UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

As explained in Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Motion"), defendants take seriously their mission to account for American service personnel who are unaccounted for from the nation's conflicts. This mission extends to plaintiff's cousin, Private Arthur H. Kelder. As is evident from the record, defendants have devoted substantial resources to considering plaintiff's request to disinter certain remains and subject them to identification procedures. As is also evident from the record, plaintiff disagrees with the pace of defendants' work, and with their analysis and recommendations to date.

Equally evident, however, is that neither defendants' consideration of plaintiff's request, nor plaintiff's disagreement with the response, suffices to provide plaintiff with standing or this Court with jurisdiction.[1] Plaintiff must allege a cognizable legal interest that has been harmed,

[1] In their Motion, defendants chose to address plaintiff's lack of standing first, in order to avoid the need for the court to engage in statutory interpretation, and because standing effectively precludes all of plaintiff's claims. However, we note that it may be better practice to address the issue of preclusion of review under the APA and sovereign immunity first, as these defenses go to the Court's jurisdiction. See Stockman v. Federal Election Commission, 138 F.3d 144, 150-

and Congress must have consented to be sued. Such an interest and consent must be found in a statute or the constitution. As the Supreme Court and the Fifth Circuit have stressed many times: not every dispute between a citizen and a federal agency is reviewable in federal court. E.g., 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."); Perales v. Casillas, 903 F.2d 1043, 1047 (5th Cir. 1990) ("'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.'") (internal quotation omitted).

Here, plaintiff has failed to identify an injury to a legal interest that provides standing or a statute that provides jurisdiction. The authority to decide whether and when remains should be disinterred for identification purposes is vested in the Department of Defense. Congress has not seen fit to limit DoD's discretion or to create a right or a process through with interested parties such as plaintiff can seek review, either within the agency or in this Court. Defendants' desire and willingness to work with families and other such parties does not change this fact. Cf. Fors v. Lehman, 741 F.2d 1130, 1134 (9th Cir. 1984) (opportunities afforded parents of missing servicemen under Missing Persons Act "were not rights but privileges.").

For these reasons, further set forth below and in defendants' Motion, plaintiff's complaint should be dismissed for lack of standing, lack of jurisdiction and sovereign immunity.

I. Plaintiff Lacks Standing

Plaintiff's complaint asserts standing based on the Missing Service Personnel Act ("the Act"), 10 U.S.C. §§ 1501, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.* Complaint ¶ 2. Plaintiff based his complaint in large part on his contention that the Act requires defendants to afford him a "status review" and other procedures, such as a missing

person's counsel, pursuant to Section 1509(e) of the Act. That section creates very limited due process rights related to status reviews and determinations of death that are available to designated beneficiaries, including the primary next-of-kin. 10 U.S.C. § 1509(e), 1504(g); Motion at 15-17.

As explained in defendants' Motion, plaintiff lacks standing because, regardless of one's interpretation of the rights provided by the Act, plaintiff is not Pvt Kelder's next-of-kin or other designated beneficiary.[2] In addition, plaintiff lacks standing because the limited rights created by the Act do not apply to the relief plaintiff seeks. As plaintiff cannot point to any statutory or constitutional basis for standing, the complaint should be dismissed.

In his Response to defendants' Motion ("Response" or "Resp."), plaintiff concedes that he is not Pvt Kelder's next-of-kin. However, he makes several arguments as to why this fact should not be dispositive. All of these arguments are unavailing.

First, plaintiff argues that defendants have an obligation, under 10 U.S.C. § 1509(e)(3), to consider "new information." 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." Plaintiff concedes that he is not a person specified in section 1504(g). He contends, however, that the defendants' "obligation to act" is triggered by receipt of information that he submitted to the Army Human Resources Command (HRC), which it, in

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[2] Contrary to plaintiff's assertion (Resp. at 8), defendants do not concede that the primary next of kin, Douglas Kelder, would have standing here. As explained in defendants' Motion, although the Act provides certain limited rights to the primary next-of-kin and other designated beneficiaries in the matter of status reviews and determinations of death, that process is not applicable here since Pvt Kelder's status is not in question. However, since Douglas Kelder, the undisputed primary next-of-kin, is not a plaintiff, the Court need not decide what, if any, rights the statute confers, as plaintiff is not among the beneficiaries of the statute.

turn, ministerially forwarded to the Defense Prisoner of War/Missing Personnel Office (DPMO).[3] Resp. at 2-3.

