UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civ. A. No. SA:12-cv-1002-FB-HJB
	§	
AMERICAN BATTLE MONUMENTS COMMISSION, et al.	§	
	§	
	§	
Defendants.	§	
	§	

DEFENDANTS' MOTION TO DISMISS,
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. Introduction

Private Arthur H. Kelder entered the United States Army on April 4, 1941, and was assigned to the Army's General Hospital #2 at Cabacen, Luzon, Philippine Islands. Along with the rest of the hospital staff, Pvt Kelder surrendered to the Japanese on or about April 8, 1942. Pvt Kelder was imprisoned at Cabanatuan Prison Camp, Philippines, where he died on November 19, 1942, most likely of pellagra. Pvt Kelder was one of 2,763 prisoners of war to perish at Cabanatuan, and, like the others, he was buried by surviving prisoners at the camp cemetery.

After the war, the United States, led by the American Graves Registration Service (ARGS), undertook a massive effort to locate, exhume, identify and repatriate the more than 300,000 American war dead who perished overseas in nearly every corner of the globe. Cabanatuan Cemetery was disinterred, and the remains were subjected to several identification efforts over a period of approximately five years. At that time, despite and perhaps because of

the numerous exhumations, reburials and handling done in attempting to identify remains, a decision was made that the Cabanatuan identification project be ended. In 1950, it was determined that Pvt Kelder's remains were non-recoverable, and his parents were so notified. All of the remains found non-recoverable from Cabanatuan were buried at Manila American Cemetery, Philippines. They are among 3,740 unknowns buried at that location, commemorated with the epitaph "Here Rests In Honored Glory A Comrade in Arms Known But To God."

Beginning in 2009, plaintiff, identifying himself as a cousin of Pvt Kelder, began making inquiries with the United States Army Human Resources Command[1] and the Defense Prisoner of War/Missing Personnel Office (DPMO)[2] regarding Pvt Kelder. The last of these contacts occurred on/about February 27, 2012, when plaintiff met with representatives of DPMO and the Joint POW/MIA Accounting Command (JPAC)[3] at a Family Member Update near Dallas,

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[1] Although not a named defendant, the U.S. Army Human Resources Command (HRC) plays a role in accounting for missing persons. 10 U.S.C 1501-1513 directs the Army portion of the Past Conflict Repatriation mission along with guidance from Army Regulation 638-2 and 600-8-1. HRC conducts six critical actions in support of this mission, including Family Outreach, serving as the DoD Representative to Families, obtaining DNA reference samples, conducting Identification Briefings, conducting status review boards, and coordinating group interments.

[2] Defendant W Montague Winfield serves as Deputy Assistant Secretary of Defense for Prisoner of War/Missing Personnel Affairs and Director, Defense Prisoner of War/Missing Personnel Office (DPMO). DPMO was established in 1993, after the U.S. Senate called for the Department of Defense to form a single DoD office to oversee POW/MIA policy and issues. Pursuant to 10 U.S.C 1501-1513, DoD Directive 2310.07E, and DoD Directive 5110.10, DPMO has been given responsibility for policy, control, and oversight within DoD for the entire process of personnel accounting for missing persons and for coordination between DoD and other U.S. agencies on all matters concerning missing persons. Pursuant to DoD Directive 2310.07E, Mr. Winfield is responsible for establishing and promulgating personnel accounting policy and determining personnel accounting requirements for DoD policies and strategic guidance. Pursuant to DoD Directive 5110.10, DPMO's mission is to lead the national effort to account for the more than 83,000 U.S. personnel lost during World War II and more recent conflicts.

[3] Defendant Johnie E. Webb serves as the Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command (JPAC). JPAC was established on October 1, 2003, and falls under the control of Unites States Pacific Command (PACOM). JPAC conducts global search, recovery, and laboratory operations to identify unaccounted-for

Texas. At that time, plaintiff was told that the information that he contended would lead to the identification of Pvt Kelder would be considered by JPAC historians and scientists, but no time line was given. Plaintiff was also told that, based on the current available information, DPMO did not recommend disinterment of specific remains identified by plaintiff that he believed to be those of Pvt Kelder. Rec. at 169. Since the filing of this lawsuit and the filing of the Record, JPAC has concluded that review and forwarded its recommendation to DPMO. Supp Rec. at 001-002. DPMO has not yet acted on the recommendation. Declaration of Cynthia A. Chambers ¶ ("Decl.") ¶ 48. (Attached as Exhibit A to this Motion).

Plaintiff filed this action on October 18, 2012, seeking, *inter alia*, a declaration from this Court that certain remains at Manila American Cemetery are those of Pvt Kelder, and relief pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*, and Mandamus Act, 28 U.S.C. § 1361. Specifically, plaintiff asks this Court to compel DPMO and other defendants,[4] to conduct a "status review" of Pvt Kelder's case pursuant to the Missing Service Personnel Act ("the Act"), 10 U.S.C. § 1509(e). Plaintiff also raises procedural and substantive objections under the APA to DoD's policy of prioritizing the recovery of those "Americans who continue to lie in the foreign battlefields where they perished or are buried in unmarked graves in foreign

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Americans from past conflicts in order to support the Department of Defense's personnel accounting efforts.

[4] In addition to defendants Winfield and Webb, plaintiff named the U.S. Department of Defense and its Secretary Leon E. Panetta (collectively, "DoD"), and the American Battle Monuments Commission and its Secretary, Max Cleland ("ABMC"). ABMC is an independent agency of the executive branch of the federal government established by Congress in 1923. Its enabling legislation is now codified in 36 U.S.C. § 2104. ABMC primarily exists to commemorate the service, achievements, and sacrifice of Armed Forces of the United States through its operation and maintenance of 24 overseas military cemeteries, and 25 memorials, monuments, and markers. However, ABMC has no authority to inter or disinter remains at the cemeteries it manages. 36 U.S.C § 2104(4) reserves that authority to the Armed Forces of the United States.

countries" over the identification of those "already recovered and buried with honor in U.S. national cemeteries at home and abroad . . . ." Complaint at ¶ 89-97; Supp. Rec. at 005. Plaintiff claims this policy illegally discriminates against a class of families and was promulgated without rulemaking in violation of the APA.

The relief plaintiff seeks in the Complaint extends to the entire DoD accounting program and all unknowns, requesting, for example, "an order that Defendants shall promptly act to fully account for all Service members whose remains were determined to be non-recoverable when new evidence is obtained from any source which provides a high probability of positive identification," or "when advances in forensic technology provide reasonable belief that such remains might be identified using technology not previously available." Complaint p. 21. Plaintiff also seeks, among other things, an order holding that certain remains are those of Pvt Kelder, and that all government records reflect such identity. Id.

The United States, including all of the defendants named in this action, is dedicated to the mission of accounting for all of America's war dead and missing. There are over 83,000 unaccounted for service men and women, of whom over 73,000 remain missing from World War II. The Missing Service Personnel Act of 1995, enacted in 1996, was amended in 2009 to include all the unaccounted for from World War II in DPMO's accounting mission. In the 2009 Amendments, Congress set a goal that DoD should seek to account for at least 200 of these missing, from all of the covered conflicts, by 2015, but the highest priority of the law remains "the return of missing persons to United States control alive." Pub. L. 111-84, Div. A, Title V, § 541(d), Oct. 28, 2009, 123 Stat. 2298.

Defendants have worked and continue to work with family members, including plaintiff, to share information, and to consider and undertake efforts to account for missing service

members, including Pvt Kelder. This Court, however, is not the proper forum for that pursuit, and plaintiff's Complaint should be dismissed for a multitude of reasons.

First, plaintiff is not Pvt Kelder's next of kin or among the persons authorized in the Missing Service Personnel Act, or elsewhere, to request relief related to Pvt Kelder. He can claim no cognizable injury under Article III of the Constitution that has been caused by defendants' acts or failure to act. Accordingly, he lacks standing, under both constitutional and prudential doctrines, in this action.[5]

Second, plaintiff's APA claims are based upon a fundamental misunderstanding of both the Missing Service Personnel Act and the APA. To waive sovereign immunity and allow review under the APA, the Missing Service Personnel Act must not preclude review and must provide meaningful standards for a court to engage in that review. Further, to compel an agency to act under the APA, the Court must find the action requested to be non-discretionary and required by law. Here, none of those prerequisites apply to the relief plaintiff seeks.

