Fort -- or let's just use a hypothetical. The  
11 personnel records indicate that -- let's just say the  
12 personnel records indicate that someone had two teeth  
13 pulled early in their career. And they're being  
14 compared to remains that's recorded as being recovered  
15 with a full set of teeth. Would you think that could  
16 still be the same person?

17 A. That's a hypothetical. And all that I can tell  
18 you is that I don't pay any attention to the dental  
19 information. I find in most cases it appears to be  
20 incorrect and misleading at best.

21 Q. So you've suggested that the misspelling of  
22 Stuart could be a cause for sort of not connecting the  
23 dots?

24 A. I think that was very obvious.

25 Q. But other than Mr. Caragay's statement about



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1 hearing that an American colonel is buried here do you  
2 have any other specific data points that are dots to be  
3 connected?

4 A. This is a lot more than most identifications.

5 Q. What is there other than Mr. Caragay's  
6 statement it's variable buried in Abucay Hacienda so  
7 it's the right general area. So there's the location,  
8 there's Mr. Caragay's statement. Is there any other  
9 data point you're using?

10 A. Sure. We know that's where Colonel Stuart  
11 died. The date is right, the locations are correct. We  
12 have his second hand statement from the -- from the  
13 scouts who were doing the burying and everything is  
14 consistent. And on top of that we've got Abie Abraham's  
15 statement. Now, keep in mind that he was the  
16 interrogator. But when you're interrogating someone who  
17 may not be proficient in english he's recording his  
18 words here. So that's Abie Abraham's statement as much  
19 as it is Mr. Caragay's. Abie was no amateur at this.  
20 He knew what he was doing.

21 Q. Have you reviewed other X-files for this area  
22 to compare them to also be potentially Colonel Stuart?

23 A. Yes, I have.

24 Q. Do you find any others that could potentially  
25 be Colonel Stuart?

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1           A.     Nothing even close to being as credible as  
2     this.   This is a slam dunk forehead slapper.

3           Q.     Let's turn back to your report, page 10.   This  
4     is Exhibit 1.   You have a section here captioned  
5     Disinterment of Identified Remains Generally and say  
6     you'll testify about disinterments generally and explain  
7     the potential for embarrassment to the government.   Why  
8     are you opining on the potential of embarrassment to the  
9     government in connection with this case?

10          A.     With the Stuart case or --

11          Q.     No, in connection with -- sorry, this lawsuit  
12     as a whole.

13          A.     The government's actions in regard to all of  
14     these guys were shameful.   Just defending them is  
15     shameful.   These guys deserved a hell of a lot better  
16     than what they got.   They're the reason that we're not  
17     speaking Japanese today.   And the government went out of  
18     their way to screw things up.   You know, I've been a  
19     young GI in combat, I know that it's nasty and dirty and  
20     things don't go well.   And I can't fault these guys but  
21     defending what -- defending what happened when we have  
22     the opportunity to put it right is just absolutely  
23     shameful.   I can give you so many examples of -- well,  
24     let's start with Cheaney.   We know that the wrong guy  
25     is -- the Army knows that the wrong guy is buried in

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1 that grave. In grave 717 we know that the four knowns  
2 in that case were shipped to the wrong families. That's  
3 shameful.

4 Q. But isn't the government correcting -- in the  
5 process of correcting that, they got the families'  
6 approval to disinter those --

7 A. I don't think they've corrected it yet after  
8 four years because they're going about it all backwards  
9 but let me finish my answer. You know, we've got the  
10 Cheaney coverup. That's shameful. We've got -- You  
11 want me to tell you about the bone boxes? You know what  
12 they did with all the excess parts? Whenever they'd end  
13 up with an extra leg bone or, you know, maybe there were  
14 two guys that died in close proximity and they didn't  
15 get the bits and pieces picked up properly and so when  
16 they got them to the cemetery they had an extra leg  
17 bone. They designated that as a CIL portion. When they  
18 got all done and they went to close up the mortuaries  
19 they had all these CIL portions, CIL for Central  
20 Identification Lab portions. And they'd give them a  
21 number just like an X-file, an X number. They didn't  
22 know what to do with them. So when they would close the  
23 mortuaries they would pack all of the similar bones, all  
24 of the arm bones or leg bones or, you know, thigh bones,  
25 whatever we're doing here, they'd pack them up into a

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1 single casket and bury them with honors as a single  
2 unknown. They'd stamp across the paperwork not to be  
3 considered for World War II unknown. They knew what  
4 they were doing was dishonorable. And this is just one  
5 example.

