IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**CIVIL ACTION NO. SA-12-CA-1002-FB**
	)	
AMERICAN BATTLE MONUMENTS COMMISSION, ET AL.,	)	
	)	
Defendants.	)	

ORDER CONCERNING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND FURTHER ORDERS OF THE COURT

Arthur H. "Bud" Kelder, like thousands of the Greatest Generation, answered his country's call to duty in World War II. He made the ultimate sacrifice of his life in a prisoner of war camp. Plaintiff Eakin, a relative and veteran himself, seeks to live up to the Soldier's Creed of "I will never leave a fellow comrade."[1] Mr. Eakin has been on his quest for justice for his relative for four years.

Notwithstanding giving his last full measure of devotion to this country, Private Kelder's government declines, on technical legal reasons as opposed to the spirit of the law, to give him a decent burial in a marked grave alongside others who died in service to the United States.

The Court nevertheless is required to follow the law. Moreover, the passage of sixty years may present insurmountable practical challenges to locate Private Kelder's remains among many others buried with him.

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[1] U.S. ARMY VALUES, http://www.Army.Mil/Values.com (last visited Aug. 5, 2013).

OVERVIEW

Before the Court is the Report and Recommendation of the United States Magistrate Judge. (Docket no. 30). No objections to the Report and Recommendation have been filed.[2] Also before the Court are plaintiff's motion to amend his complaint (docket no. 31), defendants' response (docket no. 32) in opposition thereto and plaintiff's reply (docket no. 33) to defendants' response. After careful consideration, the Court is of the opinion the Report and Recommendation should be accepted to the extent it is not modified by the filing of plaintiff's motion for leave to file an amended complaint. The Court is also of the opinion that plaintiff's motion for leave to amend his complaint should be granted subject to the rulings set forth below.

The matters discussed in the Report and Recommendation are Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (docket no. 18), Plaintiff's Motion for Declaratory Judgment, or in the Alternative, to Compel Production, and Plaintiff's Objection to the Administrative Record and Opposed Motion to Compel Completion of Administrative Record Dispositive (docket no. 15). The Report and Recommendation is considered in conjunction with plaintiff's motion to amend his complaint, defendants' response and plaintiff's reply, all of which were filed after the Report and Recommendation issued but before this Court had considered the Report.

BACKGROUND

Plaintiff, proceeding *pro se*, brings suit against defendants under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and the Missing Service Personnel Act ("MSPA"), 10 U.S.C. §§

[2] Any party who desires to object to a Magistrate's findings and recommendations must serve and file his written objections within ten days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). Service upon a party may be made by mailing a copy to the party's last known address or by electronic means. Fed. R. Civ. P. 5(b)(B), (D). Service by mail is complete upon mailing. Service by electronic means is complete upon transmission. Id.

1501-1509, and seeks declaratory relief under 28 U.S.C. § 2201 and mandamus relief under 28 U.S.C. § 1361. Federal question jurisdiction is invoked under 28 U.S.C. § 1331.

Plaintiff's suit concerns the remains of Arthur H. "Bud" Kelder, plaintiff's cousin once removed.[3] Mr. Kelder was an Army Private who died in 1942 as a prisoner of the Japanese while serving in the Pacific Theater during World War II. According to plaintiff's complaint, Private Kelder's remains were among those of fourteen servicemen originally interred in Grave 717 in a prisoner of war camp cemetery at Cabanataun, Nueva Ecija Province, Philippine Islands. Plaintiff states that, while the U.S. Army Grave Registration Service identified some of the remains recovered from Grave 717, Private Kelder's remains were not individually identified. Instead, they were determined to be non-recoverable in 1950, and were interred with others as "unknown" in Fort McKinley Military Cemetery near Manila.

Beginning in 2009, plaintiff sought to have defendants identify and determine the recoverability of Private Kelder's remains. Plaintiff alleges there is available dental and DNA evidence necessary to identify Private Kelder's remains conclusively, and that defendants have unlawfully withheld agency action to consider this new evidence and to fully and correctly account for the remains. Plaintiff's complaint alleges four causes of action: (1) a claim for failure to act by defendants regarding Private Kelder's remains in violation of the APA and the MSPA; (2) a claim for improper rule-making regarding the prioritization of recovering remains violation of the procedural requirements of the APA and contrary to the MSPA; and (3) a request for declaratory judgment identifying particular remains as those of Private Kelder based on the mandatory requirements of the MSPA; and (4) a request for

[3]Plaintiff is first cousins with Private Kelder's nephew, Douglas Kelder. Douglas Kelder and plaintiff both served in Vietnam.

mandamus relief based on the MSPA's requirements. Plaintiff's Motion for Declaratory Judgment, or, in the Alternative, to Compel Completion of the Administration Record asserts that there are numerous records missing from the administrative file that should be included in the record before the Court and he requests discovery to locate these records.