Because entitlements of dependents turn on status determinations (e.g., missing or deceased), and because of the legacy of controversial status determinations in the Vietnam era, Congress codified due process requirements of death determinations for those personnel in missing status, and made such determinations subject to limited judicial review by next of kin. 10 U.S.C. §§ 1502-1505, 1509(e), 1508. But, plaintiff is not Pvt Kelder's next of kin, and he is not appealing a determination of death. Accordingly, the statute precludes review. Moreover, contrary to plaintiff's assertions, Pvt Kelder is not in "missing status." Cf. Complaint ¶ 60; 10 U.S.C. § 1513(2). It is not disputed that he is deceased. Accordingly, nothing in the statute requires that his case be afforded a status review, appointment of counsel, or other procedures set

[5] As explained below, nor can he, *pro se*, represent third party family members in this Court. 28 U.S.C. § 1654.

forth in the Act for those in "missing status." Further, as explained below, plaintiff's claim that DoD cannot prioritize its recovery efforts also misapprehends the meaning of the Act, as nothing in the Act precludes the agency from setting priorities for accounting mission.

DoD takes its mission to Pvt Kelder and his family seriously.[6] But Congress committed the process of prioritizing recovery and accounting efforts, including determining the likelihood of success of a disinterment for identification purposes, to the discretion of the Department of Defense. Accordingly, plaintiff's claims are not subject to review under the APA.

Plaintiff's other claims also fail, even assuming he had standing to raise them. The "Prioritization Memo" that plaintiff challenges is exempt from notice and comment requirements for a myriad of reasons. Lastly, plaintiff's request that this Court declare particular remains to be those of Pvt Kelder, and his request for mandamus relief, should also be denied. Plaintiff has not identified a basis for jurisdiction for these requests, a waiver of sovereign immunity for these actions, or a nondiscretionary duty owed.

For these reasons and others, explained more fully below, plaintiff's case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), or, in the alternative, summary judgment for defendants should be granted pursuant to Fed. R. Civ. P. 56.

II. Factual Background

The facts underlying this case are more fully set forth in Exhibit A, Declaration of Cynthia A. Chambers, and the certified administrative record ("Rec." or "Supp. Rec.").[7] For purposes of this motion, the relevant facts are:

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[6] Even were the Court to find some review appropriate, review cannot be had here because there has been no final agency action on plaintiff's request. As noted above, DoD continues to consider plaintiff's submission. 5 U.S.C. § 704.

[7] This case is not the result of an agency adjudicatory action or a rule-making. Therefore, there is no formal record, and we do not believe that a record is required to determine this case. DoD

1) Plaintiff is not Pvt Kelder's primary next-of-kin, a member of his immediate family, or a previously-designated person, as defined in the Missing Service Personnel Act, 10 U.S.C. §§ 1513(4), (5) and (6). Complaint ¶ 74. Rec. 208.

2) Plaintiff's power of attorney to represent the next-of-kin before the agency expired on August 11, 2012, before the filing of the Complaint, and plaintiff does not purport to represent the next-of-kin in this action. Rec. at 208; Complaint ¶ 2.

3) Pvt Kelder is unaccounted for because his remains have not been recovered, but he is not in a missing status. 10 U.S.C. § 1513(2).

4) DoD has not yet taken a final position on plaintiff's request to disinter for identification remains that plaintiff believes to be those of Pvt Kelder. Rec. at 169; Supp. Rec. at 001-002; Decl. ¶ 48.

III. Statutory and Administrative Scheme

The principal statute at issue in this case is the Missing Service Personnel Act of 1995, as amended, 10 U.S.C. §§ 1501-1513. In order to better understand this statute and its application, however, it is helpful to briefly review the broader statutory scheme and background that led to its passage.[8] At the outset, it is also helpful to point out that personnel accounting, including identification of deceased personnel, is a distinct matter, both legally and as a matter of process, from the determination of a person's *status* (i.e., missing, deserted, deceased).

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has compiled a record, however, in order to aid in understanding the underlying facts and DoD actions with respect to plaintiff and Pvt Kelder. ABMC has no relevant records.

[8] See Maj. Pamela M. Stahl, The New Law on Department of Defense Personnel Missing as a Result of Hostile Action, 152 Mil. L. Rev. 75 (1996), for an excellent background on the history of laws pertaining to missing personnel, the events leading to the enactment of the Missing Service Personnel Act, and its provisions.

A. The American Graves Registration Service (AGRS) and the American Battle Monuments Commission

The AGRS was established September 11, 1943, by Circular 206, War Department, confirming an unnumbered restricted War Department circular, February 18, 1943, establishing a graves registration service in each theater of operations and defense command outside the continental United States. On May 16, 1946, Congress authorized AGRS to recover, identify and repatriate World War II dead. 60 Stat. 182 (1946). The mission of the AGRS terminated December 31, 1951, upon expiration of a time limit given in an amendment of August 5, 1947. 61 Stat. 779 (1947). On that date, pursuant to Executive Order, the functions of the AGRS with respect to maintenance of national cemeteries overseas were transferred to the ABMC, subject to the Army's right to "re-enter any of such cemeteries subsequent to the effective date of the transfer of functions with respect thereto for the purpose of making exhumations or reinterments should any such action become necessary." Ex. Ord. No. 10057, May 14, 1949, 14 F.R. 2585, as amended Ex. Ord. 10087, Dec. 3, 1949, 14 F.R. 7287.

The operative statute governing defendant American Battle Monuments Commission is 36 U.S.C. § 2104, which provides in relevant part:

> **Military cemeteries in foreign countries**
>
> When, as a result of combat operations, the Armed Forces establish military cemeteries in zones of operations outside the United States and the territories and possessions of the United States, the American Battle Monuments Commission and the Secretary of the Army, immediately on the cessation of hostilities, shall decide which of the cemeteries will become permanent cemeteries or, if they decide it is desirable, shall select new sites for the cemeteries at any other location. The Commission is solely responsible for the design and construction of the permanent cemeteries, and of all buildings, plantings, headstones, and other permanent improvements incidental to the cemeteries, except that--
>
> **(1)** the Armed Forces are responsible for maintaining the permanent cemeteries until the Commission declares its readiness to assume the authorized administrative duties and powers;

> **(2)** all construction undertaken by the Armed Forces in establishing and maintaining the cemetery prior to its transfer to the Commission shall be nonpermanent;
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> **(3) burials and reburials by the Armed Forces shall be carried out in accordance with plans prepared by the Commission; and**
>
> **(4) the Armed Forces have the right to re-enter a cemetery transferred to the Commission to exhume or re-inter a body if they decide it is necessary.**

36 U.S.C. § 2104 (emphasis added). The ABMC is responsible for the maintenance of the Manila American Cemetery, but has no authority with respect to the disinterment or identification of remains.

B. The Missing Service Personnel Act of 1995 and Amendments

1. Background -- The Missing Persons Act[9]

The Missing Persons Act was enacted during World War II as a temporary measure to provide for the payment of benefits to the families of missing servicemen. 56 Stat. 143 (1942). The Act provided that payment should continue for one year after the person became missing, or until the Service Secretary officially declared the person dead, whichever came first. As enacted, the law allowed the Secretary to base such a declaration on an official report of death or a "finding of death." The original Act provided no standards for a "finding of death." In 1942, and again in 1944, the Act was amended to provide further standards, although the Secretary's determination was conclusive. 58 Stat. 679 (1944); see Stahl, *supra*, at 98-100. Notably, the Secretary was permitted to make a finding of death when "the information received, or the lapse of time without information, establishes a reasonable presumption that a member in missing

[9] There is some confusion in nomenclature, as some DoD Directives refer to the Title 10, sections 1501 *et seq.* as the "Missing Persons Act." The official name of the 1996 law, however, is the "Missing Service Personnel Act of 1995." The Missing Persons Act, although partially repealed by the 1995 Act, dates to 1942 and is now codified at 37 U.S.C. § 551 *et seq.*

status is dead." 37 U.S.C. § 556(b) (1961), *quoted* in McDonald v. Lucas, 371 F.Supp. 831 (S.D.N.Y. 1974).

Until Vietnam, litigation regarding status determinations was rare, and largely had to do with entitlement to pay while in missing status. After the war, however, and the end of the repatriation of POWs in April 1973, the Missing Persons Act, and specifically the process for status reviews and findings of death, began to face legal scrutiny. Id. at 16. In 1974, a three-judge district court panel found the informal procedures used by the Secretaries to be unconstitutional. McDonald, 371 F.Supp. 831. Specifically, the Court found that dependents of missing servicemen had a constitutionally protected property interest in the benefits that they received while the service member was in missing status, and were entitled to notice and the opportunity to be heard before termination of those benefits by a finding of death. Id. at 836.

Following the *McDonald* decision, status reviews were halted until 1977, when they resumed under procedures required by *McDonald*, but established separately by each Service. Challenges ensued, but unlike previous cases, many of these suits were not brought for benefits. Rather, they were brought by parents and others seeking to challenge determinations of death that they believed were inaccurate, or that they believed would lead to the government's ceasing to investigate their missing loved ones. E.g., Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984) (rejecting standing of non-dependent parents of Vietnam MIAs to challenge status determinations (presumptive findings of death) under Missing Persons Act); Crone v. United States, 538 F.2d. 875, 881-83 (Fed. Cir. 1976) (same); Hart v. United States, 894 F.2d 1539 (11th Cir. 1990) (suit by family contesting identification of missing service member under Federal Tort Claims Act dismissed; efforts to identify remains "discretionary function"). These legal challenges were unsuccessful, but, along with continued investigations into missing and possibly

living servicemen in Southeast Asia, they set the stage for Congressional action. See Stahl, *supra* at 120-150.