6 Q. So how does that --

7 A. So today -- No, let me finish my answer,  
8 please.

9 Q. Okay.

10 A. Today we have the opportunity to make these  
11 cases right. And just like in my Kelder case DPAA and  
12 DOJ fought me tooth and nail. Now, in the Kelder case I  
13 was proven to be a hundred percent right at least as far  
14 as they've gotten on the identifications. We could make  
15 this right. Now, there's gonna be some people who are  
16 embarrassed. And they should be embarrassed but by  
17 golly at some point the government just needs to bite  
18 the bullet and fix this. There's families out here, not  
19 many parents left but there is a few, and there's  
20 siblings, there's cousins, there's nephews and those  
21 people deserve closure. Speaking as a family member I  
22 know how important that is. They deserve that closure.  
23 And we can give it to 'em. And you guys are fighting me  
24 on this. At least dig 'em up, get the DNA. Even if it  
25 didn't match someone that we have a family reference

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1 sample for maybe we'll find the right family reference  
2 sample next week or next year or sometime. But in these  
3 cases we have so much evidence that they are who we  
4 think they are, I just can't understand why you're  
5 fighting me on it. Okay, go ahead. I'm sorry for the  
6 sermon but --

7 Q. I wanted to break it up because you've covered  
8 so much ground that it's hard to go back and sort of  
9 like take it apart piece by piece but let's see how we  
10 can do that. In your report on page 10 you say: I am  
11 aware of cases in which current government officials  
12 were aware of incorrect identifications, yet they  
13 actively sought to avoid proper identification of the  
14 remains. I'm guessing you would include Cheaney in that  
15 characterization. Are there any others that you're  
16 specifically referring to?

17 A. Actually in that regard I think I was probably  
18 referring to the four knowns from grave 717. And I have  
19 documents, not with me, but I have documents that show  
20 that in the modern time frame 2010, '11, 12, in that era  
21 that the current management people at JPAC were aware of  
22 those bad IDs even before they were disinterred, yet  
23 they did nothing. And I don't think that was atypical.

24 Q. So you're referring to those four knowns from  
25 common grave 717. Are you referring to anything else in

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1 that statement?

2 A. Oh, we can lump in the Cheaney case and the  
3 rest but I think those are the obvious ones.

4 Q. Cheaney, 717. Anything else that you're  
5 specifically referring to?

6 A. You can't count the number of bad IDs made.

7 Q. But here you're specifically speaking to  
8 awareness of bad IDs and actively avoiding corrections?

9 A. Everyone involved in this is aware of the bad  
10 IDs. Every researcher at DPAA there's no doubt in my  
11 mind they know about the bad IDs because they were so  
12 common --

13 Q. Which bad IDs?

14 A. Okay, let's take Cabanatuan, because we can  
15 document these bad ideas. Bear with me, this is kind of  
16 a long story. What happened was the terminus of the  
17 death march was Camp O'Donnell. In Camp O'Donnell the  
18 burial process was really pretty orderly. And we have a  
19 lot of that from a book written by Colonel Olson who  
20 used to live right over the hill there. And he  
21 described how the burials at Camp O'Donnell were made in  
22 communal graves. And they would designate each grave  
23 with a grid location like A1. And they would also  
24 record the location in the grave of each person on  
25 the -- on the burial roster, ten men per grave. When.

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1                   They disinterred the Camp O'Donnell  
2 cemetery they went right down the list and said Smith,  
3 Jones, Doe, and they took them right off the roster  
4 because they had them there. Shortly after they started  
5 working on the Camp O'Donnell roster or disinterring the  
6 Camp O'Donnell cemetery they started disinterring the  
7 Cabanatuan cemetery. The Cabanatuan cemetery was  
8 significantly larger than O'Donnell. O'Donnell had  
9 about 1550 death burials. Cabanatuan had about 2655 I  
10 believe in the cemetery. And they tried to do the same  
11 thing identifying those remains. And they would open  
12 one of the communal graves and the first man on the  
13 roster -- which we looked at a little while ago here --  
14 okay, we know that now this much of the roster are the  
15 names of the people in this grave. And they'd -- you  
16 can see because they would assign a C number to the  
17 remains when they would get them out. So we know the  
18 sequence they took them out. And we know that they  
19 assigned names in the same sequence as the burial  
20 roster. These remains were taken from Cabanatuan to the  
21 Manila number 2 temporary cemetery and they were buried  
22 there under the name that they were given off of the  
23 roster sequence.