Even were the Court to accept such bootstrapping, however, this argument does not solve plaintiff's standing problem. Section 1509(e)(3) provides only that new information received be "considered" by DPMO, together with the missing person's counsel, to determine whether the information is "significant enough" to require a status board review. See 10 U.S.C. §§ 1509e(2)(B), 1505(c)(3), 1503(d). To the extent the statute creates any legal duty, then, it is only a procedural right for the specified family members to have credible new information they submit considered by DPMO for the purposes of a status review. There is no independent right for the family to have information received from other sources considered. Thus, DPMO's alleged failure to consider information received by (or from) another agency would create no legally-cognizable injury even to the designated family members, much less to plaintiff.[4]

Plaintiff also appears to argue that he has standing under Army Regulation (AR) 638-2. Plaintiff originally requested that the Department of the Army Human Resources Command consider his information pursuant to that regulation. Rec. at 205. The Army disclaimed

[3] Plaintiff also contends that receipt of the same information by the "Joint POW/MIA Accounting Command, Research and Investigations Branch, J2, Intelligence Directorate," as forwarded by HRC, triggers the "obligation to act" because JPAC is, according to plaintiff, a United States intelligence agency. This argument fails for the reasons set forth *infra*. However, it is important to note that JPAC is not a United States Intelligence Agency, as contemplated by 1509(e)(3)(A). The intelligence community is defined by Executive Order 12333, including several DoD components, such as the Defense Intelligence Agency, the National Security Agency, and the National Reconnaissance Office. The J2 directorate of JPAC is not a Defense Agency or DoD Field Activity that conducts defense intelligence, counterintelligence, or security as defined by DoD Directive 5143.01, the directive which assigns the responsibilities, functions, relationships, and authorities of the Under Secretary of Defense for Intelligence.

[4] Even were this procedural right to apply, it would likely not suffice to provide standing. See Summers v. Earth Island Inst., 555 U.S. 488, 496-97 (2009) (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).

jurisdiction based on the 2009 Amendments to the Missing Service Personnel Act. Plaintiff did not challenge that determination or raise any claims under that regulation in his Complaint. Thus, any applicability of that regulation is not before the Court.[5] Even if the Court were to accept this argument, however, any standing that plaintiff may have had before the agency does not provide standing under Article III. "If the party petitioning the agency lacks Article III standing, he has not been independently wronged simply because the agency denied his advisory request." Hydro Investors, Inc. v. F.E.R.C., 351 F.3d 1192, 1197 (D.C. Cir. 2003). See Motion at pp. 25-27 (citing cases).[6]

Third, plaintiff asserts that he is properly before the Court under the doctrine of third party standing. As plaintiff admits, however, the first criteria for such standing requires that the litigant himself "must have suffered an "'injury-in-fact.'" Resp. at 5, *quoting* Powers v. Ohio, 499 U.S. 400, 411 (1991). As demonstrated above and in defendant's Motion, plaintiff has not alleged such an injury to his own interest.

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[5] Contrary to plaintiff's assertions (e.g., Resp. at 4), defendants are not playing a "shell game." Plaintiff chose to base his complaint on the Act, rather than AR-638-2. However, as a result of this choice, defendants have not briefed any claim that could be construed to rely on an interpretation of AR-638-2. Counsel respectfully requests the right to further consult with the relevant agency officials should the Court find such an interpretation necessary. Defendants take no position on the views expressed by HRC in its November 4, 2011 letter (Rec. at 205) and advise the Court that, given the relative newness of the Act's addition of an accounting mission, any possible changes in responsibilities between the Army and DPMO (as well as other DoD entities involved in the accounting process) have not been fully determined through the administrative process. As discussed *infra*, however, any rights that may be afforded plaintiff under AR-638-2 (and defendants do not concede that there are any) are irrelevant to determination of defendants' Motion as a regulation alone cannot provide a basis for standing or jurisdiction.

