

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, et al.

Defendants.

§
§
§
§
§
§
§
§
§
§
§

Civ. A. No. SA:12-cv-1002-FB-HJB

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S OBJECTION
TO REPORT AND RECOMMENDATION OF UNITED STATES JUDGE
AND MOTION IN LIMINE**

Defendants United States Department of Defense, et al. hereby respond to Plaintiff’s Objection to Report and Recommendation of United States Magistrate Judge and Motion in Limine (“Objection”), ECF 110. Defendants support the recommendation of the Magistrate Judge (ECF 103) to dismiss this case and deny pending motions to intervene, but file this pleading in order to correct certain factual misstatements made by Mr. Eakin in his Objection and in his Declaration filed therewith (ECF 110-10), and to advise the Court of the status of the ongoing administrative proceedings related to the identification of PVT Kelder’s remains. Defendants further urge the adoption of the Magistrate’s recommendation to dismiss, on the grounds urged by the Magistrate or on any of the alternative grounds set forth in defendants’ previously filed dispositive motions, incorporated by reference herein. See ECF 47, 54, 64 and 75, and summarized at ECF 78 at 4-8. Plaintiff’s Motion in Limine should be denied as moot, as defendants have not sought the admission of the report that Plaintiff seeks to exclude.

I. Factual Clarifications and Timeline

Plaintiff's Objection, and specifically the Declaration of John Eakin submitted in support, contain several misstatements of fact relating to defendants' interactions with Mr. Eakin and with the Primary Next-of-Kin (PNOK) Douglas Kelder, following the identification of the remains of PVT Arthur H. Kelder, which are the subject of this case. These factual misstatements are addressed below.

A. Timing of Notification of Identification

Mr. Eakin declares that Defendants' Sixth Status Report, advising the Court of the identification of PVT Kelder's remains, was filed on January 22, before notification of the Mr. Kelder and of Plaintiff. Mr. Eakin contends that he and Mr. Kelder were notified on January 23, after the "[a]fter hours" notification to the Court on January 22. ECF 110-10 (Eakin Decl.) ¶¶ 2, 3. In truth, defendants followed normal procedure in notifying the PNOK first. Mr. Eakin was then notified, and finally, the Court. Specifically:

1. The Army Casualty Office notified Douglas Kelder at 10:16 am EST (9:16 am CST) on January 22, 2015, not on January 23 as Plaintiff asserts. Declaration of Greg Gardner at ¶ 4.

2. Counsel for defendants telephoned Mr. Eakin at 9:55 am CST on January 22, by which time he had already learned the news of the identification from Douglas Kelder. Counsel for defendants also spoke to Mr. Eakin at 3:37 pm the same day and exchanged several emails with him. See, for example, Gardner Decl. Ex. 2.

3. The Sixth Status Report was filed at 6:17 pm CST on January 22, advising the Court of the identification. Defendants' Motion to Strike Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process, or, in the Alternative, for an Extension of Time to

File Opposition to Plaintiff's Motion for Partial Summary Judgment (ECF 99), was filed shortly after the Sixth Status Report on January 22. That motion also indicated that Mr. Eakin had been informed of the notification. ECF 99 at 2.

Defendants provide this information to correct the record, particularly given Mr. Eakin's precision regarding the timing of other events, as discussed below. Apart from the Court filings, which are public documents, defendants have made no public statement regarding the identification of PVT Kelder.

B. Conversations Regarding the Status of the Power of Attorney

Mr. Eakin also asserts that personnel from the Army Casualty Office "asked [Douglas Kelder] to rescind his power of attorney in favor of Plaintiff so that he could make arrangements to accept the remains" ECF 110-10 at ¶ 3, and that "[s]hortly thereafter, Counsel for Defendants telephonically contacted Plaintiff and informed him that Douglas Kelder had rescinded his power of attorney" Id. ¶ 4.

As explained in the Declaration of Greg Gardner, the Service Casualty Office (SCO) did not ask or recommend that Mr. Kelder rescind the Power of Attorney. Rather, the SCO Officer explained to Mr. Kelder that, since he had given the Power of Attorney to Mr. Eakin, the SCO would going forward deal with Mr. Eakin regarding all casualty and mortuary matters. Mr. Kelder then stated that he was rescinding the POA and that the SCO should deal with him on all mortuary matters. Gardner Decl. ¶ 5.