2. Purpose of Missing Service Personnel Act

Against this highly-charged background, and after several unsuccessful attempts, the Missing Service Personnel Act of 1995 was signed into law on February 10, 1996. S. 256, 104th Cong. 1st. Sess. (1995). In introducing the bill in 1994, Senator Dole explained that the law "would reform [DoD's] procedures for determining whether members of the Armed Forces should be listed as missing or presumed dead." 140 Cong. Rec. S12217-05, S12220, 1994 WL 449837. Noting the criticism that DoD had received on the POW/MIA issue, the bill sought to "establish a fair and equitable procedure for determining the exact status of such personnel." Id. The law would provide for "appointment of counsel for the missing, ensuring that the Government does not disregard their interests and affording the missing due process of law." Id. Additionally, the bill "attempts to protect the interests of the missing person's immediate family, dependents, and next of kin, allowing them to be represented by counsel and to participate with the boards of inquiry." Id.

As enacted, the stated purpose of the law was "to ensure that any member of the Armed Forces . . . who becomes missing or unaccounted for is ultimately accounted for by the United States, and, as a general rule, is not declared dead solely because of the passage of time." Pub. L. 104-106, Sec. 569(a), 110 Stat 186 (1996). The bill's sponsor in the House stated that the legislation was intended to "unveil the curtain of secrecy which currently surrounds any DoD decision concerning a person's status as missing in action." Statement of Rep. Gilman 141 CONG. RC. E368 (daily ed. Feb. 16, 1995). The law has been amended numerous times, as discussed below.

3. Statutory Scheme

Section 1501(a)(1) requires designation of the Deputy Assistant Secretary of Defense for Prisoner of War/Missing Personnel Affairs, who is also designated to perform the duties as Director of DPMO. The Act encompasses three missions: personnel recovery (including matters related to search, rescue, escape, and evasion), personnel accounting (including locating, recovering, and identifying missing persons or their remains after hostilities have ceased), and status determinations (including boards of inquiry and procedures of officials reviewing reports of such boards). Of relevance here is the distinction between personnel accounting and status determinations.

The Deputy Assistant Secretary is charged with "policy, control, and oversight" of these three missions, as well as establishing particular policies. 10 U.S.C. §§ 1501(a)(1)(A), 1501(a)(1)(B), 1501(a)(4). Section 1501(a)(4) provides:

> The designated official shall establish policies, which shall apply uniformly throughout the Department of Defense, for personnel recovery (including search, rescue, escape, and evasion) and for personnel accounting (including locating, recovering, and identifying missing persons or their remains after hostilities have ceased).

Section 1501(a)(5) provides:

> The designated official shall establish procedures to be followed by Department of Defense boards of inquiry, and by officials reviewing the reports of such boards, under this chapter.

Section 1501(b) requires the Secretary to prescribe uniform procedures for all of the Services to apply to cases going forward, to include, *inter alia*, uniform procedures for determining the status of persons who become missing due to hostile action. 10 U.S.C. §§ 1501(b)(1)(A) and 1501(c).

a. Statutory Provisions

Section 1502 sets forth the requirements for the initial assessment and recommendation by a commander upon receipt of information that a person may be missing. Sections 1503-1505 provided for the three boards of inquiry: Preliminary, Subsequent, and Further Review to determine and review the status of missing persons. Section 1507 deals with requirements relating to determinations by a board appointed under section 1503, 1504 or 1505 to recommend that a person be declared dead. These sections deal with post-enactment cases and are not relevant here, except to the extent that their provisions are referenced in section 1509, dealing with pre-enactment cases.

b. Pre-enactment cases

Section 1509, of primary relevance to this case, is, since the 2009 Amendments, entitled "Program to resolve pre-enactment missing person cases." Until 2009, however, section 1509 contained no accounting program. Rather, it provided only for status reviews for certain "unaccounted for" persons from the Korean, Indochina and Cold War. The section's coverage was further limited to those persons for whom there was deemed to be some possibility of survival. See, e.g., section 1509(b) ("With respect to the Korean conflict, any unaccounted for person who was classified as a prisoner of war or as missing in action during that conflict and who (A) was known to be or suspected to be alive at the end of that conflict, or (B) was classified as missing in action and whose capture was possible.").

The original law also provided a "Special Rule" for persons classified as KIA/BNR (killed in action/body not recovered); in those cases, a status review was only to be undertaken if new information received was "compelling." Pub. L. 104-106, section 1509(c), 110 Stat 186

(1996).[10] The conference report makes clear that such reviews were intended to concern only a change in status of the person, *e.g.*, from deceased to missing: "In relation to the Special Rule for Persons Classified as KIA/BNR, the conferees believe that the evidence referred to in section 1509(c) should be compelling evidence, such 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.

The NDAA for 2000 added the first specific accounting requirement to the Act, mandating that the Secretary of Defense "make every reasonable effort to search for, recover, and identify the remains of United States servicemen lost in the Pacific theater of operations during World War II (including New Guinea) while engaged in flight operations." Pub. L. 106-65, 115 Stat. 1228 (1999). Notably, however, this requirement was not part of section 1509, which continued to deal only with pre-enactment status reviews.

The 2009 Amendments (NDAA 2010) rewrote section 1509. Pub.L. 111-84, § 541, 123 Stat. 2190 (2009). Section 1509(a), previously entitled "Review of status," established a program to account for the "unaccounted for" from nearly all of the United States' conflicts back to World War II (incorporating, but not limited to, the 1999 language regarding losses during flight operations in the Pacific theater). The section requires the Secretary to "implement a comprehensive, coordinated, integrated, and fully resourced program to account for persons described in subparagraph (A) or (B) of section 1513(1) [defining missing persons] who are unaccounted for from the following conflicts: 1) World War II . . . ." Section 1509(c) requires that "unaccounted for" persons covered by subsection (a) (e.g., those from World War II), be treated as "missing persons."

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[10] This provision was short-lived and was struck from the Act in the 1996 Amendments (Pub. L. 104-201).

The "review of status requirements" was moved to section 1509(e), which provides:

> **(e) Review of status requirements.--(1)** If new information (as described in paragraph (3)) is found or received that may be related to one or more unaccounted for persons covered by subsection (a), whether or not such information specifically relates (or may specifically relate) to any particular such unaccounted for person, that information shall be provided to the Secretary of Defense.
>
> **(2)** Upon receipt of new information under paragraph (1), the Secretary shall ensure that--
> **(A)** the information is treated under paragraph (2) of subsection (c) of section 1505 of this title, relating to addition of the information to the personnel file of a person and notification requirements, in the same manner as information received under paragraph (1) under such subsection; and
> **(B)** the information is treated under paragraph (3) of subsection (c) and subsection (d) of such section, relating to a board review under such section, in the same manner as information received under paragraph (1) of such subsection (c).

In relevant part, section 1509(e)(3) defines "new information" as "information that is credible" and that "is found or received after November 18, 1997, by a United States intelligence agency, by a Department of Defense agency, or by a person specified in section 1504(g) of this title." Section 1504(g), in turn, specifies the primary next of kin, other members of the immediate family, and any other previously designated person of the person. These persons are defined in section 1513(4), (5) and (6).

Upon receipt of such information, pursuant to section 1509(e)(2)(B), the next step is that DPMO, "with the advice of the missing person's counsel notified under paragraph (2), shall determine whether the information is significant enough to require a board review under this section." 10 U.S.C. § 1505(c)(3).

Notably, nothing in the 2009 Amendments or their legislative history purports to change the meaning of "status review." Moreover, the 2009 Amendments did not amend section 1501(e), which states:

> **(e) Termination of applicability of procedures when missing person is accounted for.**--The provisions of this chapter relating to boards of inquiry and to the actions by the Secretary concerned on the reports of those boards shall cease to apply in the case of a missing person upon the person becoming accounted for **or otherwise being determined to be in a status other than missing.**

10 U.S.C. § 1501(e)(emphasis added).

c. Definitions: Missing Person vs. Missing Status

Section 1513 contains several key definitions. Most important is the distinction between "missing person," defined in section 1513(1), and "missing status," defined in section 1513(2). In relevant part, albeit in a somewhat circular fashion, section 1513(1)(A) defines "missing persons," as, *inter alia*, "an unaccounted for person described in subsection (a) of section 1509 of this title who is required by subsection (b)[11] of such section to be considered a missing person." [Section 1509(a), in turn, refers to "persons described in subparagraph (A) or (B) of section 1513(1)."].