Defendants bring their motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. They argue the Court lacks jurisdiction under Rule 12(b)(1) either because plaintiff lacks standing to bring the suit or because his claims are outside the scope of judicial review allowed by the MSPA and the APA, and the other statutory grounds for relief raised, and thus are barred by the doctrine of sovereign immunity. Defendants also contend that plaintiff's complaint fails to state a claim upon which relief can be granted such that dismissal is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure. They also seek summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Because the Magistrate Judge recommends that defendants' motion be granted on Rule 12(b)(1) jurisdictional grounds, the Report does not address Rule 12(b)(6) or summary judgment issues. *See Stockman v. Federal Election Comm'n,* 138 F.3d 144, 151 (5th Cir. 1998) ("Jurisdiction is, of necessity, the first issue for an Article III court.").

When defendants file a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden to prove by a preponderance of the evidence that the Court has jurisdiction to hear his claims. *Id.* Such jurisdiction must affirmatively appear from the record. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 n.3 (2006) (discussing standing to bring suit).[4] "A federal court has no subject matter jurisdiction

[4] As discussed by the Magistrate Judge, plaintiff's standing to bring suit has been raised by defendants' motion, but was not be specifically addressed in the Report and Recommendation given the apparent lack of subject matter jurisdiction on the issues raised by plaintiff's "live" pleadings. Standing was addressed briefly by the Magistrate Judge, however, with regard to plaintiff's right to seek leave to amend his complaint.

over claims against the United States unless the government waives its sovereign immunity and consents to suit." *Rothe Development, Inc. v. United States Dep't of Def.,* 666 F.3d 336, 338 (5th Cir. 2011) (internal quotation omitted). Plaintiff primarily brings suit under the MSPA, although he also invokes the APA and seeks federal declaratory relief and mandamus relief under 28 U.S.C. §§ 1361 and 2201. The Magistrate Judge concludes that the Court does not have jurisdiction over plaintiff's claims on any of these grounds.

A. The MSPA

As discussed in the Report and Recommendation, the MSPA provides an exception to sovereign immunity, but it does so in very limited circumstances. The statute provides:

> (a) Right of review.–A person who is the primary next of kin (or the previously designated person) of a person who is the subject of a finding described in subsection (b) may obtain judicial review in a United States district court of that finding, but 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. Any such review shall be as provided in section 706 of Title 5.
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> (b) Findings for which judicial review may be sought.–Subsection (a) applies to the following findings:
>
> > (1) A finding by a board appointed under section 1504 or 1505 of this title that a missing person is dead.
> >
> > (2) 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.
>
> (c) Subsequent review.–Appeals from a decision of the district court shall be taken to the appropriate United States court of appeals and to the Supreme Court as provided by law.

15 U.S.C. § 1508. The Magistrate Judge found that plaintiff's suit does not fit within the limited review provided for by the statute. The Report explains:

> As Private Kelder's cousin, plaintiff is not "primary next of kin," as defined by the MSPA. *See* 10 U.S.C. § 1513(4) (incorporating by reference 10 U.S.C. § 1482(c)). [fn. 4: The parties state that, during administrative proceedings in this case, plaintiff held a power of attorney to represent Private Kelder's next of kin, but it expired on August 11, 2012, several months before plaintiff filed his suit. (Docket Entry 18, at 7; *see also* Docket Entry 27, at 7). The Court does not consider plaintiff's status as next of kin by power of attorney because plaintiff does not purport to represent the next of kin in this way in his complaint. (*See* Docket Entry 1)].

(R&R, docket no. 30, at 5 & n.4). Therefore, the Magistrate Judge continued:

> Even if plaintiff was the proper person to seek review, his complaint does not seek review of either of the two sorts of findings for which judicial review is permitted under the Act: (1) a finding that a missing person is dead; or (2) a finding that confirms that a missing person formerly declared dead is in fact dead. 10 U.S.C. § 1508(b). In this case, there is no question that Private kelder is dead. Plaintiff's suit seeks judicial review of matters related to defendants' failure to act on evidence that Private Kelder's remains may be identified and provided a proper burial.