[6] If an agency by regulation cannot grant Article III standing, *a fortiari* the agency cannot bestow standing through an internal memorandum. Cf., Resp. at 5 (arguing that the "Slocombe Memorandum" provides a basis for standing).

Finally, plaintiff takes issue with defendants' regulatory definition of "primary next-of-kin." AR-638-2, Chapter 4-4, implements 10 U.S.C. § 1482(c), which, in turn, is referenced in Section 1505 of the Act defining "primary next-of-kin." Chapter 4-4 states that only one person at a time may be the "PADD" (Person Authorized to Direct Disposition of Remains) and sets forth the order of priority for determining that person. Plaintiff objects that such a listing does not take into account "familial affinity," and suggests that standing be allowed on that basis. Congress, however, has not seen fit to broaden the categories of beneficiaries to include those associated by familial affinity, and thus, such affinity cannot serve as a basis of standing here. Cf., Fors, 741 F.2d at 1134 (9th Cir. 1984) (denying standing, under Missing Persons Act, to parents of Marine Corp officer to contest son's death determination as they were not "dependents" under that statute).

In sum, plaintiff has not identified any injury to a concrete statutory right of his that suffices to give rise to standing, and his complaint should be dismissed. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982) ("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."); see also Allen, 468 U.S. at 753; 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 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").

II. Defendants Actions Are Not Reviewable Under the APA

Section 701(a) of the APA provides for judicial review of final agency action "except to the extent that— (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). As set forth in defendants' Motion, the accounting mission of defendants, including the decision as to whether or not to disinter an unknown, is excluded from review under both of these prongs.[7] Mot. at 29-38.

With respect to judicial review, "[w]hether and to what extent a particular statute precludes judicial review [under the APA] 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 Supreme Court's reviewability test asks whether congressional intent to make an agency action judicially reviewable is 'fairly discernible' not just from the statutory text, but also from the structure, legislative history and nature of the administrative action alleged to be reviewable." Lundeen v. Mineta, 291 F.3d 300, 307 (5th Cir. 2002).

In their Motion, defendants explain that the statutory scheme, legislative history and nature of the action show that Congress had no intent to provide judicial review of defendants' accounting mission. Mot. at 29-30. Plaintiff does not respond to defendants' arguments, and we do not repeat those arguments here. In his Response, plaintiff simply cites to the general proposition favoring judicial review. This is not sufficient to show Congressional intent. Cf., Stockman v. Federal Election Commission, 138 F.3d 144, 155 (5th Cir. 1998). Plaintiff concedes, however, that Section 1508 of the Act explicitly provides judicial review only for a

[7] Defendants also argue that there has been no final agency action. Motion at 39. In his response, plaintiff argues at length on this point. Resp. at 8-13. If the Court were to reach this argument, defendants rely on the record, specifically Declaration of Cynthia A. Chambers at ¶ 48 and Supp. Rec. at 001-002, and on defendants' Motion at 39.

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. Provision of this explicit and limited review would be nonsensical if Congress intended all other actions under the Act to also be reviewable. Cf., id. at 155 n. 18. ("if judicial review were otherwise available under the APA," such a limiting provision "would not be a restriction and would, instead, be utterly superfluous . . . .").

Plaintiff also seeks to rely on AR-638-2. As explained above, that regulation is not properly before the Court as plaintiff did not rely on it in his complaint. Regardless, because it is a regulation, it provides no basis for vesting jurisdiction in the federal courts. Only Congress can waive sovereign immunity and such waiver must be "unequivocally expressed in statutory text and will not be implied." Lundeen, 291 F.3d at 304. For such waiver to occur through the APA, the relevant inquiry is whether *Congress* intended to provide for judicial review of the Executive's actions. Id. Apart from the Missing Service Personnel Act, plaintiff has not identified any statute that could provide such review.