This information was conveyed to counsel for defendants, who raised it with Mr. Eakin in the January 22 telephone call to ascertain Mr. Eakin's understanding and request clarification as to who would be acting as PNOK/PADD. Mr. Eakin stated that the POA was not revoked. Counsel for defendants then asked the SCO to inquire again of Mr. Kelder what he intended to

do. This was done by email. See Gardner Decl. Ex. 1 (1/22/15 email from William Cox to Doug Kelder).

Mr. Eakin then conferred with Mr. Kelder and responded by email:

Doug talked to [the SCO Officer] a few minutes ago and explained the power of attorney situation. . . . Doug and I are of one mind on this, plus he is better located to make funeral arrangements so please feel free to deal with him on funeral and escort arrangements. If you have to ask me something I'll have to call him so feel free to conference call or email us both, if you must.

Gardner Decl. Ex. 2 (1/22/15 email from John Eakin to Greg Gardner). On January 23, Mr.

Kelder responded in writing to Mr. Cox, stating: “[p]ursuant to our discussion, I have decided to postpone my decision rescinding my power of attorney held by Mr. John Eakin.” Gardner Decl. Ex. 3.

As is quite apparent from the contemporaneous emails, there was no attempt by defendants to suggest or otherwise pressure Mr. Kelder regarding the POA, as Mr. Eakin portrays. Per Mr. Kelder’s request as PNOK, defendants have continued to deal with Mr. Kelder on mortuary and other affairs, including questions regarding the identification and completeness of remains. However, defendants note that this exchange and subsequent conduct, specifically the admission by Mr. Eakin that he will have to consult Mr. Kelder before providing any instructions, and Mr. Kelder’s taking the lead in communications with defendants, provides additional support for defendants’ previous contentions: that the real party in interest in this action is Mr. Kelder; that Mr. Eakin is representing a third-party in litigation in violation of 28 U.S.C. § 1654; and that Mr. Eakin lacks standing. See ECF 78 at 8-14 (violation of § 1654); ECF 99 at 1 (same); ECF 47 at 27-31 (standing); ECF 54 at 2-4 (same); ECF 78 at 4 (summarizing standing argument).

C. Provision of the Identification Packet

Contrary to Mr. Eakin's assertions, the delivery of the Identification Package "on a weekend" was not "intentionally late" or otherwise designed to prejudice him. See ECF 110 at 4. In fact, just the opposite is true and the weekend delivery resulted from the SCO making extra efforts to accommodate Mr. Eakin and Mr. Kelder's request. As Mr. Eakin wrote at the time: "My apologies for keeping you out late on a Saturday night but this (the Packet) is much appreciated." Gardner Decl. Ex. 5 (Eakin email).

As was explained to Mr. Kelder at the time of the notification, it is Army policy to provide the Identification Packet at the time of the family briefing, so that Service Casualty Officers can be present and answer questions. Gardner Decl. ¶ 7. The family briefing is scheduled at the family's convenience normally within a few weeks of the identification. As explained by Mr. Gardner: "Our experience over hundreds of cases has clearly demonstrated that providing the Identification Packet in person and answering family questions reduces anxiety, stress, and confusion for the family." Id. However, due to Mr. Eakin's specific request (see Gardner Decl. Ex. 2), and his stated desire to have the packet reviewed by experts who could presumably answer any questions, the Army Casualty Office recommended the Packet be released immediately. Gardner Decl. ¶ 8.

Mr. Eakin and Mr. Kelder were informed of the identification on January 22 and received the Packet on January 24. Moreover, prior to delivery of the packet, Mr. Eakin and Mr. Kelder were told in writing that the identified remains were not complete. Gardner Decl. ¶ 9 and Ex. 4 (1/24/15 email). Mr. Eakin and Mr. Kelder were also told at that time of the Army's process for returning additional remains subsequently identified, and of the right to contest the identification. Id.

