

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, et al.

Defendants.

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

**DEFENDANTS’ REPLY TO INTERVENOR DEBBIE GERLICH CHRISTIAN’S
RESPONSE TO MOTION TO STRIKE**

28 U.S.C. § 1654 prohibits non-lawyers from representing third parties in federal court. Courts have strictly interpreted this rule, regardless of the closeness of the relationship between the would-be *pro se* litigant and the person whose rights are at stake. *See* ECF 111 at 4 and cases cited (rejecting *pro se* representation by, among others, spouses, parents of minor children, close relatives, and so forth). For purposes of Section 1654 and defendants’ motion to strike, the issue before the Court is whether Ms. Christian has any substantive rights of her own at stake in the litigation. If she does not, she may not proceed *pro se* and her motion to intervene should be struck.¹

Ms. Christian states that she is a proper representative of her mother, the primary next-of-kin of PVT Morgan, pursuant to the Missing Service Personnel Act (MSPA) 10

¹ See *Greater Southeast Community Hosp. Foundation, Inc. v. Potter*, 586 F.3d 1, 5 (D.C. Cir. 2009) (affirming district court striking of document filed by non-lawyer on behalf of corporation; striking not a sanction for “misconduct” but appropriate response to document filed by unauthorized person).

U.S.C. 1501(d).² ECF 114 at 1. This right of representation, given through a power of attorney, does not convey substantive rights, however. It seems beyond dispute that if it were possible to convey substantive rights through a revocable power of attorney, then there would be no limits on *pro se* representation of third parties. Heiskell v. Mozie, 82 F.2d 861, 863 (D.C. Cir. 1936); see Southwest Exp. Co., Inc. v. I.C.C., 670 F.2d 53 (5th Cir. 1982)(rejecting corporate assignment of interest in suit to president to permit president to continue case *pro se*); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264 (E.D.Wis.1991) (sole-member LLC cannot be represented by non-attorney owner, even where corporation assigned interest in lawsuit to owner).

In any event, Section 1501(d) of the MSPA does not apply to this case for two reasons. First, Section 1501(d) provides that the primary next of kin may designate another person to act on his behalf and that the “Secretary concerned” shall treat such person as the primary next of kin for “purposes of this chapter.” However, section 1501(d) applies only to “covered persons” under section 1501(c), which in turn applies only to prospective cases (“any member of the armed forces on active duty”) at the time the statute was enacted. This provision does not apply to pre-enactment missing persons cases, such as PVT Morgan’s.

Second, Section 1501(d) plainly applies only to “purposes of this chapter,” meaning the MSPA. Ms. Christian, however, is not suing to vindicate any right of, or duty owed to, next-of-kin under the MSPA. In establishing the World War II accounting program under the MSPA (and applicable to cases before this Court), Congress created no statutory requirements other than the establishment of a personnel file, to be available

² The Power of Attorney in favor of Ms. Christian, dated February 4, 2015, was received February 20, 2015, by the Army Past Conflict Repatriations Branch.

to family members.³ Thus, even if Ms. Christian is the designated primary next-of-kin under the MSPA, the MSPA creates no duties on defendants *vis a vis* the primary next-of-kin, or other family members, other than provision of the personnel file.⁴

Ms. Christian has not identified any procedural right due her as acting primary next-of-kin under the MSPA. Rather, her complaint is the opposite: that there are no policies or procedures through which to request the disinterment and identification of remains, and that this lack of procedures constitutes a due process violation. ECF 114 at 2.

As defendants have previously asserted, in order to be entitled to due process procedures, there must be a due process right, a governmental deprivation and a waiver of sovereign immunity, all of which defendants' dispute. For purposes of this motion to strike, however, it is sufficient to say that, even assuming a right, the right would belong to the next-of-kin. Constitutional rights cannot be assigned through a power of attorney, pursuant to the MSPA or otherwise.⁵ Therefore, Ms. Christian has no legal right of her own in this action. She cannot proceed *pro se* on rights that, if they exist at all, belong to another. 28 U.S.C. § 1654. Defendants' Motion to Strike should be granted.

³ In the 2009 Amendments to the MSPA, Congress added World War II cases to defendants' accounting program, which was retitled "Program to resolve pre-enactment missing person cases," Pub.L. 111-84, § 541, 123 Stat. 2190 (2009). Section 1509(d) requires a personnel file to be established for each person covered by the program under certain conditions, and requires that such files be made available to family members as set forth in Section 1506.

⁴ By contrast, in Sections 1502-1505 and 1509(e), Congress clearly delineated the procedural rights due to the primary next-of-kin of those in missing *status*.

⁵ For the same reason, any attempt to claim a substantive right under Army Regulation 638-2 also fails. That regulation makes clear that the right of the "Person Authorized to Direct Disposition" (PADD) is a personal one. AR-638-2 § 4-6 ("right to direct disposition of remains is a personal right"). The rights of the PADD are not property rights, and the status of PADD cannot be assigned, in the sense that a tangible property claim can. See ECF 54 at 2-4.

Conclusion

Defendants operate a discretionary government program under the statutory authority of 10 U.S.C. § 1509. In the 2009 Amendments to the MSPA, Congress extended defendants' accounting program to World War II cases. Ms. Christian first contacted defendants in October 2014. Defendants began researching the case of PVT Morgan at that time. PVT Morgan's case is similar to almost one thousand other Cabanatuan losses buried as unknowns.

Defendants will consider the historical and anthropological association between the original mass grave thought to contain the remains of PVT Morgan and the associated burials of unknowns, and make a determination on Ms. Christian's request based on this assessment as well as other factors including competing priorities for limited resources. There is no statutory or constitutional basis for judicial oversight or review of this process, and therefore Ms. Christian's motion should be denied and the underlying case dismissed in accordance with the Magistrate Judge's recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 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:

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/s/ Susan Strawn
SUSAN STRAWN
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