24                   And somewhere down the line they must have  
25 come across a dog tag or something and they figured out

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1 that they knew -- they knew who was in the grave but  
2 they couldn't individually identify them because they  
3 weren't actually buried in the grave in the roster  
4 sequence. And in those X-files they went back and the  
5 Report of Interment, which is usually the bottom page in  
6 there, have all been remade to remove the name. Now,  
7 what happened was they got that paperwork straightened  
8 out but the cemetery reference were never corrected.  
9 And so if they had sent them to Manila number 2 cemetery  
10 designated as Smith or Jones or Doe, and then later an  
11 identification was made from the dental records and they  
12 sent someone out because they'd made an identification  
13 of Doe they dug up the remains that were originally  
14 designated with that name. Are you following me? And  
15 that's how all of these knowns were sent to the wrong  
16 families. We have no way of knowing how long this went  
17 on. I'm sure there was an aw shucks moment by someone  
18 when they figured out what was happening. At some point  
19 somebody went out there and there was an empty grave  
20 where Jones was supposed to be. And it's quite likely  
21 that's when they decided that they needed to shut down  
22 the Cabanatuan project. But anyhow, we don't know how  
23 many but we know that there were a substantial, a huge  
24 number of misidentifications just from that.

25 Q. And you've suggested that how that has been



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1 handled more recently is shameful. What do you think  
2 should be done now with regard to -- do you think every  
3 remain sent home from Cabanatuan should be disinterred  
4 and checked to see if it's a different person, is that  
5 what you're suggesting would be the honorable thing to  
6 do?

7 A. You're asking me something that I think it's a  
8 little above my pay grade. I'm not sure. And I don't  
9 think you are or anyone else is. I know that we have an  
10 opportunity to make a lot of these things right when --  
11 when we sort out the Morgan or the Hansen or the  
12 Bruntmyer case we're gonna sort out some of these. And  
13 at that point I don't think that you can do anything  
14 except leave it to the families. And I've dealt with a  
15 lot of families. Some families don't give a damn about  
16 these guys and some of them really do care. And it's an  
17 individual thing.

18 And just like after World War II, families  
19 were given the option of your family member could be  
20 buried in Manila or they would return them to the states  
21 and bury them in a national cemetery or they could be  
22 buried in the states in a private cemetery. And it's a  
23 family's decision to make and it's not my decision, but  
24 I think the families need to make those decisions. You  
25 and I shouldn't.

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1 Q. But you referenced this in the context of  
2 saying the government was shameful. So is it your view  
3 that it would be less shameful or the appropriate  
4 response to identify all the families that these were  
5 potential misidentifications?

6 A. It's shameful that the government won't  
7 cooperate with the families. At least give 'em due  
8 process. You can tell me what due process is but I've  
9 got a pretty good idea. And these families are not  
10 getting due process. The DPAA has imposed arbitrary  
11 standards on when they're going to be disinterred.

12 Q. Mr. Eakin, you're not answering my question  
13 here. Continue --

14 MR. SPRAGUE: You asked him a question,  
15 let him answer it.

16 MR. THORP: But this is not an answer  
17 that's responsive to my question. I asked about --

18 THE WITNESS: Then you can say  
19 nonresponsive.

20 MR. SPRAGUE: You can make the objection  
21 but the answer needs to go on the record, so go ahead  
22 and finish your answer.

23 Q. So go ahead and finish what you were going to  
24 say.

25 A. The families need to make these decisions, you

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1 and I don't.

2 Q. So I asked a specific question.

3 A. I'm still trying to catch up to where I was  
4 when you interrupted me.

5 Q. I'll let you finish.

6 A. And the government fought me in the Kelder  
7 case, the government is fighting these families in this  
8 case. And I find that it's just not the American thing  
9 to do. It's shameful. These are heroes. They deserve  
10 better.

11 Q. So my specific question was -- we got to this  
12 point by talking about your statement that current  
13 government officials were aware of incorrect IDs that  
14 actively sought to avoid a proper identification. In  
15 response to that you raised the issue of sort of what  
16 you believe is widespread misidentification in the  
17 Cabanatuan project. My specific question to you in that  
18 context is do you think the government action in  
19 response to that, to what you believe is knowledge of  
20 widespread misidentification, should be notifying each  
21 of the families identified -- who received identified  
22 remains from Cabanatuan that their relative could be  
23 misidentified? That's my specific -- very specific  
24 question. Should the government notify each of the  
25 families with identified remains that the remains could

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1 have been misidentified?

2 A. I think I answered that, that that's above my  
3 pay grade. I think that --

4 Q. We'll just leave it there.

5 A. -- the families -- that it should be  
6 acknowledged that a number of these identifications were  
7 bogus and then let the families decide.

