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**THE NEW LAW ON DEPARTMENT OF DEFENSE PERSONNEL
MISSING AS A RESULT OF HOSTILE ACTION**

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other government agency.

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**THE NEW LAW ON DEPARTMENT OF DEFENSE PERSONNEL
MISSING AS A RESULT OF HOSTILE ACTION**

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ABSTRACT: In 1996, Congress enacted a comprehensive system on accounting for service members and civil employees of the Department of Defense and Department of Defense contractors who become involuntarily absent as a result of hostile action. This system sets forth detailed investigatory requirements and extends many due process rights to the person's family and others without regard to whether these individuals are entitled to such rights under the Fifth Amendment to the U.S. Constitution. Additionally, the new law requires the Department of Defense to keep certain information in a missing person's personnel file, and addresses release of this information to family members and others. This thesis reviews the new law, explores prior law and service regulations on accounting for missing persons to analyze the intent of the new law, identifies the new law's major shortcomings, and recommends needed changes to the law.

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**THE NEW LAW ON DEPARTMENT OF DEFENSE PERSONNEL
MISSING AS A RESULT OF HOSTILE ACTION**

MAJOR PAMELA M. STAHL*

In my 46 years of wearing a uniform in the service of this great and wonderful nation of ours, the understanding that America, and particularly her Armed Forces, took care of our people was a fundamental premise. We pick up our wounded and get them to the best possible medical care. We recover our dead and bury them respectfully. We take care of the families of the Servicemen and women when they are sent away to do the nation's fighting. We give our veterans dignified thanks and assistance when the fighting is over. And certainly recovering our prisoners and accounting for our missing is just as important as those other points. If we ever stop doing any of those things, we have let some fundamental decay get started in the country.

*-- General John W. Vessey, Jr.
Former Chairman, Joint Chiefs of Staff¹*

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I. Introduction

On January 20, 1995, Senator Robert Dole, the Senate Majority Leader, introduced Senate Bill 256, entitled "The Missing Service Personnel Act of 1995."² The purpose of the bill was twofold. First, it would ensure that the federal government accounts for service members and civilian employees of both the government and government contractors who are missing as a result of a hostile action. Second, as a general rule, the bill would ensure that the federal government does not declare these persons dead solely because of the passage of time.³

Senator Dole's bill was not, however, the first legislation proposing changes to Department of Defense procedures on accounting for missing persons. From at least 1989, members of Congress had introduced such legislation, but the legislation had never made it out of the various

General's School, United States Army, Charlottesville, Virginia.

¹ Remarks of General Vessey in a speech to the National League of POW/MIA Families in the Summer of 1988, *reprinted in* 134 CONG. REC. E2,736-38 (daily ed. Aug. 11, 1988).

² S. 256, 104th Cong., 1st Sess. (1995). Several veterans organizations supported Senator Dole's bill, including the American Legion, the Disabled American Veterans, the National Vietnam Veterans Coalition, and VietNow. See letters of support from veterans organizations attached as exhibits at 141 CONG. REC. S1,279-81 (daily ed. Jan. 20, 1995).

³ S. 256, *supra* note 2, § 2.

committees for consideration by either Branch of Congress.⁴ This time was different. The powerful Senate Majority Leader was sponsoring the legislation, and he was persistent. Senator Dole had introduced an identical bill the previous year, 1994, but Congress had not been able to consider the bill before adjournment.⁵ Finally, the stage was set for significant change.

Senator Dole's remarks upon introducing Senate Bill 256 reveal why he believed the bill was needed. He stated that by introducing the legislation he hoped to restore some of the Department of Defense's "credibility" on accounting for prisoners of war and those who are missing in action, and "rebuild faith and trust between the public and our federal government."⁶ To further this intent, Senator Dole proposed new procedures for determining the status of missing persons,

⁴ See, e.g., H.R. 1730, 101st Cong., 1st Sess. (1989), reprinted in 135 CONG. REC. H980 (daily ed. Apr. 6, 1989); H.R. 291, 103d Cong., 1st Sess. (1993), reprinted in 139 CONG. REC. H102 (daily ed. Jan. 6, 1993).

⁵ S. 2411, 103d Cong., 2d Sess. (1994), reprinted in 140 CONG. REC. S12,217 (daily ed. Aug. 19, 1994).

⁶ 141 CONG. REC. S1,274-79 (daily ed. Jan. 20, 1995). Senators Lautenberg, Lieberman, and Simpson co-sponsored S. 256. In his remarks upon introduction of the bill, Senator Lautenberg, who like Senator Dole is a World War II veteran, explained why he believed the legislation was needed. Senator Lautenberg found that "when the Pentagon looks at [the problems with the current accounting procedures] they see a rosy picture." Therefore, he believed there was "a general lack of will within the Pentagon to update its management procedures regarding missing persons." *Id.* at S1,280.

including judicial review of certain decisions. In addition, as originally introduced by the Majority Leader, Senate Bill 256 provided for appointment of counsel for the missing person, required access to government information and the missing person's personnel records by both family members and the boards of inquiry, and allowed certain persons to be represented by counsel at these boards.⁷

Less than one month after Senator Dole introduced his bill, Representative Benjamin Gilman, Chairman of the Committee on International Relations, House of Representatives, proposed similar legislation in the House. Representative Gilman's proposal, House Bill 945, was also entitled "The Missing Service Personnel Act of 1995."⁸ He intended his legislation to "unveil the curtain of secrecy which currently surrounds any DOD decision concerning a person's status as missing in action."⁹

⁷ S. 256, *supra* note 2.

⁸ H.R. 945, 104th Cong., 1st Sess. (1995). Congresswoman Molinari and Congressman Thurman co-sponsored the bill. Additionally, Congressman Robert Dornan, Chairman of the Military Personnel Subcommittee of the Committee on National Security, House of Representatives, called House Bill 945 "39 pages of the best legislation I have ever seen." *Continuation of Remarks on 50th Anniversary of World War II*, 141 CONG. REC. H5,361 (daily ed. May 18, 1995).

⁹ 141 CONG. REC. E368 (daily ed. Feb. 16, 1995). Many veterans organizations also supported H.R. 945, including the American Legion, the Vietnam Veterans of America, the National Alliance of Families, New York State POW/MIA, the American Defense Institute, VietNow, the Marine Corps League, the Live POW Lobby of America, and Task Force Omega of Colorado. See

In June 1995, the House of Representatives' Committee on National Security incorporated House Bill 945 into the House version of the National Defense Authorization Act for Fiscal Year 1996.¹⁰ As the Committee on National Security explained:

For years, Congress has struggled to find ways to obtain the fullest possible accounting of American service members and civilians under the employment of the Department of Defense who were listed as missing in action or became prisoners of war.

.
This process [a specified chain of reporting and a coordinated process of inquiry] will help to resolve perhaps the greatest recurring tragedy related to unresolved cases of missing service members whose families and next of kin have experienced both frustration and anguish in trying to obtain answers from an unresponsive bureaucracy.¹¹

letters of support from veterans organizations attached as exhibits at *id.* E369-70.

¹⁰ H.R. REP. NO. 131, 104th Cong., 1st Sess. 460-472 (1995). Representative Gilman also offered five amendments to H.R. 945, which were accepted. The amendments included: (1) a requirement that the State Department, the Transportation Department and the Central Intelligence Agency and other relevant agencies appoint an officer responsible for handling missing person issues; (2) a requirement that the Department of Defense office coordinate with these agencies; (3) a change from 24 hours to 30 days the time allotted to a family member in responding to the Defense Department board of inquiry; (4) an extension of the time after which the Defense Department may terminate further review boards after first notice of a disappearance from 20 to 30 years; and (5) a provision allowing family members of a missing person the right to judicial review of any findings of death made by the board. 141 CONG. REC. H5,891 (daily ed. June 13, 1995). See also 141 CONG. REC. E1,255 (daily ed. June 15, 1995) (statement of Rep. Kim discussing the Gilman amendments).

¹¹ H.R. REP. NO. 131, *supra* note 10, at 223-24.

The Senate Committee on Armed Services also made its version of The Missing Service Personnel Act of 1995 part of the Senate version of the National Defense Authorization Act for Fiscal Year 1996.¹² The Senate Armed Services Committee had significantly amended Senate Dole's original bill, however, deleting what it felt were the most controversial provisions. For instance, the Senate version no longer included civilian employees within its scope. Additionally, the committee deleted the provisions requiring that the missing person be represented by counsel and that certain board decisions be subject to judicial review.¹³ In commenting on its version of the legislation, the Senate Committee on Armed Services believed that "the recommended provision will assist the Department of Defense and the next-of-kin of missing service members as both struggle with the emotion and frustration of a

¹² S. REP. NO. 112, 104th Cong., 1st Sess. 157-175 (1995).

¹³ *Id.* Dismayed by the changes to S. 256, Senator Dole stated that the bill as finally reported by the Senate Committee on Armed Services was not everything that he had hoped for, but it represented all that the Senate was willing to adopt. Senator Dole noted that the Department of Defense had objections to his original bill, as did a number of Senators. Stating that there were reforms that he had hoped to achieve but which were no longer in the Senate bill, Senator Dole found that the House version of The Missing Service Personnel Act of 1995 better reflected his original bill. 141 CONG. REC. S12,534 (daily ed. Sept. 5, 1995).

system which has, to date, proved insensitive and unresponsive."¹⁴

Not everyone on the Senate Armed Services Committee agreed, however. Senator John McCain, a former prisoner of war in Vietnam,¹⁵ opposed even the amended Senate language. Senator McCain did not share the committee's editorial

¹⁴ S. REP. No. 112, *supra* note 12, at 245.

¹⁵ The Senate Select Committee on POW/MIA Affairs wrote of Captain John S. McCain III (United States Navy):

(Then Lieutenant Commander) -- McCain's A4E Aircraft was shot down over Hanoi in October 1967. Captain McCain ejected from an inverted aircraft and broken [sic] both arms and a leg during the ejection. North Vietnamese soldiers quickly pulled him from a lake near Hanoi and beat him severely. Near death, McCain recovered slowly. McCain's father, Admiral McCain, was then Commander of the Pacific Fleet. Lieutenant Commander McCain was singled out for repeated torture and brutal treatment. Numerous beatings, bones rebroken by his captors time and again, and months of solitary confinement further slowed recovery. The Vietnamese offered him early repatriation several times in an attempt to dishearten the other prisoners, but McCain refused to be repatriated ahead of the other POW's. His spirit could not be broken. He continued to resist his captors and to inspire other prisoners by his patriotic determination.

During the long internment, McCain served the other prisoners both as chaplain and an educator. As chaplain, he conducted religious services, provided spiritual guidance, and instilled constructive rehabilitative thinking for the benefit of his fellow prisoners. In addition, despite constant harassment and the routine harsh treatment, McCain devoted long hours to preparing educational lessons that would improve the morale and well-being of the other prisoners.

SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. No. 1, 103d Cong., 1st Sess. 475 (1993).

characterization of the current accounting system as "insensitive and unresponsive."¹⁶ While admitting that this may have been true many years ago, Senator McCain believed that the Department of Defense and the Military Services had since taken extensive measures to make the system "sensitive, responsive, and most important, workable."¹⁷

Undeterred, the conference committee agreed to the House version of The Missing Service Personnel Act of 1995.¹⁸ Disappointed in the conferees' action, Senator McCain again urged his fellow Senators not to adopt the House version (now the conference version) of the act, calling it "the most egregious . . . unworkable, unnecessary, and counter-productive provisions related to missing service personnel."¹⁹ Senator McCain believed the current Department of Defense POW/MIA office resources and procedures were "fully adequate to accomplish the objective of determining the fate of all of our missing people."²⁰ Additionally, Senator McCain

¹⁶ 141 CONG. REC. S12,534 (daily ed. Sept. 5, 1995).

¹⁷ *Id.*

¹⁸ H.R. CONF. REP. No. 450, 104th Cong., 2d Sess. 157-75 (1996). See also H.R. CONF. REP. No. 406, 104th Cong., 1st Sess. 158-76 (1995) (containing the first version of the NDAA for FY96 conference report vetoed by President Clinton in December 1995; the original report's version of The Missing Service Personnel Act of 1995 was identical to the provision finally enacted).

¹⁹ 141 CONG. REC. S18,873 (daily ed. Dec. 19, 1995).

²⁰ *Id.* Senator McCain further stated:

emphasized that the Department of Defense, the regional commanders in chief and the Chairman of the Joint Chiefs of

The language in the conference report prohibits the review boards it establishes from making a finding that a serviceman has been killed in action if there is "any credible evidence that suggests that the person is alive." It defines [sic] logic that, even if so much time has passed that it is physically impossible for a particular unaccounted-for serviceman to be alive, the board still cannot declare him dead if "credible evidence" is offered that he is still alive.

In my view, this is a very broad and undefined standard. It would effectively prevent, in many cases, a determination of death, leaving the families of missing persons with unfounded hopes that their loved ones are alive and unwarranted fears for their safety and health. This is something that we clearly rejected in the original Senate bill and should not have agreed to in conference. I would point out to my colleagues that there are roughly 78,000 servicemen missing from World War II. And this is an example of a war where we walked the battlefield. It might be of interest to note as well that at the conclusion of the battle of Lexington and Concord, there were five missing minutemen. Missing servicemen are unfortunately--and very tragically--a fact of war--as much as death is a fact of war.

.
The bill contains several other similar unworkable and unnecessary provisions. Among these are: a requirement that a Secretary appoint a board of review for every serviceman determined to be missing in action and subsequent review boards every 3 years for 30 years; a requirement that counsel be appointed for the missing; a requirement to subject final determinations of the Services to judicial review; the establishment of reporting requirements on commanders in the field at the very time their principal responsibility should be fighting and winning a war; and the reopening of cases from previous conflicts.

Staff strongly opposed the conference version of the act.²¹

In fact, by letter to Senator McCain, the Chairman of the Joint Chiefs of Staff added his "strong support to the Senate-passed version of the legislation" as it would "go a long way toward addressing the concerns of the Congress, the American People, and our military without unintended impacts we believe would be detrimental to our warfighting capability."²²

²¹ *Id.*

²² *Id.* at S18,874. General Shalikashvili wrote:

Dear Senator McCain: Thank you for taking time to meet with me last week and sharing your insights on some very important Defense issues we face now and in the coming years.

One of the issues your staff has contacted us on is the POW/MIA legislative initiative contained in the House and Senate versions of the FY96 Defense Authorization Bill now in conference committee. I'm aware that you've already heard from the regional CINCs expressing their concerns about compliance with certain difficult provisions contained in the House version.

No doubt we all agree the POW/MIA issue is of paramount importance to all Service members, and especially to all commanders. Nothing impacts a unit's fighting capability more than uncertainty over whether members will be listed as missing or forgotten if taken prisoner. This country has an unbreakable commitment to our men and women in uniform that such will not be the case. However, language in the House-passed version would create a bureaucracy requiring CINCs to divert precious manpower to this issue, in the middle of a conflict, without relieving the anxiety of our men and women.

The CINCs have addressed the details, but let me add my strong support to the Senate-passed version of the legislation that clearly advanced the POW/MIA issue. Such legislation will go a long way toward addressing the concerns of the Congress, the American people, and our military without unintended impacts we believe would

Despite these concerns, both the House and Senate passed the conference version of The Missing Service Personnel Act of 1995 as part of the National Defense Authorization Act for Fiscal Year 1996. Although he originally vetoed the act on December 28, 1995, President Clinton eventually signed the 1996 authorization act on February 10, 1996, thus enacting The Missing Service Personnel Act of 1995.²³ After years of trying, Congress had finally succeeded in passing legislation to reform the manner in which the Department of Defense accounts for its missing.

Will the new law actually improve the accountability process for Department of Defense personnel missing as a result of hostile action? To answer this question, this thesis will first examine the law itself. It will then review the history of American law on accounting for missing persons and our government's attempts to account for those missing as a result of the Vietnam Conflict. Next will be an analysis of whether the new law actually improves current Department of Defense and Military Service policies on deciding the status of persons missing as a result of hostile action. The final

be detrimental to our warfighting capability.

²³ The National Defense Authorization Act for Fiscal Year 1996, PUB. L. No. 104-106, § 569, 110 Stat. 186 (1996) (§ 569(b)(1) to be codified at 10 U.S.C. §§ 1501-1513) [hereinafter sections of 569(b)(1) will be referred to by their title 10, United States Code section designations; non-codified sections of the public law will be referred to as sections of the NDAA for FY96].

section proposes changes to the new law that are necessary to clarify its meaning, and provide realistic and practical procedures to improve the military's personnel accounting system.

II. The New Law on Accounting for Missing Persons²⁴

The new law details a comprehensive system of accounting for missing service members and certain civilians. Reflecting the importance of this issue, the law requires the Secretary of Defense to establish within the Office of the Secretary of Defense an office having responsibility for policy, control and oversight of the entire missing persons program.²⁵

²⁴ *Id.*

²⁵ 10 U.S.C. § 1501(a)(1). The Senate and House conferees intended this office "to have a broad range of responsibilities that include those of all the individual offices that currently have responsibilities for POW/MIA matters." In addition:

The conferees expect that the Secretary of Defense will organize this new office to serve as the single focal point in the Department of Defense for POW/MIA matters and consolidate the formulation and oversight of search, rescue, escape and evasion and accountability policies. The conferees further expect that the Secretary of Defense will make every effort to ensure a close working relationship with the national intelligence agencies.

H.R. CONF. REP. NO. 450, *supra* note 18, at 801.

The office also is responsible for coordinating with other Department of Defense offices and all departments and agencies of the Federal Government. 10 U.S.C. § 1501(a)(1)-(2). In addition, the new law requires the Secretary of Transportation to designate an officer of the Department of Transportation to have responsibility within that department for matters relating to missing Coast Guard members. *Id.* § 1510(a).

Additionally, the Department of Defense must establish uniform policies throughout the Department for personnel recovery²⁶ and for determining a person's status.²⁷

To understand the new rules, and the controversy surrounding their enactment, it is first necessary to review the law itself. Only after such a review can one fully appreciate the law's impact on the Department of Defense and its ability to exercise discretion in accounting for persons during hostile actions. For the judge advocate and civilian attorney, in addition, such a review will make clear that counsel must be thoroughly versed in the law's detailed investigative requirements to assist in the accounting process.

A. *Purpose and Applicability*

²⁶ 10 U.S.C. § 1501(a)(3). Personnel recovery includes search, rescue, escape and evasion. *Id.*

²⁷ *Id.* § 1501(b)(1). The law also requires the systematic, comprehensive, and timely collection, analysis, review, dissemination and periodic update of information related to missing persons. *Id.* § 1501(b)(1)(B). Moreover, the Secretary of Defense must prescribe these procedures in a single directive applicable to all elements of the Department of Defense. *Id.* § 1501(b)(3). The Secretary of Transportation also must prescribe procedures similar to those required of the Secretary of Defense. *Id.* § 1510(b). In addition, the Secretary of Defense may delegate any responsibility under the law to the Service Secretary. *Id.* § 1501(b)(2). Also, the Secretary of Defense has the authority to provide for extensions, on a case-by-case basis, of any time limit prescribed by the law. *Id.* § 1501(b)(4).

The purpose of the new law is to ensure that an individual "who becomes missing or unaccounted for is ultimately accounted for . . . and, as a general rule, is not declared dead solely because of the passage of time."²⁸ The law applies to service members on active duty who become involuntarily absent only as a result of a hostile action, or under circumstances suggesting that the absence resulted from a hostile action. The law also applies to civilian employees of the Department of Defense, and employees of Department of Defense contractors, who serve with or accompany the Armed Forces in the field and become involuntarily absent under similar circumstances.²⁹

B. *Beneficiaries*

The law entitles particular individuals to certain rights and benefits because of their relationship to the missing person. These persons include the "primary next of kin" and

²⁸ The NDAA for FY96, *supra* note 23, § 569(a).

²⁹ 10 U.S.C. § 1501(c). As originally introduced by Senator Dole, The Missing Service Personnel Act of 1995 applied to all federal government employees. S. 256, *supra* note 2, § 3(a). Instead, the NDAA for FY96, *supra* note 23, § 569(e), requires the Secretary of State to conduct a comprehensive study of current personnel accounting procedures for federal government employees (other than employees of the Department of Defense covered by the new law) to determine whether those procedures may be improved. The law also requires the Secretary of State to submit to the Senate Committee on Armed Services and the House National Security Committee a report on the study within one year after the date of the enactment of the NDAA for FY96 on February 10, 1996. *Id.* § 569(e)(4).

"other members of the immediate family." The missing person's primary next of kin is the individual authorized by law to direct disposition of the person's remains, including a spouse, a blood relative, an adoptive relative, or a person standing in loco parentis to the missing person.³⁰ "Other members of the immediate family" include children, parents and siblings.³¹

³⁰ 10 U.S.C. § 1513(4) defines "primary next of kin" to mean the individual authorized to direct disposition of the person's remains under 10 U.S.C. § 1482(c) (1983). Section 1482(c) provides:

Only the following persons may be designated to direct disposition of the remains of a decedent covered by this chapter:

- (1) The surviving spouse of the decedent.
- (2) Blood relatives of the decedent.
- (3) Adoptive relatives of the decedent.
- (4) If no person covered by clauses (1)-(3) can be found, a person standing in loco parentis to the decedent.

In addition, the new law allows the primary next of kin to designate another individual to act on his or her behalf as primary next of kin. The Secretary concerned must treat this designated individual as if that individual were the primary next of kin. The primary next of kin may revoke the designation at any time. *Id.* § 1501(d).

³¹ 10 U.S.C. § 1513(5) defines "immediate family member" to mean:

- (a) The spouse of the person.
- (b) A natural child, adopted child, stepchild, or illegitimate child (if acknowledged by the person or parenthood has been established by a court of competent jurisdiction) of the person except that if such child has not attained the age of 18 years, the term means a surviving parent or legal guardian of such child.
- (c) A biological parent of the person, unless legal custody of the person by the parent has been previously terminated by reason of a court decree or otherwise

The law further requires all service members, upon enlistment or appointment, to specify in writing the person(s), if any, whom the service members wish to receive information on their whereabouts and status. This person, called the "previously designated person," must be someone other than a service member's primary next of kin or immediate family member. The Service Secretary must periodically, and whenever the service member is deployed as part of a contingency operation, require the member to reconfirm or modify the previously designated person.³²

under law and not restored.

(d) A brother or sister of the person, if such brother or sister has attained the age of 18 years.

(e) Any other blood relative or adoptive relative of the person, if such relative was given sole legal custody of the person by a court decree or otherwise under law before the person attained the age of 18 years and such custody was not subsequently terminated before that time.

³² *Id.* § 1513(6) defines a "previously designated person" to mean "a person designated by the missing person under section 655 of title 10, United States Code." The NDAA for FY96, *supra* note 23, § 569(d) amends chapter 37 of title 10, United States Code by adding section 655, entitled "Designation of persons having interest in status of a missing member." This new section provides:

(a) The Secretary concerned shall, upon the enlistment or appointment of a person in the armed forces, require that the person specify in writing the person or persons, if any, other than the person's primary next of kin or immediate family, to whom information on the whereabouts and status of the member shall be provided if such whereabouts and status are investigated under chapter 76 of this title [the new law]. The Secretary shall periodically, and whenever the member is deployed as part of a contingency operation or in

C. *Pay and Allowances*

The law provides for the payment of pay and allowances to all persons in a missing status or declared dead and later found alive and returned to the control of the United States, except those subsequently determined to have been absent without leave or a deserter.³³ Therefore, once placed in a missing status, a person continues to accrue pay and allowances until that status is formally changed by the Service Secretary. The law also amends provisions of the Missing Persons Act³⁴ by including therein persons placed in a missing status under the new law.³⁵ As a result, a missing person's dependents may receive allotments of the missing person's pay and allowances during the period he is in a missing status under the new law.³⁶

D. *Immediate Commander's Initial Report*

other circumstances specified by the Secretary, require that such designation be reconfirmed, or modified, by the member.

(b) The Secretary concerned shall, upon the request of a member, permit the member to revise the person or persons specified by the member under subsection (a) at any time. Any such revision shall be in writing.

³³ 10 U.S.C. § 1511(a).

³⁴ 37 U.S.C. §§ 551-559 (1988 & Supp. 1995).

³⁵ The NDAA for FY96, *supra* note 23, § 569(c).

³⁶ 37 U.S.C. 553 (1988 & Supp. 1995), *amended* by the NDAA for FY96, *supra* note 23, § 569(c)(3).

The law requires the immediate commander³⁷ to conduct the first inquiry into the missing person's whereabouts. The commander must conduct this inquiry, called a preliminary assessment, any time the commander receives information that the whereabouts of a person covered by the law is uncertain and that the person is, or may be, involuntarily absent as a result of a hostile action. If the commander decides that the person is missing, the commander must recommend that the person be placed in a "missing status."³⁸ To be placed in a "missing status," a person must be absent in one of the following categories: missing, missing in action, captured, beleaguered, besieged, interned in a foreign country, or detained in a foreign country against that person's will.³⁹

Once the immediate commander decides that the person should be placed in a missing status, he must forward a report containing that recommendation to the Theater Component Commander having jurisdiction over the missing person.⁴⁰ Implicitly, then, if the immediate commander decides that the

³⁷ See *id.* § 1502(a) (defining "immediate commander" as "the commander of the unit, facility, or area to or in which the person is assigned").

³⁸ *Id.* § 1502(a).

³⁹ *Id.* § 1513(2).

⁴⁰ *Id.* § 1502(a). This section requires that the immediate commander transmit the report within 48 hours from receipt of the initial information that the person's whereabouts is unknown.

person's absence does not fit one of the missing status categories, the law does not require the commander to submit a report to the Theater Component Commander. For example, the commander may decide that the person is voluntarily absent, such as absent without leave, or that the person is deceased.

No later than fourteen days after the Theater Component Commander receives the immediate commander's report, he must forward it to the Secretary of Defense or the Service Secretary in accordance with Department of Defense procedures.⁴¹ The Theater Component Commander must provide a certification with the report that he is taking "all necessary actions" and using "all appropriate assets" to resolve the person's status.⁴² The law does not require, however, that the Theater Component Commander make any recommendation as to the status of the missing person.

E. The Secretary's Initial Determination of Status

No later than ten days after receiving the immediate commander's recommendation through the Theater Component Commander, the Service Secretary must appoint a board to conduct an inquiry into the person's whereabouts.⁴³ If more

⁴¹ *Id.* § 1501(b). The law defines the "Theater Component Commander" to mean, "with respect to any of the combatant commands, an officer of any of the armed forces who (A) is commander of all forces of that armed force assigned to that combatant command, and (B) is directly subordinate to the commander of the combatant command." *Id.* § 1513(8).

⁴² *Id.* § 1502(b).

⁴³ *Id.* § 1503(a).

than one person's status is related, one board may inquire into the whereabouts of all such persons.⁴⁴

1. *Board Composition and Mission*--The board must be composed of at least one individual who has experience and understanding in military operations similar to those in which the person disappeared. The board member must be a military officer, in the case of a missing service member, or a civilian, in the case of a missing civilian employee. The individual must also possess a security clearance that affords him access to all information relating to the whereabouts of the person.⁴⁵

This board must "collect, develop, and investigate all facts and evidence" relating to the person's status,⁴⁶ including actions taken to find the person,⁴⁷ and must maintain a record of its proceedings.⁴⁸ Then, the board must analyze the facts and evidence, make findings based on that

⁴⁴ *Id.* § 1503(b).

⁴⁵ *Id.* § 1503(c)(1)-(3).

⁴⁶ *Id.* § 1503(d)(1).

⁴⁷ *Id.* § 1503(e)(2).

⁴⁸ *Id.* 1503(e)(3). See also *id.* § 1503(e)(1) (specifically requiring the board to "collect, record, and safeguard all facts, documents, statements, photographs, tapes, messages, maps, sketches, reports, and other information (whether classified or unclassified) . . .").

analysis, and "draw conclusions" as to the whereabouts and status of the absent person.⁴⁹

2. *Assignment of Attorneys*--The Service Secretary must assign to the board a judge advocate, or a civilian attorney, to provide "legal counsel." This attorney must have "expertise" in the law relating to missing persons, including death determinations and rights of family members and dependents.⁵⁰ A point of controversy is the additional requirement that the Secretary appoint a "missing person's counsel" to represent the missing person. If the inquiry involves two or more individuals, a single attorney may represent them all.⁵¹ This attorney represents only the interest of the missing individual, not any member of that individual's family or other interested parties.⁵² The missing person's counsel must be qualified under Article 27(b) of the Uniform Code of Military Justice⁵³ and have a security clearance affording the counsel access to *all* information relating to the whereabouts of the person. Similar to the counsel appointed to advise the board, the missing person's

⁴⁹ *Id.* § 1503(d)(3).

⁵⁰ *Id.* § 1503(c)(4).

⁵¹ *Id.* § 1503(f)(1).

⁵² *Id.*

⁵³ UCMJ art. 27(b) (1988).

counsel also must have "expertise" in the law relating to missing persons.⁵⁴

The board of inquiry must ensure that the missing person's counsel has complete access to the board proceedings, including all information considered by the board. In addition, the counsel must observe all official activities of the board and may question witnesses before the board.⁵⁵ The law also requires that the missing person's counsel assume some duties ordinarily those of the attorney appointed to advise an administrative board. For example, the counsel must "assist the board" in ensuring appropriate information is "collected, logged, filed and safeguarded."⁵⁶ Also, the missing person's counsel must monitor the board deliberations.⁵⁷ Finally, the missing person's counsel must submit a written review of the board report to the Service Secretary.⁵⁸

3. *Access to Proceedings*--All board proceedings are closed to the public, including the person's primary next of

⁵⁴ 10 U.S.C. § 1503(f)(2).

⁵⁵ *Id.* § 1503(f)(3).

⁵⁶ *Id.* § 1503(f)(4).

⁵⁷ *Id.* § 1503(f)(3)(D).

⁵⁸ *Id.* § 1503(f)(5).

kin, other members of the immediate family, and any other previously designated person.⁵⁹

4. *Board Recommendation and Report*--The board must make a recommendation to the Service Secretary that the person be placed in a missing status, or declared to have deserted, to be absent without leave, or to be dead.⁶⁰ To declare a person dead, the board must find: (a) "credible evidence" suggesting that the person is dead; (b) "no credible evidence" suggesting that the person is alive; and (c) that United States representatives have made a complete search of the area where the person was last seen and have examined the records of the government or entity with control of that area, unless after making a good faith effort the representatives are not granted such access.⁶¹ Additionally, if the board recommends that a person be declared dead, the law requires the board to include in its report: (a) a detailed description of the location where death occurred and the location of the body, if recovered; (b) a statement of the date of death; and (c) if the body was not visually identifiable, a certification from a "practitioner of an appropriate forensic science" that the body is that of the missing person.⁶²

⁵⁹ *Id.* § 1503 (g) .

⁶⁰ *Id.* § 1503 (d) (4) .

⁶¹ *Id.* § 1507 (a) (1) - (3) .

⁶² *Id.* § 1507 (b) (1) - (4) .

The board must then submit to the Service Secretary a detailed board report not later than thirty days after the board is appointed.⁶³ The board report must include the facts and evidence considered, the recommendation, and a statement as to whether the board used classified information in forming its recommendations.⁶⁴

5. *Action by the Service Secretary*--After receipt of the board recommendation, the Service Secretary must make one of four determinations: he may declare the person to be missing,⁶⁵ to be absent without leave, to have deserted, or to be dead.⁶⁶ The law prohibits the Secretary from making a board report public until one year after the date the board of inquiry submitted its report.⁶⁷ As an exception, however, the Secretary must provide the primary next of kin, other members of the immediate family and any other previously designated person the board report, including the names of board members, and an unclassified summary of the immediate commander's report. The Secretary also must inform these individuals that

⁶³ *Id.* § 1507(h) (2) .

⁶⁴ *Id.* § 1503(h) (1) .

⁶⁵ If the Secretary determines a person to be "missing," that person enters a "missing status," that is, missing, missing in action, interned in a foreign country, captured, beleaguered, besieged, or detained in a foreign country against that person's will. *Id.* § 1513(1) - (2) .

⁶⁶ *Id.* § 1503(I) (3) .