Id. Accordingly, the Magistrate Judge concluded the MSPA does not provide the Court with jurisdiction to hear such claims.

B. The APA

The Magistrate Judge further determined the APA, 5 U.S.C. §§ 701-706, does not provide the Court with an alternative basis for jurisdiction over plaintiff's suit. The APA waives sovereign immunity to the extent a party "adversely affected . . . by the agency's action" seeks "relief other than money damages." *Rothe Development, Inc.,* 666 F.3d at 336 (quoting 5 U.S.C. § 702). The waiver is limited, however, only to those situations where no "other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." *Id.* This provision "prevents plaintiffs from exploiting the APA's [immunity] waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199, 2204-05 (2012).

As discussed in the Report and Recommendation, in this case there is another statute which places clear limitations on this suit as it is currently pleaded–the MSPA. The Magistrate Judge explained:

> That statute addresses the subject matter of the controversy in this case and it provides for judicial review only for specified persons and only for specified decisions, impliedly forbidding the review plaintiff seeks under the APA. *See* 10 U.S.C. §§ 1501(a)(1)(B), 1508. Moreover, there can be no doubt that Congress considered the APA's provisions in drafting the MSPA's limited right of review–Congress expressly refers to the APA in establishing the scope of that review. *See* 10 U.S.C. § 1508(a)(citing 5 U.S.C. § 706); *cf. Block v. North Dakota ex rel. Bd. of Univ. And Sch. Lands,* 461 U.S. 273, 286 n.22 (1983) ("§ 702 provides no authority to grant relief 'when Congress has dealt in particularly with a claim and [has] intended a specified remedy to be the exclusive remedy'") (quoting legislative history of APA)). As the Supreme Court has explained generally in discussing the APA, "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." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 349 (1984). Here, it appears that both the issues to be reviewed and the persons seeking that review are impliedly precluded. Accordingly, even if one assumes that plaintiff was "adversely affected" by defendants' actions within the meaning of the APA (a matter which defendants vigorously dispute), it appears that, as to the claims before the Court, the APA does not waive sovereign immunity.

(R&R, docket no. 30, at 6-7).

C. The Declaratory Judgment Act

The Magistrate Judge also found the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, likewise provides the Court with no independent basis for jurisdiction. The Act states that "in case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). As discussed in the Report:

> [T]he statute plainly indicates [that] relief is allowed only when the court has a "case of actual controversy" already "within its jurisdiction." The Act does not confer subject

> matter jurisdiction on a federal court where none otherwise exists. *Port Drum Co. v. Umphrey,* 852 F.2d 148, 149 (5th Cir. 1988).

(R&R, docket no. 30, at 7). "Thus," the Magistrate Judge concluded, "unless another basis for jurisdiction exists for plaintiff's suit, § 2201 cannot authorize relief." *Id.*

D. The Mandamus Act

The Mandamus Act states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. This statute waivers, for some purposes, the sovereign immunity of the United States. *McClain v. Panama Canal Comm'n,* 834 F.2d 452, 454 (5th Cir. 1987). The Magistrate Judge determined, however, the waiver does not apply in this case, at least not as it is currently pleaded.

Mandamus is an extraordinary remedy, available only when the plaintiff has a "clear and certain" right to relief. *Dunn-McCampbell Royalty Interests, Inc. v. National Park Serv.,* 112 F.3d 1283, 1288 (5th Cir. 1997); *Giddings v. Chandler,* 979 F.2d 1104, 1108 (5th Cir. 1992).

> 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 commended and so plainly prescribed as to be free from doubt."

Dunn-McCampbell Royalty Interest, Inc., 112 F.3d at 1288. In evaluating plaintiff's allegations under the Mandamus Act, the Magistrate Judge found that plaintiff has not established that any duty is owed to him. The Report explains:

> As noted above, [plaintiff] is Private Kelder's cousin. As defendants appear to concede, the MSPA places duties upon the Deputy Assistant Secretary of Defense with regard to identifying the remains of unaccounted-for members of the armed forces from World War II. (Docket Entry 18, at 12-14 (citing 10 U.S.C. §§ 1501, 1509)). But to the extent these duties are owed to private persons under the statute, they are owed to primary next

> of kin, immediate family members, or any other previously designated person of the person. *See, e.g.,* 10 U.S.C. § 1502(l). Plaintiff does not qualify as any of these. [fn. 5: Section 1501(d) indicates that the primary next of kin may designate another individual to act as primary next of kin under the MSPA. Plaintiff does not claim in his complaint to have been so designated in this case.]

(R&R, docket no. 30, at 8). The Magistrate Judge further addressed plaintiff's response to the motion to dismiss. Plaintiff argues the Court has authority to mandate that defendants comply with the provisions of Army Regulation 638-2 (Dec. 2000), which appears to require Army officials to "search for, recover, and identify eligible deceased personnel," using "all resources and capabilities immediately available" and to require the cooperation of "Department HQ and field commanders involved . . . to the fullest extent in providing information and help for recovery and identification of remains."[5] However, the Report notes, "even assuming that this regulation remains in effect, that it applies to remains such as those of Private Kelder, and that it establishes a ministerial duty devoid of discretion, plaintiff has not shown how any such duty would be owed specifically to him." (R&R, docket no. 30, at 9). In any event, the Report points out, plaintiff's complaint does not seek mandamus relief to enforce the terms of Regulation 638-2.[6]

E. Recommendations and Final Notes by the Magistrate Judge

For these reasons, the Magistrate Judge recommends that defendants' motion be granted in part and plaintiff's suit be dismissed without prejudice for lack of jurisdiction. The Magistrate Judge further

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[5] As discussed in the Report and Recommendation, plaintiff states that he originally petitioned the U.S. Army Human Resources Command ("HRC") for consideration of the new evidence under Regulation 638-2 and that the petition was perfected by submission of a power of attorney from the designated primary next of kin. However, according to plaintiff, HRC took it upon themselves to forward plaintiff's petition for action under 10 U.S.C. §§ 1501-1509. (R&R, docket no. 30, at 9 n.6).

[6] Plaintiff's mandamus cause of action does make reference to Executive Order 10057 and Public Law No. 80-368. As discussed by the Magistrate Judge, Public Law 80-368 was repealed in 1966 and the original Executive Order, while giving the Department of the Army the right to re-enter military cemeteries for exhumations and re-internments, did not place any specific duties upon the Army in this regard. (R&R, docket no. 30, at 9 n.7).

recommends that plaintiff be given the opportunity to amend his complaint to establish a basis for the Court's jurisdiction. In this regard, the Report explains:

> [A]s part of establishing the Court's jurisdiction, plaintiff must show his own standing. Plaintiff does not have standing to complain generally that defendants are violating the law. *Allen v. Wright,* 468 U.S. 737, 755 (1984). Asserting a "right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. *Id.* at 754. "[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin,* 422 U.S. 490, 499 (1975)). While a limited exception exists for a litigant seeking third party standing, the litigant must typically show that (1) he has suffered an "injury in fact" giving him a "sufficiently concrete interest" in the outcome of the issue, (2) he has a "close" relationship with the third party on whose behalf the right is asserted, and (3) there is a "hindrance" to the third party's ability to protect his own interests. *Powers v. Ohio,* 499 U.S. 400, 411 (1991).

(R&R, docket no. 30, at 10). Before making final recommendations, the Magistrate Judge noted the facts set out in plaintiff's response to defendants' motion seem to address at least the latter two of these requirements:

> Plaintiff is the Grandnephew of Private Kelder's Mother and Father. He is Private Kelder's first Cousin, once removed. Plaintiff and Douglas Kelder are Cousins. They are close in age and both are Vietnam veterans who are especially sensitive to the need to honor those who die in the service of our Country. Both were raised in the belief that the graves of their ancestors should be maintained and protected. Both share a desire that the remains of Private Kelder be identified and properly memorialized. Their interests and desires in this case are perfectly aligned.
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> Neither plaintiff nor Douglas Keldera are financially able to afford professional representation in this litigation with non-economic damages, even if such representation could be obtained, which is doubtful. Instead, both have worked cooperatively in pursuing the administrative claim, this litigation and other matters such as obtaining Private Kelder's military awards and decorations. Plaintiff and Douglas Kelder are in frequent contact via email and telephone and discussed prior to filing how to pursue this litigation. The most significant hindrance to direct participation by Douglas Kelder is that he is one-hundred percent disabled due to injuries suffered in military service and he requires frequent medical treatment which would prevent his active participation in litigation. Additionally Douglas Kelder lives in a remote area of Northern Wisconsin with limited internet service and without convenient access to a law library or a District Court. Since plaintiff had already exhausted all administrative remedies, plaintiff and

> Douglas Kelder agreed that plaintiff would pursue this litigation. Douglas Kelder's concurrence is indicated by the power of attorney he executed in favor of plaintiff for sue in pursuing the administrative claim and his cooperation in submission of his sworn affidavit attesting to his Father's record of dental treatment of Private Kelder.

Id. at 10.

In concluding, the Report recommends that defendant's Motion to Dismiss, or, in the Alternative for Summary Judgment (docket no. 18) be granted in part, and that plaintiff's case be dismissed without prejudice. The Report further recommends that plaintiff's Motion for Declaratory Judgment, or, in the Alternative, to Compel Production (docket no. 24) and Plaintiff's Objection to the Administrative Record and Opposed Motion to Compel Completion of Administrative Record Dispositive (docket no. 15) be denied. Finally, the Report recommends plaintiff be given twenty-one days from the date of any order of dismissal to amend his complaint to allege a new cause of action "which plaintiff has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11).

F. Plaintiff's Motion for Leave to Amend his Complaint

As noted above, although this Court had not yet acted on the Magistrate Judge's recommendations, on June 26, 2011, plaintiff sought leave to amend his complaint. Defendants did not file an objection to the recommendation that plaintiff be allowed to amend his complaint. Defendants did, however, file a response in opposition to the motion for leave arguing that the proposed amendment is futile and subject to dismissal. Plaintiff filed a discretionary reply contending his amended complaint clarifies that he has added separate, independent causes of action pursuant to *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), and the Mandamus Act which he implies he "has standing to bring and upon which the Court has subject matter jurisdiction to act" in accordance with the directive contained in the Report and Recommendation. *See* (R&R, docket no. 30, at 11).

STANDARDS OF REVIEW

Where no objections to the Report and Recommendation were filed, the Court need not conduct a de novo review. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). To the extent the recommendations are not modified by the filing of plaintiff's motion for leave to amend his complaint, the Court has reviewed the Report and Recommendation and finds its reasoning to be neither clearly erroneous nor contrary to law. *United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir.), *cert. denied,* 492 U.S. 918 (1989).

Leave to amend shall be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). If a complaint as amended is futile and therefore subject to dismissal, leave to amend need not be granted. *Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 546 (5th Cir. 1980), *cert. denied,* 454 U.S. 927 (1981). Once the moving party has established the reason why the amendment is required, the burden shifts to the party opposing the amendment to show that justice requires denial of the amendment. *Shipner v. Eastern Airline, Inc.,* 868 F.3d 401, 406-07 (5th Cir. 1989).

DISCUSSION

A. Proposed Amendment Under the MSPA

Plaintiff seeks to amend his complaint to restate the same claim he brought in his original pleadings under the MSPA, although he now contends he is a "previously designated person" as defined by the Act. Even if this is true, and plaintiff has standing to bring suit as a previously designated person, the proposed amendment is futile and subject to dismissal because plaintiff does not seek judicial review of a finding which is covered by the Act.

As discussed in the Report and Recommendation, there are only two findings for which judicial review is permitted under the MSPA: a finding that "a missing person is dead" or a finding which "confirms that a missing person formerly declared dead is in fact dead." (R&R, docket no. 30, at 5) (quoting 10 U.S.C. § 1508). "In this case, there is no question that Private Kelder is dead" or that "plaintiff's suit seeks judicial review of matters related to defendants' failure to act on evidence that Private Kelder's remains may be identified and provided a proper burial." *Id.* Therefore, presuming plaintiff is the proper person to seek review, his suit does not fit within the limited review provided for by the MSPA. *Id.* Accordingly, plaintiff's proposed amended MSPA claim continues to fail to state "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request to amend his complaint shall be denied.

B. Proposed Amendment under the APA

Plaintiff also seeks to amend his complaint to restate the same claim he brought in his original pleadings under the APA, although he now implies that he was "adversely affected" for purposes of the Act. Even if this is true, and plaintiff has standing to bring suit as an adversely affected person, the proposed amendment is futile and subject to dismissal because the APA does not provide the Court with jurisdiction to hear his claim. As set forth in relevant part in the Report and Recommendation, "[t]he waiver is limited . . . to those situations where no other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." (R&R, docket no. 30, at 6-7). Here, "Congress considered the APA's provisions in drafting the MSPA's limited right of review" and "the MSPA . . . provides for judicial review only for specified persons and only for specified decisions, impliedly forbidding the review plaintiff seeks under the APA." (R&R, docket no. 30, at 6-7) (citing 10 U.S.C. §§

1501(a)(1)(B), 1508; 10 U.S.C. § 1508(a); 5 U.S.C. § 706). Therefore, even presuming plaintiff is the proper person to seek review, his suit does not fit within the limited review provided for by the APA. *Id.* Accordingly, plaintiff's proposed amended APA claim continues to fail to state "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request to amend his complaint to include a claim under the APA shall be denied.

C. Claims Brought under the Declaratory Judgment Act and Mandamus Act

As discussed in the Report and Recommendation, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides the Court with no independent basis for jurisdiction. (R&R, docket no. 30, at 7). Because plaintiff's proposed amendments fail to provide a basis for jurisdiction under the MSPA and ADA, any associated claims under § 2201 cannot authorize relief. The same is true of plaintiff's current requests for relief under the Mandamus Act. *Id.* at 7-8. To this extent, plaintiff's request to amend his complaint to seek declaratory and mandamus relief based on the APA and the MSPA shall be denied.

D. Proposed Amendment Under *Bivens*

Plaintiff also seeks to amend his complaint to allege a separate and independent cause of action under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). In *Bivens*, the Supreme Court recognized "an implied right of action, derived directly from the Constitution itself," for due process violations against federal agents for duties owed to private persons. *See Stone v. Reno,* 119 F.3d 1 (table decision), No. 96-40015, 1997 WL 367680, at *1 (5th Cir. June 10, 1997) (explaining that *Bivens* permits suits for constitutional infractions against federal officials); *Jackson v. Hernandez,* No. 12-50368, 2013 WL 3365135, at *1 (5th Cir. July 5, 2013) (explaining that complaint alleging due process violations against federal prison guards is properly brought under *Bivens*).

Defendants argue in response to plaintiff's motion that "he has failed to allege any facts to support Article III standing under any construction of this claim." (Docket no. 32, at 4). In the context of federal program administration, the constitutional right to due process:

> is not implicated unless the decision goes beyond mere error to an intentional or reckless disregard of the constitutional rights of the person against whom the administrative decision is made. Mere failure to make the "correct" administrative decision does not rise to the level of a constitutional violation.

Williamson v. United States Dep't of Agric., 815 F.2d 368, 381 (5th Cir. 1987) (quoting *Bass v. United States Dep't of Agric.,* 737 F.2d 1408, 1415 (5th Cir. 1984)). Just as the officials in *Williamson* and *Bass* were charged with administering Department of Agriculture programs, federal defense officials are charged with administering programs for identifying the remains of deceased military personnel. In his proposed amendment, plaintiff alleges that he has a right to these remains without deprivation of due process and that defense officials are intentionally depriving him of this right. An argument can also be made that plaintiff's alleged designation as primary next of kin qualifies him as under the exception which exists for a litigant seeking third party standing because he alleges he suffered a due process injury in fact giving him a sufficiently concrete interest in the disposition of Private Kelder's remains, he has a close relationship with his cousin on whose behalf the *Bivens* claim is asserted, and there is a hindrance to his cousin's ability to protect his own interests. (R&R, docket no. 30, at 9-10) (discussing *Powers*, 499 U.S. at 411). For purposes of these limited proceedings, the Court is satisfied that plaintiff's amended claim states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request to amend his complaint to include a claim for violation of his due process rights under *Bivens* shall be granted.

E. Leave to Amend to Allege a Cause of Action Under the Mandamus Act

Plaintiff also seeks to amend his complaint to allege a separate and independent cause of action under the Mandamus Act. Plaintiff argues that, now that he has been designated as primary next of kin, he has rights under Army regulations and, therefore, he can proceed under the Mandamus Act. Defendants do not address this argument in response to plaintiff's motion for leave.