8 Q. Turning back to your report on page 10 there's  
9 a paragraph that begins approximately toward the middle  
10 of the page. Do you see that?

11 A. Uh-huh.

12 Q. Your first sentence there is approximately 40  
13 percent of the X-files I've reviewed are associated with  
14 a particular person or persons. What does that mean?

15 A. It means approximately 40 percent of the  
16 X-files I've reviewed are associated with a particular  
17 person or persons.

18 Q. Meaning that the disinterment report says  
19 likely so and so, is that what you mean by associated?

20 A. Well I guess disinterment report you're talking  
21 about the X-file?

22 Q. I was referring to usually the first document  
23 in the X-file. So that's my question, do you mean like  
24 the -- like we've seen in some of the ones in here where  
25 the -- when they pulled them out of the ground --

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1 A. No, no. I see what you mean.

2 Q. You just mean anywhere in the X-file there's an  
3 association, is that what you're referring to?

4 A. Exactly. And those erroneous reports of  
5 interment that I described no, you can't go by those,  
6 but those names were almost certainly names of people  
7 who were in that grave. So in that regard if I'm  
8 talking Cabanatuan it doesn't make any difference, but  
9 all of the Cabanatuan X-files we can associate with a  
10 group of names.

11 Q. So you would include all of Cabanatuan among  
12 these 40 percent?

13 A. Yes.

14 Q. And then other cases as well, whether it was an  
15 association anywhere in the X-file of this remains with  
16 some particular individual or group?

17 A. Yeah, I think we've discussed several of them  
18 like that.

19 Q. So when you say 40 percent of the X-files I  
20 have reviewed, you mean in total all the ones you've  
21 received from the government through FOIA and other  
22 means?

23 A. Well, the government keeps telling me that I  
24 have 'em all but I keep finding ones that are missing.

25 Q. I'm sorry, just -- the universe that you're

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1 referring to 40 percent of is all the X-files that you  
2 have received --

3 A. All that I have received.

4 Q. -- over the years that are compiled --

5 A. Yes. That's an approximate estimate.

6 Q. And can you give me approximately how many  
7 X-files that is, do you have a rough number of how many  
8 X-files you have?

9 A. I've received something around 10,000 X-files,  
10 I believe. You know, you can't go through and count 'em  
11 because the way that they came there was a lot of  
12 duplication and so forth. So we don't have a really  
13 good number but all the estimates are that there are  
14 about 10,000 unknowns worldwide. And I've personally  
15 reviewed all of them from Manila which is 3744 and most  
16 of the Hawaii X-files which is another 1500 to 2000 --  
17 you know, most of my work has been in the Pacific so --

18 Q. And this is all X-files from World War II?

19 A. World War II and Korea is lumped in with those.

20 Q. So a little while ago you talked about the CIL  
21 portions, burials, and how you believe that was an  
22 inappropriate way to handle the remains at that time.  
23 How does your testimony about CIL portions relate to the  
24 likelihood of identifying these service members from the  
25 graves that you have selected as the most likely

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1 locations for?

2 A. If a DNA lab identification process was in  
3 place it's likely that most of those CIL portions could  
4 be identified. But the problem with the CIL portions is  
5 in almost all cases there is absolutely zero  
6 circumstantial evidence to back 'em up so you have to go  
7 to the DNA led ID process. And I don't know how many  
8 identifications could be made from that but I've asked  
9 several people who I know who are familiar with the  
10 operations. And the most common estimate that I get  
11 from other researchers I know is that those CIL portions  
12 could account for another 5000 MIAs.

13 Q. So in your view it would be a better policy for  
14 the government to disinter all the CIL portions, submit  
15 them -- submit samples for DNA testing to see if  
16 additional identifications could be made, is that what  
17 you're saying?

18 A. I don't know if I'm gonna go that far. Like I  
19 say, this is over my head. I think that the families  
20 need due process. That's the bare minimum. The  
21 families who wish to pursue this should be allowed to.  
22 And right now there is no effective due process for  
23 families to recover the remains of their loved ones.  
24 And that's as far as I'll go.

25 Q. But you're not looking for identification of

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1 these seven individuals from amongst the CIL portion  
2 burials, right?

3 A. No. These are separate from the seven cases  
4 that we're dealing with today.

5 MR. THORP: Let's take a five minute  
6 break. I think I'm probably about done.

7 (Recess from 2:04 to 2:14)

8 MR. THORP: Pass the witness.

9 MR. SPRAGUE: I'll reserve mine until time  
10 of trial.

11 (Proceedings concluded at 2:15 p.m.)

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