⁶⁷ *Id.* § 1503(h) (3) .

the United States will conduct a subsequent review on or about one year after the date of the first official notice of the disappearance of the person, unless information is available sooner that may result in a change in status.⁶⁸

F. *Subsequent Boards of Inquiry*

The Service Secretary must also conduct a "subsequent board" into the whereabouts of a person,⁶⁹ which may combine its inquiries if the absence of two or more persons is factually related.⁷⁰ A subsequent board is required under two circumstances.

First, the Secretary must appoint a board if, within one year of the date the immediate commander transmitted his report to the Theater Component Commander, information becomes available that may change a person's status.⁷¹ Persons whose status are subject to review under this requirement are those who were the subject of an initial determination by the Secretary concerned.⁷² Consequently, the Secretary must convene a subsequent board based on new information regarding any person who was the subject of an initial board of inquiry, not just those whom the Secretary placed in a missing status.

⁶⁸ *Id.* § 1503(j).

⁶⁹ *Id.* § 1504(b).

⁷⁰ *Id.* § 1504(c).

⁷¹ *Id.* § 1504(a).

⁷² *Id.*

Second, the Secretary must appoint a board to inquire "into the whereabouts and status of a missing person" on or about one year after the date the immediate commander transmitted his report to the Theater Component Commander.⁷³ Arguably, because the law uses the term "missing person," this provision may be interpreted as applying only to individuals placed in a missing status. Two other provisions indicate, however, that the law requires a Secretary to conduct this one-year inquiry into the status of any person who was the subject of an initial determination. First, the subsequent board of inquiry is not limited to those in a missing status if additional information is discovered within the one-year time period. There is no logical reason to differentiate between these two board requirements by entitling any person subject to an initial determination to a board in one instance, but not in the other instance. Next, the Secretary must inform certain family members of all individuals who were the subject of an initial determination, not just family members of those placed in a missing status, "that the United States will conduct a subsequent inquiry . . . on or about one year after the date of the first official notice of the disappearance of that person."⁷⁴ Therefore, the better interpretation of this provision is that the law requires a board at the one-year period for all individuals who were the

⁷³ *Id.* § 1504 (b) .

⁷⁴ *Id.* § 1503 (j) (2) .

subject of an initial determination. In addition, the law contains no exception to the requirement to appoint a board on or about the one-year time period. Consequently, the law appears to require the one year subsequent inquiry, even if the Secretary has recently conducted such a board based on the receipt of additional information.

1. *Board Composition and Mission*--Although the initial board may be composed of only one member, the subsequent boards of inquiry must have at least three members, including a board president.⁷⁵ Only the president is required to have a security clearance that affords access to all information relating to the person.⁷⁶ Additionally, one board member must have an occupational specialty similar to the person's,⁷⁷ and have an understanding and expertise in activities similar to those in which the person disappeared.⁷⁸

⁷⁵ *Id.* § 1504(d)(1)-(2). If the board is inquiring into only the status of service members, the law requires the board to be composed of officers in the grade of major or lieutenant commander, or above. If the case is about civilians, only, the board must be composed of not less than three Department of Defense employees in the grade of GS-13 or higher; service members also may serve on these boards. If the board is considering both service members and civilians, the board must consist of at least one officer and one employee of the Department of Defense. The remaining board members should be in a ratio roughly proportional to the ratio of the number of service members and civilians being considered. *Id.* § 1504(d)(1).

⁷⁶ *Id.* § 1504(d)(2).

⁷⁷ *Id.* § 1504(d)(3)(A).

⁷⁸ *Id.* § 1504(d)(3)(B).

The subsequent board of inquiry must review all previous reports,⁷⁹ collect and evaluate any information on the whereabouts and status of the person that has become available since the original status determination,⁸⁰ and "draw conclusions" as to the status of the person.⁸¹ In addition, the board may secure directly from any agency of the United States all information that it considers necessary to conduct the proceedings.⁸² In releasing the information, the agency head must declassify classified information, or release the information in a manner not requiring the removal of markings indicating the classified nature of the information. If the agency cannot remove or summarize the classified information, the agency must make the classified information available to the board president and the counsel for the missing person, only.⁸³

2. *Assignment of Attorneys*--The Secretary must assign a judge advocate, or appoint a civilian attorney, with the same qualifications as those for the original board of inquiry.

⁷⁹ *Id.* § 1504 (e) (1) .

⁸⁰ *Id.* § 1504 (e) (2) .

⁸¹ *Id.* § 1504 (e) (3) .

⁸² *Id.* § 1504 (h) (1) .

⁸³ *Id.* § 1504 (h) (2) , (3) (A) .

Again, the counsel is to provide legal advice to the board.⁸⁴ The Secretary must also appoint a "counsel for the missing person" with the same qualifications and duties as specified in the original board of inquiry.⁸⁵

3. *Access to the Public*--Unlike the original board of inquiry, the primary next of kin, other members of the immediate family, and any other previously designated person may attend the subsequent board proceedings.⁸⁶ Board proceedings at which classified information is discussed, however, are closed to persons not having appropriate security clearances.⁸⁷ Additionally, the primary next of kin and the previously designated person may attend the board with private

⁸⁴ *Id.* § 1504(d)(4). See also *id.* § 1503(c)(4) and discussion *supra* part II.E.(2) (regarding the qualifications of the counsel to the board).

⁸⁵ *Id.* § 1504(f). See also *id.* § 1503(f) and discussion *supra* part II.E.2. (regarding the qualifications of the missing person's counsel).

⁸⁶ *Id.* § 1504(g). At least 60 days prior to the proceedings, the Secretary must take reasonable action to notify these individuals that they may attend the proceedings. *Id.* § 1504(g)(2). Moreover, an individual must notify the Secretary of his intent to attend the board proceedings at least 21 days prior to the proceedings. *Id.* § 1504(g)(3). Additionally, these individuals may not be reimbursed by the United States for any costs incurred in attending such proceedings, including travel, lodging, meals, local transportation, legal fees, transcription costs, and witness expenses. *Id.* § 1504(g)(6).

⁸⁷ *Id.* § 1504(h)(3)(B).

counsel.⁸⁸ These individuals and other members of the immediate family must have access to the person's personnel file, unclassified reports of prior boards, and other information.⁸⁹ Additionally, all of these individuals may present information at the board proceedings and may submit written objections to a board recommendation.⁹⁰

4. *Board Recommendation and Report*--The board must recommend whether the person's status be continued or changed,⁹¹ but may not recommend that a person be declared dead unless the board makes specific findings, similar to those required of an original board of inquiry.⁹² Then, the board must forward a report to the Secretary containing its findings, conclusions, and recommendations on status.⁹³

5. *Action by the Service Secretary*--No later than thirty days after receiving the report, the Secretary must review the

⁸⁸ *Id.* § 1504(g)(4)(A). See *supra* notes 30 and 32 for the definition of "primary next of kin" and "previously designated person," respectively.

⁸⁹ *Id.* § 1504(g)(4)(B).

⁹⁰ *Id.* § 1504(g)(4)(C)-(D). The board must attach these objections to the board recommendation. *Id.* § 1504(g)(5)(B).

⁹¹ *Id.* § 1504(e)(4).

⁹² *Id.* § 1504(i)(2). See also *id.* § 1507 and discussion *supra* part II.E.4 (regarding the standard of proof necessary to declare a person to be dead).

⁹³ *Id.* § 1504(e)(5), (i)(1). The report also must include the evidence considered by the board. *Id.* § 1504(j).

board report, the report submitted by counsel for the missing person, and any objections to the report.⁹⁴ After determining the report to be complete and free of errors, the Secretary must make a determination concerning the missing person's status.⁹⁵ Additionally, no later than sixty days after making a determination, the Secretary must provide the board report to the primary next of kin, other members of the immediate family and other previously designated persons.⁹⁶ If the Secretary continues the person in a missing status, the Secretary must notify these individuals that the United States will conduct further reviews into the whereabouts of the missing person.⁹⁷

G. *Further Reviews*

Further review boards must be appointed to inquire into the whereabouts of any person in a missing status as a result of a subsequent board of inquiry.⁹⁸ These further review boards are governed by the same procedures as those of the subsequent boards of inquiry, discussed above.⁹⁹ The

⁹⁴ *Id.* § 1504(k)(1).

⁹⁵ *Id.* § 1504(k)(3).

⁹⁶ *Id.* § 1504(l)(1).

⁹⁷ *Id.* § 1504(l)(2).

⁹⁸ *Id.* § 1505(a).

⁹⁹ *Id.* § 1505(d).

Secretary must appoint a further review board under two conditions.

First, if the missing person "was last known to be alive" or "was last suspected of being alive," a board is required on or about three years after the date of the initial report of the disappearance and no later than every three years thereafter.¹⁰⁰ A board is not required, however, after thirty years have passed from the initial report of the disappearance, or if the Secretary accounts for the person.¹⁰¹

Second, if at any time the Secretary receives information that may result in a change in status of the missing person, the Secretary must appointed a further review board.¹⁰² Unlike the subsequent board of inquiry, the law specifically provides that if the Secretary appoints a further review board under these circumstances, the time for the next three-year further review board is determined from the date of the receipt of that information.¹⁰³

H. *Discovery of Additional Evidence*

¹⁰⁰ *Id.* § 1505(b).

¹⁰¹ *Id.* § 1505(b)(3). The law defines the term "accounted for," with respect to a person in a missing status, to mean that the person is returned alive to United States control, the person's remains are recovered, or credible evidence exists to support another determination of the person's status. *Id.* § 1513(3).

¹⁰² *Id.* § 1505(b)(2).

¹⁰³ *Id.*

All government agencies, and specifically United States intelligence agencies, must forward to the Defense Department office established by the new law all information that may relate to a missing person.¹⁰⁴ The Secretary must add this information to the missing person's case file and must notify the counsel for the missing person, the primary next of kin, and any previously designated person of the existence of the information.¹⁰⁵ The head of the Defense office established by the law, with the advice of the missing person's counsel, must determine whether the information is significant enough to require a further review board.¹⁰⁶

I. *Personnel Files*

The law also provides comprehensive requirements on maintaining a missing person's personnel file. The Service Secretary must, "to the maximum extent practicable," ensure that personnel files contain all information possessed by the United States relating to the person's whereabouts.¹⁰⁷ The only exceptions pertain to classified information, the Privacy Act,¹⁰⁸ and confidential debriefing reports.¹⁰⁹

¹⁰⁴ *Id.* § 1505(c)(1).

¹⁰⁵ *Id.* § 1505(c)(2).

¹⁰⁶ *Id.* § 1505(c)(3).

¹⁰⁷ 10 U.S.C. § 1506(a). In addition, the law provides that any person who wrongfully withholds such information shall be fined as provided in title 18, United States Code, or imprisoned not more than one year, or both. *Id.* § 1506(e).

¹⁰⁸ 5 U.S.C. § 552a (1977 & Supp. 1995).

J. *Special Interest Cases*

Of some controversy are the law's special rules for those service members and civilian employees who are "unaccounted for" as a result of a hostile action during the Korean Conflict, the Indochina War era, and the Cold War era.¹¹⁰ The

¹⁰⁹ 10 U.S.C. § 1506(b)-(d). The Secretary concerned may withhold classified information from a personnel file. The file must, however, contain a notice that the withheld information exists and a notice of the date of the most recent review of that information. *Id.* § 1506(b). Additionally, the Secretary must maintain the file in accordance with the Privacy Act. Upon request, the Secretary must, however, make the personnel file available to the primary next of kin, the other members of the immediate family, or any other previously designated person. *Id.* § 1506(c). Finally, the Secretary may withhold all debriefing reports provided by missing persons returned to United States control that were obtained on a promise of confidentiality. If such a report contains non-derogatory information about the whereabouts of a missing person, the Secretary must prepare an extract of that information. After review by the source, the Secretary must place the extract in the missing person's personnel file. If the Secretary withholds a debriefing report, the missing person's personnel file must contain a notice that the information exists. *Id.* § 1506(d).

¹¹⁰ *Id.* § 1509. With respect to the Korean Conflict, the law includes any unaccounted for person who was classified as a prisoner of war or as missing in action during the Korean Conflict who was known or suspected to be alive at the end of the conflict, or was classified as missing in action and whose capture was possible. *Id.* § 1509(b)(1). The term "Korean Conflict" means "a period beginning on June 27, 1950, and ending on January 31, 1955." *Id.* § 1509(d)(1). The law also includes any unaccounted for person who was classified as a prisoner of war or missing in action during the Indochina War Era. *Id.* § 1509(b)(3). The term "Indochina War Era" means "the period beginning on July 8, 1959, and ending on May 15, 1975." *Id.* § 1509(d)(3). Finally, the law applies to any

law requires any United States intelligence agency, any Department of Defense agency, the primary next of kin, other members of the immediate family, and other previously designated persons, to forward to the Secretary of Defense any new information that could change the status of such a person with a request to conduct an evaluation of the information.¹¹¹ The Secretary of Defense must then determine whether the information is significant enough to require a review board. If so, the Service Secretary must conduct the inquiry in accordance with the provisions for a further review board.¹¹²

K. *Judicial Review*

Finally, the law contains another controversial provision allowing judicial review in a United States district court.¹¹³ Only the primary next of kin or previously designated person

unaccounted for person who was engaged in intelligence operations during the Cold War. *Id.* § 1509(b)(2). The term "Cold War" means "the period beginning on September 2, 1945 and ending on August 21, 1991." *Id.* § 1509(d)(2).

¹¹¹ *Id.* § 1509(a).

¹¹² *Id.* The case of a person initially classified as "killed in action/body not recovered" [hereinafter KIA/BNR], however, may be reviewed only if the new information is "compelling." *Id.* § 1509(c). The House and Senate conferees explained that "compelling evidence" was meant to include such evidence as "post-incident letters written by the supposedly-dead person while in captivity or United States or other archival evidence that directly contradicts earlier United States Government determinations." H.R. CONF. REP. NO. 450, *supra* note 18, at 801.

¹¹³ *Id.* § 1508(a).

may maintain an action in district court. Also, the law authorizes judicial review only for a finding of death by a subsequent or further review board, or a finding by a board that confirms that a missing person formerly declared dead is in fact dead.¹¹⁴ Additionally, the law authorizes judicial review only on the basis that there is information that could affect the missing person's status "that was not adequately considered" by the board concerned.¹¹⁵

This summary demonstrates that Congress has provided a level of detailed management of Defense Department operations found in few other codified laws on the military.¹¹⁶ To explain why some in Congress believed it necessary to enact such detailed legislation on accounting for missing persons, the next two sections review the history of military personnel accounting, including the law and implementing Department of Defense procedures.

III. Prior Laws Relating to Missing Persons

From our country's earliest history, Congress has enacted laws providing for missing service members. Significantly different from the new law, however, these laws reflect that Congress was concerned not with providing detailed accounting requirements, but with continuing payment of pay and

¹¹⁴ *Id.* § 1508(b).

¹¹⁵ *Id.* § 1508(a).

¹¹⁶ See title 10, United States Code (Armed Forces).

allowances to missing individuals and their families. This section explores these laws, including the Missing Persons Act, now codified at chapter 10, title 37, United States Code.

A. *Early American Laws on Payments to Missing Service Members*

Congress enacted the first law on payments to missing service members in 1799. This law provided payments of pay and wages to seamen who were captured by the enemy until they returned to United States control or until they died, whichever came first.¹¹⁷ Congress amended this provision one year later in 1800, expanding those covered under the act from seamen who were taken by "the enemy," to those taken by "an enemy."¹¹⁸

¹¹⁷ Act of March 2, 1799, ch. 24, § 4, 1 Stat. 709, 714-15, repealed by Act of April 23, 1800, ch. 33, § 4, 2 Stat. 45, 52, provided:

That all the pay and wages of such officers and seamen of any of the ships of the United States as are taken by the enemy, and upon inquiry at a court martial, shall appear by the sentence of the said court, to have done their utmost to defend the ship or ships, and since the taking thereof, to have behaved themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders, herein before established, shall continue and go on as aforesaid, until they be exchanged and discharged, or until they shall die, whichever may first happen: *Provided always*, that persons flying from justice shall be tried and punished for so doing.

¹¹⁸ Act of April 23, 1800, ch. 33, § 4, 2 Stat. 45, 52, provided:

That all the pay and emoluments of such officers and men, of any of the ships or vessels of the United States taken by an enemy, who shall appear by the sentence of a court martial, or otherwise, to have done their utmost to preserve and defend their ship

The Court of Claims used this seemingly insignificant change to find that the law applied to an American seaman impressed into the British Navy during a period when the United States was not at war with Great Britain.¹¹⁹ The court

or vessel, and, after the taking thereof, have behaved themselves obediently to their superiors, agreeably to the discipline of the navy, shall go on and be paid them until their death, exchange, or discharge.

Congress re-enacted the Navy statute without substantive changes in 1862, in Act of July 17, 1862, ch. 204, § 15, 12 Stat. 600, 609. The new law provided:

The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death.

¹¹⁹ See *Straughan's Case*, 1 Ct. Cl. 324 (1865). This case involved an action by the widow of Seaman John Straughan to recover his pay and rations for the five-year period that he was held by the British. In 1807, Seaman Straughan and three other Americans were serving on the American frigate, the *Chesapeake*, when it was fired upon by the British man-o-war, the *Leopard*. After the *Chesapeake* surrendered, the British seized the four men because the British considered them to be deserters, as they had escaped from British men-o-war after being forcibly impressed into service thereon. After five years of diplomatic wrangling, the British returned two of the four men, including Straughan. The other two men never returned; one died in captivity and the other was hung as a deserter.

Initially, the Attorney General disallowed Mrs. Straughan's claim, finding that Britain was not "an enemy" within the meaning of the law. 5 Op. Att'y Gen. 185 (1849). The Court of Claims disagreed. They found that when a warship deliberately fires on the flag of another government, it is an act of war. *Straughan's Case*, 1 Ct. Cl. at 329.

noted that when Congress changed the language of the 1799 law from "the enemy" to "an enemy" in 1800, it must have done so for some legislative purpose. That purpose, the court found, was to provide for engagements with pirates, then common in American seas, and to provide for such cases as the one before it, where an American ship had been fired upon and forced to surrender to a British man-o-war.¹²⁰

Congress did not pass a similar law for the Army until 1814. That law also provided for payment of pay and allowances to soldiers who were captured by the enemy. Additionally, the law authorized such payments to continue notwithstanding the expiration of a soldier's term of service while in captivity.¹²¹ During the American Civil War, these laws allowed the Congress to appropriate routinely money to

¹²⁰ *Straughan's Case*, 1 Ct. Cl. at 330.

¹²¹ Act of March 30, 1814, ch. 37, § 14, 3 Stat. 113, 115, provided:

That every non-commissioned officer and private of the Army, or officer, non-commissioned officer, and private of any militia or volunteer corps, in the service of the United States, who has been, or who may be captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled whilst in the actual service of the United States: *Provided*, That nothing herein contained shall be construed to entitle any prisoner of war, of the militia, to the pay and compensation herein provided after the date of his parole, other than the traveling expenses allowed by law.

pay the salaries of prisoners of war held by the Confederacy.¹²² In addition, in 1862, Congress authorized the Secretary of War to obtain from these prisoners of war allotments of their pay for families or friends.¹²³

One question that arose during this time was whether the law required payments to continue after the Army dismissed an officer who was a prisoner of war for the offense of being captured. In 1868, the Court of Claims decided that the law required payments to continue under these circumstances in *Lieutenant Jones' Case*.¹²⁴ Prior to that decision, the Army denied such payments after discharging for being captured an

¹²² In 1862, Congress appropriated \$3,373,728 "for supplies, transportation, and care of prisoners of war," Act of July 5, 1862, ch. 133, § 1, 12 Stat. 505, 507; in 1863, for the same purpose, \$1,500,000, Act of February 9, 1863, ch. 25, § 1, 12 Stat. 642, 644; in 1864, \$900,000, Act of June 15, 1864, ch. 124, § 128, 13 Stat. 126, 128; and in 1865, \$1,000,000, Act of March 3, 1865, ch. 81, § 1, 13 Stat. 495, 496. Also, in 1866, Congress by joint resolution provided for the commutation of rations of prisoners of war, and payment thereof to the prisoner upon his release, Act of July 25, 1866, res. 74, 14 Stat. 364. Further, in 1867, Congress authorized payments to the service member's heirs in case of his death, either before or after his return, Act of March 2, 1867, ch. 145, § 3, 14 Stat. 422, 423.

¹²³ Act of February 6, 1862, res. 9, 12 Stat. 613.

¹²⁴ 4 Ct. Cl. 197 (1868). During the American Civil War, the South had captured Lieutenant Jones and held him in a prisoner of war camp. After his release, Lieutenant Jones made a claim for his pay and allowances that accrued during his captivity. Because the Army had discharged him while in captivity for the offense of being captured, the Army denied his claim for the period after his discharge.

officer held as a prisoner of war. The Court of Claims found, however, that even though the War Department had the authority to dismiss an officer, the 1814 law allowed the officer to receive his pay notwithstanding the expiration of his term of service.¹²⁵

In 1874, Congress codified both the Army and Navy provisions at Revised Statutes, sections 1288 and 1575, respectively. Congress did not repeal these laws until 1962.¹²⁶

B. *The Missing Persons Act*¹²⁷

Not until the Second World War did Congress enact laws providing for payment of pay and allowances to missing service

¹²⁵ *Id.* at 203. The government had argued that this construction would lead to unworthy officers and soldiers receiving their pay after capture, even if they remained with and aided the enemy. The court rejected this argument, noting that the Articles of War provided authority for forfeiting the pay of such men; if Lieutenant Jones had been guilty of such an offense, he could have been convicted and punished, including the forfeiture of pay. The court further rejected the government's argument that an officer's "term of service" did not "expire" in the sense in which the terms were used in the statute when the Army dismissed an officer. *Id.* at 203-04.

¹²⁶ Act of September 7, 1962, PUB. L. No. 87-649, § 14, 76 Stat. 451, 498.

¹²⁷ Missing Persons Act, ch. 166, 56 Stat. 143 (1942) (current version at 37 U.S.C. §§ 551-559 (1988 & Supp. 1995) and 5 U.S.C. §§ 5561-5569 (1980 & Supp. 1995)). Congress amended the act in 1944 to provide that the act should be called the "Missing Persons Act." Act of July 1, 1944, ch. 371, sec. 7, § 19, 58 Stat. 679, 681.

members other than those known to have been captured by an enemy. Prior to this time, the War Department held a service member's pay and allowances, and stopped all allotments, when he was reported missing in action. In addition, as long as the service member remained missing, and not officially declared dead, the law did not allow the family to collect the six months' death gratuity.¹²⁸ As one would expect, this caused the person's family much financial hardship. In 1942, the Navy introduced legislation to assist in providing for the families of the growing number of personnel reported as missing in the European and Pacific Theaters. As a result, Congress enacted the Missing Persons Act, intended to be a temporary measure, addressing a missing person's pay and allowances, and his allotments.¹²⁹

1. *Applicability*--As originally enacted, the Missing Persons Act applied to commissioned and warrant officers, and enlisted members in the active service, and civilian officers and employees of federal departments when they were assigned for duty outside the continental United States or Alaska.¹³⁰

¹²⁸ H.R. REP. No. 1680, 77th Cong., 2d Sess. 3, 5 (1942), reprinted in Bell v. United States, 366 U.S. 393, 408 n.20 (1961).

¹²⁹ *Id.*

¹³⁰ Missing Persons Act, *supra* note 127, § 1(a) (current version at 37 U.S.C. § 552 (1988 & Supp. 1995) and 5 U.S.C. § 5561(2) (1980 & Supp. 1995)). The original act also applied to commissioned officers of the Coast and Geodetic Survey and the Public Health Service. *Id.* By Act of August 29, 1957, PUB. L. No. 85-217, sec. (b), § 2, 71 Stat. 491, Congress

The act covered all such persons who were missing, missing in action, interned in a neutral country, captured by an enemy, or beleaguered or besieged by enemy forces.¹³¹ It did not apply, however, to persons who were absent without authority.¹³²

2. *Pay and Allowances*--The act entitled service members and civilian employees in a missing status to receive, or to have credited to their accounts, the same pay and allowances to which they were entitled at the beginning of their absence, or may have become entitled to thereafter.¹³³ Additionally, as

amended the act to include service members performing full-time training duty, full-time duty, or inactive duty training. This amendment ensured that service members performing other types of duty would be entitled to the pay and allowances that they would have had, had they been on active duty at the time that they entered a missing status. S. REP. No. 970, 85th Cong., 1st Sess. (1957), reprinted in 1957 U.S.C.C.A.N. 1730-32. As currently codified at 37 U.S.C. § 552 (1988 & Supp. 1995) and 5 U.S.C. § 5561(2) (1980 & Supp. 1995), the Missing Persons Act applies to members of the uniformed service on active duty or performing inactive duty training and generally to an employee in an Executive agency or Military Department of the Federal government who is a citizen or national of the United States or an alien admitted to the United States for permanent residence.

¹³¹ Missing Persons Act, *supra* note 127, §§ 2, 14 (current version at 37 U.S.C. § 551(2) (1988) and 5 U.S.C. § 5561(5) (1980)).

¹³² *Id.* § 2 (current version at 37 U.S.C. § 552(c) (1988 & Supp. 1995) and 5 U.S.C. § 5562(c) (1980)).

¹³³ *Id.* (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C. § 5562(a) (1980)).

in the earlier laws providing for payments to prisoners of war, a service member's expiration of a term of service during his absence did not terminate the right to pay and allowances.¹³⁴

3. *Allotments*--The act also addressed allotments for the support of dependents. Generally, the Service Secretary (then called the "Department Head") could "direct the continuance, suspension, or resumption of payments" of such allotments.¹³⁵ The Secretary could take such action when justified "in the interest of the Government, or of the missing person, or of a dependent of the missing person."¹³⁶

As originally enacted, however, Congress intended payments of allotments to be temporary. The original Missing Persons Act allowed payments to continue for one year after the person first became missing, or until the Service Secretary officially declared the person dead, whichever came first.¹³⁷

¹³⁴ *Id.* (current version at 37 U.S.C. § 552(b) (1988 & Supp. 1995)).

¹³⁵ *Id.* § 4 (current version at 37 U.S.C. § 553 (1988 & Supp. 1995) and 5 U.S.C. § 5563 (1980) allows the Service Secretary to initiate, continue, discontinue, increase, decrease, suspend or resume payment of allotments from the pay and allowances of a missing person).

¹³⁶ *Id.* (current version at 37 U.S.C. § 553 (1988 & Supp. 1995) and 5 U.S.C. § 5563 (1980)). In addition, dependents could continue to receive an allotment, even if it expired while the service member was in a missing status. *Id.* § 3 (current version at 37 U.S.C. § 552 (1988 & Supp. 1995)).

¹³⁷ *Id.* § 3.

One exception was that if a Military Service received an official report that the person was alive and in enemy hands, beleaguered or besieged by enemy forces, or interned in a neutral country, payments continued until the Service received evidence that the person was dead or returned to Service control.¹³⁸ A short ten months after enactment, however, Congress amended the act to provide that allotments also were to continue beyond the initial twelve-month period when the Secretary decided to continue a person in a missing or missing in action status.¹³⁹

4. *Determinations of Death*--The Missing Persons Act provides two types of determinations of death: (1) an official report of death; and (2) a finding of death. As originally enacted, the Missing Persons Act did not provide any particular method or standard upon which to make a "finding of death," but left this matter entirely to the Secretary's discretion.¹⁴⁰ Congress quickly recognized, however, the need for an inquiry prior to making a finding of death. Therefore, the 1942 amendments to the Missing Persons Act changed the manner under which a Service Secretary could declare a missing person to be dead. The amendments required the Secretary to

¹³⁸ *Id.* §§ 3-4.

¹³⁹ Act of December 24, 1942, ch. 826, sec. 1, §§ 5-6, 56 Stat. 1092 (current version at 37 U.S.C. 553 (1988 & Supp. 1995) and 5 U.S.C. 5563 (1980)).

¹⁴⁰ Missing Persons Act, *supra* note 127, § 5.

review fully a case of a person who was missing or missing in action when the twelve-month period from the date of commencement of the absence was about to expire.¹⁴¹ Following this review, and after the expiration of twelve months from the beginning of the absence, the Secretary could direct that the person be continued in a status of missing or missing in action, if the person could reasonably be presumed to be living. Otherwise, the Secretary could make a finding of death.¹⁴² The amendment also made clear that the Service Secretaries must conduct additional inquiries "whenever warranted by information received or other circumstances."¹⁴³

Congress again amended the Missing Persons Act in 1944.¹⁴⁴ Most importantly, the amendments addressed more fully the circumstances under which a Military Service could make an

¹⁴¹ Act of December 24, 1942, *supra* note 139, sec. 1, § 5 (current version at 37 U.S.C. 555 (1988 & Supp. 1995) and 5 U.S.C. 5565 (1980)).

¹⁴² *Id.* The amendment also provided that when the Secretary concerned made a finding of death, the finding must include the date on which death was presumed to have occurred for the purposes of terminating pay and allowances, settling accounts, and paying death gratuities. The date of death must be the day following the day of expiration of an absence of 12 months, or in cases where the missing status was continued, a day determined by the Service Secretary. *Id.*

¹⁴³ *Id.*

¹⁴⁴ Act of July 1, 1944, ch. 371, 58 Stat. 679.

"official report of death" and a "finding of death."¹⁴⁵ First, the amendment authorized a Service Secretary to make an "official report of death" when he received information that established conclusively the death of a missing person.¹⁴⁶ According to the amendment, a Secretary's determination on this matter was conclusive. In addition, a Secretary could make an official report of death under these circumstances, even if he had previously taken action relating to death or other status of the person.¹⁴⁷

The 1944 amendments also provided a standard of proof that a Service Secretary must meet before making a "finding of death" after the twelve-month review. The Secretary concerned could make a finding of death whenever he decided that "information received, or a lapse of time without information . . . [established] a reasonable presumption that any person in a missing or other status is no longer alive."¹⁴⁸

¹⁴⁵ *Id.* sec. 5, § 9 (current version at 37 U.S.C. §§ 555, 556(b) (1988 & Supp. 1995) and 5 U.S.C. §§ 5565, 5566(b) (1980)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Congress also deleted the requirement for an "official report" from the enemy that a person was in a missing status. *Id.* sec. 2, § 2 (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C. § 5562(a) (1980)). Under the original act, entitlement to pay and allowances was dependent upon a person being "*officially reported as missing, missing in action, interned in a neutral country, or captured by an enemy [emphasis added].*" Missing Persons Act, *supra* note 127, § 2.

5. *Temporary Nature of the Original Act*--Except for federal income-tax purposes,¹⁴⁹ Congress originally enacted the Missing Persons Act to remain in effect from September 8, 1939, until twelve months after the termination of the war with Germany, Italy, and Japan.¹⁵⁰ By Joint Resolution, Congress designated the termination date of any state of war for purposes of the Missing Persons Act to be July 25, 1947.¹⁵¹ In June of 1948, however, Congress deleted this provision from the Joint Resolution, and made the Missing Persons Act

¹⁴⁹ See Missing Persons Act, *supra* note 127, § 13 (providing that a person in a missing status is not liable to pay any Federal income tax until the earliest of the fifteenth day of the third month following the month: (1) in which the person ceased to be a prisoner of war or detained by a foreign government . . . ; (2) in which the war with Germany, Italy, and Japan is terminated by Presidential Proclamation; or (3) an executor, administrator, or conservator of the estate of the person is appointed) (current version at 37 U.S.C. § 558 (1988) and 5 U.S.C. § 5568 (1980), provides that, generally, a Federal income tax return of, or the payment of Federal income tax by, a member in a missing status does not become due until the earlier of the fifteenth day of the third month following the month in which: (1) he ceased being in a missing status; or (2) an executor, administrator, or conservator of the estate of the taxpayer is appointed).

¹⁵⁰ *Id.* § 15, amended by Act of December 24, 1942, *supra* note 139, sec. 1, § 15 (providing that the act shall be effective until 12 months after the termination of the war with Germany, Italy, and Japan, "or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate").

¹⁵¹ Act of July 25, 1947, ch. 327, § 3, 61 Stat. 449, 451.

applicable to persons inducted into the armed forces under the Universal Military Training and Service Act of 1948.¹⁵²

Reflecting the temporary nature of the Missing Persons Act, Congress continued to extend the act in one-year increments from 1952 to 1957.¹⁵³ Finally, Congress eliminated the provision limiting the duration of the act in 1957.¹⁵⁴ The legislative history reflects that Congress made the act permanent in 1957 because of the size of American forces in many foreign countries at that time and the likelihood that "several military and civilian employees [would] continue to enter a missing status each year." Unless the act was permanent, Congress felt that "the dependents of persons

¹⁵² ch. 625, § 4(e), 62 Stat. 604, 608.