The Magistrate Judge found that plaintiff's claim under the Mandamus Act failed because plaintiff did not cite to any regulation which established a non-discretionary duty to act as it applied to plaintiff directly. (R&R, docket no. 30, at 8-9). In his proposed amendment, plaintiff seeks mandamus relief to enforce the terms of Army Regulation 638-2. As discussed in the Report, this regulation requires Army officials to "search for, recover and identify eligible deceased personnel," using "all resources and capabilities immediately available" with the cooperation of department headquarters and field commanders to the fullest extent in providing information and help for recovery and identification of remains." *Id.* In the amendment, plaintiff alleges this duty is owed specifically to him because he has been designated primary next of kin. *See* 10 U.S.C. § 1502(l). For purposes of leave to amend, plaintiff has sufficiently alleged that the Deputy Assistant Secretary of Defense has a duty with regard to identifying the remains of unaccounted-for members of the armed forces from World War II and that, to the extent these duties are owed to private persons, he qualifies as acting primary next of kin. Accordingly, plaintiff's mandamus claim as amended states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request for leave to amend his complaint to replead his claim under the Mandamus Act shall be granted.

F. The Declaratory Judgment Act

Although the Declaratory Judgment Act, 28 U.S.C. §§ 1201-2202, provides the Court with no independent basis for jurisdiction, plaintiff's amended complaint provides a basis for jurisdiction under *Bivens* and the Mandamus Act. Accordingly, plaintiff's amended claim under the Declaratory Judgment Act states "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). To this extent, plaintiff's request to amend his complaint to amend his claim under the Declaratory Judgment Act shall be granted.

G. Summary

The basis of some of plaintiff's amended claims remain the same as in his original complaint: the Administrative Procedure Act ("APA") and Missing Service Personnel Act ("MSPA"). These amendments would be futile and are subject to dismissal because the MSPA is limited to judicial review of findings that a serviceperson is deceased and the APA is limited by the restrictions of the MSPA. (R&R, docket no. 30, at 4-9). However, it appears to this Court that plaintiff may possibly recover under *Bivens* and the Mandamus Act. At this juncture, it is not clear that plaintiff's *Bivens* and mandamus claims, and his resulting request for relief under the Declaratory Judgment Act, are futile and subject to dismissal. Accordingly, defendants have not shown justice requires denial of the amendment to the extent plaintiff seeks to allege "a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act." (R&R, docket no. 30, at 11). The motion to amend shall therefore be granted to the extent that plaintiff shall be directed to file an amended complaint which eliminates the claims brought under the APA and MSPA in his original pleadings, and any actions for declaratory or mandamus relief based thereupon. Plaintiff shall further be directed to

file an amended complaint alleging his *Bivens* and mandamus causes of actions, and his related declaratory judgment cause of action, in accordance with the Order.

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 30) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that:

* Plaintiff's Objections to the Administrative Record and Opposed Motion to Compel Completion of Administrative Record Dispositive (docket no. 15) and Plaintiff's Alternative Motion to Compel Production (contained within docket no. 24) are DENIED; and

* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (docket no. 18) is GRANTED in PART and DISMISSED as MOOT in PART. The Motion is GRANTED in PART such that the causes of action set forth in plaintiff's original pleadings–*i.e.,* his Complaint for Declaratory Judgment and Injunctive Relief (docket no. 1) and Plaintiff's Motion for Declaratory Judgment (contained within docket no. 24)–are DISMISSED for lack of standing and subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants' alternative requests for relief under Rule 12(b)(6) (failure to state a claim) and Rule 56 (summary judgment) are Dismissed as Moot because the motion is based on plaintiff's original pleadings and the Court deems it appropriate to grant plaintiff leave to file an amended complaint which alters the substantive relief requested.

IT IS FURTHER ORDERED that plaintiff's motion to amend his complaint (docket no. 31) is GRANTED, although the Court declines to file the proposed amended complaint as part of the record (because it contains previously pleaded causes of action which the Court has found are subject to dismissal for the reasons stated by the Magistrate Judge in the Report and Recommendation, which has now been accepted by this Court). Plaintiff is GRANTED leave to file, **within sixty (60) days of the date of this Order,** an amended complaint which eliminates previously pleaded causes of action found to be subject to dismissal in the Report and Recommendation (docket no. 30) and which sets forth plaintiff's allegations against the federal defendants for due process violations under *Bivens*, for violations of the Mandamus Act, and plaintiff's resulting claims brought under the Declaratory

Judgment Act. This does not preclude defendants from filing a motion to dismiss and/or for summary judgment based on the amended complaint, if they deem it necessary.

IT IS FINALLY ORDERED that this case continues to be referred to the Magistrate Judge for further pretrial proceedings.

It is so ORDERED.

SIGNED this 5th day of August, 2013.

FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE