

**DEFENSE PRISONER OF WAR/
MISSING PERSONNEL OFFICE**



50 U.S. Code Section 435 Note

"THE McCAIN BILL"



**DEFENSE PRISONER OF
WAR/MISSING PERSONNEL
OFFICE**



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Foreword

The intent of the "McCain Bill" is to make available to the public information relating to America's unaccounted-for servicemembers, while still respecting the privacy and desires of the primary-next-of-kin.

The statute levies guidelines for reviewing, processing, and forwarding information for public review.

This booklet highlights the history and application of the McCain Bill legislation.

"The McCain Bill"

A Brief History

On December 5, 1991, Congress enacted 50 USC § 435 Note as Public Law 102-190, commonly referred to as the McCain Bill. The statute requires the Secretary of Defense to make available to the public--in a "library like setting"--all information relating to the treatment, location, and/or condition (T-L-C) of United States personnel who are unaccounted-for from the Vietnam War. The facility chosen to receive this information is the Library of Congress (LoC). The Secretary of Defense is named as the "official custodian."

Prior to release of T-L-C information, the Department of Defense is required to obtain written consent from the primary-next-of-kin (PNOK) to release publicly such information. In the case of those unaccounted-for from the Vietnam era, letters were mailed to the 2,266 PNOKs; responses were received from 1,893. Of these, approximately 366 declined consent to release T-L-C information. Another 243 PNOKs were located but failed to respond. Each of these is, therefore, considered a PNOK "no" under the provisions of the statute. Following a reasonable search, 130 PNOKs could not be located. Based upon the pro-release intent of the statute, these 130 PNOKs were considered to have given their consent to release T-L-C information. A database was established reflecting PNOK responses and is updated as cases are resolved. Hard copy lists are provided to all offices of the federal government that deal with this issue. The Defense Prisoner of War/Missing Personnel Office (DPMO) continues to receive PNOK consent for release of information on the unaccounted-for.

The McCain Bill has been amended twice since it was originally signed. The first amendment was in the FY95 National Defense Authorization Act. This amendment incorporated the Korean and Cold War unaccounted-for under similar provisions as the Vietnam War unaccounted-for. However, the statute established the National Archives as the "library like setting" for this material and made the Archivist of the United States the "official custodian."

The second amendment was in the FY96 National Defense Authorization Act. This amendment established a 90-day period to locate and gain permission from the PNOK to release information regarding T-L-C of those unaccounted-for from the Korean/Cold War. (Note: The 90-day rule applies only to Korea/Cold War.) DPMO is developing a comprehensive database similar to the one established for the Vietnam War and will distribute the information once it has been completed.

The McCain Bill does not specifically direct declassification. Its "pro-release" intent does, however, imply such action to make the information available to the public. Compliance with the PNOK's non-consent does limit the Government's ability to release publicly all information containing T-L-C data that is declassified.

50 United States Code Section 435 Note

DISCLOSURE OF INFORMATION CONCERNING UNACCOUNTED FOR UNITED STATES PERSONNEL OF THE COLD WAR, THE KOREAN CONFLICT, AND THE VIETNAM ERA.

(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) Paragraph (1) applies to any record, live-sighting report, or other information in the custody of the official custodian referred to in subsection (d) (3) that may pertain to the location, treatment, or condition of **(A)** United States personnel who remain not accounted for as a result of service in the Armed Forces or other Federal Government service during the Korean conflict, the Vietnam era, or the Cold War, or **(B)** their remains.

(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 member or members of that person determined pursuant to subparagraph (B) of that paragraph 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/MIA's.

(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 originated by the Department of Defense, the official custodian shall make such records and other information available to the public pursuant to this section not later than January 2, 1996. 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 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 any United States personnel referred to in subsection (a)(2) who remain not accounted for but who may still be alive in captivity, 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) DEFINITIONS- For purposes of this section:

(1) The terms "Korean conflict" and "Vietnam era" have the meanings given those terms in section 101 of title 38, United States Code.

(2) The term "Cold War" means the period from the end of World War II to the beginning of the Korean conflict and the period from the end of the Korean conflict to the beginning of the Vietnam era.

(3) The term "official custodian" is --

(A) in the case of records, reports, and information relating to the Korean conflict or the Cold War, the Archivist of the United States; and

(B) in the case of records, reports, and information relating to the Vietnam era, the Secretary of Defense.

The Decision-making Process

Congress offered no formal guidelines for establishing review procedures necessary to determine whether information containing "treatment," "location," and/or "condition" may be released to the public. The following guidelines have been developed over many years based on experience, analysis of documents, and extensive legal counsel.

These guidelines have been applied to more than a million pages of information that has been released to the Library of Congress, family members, Congress, and interested individuals and groups through declassification efforts under Executive Order 12812, Freedom of Information requests, and the Mandatory Declassification Review process.

Definitions

TREATMENT, LOCATION and/or CONDITION

The words "treatment," "location," and/or "condition" appear in that paragraph of 50 United States Code Section 435 Note (referred to as the McCain Bill) that defines the class of information to which the public disclosure requirement is applicable. The words themselves are not further defined in the statute.

In accordance with the normal rules of statutory construction, we look to the plain meaning of the words in the context in which they appear. We also may consider the legislative intent which is intrinsically obvious in the legislation itself or is further evidenced in the legislative history of the provision (e.g., committee reports; speeches; debates; testimony; etc.). In this case, there is no legislative history that would suggest that anything other than the plain meaning of the words used was intended by the Congress.

Accordingly, as the agency charged with implementing the statute as it applies to Vietnam, Korean, and Cold War casualties, DPMO will apply the plain meaning standard. The purpose of the statute is to effect the public disclosure of information relevant to the resolution of the cases of the unaccounted-for persons. This is a pro-release piece of legislation with some restrictions. There should be no effort to apply further restrictive or artificially limiting meaning to the plain words.

It is not possible to provide an effective, all-encompassing definition of "treatment," "location," and/or "condition." Nevertheless, in work thus far we have developed examples for each category that may be helpful in one's analysis of specific materials. These examples are not exhaustive or exclusive, merely illustrative:

- TREATMENT**
- * Circumstances of capture/internment
 - * Medical treatment or lack thereof
 - * Availability of food and water
 - * Interrogation techniques/torture
 - * Physical or mental abuse, threats, humiliation

- LOCATION**
- * Identifiable geographic feature (river, lake, mountain)
 - * Place name (village, city, hamlet - not province)
 - * Prison camp site (Hanoi Hilton/Son Tay/Zoo)
 - * Distance from a known point
 - * 6 digit or greater UTM coordinate
 - * GEOCOORDS (degrees/minutes/seconds)

- CONDITION**
- * Physical or mental condition (weak, malnourished, sick, feverish, delirious, coma)
 - * Specific injuries (skull fracture, broken arm, gunshot or fragment wound, concussion, etc.)
 - * Description of cause/circumstances of death
 - * Remains (to include those referenced during a Joint Field Activity but not positively identified)
 - * Non-biological evidence (such as that which implies the individuals did not exit the aircraft--e.g. ejection seat, parachute parts, other life support equipment)

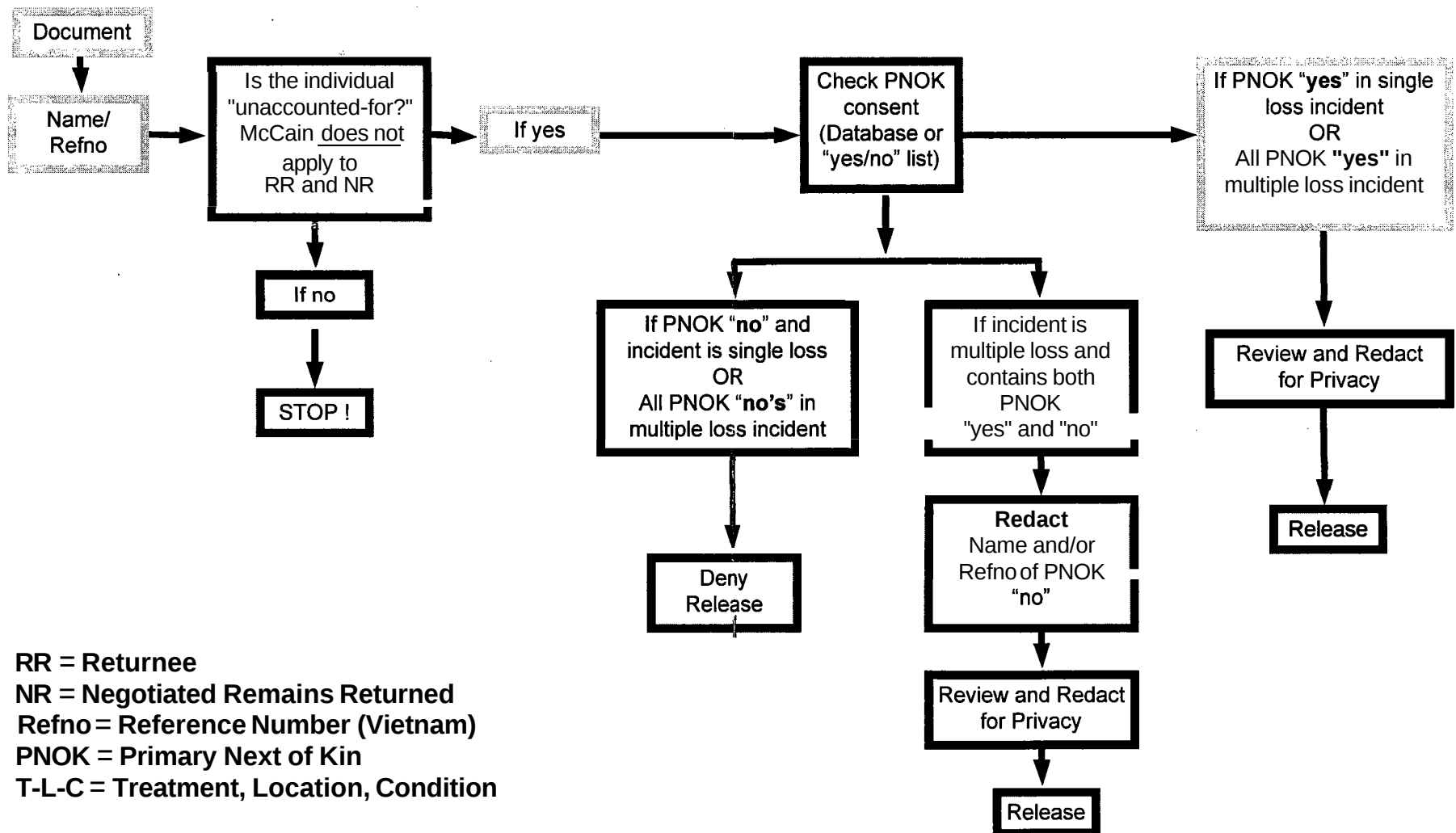
As the examples illustrate, information which is logically relevant to a determination of fate should be included among that which is subject to the disclosure requirements of the McCain provision as amended.

Questions are raised regarding the application of the word "dead" as it relates to the McCain Bill. In the usual context of our work, "dead" is a status, but it also can be descriptive of a condition. Information or evidence that a person is dead is clearly relevant to a determination of fate and that information is subject to the McCain provision when it arises in the descriptive context. For the purposes of DPMO's redaction work, we must apply a sensible rule. When we encounter the word dead, and it is clearly used in the context of a previously known status, as in a compilation listing casualties, then the reference may stand without application of the PNOK release rule. However, where it is used descriptively, such as in a witness statement, then the normal rules relative to the PNOK release are applicable.

"McCain Bill" Decision Logic

(Used for Classified, Declassified and Unclassified Information)

This process should be used when considering the release of any information pertaining to the Korean Conflict, the Cold War, and the Vietnam War



KEY POINTS

50 United States Code
Section 435 Note

"The McCain Bill"

History of the Law

First Amendment

* FY 95 National Defense
Authorization Act

* Include Korea/Cold War

History of the Law

- * Senator McCain
- * 5 December 1991
- * Vietnam
- * Two Amendments

History of the Law

Second Amendment

* FY 96 National Defense
Authorization Act

* 90-days to locate
Korean/Cold War PNOK

PNOK Consent/Non-Consent

- * If the PNOK cannot be located, the PNOK is considered a **"yes."**
- * If the PNOK received the letter but ***did not respond***, the PNOK is considered a **"no."**

PNOK Consent/Non-Consent

"Cannot be located" is defined as:

- * **Vietnam** PNOK: After reasonable effort to locate.
- * **Korean/Cold War** PNOK: After **90** days of trying to locate.

Treatment, Location, &/or Condition

Treatment:

- * Circumstances of capture/internment
- * Physical or mental abuse, humiliation
- * Interrogation techniques/torture

Treatment, Location, &/or Condition

Location:

- * Identifiable geographic feature
- * Place name
- * UTM/GEOCOORDS
- * Prison name

Treatment, Location, &/or Condition

Condition:

- * Physical or mental condition
- * Specific injuries
- * Remains
- * Non-biological evidence

Highlights

- * The McCain Bill is not an issue of classification.
- * The McCain Bill also applies to unclassified information.

Highlights

- * Name and Reference Number (Refno) are treated the same.
- * Family members of the unaccounted-for **are not** protected under the provisions of the law. (Incl. PNOK "no's")

Highlights

- * The McCain Bill applies to all material released by DoD.
- * Includes material generated in the **past**, that which is produced in the **present** and any which may be developed in the **future**.

Highlights

- * The law **does not** apply to returnees and negotiated remains prior to December 1991.
- * McCain **does not** apply once remains are repatriated, identified, and returned to the PNOK.

Highlights

- * McCain Bill also applies to photographs

Highlights

- * Names and Refnos of PNOK "no's" **can** be found in the LoC.
 - * Lists of names/Refnos
- * McCain **only** applies when information pertains to T-L-C.

Key things to remember

- * Not an issue of classification
- * "Pro release"
- * T-L-C: ask the question?
- * Consider PNOK Consent/Non-consent

NOTES

NOTES