¹⁵³ See Act of July 3, 1952, ch. 570, § 1(a)(7), 66 Stat. 330, 331, amended by Act of March 31, 1953, ch. 13, 67 Stat. 18 (continuing the provisions of the Missing Persons Act until July 1, 1953); repealed by Act of April 4, 1953, ch. 17, § 2, 67 Stat. 20, 21 (providing that the termination date of the Missing Persons Act was February 1, 1954); repealed by Act of January 30, 1954, ch. 3, 68 Stat. 7 (providing that the termination date was July 1, 1955); repealed by Act of June 30, 1955, ch. 254, 69 Stat. 238 (providing that the termination date was July 1, 1956); repealed by Act of July 20, 1956, ch. 658, 70 Stat. 595 (providing that the termination date was July 1, 1957); repealed by Act of August 7, 1957, Pub. L. No. 85-121, 71 Stat. 341 (providing that the termination date was April 1, 1958).

¹⁵⁴ Act of August 29, 1957, Pub. L. No. 85-217, sec. (e), § 15, 71 Stat. 491, 493.

entering a missing status could experience inconvenience and hardship."¹⁵⁵

6. *Other Significant Amendments*--Congress continued to amend the Missing Persons Act, in many instances broadening its scope to accommodate particular conflicts, such as those in Korea and Vietnam. For example, as a result of United States involvement in Korea, Congress amended the act by substituting the phrase "hostile force" for "enemy," and deleting the phrase "interned in a neutral country" and substituting "interned in a foreign country."¹⁵⁶ Additionally, in the 1960s and early 1970s Congress again amended the act as a result of the then-on-going conflict in Vietnam. In 1964, for instance, Congress amended the act to include a person "detained in a foreign country against his will."¹⁵⁷ Congress

¹⁵⁵ S. REP. NO. 970, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S.C.C.A.N. 1730, 1731.

¹⁵⁶ See Act of July 3, 1952, ch. 570, § 1(a)(7), 66 Stat. 330, 331 (current version at 37 U.S.C. § 551(2) (1988) and 5 U.S.C. § 5561(5) (1980) (extending the Missing Persons Act until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proclamation No. 2914, 3 C.F.R. 71 (Supp. 1950)) and, during that extension, providing for amendments as discussed in the text). See also Act of April 4, 1953, ch. 17, § 2, 67 Stat. 20, 21 (amending the Missing Persons Act by extending the act until February 1, 1954, and permanently amending the act as discussed in the text).

¹⁵⁷ Act of August 14, 1964, Pub. L. No. 88-428, sec. 3, § 2, 78 Stat. 437 (current version at 37 U.S.C. § 551(2) (1988) and 5 U.S.C. § 5561(5) (1980)).

also (belatedly) amended the act that year to specifically include members of the Air Force.¹⁵⁸

¹⁵⁸ *Id.* secs. 2, 7, §§ 1(b), 10 (current version at 37 U.S.C. § 551(2) (1988)). During this time, Congress also enacted several amendments to the Missing Persons Act on entitlement of dependents to travel and transportation allowances. In 1968, for example, Congress amended the act by adding a provision authorizing the temporary storage of household and personal effects for a member who is officially reported as absent for a period of more than 20 days or in a missing status. Act of January 2, 1968, PUB. L. No. 90-236, 81 Stat. 764 (codified at 37 U.S.C. § 554(b) (1988)). In an Air Force recommendation, dated August 31, 1967, then-Under Secretary of the Air Force Norman Paul explained:

Family life without the member is an extremely difficult one, particularly following a notice that the member is in a missing status. The dependents of members in such circumstances deserve the most compassionate and humane consideration that our Government can bestow. They ought to be able to postpone making a decision on moving until they are under less emotional strain and have a firm idea as to final disposition of effects. Action to make this possible is no more than moral responsibility.

Statement attached to S. REP. No. 932, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 2653, 2654-55.

Congress also authorized movements of mobile homes and trailers, and additional movements when justified. Act of October 9, 1972, PUB. L. No. 92-477, § 1, 86 Stat. 793 (codified at 37 U.S.C. § 554(a) (1988 & Supp. 1995)). In considering this legislation, the Senate Committee on Armed Services noted that as of May 6, 1972, there were a total of 1,077 military families of service members in a missing status. S. REP. No. 1234, 92d Cong., 2d Sess. (1972) reprinted in 1972 U.S.C.C.A.N. 3552, 3553.

Congress further amended the act to allow payments to survivors of dependency and indemnity compensation based on the highest pay grade held by the missing service member, even if later determined that the member died prior to the date of promotion to that grade. Act of November 24, 1971, PUB. L. No. 92-169, § 1, 85 Stat. 489 (codified at 37 U.S.C. 552(a) (1988 & Supp. 1995) and 38 U.S.C. 1302 (1991)). Congress

Prior to 1966, the Missing Persons Act was codified in title 50, United States Code Appendix (War and National Defense).¹⁵⁹ In 1966, Congress revised the laws relating to civilian employees of the federal government and re-codified

inadvertently repealed the amendment in Act of October 12, 1972, PUB. L. No. 92-482, 86 Stat. 796; and re-enacted the amendment in Act of April 27, 1973, PUB. L. No. 93-26, § 1, 87 Stat. 26. In re-enacting the legislation in 1973, Congress noted that over 65 missing service members had been promoted since October 12, 1972. The Senate Committee on Armed Services anticipated that a total of 149 such promotions would be made before June 1, 1973. S. REP. No. 104, 93d Cong., 2d Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 1293, 1294.

Finally, Congress amended the act to permit continued payment of incentive pay for hazardous duty to service members during a period of hospitalization and rehabilitation after they returned from a missing status. Act of October 12, 1972, PUB. L. No. 92-482, 86 Stat. 796 (codified at 37 U.S.C. 552(a)(2) (1988)). In considering this legislation, the Senate Committee on Armed Services noted that, as of May 6, 1972, a total of 1,428 missing service members continued to receive incentive pay for hazardous duty. As of that date, the average period these service members had been missing or imprisoned in Vietnam was over five years. More than 450 of them had been in a missing status longer than any American service member in history. Therefore, because of the length and circumstances of their confinement, Congress anticipated that, if returned, these service members would require periods of hospitalization and rehabilitation before they were again able to engage in hazardous duties. Congress did not believe that family income should be reduced by cutting off incentive pay for a one-year period because the period of hospitalization and rehabilitation would be particularly trying on service members and their families. S. REP. No. 1235, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3565, 3566.

¹⁵⁹ 50 U.S.C. app. §§ 1001-1015 (1964), *repealed by* Act of September 6, 1966, Pub. L. No. 89-554, § 5(b), 80 Stat. 378, 625.

them at title 5, United States Code. As part of that re-codification, Congress re-codified the portions of the Missing Persons Act relating to civilian officers and employees in title 5.¹⁶⁰ At the same time, Congress re-codified the provisions of the Missing Persons Act relating to service members in title 37, United States Code (Pay and Allowances of the Uniformed Services).¹⁶¹ Thus, Congress' placement of the Missing Persons Act in title 37 indicates that it continued to view the act as a law concerned with the pay and allowances of missing service members.

The only significant change to the Missing Persons Act since the Vietnam Conflict resulted from the Iranian hostage crisis in 1979 and 1980, and other incidents of hostage-taking in the Middle East.¹⁶² In 1986, Congress added a new provision

¹⁶⁰ See 5 U.S.C. §§ 5561-5569 (1980 & Supp. 1995).

¹⁶¹ See 37 U.S.C. §§ 551-559 (1988 & Supp. 1995).

¹⁶² After American citizens were taken hostage in Iran, Congress passed the Hostage Relief Act of 1980, PUB. L. No. 96-449, 94 Stat. 1967, reprinted in 5 U.S.C. 5561 nt (Supp. 1995). This act defines an "American Hostage" to include both individuals in the civil service and the uniformed services of the United States. Among other benefits, the act allows allotments to special savings funds, payment for certain education and training of a spouse or child, and special rules regarding federal tax liability. Congress later extended these provisions to include American hostages in Iraq, Kuwait and Lebanon. Act of November 5, 1990, PUB. L. No. 101-513, § 559C, 104 Stat. 1979, 2064; Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, PUB. L. No. 102-138, § 302(A), 105 Stat. 707, 708 (1991) (effective as of the date of enactment of Act of November 5, 1990, *supra*); and Act of October 24, 1992, PUB. L. No. 102-499, § 5(a), 106 Stat. 3264,

to the Missing Persons Act to provide certain benefits to members of the uniform services held as captives.¹⁶³ This provision established a new missing status, that of a "captive status," and provided special payments to service members, and others, who are in that status.¹⁶⁴

3266 (effective as of the date of enactment of Act of November 5, 1990, *supra*), reprinted in 5 U.S.C. 5561 nt (Supp. 1995).

¹⁶³ Omnibus Diplomatic Security and Antiterrorism Act of 1986, PUB. L. No. 99-399, §§ 803(a), 806(a)(1), 100 Stat. 853, 879, 884, amended by Defense Technical Corrections Act of 1987, PUB. L. No. 100-26, § 8(e)(11), 101 Stat. 273, 286 (codified at 37 U.S.C. § 559 (1988 & Supp. 1995) and 5 U.S.C. § 5569 (Supp. 1995)).

¹⁶⁴ 37 U.S.C. § 559 (1988 & Supp. 1995) and 5 U.S.C. § 5569 (Supp. 1995). The President may determine that a service member is in a captive status if the captivity arose because of a hostile action and as a result of membership in the uniform services. The law does not, however, include a period of captivity as a prisoner of war if Congress provides monetary payment in recognition of that captivity. 37 U.S.C. § 559(a)(1) (Supp. 1995). If the individual is in a captive status, the President must make a cash payment to the service member or civilian prior to the end of the one-year period beginning on the date on which that status terminates. 37 U.S.C. § 559(c)(1) (Supp. 1995) and 5 U.S.C. § 5569(d)(1) (Supp. 1995). The amount of the cash payment to a service member or civilian who becomes a captive is determined under 5 U.S.C. § 5569(d)(2) (Supp. 1995), which provides:

The amount of the payment under this subsection with respect to an individual held as a captive shall be not less than one-half of the amount of the worldwide average per diem rate under section 5702 of this title [title 5, U.S. Code] which was in effect for each day that individual was so held.

The President may defer payment if the former captive is charged with certain captivity-related offenses during that one-year period. If convicted of the offense, the President may deny payments under the law. In the case of service

C. Litigating Secretarial Determinations Under the Missing Persons Act

Federal court cases construing the Missing Persons Act began to appear in the early 1950's. Generally, plaintiffs were service members and federal government employees complaining of a Service Secretary's decision in one of three areas: (1) a person's status as it affected rights to pay and allowances; (2) the types of allowances payable under the act; and (3) allotments to family members.

members, these "captivity related offenses" include offenses referred to under the UCMJ, chapter 47, title 10, United States Code, that are punishable by dishonorable discharge, dismissal, or confinement for one year or more. 37 U.S.C. § 559(c)(3)(A)(ii)(II) (1988 & Supp. 1995). Additionally, as applied to both service members and civilians, captivity-related offenses include those offenses referred to in 5 U.S.C. § 8312(b)-(c) (1980 & Supp. 1995), such as harboring or concealing persons, gathering, transmitting, or losing defense information, gathering or delivering defense information to aid foreign government, disclosing classified information, espionage and censorship, sabotage, treason, misprision of treason, rebellion or insurrection, seditious conspiracy, advocating overthrow of government, recruiting for service against United States, enlistment to serve against the United States, tampering with or receipt or communication of restricted data, and certain perjuries. 37 U.S.C. § 559(c)(3)(A)(ii)(I) (1988 & Supp. 1995) and 5 U.S.C. § 5569(d)(3)(B) (Supp. 1995).

Unlike Secretarial determinations under other provisions of the Missing Persons Act, the new section specifically provides that Presidential decisions regarding captive status and deferral or denial of payments are final and not subject to judicial review. 37 U.S.C. § 559(d) (Supp. 1995) and 5 U.S.C. § 5569(i) (Supp. 1995).

1. *Determinations of Status*--The first court decisions on the Missing Persons Act concerned an individual's entitlement to pay and allowances based on a Service Secretary's determination of status. Because the act provides that such decisions are "conclusive,"¹⁶⁵ the courts have consistently held that a Service Secretary's decision concerning a person's entitlement to pay and allowances is not subject to judicial review, except on a showing that the decision is arbitrary or capricious and not supported by substantial evidence.

For example, in the 1950 case of *Moreno v. United States*,¹⁶⁶ the Court of Claims held conclusive an Army decision

¹⁶⁵ Missing Persons Act, *supra* note 127, § 9, amended by Act of July 1, 1944, *supra* note 144, sec. 5, § 9 (current version at 37 U.S.C. § 556(a) (1988) and 5 U.S.C. § 5565(a) (1980)).

¹⁶⁶ 93 F. Supp. 607 (Ct. Cl. 1950), *cert. denied*, 342 U.S. 814 (1951). Merino was born in the Philippines and was a naturalized citizen of the United States. On July 26, 1941, President Roosevelt called the Philippine Army into the service of the United States. The United States ordered Moreno to extended active duty as a second lieutenant in the Philippine Scouts on February 8, 1942. Two months later, the Japanese Army captured Moreno. Thereafter, the United States formally surrendered all American and Filipino Army troops in the Philippines to Japan in June 1942. The Japanese held Moreno as a prisoner of war until late June 1942, when they released him on parole and allowed him to return to his home. It was not until January 28, 1945 that the United States Army, having recaptured the Philippines, resumed military control of its former personnel, including Moreno. *Id.*

In Act of July 25, 1947, ch. 329, 61 Stat. 455, Congress amended the Appropriation Act of February 18, 1946, ch. 30, 60 Stat. 6, to provide benefits to the Army of the Philippines under the Missing Persons Act. Under the Missing Persons Act, the proper authority determined that Moreno was not in a casualty status during the period of his parole by the

that First Lieutenant Moreno was not in a missing status during a certain period and therefore not entitled to pay and allowances. In doing so, the court noted that the act provides that Secretarial determinations "shall be conclusive as to . . . any . . . status dealt with by this Act" and that Secretarial decisions "of entitlement of any person, under provisions of this Act, to pay and allowances . . . shall be conclusive."¹⁶⁷ The court noted, however, that even assuming Congress intended such determinations to be subject to an arbitrary and capricious standard, it could not find that the Army acted arbitrarily in this case.¹⁶⁸ Thus, the court left

Japanese. The Army reasoned that one who is paroled and allowed to go to his home is not in the status of a person "captured by an enemy, beleaguered or besieged," as required by the act. *Moreno*, 93 F. Supp. at 607.

¹⁶⁷ Missing Persons Act, *supra* note 127, § 9; amended by Act of July 1, 1944, *supra* note 144, sec. 5, § 9 (current version at 37 U.S.C. § 556 (1988) and 5 U.S.C. § 5566 (1980)).

¹⁶⁸ Congress amended the Missing Persons Act in 1957 to cover those Philippine Scouts who, like Moreno, were captured by the Japanese and then paroled and allowed to return to their homes. The amendment allowed these individuals to receive their pay and allowances for the period of their parole. The amendment did not cover Philippine Scouts, however, who voluntarily participated with or for the Japanese in activities of a military nature hostile to the United States. Act of August 29, 1957, PUB. L. No. 85-217, sec. (b), § 2, 71 Stat. 491. Congress noted that the amendment was necessary to pay these individuals because the War Department had a policy only to pay Philippine Scouts if they could show restraint, deprivation, or hardship greater than that which was suffered by the other people of the islands. Under this standard, the War Department determined that Philippine Scouts who had joined a guerrilla unit or engaged in other anti-Japanese

open the possibility that it would overturn a Secretarial decision that was arbitrary and capricious.

The Court of Claims followed its holding in *Moreno* in the 1955 cases of *Ferrer v. United States*¹⁶⁹ and *Logronio v. United States*,¹⁷⁰ and the 1961 case of *Alpuerto v. United States*.¹⁷¹ Citing *Moreno*, the court found in all three cases that the

activities were in a missing status and entitled to full pay. The War Department, however, decided that those who had merely gone home to their civilian pursuits could not be paid. S. REP. No. 970, 85th Cong., 1st Sess. (1957), reprinted in 1957 U.S.C.C.A.N. 1730, 1733.

¹⁶⁹ 140 F. Supp. 954 (Ct. Cl. 1955). Ferrer also was a member of the Philippine Army who, like *Moreno*, was called into the service of the United States Armed Forces during World War II. On April 17, 1942, Ferrer left his unit and was absent until December 28, 1942, during which time he alleged that he was hiding in the hills to avoid capture by the enemy. On December 28, 1942, Ferrer became a member of the Cebu Area Command, a guerrilla organization. The proper authority determined that Ferrer was not in a missing status from the time he left his unit until he joined the guerrilla organization.

¹⁷⁰ 133 F. Supp. 395 (Ct. Cl. 1955). Logronio was another member of the Philippine Army in the service of the United States during World War II who claimed that he was entitled to pay and allowances during a period in which the Army had declared him to be in a "no casualty" status and not entitled to benefits under the act.

¹⁷¹ 152 Ct. Cl. 270 (1961). The Army determined under the Missing Persons Act that Alpuerto, also a member of the Philippine Army, was in a missing status during the period in question, therefore entitling him to the pay and allowances of a private first class. Alpuerto filed suit, however, claiming that he should not have been paid as a private first class, because the Philippine Army had promoted him several times during the period in question.

Army's decision that a soldier was not in a missing status during a certain period was final and conclusive. In the 1961 case of *Espartero v. United States*,¹⁷² however, the Court of Claims made clear that it would be willing to overturn a Secretarial decision on status under the Missing Persons Act, finding that the Missing Persons Act "prevents this court from reviewing a determination under this Act *unless it is shown that such determination was arbitrary or capricious.*"¹⁷³

The first Supreme Court decision construing the Missing Persons Act was the 1961 case of *Bell v. United States*.¹⁷⁴ The petitioners in *Bell* were enlisted men in the United States Army who were captured in 1950 and 1951 during the Korean Conflict. As the Supreme Court noted in its opinion, while in the prison camps the petitioners behaved with "utter disloyalty to their comrades and to their country."¹⁷⁵ Moreover, after the Korean Armistice in 1953, the plaintiffs refused repatriation and went to Communist China. The Army formally discharged them in 1954. After they returned to the United States in 1955, the Army denied their claims to recover pay and allowances that accrued before their discharge. The Court of Claims likewise denied their subsequent petitions,

¹⁷² 152 Ct. Cl. 789 (1961).

¹⁷³ *Id.* at 792 (emphasis added).

¹⁷⁴ 366 U.S. 393 (1961).

¹⁷⁵ *Id.* at 394.

finding that "neither the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs."¹⁷⁶

Curiously, the petitioners in *Bell* did not rely on the Missing Persons Act in alleging that they were entitled to pay and allowances during the time in question. Rather, they claimed entitlement under the very same 1814 statute that Lieutenant Jones had relied upon when he was taken prisoner by the South during the Civil War.¹⁷⁷ Generally, that law provided that a soldier who is captured by the enemy is entitled to receive his pay, subsistence, and allowances.¹⁷⁸

The government first argued that the Missing Persons Act was later in time and should be controlling. The Supreme Court refused to find, however, that the Missing Persons Act operated to repeal the 1814 statute on which petitioners relied. The Court found that the legislative history of the act clearly disclosed that at the time it was considered, Congress was fully aware of the 1814 statute and did not repeal it.¹⁷⁹ The government next argued that the petitioners

¹⁷⁶ 181 F. Supp 668, 674 (Ct. Cl. 1960).

¹⁷⁷ See *Lieutenant Jones' Case*, 4 Ct. Cl. 197 (1868) discussed *supra* notes 124, 125 and accompanying text.

¹⁷⁸ Act of March 30, 1814, *supra* note 121 (codified at 37 U.S.C. 242 (1958) when the Supreme Court considered *Bell*).

¹⁷⁹ *Bell*, 366 U.S. at 409 n.21. Additionally, the Court noted that Congress had twice recodified the 1814 statute since the

were not covered by the Missing Persons Act because their behavior as prisoners of war rendered them no longer in the "active service in the Army . . . of the United States," as required by the act.¹⁸⁰ The Court also rejected this argument, finding that "active service" referred to a person's status at the time he became missing. The Court further noted that the Army had never made an administrative determination that the petitioners were absent without leave during the time in question.¹⁸¹ Therefore, the Supreme Court held that under

Missing Persons Act was first enacted in 1942, once in 1952 and again in 1958. Therefore, the Missing Persons Act was not clearly "later in time" and, thus, controlling, as argued by the government. Congress repealed the 1814 statute one year after the Supreme Court decision in *Bell* in Act of September 7, 1962, *supra* note 126.

¹⁸⁰ *Bell*, 366 U.S. at 408 (quoting the Missing Persons Act as then-codified at 50 U.S.C. app. § 1002(a) (1958)).

¹⁸¹ *Id.* at 412-13. The Court noted that the 1954 record of hearings before the House Committee on Armed Services on a bill to extend the Missing Persons Act indicated that some thought was given to the possibility of an administrative determination that petitioners were absent from their post of duty.

Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?

General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.

Mr. Kilday. When does that stop?

Mr. Bates. Does that stop next week?

General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.

Mr. Bates. Aren't they absent without leave?

General Powell. No, sir.

Mr. Bates. What is it?

General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.

Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?

General Powell. That is a matter still to be decided by the Secretary of Defense.

Mr. Bates. Or deserters, you know.

General Powell. The Secretary of Defense is deciding for all services.

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Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.

General Powell. Sir, the Secretary of Defense must make a decision, including psychological factors, individual rights, the law involved, and national policy.

Mr. Vinson. That is right.

General Powell. He has not as yet announced such a decision to us.

Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?

The Chairman. Sure.

Mr. Van Zandt. Oh, yes.

Mr. Cunningham. Why so? They are not to blame for this.

Mr. Bishop. No, they are not.

Mr. Vinson. Well, if a man is absent without leave --

Mr. Cunningham. A man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?

The Chairman. Wait, one at a time. The reporter can't get it.

Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

either statute the petitioners were entitled to the pay and allowances that accrued during their detention as prisoners of war.¹⁸²

2. *Determinations on Allowances*--The Court of Claims also has considered what allowances are covered under the Missing Persons Act. The court has not been consistent, however, on the standard used to review Secretarial decisions on allowances payable under the act. At least two early decisions held that the question is one of law, fully reviewable by the courts. A later Court of Claims opinion held, however, that a Secretarial determination on payable allowances is conclusive and not reviewable by the courts, unless arbitrary and capricious.

In 1951, the Court of Claims considered two such cases. In the first case, *Dilks v. United States*,¹⁸³ the court noted

Hearings before House Committee on Armed Services on H.R. 7209, 83d Cong., 2d Sess. 3071-72 (1954), reprinted in Bell, 366 U.S. at 413 n.28.

¹⁸² *Bell*, 366 U.S. at 416. The Court further noted that the law relating to the right to pay of members of the Navy taken prisoner did appear to require a standard of conduct after capture. That statute, then-codified at 37 U.S.C. 244 (1958), required that, to receive pay and allowances, seamen must appear "to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy." On the other hand, the Army statute, then-codified at 37 U.S.C. 242 (1958), did not contain such a standard. (Both the Army and Navy statutes were repealed in 1962, see *supra* note 126 and accompanying text.)

¹⁸³ 97 F. Supp. 702 (Ct. Cl. 1951).

that the Missing Persons Act entitled a person in a missing status to the same pay and allowances to which he was entitled at the beginning of such absence.¹⁸⁴ Consequently, the court held as a matter of law that an individual is entitled to all allowances that he is receiving under competent, unrevoked and existing orders at the time of captivity, absent proof of a specific Congressional intent to exclude them.¹⁸⁵ The government had argued in *Dilks* that under the holding in *Moreno v. United States*,¹⁸⁶ the Army's decisions on what allowances are payable under the act are conclusive and may not be overturned, absent a finding that the decision was arbitrary and capricious. The court disagreed, finding that it was not bound by the decision in *Moreno*, and the only issue was one of law as to what Congress intended when it used the

¹⁸⁴ Missing Persons Act, *supra* note 127, § 2 (current version at 37 U.S.C. 552(a) (1988) and 5 U.S.C. 5562(a) (1980)).

¹⁸⁵ *Dilks*, 97 F. Supp. at 706. The court found that the act's language, taken by itself, included any allowance of which a missing person was validly in receipt. Therefore, the government would have to show proof that Congress specifically intended to exclude any one type of allowance. The government cited to certain legislative history showing that Congress was advised of, and agreed to, the policy of crediting such allowances as flight pay, submarine pay, parachute pay, subsistence, and rental or quarters allowances, but not temporary per diem or travel. The government was unable to show, however, that Congress specifically intended to exclude from payable allowances under the act subsistence in lieu of rations and quarters. Therefore, the court held *Dilks* was entitled to this allowance.

¹⁸⁶ 93 F. Supp. 607 (Ct. Cl. 1950).

expression "the same pay and allowances."¹⁸⁷ Citing its holding in *Dilks*, the Court of Claims in *Hevenor v. United States*,¹⁸⁸ again held in 1951 that a Service's decision as to

¹⁸⁷ *Dilks*, 97 F. Supp. at 706 (quoting the Missing Persons Act, *supra* note 127, § 2 (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C. § 5562(a) (1980)). The court noted that, unlike the case of *Moreno v. United States*, 93 F. Supp. 607 (Ct. Cl. 1950) where the court found conclusive an Army determination as to missing status, there was no issue as to *Dilks* status--the Army had decided that he was in a missing status. The only issue was which allowances *Dilks* was entitled to receive because of his missing status. Reviewing the legislative history of the act's provision that Secretarial determinations are conclusive, the court found that Congress enacted the provision to preclude the General Accounting Office from later disallowing a service settlement because of incomplete records, and not to preclude judicial review. *Dilks*, 97 F. Supp. at 705-06.

¹⁸⁸ 101 F. Supp. 465 (Ct. Cl. 1951). *Hevenor* was a civilian employee of the Federal government who was captured and imprisoned by the Japanese while on official business at Wake Island on December 23, 1941. He was released from a prisoner of war camp in Japan in September 1945. *Hevenor* had traveled to Wake Island under travel orders authorizing a per diem of \$6.00 in lieu of subsistence. After his return in 1945, he filed a claim which included per diem for the entire period of his captivity. The Director of the Bureau of the Budget determined that *Hevenor* was entitled to the per diem, as stated in travel orders, for the entire period of his captivity. The Comptroller General of the United States disagreed. The Comptroller found that temporary per diem allowance while in a travel status was not an "allowance" that was contemplated by the phrase "pay and allowances" as used in the Missing Persons Act. *Hevenor v. United States*, 27 Comp. Gen. 205 (1947).

Hevenor then petitioned the Court of Claims, arguing that: (1) per diem allowances in lieu of subsistence was clearly within the terms of "same pay and allowances" under the act; and (2) if there was any doubt, the act precluded review of the Director, Bureau of the Budget decision that *Hevenor* was

what constitutes allowances for purposes of the Missing Persons Act is a question of law, not precluded from judicial review by the act.¹⁸⁹

Ten years later, in 1961, the Court of Claims decided the case of *Espartero v. United States*.¹⁹⁰ The proper authority decided that Espartero was in a missing status during the time in question, entitling him to pay, but denied his claim for certain allowances. Without citing to *Dilks* or *Hevenor*, the court held that "[c]learly plaintiff cannot recover under the Missing Persons Act" because the act provides that the Army's determination that Espartero was not entitled to the allowance was conclusive.¹⁹¹

entitled to the allowance because the Director determination was conclusive.

¹⁸⁹ *Hevenor*, 101 F. Supp. at 467. The Court of Claims held that the act did not entitle Hevenor to per diem for travel expenses because the legislative history of the act indicated that Congress intended to exclude such allowances from coverage under the act (quoting *Hearings of the House Committee on Naval Affairs on H.R. 4405*, 78th Cong., 2d Sess. 2343 (1944) which states, in pertinent part, that "[i]t has been administratively determined that pay and allowances to be credited during an absence include all continuing pay and allowances to which entitled at the beginning of an absence but not temporary allowances such as per diem for travel expenses"). *Hevenor*, 101 F. Supp. at 466.

¹⁹⁰ 152 Ct. Cl. 789 (1961).

¹⁹¹ *Id.* at 791. This is the very same argument made by the government, and rejected by the Court of Claims, in *United States v. Dilks*, 97 F. Supp. 702 (Ct. Cl. 1951). In analyzing this issue, the court cited to its earlier decisions, beginning with *Moreno v. United States*, 93 F. Supp. 607 (Ct. Cl. 1950), that service decisions on status are conclusive and

By implication, then, *Espartero* overruled *Dilks* and *Hevenor*; the same standard of review is to be applied to Service decisions on allowances payable under the act, as is applied to decisions on status.

3. *Determinations on Allotments*--The final area of litigation on payments authorized by the Missing Persons Act is a Service Secretary's decision on payments of allotments to dependents.¹⁹² The act requires the Service Secretary to make decisions on allotments of pay and allowances in the interests of "the member, his dependents, or the United States."¹⁹³ Similar to other Secretarial decisions under the act, the courts have held that Secretarial decisions on payments of allotments to family members are not subject to judicial review, unless arbitrary and capricious.

not reviewable, unless arbitrary and capricious. *Espartero*, 152 Ct. Cl. at 791-92.

¹⁹² Missing Persons Act, *supra* note 127, § 1(c), amended by Act of July 1, 1944, *supra* note 144, sec. 1, § 1(c) (current version at 37 U.S.C. § 551(1) (1988) and 5 U.S.C. § 5561(3) (1980)), defined "dependents" as a lawful wife, an unmarried child under 21 years of age, a dependent mother or father, an unmarried dependent stepchild or adopted child under 21 years of age, a dependent designated in official records, or an individual determined to be a dependent by the Service Secretary.

¹⁹³ Missing Persons Act, *supra* note 127, § 4, amended by Act of July 1, 1944, *supra* note 144, sec. 4, § 4 (current version at 37 U.S.C. § 553(e) (Supp. 1995) and 5 U.S.C. § 5563(e) (1980)).

For example, in 1979, the Court of Claims first considered the case of *Cherry v. United States*.¹⁹⁴ Colonel Fred Cherry was a prisoner of war in North Vietnam from October 1965 until February 1973.¹⁹⁵ During his captivity, the Air Force allotted nearly all of his pay and allowances, some \$147,000, to his spouse for the support of her and their four children. After his return, Colonel Cherry divorced his wife on the grounds of adultery; she had been living with another man and had a child by him while Colonel Cherry was a prisoner of war.¹⁹⁶

Colonel Cherry sued the Air Force to recover his pay and allowances asserting two theories of recovery: (1) the Missing Persons Act was unconstitutional because it allowed confiscation of his property without due process of law or procedural safeguards; and (2) some payments to his former wife were illegal because the Air Force arbitrarily and capriciously failed to follow adequate safeguards to ensure

¹⁹⁴ 594 F.2d 795 (Ct. Cl. 1979), *sub opinion*, 640 F.2d 1184 (Ct. Cl. 1980), *aff'd*, 697 F.2d 1043 (Fed. Cir. 1983).

¹⁹⁵ In 1965, then-Major Cherry's F-105D aircraft was shot down in Northern Vietnam. His wingman observed him on the ground and established and maintained beeper contact throughout the remaining daylight hours, but could not reestablish beeper contact the next morning. Colonel Cherry's subsequent captivity was marked by violent beatings by the North Vietnamese. Colonel Cherry resisted his captors, refusing to compromise his beliefs and training until his release seven and one-half years later. SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS, *supra* note 15, at 474.

¹⁹⁶ *Cherry*, 594 F.2d at 797.

that his interests, as well as those of his dependents, were being protected. In its original opinion, the Court of Claims first found the act to be a constitutional exercise of Congress' power "to make Rules for the Government and Regulation of the land and naval Forces."¹⁹⁷ The court next observed that the Missing Person's Act gave the Air Force broad discretion in providing for family members, but that discretion was not absolute. The Secretary must consider the interests of "the member, his dependents, or the United States" when making decisions on allotments.¹⁹⁸

Given this mandate, the court found that the Service acts as a trustee for the member. As trustee of Colonel Cherry's account, the Air Force had a duty to ensure that it equally weighed the interests of all beneficiaries. The court found that at some point the Air Force should have investigated the manner in which Mrs. Cherry was expending funds, and Colonel Cherry was entitled to funds disbursed after that point.¹⁹⁹

¹⁹⁷ See *id.* (quoting U.S. CONST. art. I, § 8, cl. 14).

¹⁹⁸ See *id.* at 798 (quoting 37 U.S.C. 553(e) (Supp. 1995)).

¹⁹⁹ *Id.* at 800. In Mrs. Cherry's case, the Air Force routinely, and without exception, granted requests for emergency funds, including: vacations, large amounts of cash allegedly stolen, and, in 1968, for surgery in a private hospital, despite the fact that she was entitled to free medical care (the record indicated that the surgery was for the delivery of an illegitimate child). Additionally, the court found that the record indicated that Colonel Cherry's sister had complained to the Air Force that a man was living with Mrs. Cherry and that she had borne him a child. Further,

The court therefore remanded the case to the trial division to decide this issue.²⁰⁰

The Air Force then filed a motion for Relief from Judgment, arguing that the Missing Persons Act did not expressly impose a trust duty on the Air Force to administer the accounts of missing persons and none may be implied.²⁰¹ In deciding this issue, the Court of Claims did not adhere to its earlier characterization as one of a trustee, finding it unnecessary for the Secretary to assume such a role to exercise the statutory duties in a manner that is constitutional. All that the law requires, according to the court, is that the Secretary exercise the statutorily granted discretion fairly, without abusing it.²⁰² In Colonel Cherry's case, the court found that the Air Force arbitrarily and capriciously settled on a policy of satisfying the demands of Mrs. Cherry, without considering Colonel Cherry's interests. Vacating its prior decision, the court again remanded the case to the trial division.²⁰³

it was clear by late 1971 that Mrs. Cherry was avoiding inquiries by the Air Force. *Id.*

²⁰⁰ *Id.* at 801.

²⁰¹ *Cherry v. United States*, 640 F.2d 1184 (1980).

²⁰² *Id.* at 1188.

²⁰³ *Id.* at 1190. After a trial division decision, adopted by the Court of Claims, Colonel Cherry appealed to the Federal Circuit in *Cherry v. United States*, 697 F.2d 1043 (Fed. Cir. 1983). The Federal Circuit agreed with the Court of Claims in all respects except the dates on which the Air Force should

In *Pitchford v. United States*,²⁰⁴ the Court of Claims made clear that "[i]t requires an extraordinary case, such as that in *Cherry*, for [the court] to conclude that the Secretary abused his discretion."²⁰⁵ Again, the court noted that the act gives the Secretary wide discretion to decide whether a particular payment is in the interest of "the member, his dependents, or the United States."²⁰⁶ The court found that it was not its function to "second-guess" a Secretary's judgment on whether a particular payment is appropriate; neither is it a court's function to substitute its judgment for that of the

have investigated emergency requests and reduced the allotment. The court found that the appropriate Air Force regulation permitted the allotment of 100 percent of a missing member's pay and that, in view of Colonel Cherry's four minor children, the 100-percent allotment was reasonable. The court then found that in assigning a date on which the Air Force should have known that Colonel Cherry's interests were so compromised that a reduction was warranted, the Claims Court's Trial Division should be guided by two policies: (1) the Air Force's proper concern is with the missing person's pecuniary interest; and (2) the Air Force should have a decent respect for the spouse's privacy and should presume good behavior. *Id.* at 1049.

The Court then held that the receipt by the Air Force of the letter from Mrs. Cherry requesting reimbursement for "stomach surgery" is the occurrence from which the Air Force knew or should have known that Colonel Cherry's pecuniary interests were seriously compromised and should have reduced the allotment. The court noted that some payments should have continued, however, because Mrs. Cherry was feeding and clothing the four Cherry children. *Id.* at 1051.

²⁰⁴ 666 F.2d 533 (Ct. Cl. 1981).

²⁰⁵ *Id.* at 535.

²⁰⁶ *Id.* (quoting 37 U.S.C. § 553(e) (Supp. 1995)).

Secretary's on this issue. Therefore, the court held that a Secretary's decision is subject to only the most limited review under the strict abuse of discretion standard.²⁰⁷

In summary, federal courts have consistently construed the Missing Persons Act as providing the Service Secretaries wide discretion in making determinations under its provisions. Unless found arbitrary and capricious, federal courts have upheld Secretarial decisions under the Missing Persons Act on the status of an individual, payable allowances, and allotments to family members. Until the 1960s, decisions by the Service Secretaries under the Missing Persons Act were infrequently litigated and were not the subject of widespread public debate--then came Vietnam.

IV. The Legacy of Vietnam

MAUREEN DUNN: Mr. McNamara, you don't know who I am.

²⁰⁷ *Id.* In *Pitchford*, the Court of Claims found that, unlike Mrs. Cherry's requests, the Air Force carefully considered Mrs. Pitchford's requests for funds before making disbursements. Also, there was no indication that Mrs. Pitchford was unfaithful. At oral argument, plaintiff's attorney stated that the plaintiff's only complaint against his former wife during his captivity was that she had been "extravagant." *Id.* See also *Luna v. United States*, 810 F.2d 1105 (Fed. Cir. 1987) (finding that the Air Force's decision to grant Mrs. Luna's requests for money was not arbitrary and capricious. Contrasting the facts with those in *Cherry*, the court noted that Mrs. Luna made only four requests for money and the Air Force received no complaints about her; on the other hand, Colonel Cherry's wife made 23 requests for money and the Air Force had received information that should have triggered an investigation of Mrs. Cherry.). *Id.* at 1107-08.

But you certainly played a role in a situation that created the rest of my adult life. My name is Maureen Dunn. And I don't know if you remember the incident-- February 14, 1968, the China Incident. You, President Johnson, Vice President Humphrey, Clark Clifford, Chairman of the Joint Chiefs of Staff General Wheeler . . . Secretary of State Rusk . . . met for thirty minutes about "the China Incident." Do you remember that?

ROBERT McNAMARA: No, I'm sorry.

DUNN: A pilot was shot down over Hainan Island. Do you remember that incident?

McNAMARA: I'm sorry, I don't.

DUNN: Okay, well, the thing is, his beeper was heard when he was first shot down indicating that he was still alive, and then six and a half hours later it was heard for twenty to seventy minutes. And you people sat there in that room for forty-five minutes, never using his name: he was always "the China Incident." He was twenty-five years old. So you never had a face to see. Or to know that he had a twenty-five-year-old wife and a baby, a one-year-old baby. But I'm that guy's wife. And on page six of the classified document that I received in 1992 . . . you said, "No rescue attempt should be made. Don't go after him. It's not worth it." And all these years, Mr. McNamara, I've wanted someone who was at that meeting to say to me, "I am sorry." And I'd like you to say that to me in front of all these people. "I am sorry." Please. I just want you to say, "I am sorry."

McNAMARA: I have no recollection of the meeting, and I can't believe I--

DUNN: Well, it's right here.

McNAMARA: I understand what you have, but I haven't seen it and I'd like to see it.

DUNN: It's right here.

McNAMARA: But let me just say this: if I said it, I'm not sorry, I'm horrified.

DUNN: I'd like you to say to me, "I'm sorry, Maureen."

McNAMARA: Well, I'll say I'm sorry, but that's not enough. I am absolutely horrified.²⁰⁸

²⁰⁸ Meeting McNamara: Robert S. McNamara Meets Vietnam Pilot's Wife Maureen Dunn, HARPER'S MAGAZINE, July 1995, at 14 (portions of a transcript of an April 25, 1995 exchange at Harvard University's Kennedy School of Government between Robert McNamara and Maureen Dunn, the widow of a Vietnam veteran.

With the repatriation of American prisoners of war following the signing of the Paris Peace Accords on January 27, 1973, came significant, fundamental challenges to the Missing Persons Act. Although it is difficult to imagine because of the Vietnam-era furor, the twelve-year conflict was actually America's most accounted-for modern war at that time. The Second World War had left some 78,000 American servicemen missing or otherwise unaccounted for,²⁰⁹ and the United States had never accounted for over 8,000 Americans after the Korean Conflict.²¹⁰

At the end of the repatriation, dubbed "Operation Homecoming," in April 1973, the Department of Defense reported that 1,929 persons were in a missing status in Southeast Asia: 1,220 missing in action, 118 missing due to non-combat causes, and 591 prisoners of war. Under Service regulations, the Service Secretaries classified another 1,118 as Killed in

The exchange took place during a question-and-answer session following a speech by McNamara to promote his book, ROBERT McNAMARA, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM (1995)). According to the article, Joseph Dunn was a Navy pilot shot down over Chinese territorial waters on February 14, 1968. Robert McNamara was Secretary of Defense at that time. Although U.S. intelligence indicated Dunn survived the attack, no rescue attempt was made, largely because of the government's fear of drawing China into the war. *Id.*

²⁰⁹ 141 CONG. REC. S18,873 (daily ed. Dec. 19, 1995) (statement of Sen. McCain).

²¹⁰ 133 CONG. REC. H697 (daily ed. Feb. 18, 1987) (statement of Rep. Montgomery).

Action/Bodies Not Recovered (KIA/BNR).²¹¹ The United States attempted to obtain from the North Vietnamese a full-accounting of these service members through the Paris Peace Accords. Article 8(b) of the accords provided:

The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of remains, and to take any such other measures as may be required to get information about those still considered missing in action.²¹²

In late 1973, Senators Robert Dole and Jesse Helms offered an amendment to the Eagleton Amendment which proposed to cut off funding for military operations in Vietnam.²¹³ To enforce

²¹¹ SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 144.

²¹² Section 8(b) of the Paris Peace Accords is reprinted in the Congressional Record at 138 CONG. REC. S17,780 (daily ed. Oct. 8, 1992).

²¹³ The Eagleton Amendment provided that "[n]one of the funds herein appropriated under this Act [the 1973 Continuing Appropriations Resolution] or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces." 119 CONG. REC. 17,124 (1973). Both Houses of Congress adopted the Eagleton Amendment. 119 CONG. REC. 17,693, 21,173 (1973). Although President Nixon vetoed the Eagleton Amendment, the President ultimately signed into law an amendment to the Continuing Appropriations Resolution which stated:

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the

section 8(b) of the Paris Peace Accords, the Dole-Helms amendment would have authorized the President to use force "if the Government of North Vietnam is not making an accounting, to the best of its ability, of all missing in action personnel of the United States in Southeast Asia."²¹⁴ Senator Dole, sensing defeat for his amendment, remarked to his fellow Senators:

I would hope those who read the record and those who sit down next year or 20 years from now to read the record, in the event the North Vietnamese do not carry out the agreement, will know that there were those of us in the Senate who stood and let our views be known.²¹⁵

Over twenty years later, Senator Dole is still attempting to achieve his goal of a full accounting of service members unaccounted for in Vietnam, as evidenced by his sponsorship of The Missing Service Personnel Act of 1995.

A. *Secretarial Finding that a Missing Service Member is Dead*

shores of North Vietnam, South Vietnam, Laos or Cambodia. The Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. 93-52, § 108, 87 Stat. 134 (1973).

The President contemporaneously signed the Second Supplemental Appropriations Act of 1973, Pub. L. 93-50, § 307, 87 Stat. 129, which provided:

None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purposes.

²¹⁴ 119 CONG. REC. 17,685 (1973).

²¹⁵ *Id.*

After "Operation Homecoming" in 1973, there were many families of missing service members who still hoped for the return of their loved ones. Some of these families actively contested any change in status under the Missing Persons Act.²¹⁶ Their frustration centered around the provisions of the act that define when a Service Secretary may declare a person in a missing status to be dead. The Missing Persons Act provides two types of determinations of death: an "official report of death" and a "finding of death."²¹⁷ This latter finding of death proved controversial. The Missing Persons Act requires the Secretary concerned to review a missing service member's case at the end of the twelve-month period in a missing status, or when information warrants such a review.²¹⁸ After that review, the Secretary may direct that the service member be continued in a missing status, if the member can reasonably be presumed to be living, or make a "finding of death."²¹⁹ The Secretary may make a "finding of death" when he "considers that the information received, or a

²¹⁶ See *McDonald v. McLucas*, 371 F. Supp. 831, 836 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974). The district court also noted that there were those who had accepted the apparent fate of death of their missing service members, and who wanted the services to make immediate determinations of death so that they might begin their lives anew. *Id.*

²¹⁷ 37 U.S.C. § 552(b) (1988 & Supp. 1995).

²¹⁸ *Id.* § 555 (1988 & Supp. 1995).

²¹⁹ *Id.*

lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead."²²⁰

During the Vietnam era, the Military Services had implemented the act's twelve-month review requirement by establishing informal boards to review a missing person's status. After completing its review, the board would make a recommendation as to whether either of the determinations of death should be made, or whether the member should be continued in a missing status. The Secretary or his designee then reviewed the recommendation of the board and made a final determination.²²¹

Some families charged that the Missing Persons Act allowed the Secretary to make an automatic "finding of death" after a service member had been in a missing status for twelve months, without requiring any effort by the Secretary to locate the service member. Additionally, these family members reasoned that once presumed dead, the Service would no longer attempt to locate the service member. Based on this belief, in 1973 several parents and spouses of missing service members filed a class action suit on behalf of all next-of-kin of American servicemen who had been carried in a missing status while on active duty in Indochina since January 1, 1962. The plaintiffs named all three Service Secretaries as defendants.

²²⁰ *Id.* § 556(b) (1988).

²²¹ See *McDonald v. McLucas*, 371 F. Supp. 831, 833 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

The case, *McDonald v. McLucas*,²²² reflected the shifting attitude in the purpose of the Missing Persons Act.

In *McDonald*, plaintiffs alleged that the sections of the Missing Persons Act that governed the circumstances under which the Military Services could declare a service member in a missing status to be dead were unconstitutional on their face and as applied, in violation of the due process clause of the Fifth Amendment.²²³ Plaintiffs argued that: (1) there were no statutory criteria to guide the Secretary in deciding whether to make an official report of death or presumptive finding of death; (2) Congress had not delegated rule-making authority to the Secretaries with respect to a finding of death; (3) there was no notice given to the next-of-kin regarding the pendency of a status review, nor any opportunity to be heard before a finding of death was made; and (4) the act permitted the Service Secretary to make findings in the total absence of any evidence.²²⁴

²²² 371 F. Supp. 837 (S.D.N.Y. 1973), 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

²²³ *Id.* at 838 (citing 37 U.S.C. §§ 555, 556 (1988 & Supp. 1995)).

²²⁴ *Id.* In count three, plaintiffs further alleged that the Service Secretary acted in an arbitrary and capricious manner in making findings of death because the Military Services failed to search diligently for all available information about the missing service members. Therefore, the Secretarial findings of death were based on "pure speculation and guesswork." The court dismissed this claim, holding that a remedy based on this allegation was not available to the

Because the plaintiffs sought an injunction restraining enforcement of an Act of Congress for violating the United States Constitution, the district court judge decided that a three-judge panel must be convened to consider the facial attacks against the act.²²⁵ The judge also decided that the

plaintiffs because they represented missing service members for whom the Services had not (yet) made findings of death. *Id.* at 839-40.

Plaintiffs also alleged in count four that the findings of death made under the Missing Persons Act were subject to the Administrative Procedure Act (5 U.S.C. §§ 500 et seq. (1977 & Supp. 1995)) [hereinafter APA] and that defendants failed to comply therewith. The court also found this count to be without merit, as the APA clearly did not apply to the Missing Persons Act. In deciding this issue, the court cited to the APA's rule-making authority at 5 U.S.C. § 553 (1977), which provides that it is inapplicable "to the extent that there is involved -- (1) a military or foreign affairs function of the United States," or "(2) a matter relating to . . . public property, loans, grants, benefits, or contracts." *McDonald*, 371 F.Supp. at 840.

In count five, plaintiffs claimed that as a result of the findings of death, they were deprived of their constitutional rights as beneficiaries of the Paris Peace Accords of January 1973. The court found it unnecessary to make a determination as to this argument because it would not resolve the constitutional issues that must be addressed by the three-judge court. *Id.* at 840.

²²⁵ *Id.* at 839. At the time of this decision, 28 U.S.C. § 2282 (1970) required that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality could not be granted unless heard and decided by a three-judge district court. Later, 28 U.S.C. § 2282 was repealed by Act of August 12, 1976, Pub. L. No. 94-381, § 2, 90 Stat. 1119. In deciding whether to convene a three-judge court, the court noted that the Supreme Court had consistently held that due process under the Fifth Amendment required some form of notice and opportunity to be heard in administrative proceedings when

panel should hear and determine, if necessary, plaintiffs' claim that the Services' application of the statute was unconstitutional.²²⁶ The judge, therefore, issued a temporary restraining order pending the three-judge panel's determination of these issues. The restraining order applied to all members of the Army, Navy, Marines and Air Force who were, on July 20, 1973, in a missing status while serving in Indochina. As of the date of the order, August 6, 1973, the Military Services were prohibited from making any official report of death or any finding of death with respect to these service members.²²⁷

adjudications of fact are made, and when a person is deprived of a protected interest. The court found a property interest involved in the monthly payments that accrue while a service member is carried in a missing status. The court further noted that a Service Secretary's authority to make presumptive findings of death under the Missing Persons Act, coupled with the lack of notice and opportunity to be heard, appeared to create an irrebuttable presumption of death. This also raised a substantial constitutional question because the Supreme Court had traditionally held that irrebuttable presumptions that act to deprive persons of protected interests violate the due process clause of the Fifth Amendment (citations omitted). *McDonald*, 371 F.Supp. at 839-40.

²²⁶ *McDonald*, 371 F. Supp. at 839.

²²⁷ *Id.* at 840-41. The court excepted the following actions:

- (1) Defendants may proceed under Sections 555 and 556 of 37 U.S.C. as to any MIA if they receive from the primary next-of-kin a request in writing that they not delay action on the information in their possession.
- (2) Defendants may continue or initiate any activity for the purpose of obtaining information about any MIA.

Six months later, on February 13, 1974, a three-judge panel for the Southern District of New York permanently enjoined the Military Services from making determinations of death under the Missing Persons Act, except in conformance with the court's opinion.²²⁸ The court found the particular sections of the Missing Persons Act unconstitutional on their face and as applied insofar as they permitted the Service Secretaries to make official reports of death and findings of death without affording next-of-kin who are entitled to benefits under the Missing Persons Act notice and an opportunity to be heard.²²⁹

The court noted that prior Supreme Court decisions had established that procedural due process is required in administrative proceedings when adjudications of fact are made which may deprive a person of a constitutionally protected interest.²³⁰ The court found that there was "no question that

(3) Defendants may communicate any information so obtained now in their possession or hereafter acquired.

(4) Defendants may respond to any unsolicited inquiry from any family of any MIA not related to the allegations or merits of this action.

(5) Defendants may deliver the possessions or remains of any MIA to the primary next-of-kin.

²²⁸ McDonald v. McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974).

²²⁹ *Id.* at 837.

²³⁰ *Id.* at 834 (citing *Hannah v. Larche*, 363 U.S. 420 (1960); *Morgan v. United States*, 304 U.S. 1 (1938)).

an 'official report of death,' or a 'finding of death' made by [the Service Secretaries] is an adjudication of fact."²³¹ The court next found that the plaintiffs had a property interest, protected by the Fifth Amendment, in the continuation of entitlements to pay and allowances granted to them under the act. Therefore, the United States Constitution required the Services to provide such persons with notice and an opportunity to be heard before deciding that a service member in a missing status is dead.²³² The court declined, however, to prescribe the exact form of these procedures.

We only hold that under minimum due process standards notice must be given of a status review and the affected parties afforded a reasonable opportunity to attend the review, with a lawyer if they choose, and to have reasonable access to the information upon which the reviewing board will act. Finally, they should be permitted to present any information which they consider relevant to the proceeding. Once that is done, the requirements of due process have been satisfied.²³³

In a subsequent decision, the Court of Claims refused, however, to apply *McDonald* retroactively to declare all prior determinations of death void *ab initio*.²³⁴

²³¹ *Id.*

²³² *Id.* (citations omitted).

²³³ *Id.* at 836. On May 28, 1974, the Supreme Court refused a government application for stay of judgment and other relief. *McDonald v. McLucas*, 417 U.S. 905 (1974). Six months later, on November 11, 1974, the Supreme Court affirmed the judgment of the New York District Court in a memorandum opinion. *McDonald v. McLucas*, 419 U.S. 987 (1974).

²³⁴ See *Crone v. United States*, 538 F.2d 875 (Ct. Cl. 1976).

B. *Re-establishing Status Review Hearings After McDonald*

In 1974, immediately following the declaratory judgment in *McDonald*, representatives of the Office of the Secretary of Defense and the Military Services met to decide how to implement the *McDonald* ruling.²³⁵ Generally, they agreed that basic uniformity among the Services in administering the informal status review hearing was imperative. Also, the new procedures must be informal and not adversarial in nature. Consequently, procedures would not include cross-examination of witnesses, presentation of interrogatories, or the recording of testimony. They agreed further that the Services would send notices to the next-of-kin receiving financial benefits under the Missing Persons Act. These individuals would be known as "primary next-of-kin." Only these individuals could attend the status review; the Services would keep all other "secondary next-of-kin" informed of developments by mail. The Services also would grant the primary next-of-kin access to all information on which the status review would be based. Additionally, they agreed that the Services would review classified matter for declassification, but if the material could not be declassified, the primary next-of-kin would not be shown the

²³⁵ See Memorandum for Record, Department of Defense, Office of General Counsel, Washington, D.C., subject: *McDonald v. McLucas*, U.S.D., S.D.N.Y., 73 Civ. 3190 (February 13, 1974) (March 18, 1974) [hereinafter OGC Memorandum for Record].

material or informed of its existence. Moreover, the file reviewed by the hearing officer and the Secretary could not include any information not available to the next-of-kin.²³⁶

Even after adopting new policies in 1974, however, the Department of Defense continued to suspend all status reviews of missing service members under the Missing Persons Act, except where requested by next of kin or upon receipt of conclusive evidence of death, such as the return of remains.²³⁷ During this suspension, both the Executive Branch and the Congress investigated the fate of American service members missing in Southeast Asia.²³⁸

During 1973 and 1974, for example, the Senate Foreign Relations Committee, chaired by Senator Fulbright, held public hearings to review the problem of those still listed as

²³⁶ In the Spring of 1974, all the Military Services established policies complying with this agreement. See, e.g., Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et seq.), approved by J. William Middendorf II, Acting Secretary of the Navy (March 26, 1974) (on file with Office of POW/MIA, Military Personnel Command, Department of the Navy).

²³⁷ *But see In re Estate of Rausch*, 347 N.Y.S.2d 925 (1973) (holding that the federal court order restraining the military services from making an official report of death of any person declared to be missing in action did not restrain the New York state court from making a finding of death pursuant to laws enacted in its jurisdiction).

²³⁸ Between April 1973 and April 1975, however, North Vietnam returned the remains of only 23 United States personnel. POW-MIA FACT BOOK, DEPARTMENT OF DEFENSE, July 1990, at 4.

prisoners of war and missing in action in Southeast Asia.²³⁹

The House of Representatives' Select Committee on Missing Persons in Southeast Asia also held hearings from 1975 through 1976. At the beginning of its tenure in 1975, the select committee requested that the Department of Defense continue to suspend status review hearings.²⁴⁰ The committee, chaired by Representative Sonny Montgomery and known as the "Montgomery Committee", concluded in December of 1976 that the Missing Persons Act "adequately protects the rights of the missing person and their next-of-kin."²⁴¹ The committee found that the massive efforts of the American combatant forces to recover their lost personnel were "unparalleled in the history of our nation and contributed significantly to rescuing more than half of all aviators shot down in Indochina and recovering remains of numerous ground force personnel."²⁴²

Additionally, the Montgomery Committee found that the Department of Defense "generally" gave "generous attention to the needs and desires of POW/MIA next-of-kin."²⁴³ It found, however, that, at the Executive Branch's direction, the

²³⁹ S. REP. NO. 779, 93d Cong., 2d Sess. 3 (1974).

²⁴⁰ HOUSE SELECT COMMITTEE ON MISSING PERSONS IN SOUTHEAST ASIA, 94th Cong., 2d Sess., SUMMARY, CONCLUSIONS AND RECOMMENDATIONS v (Comm. Print Dec. 1976) [hereinafter the Montgomery Committee].

²⁴¹ *Id.*

²⁴² *Id.* at 5.

²⁴³ *Id.*

Department of Defense "sometimes concealed actual loss sites during the 'secret war in Laos,' and that this misinformation later contributed to the mistrust expressed by next-of-kin." Moreover, according to the committee, "[t]he military classification system figured prominently in the difficulty experienced by some MIA families and contributed to unnecessary confusion, bitterness, and rancor."²⁴⁴

In 1977, President Jimmy Carter appointed Leonard Woodcock to head the Presidential Commission on Americans Missing and Unaccounted for in Southeast Asia. This commission visited both Vietnam and Laos to discuss the issue of those unaccounted for from the Vietnam Conflict. During one of these visits in March 1977, the Vietnamese first announced that they had established an office to seek information on missing Americans and to recover remains.²⁴⁵ Despite efforts to locate those missing in Southeast Asia, however, the Montgomery Committee, the Woodcock Commission and the Department of Defense all concluded that there was no evidence that any American personnel were alive and being held against their will in Southeast Asia.²⁴⁶

²⁴⁴ *Id.*

²⁴⁵ See POW-MIA FACT BOOK, *supra* note 238.

²⁴⁶ Memorandum, Secretary of Defense Harold Brown to President Jimmy Carter, subject: Status Reviews for Servicemen Missing in Southeast Asia (May 26, 1977), reprinted in 141 CONG. REC. S16,417 (daily ed. Oct. 31, 1995). See memorandum *infra* note 249.

By early 1977, President Carter was attempting friendlier relations with Vietnam.²⁴⁷ At the same time, however, the President had requested that the Pentagon forward recommendations on status reviews of those service members still carried in a missing status.²⁴⁸ On May 26, 1977, then-

²⁴⁷ Those efforts eventually ended when Vietnamese troops occupied Cambodia and drove out Pol Pot's Khmer Rouge in January 1979. See George Black, *Republican Overtures to Hanoi*, THE NATION, June 4, 1988, at 773.

²⁴⁸ See Memorandum, Secretary of Defense Harold Brown to President Jimmy Carter (February 14, 1977), reprinted in 141 CONG. REC. S16,417 (daily ed. Oct. 31, 1995):

I understand that at your meeting on February 11 with leaders of the National League of Families, you indicated that the moratorium on unsolicited status changes for MIAs would continue. From our conversation before that meeting, my understanding is that the Department of Defense should go through all the files, getting ready to move on a program of unsolicited status changes later this year depending upon the outcome of negotiations with the Vietnamese.

Do I correctly understand your wishes?

See also Memorandum, Michael Oksenberg, National Security Council, to Zbigniew Brzezinski, subject: Forthcoming Paris Negotiations with the Vietnamese (March 25, 1977), reprinted in 141 CONG. REC. S16,417 (daily ed. Oct. 31, 1995):

You might wish to underscore to the President the desirability of toning down expectations, should a question arise at the press conference about the Paris negotiations.

The Vietnamese media have been vitriolic in their attacks on the U.S. They have explicitly linked aid to recognition. They have begun to release additional communications which passed between the Nixon Administration and the DRV.

Among other considerations, the hardened mood makes it unlikely that we will be obtaining more information on MIAs. At the same time, in response to the President's request, the Pentagon is forwarding

Secretary of Defense Harold Brown wrote to President Carter recommending that, "given the overwhelming probability that none of the MIAs ever will be found alive," the Service Secretaries should be allowed to conduct status reviews "as mandated by law even though we have not received a full accounting."²⁴⁹ Secretary Brown assured President Carter that

recommendations on status reviews of the MIAs. The Pentagon will recommend that case reviews go forward, i.e., that MIAs be declared KLA [sic, KIA]. This will place the President in a difficult political position, should he decide to accept the Pentagon's recommendation. He had earlier pledged not to allow case reviews until an adequate accounting had been obtained. And he had raised public expectations that the Vietnamese were going to be more forthcoming on MIA information. Now it looks as if we may be in a deep freeze for at least many months.

Placed in the broadest context, when one considers the Vietnamese statements as well as Congressional votes against aid to Vietnam, we see the inability of two bitter enemies swiftly to place the past behind them, as the President had hoped.

²⁴⁹ Memorandum, Secretary of Defense Harold Brown to President Carter, subject: Status Reviews for Servicemen Missing in Southeast Asia (May 26, 1977), reprinted in, 141 CONG. REC. S16,417) (daily ed. Oct. 31, 1995):

You have asked for my recommendations concerning status reviews for MIA.

As you know, since mid-1973 DoD has conducted status reviews only upon the written request of a missing serviceman's primary next of kin or upon receipt of conclusive evidence of death, such as the return of his remains. The Woodcock Commission concluded (as had the House Select Committee on Missing Persons in Southeast Asia and the Department of Defense) that there is no evidence that any American servicemen are alive and being held against their will in Southeast Asia.

It is true that the Southeast Asian governments probably have significantly more information about our

the procedures for status reviews met legal requirements and

missing men than they have given to us. There is no reason to believe, however, that continuing to carry servicemen as missing in action puts pressure on Hanoi to provide information on our missing men. In fact, the opposite is probably true; it puts pressure on us to make concessions to Hanoi. Status reviews, and obtaining of a complete accounting, are two distinct issues. An accounting that confirms death by direct evidence validates a declaration or presumption of death for a missing serviceman, but it is not a legal prerequisite to a status change.

Given the overwhelming probability that none of the MIAs ever will be found alive, I believe the time has come to allow the Secretaries of the Army, Navy and Air Force to exercise their responsibilities for status reviews as mandated by law even though we have not received a full accounting.

Reinstatement of reviews will of course be controversial. Certain members of the Congress, some families of the missing men, and others will charge that it is an abandonment of MIAs.

.

The resumption of reviews will be preceded by (1) an expression of our strong commitment to obtaining further information about the missing men and (2) careful preparation of concerned groups for the change of policy. The decision will be discussed forthrightly with the National League of Families. Appropriate Senate and House leaders and key members will be given advance notice.

The procedures for status reviews will be uniform among the Military Departments, in accordance with legal requirements, and announced through simultaneous letters from the Service Secretaries to the PW/MIA families.

The public will be informed of the reasons for reinstituting status reviews and assured that this does not detract from our determination to obtain an accounting. (I suggest that the public announcement would be most effective coming from you, but I am prepared to make it instead).

were uniform throughout the Department of Defense. The Secretary explained that status reviews and obtaining a complete accounting were two different issues. A service member may be presumed dead under the Missing Persons Act. To be "accounted for," however, death must be confirmed by direct evidence.²⁵⁰

Then, in August of 1977, the government announced that it would resume status reviews under the Missing Persons Act of those service members still in a missing status from the Vietnam Conflict.²⁵¹

C. *Challenges to Status Review Boards*

Immediately following the government's announcement, parents and "next friends" of several missing service members filed a motion in the Eastern District of New York. The plaintiffs requested a preliminary injunction staying the President and the Department of Defense from instituting or continuing status reviews under the Missing Persons Act. The district court denied their motion, and plaintiffs appealed.²⁵² The Second Circuit affirmed the district court's decision denying plaintiff's motion, stating:

There is nothing that the government of a grateful

²⁵⁰ *Id.*

²⁵¹ See *Hopper v. Carter*, 572 F.2d 87, 88 (2d Cir. 1978) (discussing the government's announcement that it would resume status review hearings).

²⁵² *Hopper v. Carter*, No. 77-1793, slip op. (E.D.N.Y. Dec. 19, 1977), *aff'd*, 572 F.2d 87 (2d Cir. 1978).

people can ever do fully to compensate or comfort the next of kin of those who have given "the last full measure of devotion," and for whom there is no hope of return. But it is beyond dispute that the government now provides every opportunity for the discovery and consideration of any evidence militating against a determination of death. The government is acting generously and compassionately in sparing no pains to ascertain as conclusively as possible what has actually happened to those missing in action before reaching any determination adverse to their interests or those of their next of kin. The conclusion is inescapable that the measures taken by the government suffice to defeat any claim that the constitutional rights of the plaintiffs are being or may be violated.²⁵³

Many families of service members who had not come home from Southeast Asia did not agree. For them, the Missing Persons Act was not a law "enacted solely for the purpose of affording some financial support for the families of missing members . . . during the time their fate was unknown."²⁵⁴ Rather, it was a law that allowed the military to write-off their loved ones by declaring them dead, without any attempt to locate these persons. Consequently, some family members continued to litigate any attempt by the Military Services to declare their loved ones dead: not because they wanted the service member's pay and allowances, but because they wanted the government to continue its efforts to discover what happened to their loved ones. Federal courts dismissed many of these suits, however, based on a lack of standing or a

²⁵³ Hopper v. Carter, 572 F.2d 87, 88 (2d Cir. 1978).

²⁵⁴ Bell v. United States, 366 U.S. 393, 408 (1961).

failure to exhaust administrative remedies. When not dismissed on these bases, challenges to status review hearings, generally alleging non-compliance with due process, the Freedom of Information Act, and the Paris Peace Accords, ordinarily were unsuccessful.

1. *Standing to Challenge Status Decisions*--In *Crone v. United States*,²⁵⁵ the Court of Claims held that dependents who are entitled to allotments of a missing service member's pay and allowances have standing to sue under the Missing Persons Act.²⁵⁶ These individuals may sue in an attempt to prove that their allotments were unlawfully discontinued because a determination of death was unlawful.²⁵⁷ According to the Court of Claims, the standard of review is whether a determination is supported by substantial evidence. Further, the court found that claimants are entitled to a *de novo* trial on the

²⁵⁵ 538 F. Supp. 875 (Ct. Cl. 1976), *reh'g granted*, 210 Ct. Cl. 748 (1976).

²⁵⁶ *Id.* at 883. The Court of Claims found that it had jurisdiction pursuant to 28 U.S.C. § 1491 (1994) because plaintiffs claimed monetary relief under the Missing Persons Act. *Crone*, 538 F. Supp. at 877.

²⁵⁷ *Crone*, 538 F. Supp. at 883. The court also indicated that a dependent-wife may have standing to sue under the Missing Persons Act, even though the appropriate authority immediately had declared her husband to be dead. The court stated that the issue of the wife's standing to sue is intertwined with the possibility of her right to recover under the Missing Persons Act if she can establish that her husband should have been placed in a missing status, and not immediately declared dead. *Id.*

disputed issues of fact.²⁵⁸ The court decided, however, that parents do not have the right to challenge death determinations unless they are eligible under the act to receive their children's pay and allowances.²⁵⁹ In so deciding, the court observed that there appeared to be no Congressional intent to extend the protections and benefits conferred by the act to persons other than dependents and the missing persons themselves.²⁶⁰

In addition, parents cannot establish standing to sue simply because a Military Service has extended to them some procedure during the status review hearing. For example, in 1978, the parents of Marine Lieutenant Colonel Gary Fors received notice that the Marines' Missing and Captured Review Board would review their son's missing in action status. The notice stated that the parents were allowed to attend a hearing, with or without private counsel, to review all evidence to be considered by the board, and to present any additional evidence for review. After the board recommended that Lieutenant Colonel Fors' status be changed to killed in

²⁵⁸ *Id.* at 887.

²⁵⁹ See *McDonald v. McLucas*, 371 F. Supp. 831, 834 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974) (finding that next of kin who receive monthly payments under the Missing Persons Act while a member is carried in a missing status have a right to procedural due process in administrative proceedings where adjudications of fact are made which may deprive them of those payments).

²⁶⁰ *Crone*, 538 F. Supp. at 882.

action, the parents filed suit, seeking to have their son's status restored and to enjoin the Secretary of the Navy from adjusting the status without court order. The district judge dismissed the complaint for lack of standing because Mrs. Fors (the only living parent at the time of the decision) was not a "dependent," as defined by the act.²⁶¹

On appeal, Mrs. Fors argued that the government was estopped to deny her standing because it had considered her next-of-kin and allowed her some rights under the Missing Persons Act, as interpreted by *McDonald*.²⁶² The Ninth Circuit Court of Appeals disagreed, finding that the process extended to Mrs. Fors was not a right, but a privilege, as Congress intended the Missing Persons Act to benefit only the dependents of missing service members. Consequently, the Marine Corps' extension to non-dependents of certain procedures did not change the purpose of the act, nor extend standing to non-dependents.²⁶³

²⁶¹ Fors v. Hildago, No. C80-421T, slip op. (W.D.Wash. Aug. 4, 1983), *sub nom.* Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984). The Missing Persons Act defines a "dependent" as a spouse, an unmarried child (including an unmarried dependent stepchild or adopted child) under 21 years of age, a dependent mother or father, a dependent designated in official records, and a person determined to be dependent by the Secretary concerned, or his designee. 37 U.S.C. § 551(1) (1988).

²⁶² Fors v. Lehman, 741 F.2d 1130, 1134 (9th Cir. 1984).

²⁶³ *Id.*

Parents were, therefore, stymied in their efforts to stop the Military Services from changing the status of their children, unless the parents were entitled to benefits under the Missing Persons Act.²⁶⁴ Spouses of missing service members, however, as beneficiaries of the act, continued to file suit attempting to stop these status reviews.

2. *Challenges Prior to Secretarial Action*--Federal courts have consistently dismissed complaints attempting to enjoin Service Secretaries from taking action on a board recommendation, finding them to be premature. In *Darr v. Carter*,²⁶⁵ for example, the Eight Circuit Court of Appeals denied a motion to enjoin the Secretary of the Air Force from acting on a status review board recommendation that Captain Charles Darr's status be changed from missing in action to killed in action. The court held that allowing the action would be an improper and premature interference with the administrative process.²⁶⁶

²⁶⁴ See, e.g., *Crone v. United States*, 210 Ct. Cl. 748, 749 (1976) (finding that there may be an issue of fact as to whether plaintiff Velma Crone was the financial dependent of her son because if she was a financial dependent, she had standing to sue under the Missing Persons Act).

²⁶⁵ 640 F.2d 163 (8th Cir. 1981).

²⁶⁶ *Id.* at 164. The court noted that the exhaustion and finality requirements are not without exception. Immediate judicial review is appropriate only if there is a showing that the denial of the same will subject the plaintiff either to irreparable injury or an inadequate remedy. *Id.* at 165 (citation omitted). In Mrs. Darr's case, the court found that she had not demonstrated irreparable injury incident to the

3. *Due Process Challenges*--In 1979, the wife of Air Force pilot Captain Francis Townsend filed suit attempting to prevent the Air Force from acting on a recommendation by a board of officers that her husband's missing in action status be changed to killed in action.²⁶⁷ Mrs. Townsend argued in part that the hearing violated her due process rights under the Fifth Amendment.

First, Mrs. Townsend argued that her due process rights were violated because the board was not impartial, as the board members may have been subject to command pressure in rendering their decision. The court rejected this argument, finding that the fact that all board members were members of

orderly procedures of the Air Force regulation, nor had she shown injury due to extraordinary litigation expense, unreasonable administrative delay, or lack of jurisdiction on the part of the Secretary of the Air Force. Additionally, she had not shown that her administrative remedy was not adequate. As the court observed, the only deprivation in this case would arise at the conclusion of agency proceedings if the son's status was changed. *Id.* See also *Lewis v. Reagan*, 660 F.2d 124 (5th Cir. 1981) (adopting the reasoning in *Darr* and finding plaintiff's suit to be premature); *Evans v. Secretary of the Army*, No. 79-3104, slip op. (N.D.Ill. Feb. 7, 1980) (granting a defense motion to dismiss and finding that plaintiff had not exhausted her administrative remedies by: (1) applying to the Army Board for Correction of Military Records to correct errors in the decision to change Captain Kenneth Yonan's status, as provided by 32 C.F.R. § 581.3 (1995); and (2) requesting the Secretary of the Army to reconsider his decision to change that status, as provided in 37 U.S.C. 556(d) (1988 & Supp. 1995)).

²⁶⁷ *Townsend v. United States*, 476 F.Supp. 1070 (N.D.Tex. 1979).

the Air Force did not in itself bar them from acting as impartial decision makers.²⁶⁸

Second, Mrs. Townsend alleged that she was denied her right to cross-examination. She argued first that because the officers were asked to rely on their combat experience, any decision they reached was based in part on that experience, which was not presented at the hearing and not subject to cross-examination. The court disagreed, finding that courts had previously approved fact-finding panels that drew on their particular backgrounds in making a decision.²⁶⁹ Mrs. Townsend also argued that she was denied her right to cross-examination because the board's decision was partially based on classified information that was not available to her. The court found no merit to this claim, either. It noted that the classified information pertained only to sources and methods of gathering information in Vietnam and the Air Force provided Mrs. Townsend with extracts from that information. Additionally, the court observed that the board made a specific finding that the classified information did not affect its decision.²⁷⁰

²⁶⁸ *Id.* at 1072 (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)).

²⁶⁹ *Id.* at 1073 (citing *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970)). The court also noted that the board members' experience enabled them to consider and draw on reasonable inferences from that experience. Moreover, the status review procedure provided for a voir dire of the board members to decide whether any should be disqualified for cause. *Id.*

²⁷⁰ *Id.* at 1073.

Third, Mrs. Townsend argued that her due process rights were violated because the Air Force did not make available over 15,000 pages of uncorrelated documents (that is, documents not identified as pertaining to any particular individual) until after the hearing. The Air Force had, however, released all unclassified correlated information relating to Captain Townsend. The court found this allegation to be without merit because Mrs. Townsend made no claim that the uncorrelated documents contained any new information.²⁷¹

Fourth, Mrs. Townsend argued that it was impossible for the Air Force to make a fair determination of the status of a missing service member until it examined all possible sources of information. In rejecting this argument, the court found that due process did not mean interminable delay: a decision made after notice and hearing and with reasonable promptness is not invalid simply because "every conceivable source of information, however remote or conjectural, has not been exhausted."²⁷²

Finally, Mrs. Townsend complained of a lack of formal discovery proceedings. The court found, however, that due process did not require a trial-type hearing in every

²⁷¹ *Id.* at 1072.

²⁷² *Id.* at 1074.

conceivable case.²⁷³ It further noted that, "[t]he status review hearing is not the kind of situation which requires an adversarial, trial-type hearing."²⁷⁴

4. *Freedom of Information Act Challenges*²⁷⁵--Mrs. Townsend also argued that the government failed to maintain and provide records in a timely and complete manner, as required by the Freedom of Information Act (FOIA). Specifically, she alleged that the Air Force violated the FOIA by failing to: (1) provide board members with certain documents until the hearing; and (2) disclose the uncorrelated documentation before the hearing. Mrs. Townsend complained that these failures violated the FOIA requirement to maintain records in a timely and complete manner.²⁷⁶ The court found both arguments to be without merit: the records were not disclosed to the board prior to the hearing to prevent preconceptions by the board, and records on Captain Townsend, specifically, had been maintained as required.²⁷⁷

²⁷³ *Id.* (citing *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 894 (1961); *Woodbury v. McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971)).

²⁷⁴ *Id.*

²⁷⁵ 5 U.S.C. § 552a (1977 & Supp. 1995).

²⁷⁶ *Townsend*, 476 F. Supp. at 1074 (citing 5 U.S.C. § 552a(a)(5), (e)(5) (1977 & Supp. 1995)).

²⁷⁷ *Id.*

Additionally, the Fifth Circuit in *Lewis v. Reagan*²⁷⁸ addressed whether the government must act on a primary next of kin's FOIA request before a status review hearing could be convened. The court held that the mere pendency of a FOIA request, or appeals from denials of access to such information, did not give rise to the irreparable injury necessary to enjoin a status review hearing under the Missing Persons Act.²⁷⁹

5. *Paris Peace Accords Challenges*--Finally, family members argued that a change in status from missing to killed in action would result in a loss of their constitutional rights as beneficiaries of section 8(b) of the Paris Peace Accords.²⁸⁰ In *Darr v. Carter*,²⁸¹ the court rejected this argument, holding that a presumptive finding of death did not alter the government's obligation under the Paris Peace Accords to continue its efforts to locate those persons as to

²⁷⁸ 660 F.2d 124 (5th Cir. 1981).

²⁷⁹ *Id.* at 128.

²⁸⁰ See § 8(b) of the Paris Peace Accords, *supra* note 212 and accompanying text. Plaintiffs first raised this claim in *McDonald*, but the district court found it unnecessary to decide this matter because it would not resolve the constitutional due process issues to be decided by the three-judge panel. *McDonald v. McLucas*, 371 F. Supp. 837, 840 (S.D.N.Y. 1973), 371 F. Supp. 831 (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974).

²⁸¹ 487 F. Supp. 526 (E.D.Ark. 1980), *aff'd*, 640 F.2d 163 (8th Cir. 1981).

whom no conclusive information of death had been received. The court noted that "[t]he government had demonstrated no such interpretation of the change of status, and the finding may be reconsidered upon discovery of additional facts or documents."²⁸²

As reflected in the above court decisions, after the Military Services implemented procedures required by *McDonald*, courts generally did not interfere in Secretarial decisions under the Missing Persons Act. Implementation of these procedures did not, however, dispel the belief by some individuals that the United States had left behind service members in Southeast Asia.

D. Government Efforts to Locate Persons Unaccounted for in Southeast Asia

In 1979, Private First Class Robert Garwood, United States Marine Corps, returned from Vietnam after fourteen years.²⁸³

²⁸² *Id.* at 528.

²⁸³ See Memorandum, Michael Oksenberg, National Security Council, to David Aaron, subject: League of Families Meeting with the President (March 7, 1979), reprinted in 139 CONG. REC. S8,565 (daily ed. July 1, 1993).

A live American defector had been sighted in Hanoi and has indicated that he wishes to return to the United States. The Vietnamese had previously given no indication that there were any live Americans in Vietnam--although they clearly knew about this case. The defector has also claimed that he knows of other Americans, apparently, who are alive in Vietnam. It is politically wise perhaps for the President to protect himself on this issue by reasserting his continued interest in a full accounting.

On March 22d of that year, Private Garwood stepped off a plane in Bangkok, Thailand, and a Marine Corps official advised him that he was under investigation for certain criminal activities, including desertion.²⁸⁴ The Marine Corps ultimately convicted Private Garwood of communicating with the enemy and assault on an American prisoner of war.²⁸⁵ He was sentenced to be discharged from the Marine Corps with a dishonorable discharge, to forfeit all pay and allowances, and to be reduced to pay grade E-1.²⁸⁶ Although the evidence

²⁸⁴ See *U.S. v. Garwood*, 16 M.J. 863, 866 (N.M.C.M.R. 1982), *aff'd*, 20 M.J. 148 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985). Following a UCMJ art. 32 (1988) investigation, the Marine Corps charged Private Garwood with desertion, in violation of UCMJ art. 85 (1988); solicitation of U.S. troops in the field to refuse to fight and to defect, in violation of UCMJ art. 82 (1988); communication and holding intercourse with the enemy, in violation of UCMJ art. 104 (1988); and misconduct as a prisoner of war, in violation of UCMJ art. 105 (1988). Following presentation of the case in chief, the military judge granted Private Garwood's motion for findings of not guilty on the desertion and solicitation charges, and one specification of the maltreatment charge.

²⁸⁵ UCMJ art. 104 and art. 128 (1988), respectively.

²⁸⁶ *Garwood*, 16 M.J. at 865. The testimony at trial from fellow prisoners of war revealed that Private Garwood was not simply a prisoner of war who had been held against his will in Vietnam for fourteen years. For example, Garwood acted as an interpreter during political indoctrination classes given to American prisoners of war; he acted as an informer to enemy captors regarding prohibited activities of the American prisoners; he served as an interrogator of Americans upon their initial entry into the camps; and he assaulted an American prisoner following an incident in which an enemy camp commander's cat had been killed for food by the American prisoners of war. *Id.* at 866.

indicated that Garwood had remained in Vietnam voluntarily, his return was, nevertheless, proof that Americans remained in Southeast Asia after the end of the war.

The unexpected return of PFC Garwood touched off hopes among the families of some servicemen still unaccounted for in Southeast Asia that their husbands and sons may still be alive . . . and brought renewed pressure on several Congressmen to reopen the sensitive question of Americans missing in Southeast Asia.²⁸⁷

Despite the hope of some family members that their missing service members survived, by the early 1980s the Services had declared all but one of those previously determined to be prisoners of war or missing in action in Southeast Asia to be dead under the Missing Persons Act, either under an official report of death or a finding of death. In cases where remains had not been recovered, the Services transferred these service members from a missing status to a KIA/BNR status. As a symbolic gesture, the government continued to list Air Force Colonel Charles E. Shelton of Owensboro, Kentucky as a prisoner of war.²⁸⁸

²⁸⁷ *PFC Garwood's Return Renews Families' Hopes*, RALEIGH NEWS, May 25, 1979, at A1.

²⁸⁸ 135 CONG. REC. H973 (daily ed. April 6, 1989) (statement by Rep. Rowland). See also 136 CONG REC. S5,898 (daily ed. May 9, 1990) (statement by Sen. Ford):

On April 29, 1965, Colonel Shelton was piloting RF101C during a routine reconnaissance mission over Laos when he was shot down. Another American pilot witnessed Shelton parachuting to the ground, and Shelton informed the pilot by radio contact that he was safe. According to a village witness, and later confirmed by U.S. rallier reports, Colonel Shelton was captured by Pathet Lao Forces.

Further complicating the issue of missing service members, the Department of Defense began in the early 1980s to include in the definition of "unaccounted for" all service members originally categorized as KIA/BNR, as well as those initially classified as missing.²⁸⁹ This led to a dramatic increase in the number of unaccounted for service members, and resulted in a situation wherein there were more Americans currently considered unaccounted for from Southeast Asia than immediately after the war. This policy was due in large part to litigation initiated by families of prisoners of war and those missing in action and Congressional pressure.²⁹⁰

During the early 1980s, Congress continued to devote many hours to accounting for service members from Southeast Asia, including hearings by a special task force under the

According to a CIA report, three years after his capture, three communist soldiers escorted Colonel Shelton to a North Vietnamese Army office. As the soldiers were attempting to chain Colonel Shelton to a desk, he managed to obtain the chain and killed the soldiers in self-defense.

In 1971, Colonel Shelton and another American were briefly rescued, but were later recaptured by the Vietnamese. Because he remains in a "missing status" as a prisoner of war, the United States Treasury continues to issue monthly checks to Colonel Shelton's wife, made payable to Charles E. Shelton.

²⁸⁹ Prior to the 1980s, the Department of Defense considered only service members initially classified as missing to be "unaccounted for." SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 158.

²⁹⁰ *Id.*

Subcommittee on Asian and Pacific Affairs, House Foreign Affairs Committee.²⁹¹ Additionally, President Ronald Reagan declared that his administration "attached the highest priority to the problem of those missing in action."²⁹² Also during this time, the government coordinated its policy on prisoners of war and those missing in action through the POW/MIA Interagency Group (IAG). Membership in the IAG included the Defense Department, the Joint Staff, the White House National Security Council staff, the State Department, the Defense Intelligence Agency and the National League of POW/MIA Families.²⁹³

²⁹¹ 131 CONG. REC. 19,620 (1985).

²⁹² President's Remarks on Signing a Resolution and a Proclamation Declaring National POW/MIA Recognition Day, 1981 PUB. PAPERS 508 (June 12, 1981). See also S. CON. RES. 46, 99th Cong., 1st Sess., 99 Stat. 1938-39 (1985) (providing that it was the "sense of Congress" that President Reagan should "ensure that officials of the United States Government consciously and fully carry out his pledge of highest national priority to resolve the issue of two thousand four hundred and eighty-three Americans still missing and unaccounted for in Indochina" and encouraging the President to "work for the immediate release of any Americans who may still be held captive in Indochina"). But see 131 Cong. Rec. 19,622 (1985) (statement by Rep. Montgomery objecting to the above language, last-quoted, because he had been involved in the prisoner of war, missing in action issue "for some 15 years and [had] made 13 trips to Southeast Asia" and while he "sincerely hope[d]" that he was wrong, it was his opinion "that no Americans are being held captive against their will in Indochina as a result of our involvement in the Vietnam War").

²⁹³ POW-MIA FACT BOOK, *supra* note 238.

Then, in 1984, the Government of Laos allowed an American team to excavate the crash site of an American aircraft shot down in Laos in 1972. Shortly thereafter, an American team visited a crash site of an American aircraft shot down near Hanoi. This was the first time in twelve years that Americans had examined a crash site in Indochina.²⁹⁴ It appeared that Laos and Hanoi were finally cooperating. Hanoi agreed to an increase in the schedule of government-to-government technical meetings, and returned several sets of American remains.²⁹⁵ Also, the Government of Lao People's Democratic Republic allowed an American excavation team to inspect and work at a crash site near Pakse, Laos. The team recovered thousands of bone and tooth fragments, personal effects, and military identification tags. As a result of the recovery efforts, the United States Army Central Identification Laboratory in Hawaii identified fifteen remains.²⁹⁶

With the government's continuing efforts to recover remains and account for service members came a shift in focus by family members dissatisfied with government accounting efforts. Instead of concentrating on the Missing Persons Act

²⁹⁴ 131 CONG. REC. 19,620 (1985) (statement of Rep. Solomon).

²⁹⁵ *Id.* (statement of Rep. Gilman).

²⁹⁶ *Id.* See also *Hart v. United States*, 894 F.2d 1539, 1542 (11th Cir. 1990), *cert. denied*, 498 U.S. 980 (1990) (regarding one of those service members identified as a result of the Pakse excavation).

and status decisions thereunder, families began challenging the process of remains identifications.

E. Challenges to Service Accounting Decisions

Because service members were no longer in a missing status under the Missing Persons Act, families based their challenges to Service accounting decisions on other Federal law, including the Federal Tort Claims Act and the Hostage Act. As in earlier claims filed under the Missing Persons Act, however, these latest challenges generally were not successful.

1. *Federal Tort Claims Act*²⁹⁷--One of those identified at the Pakse crash site in Laos was Lieutenant Colonel Thomas Hart. As a result of that identification, the wife of Lieutenant Colonel Hart became the first family member to refuse to accept the remains of a service member from Southeast Asia. In 1972, Lieutenant Colonel Hart and fifteen other crewmembers were on board an Air Force AC-1304 Spectre when it was hit by anti-aircraft fire. The Air Force originally placed Lieutenant Colonel Hart in a missing status, but after conducting a review in 1978 under the Missing Persons Act, the Air Force changed his status to KIA/BNR. In 1985, a United States Army Central Identification Laboratory team recommended to the Armed Services Graves Registration Office that the crewmen be listed as identified. Mrs. Hart's own expert examined the remains and concluded it was

²⁹⁷ 28 U.S.C. §§ 2671-80 (1994).

impossible to tell whether the fragments came from Lieutenant Colonel Hart. Mrs. Hart then refused to accept the remains. The Graves Registration Office eventually rescinded the identification based on an independent study commissioned by the Army that concluded it could confidently confirm only two of the crash site identifications.

When the government refused to return Lieutenant Colonel Hart to an unaccounted for (KIA/BNR) status, however, Mrs. Hart, her daughter, and Lieutenant Colonel Hart's mother filed suit in the Northern District of Florida under the Federal Tort Claims Act (FTCA) claiming intentional infliction of emotional distress. The district court held the government liable to all three plaintiffs.²⁹⁸ On appeal, however, the Eleventh Circuit reversed the district court's decision. The court held that government efforts to identify deceased personnel clearly fell within the discretionary function exception to the FTCA.²⁹⁹

²⁹⁸ Hart v. United States, 681 F. Supp. 1518 (N.D.Fla. 1988), *rev'd*, 894 F.2d 1539 (11th Cir. 1990), *cert. denied*, 498 U.S. 980 (1990).

²⁹⁹ Hart v. United States, 894 F.2d 1539, 1544 (11th Cir. 1990), *cert. denied*, 498 U.S. 980 (1990). The Federal Tort Claims Act [hereinafter FTCA] does not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be

Shortly after the United States excavated the Pakse site, a joint United States-Laotian search and recovery team excavated the site of an AC-130 crash in southern Laos. The gunship had exploded and crashed in 1972 after being struck by a surface-to-air missile. The Air Force listed Senior Master Sergeant Robert E. Simmons, among other crewmembers, as missing in action from the date of that crash. In 1977, the Air Force changed his status from missing in action to KIA/BNR, after a status review under the Missing Persons Act.

The recovery team excavating the site in 1986 recovered a tooth among the remains which the United States Central Identification Laboratory in Hawaii determined to be the upper right second molar of Simmons. Based on this identification, the Air Force changed Master Sergeant Simmons' status from KIA/BNR to KIA "body recovered." Simmons' mother then filed a claim with the Air Force stating that she had suffered emotional distress because the Air Force had informed her by telephone while she was at work that her son's status "would be changed from missing in action to killed in action based on the discovery of a single tooth."³⁰⁰

abused.

28 U.S.C. § 2680(a) (1994).

³⁰⁰ Simmons v. United States, 754 F. Supp. 274, 277 (N.D.N.Y. 1991). Plaintiff's claim again demonstrated the confusion between the status of missing in action under the Missing Persons Act and KIA/BNR under Service regulations.

After the Air Force denied her claim, Mrs. Simmons filed suit in federal district court.³⁰¹ She alleged that her claim under the FTCA accrued in 1987, based on the Air Force notification that her son was positively known to be dead, when the Air Force knew or should have known that discovery of a tooth does not confirm death. She claimed that the Air Force's action constituted deliberate infliction of emotional harm, compensable under the FTCA. The district court disagreed, finding that portions of Mrs. Simmons' complaint challenging the conclusiveness of death based on a finding of one tooth were incorrect because the Air Force determined in 1977 after a status review hearing that her son was killed in action. According to the court, the Air Force did not intend to verify death when it identified the tooth in 1987. Rather, its intent was to recover the remains of service members who were killed in action in Vietnam. Therefore, the court decided that any damages suffered as a result of her son's change in status to killed in action accrued in 1977. Consequently, the claim for damages under the FTCA was barred by the statute of limitations.³⁰²

³⁰¹ *Id.*

³⁰² *Id.* at 278. A claimant must file an administrative claim with the agency within two years of the time the claim accrues as a condition precedent to suit under the FTCA. 28 U.S.C. § 2401(b) (1994). The court noted that a claim challenging the Air Force's decision to change plaintiff's status from KIA/BNR to KIA, body recovered, on the basis of one tooth was not barred, as it accrued in 1987. Plaintiff's claims were not, however, based on this change of status. *Id.* at 279.

Mrs. Simmons also argued that the government failed to adhere to its own guidelines in excavating, documenting, and identifying remains. The court agreed with the Eleventh Circuit holding in *Hart*, however, that such a claim is barred by the discretionary function exception to the FTCA.³⁰³

Family members also filed suit under the FTCA arguing that a Military Service was negligent in its original classification decision. For example, in *Vogelaar v. United States*,³⁰⁴ the mother of Private Alan Barton, a soldier who disappeared in Vietnam, filed an action under the FTCA claiming that the Army was negligent in investigating the circumstances of her son's disappearance in Vietnam, and improperly classifying him as a deserter. The Army recovered Private Barton's remains in Vietnam in 1972, but did not identify them until 1983, due in large part to an Army mistake omitting his name from an "in-Vietnam" deserter list.

The court held that the mother's claim that the Army was negligent in its original investigation and classification of her son as a deserter was barred under the FTCA by both the

³⁰³ *Id.* at 280. The court found that pertinent regulations did not prescribe a specific set of procedures in either the search or identification policies promulgated by the military. Therefore, the government employees involved in the excavation and identification were forced to exercise their discretion in determining what procedures to follow and which forms to fill out documenting the excavation and identifying the remains. *Id.*

³⁰⁴ 665 F. Supp. 1295 (E.D.Mich. 1987).

foreign country exclusion³⁰⁵ and the combat exclusion.³⁰⁶ The court also found that accounting for and recovering the remains of service members in a combat theater during time of war is a nonjusticiable political question.³⁰⁷ It further

³⁰⁵ See *id.* at 1300 (quoting the FTCA, 28 U.S.C. § 2680(k) (1994), which provides that "[t]he provisions [of the FTCA] shall not apply to any claim arising in a foreign country").

³⁰⁶ See *id.* at 1301 (quoting the FTCA, 28 U.S.C. § 2680(j) (1994), which precludes "any claim arising out of the combatant activity of the military or naval forces or the Coast Guard, during time of war").

³⁰⁷ *Id.* at 1302. See also *Dumas v. United States*, 554 F. Supp. 10 (D.Conn. 1982) (dismissing plaintiff's claim that his brother's "civil and constitutional rights" were violated when the government failed to obtain his timely release from a Korean prisoner of war camp in 1953. The district court found that these claims presented either nonjusticiable political questions or fell within the combat exclusion and the discretionary function exceptions to the FTCA. The court did, however, allow the plaintiff to continue with his claim that the Secretary of the Army had wrongfully classified his brother as missing in action, when in fact he was a prisoner of war. The Army ultimately corrected these records to reflect that plaintiff's brother had been held as a prisoner of war); *Midgett v. United States*, 603 F.2d 835 (Ct. Cl. 1979) (directing that the Secretary of the Army correct Private Midgett's records to reflect that he had died on November 25, 1967 in Vietnam. After Private Midgett disappeared in Vietnam, the Army declared him absent without leave and subsequently discharged him as a deserter. The court found that the stigma associated with the Army's characterization of a serviceman as a deserter, after he had disappeared and was presumably deceased in a combat zone, requires strict scrutiny. The court then held that the Army Board for Correction of Military Records' decision not to change Private Midgett's records was arbitrary and capricious, contrary to law and unsupported by substantial evidence. The court found that the board's reliance on the administrative presumption of desertion, and the uncorroborated, inconclusive and secondhand

found, however, that the identification process changed once the war was over and the remains and identification system returned to the United States. Therefore, the plaintiff may be able to recover for the government's failure to identify and deliver her son's remains in a timely fashion.³⁰⁸

2. The Hostage Act³⁰⁹--In 1986, family members of missing Vietnam service members joined Vietnam veterans in another lawsuit against the government. In *Smith v. Reagan*,³¹⁰ plaintiffs first sought a writ of mandamus under the Hostage

testimony of former comrades was legal error, as the board had before it a legal presumption of death in the form of a decree from a Virginia state court, as well as the fact of his disappearance at the time and place of wartime hostilities.).

³⁰⁸ *Vogelaar*, 665 F. Supp at 1306. The court found that when the government undertook to identify Private Barton's remains, it owed a duty to his mother to proceed with reasonable care; the fact that the mother otherwise might suffer emotional distress was both foreseeable and likely.

³⁰⁹ 22 U.S.C. § 1732 (1990) states, in pertinent part:
Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release.

³¹⁰ 637 F. Supp. 964 (E.D.N.C. 1986), rev'd, 844 F.2d 195 (4th Cir. 1988), cert. denied, 488 U.S. 954 (1988).

Act ordering the President to conduct foreign relations with various countries in Southeast Asia to pursue official inquiries about the status of Americans missing in action. The district court dismissed the mandamus count holding that the United States Constitution confers on the President the right to conduct foreign affairs and, therefore, the court lacked subject matter jurisdiction to issue a writ of mandamus.³¹¹ Plaintiffs next asked the court to declare that the class of service members designated as missing in action were protected under the United States Constitution and laws.³¹² On a government motion for summary judgment, the court refused to dismiss plaintiff's request for declaratory judgment.³¹³

In an interlocutory appeal, the Fourth Circuit Court of Appeals reversed the district court decision and granted the government's request for summary judgment on this issue. The court found that the plaintiffs were really asking the court to determine whether American service members remained in

³¹¹ *Id.* at 966.

³¹² This last request for declaratory judgment again exemplifies the confusion over the term "missing in action." At the time plaintiffs filed their request for declaratory judgment asking the court to declare that those designated as missing in action enjoy the protections of the constitution and laws, there were no Vietnam-era service members who remained in a missing status, missing in action category, under the Missing Persons Act.

³¹³ *Smith*, 637 F. Supp. at 968.

captivity in Southeast Asia and to assess the adequacy of the Executive's efforts to obtain their release.³¹⁴ The court refused to interfere, finding that it had "no rightful power and no compass."³¹⁵ Moreover, even if the issues raised were justiciable, the court held that the suit must be dismissed because the Hostage Act created no explicit private right of action.³¹⁶

F. *Release of Information On Unaccounted for Service Members*

Throughout the 1980s, various individuals continued to make allegations of a government "cover-up" of this issue. These allegations were fueled by blockbuster movies about rescuing "forgotten" Vietnam prisoners of war, and profiteers claiming that, for a price, they could find a family member's loved one.³¹⁷ Congress investigated the question of a cover-up

³¹⁴ *Smith v. Reagan*, 844 F.2d 195, 196 (4th Cir. 1988), cert. denied, 488 U.S. 954 (1988).

³¹⁵ *Id.* at 202.

³¹⁶ *Id.* at 200.

³¹⁷ Alan Pell Crawford, *POW's/MIA's: What the Numbers Say*, THE VETERAN, April 1987, Part 1 (a monthly newspaper of the Vietnam Veterans of America), reprinted in 133 CONG. REC. 21,222-25 (1987). Additionally, in the mid-1980s, Garwood again took center stage, insisting to 60 Minutes Ed Bradley that Vietnam had "released" him only because he agreed to say that he had stayed in Vietnam voluntarily. Garwood also claimed that he was never debriefed on what he knew: that he saw American prisoners in Vietnam. Garwood's claims were suspect, however, because he had, in fact, been interviewed several times shortly after his return in 1979, not only by the Defense Intelligence Agency, but also by the Marine Corps and by Congressmen Lester Wolff and Benjamin Gilman. *Id.* at 21,223.

and, in 1984, the House Task Force on American Prisoners and Missing in Southeast Asia, chaired by Representative Gilman, announced that it found that there was no government cover-up of information of live prisoners.³¹⁸ Additionally, in 1985, Senator John McCain felt compelled to denounce allegations of a cover-up from the Senate floor. Senator McCain conceded that "possibly not enough reporting has been followed up, and that perhaps not the correct procedures have been used in certain specific cases where there are live sightings and other reasons to believe that men are still alive." Senator McCain stated, however:

I do reject . . . the allegations that there has been some kind of a cover-up on the part of this administration or previous administrations on this issue. There are too many men and women in uniform in the military who have been involved in this issue intimately, and I believe that such a thing as a cover-up is simply impossible.³¹⁹

Fueling suspicions of a government cover-up, however, a 1986 Defense Intelligence Agency Task Force, chaired by General Eugene Tighe, concluded that there was "a strong

See also Alan Pell Crawford, *POW's/MIA's: What the Numbers Say*, THE VETERAN, May 1987, Part 2, reprinted in 133 CONG. REC. 21,225-27 (1987) (citing to such cases as that of former Green Beret James G. "Bo" Gritz, who convinced several people to give him thousands of dollars for a failed rescue mission and who claimed that multimillionaire H. Ross Perot would finance most of his efforts).

³¹⁸ Crawford, *supra* note 317, May 1987, Part 2, reprinted in 133 CONG. REC. 21,225 (1987).

³¹⁹ 131 CONG. REC. 19,621-22 (1985).

possibility" that American prisoners of war were still alive and being held against their will in Vietnam.³²⁰ Acknowledging the significance of the entire missing persons issue, in 1987 President Ronald Reagan appointed General John Vessey, Jr., former Chairman of the Joint Chiefs of Staff, as his Special Presidential Emissary for POW/MIA affairs.³²¹

In 1988, Congress first recognized the importance of releasing all possible information on unaccounted for service members by enacting legislation incorporating into law government policy on disclosure of live-sighting reports of any person who was missing in action, a prisoner of war or unaccounted for in Southeast Asia. This legislation required

³²⁰ SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. No. 1, *supra* note 15, at 515. The Tighe Commission was chaired by General Eugene Tighe, Defense Intelligence Agency director from 1974 to 1981, and assisted by Ross Perot and two former prisoners of war, Brigadier General Robbie Risner (USAF-Ret.) and Lieutenant General John Peter Flynn (USAF-Ret.). When questioned by Representative Solarz, Chairman of the House Foreign Affairs Committee's Subcommittee on Asian and Pacific Affairs, General Tighe stated that the task of his commission "was to find out whether there was [a cover-up], and we found no evidence whatsoever." Crawford, *supra* note 317, May 1987, Part 2, reprinted in 133 CONG. REC. 21,226 (1987).

³²¹ General Vessey met several times with Vietnamese officials to discuss prisoner of war and missing in action issues. By 1988, several Congressmen were calling for the restoration of normal diplomatic relations with Vietnam, including Senators John McCain, Alan Simpson, Larry Pressler, and Nancy Kassebaum. The Reagan administration continued to refuse to consider renewed ties, however, until Hanoi withdrew its forces from Cambodia and gave a full accounting of Americans unaccounted for from Vietnam. George Black, *Republican Overtures to Hanoi*, THE NATION, June 4, 1988, at 773.

that the government make available to next of kin all such reports, or portions thereof, that had been correlated or possibly correlated to that person.³²²

In late 1990, members of the Senate Committee on Foreign Relations investigating the government's handling of the prisoner of war/missing in action matter issued a minority interim report. Although the minority report found no reason to believe that the majority, if not most, of the findings of death were incorrect, the report stated "staff review of live-sighting report files at DIA found a disturbing pattern of arbitrary rejection of evidence that connected a sighting to a specific POW/MIA or U.S. POW/MIAs in general." The report concluded that "[t]he executive branch has failed to address adequately the concerns of the family members of the POW/MIAs, and has profoundly mishandled the POW/MIA problem."³²³

With this evidence, and quoting from the Fourth Circuit holding in *Smith v. Reagan*³²⁴ that "[a]ccountability [of U.S. POW/MIA's] lies in oversight by Congress or in criticism from

³²² Intelligence Authorization Act, Fiscal Year 1989, Pub. L. No. 100-453, § 404, 102 Stat. 1904, 1908-09 (1988), reprinted in 50 U.S.C. 401 nt (1991).

³²³ Memorandum, U.S. Senate, Committee on Foreign Relations, subject: Interim Report by the Minority Staff of the Senate Committee on Foreign Relations on the U.S. Government's handling of the POW/MIA matter (October 26, 1990), reprinted in 137 CONG. REC. S3,438 (daily ed. Mar. 14, 1991).

³²⁴ 844 F.2d 195, 199 (4th Cir. 1988), cert. denied, 488 U.S. 954 (1988).

the electorate, but not in the judgment of the courts," Senator Bob Smith submitted Senate Resolution 82. As a result of the resolution, the Senate established in 1991 the Select Committee on POW/MIA Affairs to review and assess United States policy concerning POW/MIA issues.³²⁵

In 1991, the government's handling of this issue was further criticized when, in a February 12, 1991 memorandum, Colonel Millard Peck, United States Army, resigned his assignment as the Chief of the Special Office for Prisoners of War and Missing In Action, Defense Intelligence Agency. In his resignation, Colonel Peck stated that it was "a travesty" that National leaders continued to address the prisoner of war/missing in action issue as the "highest national priority." In Colonel Peck's observation, the "principal

³²⁵ S. Res. 82, 102d Cong., 1st Sess. (1991), *reprinted in* 137 Cong. Rec. S3,436 (daily ed. March 14, 1991) (Senator Smith submitted this resolution for himself, and Senators Grassley, Helms, Reid, Graham, Mack, Thurmond, Riegle, Specter, and Lautenberg). The members of the committee included: Senators John Kerry and Bob Smith, co-chairmen, Tom Daschle, John McCain, Dennis Deconcini, Bob Kerrey, Harry Reid, Charles Robb, Bob Smith, Hank Brown, Charles Grassley, Nancy Kassebaum, and Jesse Helms. Also in 1991, Congress enacted legislation to assist the committee by requiring the Secretary of Defense to submit information on service members and civilian employees who remain unaccounted for as a result of military actions during World War II and the Korean Conflict. Intelligence Authorization Act, Fiscal Year 1992, Pub. L. No. 102-183, § 406, 105 Stat. 1260, 1268 (1991).

government players were interested primarily in conducting a 'damage limitation exercise'"³²⁶

At the same time, however, the government was making progress. On April 20, 1991, the Bush administration announced that the United States had agreed to open a temporary office in Hanoi. The office's sole purpose was to investigate the fate of those still missing in Indochina.³²⁷ This was the United States' first official presence in Vietnam since the conflict ended.³²⁸ By September 1991, the United

³²⁶ Memorandum, Colonel Millard A. Peck to Director, Defense Intelligence Agency, subject: Request for Relief (February 12, 1991). Colonel Peck further requested that he be retired immediately from active military service, "[s]o as to avoid the annoyance of being shipped off to some remote corner, out of sight and out of the way, in my own 'bamboo cage' of silence somewhere." Ronald Knecht, Special Assistant for Command, Control, Communications and Intelligence, Defense Intelligence Agency, headed a management review team of Colonel Peck's allegations in April 1991. The team found that Colonel Peck was not qualified as an intelligence manager and was "too close to the Vietnam POW/MIA issue to be objective." Moreover, the management team did not find any facts that supported Colonel Peck's allegations of impropriety in the POW/MIA resolution process. The report added that Colonel Peck had been warned several times by the Director, Defense Intelligence Agency, about his managerial shortcomings. SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 175.

³²⁷ *Vietnam and America: Toehold in Hanoi*, THE ECONOMIST, April 27, 1991, at 42.

³²⁸ From 1992-1994 Joint Task Force-Full Accounting investigated and excavated cases involving more than 1,700 unaccounted for Americans in Vietnam, Laos and Cambodia. Cliff Gromer, *A Full Accounting: Our Government Brings High Tech to Bear in the Search for Vietnam War MIAs*, POPULAR MECHANICS, September 1994, at 41.

States' diplomatic initiatives with governments in Indochina had significantly improved access to information that might help attain an accounting of American personnel from Southeast Asia.³²⁹ Consequently, the Secretary of Defense established within the Office of the Assistant Secretary of Defense for International Security Affairs the position of Deputy Assistant Secretary of Defense for Prisoner of War/Missing In Action Affairs. This office had primary responsibility for developing and coordinating policy on accounting for personnel.³³⁰ Later, the Department of Defense published regulations specifically authorizing the Director, Defense Prisoner of War/Missing in Action Office (DPMO) to communicate directly with other government officials, representatives of the legislative branch, members of the public, and representatives of foreign governments in carrying out assigned functions.³³¹

³²⁹ Memorandum, Deputy Secretary of Defense to Under Secretary of Defense for Policy, Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, Assistant Secretary of Defense for Public Affairs and Director of Administration and Management, subject: Policy Organization for POW/MIA Affairs (September 17, 1991).

³³⁰ *Id.*

³³¹ 32 C.F.R. § 371.7 (1995). In 1993, the Department of Defense published regulations outlining the mission, responsibilities and functions of the Defense Prisoner of War/Missing in Action Office (DPMO). *Id.* § 371 (1995). Those regulations provide that this office is to provide centralized management of this issue within the Department of Defense. *Id.* § 371.3. In addition, among other things, the

Also in 1991, Congress enacted legislation expanding the 1988 law requiring disclosure of certain information on unaccounted for service members.³³² The new law required the Secretary of Defense to make available to the public all records within his control regarding live-sighting reports, or other information, relating to the location, treatment, or condition of any Vietnam-era service member who was ever carried in a prisoner of war or missing in action status.³³³

Director, DPMO, has the responsibility and authority to serve as the Department of Defense focal point for POW/MIA matters, provide Department of Defense participation in the conduct of negotiations with officials of foreign governments, and provide representation to established POW/MIA-related interagency fora. *Id.* § 371.5.

³³² See *supra* note 322 and accompanying text for a discussion of the 1988 legislation.

³³³ National Defense Authorization Act for Fiscal Years 1992 and 1993, PUB. L. No. 102-190, § 1082, 105 Stat. 1335, 1480 (1991), reprinted in 50 U.S.C. nt 401 (Supp. 1995) [hereinafter NDAA for FYs92-93], provides:

(a) Public Availability of Information. (1) Except as provided in subsection (b), the Secretary of Defense shall, with respect to any information referred to in paragraph (2), place the information in a suitable library-like location within a facility within the National Capital region for public review and photocopying.

(2) (A) Paragraph (1) applies to any record, live-sighting report or other information in the custody of the Department of Defense that relates to the location, treatment, or condition of any Vietnam-era POW/MIA on or after the date on which the Vietnam-era POW/MIA passed from United States control into a status classified as a prisoner of war or missing in action, as the case may be, until that individual is returned to United States control.

(B) For purposes of this section, a Vietnam-era POW/MIA is any member of the Armed Forces or civilian employee of the United States who was at any time classified as a prisoner of war or missing in action during the Vietnam era and whose person or remains have not been returned to United States control.

(b) Exceptions. (1) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if --

(A) the record or other information is exempt from the disclosure requirements of section 552 of title 5, United States Code, by reason of subsection (b) of that section; or

(B) the record or other information is in a system of records exempt from the requirements of subsection (d) of section 552a of such title pursuant to subsection (j) or (k) of that section.

(2) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if the record or other information specifically mentions a person by name unless --

(A) in the case of a person who is alive (and not incapacitated) and whose whereabouts are known, that person expressly consents in writing to the disclosure of the record or other information; or

(B) in the case of a person who is dead or incapacitated or whose whereabouts are unknown, a family member or family members of that person determined by the Secretary of Defense to be appropriate for such purpose expressly consent in writing to the disclosure of the record or other information.

(3) (A) The limitation on disclosure in paragraph (2) does not apply in the case of a person who is dead or incapacitated or whose whereabouts are unknown if the family members or members of that person determine pursuant to subparagraph (B) of that paragraph cannot be located after reasonable effort [*].

(B) Paragraph (2) does not apply to the access of an adult member of the family of a person to any record or information to the extent that the record or other information relates to that person.

(C) The authority of a person to consent to disclosure of a record or other information for the purposes of paragraph (2) may be delegated to another

person or an organization only by means of an express legal power of attorney granted by the person authorized by that paragraph to consent to the disclosure.

(c) Deadlines. (1) In the case of records or other information that are required by subsection (a) to be made available to the public and that are in the custody of the Department of Defense on the date of the enactment of this Act [December 5, 1991], the Secretary shall make such records and other information available to the public pursuant to this section not later than three years after that date. [**] Such records or other information shall be made available as soon as a review carried out for the purposes of subsection (b) is completed.

(2) Whenever after March 1, 1992, a department or agency of the Federal Government receives any record or other information referred to in subsection (a) that is required by this section to be made available to the public, the head of that department or agency shall ensure that such record or other information is provided to the Secretary of Defense, and the Secretary shall make such record or other information available in accordance with subsection (a) as soon as possible and, in any event, not later than one year after the date on which the record or information is received by the department or agency of the Federal Government.

(3) If the Secretary of Defense determines that the disclosure of any record or other information referred to in subsection (a) by the date required by paragraph (1) or (2) may compromise the safety of a Vietnam-era POW/MIA who may still be alive in Southeast Asia, then the Secretary may withhold that record or other information from the disclosure otherwise required by this section. Whenever the Secretary makes a determination under the preceding sentence, the Secretary shall immediately notify the President and the Congress of that determination.

(d) Definition. For purposes of this section, the term "Vietnam era" has the meaning given that term in section 101 of title 38, United States Code.

* NDAA for FY96, *supra* note 23, § 1085(1), amended this provision by striking out "cannot be located after a reasonable effort." and inserting in lieu thereof:

The 1991 law required all other agencies and departments of the Federal Government that receive such information to provide it to the Secretary of Defense, who must then make the records available.³³⁴

Building on these disclosure laws, in 1992 the Senate passed a resolution unanimously requesting the President to

cannot be located by the Secretary of Defense--

(i) in the case of a person missing from the Vietnam era, after a reasonable effort; and

(ii) in the case of a person missing from the Korean Conflict or Cold War, after a period of 90 days from the date on which any record or other information referred to in paragraph (2) is received by the Department of Defense for disclosure review from the Archivist of the United States, the Library of Congress, or the Joint United States-Russian Commission on POW/MIAs.

** National Defense Authorization Act for Fiscal Year 1995, PUB. L. No. 103-337, § 1036, 108 Stat. 2663 (1994) extended the deadline to make the information available to September 30, 1995; NDAA for FY96, *supra* note 23, § 1085(2), extended this deadline to January 2, 1996.

The Department of Defense reported that under this law, it had declassified some 670,000 pages of Vietnam-era POW/MIA documents in 1992 alone. 140 CONG. REC. S7,539 (daily ed. June 23, 1994) (statement of Sen. Smith).

³³⁴ NDAA for FYs92-93, *supra* note 333, § 1082(c)(2). The law provides three exceptions to its disclosure requirements. It does not require disclosure of information exempt under the Privacy Act, 5 U.S.C. 552(b) (1977 & Supp. 1995), or the Freedom of Information Act, 5 U.S.C. 552a(j), (k) (1977 & Supp. 1995). Additionally, the law does not require disclosure if the record specifically mentions a person by name unless the person expressly consents in writing to disclosure. However, the law allows access to these records, as an exception, by an adult member of the family of the missing person. *Id.* § 1082(b).

issue an executive order "requiring all executive branch departments and agencies to declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POW's and MIA's."³³⁵ President George Bush immediately issued the executive order, dated July 22, 1992, requiring the declassification of all such materials on Americans who became prisoners of war or missing in action in Southeast Asia.³³⁶

Also during 1992, the Select Committee on POW/MIA Affairs, co-chaired by Senators John Kerry and Bob Smith, continued its investigation, including the taking of testimony by former Secretary of State Henry Kissinger and a written statement from former President Richard Nixon.³³⁷ Finally, in January 1993, the select committee published its final report, finding "no compelling evidence" that any American service member was

³³⁵ S. Res. 324, 102d Cong., 2d Sess. (1992), *reprinted in* 138 CONG. REC. S9,664 (daily ed. July 2, 1992).

³³⁶ Exec. Order No. 12812, July 22, 1992, 3 C.F.R. 311 (1992 Comp.). On Memorial Day, 1993, President Bill Clinton pledged that the government would declassify virtually all documents related to individuals held as prisoners of war or missing in action by Veteran's Day. On Veteran's Day, November 11, 1993, President Clinton announced that the government had declassified all relevant documents that it could. President's Remarks at a Veterans Day Breakfast, 29 WEEKLY COMP. PRES. DOC. 2323 (Nov. 11, 1993).

³³⁷ See testimony of Dr. Kissinger and Memorandum, Richard Nixon to Select Committee on POW/MIA Affairs In Response to the Committee's Questions of December 18, 1992 (December 30, 1992), *reprinted in* 139 CONG. REC. S1,214-18 (daily ed. Feb. 3, 1993).

currently being held in Southeast Asia.³³⁸ Moreover, the committee found no evidence that officials or investigators from the Defense Intelligence Agency ever concealed or covered-up information concerning the possible presence of live Americans in Southeast Asia.³³⁹ The committee found, however, that the failure of the Executive Branch to establish and maintain a consistent, sustainable set of categories and criteria for the status of missing Americans both during and after the war "contributed substantially to public confusion and mistrust." The committee noted that during the Vietnam Conflict a number of persons listed as prisoner of war by the Defense Intelligence Agency were listed as missing in action by the Military Services. Later, the question of how many Americans were truly unaccounted for was confused by the Defense Department's decision to include those initially classified as KIA/BNR in its listings of those unaccounted for in Southeast Asia.³⁴⁰

During the early 1990s, the government also intensified efforts to account for service members from the Second World War, the Korean Conflict, and the Cold War era. The Bush administration, for example, established a joint commission with Russia to investigate unresolved cases of prisoners of

³³⁸ SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 9.

³³⁹ *Id.* at 15-16.

³⁴⁰ *Id.* at 17.

war and those missing in action dating from the Second World War.³⁴¹ Additionally, in October 1991, the United States and North Korea entered into an agreement on the repatriation of remains of United States personnel from the Korean Conflict.³⁴² Also, in 1994, Senator Bob Smith, on behalf of himself and several other senators, introduced legislation on unaccounted for service members from Korea, Vietnam, and the Cold War era. As enacted, the law amended the 1991 disclosure laws by requiring the Secretary of Defense to make available records within his control regarding live-sighting reports and other information on service members from the Korean Conflict and the Cold War era, as well as on Vietnam-era service members.³⁴³

The law also required the Secretary of Defense to designate an official of the Department of Defense to serve as a single point of contact for immediate family members of any unaccounted for POW/MIA from the Korean Conflict and the Cold

³⁴¹ Statement by Press Secretary Fitzwater on the Russia-United States Commission on Prisoners of War and Missing in Action, 28 WEEKLY COMP. PRES. Doc. 517 (Mar. 20, 1992).

³⁴² National Defense Authorization Act for Fiscal Year 1995, PUB. L. No. 103-337, § 1035(a)(3), 108 Stat. 2663 (1994) [hereinafter NDAA for FY95].

³⁴³ *Id.* § 1036 (amending NDAA for FYs92-93, *supra* note 333, § 1082). The law defines "Cold War" to mean the period from the end of WWII to the beginning of the Korean Conflict and the period from the end of the Korean Conflict to the beginning of the Vietnam era. *Id.* § 1036(d)(2).

War.³⁴⁴ The law required the official to assist these individuals in searching for information. In addition, two provisions of the law addressed establishing contact with other countries to account for service members from the Korean Conflict. The first contained the "sense of Congress" that the Secretary of Defense should establish contact with officials of the Chinese Ministry of Defense regarding unresolved issues on American prisoners of war and those missing in action from the Korean Conflict.³⁴⁵ The second required the President to give serious consideration to establishing a joint working-level commission with North Korea.³⁴⁶

³⁴⁴ *Id.* § 1031. The term "unaccounted-for Korean conflict POW/MIA" means a member of the Armed Forces or civilian employee of the United States who, as a result of service during the Korean conflict, was at any time classified as a POW or MIA and remains unaccounted for. *Id.* § 1031(e)(1). The term "unaccounted-for Cold War POW/MIA" means the same personnel as above who, as a result of service during the period from September 2, 1945, to August 21, 1991, was at any time classified as a POW or MIA and who remains unaccounted for. *Id.* § 1031(e)(2). There are 130 individuals unaccounted for as a result of Cold War incidents. 140 CONG. REC. S7,539 (daily ed. June 23, 1994) (statement of Sen. Smith).

³⁴⁵ NDAA for FY95, *supra* note 342, § 1033. The legislation explained that this "sense of Congress" was the result of a failure by the Departments of State and Defense to implement the Senate Select Committee on POW/MIA Affairs recommendation that they form a POW/MIA task force on China similar to Task Force Russia. *Id.* § 1033(b).

³⁴⁶ *Id.* § 1035(c). Congress also based this provision of the law on recommendations from the Senate Select Committee on POW/MIA Affairs. The committee had recommended that the Departments of State and Defense take immediate steps to form

The law further required the Secretary of Defense to submit to Congress a by-name listing of all personnel about whom officials of the Socialist Republic of Vietnam might be able to produce additional information or remains that could lead to accounting for those personnel.³⁴⁷ On November 13, 1995 the Defense Department presented to Congress a comprehensive review of all cases involving unaccounted for Americans in Southeast Asia. As of November 1995, there were 2,162 Americans still unaccounted for in Southeast Asia: 1,613 in Vietnam, 464 in Laos, 77 in Cambodia, and 8 in China.³⁴⁸ None of these individuals, however, are in a missing status, such as missing in action or prisoner of war, under the Missing Persons Act.³⁴⁹

a commission with North Korea through the United Nations Command, and that the President establish a joint working level commission with North Korea. *Id.* § 1035(a).

³⁴⁷ *Id.* § 1034.

³⁴⁸ *Hearing of the Military Personnel Subcommittee of the House National Security Committee on Government's Knowledge of POWs and MIAs*, 104th Cong., 1st Sess. (1995) (testimony of General James Wold, Director, Defense POW/MIA Office), available in LEXIS, Nexis Library, Federal News Service, November 30, 1995. General Wold testified that the Comprehensive Study placed each unaccounted service member into one of three categories: (1) those where the Department of Defense has specific next steps to pursue in the investigation process; (2) cases where the Department of Defense has exhausted all current leads; and (3) the cases of 567 individuals where no action by any government will result in the recovery of remains (such as cases where aircraft were downed at sea).

³⁴⁹ On September 19, 1994, upon the request of his family, the Secretary of the Air Force made a finding of death under the

Finally, the law required the Department of Defense to review the provisions of the Missing Persons Act in consultation with the Service Secretaries. Within 180 days after enactment, the law required the Secretary of Defense to report to Congress with recommendations as to whether those provisions of law should be amended.³⁵⁰ In June 1995, the Department of Defense presented its recommendations to Congress.³⁵¹ First, the Department recommended that the Missing Persons Act be amended to codify procedural protections required by the *McDonald* decision.³⁵² These

Missing Persons Act in the case of Colonel Charles Shelton, the last Vietnam-era veteran to be carried in a missing status, prisoner of war category. Telephone Interview with Mr. Barney Frampton, Missing Persons Division, HQ, AFMPC/DPMCB, Department of the Air Force, Randolph Air Force Base, Texas (February 9, 1996). See also Dina Elboghdady & Jeff Kramer, *Dornan Rule Requires Evidence Before MIAs can be Called Dead*, THE ORANGE COUNTY REGISTER, March 15, 1996, at A1 (reporting that Colonel Shelton's five children asked that the Air Force declare Colonel Shelton dead after his wife committed suicide).

³⁵⁰ NDAA for FY95, *supra* note 342, § 1032. The report was due to Congress on April 5, 1995 (180 days from the date of enactment of the law on October 5, 1994).

³⁵¹ *Department of Defense Report on the Review of Chapter 10, Title 37, United States Code*, attached as an enclosure to a letter from Secretary of Defense William Perry to The Honorable Strom Thurmond, Chairman, Committee on Armed Services, United States Senate, Washington, DC (undated) (on file with the Defense Prisoner of War/Missing in Action Office, Department of Defense) [hereinafter *Department of Defense Report*].

³⁵² *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

protections, extended to the missing person's next-of-kin who receive benefits under the Missing Persons Act, include: notice and a reasonable opportunity to attend the review with privately retained attorney, reasonable access to the information on which the review is based, and the opportunity to present any information they consider relevant at the hearing. Also, the Department of Defense recommended that the act be amended to delete the phrase "or a lapse of time without information" from the provision on when the Service Secretary may make a finding of death.³⁵³ Thus, the Department proposed that the act authorize the Service Secretary to make a finding of death only when the Secretary "considers that the United States Government has made reasonable efforts to obtain sufficient data to warrant a finding of death, and that existing information establishes a reasonable presumption that a member in a missing status is dead."³⁵⁴

³⁵³ See 37 U.S.C. 556(b) (1988) (providing that the Service Secretary may make a finding of death "when he considers that information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead").

³⁵⁴ Department of Defense Report, *supra* note 351, at 2. The Department of Defense proposed to delete the language referring to a "lapse of time without information" because, as the Department explained, while never the policy of the Defense Department, this section had been interpreted by some outside the Department of Defense as authorizing the Service Secretaries to declare a person dead primarily on the basis of a passage of time. *Id.* The Department of Defense also recommended that the act be amended to authorize the Secretary

concerned to remove from a missing status members who are voluntarily absent. *Id.* at 4.

On October 31, 1995, Senator Smith took to the Senate floor, denouncing the Department of Defense for being unresponsive to the requirements of the law, as contained in the NDAA for FY95, *supra* note 342, §§ 1031-1036. Senator Smith complained that the Department of Defense had not submitted its recommendations on changing the Missing Persons Act at the end of the 180-day period required by the law, that is, on April 5, 1995. *Id.* § 1032. According to Senator Smith, Congress received the report at the end of June, two months late, and "[i]t was obvious the Defense Department made no serious attempts to consult with Members of Congress before submitting what turned out to be an inadequate report." Senator Smith also presented a letter from the President of the Korean/Cold War Family Association complaining that the Department of Defense "single point of contact" required by the law was not able to follow through on requests for information. *Id.* § 1031. Senator Smith further stated that the Secretary of Defense had visited Beijing just three weeks after the President had signed into law the provision urging the Secretary of Defense to establish contact with officials of the Communist Chinese Minister of Defense on Korean War American POWs and MIAs. *Id.* § 1033. The Secretary did not, according to Senator Smith, even broach the subject with the very same officials. Additionally, Senator Smith heatedly complained that the Department of Defense had, after 10 months, not been able to produce the by-name listing of all Vietnam-era POW/MIA cases where it is possible that Vietnamese or Lao officials can produce additional information; a list the law required to be produced by November 17, 1994 (45 days from the date of its enactment on October 5, 1994). *Id.* § 1034. (The Department of Defense finally forwarded the list to Congress in November 1995, *supra* note 348 and accompanying text.) Senator Smith conceded that the Defense Department had made headway in its efforts to obtain information from North Korea on POW/MIAs. Nevertheless, he complained that the President had not formed a special commission with the North Koreans to resolve the issue, as urged by the law. *Id.* § 1035. Finally, as to the requirement to disclose all Defense Department records on American POW/MIAs from the Korean and Cold Wars in the possession of the National Archives by September 30, 1995, Senator Smith complained that the administration had not met the deadline and had requested a

During this time, relations with Hanoi were warming. In February 1994, President Clinton announced that the United States was lifting the trade embargo against Vietnam and establishing a liaison office in Hanoi. President Clinton said this step offered the best way to achieve a full accounting of Americans unaccounted for in Southeast Asia.³⁵⁵ Then, on July 11, 1995, President Clinton announced the normalization of diplomatic relations with Vietnam.³⁵⁶

To date, the government continues its search to account for service members. A Presidential delegation, headed by

three-month extension. *Id.* § 1036. (Congress did, in fact, extend this deadline to January 2, 1996 in the NDAA for FY96, *supra* note 23, § 1085(2)). 141 CONG. REC. S16,404-19 (daily ed. Oct. 31, 1995) (statement of Sen. Smith).

³⁵⁵ President's Remarks Announcing the End of the Trade Embargo on Vietnam and an Exchange with Reporters, 30 WEEKLY COMP. PRES. DOC. 205 (February 3, 1994). The majority of the Senate approved of this action, as reflected in its "sense of Senate on relations with Vietnam," Act of April 30, 1994, PUB. L. NO. 103-236, § 521, 108 Stat. 382 (1994). This "sense of Senate" reveals that the majority of Senators believed the government was committed "to seeking the fullest possible accounting" of unaccounted for servicemen from Southeast Asia. In addition, a majority thought that the Government of Vietnam had increased its cooperation and that "substantial and tangible progress had been made" in the accounting process. Further, the Senate noted that United States senior military commanders and personnel working in the field to account for POW/MIAs believed that lifting the embargo against Vietnam would "facilitate and accelerate the accounting efforts."

³⁵⁶ President's Remarks Announcing the Normalization of Diplomatic Relations with Vietnam, 31 WEEKLY COMP. PRES. DOC. 1,217 (July 11, 1995).

Hershel Gober, Deputy Secretary of Veterans Affairs, has met with officials from Hanoi on at least three occasions.³⁵⁷

Members of the United States-Russian Joint Commission also continue to search for remains of service members possibly held in the Soviet Union during the Korean Conflict.³⁵⁸ In early 1996, however, the outlook was grimmer in North Korea. In January, talks with the North Koreans collapsed. Then, on January 20, 1996, North Korea dissolved an excavation team assigned to the task, accusing Washington of not paying enough money for the remains of United States service members.³⁵⁹

The government also continues its efforts to release information on unaccounted for service members. For example, the Library of Congress has made available on the internet bibliographic records of government documents on prisoners of

³⁵⁷ *Hearing of the Military Personnel Subcommittee of the House National Security Committee on Government's Knowledge of POWs and MIAs*, 104th Cong., 1st Sess. (1995) (testimony of Hershel W. Gober, Deputy Secretary of Veterans Affairs, Department of Veterans Affairs), available in LEXIS, Nexis Library, Federal Document Clearing House Congressional Testimony, December 14, 1995.

³⁵⁸ Vladimir Isachenkov, AP, August 30, 1995, available in LEXIS, Nexis Library, AP File. According to this article, a former Soviet soldier testified in 1995 before that commission that he met four American POWs in 1951 in the then-Soviet Union.

³⁵⁹ *See North Korea to Halt Excavation of U.S. War Dead*, Los ANGELES TIMES, January 21, 1996, at A9 (quoting General James Wold, Director, Defense POW/MIA Office, that Washington offered more than \$1 million for the 162 remains returned in 1993-94; North Korea reportedly demanded \$4 million).

war and those missing in action in Southeast Asia. Also available on line are several files containing papers from the United States-Russia Joint Commission on POWs/MIAs.³⁶⁰

The stories, however, also continue. On January 15, 1996, a South Korean newspaper cited an unnamed South Korean official as saying the United States had confirmed that it believes about ten American service members are still held by the North Koreans. As proof, the paper published a photograph of one of the alleged service members. At the same time, footage from an early 1980s North Korean movie surfaced, appearing to show two Caucasians whom the paper claimed were American service members--again, hopes were raised. The Pentagon denied the reports that American service members are still being held by North Korea. The Americans turned out to be four service members who deserted their units in South Korea in the 1960s.³⁶¹

³⁶⁰ *Library of Congress Adds POW/MIA Documents Index to Internet*, INFORMATION TODAY, January 1995, at 41. See also *Library of Congress puts POW/MIA Documents Index on Internet*, ONLINE, March 1995, at 10 (providing that the information is available in a demonstration file on the Internet via the Library's World-Wide Web server at <http://lcweb.loc.gov>).

³⁶¹ *Pentagon Names 4 GIs Who Defected to North Korea*, LOS ANGELES TIMES, January 17, 1996, at A4. See also *Pentagon Identifies 4 Defectors*, THE DAYTON DAILY NEWS, January 17, 1996 at A5 (reporting that the Pentagon had identified the four as Private Larry Abshier, Corporal Jerry Parrish, Private James Dresnok and Sergeant Robert Jenkins; all four defected from 1962-1965).

Not so easily dismissed is the more recent case of former Army Master Sergeant Mateo Sabog. In March 1996, Mr. Sabog, missing from Vietnam and presumed dead, walked into a Social Security Administration office in Georgia and filed for benefits. The Army last saw Master Sergeant Sabog in Saigon in February 1970 preparing to leave country after serving his second tour of duty in Vietnam. Initially, the Army listed Sabog as a deserter. In 1979, at the request of his family, however, an Army board decided that a mistake had been made and Sabog should be considered missing in action, presumed dead. Additionally, in 1993, Sabog's name was added to the Vietnam Veterans Memorial.³⁶² In April 1995, the Defense Prisoner of War/Missing in Action Office informed Sabog's brother that the Vietnam government had indicated that Sabog's remains had been recovered. The remains included teeth, which the Army was attempting to positively identify through DNA analysis when Sabog turned up in Georgia.³⁶³ The Army is not, however, treating Sabog's return as a criminal matter. An investigation revealed that Sabog, who had twenty-four years of active service when he disappeared, had made it back to the United States in 1970, but simply vanished. As an Army

³⁶² Ron Martz & Rebecca McCarthy, *Back from the "Dead": A Military Mystery*, THE ATLANTA JOURNAL AND CONSTITUTION, March 9, 1996, at A1.

³⁶³ "Dead" Soldier Is Alive, AP, March 7, 1996, available in LEXIS, Nexis Library, AP File.

spokesperson stated, "this is not another Bobby Garwood situation."³⁶⁴

Are there other Mateo Sabogs out there? Service members from Vietnam who, for whatever reason, never made it back to their families and who were presumed dead by their country? Of course, Sabog himself represents such a possibility. Some will no doubt argue that Sabog's return affirms the need for the new law, as the Army's accounting procedures obviously were not adequate to account for Mr. Sabog.³⁶⁵ This argument, however, fails to consider the Military Services' procedures on accounting for service members when Congress enacted the new law. It is these procedures, and not those in effect during past conflicts, that must be examined before deciding whether Service policies are inadequate to determine the status of missing Department of Defense personnel.

³⁶⁴ See Susan Katz Keating, *Listed on Vietnam Memorial, Former Soldier Files for Benefits*, THE WASHINGTON TIMES, March 7, 1996, at A6 (quoting Army spokesperson Major Anda Strauss).

³⁶⁵ See, e.g., Nancy West, *Smith: Vet's Rise Proves MIA Point*, NEW HAMPSHIRE SUNDAY NEWS, March 24, 1996, at A1 (quoting from a letter forwarded to the newspaper from Senator Bob Smith claiming that the case of Mateo Sabog demonstrates how quick the Clinton administration has been to "'resolve' MIA cases in a desperate attempt to justify full normalization of relations between Hanoi and Washington before the truth is finally known about our missing personnel"); Martz, *supra* note 262 (quoting Ms. Dolores Alfond, head of the National Alliance of Families of POWs and MIAs, who stated that the return of Sabog "shows the Pentagon had no idea who is really dead . . . [i]t also shows they are declaring people dead just to get the numbers off the books").

V. Current Department of Defense Procedures on Accounting for Missing Persons

As discussed, Congress never intended the Missing Persons Act to be a law to account for missing persons.³⁶⁶ A review of the Department of Defense policy and implementing Service regulations reveals, however, that the Military Services have broadened the act's requirements and have, in fact, created a system for personnel accounting. Indeed, current Service regulations contain systems for determining the status of missing persons similar to that of the new law.

A. Department of Defense Policy

Department of Defense policy requires that the Military Services provide a full and accurate accounting of personnel in a missing status "to the most realistic extent possible."³⁶⁷

³⁶⁶ See *supra* part III.B. (discussing the purpose of the Missing Persons Act).

³⁶⁷ DEP'T OF DEFENSE, INSTRUCTION 1300.18, MILITARY PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES, para. D.2. (December 27, 1991) [hereinafter DODI 1300.18]. The Department of Defense defines the various missing status categories as follows.

Missing. A casualty status applicable to a person who is not at his or her duty location due to apparent involuntary reasons and whose location may or may not be known. Chapter 10 of 37 U.S.C. . . . provides statutory guidance concerning missing members of the Military Services. Excluded are personnel who are AWOL, deserter, or dropped-from-rolls status. A person declared missing is further categorized as follows:

- a. Beleaguered. The casualty is a member of an organized element that has been surrounded by a hostile force to prevent escape of its members.
- b. Besieged. The casualty is a member of an organized element that has been surrounded by a hostile force for

To further this policy, the Defense Department gives instructions to the Military Services on placing a service member in a missing status. Prior to the new law, however, the Defense Department did not provide written guidance on status review hearings.³⁶⁸

First, when a commander suspects that a person may be missing, the Department of Defense requires that the Services

compelling it to surrender.

c. Captured. The casualty has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country.

d. Detained. The casualty is prevented from proceeding or is restrained in custody for alleged violation of international law or other reason claimed by the government or group under which the person is being held.

e. Interned. The casualty is definitely known to have been taken into custody of a nonbelligerent foreign power as the result of and for reasons arising out of any armed conflict in which the Armed Forces of the United States are engaged.

f. Missing. The casualty is not present at his or her duty location due to apparent involuntary reasons and whose location is unknown.

g. Missing in Action (MIA). The casualty is a hostile casualty, other than the victim of a terrorist activity, who is not present at his or her duty location due to apparent involuntary reason and whose location is unknown.

Id. encl. 2, para. 24.

³⁶⁸ In 1974, representatives of the Department of Defense and the Military Services agreed on status review procedures required to implement the decision in *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974). Although the Defense Department ultimately approved the Services' procedures, it did not itself issue implementing guidance. See OGC Memorandum for Record, *supra* note 235 and accompanying text (summarizing the agreement).

place the person in an interim status called "Duty Status-Whereabouts Unknown" or "DUSTWUN."³⁶⁹ The Services must use the DUSTWUN status when a commander suspects that a person's absence is involuntary, but there is not yet sufficient evidence to decide whether the person is missing or dead.³⁷⁰ This status "is useful during armed conflict when hostilities prevent an immediate capability to determine the member's true status or search and rescue efforts are on-going to determine the member's true status."³⁷¹ Normally, the Services may retain a person in a DUSTWUN casualty status for a maximum of ten days, as this time is "usually sufficient" to investigate the circumstances of the absence.³⁷²

Second, the Department of Defense requires the Military Services to appoint a casualty assistance representative in cases of missing service members. This representative maintains contact with the next of kin to keep them informed on all matters relating to the case until it has been resolved and all entitlements and benefits are received. The

³⁶⁹ See DODI 1300.18, *supra* note 367, encl. 2, para. 7 (defining "casualty status" as a term used to classify a casualty for reporting purposes). According to Department of Defense policy, there are seven casualty statuses: Deceased, DUSTWUN, Missing, Very Seriously Ill or Injured (VSI), Seriously Ill or Injured (SI), Incapacitating Illness or injury (III), and Not Seriously Injured (NSI)). *Id.*

³⁷⁰ *Id.* para. F.2.a.

³⁷¹ *Id.*

³⁷² *Id.* para. F.2.b.

representative also provides points of contact for information regarding investigations and other government agencies that may be involved in the missing service member's case.³⁷³

Third, the Department of Defense provides instruction on release of information about the person. The Military Service must furnish the next of kin information on the circumstances surrounding the incident and keep them informed as additional information becomes available. The Military Service must also make every effort to declassify information in cases where a member is declared deceased or missing.³⁷⁴ The information released to the public is limited to basic biographical information, except under two conditions: a court-appointed legal guardian may give written consent for release of information to a third party, and information subject to FOIA

³⁷³ *Id.* para. F.1.b.(1). The Department of Defense policy also provides guidance on notifying next of kin that an individual is in a missing status. Ordinarily, a uniformed representative of the Military Service must make an initial notification, in person, to the primary next of kin. If a casualty results from either a hostile action or terrorist activity, the initial notification also must be made in person to parents who are the secondary next of kin. Additionally, the policy provides that the member's wishes, expressed in either the record of emergency data or by the member at the time of the casualty, concerning whom not to notify must be honored, unless the commander decides that official notification should be made. *Id.* para. F.1.a.

³⁷⁴ *Id.* para. F.1.b.(4). Additionally, in cases where a person disappears during a classified operation, the Military Service must provide all unclassified information to the next of kin. *Id.*

must be released.³⁷⁵ If the FOIA is invoked, the Service must release the information unless it qualifies for an exemption thereunder. The two exemptions that apply most often are the national security exemption and the personal privacy exemption.³⁷⁶

B. Military Services' Policies Placing a Person in a Missing Status

As mandated by Department of Defense policy, the Military Services require the appropriate authority to place a person in a DUSTWUN status when a person's whereabouts is unknown and the absence may be involuntary. Similar to the new law, once in a DUSTWUN status, the Services require an investigation prior to placing an absent person in a missing status.

Because the Department of Defense provides no procedures on investigating the whereabouts of absent persons, each Service has promulgated its own investigative procedures.

1. *Army Procedures*³⁷⁷--The Army's policy requires the first commander in the chain of command to initiate an

³⁷⁵ *Id.* para. F.3.c.

³⁷⁶ *Id.* para. F.3.a. (citing 5 U.S.C. 552(b)(1), (b)(6) (1977 & Supp. 1995), respectively). In determining whether information should be released under FOIA, it is Defense Department policy to use a balancing test, weighing the public interest in disclosure against the potential invasion of personal privacy. In addition, Defense Department policy instructs that the privacy of family members "should be considered as a clear and present factor that weighs against the public release of information." *Id.* para. F.3.c.

³⁷⁷ DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 October 1994) [hereinafter AR 600-8-1]. The policy provides that it is an implementation of the Missing

immediate investigation when a soldier's whereabouts is unknown. If, after twenty-four hours, the soldier's status is still unknown and is believed to be involuntary, the Casualty Area Commander (CAC), in coordination with the Commander, United States Army Personnel Command (CDR, PERSCOM), must designate the soldier as DUSTWUN.³⁷⁸ Next, the first Lieutenant Colonel level commander in the soldier's chain of command must initiate an informal investigation.³⁷⁹ By day seven, the CAC must forward the results of the investigation to the CDR, PERSCOM, with a recommendation that the soldier be declared missing, dead, or absent without leave.³⁸⁰ On receipt of the CAC's recommendation, the CDR, PERSCOM appoints a hearing officer in the grade of major or above to review the findings and recommend an appropriate duty status.³⁸¹ The CDR,

Persons Act, and cites to the Congressional purpose of the act "to alleviate financial hardship suffered by family members of persons determined to be in one of the missing categories." *Id.* para. 8-1a.

³⁷⁸ *Id.* para. 8-1b. The CAC is a commander who has casualty reporting responsibilities to the U.S. Total Army Personnel Command Casualty Operations Center. The CAC is responsible for the area in which the casualty occurs or the area in which the next of kin resides. *Id.* app. C, § IIII, Terms.

³⁷⁹ See DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (outlining the informal procedures to be used by the commander).

³⁸⁰ AR 600-8-1, *supra* note 377, para. 8-8b.

³⁸¹ *Id.* para. 8-9a.

PERSCOM, as designee of the Secretary of the Army, then makes a decision as to the soldier's status.³⁸²

If the CDR, PERSCOM decides that a soldier should be placed in a missing status, the soldier's General Court-Martial Convening Authority (GCMCA) must convene a board of inquiry.³⁸³ The board develops all facts surrounding the disappearance³⁸⁴ and recommends that the soldier be finally declared missing, dead, absent without leave, or returned to military control.³⁸⁵ By day forty-five, the GCMCA must forward the report to CDR, PERSCOM, who then makes a final determination of status.³⁸⁶

2. *Navy Procedures*³⁸⁷--The Navy requires that a commander must immediately report to the Commander, Naval Military

³⁸² *Id.* para. 8-9b.

³⁸³ *Id.* para. 8-12a. A single board may consider the status of all persons involved in the same incident. In addition, if no GCMCA exists, the commander reporting directly to CDR, PERSCOM, must appoint the board. The board is composed of not less than three commissioned officers, at least one senior to the missing soldier or in the grade of major, whichever is higher. *Id.* para. 8-12b.

³⁸⁴ *Id.* para. 8-11.

³⁸⁵ *Id.* para. 8-14. The report must also contain specific information, including: the duration, extent and results of searches; names, identification and original sworn statements; and maps of the area in which the person disappeared. *Id.* paras. 8-14b, 8-14c.

³⁸⁶ *Id.* paras. 8-15, 8-16.

³⁸⁷ DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL (1 July 1969, through C July 1986) [hereinafter NAVMILPERSMAN].

Personnel Command (CDR, NAVMILPERS) that a sailor may be missing.³⁸⁸ The command must also submit a Personnel Casualty Report no later than four hours following receipt of information that a sailor may be missing. This report contains a detailed description of the circumstances that led to the sailor's disappearance.³⁸⁹ Thereafter, the command must submit daily supplemental search reports, stating the progress of the search and any other pertinent information, to keep next of kin informed.³⁹⁰

If, after the immediate search, the sailor's command believes conclusive evidence of death exists, the command "has the authority and duty to submit a report of death."³⁹¹ "Conclusive evidence of death may be considered to exist when information . . . overcomes beyond any reasonable doubt or logical possibility that a missing person may have survived," but is not limited to the recovery of remains.³⁹² If conclusive evidence of death does not exist, the command must decide whether the sailor's status is unauthorized. If not unauthorized, the commander must submit a detailed report to

³⁸⁸ *Id.* para. 42101000.5.A.

³⁸⁹ *Id.* paras. 42101000.6., 42101000.7.

³⁹⁰ *Id.* para. 42101000.7.

³⁹¹ *Id.*

³⁹² *Id.* para. 42101000.8.

the CDR, NAVMILPERS that includes a recommendation as to the proper casualty status.³⁹³ The Secretary of the Navy or his delegate then determines the sailor's proper status under the Missing Persons Act.³⁹⁴

3. *Marine Corps Procedures*³⁹⁵--Marine Corps policy provides that once a command reports a marine in a DUSTWUN status, the special courts-martial convening authority (SPCMCA) must convene a board to investigate the circumstances of the disappearance. The board must recommend whether the marine should be declared missing, dead or in an unauthorized absence (UA) status. Within ten days of the disappearance the SPCMCA reviews the investigation, and by the tenth day declares the marine dead, missing, UA, or found alive. The SPCMCA then submits the investigation and his decision directly to the Commandant of the Marine Corps.³⁹⁶

³⁹³ *Id.* The report must include "latitude and longitude, distance from nearest land, when applicable; local conditions; extent of searches made; [and] statements of survivors or other members who may have pertinent information concerning the attendant circumstances" *Id.*

³⁹⁴ *Id.*

³⁹⁵ MARINE CORPS ORDER P3040.4C, SUBJ: MARINE CORPS CASUALTY PROCEDURES MANUAL (SHORT TITLE: MARCORCASPROC MAN) (14 April 1988) [hereinafter MARCORCASPROC MAN].

³⁹⁶ *Id.* para. 5002.2.

4. *Air Force Procedures*³⁹⁷--Air Force policy requires that once a commander places an airman in a DUSTWUN status, the command has ten days to conduct search and rescue operations.³⁹⁸ By the end of the tenth day, the commander must determine whether the absence is voluntary or involuntary.³⁹⁹ If the absence is involuntary and there is insufficient evidence to declare the person dead, the commander must declare the person missing and ensure that the Casualty Assistance Representative (CAR) submits an initial missing report.⁴⁰⁰ Prior to declaring an airman missing and submitting a report, however, the commander must consult with Headquarters, Air Force Military Personnel Center.⁴⁰¹

³⁹⁷ DEP'T OF AIR FORCE, INSTRUCTION 36-3002, CASUALTY SERVICES (26 August 1994) [hereinafter AFI 36-3002].

³⁹⁸ *Id.* para. 2.15.

³⁹⁹ *Id.* para. 2.10.6.

⁴⁰⁰ *Id.* para. 2.12.2.

⁴⁰¹ *Id.* para. 2.12.3. After submitting an initial Missing report, the commander must submit supplemental reports as new information becomes available and must maintain continuous surveillance to locate the missing airman. The commander of the affected theater of operations normally assumes this responsibility during wartime. This commander must maintain close contact with the following persons to assist in identifying personnel: escapees, members who have evaded capture, repatriates, rescued U.S. and allied personnel, parent units, ground forces and naval forces. *Id.* para. 2.12.7.1.

The above review reflects that Service procedures are similar to the new law in that they require the missing person's commander to conduct an initial investigation.⁴⁰² In addition, after the commander's investigation, the new law requires the Service Secretary to appoint a board to review the facts and make a recommendation.⁴⁰³ Both the Army and Marine Corps require a similar review by the GCMCA and the SPCMCA, respectively. In fact, the Army adds an additional layer of review by requiring an officer to review the case and make a recommendation to the Secretary, who then decides whether a person may be missing and, if so, requires the GCMCA to conduct a review board.⁴⁰⁴ The Navy and Air Force, however, require only that the immediate commander conduct an investigation before a Secretarial decision to place a person in a missing status.

C. Military Services' Policies on Status Review Boards

At the time Congress enacted the new law, the Defense Department did not provide written guidance on status review board hearings. Shortly after the *McDonald* decision in 1974, however, the Services had promulgated their own procedures on

⁴⁰² See *supra* part II.D. (summarizing the new law's requirement for an immediate commander's investigation).

⁴⁰³ See *supra* part II.E. (summarizing the new law's procedures for an initial determination of status by the Service Secretary).

⁴⁰⁴ See *supra* part V.B.1. (discussing Army requirements).

status review hearings.⁴⁰⁵ With the exception of the Navy,⁴⁰⁶ the Services have updated their hearing procedures since that time. Many Service procedures are similar because they reflect Missing Persons Act requirements, such as the requirement to hold a status review board after twelve months in a missing status and upon receipt of additional information.⁴⁰⁷ The new law also requires a review board under these circumstances.⁴⁰⁸ Many Service procedures are also similar to each other, and to the new law, because they implement the due process requirements outlined in the *McDonald* decision.⁴⁰⁹ For example, the Services provide that dependents who are receiving allotments of a missing person's

⁴⁰⁵ See OGC Memorandum for Record, *supra* note 235 and accompanying text (discussing Service procedures promulgated after *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974)).

⁴⁰⁶ Memorandum, Acting Secretary of the Navy, subject: Department of Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. §§ 551, et. seq.) (26 March 1974) [hereinafter Navy Memo] (on file with the Office of the POW/MIA Affairs, Naval Military Personnel Command, Department of the Navy). As of this writing, however, the Navy is drafting a new instruction, to be designated DEP'T OF NAVY, INSTRUCTION (NAVIN) 1771.1, PROCEDURE GUIDE: STATUS REVIEW OF MISSING PERSONNEL (draft).

⁴⁰⁷ 37 U.S.C. § 555(a) (1988).

⁴⁰⁸ See *supra* part II.F. (summarizing the new law's requirement for a subsequent board of inquiry).

⁴⁰⁹ *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

pay and allowances are entitled to notice and an opportunity to attend a status review hearing.⁴¹⁰ These individuals may attend the hearing at their own expense with privately retained counsel,⁴¹¹ and must receive access to information to be reviewed by the board.⁴¹² Additionally, these individuals may present information at the hearing itself.⁴¹³

⁴¹⁰ See AR 600-8-1, *supra* note 377, para. 8-25a (Army policy requiring such notice except if the contemplated status changes do not affect entitlement to pay and allowances, such as a change from "missing in action" to "beleaguered", but cautioning that a subsequent review may disclose that facts warrant a change that would terminate entitlement to pay and allowances); Navy Memo, *supra* note 406, para. 2(a)-(c) (Navy policy); MARCORCASPROC MAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and DEP'T OF AIR FORCE, AIR FORCE MILITARY PERSONNEL CENTER INSTRUCTION 36-9, STATUS REVIEW OF MISSING PERSONNEL, para. 3 (31 March 1995) (Air Force policy) [hereinafter AFMPCI 36-9].

⁴¹¹ See AR 600-8-1, *supra* note 377, para. 8-25b, 27 (Army policy); Navy Memo, *supra* note 406, para. 2(a)-(c) (Navy policy); MARCORCASPROC MAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and AFMPCI 36-9, *supra* note 410, para. 3 (Air Force policy).

⁴¹² See AR 600-8-1, *supra* note 377, para. 8-25c (Army policy); Navy Memo, *supra* note 406, para. 2(e) (Navy policy); MARCORCASPROC MAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and AFMPCI 36-9, *supra* note 410, para. 4 (Air Force policy). The Army is the only Service, however, to provide guidance on release of classified information. Army policy requires that every effort be made to downgrade classified information, present an unclassified summary, or remove classified portions of information. If the information cannot be downgraded, removed, or summarized, it may not be made available to the hearing officer, and may not be considered in the course of the Army review. AR 600-8-1, *supra* note 377, para. 8-25c. See also AFMPCI 36-9, *supra* note 410, para. 5 (requiring the status review board to record the effect, if any, that classified information had on their finding and

Although similar, each Service policy contains some procedures peculiar to its status review hearings. Only the Army and Air Force, for example, require investigations prior to a status review hearing. The Army policy requires the GCMCA to appoint a board of inquiry if a soldier is still missing by the 300th day after being reported in a DUSTWUN status.⁴¹⁴ The board must evaluate the recommendations of the first board and any additional data.⁴¹⁵ By the 350th day, the GCMCA must review and forward the board report to the CDR, PERSCOM.⁴¹⁶ The CDR, PERSCOM then uses this report to perform the twelve-month status review required by the Missing Persons Act.⁴¹⁷ Similarly, the Air Force requires that if there is no

recommendation, thereby implying that such information may be considered by the board, but without addressing release of that information to dependents).

⁴¹³ See AR 600-8-1, *supra* note 377, para. 8-25d (Army policy); Navy Memo, *supra* note 406, para. 2(f) (Navy policy); MARCORCASPROC MAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and AFMPCI 36-9, *supra* note 410, para. 3 (Air Force policy, also allowing dependents to make a closing argument).

⁴¹⁴ AR 600-8-1, *supra* note 377, para. 8-20. This board must follow the same procedures as the original board of inquiry. *Id.* para. 8-21.

⁴¹⁵ *Id.* para. 8-19a.

⁴¹⁶ *Id.* para. 8-22.

⁴¹⁷ *Id.* para. 8-23. See also *id.* para. 8-24 (requiring a status review if warranted based on a passage of time, information that indicates a "reasonable presumption" that the missing person is dead, or receipt of "compelling information" concerning the person's whereabouts or fate).

change in a missing airman's status within eight months, the commander must conclude the initial investigation by submitting a nine-month investigative report, which is then used in the twelve-month status review process. The commander must submit a report in nonhostile situations and may submit a report in hostile situations.⁴¹⁸ The Navy and Marine Corps, as well as the new law, do not require an investigation prior to a status review hearing.

The composition of the status review boards also varies among the Services. The Army, for example, requires that a single commissioned officer in the grade of major or above conduct the status review hearing.⁴¹⁹ The Navy also requires a single officer to conduct a status hearing,⁴²⁰ and further requires the hearing officer to forward a recommendation and report to a separate status review board.⁴²¹ Similar to the

⁴¹⁸ AFI 36-3002, *supra* note 397, para. 2.12.8.

⁴¹⁹ AR 600-8-1, *supra* note 377, para. 8-26a.

⁴²⁰ Navy Memo, *supra* note 406, para. 2(I).

⁴²¹ *Id.* para. 2(1). The next of kin are entitled to appear with private counsel and present evidence at the status review hearing. *Id.*

new law,⁴²² both the Marine Corps and the Air Force require a three-member status review board hearing.⁴²³

Among the Services, only the Air Force allows secondary next of kin not receiving financial benefits under the Missing Persons Act to attend the hearing, but as nonparticipants only.⁴²⁴ The new law, on the other hand, opens the status review hearing not only to the primary next of kin, but also to other members of the immediate family and any other previously designated persons.⁴²⁵ Additionally, only the Army and Air Force reflect the new law's requirement for appointment of legal counsel by specifically providing that a hearing officer may receive legal advice.⁴²⁶

⁴²² See *supra* part II.F.1. (describing the new law's subsequent board of inquiry composition).

⁴²³ MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and AFMPCI 36-9, *supra* note 410, para. 6 (Air Force policy).

⁴²⁴ AFMPCI 36-9, *supra* note 410, para. 3. The Army, Navy and Marine Corps allow only dependents to attend the board hearings. AR 600-8-1, *supra* note 377, para. 8-26a (Army policy); Navy Memo, *supra* note 406, para. 2(k) (Navy Policy); and MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy).

⁴²⁵ See *supra* part II.F.3. (summarizing the new law's provision on attendance by family members and others at the subsequent boards of inquiry).

⁴²⁶ See *supra* part II.F.2. (summarizing the new law's requirement that an attorney be appointed to advise a subsequent board of inquiry). The Army's hearing officer may request legal advice from the Office of The Judge Advocate General of the Army. AR 600-8-1, *supra* note 377, paras. 8-26a, 8-26d. The Air Force requires appointment of a non-voting

Unlike other Service policies, however, the Air Force provides a detailed standard of proof that must be met before the appropriate authority may make a status decision. The Army, Navy and Marine Corps policies contain the standard of proof for a status decision that is required by the Missing Persons Act, that is, the board must make a finding that the missing person can reasonably be presumed to be living, can reasonably be presumed to be dead, or that the evidence conclusively establishes death.⁴²⁷ While the Air Force policy also contains this standard of proof,⁴²⁸ it further explains that a finding that an airman may be reasonably presumed to be living or to be dead must be supported by a preponderance of

legal advisor to advise the board and rule finally on questions of law and procedure. The Air Force also requires a separate judge advocate to prepare a legal review of the status review hearing. AFMPCI 36-9, *supra* note 410, paras. 7, 10.

⁴²⁷ AR 600-8-1, *supra* note 377, para. 8-26g (Army policy); Navy Memo, *supra* note 406, para. 2(1) (Navy policy); and MARCORCASPROC MAN, *supra* note 395, para. 5003.1 (Marine Corps policy). The Missing Persons Act requires that the Secretary concerned, or his designee, may direct a continuance of a missing person's status "if the member can reasonably be presumed to be living," or make a finding of death "when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead" 37 U.S.C. §§ 555(a)(1), 556(b) (1988). Additionally, the act allows Service Secretaries to make official reports of death "[w]hen the Secretary concerned receives information that he considers establishes conclusively the death of a member" *Id.* § 556(b).

⁴²⁸ AFMPCI 36-9, *supra* note 410, para. 8.1.

the evidence.⁴²⁹ A finding that the evidence establishes conclusively that the airman is dead must be supported by evidence which proves beyond a reasonable doubt that the missing member could not have survived. According to Air Force policy, the recovery of remains is not a prerequisite to a conclusive finding of death, and a passage of time without information may be considered as evidence.⁴³⁰

As reflected in Service policy, each Service already required an investigation prior to placing a service member in a missing status. Additionally, once placed in a missing status, the Services require a status review hearing that provides procedures mandated by the Missing Persons Act and the Fifth Amendment. As a result, many of the Services' accounting procedures are similar to each other and to the new law. Consequently, when the new law was enacted, Service procedures on determining the status of missing persons were quite comprehensive; Senator McCain was probably correct when he stated that they were "fully adequate to accomplish the objective of determining the fate of all of our missing people."⁴³¹

⁴²⁹ *Id.* para. 8.2.

⁴³⁰ *Id.* See also AR 600-8-1, *supra* note 377, para. 8-24 (Army policy providing that a case review may be warranted based on a passage of time or receipt of compelling information concerning the soldier's whereabouts or fate).

⁴³¹ See *supra* note 20 and accompanying text.

Although new investigatory procedures may not have been needed, additional procedures designed to open the process to family members were necessary. Current Department of Defense and Service policies on missing persons investigations still do not allow sufficient family-member participation in the process. Only dependents who are entitled to due process under the Fifth Amendment because they receive benefits are given access to information to be reviewed by the board and are allowed to attend the status review hearings (except that the Air Force allows other family members to attend the hearing). In addition, none of the Service policies effectively addresses the impact of classified information on the review process. The only Service to address this issue specifically is the Army, and its policy is that if the information cannot be downgraded, it may not be provided to dependents or considered by the status review board.⁴³²

As both the Senate Committee on Armed Services and the House Committee on National Security observed, many persons perceived the Department of Defense as an "unresponsive bureaucracy" that ignored the family members of missing personnel from the Vietnam Conflict.⁴³³ As the Senate Select Committee on POW/MIA Affairs concluded in 1993, much of the controversy surrounding the government's handling of the

⁴³² See *supra* note 412 (outlining the Army policy on the use of classified information in status review hearings).

⁴³³ See *supra* notes 11, 14 and accompanying text.

POW/MIA issue in Southeast Asia could have been avoided if the relevant documents had been declassified and made available to family members long ago. As the committee noted, "[s]ecrecy breeds the suspicion that important information is being withheld, while fueling speculation about what that information might be."⁴³⁴ The new law effectively addresses this problem by allowing all family members to attend the status review hearings, mandating certain information be kept in a missing person's personnel file or, if not in the personnel file, requiring the file to contain a notice that the information exists, and compelling release of the personnel file to family members.⁴³⁵

In addition, the new law's requirement for uniform procedures on personnel accounting throughout the Department of Defense will assist in assuring family members that the Department is finally taking the lead on this issue.⁴³⁶ The

⁴³⁴ SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 30.

⁴³⁵ 10 U.S.C. §§ 1504(g), 1506(b), 1506(f). The new law does not, however, address the most recent litigation on missing persons, that is, the identification of remains. See, e.g., *Hart v. United States*, 681 F. Supp. 1518 (N.D.Fla. 1988), *rev'd*, 894 F.2d 1539 (11th Cir. 1990), *cert. denied*, 498 U.S. 980 (1990) (alleging intentional infliction of emotional distress under the FTCA by improperly identifying remains); *Simmons v. United States*, 754 F. Supp. 274 (N.D.N.Y. 1991) (alleging intentional infliction of emotional distress under the FTCA by changing a airman's status from KIA/BNR to KIA, body recovered on the basis of the identification of a single tooth).

⁴³⁶ 10 U.S.C. § 1501(b).

Defense Department should have promulgated uniform procedures on its own initiative long ago. In leaving these procedures in the hands of the Military Services, the Defense Department contributed to the perception that it was not adequately involved in overseeing this issue. Finally, by authorizing judicial review of certain Secretarial decisions, family members may be assured that they have some recourse if not satisfied with a Military Service's status decision.⁴³⁷

VI. Proposals to Improve the New Law

While the new procedures for determining the status of missing personnel are similar to existing Service regulations in many respects, the new law is significantly different in that it: (1) requires a missing person's counsel;⁴³⁸ (2)

⁴³⁷ See 10 U.S.C. § 1508(a) (providing that judicial review is to be governed by the standard in 5 U.S.C. § 706 (1977), which states, in part, that the reviewing court shall "(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). Under the Missing Persons Act, however, federal court review of status decisions was always available to family members receiving allotments of a missing person's pay and allowances. See, e.g., *Crone v. United States*, 538 F.2d 875, 883 (Ct. Cl. 1976), *reh'g granted*, 210 Ct. Cl. 748 (1976) (providing that dependents receiving benefits under the Missing Persons Act have standing to challenge Secretarial decisions affecting those benefits, and that the standard of review under the Missing Persons Act is an arbitrary and capricious one; the same standard as that under the new law).

⁴³⁸ 10 U.S.C. § 1504(f).

provides a "credible evidence" standard of proof to declare a person dead;⁴³⁹ and (3) requires further review boards every three years for thirty years, regardless of whether new information is received.⁴⁴⁰ These provisions, among others, are probably those that Senator McCain was referring to when he stated that the act contains "the most egregious . . . unworkable, unnecessary, and counter-productive provisions related to missing service personnel."⁴⁴¹ This section discusses these problem areas, explains why they should be amended, and proposes needed changes. At appendix A are the proposed legislative amendments.

A. *Board Proceedings*

The law contains a number of board procedures that must be amended. The amendments proposed in this section are designed to provide the Department of Defense and the family members with board procedures that ensure a fair and workable process.

1. *Delete Requirement for Missing Person's Counsel*--The requirement for the Secretary concerned to appoint a missing person's counsel should be deleted, as such a counsel is inappropriate and unnecessary. The new law requires the Secretary to appoint a counsel to "represent" each person

⁴³⁹ *Id.* § 1507(a).

⁴⁴⁰ *Id.* § 1505(b).

⁴⁴¹ See *supra* note 19. See also *supra* notes 20-21 and accompanying text (discussing more fully Senator McCain's opinion on the new law).

covered by an initial board of inquiry, a subsequent board of inquiry, and a further review board.⁴⁴² This attorney is in addition to the judge advocate, or civilian attorney, appointed to provide legal counsel to the boards.⁴⁴³ Additionally, the law requires the Defense Department to forward all new information relating to the missing person to the missing person's counsel, as well as the primary next of kin and previously designated person. The head of the Department of Defense office established by the law also must obtain the advice of the missing person's counsel prior to deciding whether the information warrants a further review board.⁴⁴⁴

First, requiring a separate counsel to represent the missing person implies that Service Secretaries cannot be trusted to apply the law. This implication appears validated by the law's requirements that the missing person's counsel perform many duties normally considered to be those of a board's legal advisor, such as assisting the board in ensuring that all appropriate information is collected, logged, filed, and safeguarded, advising the Defense Department on whether a further review board is necessary based on new information, and monitoring board deliberations. With the assistance of

⁴⁴² 10 U.S.C. §§ 1503(f), 1504(f) and 1505(d), respectively.

⁴⁴³ *Id.* §§ 1503(c)(4), 1504(c)(4) and 1505(d).

⁴⁴⁴ *Id.* § 1505(c)(2).

the legal advisor to the board, there is simply no support for the proposition that the Service Secretary cannot correctly apply the new law.

Second, other than attempting to protect the interests of his "client" by ensuring that the board appropriately applies the law (a function already performed by the board's legal advisor), the missing person's counsel performs no other function. The counsel presumably will have never met the missing person and has no more knowledge of what that person would have wanted under the circumstances than do the board and the Secretary. Consequently, the missing person's counsel is in the awkward position of attempting to represent a client with whom he has no attorney-client relationship and for whom he has no personal knowledge. The only individuals who may know what the missing person may want are the person's family members. Therefore, either the counsel is left to decide alone what is best for the missing person, or the counsel may attempt to discover the client's wishes by consulting family members. If the missing person's counsel decides on this latter approach, the counsel risks becoming embroiled in arguments between spouses, children, parents and designated persons over what these individuals believe the missing person would have wanted. The entire situation is magnified considerably when the missing person's counsel must represent several "clients" subject to the same board review.

2. *Restrict the Process Afforded to Family Members and Other Designated Persons*--The Service Secretary should provide

primary next of kin, immediate family members and previously designated persons notice and an opportunity to attend a status review hearing, and allow them access to unclassified information. Only the primary next of kin, however, should be entitled to attend the hearing with a lawyer, present relevant information at the hearing, and submit written objections to the board recommendation. If there is no primary next of kin, the law should afford the previously designated person the same process. This procedure will further the Congressional intent to "unveil the curtain of secrecy" surrounding the current procedures,⁴⁴⁵ while at the same time protecting the process from becoming an adversarial hearing. As the court in *United States v. Townsend* correctly observed, "[t]he status review hearing is not the kind of situation which requires an adversarial, trial-type hearing."⁴⁴⁶

The new law entitles the primary next of kin,⁴⁴⁷ all members of the immediate family,⁴⁴⁸ and any previously designated person⁴⁴⁹ to: (1) notice and an opportunity to

⁴⁴⁵ See *supra* note 9 and accompanying text (statement of Rep. Gilman upon introduction of H.R. 945, The Missing Service Personnel Act of 1995).

⁴⁴⁶ 476 F. Supp. 1070, 1074 (N.D.Tex. 1979).

⁴⁴⁷ See *supra* note 30 (defining "primary next of kin").

⁴⁴⁸ See *supra* note 31 (defining "member of the immediate family").

⁴⁴⁹ See *supra* note 32 (defining "previously designated persons").

attend the hearing;⁴⁵⁰ (2) access to the missing person's personnel file and any other unclassified information or documents relating to the person's whereabouts;⁴⁵¹ (3) an opportunity to present relevant information at the board proceedings;⁴⁵² and (4) an opportunity to submit written objections to any recommendation of the board.⁴⁵³ In fact, the only right enjoyed by the primary next of kin that other members of the immediate family do not have is the right to attend the hearing with private counsel.⁴⁵⁴ The new law extends this right, however, to the previously designated person as well.⁴⁵⁵

According to the holding in *McDonald v. McLucas*,⁴⁵⁶ the Fifth Amendment⁴⁵⁷ requires that dependents⁴⁵⁸ who are

⁴⁵⁰ 10 U.S.C. § 1504 (g) (1) - (2) .

⁴⁵¹ *Id.* § 1504 (g) (4) (B) .

⁴⁵² *Id.* § 1504 (g) (4) (C) .

⁴⁵³ *Id.* § 1504 (g) (4) (D) .

⁴⁵⁴ *Id.* § 1504 (g) (4) (A) .

⁴⁵⁵ *Id.*

⁴⁵⁶ 371 F. Supp. 831, 834 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974) (holding that prior to a Secretarial determination of death under the Missing Persons Act, dependents are entitled to the following procedural due process: (1) notice and an opportunity to attend the hearing, with a lawyer if they choose; (2) reasonable access to the information upon which the reviewing board will act; and (3) an opportunity to present any information which they consider relevant to the proceedings).

authorized allotments of a missing person's pay and allowances under the Missing Persons Act⁴⁵⁹ are entitled to procedural due process prior to a status decision that may affect their allotments. The new act amends the Missing Persons Act by authorizing dependents of persons determined to be missing under the new law to receive allotments of the missing person's pay and allowances.⁴⁶⁰ Consequently, under *McDonald*, dependents of persons found missing under the new law are entitled to procedural due process prior to a Secretarial decision that the missing person is dead.

The new law, however, extends due process to the primary next of kin, other members of the immediate family, and any other previously designated person, without regard to their status as dependents under the Missing Persons Act.⁴⁶¹ Because

⁴⁵⁷ U.S. CONST. amend. V.

⁴⁵⁸ The Missing Persons Act defines a "dependent" to include a spouse, unmarried child under 21 years of age; a dependent mother or father; a dependent designated in official records; and a person determined to be dependent by the Secretary concerned or his designee. 37 U.S.C. § 551(1) (1988).

⁴⁵⁹ See 37 U.S.C. § 553(e)-(f) (Supp. 1995) (authorizing the Secretary concerned to direct the initiation, continuance, discontinuance, increase, decrease, suspension, or resumption of payments of allotments from the pay and allowances of a missing person until the Secretary receives evidence that the member is dead or has returned to military control).

⁴⁶⁰ NDAA FY96, *supra* note 23, § 569(c)(2)(C).

⁴⁶¹ Except that only the primary next of kin and previously designated persons may attend the board hearing with counsel. 10 U.S.C. § 1504(g)((4)(A)).

one purpose of the new law is to "unveil the curtain of secrecy which currently surrounds any DOD decision concerning a person's status as missing in action,"⁴⁶² the law should extend some process to certain individuals who may not be entitled to a missing person's pay and allowances. The process envisioned by the new law will, however, foster an adversarial, trial-type atmosphere that is not helpful in assisting either the family or the Defense Department in resolving a missing person's status. For example, one can foresee situations in which the missing person's family members do not have the same interests. As the *McDonald* court observed, during the Vietnam-era some family members actively contested any change of status, while others, who had accepted the apparent fate of death of their missing service members, wanted the services to make immediate determinations of death so that they might begin their lives anew.⁴⁶³ Because all family members and previously designated persons may present information at the board proceedings and submit written objections to board recommendations, a tremendous potential exists for the hearing to become an adversarial battle of the

⁴⁶² See *supra* note 9 and accompanying text (statement of Rep. Gilman upon introduction of H.R. 945, The Missing Service Personnel Act of 1995).

⁴⁶³ *McDonald v. McLucas*, 371 F. Supp. 831, 836 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

family, with no one "winning," not the Military Service and not the family members.

This situation is exacerbated when the missing person has named a non-family member as a "previously designated person" entitled to the same rights as the primary next of kin, including the right to be represented by counsel. Potentially, then, there could be four or more attorneys at the hearing: the legal advisor to the board, the missing person's counsel, and the counsels for the primary next of kin and the previously designated persons. Also, who will this previously designated person be? When deploying to Operation Desert Shield, this author assisted many soldiers with wills. A surprising number of young, unmarried soldiers named girlfriends as primary beneficiaries of their wills and insurance policies, including girlfriends of very short duration. If these soldiers were willing to designate such individuals to receive all of their assets upon their death, they will not hesitate to confer on them the status of "designated person" under the new law.⁴⁶⁴ Certainly, if the person has no primary next of kin, the person should be able to designate someone else to receive the due process benefits contemplated by the new law. Otherwise, the law should not

⁴⁶⁴ One can even imagine scenarios where a girlfriend is the "designated person" fighting over the person's status with the wife. Under the new law, the girlfriend would have the same rights as the person's wife.

entitle the designated person to the same process as the primary next of kin.

3. *Amend Standard of Proof to Declare a Person Dead*--The credible evidence standard of proof for declaring a person dead should be replaced by a standard requiring that death be established by clear and convincing evidence. The new law outlines a three-prong test that must be met before a Secretary may declare a missing person to be dead. First, the Secretary must find that there is credible evidence that the person is dead. Second, the Secretary must decide that the United States possesses no credible evidence that the person is alive. Third, United States representatives must have made a complete search of the area where the person was last seen and must have examined the records of the government or entity having control over that area, unless after making a good faith effort the representatives are not granted access.⁴⁶⁵

Under the Missing Persons Act, the Secretary concerned may make a finding of death if "the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead."⁴⁶⁶ Some individuals believe that this standard allows a Secretary to declare a person dead based only on the length of time in a missing status, without making any effort to locate the missing person. Therefore, one purpose of the new law was to

⁴⁶⁵ 10 U.S.C. § 1507(a).

⁴⁶⁶ 37 U.S.C. 555(b) (Supp. 1995).

ensure "that a person is not declared dead solely because of the passage of time."⁴⁶⁷ This purpose is assured by the third prong of the new test which requires that United States representatives make a complete search of the area where the person was last seen and examine the records of the government or entity having control over that area, unless not granted access.⁴⁶⁸ Thus, a passage of time without information is not sufficient; the United States must attempt to locate the missing person before the Secretary may declare the person dead.

Unlike the third prong of the new test, however, the first two prongs do not further the intent of Congress that a person not be declared dead based solely on the passage of time. Under any standard of proof, including the new law's, the length of time in a missing status, although not determinative in itself, is one factor that a Secretary must consider in deciding the person's status. For example, after a long period of time without additional information, a Secretary may decide under the new law that once-credible evidence that a person is alive is no longer credible and, in fact, the period

⁴⁶⁷ NDAA for FY96, *supra* note 23, § 569(a). The Department of Defense denied, however, that it had ever been its policy to declare a missing member dead primarily on the basis of passage of time. Department of Defense Report, *supra* note 351.

⁴⁶⁸ 10 U.S.C. § 1507(a)(3).

of time without additional information has become credible evidence that the person is dead.

In addition to not furthering the Congressional purpose, as explained above, the two-prong test will result in confusion because it is not defined in the new law and is unfamiliar in case law and military regulation. Generally, there are three standards of proof for different types of cases: (1) preponderance of the evidence; (2) clear and convincing evidence; and (3) evidence beyond a reasonable doubt. The function of these standards is to instruct the factfinder on the degree of confidence our society thinks he should have in the correctness of factual conclusions.⁴⁶⁹ The standard of proof, therefore, allocates the risk of error and indicates the relative importance attached to the ultimate decision.⁴⁷⁰ At one end is the preponderance of the evidence standard, which allows both parties to share the risk of error in "roughly equal fashion."⁴⁷¹ This standard is generally used, for example, in decisions regarding money.⁴⁷² At the other end is the beyond a reasonable doubt standard used in criminal case, where the interests of the defendant in liberty or life require a standard of proof designed to exclude as

⁴⁶⁹ *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

⁴⁷⁰ *Addington v. Texas*, 441 U.S. 418, 423 (1979).

⁴⁷¹ *Id.*

⁴⁷² *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

nearly as possible the likelihood of an erroneous decision by imposing almost all of the risk of error upon society.⁴⁷³

Neither of the above standards appears appropriate in deciding whether a missing person is dead. The missing person and his family should not share equally with the government in the risk that a Secretary's decision may be erroneous such that a preponderance of the evidence standard is appropriate. Neither, however, should the government bear almost the entire risk by using the criminal standard of evidence beyond a reasonable doubt. If a person who is declared dead is later returned to United States control, the person is entitled to all benefits lost because of the declaration of death, including pay and allowances that accrued during that period.⁴⁷⁴

The appropriate standard of proof is the third, intermediate standard: proof by clear and convincing evidence. The Supreme Court has required proof by clear and convincing evidence where particularly important individual interest or rights are at stake.⁴⁷⁵ Certainly, both the missing person and his family members have an important interest at stake in a

⁴⁷³ *In re Winship*, 397 U.S. at 370.

⁴⁷⁴ 10 U.S.C. § 1511.

⁴⁷⁵ See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); and *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization).

Secretarial decision that a missing person is dead. As reflected in the reaction of some families of service members missing in Southeast Asia, this interest generally is more than a mere stake in entitlement to allotments. Consequently, the clear and convincing evidence standard of proof is preferable to the new law's peculiar two-pronged standard because it is an established standard of proof historically used in circumstances like those of the new law where important individual interests are at stake.

4. *Delete Requirement for a Board Member With a Similar Occupational Specialty*--The law requires that both the subsequent and further review boards have one member with an "occupational specialty similar to that of one or more of the persons covered by the inquiry."⁴⁷⁶ This requirement is not necessary and should not be statutorily mandated. In many instances, the person's disappearance will have no direct correlation with his military occupational specialty, and to require such a person to be a member of the board furthers no purpose. If a Secretary believes such a person would be helpful to the board, the Secretary should have the discretion to appoint that person.

B. *Preliminary Assessment and Initial Board of Inquiry Procedures*

The preliminary assessment and initial board of inquiry procedures must be amended to ensure a thorough investigative

⁴⁷⁶ 10 U.S.C. § 1505(d)(3)(A).

process so that the Secretary concerned may make a decision on the person's status based on all available information. Therefore, the law should afford the immediate commander additional time to conduct the preliminary assessment and should grant the Secretary discretion to designate the appropriate authority to review the assessment to ensure that the record is complete.

1. *Extend Time Period To Conduct a Preliminary Assessment*--The immediate commander should be allowed seven days to perform the preliminary assessment.⁴⁷⁷ Currently, if the immediate commander decides that the person should be placed in a missing status, the commander must transmit a report to the Theater Component Commander within forty-eight hours of receiving the information on the disappearance.⁴⁷⁸ Two days is not enough time for the immediate commander to gather sufficient evidence, decide on a recommendation of missing and forward a report to the Theater Component Commander.⁴⁷⁹

⁴⁷⁷ Existing Department of Defense procedures allow a person to remain in a DUSTWUN status for 10 days. DODI 1300.18, *supra* note 367, para. F.2.b.

⁴⁷⁸ 10 U.S.C. § 1502(a)(2).

⁴⁷⁹ The new law allows the Secretary of Defense, however, to grant an extension of this time period, on a case-by-case basis and in 48 hour increments, only. 10 U.S.C. § 1501(b)(4).

2. *Delete Requirement to Forward Preliminary Assessment Through Theater Component Commander*--The provision requiring the immediate commander to forward the preliminary assessment through the Theater Component Commander should be deleted.⁴⁸⁰ The Theater Component Commander is the commander of all forces of a particular armed force assigned to the combatant command who is directly subordinate to the commander of the combatant command.⁴⁸¹ The law not only requires the report to be forwarded through the Theater Component Commander, but makes this commander responsible for ensuring that "all necessary actions are being taken and all appropriate assets are being used" to locate the missing person.⁴⁸² Consequently, the Theater Component Commander is not simply a conduit for the immediate commander's report; he must also ensure that everything is being done--and done right--to account for the missing person.

The Theater Component Commander is not the appropriate person to ensure the sufficiency of such an investigation for

⁴⁸⁰ *Id.* § 1502(a)(2). This provision does not prohibit the Department of Defense from requiring the immediate commander to forward the report through any number of intermediate commanders. Such a requirement could result in a substantial delay before the report reaches the Theater Component Commander because the law does not require that the report reach the Theater Component Commander within a certain time period.

⁴⁸¹ 10 U.S.C. § 1513(8).

⁴⁸² *Id.* § 1502(b).

at least two reasons. First, in instances where a person has disappeared during a hostile action the Theater Component Commander will be intimately involved in that hostile action, conducting combat operations. Because of these duties, it is uncertain whether such a commander will be able to provide the high level of scrutiny to these administrative investigations that Congress has in mind. Second, the Theater Component Commander likely will not have the background and expertise needed to ensure that the investigations are thorough and complete.

The Service Secretary should be allowed the discretion to designate the authority whom the Secretary believes has the knowledge and expertise to ensure that all necessary actions are being taken and all appropriate assets are being used. For example, the Services currently require the appointing authorities to forward their investigations directly to their headquarters personnel commands.⁴⁸³ This procedure is appropriate because the personnel commands have the institutional knowledge and expertise in personnel matters,

⁴⁸³ The Army requires the CAC to forward the investigation directly to CDR, PERSCOM, in accordance with AR 600-8-1, *supra* note 377, para. 8-8b. The Navy requires the investigation be forwarded to the CDR, NAVMILPERS under NAVMILPERSMAN, *supra* note 387, para. 42101000.8. The Marine Corps requires its investigations be forwarded to the Commandant of the Marine Corps pursuant to MARCORCASPROCMAN, *supra* note 395, para. 5001.3. Finally, the Air Force requires the investigations be forwarded to the Head, Personnel Affairs Branch under AFI 36-3002, *supra* note 397, para. 2.12.3.

including missing persons investigations and procedures, that is necessary to ensure that these complicated investigations are thorough and complete.

3. *Amend Board Report Release Requirements*--The law should be amended to provide that, once the Secretary makes a final status decision, the board report may be released in accordance with law, similar to other administrative investigations. As enacted, the law prohibits the Service Secretary from making a board report public until one year after the date the board submitted its report to the Secretary.⁴⁸⁴ Because the law requires the Secretary to decide a person's status no later than thirty days after receiving a board report,⁴⁸⁵ a report generally will not be released until eleven months after the Secretary makes a final decision.

In a law concerned with access to information on a missing person, the prohibition on release of the board report seems misplaced. In addition, as an exception to this release prohibition, the law requires the Secretary to provide certain family members with an unclassified summary of the immediate commander's report and the report of the board of inquiry no later than thirty days after making a final decision on the person's status. These individuals presumably may do whatever they wish with the board report any way, including making it public despite the Secretarial prohibition.

⁴⁸⁴ 10 U.S.C. § 1503(g)(3).

⁴⁸⁵ *Id.* § 1503(I).

C. *Subsequent and Further Boards of Inquiry*

Finally, various provisions on subsequent boards of inquiry and further review boards need to be amended to clarify when these boards are required.

1. *Amend Who May Be the Subject of a Subsequent Board of Inquiry*--The law should require the Service Secretary to convene a subsequent board of inquiry only in cases of persons whom the Secretary placed in a missing status as a result of an initial board of inquiry. The Secretary is now required to convene a subsequent board of inquiry to review the status of all individuals who were the subject of an initial board of inquiry, including those whom the Secretary declared to be dead, absent without leave, or deserters. Consequently, the law extends procedural due process to all these individuals, their family members and previously designated persons. Because Congress intended the law to apply to those who are involuntarily absent,⁴⁸⁶ the law should not extend its procedural protections to those whom the Secretary determines are voluntarily absent. In addition, once the Secretary declares an individual to be dead, no additional process should be required.

2. *Amend Requirement To Conduct a One-Year Subsequent Board of Inquiry*--The law should be amended to provide that a one-year subsequent board of inquiry is not required if,

⁴⁸⁶ See § 1501(c) (providing that the act covers certain persons "who become involuntarily absent as a result of a hostile action").

within the one-year period, the Service Secretary convened a subsequent board of inquiry because of additional information that may change the person's status. The one-year subsequent board of inquiry is now required, without exception.

Therefore, even if the Secretary concerned has recently conducted a board within the one-year time period because of receipt of additional information, another board is required after one year. This requirement is unnecessary. One board within a one-year period is adequate, especially given that the law requires a further review board any time after a subsequent board of inquiry when the Secretary receives information that could change the person's status.⁴⁸⁷

3. *Clarify Time for Convening Subsequent and Further Review Boards*--The law should be clarified to provide that the time period for calculating when the Secretary must convene the subsequent and further review boards begins to run from the date the immediate commander forwards his report. As currently written, the point in time upon which to calculate these periods is not clear because it is described in three different ways.

First, the law requires a Secretary to notify certain family members that a subsequent board of inquiry will convene "on or about one year after the date of the first official notice of the disappearance of the person."⁴⁸⁸ Then, the law

⁴⁸⁷ *Id.* § 1505(b)(2).

⁴⁸⁸ *Id.* § 1503(j)(2).

provides that the Secretary must convene a subsequent board of inquiry "on or about one year after the date of the transmission of [the immediate commander's report]." ⁴⁸⁹ Finally, the law requires the Secretary to conduct a three-year further review "on or about three years after the date of the initial report of the disappearance of the person." ⁴⁹⁰

The first two provisions attempt to describe the same point in time, that is, when the one-year time period begins to run for the purpose of deciding when a subsequent board of inquiry must convene. For clarity, therefore, the provisions should use the same phraseology to describe when the one-year period begins to run. In addition, there is no reason why the points in time from when the one-year and three-year reviews begin to run should be different.

4. *Clarify When a Further Review Board is Required*--The provision of the new law requiring three-year further review boards "in the case of a missing person who was last known to be alive or who was last suspected of being alive" must be amended to delete the quoted language. ⁴⁹¹ Also, the law should be amended to provide that the Secretary is not required to appoint a board more than twenty years, instead of thirty years, after the immediate commander forwarded his report. ⁴⁹²

⁴⁸⁹ *Id.* § 1504 (b) .

⁴⁹⁰ *Id.* § 1505 (b) (1) (A) .

⁴⁹¹ *Id.* § 1505 (b) .

⁴⁹² *Id.* § 1505 (b) (3) .

First, the language requiring a board only for those missing persons last known, or suspected, of being alive inappropriately implies that the law contemplates carrying persons in a missing status who were not last known, or suspected, of being alive. If the Service Secretary has not even a "suspicion" that the person is alive, surely the Secretary should make a finding of death. In addition, the law does not require the Secretary to ever review the missing status of an individual who was not last known, or suspected, of being alive, unless the Secretary receives information that may change the person's status. Consequently, such a person could remain in a missing status indefinitely. Furthermore, all missing persons, including those apparently held in a missing status who were not last known or suspected of being alive, continue to accrue pay and allowances.⁴⁹³ The Service Secretary may also initiate, continue, discontinue, increase, decrease, suspend or resume payment of allotments to dependents from the pay and allowances of these missing persons.⁴⁹⁴ Potentially, an individual not last known or suspected of being alive could continue to accrue pay and allowances, and his dependents could continue to receive

⁴⁹³ 37 U.S.C. 552 (1988 & Supp. 1995), amended by NDAA for FY96 *supra* note 23, § 569(c)(2).

⁴⁹⁴ 37 U.S.C. 553 (1988 & Supp. 1995), amended by NDAA for FY96, *supra* note 23, § 569(c)(3).

allotments, indefinitely, without any requirement ever to review the person's status.

Next, the law should be amended to require further review boards every three years for twenty years, not thirty years. This will make the requirement more manageable for the Military Services, while at the same time ensuring that the Service Secretary review a missing person's status for a reasonable length of time after the person's disappearance.

VII. Conclusion

On a subject as personal and emotional as the survival of a family member there is nothing more difficult than to be asked to accept the probability of death when the possibility of life remains.

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Unfortunately, the existence of a strong "accountability process" cannot stop the pain in a family member's heart, nor can it substitute for the gut belief held by some that one or more U.S. POWs survive. . . . These kinds of differences need not lead to differences of goal. It does not matter with what emotions we proceed at this point to seek further answers; it is important only that we continue looking as long as there is good reason to believe that additional answers may be found.

*--Senate Select Committee
on POW/MIA Affairs⁴⁹⁵*

Because of circumstances beyond our government's control, there will always be cases of missing persons that cannot be resolved either by the recovery and identification of remains

⁴⁹⁵ SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. NO. 1, *supra* note 15, at 3, 43.

or the return of the person to military control. This, sadly, is a fact of war. Our country must, however, make every possible effort to account for its personnel. As discussed, the push to enact new laws on accounting for missing persons grew out of the frustrations with the Missing Persons Act of some family members of those declared missing during the Vietnam Conflict. Congress, however, never intended the Missing Persons Act to be a law on accounting for missing persons; Congress intended the law to relieve the financial hardship of a missing person's family members by providing them with an allotment of the missing person's pay and allowances. The Military Services have built on the Missing Persons Act, however, by promulgating policies on accounting for missing persons. At the time of the new law, Service procedures on determining the status of missing personnel were comprehensive and "fully adequate to accomplish the objective of determining the fate of all of our missing people."⁴⁹⁶ These procedures needed to be updated, however, to address family-member concerns regarding their involvement in the process and the release of information to them about their missing service members.

The Department of Defense and the Military Services must now implement the new law. Because existing Service regulations contain many similar investigative procedures,

⁴⁹⁶ See *supra* note 20 and accompanying text (statement by Senator McCain).

implementing many of the new rules should not be difficult. On the other hand, implementing the law's more complicated procedures will require close supervision by judge advocates and civilian attorneys. Congress would ease implementation, however, by enacting the amendments suggested in this thesis. After enacting these amendments, and with vigilant oversight by judge advocates and others within the Department of Defense, hopefully Congress will have succeeded in accomplishing what it had hoped: a law ensuring that the Government accounts for all service members and certain civilians who are missing as a result of a hostile action, and ensuring that these individuals are not declared dead solely because of the passage of time.⁴⁹⁷

⁴⁹⁷ NDAA for FY96, *supra* note 23, § 569(a).

APPENDIX A

A BILL

To amend Chapter 76 of Title 10, United States Code
(Missing Persons), to clarify procedures on
accounting for certain missing personnel.

Chapter 76 of title 10, United States Code, is amended as
follows:

(1) Section 1502 is amended--

(A) in subsection (a) (2) by striking out "48 hours" and
inserting in lieu thereof "seven days" and by striking out
"theater component commander with jurisdiction over the missing
person" and inserting in lieu thereof "Secretary concerned, or
his delegee"; and

(B) by striking out subsection (b) and redesignating
subsection (c) as subsection (b); and

(C) in subsection (c), now subsection (b), by striking out
the second sentence.

(2) Section 1503 is amended--

(A) by striking out subsection (f) and by redesignating
subsection (g) as subsection (f), subsection (h) as subsection
(g), subsection (i) as subsection (h), subsection (j) as
subsection (i) and subsection (k) as subsection (j); and

(B) in subsection (g)(3), now subsection (f)(3), by striking out the entire subsection and inserting in lieu thereof "The Secretary of Defense shall release a report submitted under this subsection with respect to a missing person in accordance with laws providing for release of Government documents to the public."; and

(C) in subsection (j)(2), now subsection (i)(2)--

(i) by inserting at the beginning of the subsection "with respect to a person determined by the Secretary concerned to be in a missing status,"; and

(ii) by striking out "of the first official notice of the disappearance of that person" and inserting in lieu thereof "of the transmission of a report concerning the person under section 1502(a)(2)".

(3) Section 1504 is amended--

(A) in subsection (a) by striking out "covered by a determination" and inserting in lieu thereof "determined to be in a missing status by the Secretary concerned"; and

(B) in subsection (b)--

(i) by striking out "DATE OF APPOINTMENT" and inserting in lieu thereof "ONE-YEAR BOARD"; and

(ii) by inserting a new sentence "A board is not required under this subsection if the Secretary concerned convened a board in accordance with subsection (a) to review the status of the missing person." at the end of the subsection; and

(C) in subsection (d) (3), by striking "(A) has an occupational specialty similar to that of one or more of the persons covered by the inquiry; and" and redesignating subsection (B) as subsection (A) and subsection (C) as subsection (B); and

(D) by striking out subsection (f) and redesignating subsection (g) as subsection (f), subsection (h) as subsection (g), subsection (i) as subsection (h), subsection (j) as subsection (i), subsection (k) as subsection (j), subsection (l) as subsection (k), and subsection (m) as subsection (l); and

(E) in subsection (g) (4) (A), now subsection (f) (4) (A), by inserting ", if no such person can be located after a reasonable effort," after "who is the primary next of kin or"; and

(F) in subsection (g) (4) (C), now subsection (f) (4) (C), by inserting "in the case of an individual who is the primary next of kin, or if no such person can be located after a reasonable effort, the previously designated person," at the beginning of the subsection; and

(G) in subsection (g) (4) (D), now subsection (f) (4) (C), by inserting "in the case of an individual who is the primary next of kin, or if no such person can be located after a reasonable effort, the previously designated person," at the beginning of the subsection; and

(H) in subsection (h) (3) (A), now subsection (f) (3) (A), by striking out "counsel for the missing person appointed under subsection (f)" and inserting in lieu thereof "legal counsel to the board appointed under subsection (d) (4)"; and

(I) in subsection (k)(1) by striking out "(j)" and inserting in lieu thereof "(i)"; and

(J) by striking subsection (k)(1)(B), now (j)(1)(B), and redesignating subsection (j)(1)(C) as (j)(1)(B); and

(K) in subsection (k)(1)(C), now subsection (j)(1)(B), by striking out "(g)" and inserting in lieu thereof "(f)".

(4) Section 1505 is amended--

(A) in subsection (b)(1) by striking out "who was last known to be alive or who was last suspected of being alive"; and

(B) in subsection (b)(1)(A) by striking out "initial report of the disappearance of the person under section 1502(a)" and inserting in lieu thereof "transmission of a report concerning the person under section 1502(a)(2)"; and

(C) in subsection (b)(3)(A) by striking out "30" and inserting in lieu thereof "20"; and

(D) in subsection (b)(3)(B) by striking out "30" and inserting in lieu thereof "20"; and

(E) in subsection (c)(2)--

(i) by striking "(A) the designated missing person's counsel for that person, and (B)"; and

(ii) by inserting after "the primary next of kin and" the phrase ", if no such person can be located after a reasonable effort,"; and

(F) in subsection (c)(3) by striking out ", with the advice of the missing person's counsel notified under paragraph (2),".

(5) Section 1507 is amended in subsection (a) --

(A) by striking out "(1) credible evidence exists to suggest that the person is dead; (2) the United States possesses no credible evidence that suggests the person is alive; and" and inserting in lieu thereof "(1) death is established by clear and convincing evidence, and"; and

(B) by redesignating subsection (3) as subsection (2).

(6) Section 1513 is amended--

(A) in subsection (3)(C) by striking out "credible" and inserting in lieu thereof "clear and convincing"; and

(B) by striking out subsection (8).