"Unaccounted for" is not defined in the statute and has historically been given different meanings.[12] However, DoD takes the position here that Pvt Kelder is "unaccounted for" and thus a "missing person" within the meaning of the statute and its accounting mission. 10 U.S.C. § 1509(c).

"Missing person," however, is distinct from "missing status." The latter term is defined in section 1513(2) as "the status of a missing person who is determined to be absent in a category of any of the following:

> **(A)** Missing.

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[11] To further confuse things, the reference to subsection (b) appears to be an error; the correct reference is subsection (c).

[12] See Senate Select Committee on POW/MIA Affairs Rep. No. 1, 103d Cong., 1st Sess. 158 (1993) (noting that by 1980, DoD began including all POW/MIAs, including those originally categorized as Killed in Action/Body not Recovered (KIA/BNR) in lists of "unaccounted for").

(B) Missing in action.

(C) Interned in a foreign country.

(D) Captured.

(E) Beleaguered.

(F) Besieged.

(G) Detained in a foreign country against that person's will."

Private Kelder is not in "missing status." Rather, he is deceased.[13]

d. Definition of Beneficiaries

Section 1513 also defines the beneficiaries under the Act: the primary next of kin, the immediate family, and the "previously designated person." 10 U.S.C. §§ 1513(4), (5) and (6). Without repeating the definitions here, it is undisputed that plaintiff is not within any of them.

e. Judicial Review

Section 1508 provides for limited judicial review. In essence, review may be had 1) only by the primary next of kin or previously designated person; 2) only of a finding by a board appointed under section 1504 or 1505 that a missing person is dead, or a finding by a board appointed under 1509 that confirms a previous finding of death; and 3) only on the basis of a claim that "there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process under this chapter." 10 U.S.C. § 1508.

[13] See Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms* 08 November 2010, as amended through 15 November 2012, accessed at http://www.dtic.mil/doctrine/dod_dictionary/ ("There are seven casualty statuses: (1) deceased; (2) duty status - whereabouts unknown; (3) missing; (4) very seriously ill or injured; (5) seriously ill or injured; (6) incapacitating illness or injury; and (7) not seriously injured.").

C. DoD Implementation of Act and Application to Pvt Kelder

1. Pvt Kelder is Considered "Unaccounted For"

Directive 2310.07E[14] "[e]stablishes policy and assigns responsibilities" for the implementation of, *inter alia*, the Missing Service Personnel Act. Directive 2310.07E 1.1.1. That Directive states:

> E2.1.1.2. Accounting for personnel from Operations DESERT SHIELD and DESERT STORM and, **absent new information that may result in a change in status**, the Indochina war era, the Korean Conflict, and the Cold War, and World War II is based on practice prior to the enactment of reference (a) [10 U.S.C. § 1501, *et seq.*]. The USG accounts for personnel unaccounted for from these conflicts in two ways: returning live individuals to U.S. control or recovering and identifying the remains of deceased personnel. For those unaccounted for personnel who may not be accounted for by either means, but there is a preponderance of evidence that the individual is deceased and that recovery and identification of the unaccounted for person's remains are not possible, further active accounting efforts shall cease. In these instances, however, the individual's name shall remain on the DoD roster of unaccounted for, and declared deceased, body not recovered.

Directive 2310.07E, Definitions, P E2.1.1.2 (emphasis added). Pursuant to this Directive, Pvt Kelder is "unaccounted for" and therefore a person covered by section 1509(a).

2. Pvt Kelder is Not in "Missing Status" and Is Not Eligible for a Status Review

The Directive above interprets the Missing Service Personnel Act as requiring no change in accounting practices for personnel from World War II, "absent new information that may result in a change in status." Further, DoD's Instruction 2310.05, implementing the Act as it pertains to boards of inquiry, states:

> 2.4. When a covered person becomes accounted for or is otherwise determined to be in a status other than missing (i.e., deserted, absent without leave, or **dead**),

[14] Adopted November 13, 2003, certified current as amended August 21, 2007, (Personnel Accounting -- Losses Due to Hostile Act); accessed at http://www.dtic.mil/whs/directives/corres/pdf/231007p.pdf.

> provisions herein relating to boards of inquiry and to the actions by the Secretary concerned on the reports of those boards shall cease to apply.

Instruction 2310.05, January 31, 2000, Incorporating Administrative Change 1, March 14, 2008, (emphasis added).[15]

Although the Directive and the Instruction pre-date the 2009 Amendments, they were reviewed after the 2000 inclusion of accounting efforts for World War II flight operations. Therefore, these provisions reflect the fact that "status reviews" were not intended to apply to accounting efforts generally, but rather only to persons in "missing status" where such review might result in a change of status. In the case of Pvt Kelder, the provisions of section 1509(e) relating to status reviews, as implemented by Directive 2310.07E and Instruction 2310.05, do not apply.[16]

D. Policies Regarding Disinterments

As noted, the 2009 Amendments brought all of the unaccounted for from WWII under the coverage of the Act for the first time. This change gave DPMO responsibility over policy, oversight and control over these cases, and resulted in the creation of a WWII field division within DPMO. However, nothing in the Act provided specific guidance or mandates regarding these efforts.

There are two memoranda relevant to this case. With respect to specific disinterment of remains buried as "unknowns," DPMO and JPAC continue to apply a policy set forth in a May 13, 1999, memorandum, entitled "Disinterment Policy for the Purpose of Identification." Supp. Rec. 003-004. That policy provides that a "decision to disinter must be based on sufficient

[15] http://www.dtic.mil/whs/directives/corres/pdf/231005p.pdf

[16] Plaintiff also requested that Department of the Army Human Resources Command consider his information pursuant to Army Regulation 638-2. Rec. at 205. The Army disclaimed jurisdiction based on the 2009 Amendments. Rec. at 227-28. Plaintiff bases his claims on the Missing Service Personnel Act, so we do not address AR 638-2 here.

circumstantial and anatomical evidence which when combined with current forensic science techniques would lead to a high probability of positive identification."

The second memorandum, which plaintiff termed the "Prioritization Memo," is a December 16, 2010, memorandum from the Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs to the Services and the Joint Staff. Entitled "Policy Guidance on Prioritizing Remains Recovery and Identifications," the memorandum states:

> We place a high priority on the recovery and identification of our nation's missing. For those still missing from World War II through Desert Storm, our first priority is to recover and identify Americans who continue to lie in the foreign battlefields where they perished or are buried in unmarked graves in foreign countries. We will give a higher priority to investigations and recovery efforts where the potential for success is highest and where the risk of losing access to remains at particular sites is greatest.
>
> Identifying remains of unknowns already recovered and buried with honor in U.S. national cemeteries at home and abroad must take a lower priority.

Supp. Rec. 005.

IV. Argument

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) permits a defendant to move to dismiss a claim on the ground, among others, that the court lacks subject matter jurisdiction because the plaintiffs lack standing, or because the United States has not waived its sovereign immunity. In a motion under Rule 12(b)(1), the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts, plus the Court's resolution of disputed facts. Freeman v. United States, 556 F.3d 326, 334 (5th Cir.2009). Upon motion, the plaintiff bears the burden to prove by a preponderance of the evidence that the court has jurisdiction to hear its claims. Indeed, it is

"presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006).

In considering a motion to dismiss under 12(b)(6), all factual allegations from the complaint should be taken as true. Fernandez-Montes v. Allied Pilots Assoc., 987 F.2d 278, 284 (5th Cir.1993). To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), however, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, (2007) (footnote omitted) (citations omitted).

If (and only if) any of plaintiffs' claims are not dismissed for the reasons elaborated below, summary judgment on behalf of the defendants is appropriate because the pleadings and the evidence establish that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" under Federal Rule of Civil Procedure 56(c).

B. Plaintiff Lacks Standing

"If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." DaimlerChrysler Corp., 547 U.S. at 341. In this case, the Court need not reach plaintiff's claims that the DoD has failed to comply with the mandates of the Missing Service Personnel Act, because plaintiff lacks standing under both Article III of the Constitution and the prudential standing doctrine to assert any of his claims.

At its "irreducible constitutional minimum," Article III requires satisfaction of three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the

injury suffered will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). As the Fifth Circuit has explained:

> By insisting that a plaintiff have a personal stake-an individuated interest rather than an interest in good government shared by all citizens-Article III avoids enlisting federal courts in policy exercises about how the government operates. This insistence vindicates principles of separation of powers and federalism by closing the doors to those who would only entreat the court to superintend the legal compliance of the other branches and the states.

Doe v. Beaumont Indep. School Dist., 240 F.3d 462, 466 (5th Cir. 2001). Plaintiff bears the burden of establishing the elements of standing for each type of relief sought. Lujan at 561.

In addition to meeting the requirements of Article III, plaintiff must have standing under well-established prudential limits. There are three such limits: [1] whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, [2] whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and [3] whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties. Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 560 (5th Cir. 2001). These prudential requirements, like the Article III requirement, are "an integral part of 'judicial self-government.'" Id. (*quoting* Lujan, 504 U.S. at 560). The "essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard" of the statute they seek to enforce. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) (internal quotations and brackets omitted).

Plaintiff's claim to standing is based on his assertion that he is a "relative" of Pvt Kelder. Complaint ¶ 2. He asserts that he is "'suffering legal wrong because of agency action' and is 'adversely affected or aggrieved by agency action within the meaning of 10 U.S.C. § 1509, which provides that the Secretary of Defense 'shall implement a comprehensive, coordinated, integrated, and fully resourced program to account for persons . . . who are unaccounted for . . .

from World War II.'" Id. Specifically, he complains: 1) that defendants have failed to consider new information that plaintiff alleges he has provided in Pvt Kelder's case, and 2) that DoD's "Prioritization Memo" is arbitrary, capricious and contrary to the Missing Service Personnel Act. Plaintiff also claims that the Memo was promulgated without notice and comment in violation of the APA. Id. ¶¶ 88, 91-97.

As explained below in more detail, plaintiff's claims are based on erroneous interpretations of the statute. Even accepting his interpretation of the Act's requirements, however, he has not and cannot assert a cognizable injury under Article III or the prudential standing doctrine. Accordingly, the Court need not reach his statutory interpretation claims because plaintiff plainly lacks standing under both Article III and the prudential standing doctrine to bring them.

Plaintiff's first claim hinges on his reading of 10 U.S.C. § 1509(e), which, as described above, applies to status reviews for "pre-enactment" cases. To summarize, plaintiff claims that he has submitted "new information," pursuant to section 1509(e), pursuant to which he is entitled to appointment of a "missing person's counsel" and a review of Pvt Kelder's status. Complaint ¶¶ 49, 62, 88. Such a review, were it applicable, would consist of consideration by DPMO, together with the missing person's counsel, as to whether the information is "significant enough" to require a board review. See 10 U.S.C. §§ 1509e(2)(B), 1505(c)(3), 1503(d).

The statute makes clear, however, that the sources for "new information" required to be considered are limited. Section 1509(e)(3), in relevant part, defines "new information" as information that is "credible," and "is found or received after November 18, 1997, by a United States intelligence agency, by a Department of Defense agency, or by a person specified in section 1504(g) of this title." Section 1504(g), in turn, specifies the family members who may

submit new information: "the primary next of kin, other members of the immediate family, and any other previously designated person of the person[17] . . . ." Members of the immediate family are defined in section 1513(5) and include spouses, children, parents, siblings and legal custodians. Plaintiff is not a person specified in section 1504(g).

In the context of the Act's predecessor, the Missing Person's Act, courts routinely rejected standing of non-dependent relatives to contest status determinations in situations where the alleged injury was far less remote than here. In Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984), for example, the Court denied standing to the parents of a Marine Corps officer challenging the reclassification of their son from missing to killed in action. Acknowledging that they were not "dependents" within the meaning of the statute, the parents alleged mental anguish from the government's declaration of their son's death. The parents alleged that the determination was made "'without any demonstrable and credible actions or investigations'" and argued that the status change would "lessen[] the government's incentive to continue investigating" the disappearance of their son. Id. at 1134, *quoting* affidavit of Mr. Fors. The Court rejected standing on prudential grounds, finding non-dependents were not within the "zone of interests" of the MPA. Id. See also Crone v. United States, 538 F.2d. 875, 881-83 (Fed. Cir. 1976) (rejecting standing of non-dependent parents of Vietnam MIAs to challenge status determinations (presumptive findings of death) under MPA; finding no "Congressional intent that persons other than dependents of MIAs, or the MIAs themselves when and if they return, be permitted to assert entitlement to the protection and benefits which that Act confers.").

Mindful of the harshness of these cases, Congress, in the Missing Service Personnel Act, expanded the ability of families to participate in the status review process. But, even assuming

[17] "Previously designated person," defined in section 1513(6), refers to a person designated by the missing person him or herself prior to becoming missing, and has no relevance here.

that process applies here, and that section 1509 creates a "right" to have new information considered by DPMO and a missing person's counsel, Congress clearly defined and limited the group of people who may submit that information. Nothing in the statute evinces a Congressional intent to open the process to members of an extended family or to the general interested public.

Plaintiff may claim that he was a proper representative of the next of kin in his dealings with DoD and that, accordingly, he is entitled to the process due that person.[18] Cf. 10 U.S.C. 1501(d) (providing that the primary next of kin may "for purposes of this chapter" 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, not pre-enactment cases.

Moreover, even if accepted by the agency, such a designation cannot satisfy Article III for at least three reasons. First, the Complaint contains no allegation that plaintiff seeks to represent anyone other than himself in this action. Complaint ¶ 2. The power of attorney submitted by plaintiff to DoD expired on August 11, 2012, well before this suit was filed. Rec. at 208. There are, therefore, no facts in the record to support a contention that plaintiff is acting with the authorization of, or attempting to represent, any family members here.

Second, even if plaintiff was authorized, at some point, to represent the next of kin before the agency, that right cannot confer standing on plaintiff in this Court. See Summers v. Earth

[18] Plaintiff, in his contacts with the DoD, submitted a power of attorney from the next of kin. Rec. at 208.

Island Inst., 555 U.S. 488, 496-97 (2009). In *Summers*, the Court rejected plaintiffs' claimed injury that they were denied the right to file comments on an agency action, reasoning:

> But deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing. Only a "**person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.**"

Id. at 496 (*quoting* Lujan, 504 U.S. at 572, n. 7) (emphasis added in original). See also Warth v. Seldin, 422 U.S. 490, 498 (1975) (doctrine of Article III standing, an essential aspect of the case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." (internal quotations omitted)). Because the statute creates no duty to plaintiff, he cannot claim a cognizable injury, under Article III, from any alleged violation of it with respect to the interests of others.

As the Court explained in Hydro Investors, Inc. v. F.E.R.C.:

> Administrative agencies need not adjudicate only Article III cases and controversies, but federal courts must. If the petitioner has no Article III concrete interest in receiving the relief requested before the agency, this Court has held, Congress has no power to grant a petitioner a right to seek judicial review of an agency's decision to deny him relief. *Gettman v. DEA,* 290 F.3d 430, 433 (D.C.Cir.2002); *Fund Democracy, LLC v. SEC,* 278 F.3d 21, 27-28 (D.C.Cir.2002). Because Congress cannot abrogate the requirements of Article III, as we explained in those cases, this principle applies even if Congress gave Hydro a right to seek judicial review of FERC's decision in this Court. *Gettman,* 290 F.3d at 433; *Fund Democracy,* 278 F.3d at 27-28. Any other rule would allow Congress to create federal jurisdiction by the simple expedient of granting any party - no matter how far removed from the true controversy - a right to petition the agency, and then a right to seek judicial review if the agency denied the request. Article III does not permit Congress to expand the federal judicial function through such stratagems. If the party petitioning the agency lacks Article III standing, he has not been independently wronged simply because the agency denied his advisory request.

Id., 351 F.3d 1192, 1197 (D.C. Cir. 2003). See also KERM, Inc. v. F.C.C., 353 F.3d 57, 59, 61 (D.C. Cir. 2004) ("That a petitioner participated in administrative proceedings before an agency

does not establish that the petitioner has constitutional standing to challenge those proceedings in federal court. . . . [petitioner] has failed to assert any injury that is sufficiently unique as to distinguish KERM from any other public-minded potential litigant interested in ensuring the faithful enforcement of the Act"); Wilcox Elec., Inc. v. F.A.A., 119 F.3d 724, 727–729 (8th Cir. 1997).[19] Accordingly, even were plaintiff's power of attorney effective, it would not suffice to confer standing in this Court. Cf. Fors, 741 F.2d at 1134 (rejecting claim that government was estopped from denying standing because it had considered plaintiff's husband as next-of-kin and allowed parents some rights under the Missing Persons Act; finding "[t]hese opportunities were not rights but privileges.").

Plaintiff's claimed injury here is based on his belief that defendants are violating their duty. But "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982). Neither plaintiff's alleged procedural injuries, nor his general wish that defendants prioritize their efforts differently, give plaintiff standing. Lujan, 540 U.S. at 573-74; Allen v. Wright, 468 U.S. 737, 753 (1984)("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); Delta Commercial v. Gulf of Mexico Fishery Mgmt. Council, 364 F.3d 269, 272–73 (5th Cir.2004) (deviation from statutory requirement insufficient to convey standing; "the only

[19] In any event, nothing in the Missing Service Personnel Act suggests Congress intended to confer standing on persons other than the next of kin, immediate family members and previously designated persons. Even if it applied, section 1501(d) refers not once, but twice, to the next of kin's ability to designate another person to represent him "for purposes of this chapter." For good measure, the Act specifies that the "Secretary concerned" shall treat the designee as the next of kin. There is no evidence that Congress meant for such persons to have standing in federal court.

interest injured by deviating from this mandate is the Association's generalized interest in proper application of the law. Frustration of such an interest is not by itself an injury in fact for purposes of standing").

This case should be dismissed because plaintiff cannot allege an injury to a legally cognizable interest under the statute and thus he lacks standing under Article III. For essentially the same reasons, he is not within the "zone of interests" of the Act and therefore the case should be dismissed for prudential reasons also.

Finally, however, even were the Court to entertain plaintiff's claim to represent the next of kin, any claim that plaintiff is acting on behalf of others faces a third, insurmountable, hurdle. Plaintiff is *pro se*, and therefore is barred by statute from asserting the claims of others in this Court. 28 U.S.C. 1654 ("[i]n all courts of the United States the parties may plead and conduct *their own cases* personally or by counsel") (emphasis added). This provision has been interpreted uniformly to prohibit *pro se* litigants from pursuing claims on behalf of others, even where such representation is permitted before an agency. See Simon v. Hatford Life, Inc., 546 F.3d 661, 664-65 (9th Cir. 2008) ("well-established that the privilege to represent oneself *pro se* provided by § 1654 is personal to the litigant and does not extend to other parties or entities. . . . Consequently, in an action brought by a *pro se* litigant, the real party in interest must be the person who 'by substantive law has the right to be enforced'") (*quoting* C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) and citing cases; Iannaccone v. Law, 142 F.3d 553 (2d Cir. 1998) (discussing history of pro se representation and denying estate administrator's attempt to represent estate pro se). Here, the putative rights that plaintiff seeks to assert are those of the next of kin, and he is barred from asserting those claims *pro se*.

C. The Missing Service Personnel Act Precludes Judicial Review

Yet another reason plaintiff's claim must be dismissed is that the Act itself precludes judicial review. As the Supreme Court explained:

> The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1). Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Inst., 467 U.S. 340, 346 (1984). "The congressional intent necessary to overcome the presumption [of reviewability] may [ ] be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it ... or from the collective import of legislative and judicial history behind a particular statute ... [or] by inferences of intent drawn from the statutory scheme as a whole." Id. at 349 (internal citations omitted). Moreover, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." Id.

The Missing Service Personnel Act explicitly provides judicial review for a finding by a board appointed under section 1504 or 1505 that a missing person is dead, or a finding by a board appointed under 1509 that confirms a previous finding of death. 10 U.S.C. § 1508. The law limits that review to primary next of kin (or previously designated persons) and states that such review may be had only on the basis of a claim that "there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process under this chapter." Id.

Although the Act does not explicitly preclude judicial review of other provisions, it "provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons" that certainly impliedly precludes review outside those parameters. Block at 349. Indeed, it would make no sense for Congress to sharply prescribe procedures for the judicial review of death determinations, while intending for other, less consequential, decisions to be subject to judicial review. Moreover, there was no contemporaneous judicial construction that would have permitted such review. Only death determinations were the type of adjudication of fact that resulted in deprivation of judicially recognized rights. See McDonald, 371 F.Supp. 831. Decisions regarding, for example, whether to consider and what weight to give to information provided by family members, how to undertake identification efforts or whether to continue searching had been held to be discretionary. E.g., Hart, 894 F.2d at 1546, 1548. The statutory scheme sets no standards for these decisions, much less an administrative process that would lead to judicial review. Moreover, even the limited review provided in the Act was controversial at the time. See 141 CONG. REC. S18,873 (daily ed. Dec. 19, 1995) (Statement of Sen. McCain) (terming the judicial review provision, among others, "unworkable and unnecessary"). Here, allowing judicial review of decisions regarding the quantum or quality of evidence that supports a decision to (or not to) disinter, or how to prioritize such decisions, would be unworkable. "[C]ongressional intent to preclude judicial review is 'fairly discernible' in the detail of the legislative scheme," *id.* at 351, and plaintiff's claim should be dismissed on this ground as well.

D. DoD's Accounting Mission Is Committed to Agency Discretion by Law, and Therefore Exempt from Review Under the APA

The APA also prohibits judicial review of challenged policies or practices that are committed to the agency's discretion by law. See 5 U.S.C. § 701(a)(2). This exemption from

judicial review applies, as a general matter, to situations covered by statutes that are written so broadly that "'there is no law to apply.'" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess, 26 (1945). Accordingly a "court would have no meaningful standard against which to judge the agency's exercise of discretion." Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (*quoting* Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

In *Lincoln v. Vigil*, the Court expounded on the rationale of *Heckler*, finding that the allocation of funds from a lump sum appropriation is committed to agency discretion and not subject to APA review. The Court explained:

> Like the decision against instituting enforcement proceedings, then, an agency's allocation of funds from a lump-sum appropriation requires “a complicated balancing of a number of factors which are peculiarly within its expertise”: whether its “resources are best spent” on one program or another; whether it “is likely to succeed” in fulfilling its statutory mandate; whether a particular program “best fits the agency's overall policies”; and, “indeed, whether the agency has enough resources” to fund a program “at all.” *Heckler,* 470 U.S., at 831, 105 S.Ct., at 1655. As in *Heckler,* so here, the “agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” *Id.,* at 831–832, 105 S.Ct., at 1656.

508 U.S. at 193.

Even if statutes set forth criteria to be considered in agency action, action is not reviewable if that criteria is not "judicially manageable." Nat'l Federal of Fed. Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990) (declining review of DoD and Commission’s base closing decisions where statute contained criteria, but criteria not judicially manageable). Courts have thus concluded that actions are not reviewable under the APA where the language of the statute, structure of the statutory scheme, objectives of the statute, legislative history and the nature of the administrative action permit broad agency discretion. See, e.g., Block, 467 U.S. at 345.

Finally, "agency action does not automatically become reviewable just because the agency gives a 'reviewable' reason for otherwise unreviewable action.'" American Bank, N.A. v. Clarke, 933 F.2d 899, 902 (10th Cir.1991)) (quoting ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 283 (1987)). As the Court pointed out in *Brotherhood of Locomotive Engineers*, a prosecutor's decision not to prosecute is not subject to judicial review even though "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently 'reviewable' proposition. . . . yet it entirely clear that [it] cannot be the subject of judicial review." Id.

As explained above, the Missing Service Personnel Act contains a broad grant of authority to DoD to "establish policies, which shall apply uniformly throughout the Department of Defense, . . . for personnel accounting (including locating, recovering, and identifying missing persons or their remains after hostilities have ceased)." 10 U.S.C. § 1501(a)(4). Apart from designating the covered conflicts, the law contains no guidance as to how the DoD is to manage its accounting mission. Standards are lacking in all areas: from which missions to prioritize, to which disinterments would be likely to result in successful identifications, to which identification techniques to employ in a given case.

As the "Prioritization Memo" itself makes clear, decisions regarding recovery and accounting efforts require "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." Heckler, 470 U.S. at 831. These factors include geopolitical, and/or environmental factors that may lead to loss of access to recovery sites. They include scientific analysis and experience necessary to evaluate the likelihood of success in a particular case, a calculation involving a huge array of factors such as the quality of the historical record,

soil and weather conditions at the site, likelihood of disturbance, and other forensic factors. They include fiscal considerations. Finally, they include balancing the interests of "families of the missing from many different conflicts." All of these factors are peculiarly within the agency's expertise.

Accordingly, there are insufficient standards for this Court to evaluate the lawfulness of the DoD's actions.[20] See Perales v. Casillas, 903 F.2d 1043, 1047 (5th Cir. 1990) (stressing that the lack of legislative standards meant that the alleged injury was not legally cognizable). "When there are no rules or standards there is neither legal right nor legal wrong. There may be moral or prudential claims, but such claims are the province of other actors, be they administrators or legislators." Id. (*quoting* Achaeoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985)). Because the APA would prohibit the sort of judicial review that plaintiffs seek to have this Court conduct with respect to DoD's disinterment decision, Plaintiffs' claim is not cognizable under the APA and should be dismissed.

Of course, as the Court in *Lincoln* points out, "Congress may always circumscribe agency discretion . . . by putting restrictions in the operative statutes . . . ." Lincoln, 508 U.S. at 193. Plaintiff first cause of action claims that the Act requires DoD to consider "new, not previously considered, evidence of the identity of unidentified remains x-816." Complaint ¶ 88. Although not specifically part of this cause of action, plaintiff also maintains that DoD has failed to

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[20] In analogous cases under the Federal Tort Claims Act, courts have consistently rejected challenges to decisions and procedures used in the recovery and identification of servicemembers, finding those judgments subject to the discretionary function exception of the FTCA. See Hart, 894 F.2d at 1545-46 (discussing identification techniques where remains commingled; "The discretionary nature of these processes is particularly evident with regard to the identification techniques used by [the U.S. Army Central Identification Lab (now JPAC)]."); Simmons v. United States, 754 F. Supp. 274, 281 ((N.D.N.Y. 1991) ("government employees involved with identifying the remains forced to use their discretion [] in determining what procedures offered the most accurate identifications under the circumstances.").

appoint a missing persons counsel and a status review board, which he contends is required by the Act. Id. ¶¶ 49, 62, 67.[21] Plaintiff's second cause of action contends that defendants' "Prioritization Memo" is contrary to the Missing Service Personnel Act, which he argues prohibits prioritizing or "discrimination" in the recovery of remains, and is arbitrary, capricious and an abuse of discretion, in violation of the APA. Complaint ¶¶ 90-96.

These claims are evaluated under the standard set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). As explained by the Fifth Circuit, that familiar standard requires a two-step framework:

> We first decide whether Congress spoke directly to the precise question at issue, and, if it did, give effect to the unambiguously expressed intent of Congress; under such a situation, we will reverse an agency's interpretation if it does not conform to plain meaning of the statute. If the statute is silent or ambiguous, however, we ask whether the agency's interpretation is based on a permissible construction of the statute. We may reverse the agency's construction of an ambiguous or silent provision only if we find it arbitrary, capricious, or manifestly contrary to the statute. That is to say, we will sustain an agency's interpretation of an ambiguous statute if that interpretation is based on a permissible construction of the statute. This is Chevron's second step.

ConocoPhillips Co. v. U.S. E.P.A., 612 F.3d 822, 838-39 (5th Cir. 2010); see also National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (under *Chevron*, a court must defer to the agency's construction, "even if the agency's reading differs from what the court believes is the best statutory interpretation," if the statute is within the

[21] Plaintiff casts DoD's alleged failure to act on his information as a violation of section 706(1) of the APA, under which the "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Supreme Court has made clear that a claim for relief under section 706(1) is limited to challenges to the omission of (1) "a *discrete* action" that is (2) "legally *required*." Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 63, (2004) (emphasis in original). See Lujan, 497 U.S. at 891 (party "cannot seek *wholesale* improvement of [an agency] program by court decree, rather than in the office of the Department or the halls of Congress.") (emphasis in original). Accordingly, in order to state a claim under section 706(1), plaintiff must show that the Act requires DoD to consider the allegedly new evidence provided by plaintiff, and/or to appoint of missing persons counsel and convene a board of inquiry. As this argument is foreclosed by a finding that the relevant actions are committed to agency discretion by law, we do not address this claim separately.

agency's jurisdiction to administer and where the agency's construction of an ambiguity is reasonable).

1. The Missing Service Personnel Act Does Not Require DoD to Consider New Evidence, Appoint a Missing Person's Counsel or Conduct a Status Review

As explained above, Section 1509(e) -- "Review of Status Requirements" -- on which plaintiff appears to rely, applies only to those in a missing *status*. Section 1501(e) makes this point explicit:

> **(e) Termination of applicability of procedures when missing person is accounted for.**--The provisions of this chapter relating to boards of inquiry and to the actions by the Secretary concerned on the reports of those boards shall cease to apply in the case of a missing person upon the person becoming accounted for **or otherwise being determined to be in a status other than missing**.

10 U.S.C. § 1501(e) (emphasis added). As explained, while DoD considers Pvt Kelder to be "unaccounted for," he is not in missing *status*. See 10 U.S.C. § 1513(2) (defining missing status). The procedures in section 1509(e) simply do not apply.

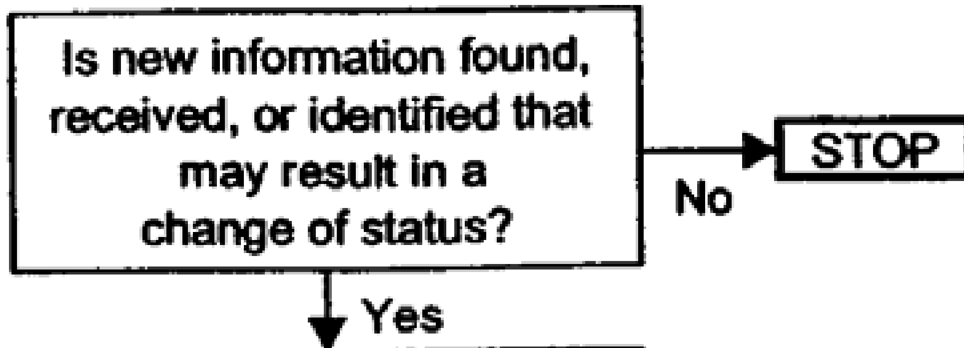
Here, the statute is not ambiguous. However, as explained in the statutory background section above, it has been clarified even further by DoD's implementing Directives and Instructions. Directive 2310.07E 1.1.1. states:

> E2.1.1.2. Accounting for personnel from Operations DESERT SHIELD and DESERT STORM and, **absent new information that may result in a change in status**, the Indochina war era, the Korean Conflict, and the Cold War, and World War II is based on practice prior to the enactment of reference (a) [10 U.S.C. § 1501, *et seq.*].

Further, DoD's Instruction 2310.05, implementing the Act as it pertains to boards of inquiry, states:

> 2.4. When a covered person becomes accounted for or is otherwise determined to be in a status other than missing (i.e., deserted, absent without leave, or **dead**), provisions herein relating to boards of inquiry and to the actions by the Secretary concerned on the reports of those boards shall cease to apply.

Instruction 2310.05 (emphasis added). See also E8.A1. to Instruction 2310.05, "ATTACHMENT 1 TO ENCLOSURE 8 PRE-ENACTMENT CASES," which sets forth a flow chart to guide implementation of section 1509(e). The chart provides, in relevant part:



In short, the procedures in question plainly apply to *status* reviews, the purpose of which is to determine whether a service member in missing *status* should continue to be carried in that status or be declared deceased. This reading is consistent with the legislative history and purpose of the Act, which was to provide due process in the making of death determinations and to ensure that the person is "not declared dead solely because of the passage of time." Pub. L. 104-106, Sec. 569(a).

Moreover, this reading is consistent with other provisions of the Act. The judicial review provisions in section 1508 provide judicial review only for findings of death or a "finding by a board appointed under section 1509 of this title that confirms that a missing person formerly declared dead is in fact dead." 10 U.S.C. § 1508(b)(2). And, as Senator Dole stated, the purpose of the missing person's counsel is to "ensur[e][] that the Government does not disregard their interests and afford[] the missing due process of law." 140 Cong. Rec. S12217-05, S12220, 1994 WL 449837. It would make little sense to appoint counsel to represent a person confirmed dead, who has no cognizable legal interest or due process rights.

Pvt Kelder's status is deceased, and plaintiff has not submitted information that would result in a change in that status. Accordingly, under the plain meaning of the statute, he is not entitled to have that information considered under the process pertaining to "status reviews." 10 U.S.C. 1509(e). To the extent any ambiguity exists, DoD's interpretation is reasonable and not "manifestly contrary to the statute." Chevron, 467 U.S. 837.

2. Prioritizing Recovery Actions is Not Contrary to the Act

Plaintiff's second cause of action contends that sections 1501(a)(4) and (a)(6) of the Missing Service Personnel Act limit DoD's discretion and prohibit the policy set forth in the "Prioritization Memo." Complaint ¶¶ 91-92. In section 1501(a)(4), Congress mandated that the DPMO "shall establish policies, which shall apply uniformly throughout the Department of Defense, for personnel recovery . . . and for personnel accounting." Plaintiff contends that this section's requirement -- that policies "shall apply uniformly throughout the Department of Defense" -- means that DoD may not prioritize (or "discriminate") among the unaccounted for. Complaint ¶ 91. Similarly, section 1501(a)(6) provides that "[t]he Secretary of Defense shall establish an activity to account for personnel who are missing or whose remains have not been recovered from the conflict in which they were lost." Plaintiff contends that this provision, by not *affirmatively allowing* for prioritization, has the effect of precluding it. Complaint ¶ 92.

As discussed above, these claims are reviewed under *Chevron.* Plaintiff's claim fails under step one of *Chevron*, as the plain meaning of the statute does not support his reading. Section 1501(a)(4) states that the policies "shall apply uniformly throughout the Department of Defense," or, in other words, they shall apply uniformly to the Services, which previously had their own policies and procedures. This reading is supported by the legislative history, which states that the House and Senate conferees intended that the new office created by the Act,

DPMO, "to have a broad range of responsibilities that include those of all the individual offices that currently have responsibility for POW/MIA matters." H.R. CONF. REP. NO. 450, 104th Cong. 2d Sess. 157-75, 801 (1996).

Plaintiff's reading of section 1501(a)(6) is also not supported by the plain meaning of the statute. That language -- "[t]he Secretary of Defense shall establish an activity to account for personnel who are missing or whose remains have not been recovered" -- contains no prohibition of the agency prioritizing its mission. The absence of restrictions, as explained above, does not limit the agency's discretion in this regard, but rather indicates Congress' intent to leave policy-making to the expertise of the agency. Brand X Internet Services, 545 U.S. at 980.

If any doubt remains as to the plain meaning of these sections, it is resolved by another, uncodified, provision of the 2009 Amendments to the Act. In these Amendments, the same that added World War II cases to the program, Congress provided that "a priority of the program required by section 1509 . . . to resolve [pre-enactment (1996)] missing person cases . . . shall be the return of missing persons to United States control alive." Pub. L. 111-84, Div. A, Title V, § 541(d), Oct. 28, 2009, 123 Stat. 2298. Plainly, Congress did not intend to enact a uniform policy applicable to all of the unaccounted for, when Congress itself set a priority for the program.

In sum, the sections cited by plaintiff do not restrict the agency's discretion, rather, in their broad terms, they reinforce the complete policy-making authority that Congress left to DoD in the Act. Neither the policy guidance in the "Prioritization Memo," nor any specific decisions related to disinterment, are subject to review under the APA.[22] See Heckler v. Chaney, 470 U.S. at 830.

[22] As noted above, challenges under section 706(1) of the APA are limited to challenges to the omission of (1) "a *discrete* action" that is (2) "legally *required.*" SUWA, 542 U.S. at 63 (emphasis in original). Because plaintiff can point to no such action, his claim under section 706(1), to compel agency action unreasonably delayed, should be dismissed.

E. Neither the Decision on Disinterment nor the Prioritization Memo Is Final Agency Action Subject to Review

A third reason that plaintiff's APA claims fail is that neither challenged action is a "final" agency action. 5 U.S.C. § 704. The Supreme Court has established a two-part test for determining whether agency action is "final" within the meaning of the APA. "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process....And Second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow."' Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citation omitted).

Accordingly, even were the Court to find that DoD were legally required to consider plaintiff's information, his APA claim must still fail. DoD has and continues to consider the information submitted by plaintiff. See Decl. ¶ 48 and Supp. Rec. at 001-002. Accordingly, there has been no final agency action and such action has not been "unreasonably delayed." See 5 U.S.C. §§ 704 (requiring final agency action) and 706(1).

The "Prioritization Memo" is not "final" because it is not an action that determined plaintiff's rights or imposed obligations on him. "Agency actions that have no effect on a party's rights or obligations are not reviewable final actions." National Pork Producer's Council v. U.S. E.P.A., 635 F.3d 738, 756 (5th Cir. 2011).

F. The "Prioritization Policy" is Exempt from the Notice and Comment Procedures of the APA

In addition to his statutory claims, plaintiff also contends that the Prioritization Memo violates the familiar notice and comment provisions of the APA. 5 U.S.C. § 553. To be subject to these requirements in the first instance, however, the document in question must be a "rule,"

as defined in section 551(4).[23] As the Supreme Court has noted, "[d]etermining whether an agency's statement is what the APA calls a 'rule' can be a difficult exercise." Lincoln, 508 U.S. at 196-97. The Court need not engage in that exercise where, as here, there are a number of exceptions to the general rule requiring notice and comment that plainly apply. See id.

First, section 553(a)(1) specifically exempts any action involving "a military or foreign affairs function of the United States." There can be no doubt that DoD's recovery and accounting mission is a "military function." Indeed, this exemption has been found to apply in a closely-related area. McDonald, 371 F.Supp. at 840 (proceedings of Secretaries of Army, Navy, and Air Force to determine whether or not to make official reports of death or presumptive findings of death as to servicemen carried in missing status while on active duty in Indochina exempt under this section as military function). Accordingly, the policy is not subject to the procedures of section 553.

Second, the policy is exempt from section 553 as a "matter relating to agency management." 5 U.S.C. § 553 (a)(2). The memo is an internal guidance to guide the various components in prioritizing their work. See Lincoln, 508 U.S. at 197 (termination of discretionary program providing health services to Indian children exempt as rule "of agency organization").

Finally, section 553 also contains an exception for "general statements of policy." 5 U.S.C. § 553(b). In Lincoln, the Supreme Court affirmed that this exemption covers "'statements issued by an agency to advise the public prospectively of the manner in which the

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[23] "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

agency proposes to exercise a discretionary power.'" Id. (internal citations omitted). Thus, even assuming the memorandum was issued to advise the public, rather than simply the affected components to which it is addressed, the "prioritization policy" is exempt under this section.

G. Count Three, Which Seeks Declaratory Judgment, Should Also Be Dismissed

Plaintiff seeks a declaratory judgment from this Court that the remains identified as X-816 are those of Pvt Kelder. Complaint ¶ 105. Plaintiff alleges jurisdiction exists for this claim because there is a "live controversy" between plaintiff and defendants. Id. ¶ 4.

"[I]t is well settled that [the Declaratory Judgment Act] does not confer subject matter jurisdiction on a federal court where none otherwise exists." Lawson v. Callahan, 111 F.3d 403, 405 (5th Cir.1997). Plaintiff has identified no basis of jurisdiction[24] for this claim and therefore it should be dismissed.

In addition, "[t]he 'actual controversy' required under 28 U.S.C. § 2201(a) 'is identical to the meaning of 'case or controversy' for the purposes of Article III." Bauer v. Texas, 341 F.3d 352, 358 (5th Cir. 2003), *quoting* Lawson, 111 F.3d at 405. "The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests." Bauer, 341 F.3d at 359, *citing* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). As demonstrated above, plaintiff lacks standing under Article III in this case. As he has no legal interest in the identity of X-816, he can allege no "actual controversy" within the meaning of the Declaratory Judgment Act.

[24] Moreover, the United States must consent to be sued, and that consent is a prerequisite to federal jurisdiction. United States v. Navajo Nation, 537 U.S. 488, 502 (2003). Consent may not be inferred, but must be unequivocally expressed. United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003). The Declaratory Judgment Act provides no waiver of sovereign immunity for suits against the federal government. Skelly Oil Co., 339 U.S. 667, 671-72 (1950).

H. Plaintiff's Request for Mandamus Relief Should Also be Denied

Plaintiff's last count requests relief pursuant to 28 U.S.C. § 1361. Complaint ¶¶ 106-114. Plaintiff alleges that defendants have a non-discretionary duty to: 1) appoint a missing person's counsel (id. ¶ 110); 2) "take all practical efforts to identify the remains of Pvt Arthur H. Kelder, and all other deceased military personnel, and to return those remains for burial as directed by the primary next of kin" (id. ¶ 111); conduct a forensic pathology investigation to determine the identity of unknowns (id. ¶ 112); correct records and memorials to "properly reflect" the identification of deceased military personnel (id. ¶ 113) and "consider the evidence that unidentified remains X-816 are actually those of" Pvt Kelder (id. ¶ 114). As a source of these duties, plaintiff cites the Missing Service Personnel Act, Public Law 368 and Executive Order 10057, and 10 U.S.C. § 1471.

"The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of 'a clear nondiscretionary duty.'" Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988) (*quoting* Heckler v. Ringer, 466 U.S. 602, 616 (1984)). "In order for mandamus to issue, [plaintiff] must demonstrate that a government officer owes [plaintiff] a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion. The legal duty must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt." Dunn-McCampbell Royalty Interest, Inc. v. National Park Service, 112 F.3d 1283, 1288 (5th Cir. 1997) (internal citations omitted).

As discussed above, nothing in the Missing Service Personnel Act creates a legal duty to plaintiff. Plaintiff has no standing under that Act, and the relief he seeks is both inapplicable (in the case of status review procedures) and within the discretion of DoD.

The operative Executive Order and statute of defendant American Battle Monuments Commission likewise creates no non-discretionary duty. In relevant part, the Executive Order 10057 transferred responsibility for operation and maintenance of World War II permanent military cemeteries to defendant American Battle Monuments Commission. The enabling law states only that the "Commission is solely responsible for the design and construction of the permanent cemeteries, and of all buildings, plantings, headstones, and other permanent improvements incidental to the cemeteries."

Section 1471, Title 10, has not been discussed previously, but it is equally unavailing. The statute merely provides that "the Armed Forces Medical Examiner may conduct a forensic pathology investigation to determine the cause or manner of death of a deceased person," 10 U.S.C. § 1471(a), if, among other things, "the identity of the decedent is unknown." 10 U.S.C. § 1471(b)(2)(E). This statute is inapplicable on its face as plaintiff is not seeking an investigation to "determine the cause and manner of death" of Pvt Kelder. But the statute is also permissive ("may conduct"). It creates no non-discretionary duty to anyone.

V. Conclusion

For the reasons set forth above, this Court lacks jurisdiction and the complaint should be dismissed as to all defendants pursuant to Fed. R. Civ. P. 12(b)(1). In the alternative, the complaint should be dismissed for failure to state a claim, or summary judgment granted for defendants. Fed. R. Civ. P. 12(b)(6) and 56.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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