Plaintiff's claim is also exempt from review under the APA under Section 701's second prong because any action on disinterment and identification is committed to agency discretion by law. See 5 U.S.C. § 701(a)(2). In their Motion, defendants explained that 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). Put another way, review under the APA is precluded when the "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)). As explained in defendants' Motion, the

Missing Service Personnel Act provides no standards by which the agency's actions should be guided or judged: 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.

In response, plaintiff cites only Congress' requirement that DPMO be staffed and funded "to enable the activity to perform the complete range of missions of the activity." 10 U.S.C. § 1501(a)(6) (A). From this general language, plaintiff argues that the agency is devoid of discretionary authority, and that DPMO "was conceived and funded with a desire to resolve any and all cases which were placed before it." Resp. at 14. This response misapprehends the requirement of "law to apply." The issue is not whether an agency has a statutory mandate. The issue is whether an "agency's inaction [or action] in such a situation is necessarily exempt from judicial review because there are no meaningful standards against which to judge the agency's exercise of discretion." Perales, 903 F.2d at 1047. The language that plaintiff cites provides no criteria from which a court could review how the agency pursues its mission, much less how it reaches a decision in a particular case.

Moreover, if Congress did intend for the agency to adjudicate "all cases which were placed before it," Congress certainly knows how to create such an administrative process. This Congress plainly did not do.[8] And, without an adjudicatory process, courts have required even clearer standards against which to judge the agency's exercise of discretion. As the Perales Court cautioned:

> While statutory or regulatory standards are necessary for direct review of particular administrative adjudicatory decisions, they are even more necessary as

[8] As defendants point out in their Motion, Congress explicitly recognized the agency's discretion to prioritize by providing that DoD should seek to account for at least 200 missing, from all of the covered conflicts, by 2015. Pub. L. 111-84, Div. A, Title V, § 541(d), Oct. 28, 2009, 123 Stat. 2298. There was no mandate, as plaintiff would have it, to immediately begin work on the over 9,000 unknowns, or the over 83,000 missing.

> a basis for an inquiry into general administrative decision-making practices. Such an inquiry made without statutory or regulatory standards constitutes a proceeding "seek[ing] a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" which *Allen v. Wright* condemned.

Perales, 903 F.2d at 1051.[9]

III. Plaintiff's Claims under the Declaratory Judgment Act and Mandamus Act Also Fail

As defendants explained in their Motion, this Court lacks jurisdiction under the Declaratory Judgment Act to declare that certain remains are those of Pvt Kelder, and plaintiff lacks a legal interest sufficient to create a "case or controversy" under Article III. In his Response, plaintiff does not identify any basis for jurisdiction. He also does identify any legal interest he has that is adverse to defendants. Accordingly, the claim should be dismissed.

Likewise, plaintiff has failed to identify any "clear non-discretionary duty" that would support a mandamus action. Plaintiff's response simply reiterates his position that defendants have a non-discretionary duty to account for all of the unaccounted for. Plaintiff does not describe on what basis this duty is owed to him. Nor does he describe a "specific, ministerial act, devoid of the exercise of judgment or discretion … set out in the Constitution or by statute, [] its performance […] 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). Accordingly, these claims must also be dismissed.[10]

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[9] Perales also forecloses plaintiff's reliance on AR-638-2. Resp. at 14. In addition to the reasons discussed above, the Fifth Circuit has held that "[t]he failure of an agency to follow its own regulations is not . . . a per se denial of due process unless the regulation is required by the constitution or a statute." Id. at 1050 (internal quotation omitted). Plaintiff had not identified a statute or constitutional provision that mandates any right or process with respect to disinterment of unknowns.

[10] The final section of plaintiff's response sets forth several new claims not raised in his complaint regarding the "Prioritization Memo." For the reasons set forth elsewhere and in defendants' Motion, plaintiff lacks standing to challenge this policy and it is not subject to

IV. Conclusion

For the reasons set forth above and in defendants' Motion, defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 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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review under the APA. Plaintiff cites no support for his claims that the policy violates the equal protection and due process clause of the constitution and defendants know of none.