The Army Casualty Office has continued to work with Mr. Kelder to provide documents and answer questions. However, neither Mr. Kelder nor Mr. Eakin has requested an Identification Briefing and therefore none has been scheduled. The Army Casualty Office is prepared to provide the Briefing to answer questions if requested. *Id.* ¶ 13. Moreover, as explained below, Mr. Eakin has 90 days to challenge the identification. That time begins with receipt of the Packet; therefore he has not been prejudiced by any alleged “delay.”

II. The Administrative Process

Mr. Eakin asserts that he has been prejudiced by the “late delivery” of the Identification Packet and the Magistrate Judge’s decision to the extent that he was not allowed to challenge the identification of PVT Kelder’s remains in this Court. He also argues that the case is not moot until the family accepts the identification. He also appears to contest the completeness of the remains and asserts that the case is not moot until all of the remains are recovered including those that may be found in the caskets of the four servicemembers identified after the war and buried in the United States.

As explained below, there are clear regulations and administrative processes governing these issues that provide much of the relief Mr. Eakin seeks. Mr. Eakin may choose to pursue these avenues or not, but he cannot prolong this litigation. The Magistrate Judge was correct in finding the matter moot.

A. Mr. Eakin Can Challenge the Identification through the Administrative Process

This Court is not the proper venue and has no jurisdiction to consider the adequacy of the identification, even were such identification the subject of the First Amended Complaint.¹

¹ It bears remembering that Plaintiff’s First Amended Complaint sought a declaratory judgment that the remains known as X-816 were, as a matter of fact, the remains of PVT Kelder. It did not

Department of Defense Instruction Number 3001.03, attached as Exhibit 6 to the Gardner Declaration, governs the procedure to challenge identifications. Mr. Eakin and Mr. Kelder have been informed that they have 90 days from the receipt of the Identification Packet to lodge such a challenge by submitting a letter of intent to do so through the SCO. Gardner Decl. ¶¶ 10-11; DoDI 3001.03 E4.4. The challenge is heard by the Armed Forces Identification Review Board, pursuant to the process set forth in the Instruction.

To the extent that Mr. Eakin challenges whether or not the remains identified are in fact those of PVT Kelder, see ECF 110 at 6, such a challenge should and must be brought before the Board. Under the Instruction, in challenging an identification the PADD has the right to, among other things: to be represented by private counsel; to submit the remains for private DNA testing under conditions set forth in the Instruction; to submit additional evidence including lab results; and to submit written objections to any finding or recommendation made by the Board. DoDI 3001.03 E4.4

The determination of the Board is not subject to judicial review, however. 10 U.S.C. § 1508. Therefore, whether or not Mr. Eakin chooses to challenge the identification through this process, this case is moot. This court has neither jurisdiction to conduct a *de novo* hearing on the identification, nor to review the Board's finding.

seek the disinterment of ten sets of remains. In fact, X-816 consisted of remains of PVT Kelder and at least seven other individuals, while remains of PVT Kelder were found in three caskets. Plaintiff's current challenge to the actual identification of the remains is not contained in the First Amended Complaint. The claim in the First Amended Complaint is moot whether or not Plaintiff accepts the identification.

B. There is No Right to Challenge the Completeness of the Remains

The Armed Forces Identification Review board does not hear challenges to the completeness of remains, however.² Id. at E4.1.2. As explained previously, there is no due process right associated with human remains. There is no standing to claim unidentified remains, ECF 47 at 3, and, in any event, human remains are not “property,” for purposes of the due process clause. ECF 54 at 11-13.

Army Regulation 638-2 governs the disposition of remains identified after the formal identification is made. The Regulation provides that the PADD will be notified of additional remains. The PADD then may choose one of three options:

- (1) Disinter the interred remains, place the additional portions in the casket with the principal remains, and re-inter.
- (2) Place the portions in an appropriate container and inter in the same grave site above the casket with the principal remains.
- (3) The Army will dispose of the portions by complete incineration.

AR 638-2 ¶ 8-12.

Contrary to Mr. Eakin’s assertions, defendants have not violated their identification procedures by not simultaneously identifying all remains from the ten disinterments, or by reserving the possibility that additional remains of PVT Kelder may be identified. Plaintiff has no standing to complain about defendants’ failure to announce identifications of other remains. The identification of PVT Kelder was made first at least in part because defendants were responding to Mr. Eakin’s disinterment request relating to PVT Kelder. Defendants, not Mr. Eakin, made the determination to exhume the other nine graves, believing that the disinterment

² As defendants explained previously, the due process accorded identifications stems from the deprivation of property rights – the termination of benefits to dependents – that results from the identification and subsequent death determination of a missing servicemember. ECF 18 at 9-11. Although there is no such deprivation associated with the identification in this case, the procedures nonetheless apply.

of all of the graves provided the best chance of identifying PVT Kelder's remains as well as additional identifications. Plaintiff objected to the decision to exhume multiple sets of remains, and has repeatedly complained about defendants' alleged slowness in making the identification.

The policies that provide for simultaneous processing of mass casualties, cited by Plaintiff at ECF 110 p. 9, are for the purposes of aiding identifications by keeping possibly commingled remains together. These policies do not require that defendants hold identifications once made unless and until all can be announced simultaneously. Moreover, they are simply policies to govern the internal work of the agency; they do not create any legal right in a family member to stop an identification from being made.

As a practical matter, most if not all identified remains returned to families from past conflicts are incomplete. Gardner Decl. ¶ 12. The specific provision for these occurrences in AR 638-2 provides evidence that the situation is not unique. Here, the remains from the ten disinterments that can be associated with PVT Kelder through DNA testing or anthropological methods at this time have been identified. There may be some remains, from which DNA samples could not be or were not obtained, that are ultimately assigned to PVT Kelder, but this process of association will take some time. Since remains from at least fourteen individuals have been identified from the ten caskets, it may be years before all remains can be matched to an individual, and some may never be identified.

Here, the most likely source of additional remains lies in the four caskets of men identified after the war and now buried according to the wishes of their families. These remains may not be in the custody or control of defendants, however. There has been no determination whether or not defendants will seek exhumation of these remains. Such exhumations would almost certainly require consent of the family involved, a permit and quite possibly permission

of the state or local court with jurisdiction over the remains. As we have previously stated, common law generally provides that, upon burial, remains pass to the custody of the state. Exhumation is disfavored. See *Lascurain v. City of Newark*, 793 A.2d 731, 349 N.J. Super 251 (2002) (“Once a body is buried it is in the custody of the law, and removal or other disturbance of it is within the jurisdiction of our courts with equitable powers.”); ECF 54 at 12-13.

Whether defendants will seek exhumations, whether the families involved will request or consent to them, whether a court order will be required, and whether a court will find the goal sufficiently “laudable” to justify the disturbance are all issues that are unresolved at this time and unlikely to be resolved in the near term. Certainly, however, this Court lacks jurisdiction to order their exhumation. Cf. *Watson v. Manhattan and Bronx Surface Transit Operating Authority*, 487 F.Supp. 1273, 1277 (D.N.J. 1980) (federal district court lacked jurisdiction to order disinterment of a dead body even when there was a civil action pending with jurisdiction over the subject matter and parties). As plaintiff has no federal statutory or constitutional right to the exhumation of these remains, and the Court has no jurisdiction to order them, defendants’ failure to pursue exhumation at this stage is not reason to continue this case.

III. The Court Should Adopt the Recommendation of the Magistrate Judge to Dismiss this Case and to Deny Motions to Intervene

The Magistrate Judge has recommended dismissal of Mr. Eakin’s case, as well as denial of pending motions to intervene, on mootness and standing grounds. R&R (ECF 103). Defendants support the Magistrate’s recommendations.

In addition to the reasons stated by the Magistrate Judge, and in the alternative, defendants re-urge the grounds set forth in their dispositive motions that were dismissed without prejudice by this Court on August 12, 2014, specifically their Motion to Dismiss Plaintiff’s First Amended Complaint, or, in the Alternative, for Summary Judgment, filed December 17, 2013,

and Defendants' Suggestion of Mootness, filed July 8, 2014. Defendants urge as alternative grounds for dismissal the grounds set forth in those motions, and incorporate those motions by reference herein. See ECF 47, 54, 64 and 75.

Many of the applicable arguments are summarized at ECF 78 at 4-5:

1) Plaintiff lacks standing, since, among other reasons, plaintiff is not the next-of-kin and Article III standing cannot be transferred or assigned by power of attorney. ECF 47 at 27-30; ECF 54 (Reply to Response) at 2-4. Defendants also asserted that even the next-of-kin would lack standing since, among other reasons, the remains are unidentified (and therefore the claimed injury of the next-of-kin is speculative, as is causation and redressibility), and there is no statutory or constitutional right at stake, and, without a legal right, there is no legally cognizable injury. ECF 47 at 30 n. 11, 31-32.

2) Plaintiff's mandamus claims fail because he has not identified (and none exists) a presently-existing, non-discretionary and ministerial legal duty to exhume and seek to identify unknown remains. Without such a duty, this claim fails on sovereign immunity and standing grounds, and also fails to state a claim for relief. ECF 47 at 22-25 (sovereign immunity); 31 (standing); and 32-35 (failure to state a claim); ECF 54 at 5-7.

3) Plaintiff's due process claim fails because, among other reasons:

a) no one can have a property interest in remains that are *unidentified*; and further human remains are not "property" and there is no constitutionally-recognized property interest in human remains. ECF 54 at 11-14.

b) there has been no government deprivation, since defendants' accounting program is a voluntary affirmative government program, not an exercise of government coercive power over property rights; the deprivation occurred at the hands of the Imperial Japanese. ECF 47, at 39-41; ECF 54 at 15-16.

Id. (footnote omitted). Defendants note that, in addition to those motions and the grounds therein, which address Plaintiff's claims as pleaded in the First Amended Complaint, the Missing Service Personnel Act precludes review of Mr. Eakin's current contentions regarding the identification and the completeness of remains. 10 U.S.C. § 1508; ECF 30 at 5-7; ECF 54 at 9-10.

The same jurisdictional obstacles require dismissal of the motions to intervene. With the exception of John Patterson, every ground for dismissal of Mr. Eakin's claims applies equally to

the would-be intervenors. John Patterson appears to be the PNOK, so one of defendants' grounds for lack of standing would not apply to his claim. However, he, too, lacks standing for all of the other reasons set forth in defendants' motions and summarized above. ECF 47 at 30, n. 11 and 31.

IV. The Motion in Limine Should be Denied as Moot

Mr. Eakin seeks to exclude the report of Dr. Thomas Holland, which he himself has submitted as an exhibit. ECF110-3. Defendants have not proffered this report to the Court, and therefore the motion is moot. As discussed above, if Plaintiff wishes to contest defendants' identification of PVT Kelder, he may do so through the administrative process, which specifically provides him the right to conduct DNA tests under conditions provided (such that the tests will not consume the entirety of the remains) and to submit other evidence. Dr. Holland's report is not relevant to any issue before the Court in this action, and in fact review of its findings is precluded under 10 U.S.C. § 1508.

V. Conclusion

Neither plaintiff nor the applicants for intervention have identified any statutory or constitutional right at issue in this matter, and the Court has never had jurisdiction. Defendants considered plaintiff's disinterment request through the administrative process, and determined that, although exhumation of X-816 alone did not meet the disinterment standard, the exhumation of the ten associated graves would provide the necessary "high probability of identification" required under internal guidance. Defendants have now made the identification of PVT Kelder from three of those ten graves. Plaintiff may appeal that identification through the administrative process. This Court is neither an alternative venue, nor a Court of review for that decision. Some two and a half years on, this case should be dismissed as moot, or in the

alternative, for lack of jurisdiction, in accordance with the recommendation of the Magistrate Judge and defendants' dispositive motions.

Respectfully submitted,

RICHARD L. DURBIN, JR.
Acting United States Attorney

/s/ Susan Strawn
SUSAN STRAWN
Tex. Bar No. 19374330
Assistant United States Attorney
601 NW Loop 410, Ste 600
San Antonio, TX 78216
Attorneys for Defendants
Tel. (210) 384-7388
Fax (210)384-7312
SStrawn@usa.doj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Eakin
Plaintiff *pro se*

And caused a copy to be sent, by certified U.S. Mail, to:

Sally Hill Jones
2661 Red Bud Way
New Braunfels, TX 78132

Hon. John Alexander Patterson
721 North Quidnessett Road
North Kingston, RI 02852

Debbie Gerlich Christian
986 View Ridge
Pipe Creek, TX 78063

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney