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 PLAINTIFF'S FIRST AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Preliminary Statement

As the District Court noted in its previous Order in this case, PVT Arthur H. Kelder made the ultimate sacrifice for his country, perishing in Cabanatuan Prison Camp, Philippines in 1942. Order Concerning Report and Recommendation of the United States Magistrate Judge and Further Orders of the Court ("Doc. 34") at 1. Contemporaneous records indicate that he was buried in a common grave with thirteen others who died the same day. Declaration of Cynthia A. Chambers ("Chambers Decl.") at ¶ 3, Exh. A to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Doc. 18"). A grave number was not contemporaneously assigned, but was assigned later based on recollection of a survivor. *Id.*, citing Administrative Record ("AR") at 156. As Dr. Chambers writes:

> The burials at Cabanatuan were hampered by a number of adverse conditions, including the weakened condition of the surviving prisoners who made up the burial details and the wet conditions in the Philippines, coupled with a lack of drainage in the area where the prisoners were

> buried (Record at 12). These conditions contributed to a situation in which the remains of the deceased persons buried in the common graves could become intermixed as they decomposed in close proximity to each other and that may have contributed to a finding, in 1951, that the remains of Cabanatuan deceased prisoners had become 'jumbled beyond belief.' (Record at 14).

Id. ¶ 5.

After the war, remains of some 2,763 prisoners of war who perished were exhumed from the camp cemetery. However, records have not been found to specify the process used for disinterment of the remains. *Id.* ¶ 7. Dr. Chambers writes:

> Accordingly, it is unknown whether the group remains from marked grave locations, such as the remains from what was thought to be grave number 717 [thought to contain PVT Kelder], were kept together. Given the lack of documents produced during the disinterment of remains from Cabanatuan, there also is a lack of information specifying the process for finding the various grave locations, as well as what was done to ensure that group remains buried in the group grave sites weren't mixed together with each other or with remains from other nearby grave locations (Record at 3, 15, 152- 153).

Id.

Following disinterment, over an approximately five year period, numerous attempts were made to identify the remains. This process resulted in several disinterments and reinterments. *Id.* ¶¶ 8-17. In 1949, field staff proposed a group identification be approved for remains associated with grave location 717, which would have included PVT Kelder. *Id.* ¶ 18. However, Memorial Division Headquarters did not approve this identification, stating:

> After a careful review of this case, it has been determined that the dental and physical evidence presented is not sufficiently conclusive to prove the individual or to substantiate the group recommendation. The association of these decedents with these Unknown remains is based upon information contained in the Cabanatuan POW Camp Death Report. Experience with this report has proved it to be a valuable aid for the association of decedents with Unknown remains. However, in repeated instances it has

> been shown that the report does not constitute substantive proof within itself. Therefore, it is subject to qualifying or substantiating comparison of dental and physical data.

Id. ¶ 20.

On January 11, 1950, a board of officers at the Army Graves Registration Service (AGRS) Headquarters in the Philippines determined that the remains of the individuals associated with Cabanatuan Prison Camp grave location 717 should be declared non-recoverable. On January 26, 1950, a board of officers approved this recommendation of non-recoverability. *Id.* ¶¶ 20-21. Finally, on February 13, 1950, based on the proceedings and recommendations of an AGRS Field Board of Review in the Philippines, Lieutenant Colonel T.H. Metz, US ARMY Quartermaster Corps, specifically approved the Field Board of Review's finding that the remains of PVT Kelder were non-recoverable. *Id.* ¶ 22.

However, identification efforts continued. AGRS tasked two subject matter experts with reviewing AGRS' identification efforts in the Phillipines. In the course of that review, one expert, Dr. Mildred Trotter, reported that the remains were "jumbled beyond belief," "eroded much beyond a state that [could] be illustrated on a black-out chart," and in "such a state of deterioration that evidence on which identification depends had been largely obliterated." *Id.* ¶ 27. Dr. Trotter and the other expert, LTC Abel, deemed the AGRS' efforts a failure and recommended that they cease. The Memorial Division decided to end further efforts to identify remains from Cabanatuan. *Id.* ¶ 28. PVT Kelder's file was audited in 1951, but no change was made to the determination of non-recoverability. *Id.* ¶ 30. Finally, on December 31, 1951, the mission of AGRS to identify war dead terminated, in accordance with the deadline set by Congress. 61 Stat.

779 (1947). PVT Kelder's remains, along with 3,785 others in the Philippines and 4,740 around the world, were buried as unknowns in the Memorial Cemeteries then being established overseas. 61 Stat. 779 (1947).

Plaintiff believes that he has determined which grave contains the remains of PVT Kelder. Defendants[1] have considered the evidence and arguments submitted to them by plaintiff, and conducted a historical and scientific review of the evidence concerning the Cabanatuan burials in general and PVT Kelder in particular. Supp. AR at 2; Chambers Decl. ¶¶ 34, 42-46 . Defendants disagree with plaintiff as to the strength and meaning of the evidence presented by plaintiff, and with his contrary reading of the defendants' records. Id.; First Amended Complaint ("Doc. 39") ¶ 145. Defendants' own review does not support disinterment of the remains, because defendants have assessed that there is not the "high degree of certainty" that plaintiff claims, that the remains are those, or solely those, of PVT Kelder.[2] *Id* ¶ 45-46; Supp. Rec. 1-2. Defendants have explained their position to plaintiff. Doc. 39 ¶ 145. Plaintiff disagrees, however, and seeks relief in this Court.

Among other relief, plaintiff seeks a declaration that families have an "absolute right" to the remains of their family members. There can be, of course, no absolute right to the identification and return of remains. Some, lost at sea or elsewhere, will never be recovered. Others' whereabouts may simply be lost to time, geopolitical circumstances or other issues beyond defendants' control. Still, as plaintiff points out, it is true that

[1] The various defendants' relevant responsibilities are set forth in Doc. 18, fn. 2-4.

[2] On January 30, 2013, the recommendation of the Joint POW/MIA Accounting Command (JPAC), which did not support disinterment, was forwarded to the Deputy Assistant Secretary of Defense for POW/Missing Personnel Office (DPMO) for action. No final decision has been made on whether to pursue the disinterment that plaintiff seeks. Supp. AR at 2.

today, with enough resources and effort, many of the unknowns of World War II, whose remains were recovered and interred, could be identified with the help of DNA testing.[3] It is also true, as he states, that such a process might reveal prior misidentifications that would impact far more families across the country than just those of the current unknowns. However, it is not true that plaintiff speaks for the all families, as he purports to do in his complaint, or that they all share his desire to disinter loved ones, whether interred as known or unknown. Defendants' experience and legal obligation in working with these families counsels otherwise.

For cases like PVT Kelder's, whose fate is known and whose remains are buried in Memorial Cemeteries, the issue of disinterment is complex. The mission of "bringing them home," which may be one family's wish, must be balanced with the age-old belief in the sanctity of the grave, a belief enshrined in the common law, which holds that, once buried, custody of remains passes from the family to the state. A quest such as plaintiff's must be balanced against the wishes of other families whose loved ones or own lives may be disturbed by disinterment of long-settled remains. In addition, in an environment without limitless resources, plaintiff's interests must be balanced against those of families whose loved ones remains have not been interred, and in some cases, whose fate is

[3] DNA is not the panacea that plaintiff implies, however. JPAC's success rate in *obtaining* DNA from WWII remains is approximately 87%, but that rate is higher based on the fact that selection of candidates for disinterment takes into consideration the likelihood of success in using this tool, based on considerations such as contamination, deterioration, and so forth. In addition, making an identification through DNA depends on the availability of familial samples, which may be beyond the control of the government to obtain. No identifications have been made solely on the basis on DNA results.

unknown. As established by Congress, defendants' mission serves the larger mission, rather than any individual family.[4]

Accordingly, to protect the sanctity of the grave and the interests of other families, as well as to prioritize resources, defendants have adopted a policy that requires that there must be a high probability of successful identification before a disinterment occurs. *See* "Disinterment Policy for the Purpose of Identification" Supp. AR at 003-004 ("Slocombe Memo"). Defendants have determined that PVT Kelder's case does not meet this standard. Plaintiff disputes this finding. See Doc. 39 ¶ 145 ("Defendant Webb went on to further itemize specific reasons the case should not be further investigated. All of these reasons for denial of further investigation were without basis in fact."); Doc. 39 ¶ 147 (conclusion of Scientific Director of Central Identification Laboratory that "No definitive individual associations could be established" with respect to PVT Kelder was "without basis in fact.").

Defendants do not dispute the sincerity of plaintiff's quest to identify his cousin's remains. However, for the reasons set forth below and in defendants' prior pleadings, plaintiff's disagreement with the expert agency on the interpretation of facts and policy is not a matter for this Court, and the relief he seeks is not available in this action. As this Court previously held, the Missing Service Personnel Act (MSPA), 10 U.S.C. §§ 1501, *et seq.*, governs the controversy here, as that statute is the sole legislative authority for defendants' accounting mission with respect to WWII remains. As this Court held,

[4] *See* Statement of Susan Davis, Subcommittee Chairwoman, Subcommittee on Military Personnel, Committee on House Armed Services, April 2, 2009, 209 WL 908504 ("The subcommittee remains dedicated to the full accounting of all American Prisoners of War and those Missing in Action; we owe it to their families, but most importantly, we owe it to the men and women currently serving in uniform.").

Congress precluded judicial review over such matters in MSPA. That holding is equally applicable to plaintiff's claims here. Moreover, Congress created no non-discretionary duty to identify remains that would support mandamus jurisdiction, and there is no entitlement to identification of remains for purposes of the Due Process Clause. For these reasons and others, 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.

I. Procedural History

Plaintiff filed this action on October 18, 2012. Plaintiff's first complaint sought relief under the MSPA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 and the Mandamus Act, 28 U.S.C. § 1361. Defendants moved to dismiss, or in the alternative, for summary judgment, based, among other things, on plaintiff's lack of standing, and this Court's lack of jurisdiction under the APA because 1) the MSPA precludes review and therefore the APA does not provide a waiver of sovereign immunity, 5 U.S.C. § 701(a)(1); 2) defendants' accounting mission is committed to agency discretion by law, precluding APA review under 5 U.S.C. § 701(a)(2); and 3) that, in the absence of final agency action, jurisdiction was lacking under 5 U.S.C. § 704. Doc. 18.

This Court recommended that the case be dismissed for lack of subject matter jurisdiction, holding that the plaintiff's claims were precluded from review under the APA because the MSPA "addresses the subject matter of the controversy in this case," and it precludes the review plaintiff sought. Report and Recommendations of the United

States Magistrate Judge ("Doc. 30") at 6. The Court, however, recommended that plaintiff be allowed to amend his complaint. *Id.* at 11.

Before the District Court acted on this Court's Report, plaintiff filed a motion for leave to file his first amended complaint, attaching a complaint. That complaint contained new causes of action, including one under a *Bivens* theory. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Defendants objected to the proposed complaint, arguing that amendment was futile as it did not remedy the fatal jurisdictional defect.

The District Court addressed both this Court's Report and the defendants' opposition to the motion for leave to amend. The Court adopted this Court's recommendations and dismissed the complaint, holding that judicial review was precluded by the MSPA and, accordingly, no review was available under the APA. Doc. 34 at 5-7. However, the Court granted plaintiff leave to "file an amended complaint alleging his *Bivens* and mandamus causes of actions, and his related declaratory judgment cause of action." *Id.* at 18.

II. Plaintiff's First Amended Complaint

Plaintiff's First Amended Complaint ("Doc. 39") differs from the complaint he sought leave to file and that was the subject of the District Court's prior Order. He again seeks relief under the Declaratory Judgment Act and the Mandamus Act, as well as injunctive relief on a due process theory. Plaintiff does not seek relief against individual defendants under a *Bivens* theory. In Counts 1 and 3, Plaintiff seeks a declaratory judgment that 1) family members of missing service personnel have a "right to possess

such remains for burial as they direct," (Count 1, Doc. 39 ¶ 126); and 2) that the remains known as X-816 are those of Arthur H. Kelder (Count 3, Doc. 39 ¶ 141).

Plaintiff also seeks mandamus relief. Count 2, Doc. 39 ¶ 127-136. Although Count 2 does not clearly state the mandamus relief requested, plaintiff's Prayer for Relief contains the following requests which are in the nature of mandamus relief:

> c. An order, that Defendants shall promptly act to consider new evidence of the identity of unidentified remains when such evidence becomes available from any source;
> d. An order, that Defendants shall promptly act to identify the remains of all deceased Servicemembers whose remains were determined to be non-recoverable when advances in forensic technology provide reasonable belief that such remains might be identified using technology not previously available;
> e. An order, that Defendants shall promptly disinter for identification all unidentified remains upon a showing of a probability of their identification;
> f. An order, holding that the human remains designated as X-816 . . . are those of Arthur H. Kelder and all U.S. Government records, markers and actions shall reflect such identity.

Doc. 39 ¶ VI, c-f.

Lastly, in Count 4, plaintiff seeks "injunctive relief declaring their rights to due process in seeking the return of family members who dies in defense of the United States. These rights include clear, unambiguous, standards for disinterment, identification, appeal and reasonable limits on the time to perform each . . . ."

III. Statutory Scheme

A. Missing Service Personnel Act

As explained in defendants' first Motion to Dismiss (Doc. 18), the Missing Service Personnel Act ("MSPA"), 10 U.S.C. §§ 1501 *et seq.*, governs plaintiff's claims. The Act was enacted to "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 bulk of the Act deals with post-enactment cases -- establishing a statutory regime for "covered persons," defined, in Section 1501(c), as "any member of the armed forces on active duty – (A) who becomes involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and (B) whose status is undetermined or who is unaccounted for."[5]

Beginning in Section 1502, the Act sets forth the requirements that apply when a covered person becomes missing and which apply until such time as "the person become[s] accounted for or otherwise [is] determined to be in a status other than missing." 10 U.S.C. § 1501(3). Section 1502 provides for the initial assessment and recommendation by a field commander upon receipt of information that a person may be missing. Upon receipt from a commander of a recommendation that a person be placed in a missing status (pursuant to Section 1502), Section 1503 requires the Secretary to appoint a board of inquiry within 10 days to, *inter alia*, recommend that the person be placed in a missing status, to have deserted, to be AWOL, or to be dead. Section 1504 sets forth procedures for a subsequent board of inquiry which applies where "information that may result in a change of status" of a covered person is received within one year of the initial report under Section 1502. Finally, Section 1505 provides that the Secretary may conduct further reviews into the status of "any person determined by the Secretary under section 1504 to be in a missing status" "upon receipt of information that may result in a change of status of the person." 10 U.S.C. §§ 1505(a) and (b).

[5] Section 1501(c) also sets forth when civilians and contractors may be "covered persons;" these provisions have no relevance here.

Sections 1503-1505 each set out detailed procedures for the boards of inquiries, including provisions for the appointment of missing persons' counsels and for participation of the Primary Next-of-Kin (PNOK) and other family members. As Section 1501(e) makes clear, and this Court has previously found, these procedures do not apply to PVT Kelder's case because PVT Kelder is not in a missing status.

1. Program to resolve pre-enactment cases

The provisions of the statute applicable to PVT Kelder were enacted in 2009 as part of the National Defense Authorization Act of 2010. In relevant part, the 2009 Amendments created a "Program to resolve pre-enactment missing person cases" and added, for the first time, all World War II unaccounted for service members to the statutory mandate. Pub.L. 111-84, § 541, 123 Stat. 2190 (2009). The new Section 1509(a) set forth that the "Secretary of Defense shall implement a comprehensive, coordinated, integrated, and fully resourced program to account for" the "unaccounted for" from nearly all of the United States' conflicts back to World War II.[6]

Section 1509(b) states that the program shall be implemented within the Department of Defense "POW/MIA accounting community," which is further defined as including, of relevance here, DPMO and JPAC. The statutorily-defined "community" does not include family members or other non-governmental groups. Indeed, apart from the status reviews described in Section 1509(e), which this Court previously found inapplicable to PVT Kelder, the Section has few mandates. Only one provision sets forth

[6] 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). However, this was not part of Section 1509.

an obligation to family members: Section 1509(d) requires a personnel file to be established for each person covered by the program under certain conditions, and requires that such files be made available to family members as set forth in Section 1506.

In stark contrast to sections 1502-1505 and 1509(e), then, which deal with those in a missing status and which clearly delineate the rights due family members, the accounting program applicable to PVT Kelder contains no statutory requirements (other than the maintenance of a file) that place duties on defendants *vis a vis* family members, or that provide for benefits to family members of the unaccounted for. In the governing statute, Congress chose not to provide plaintiff with the types of procedures for disinterment and identification that he now seeks, instead vesting complete discretion in the DoD with respect to its accounting program.

2. Judicial Review

As this Court and the District Court held, Congress implicitly prohibited judicial review under the MSPA, except in the limited cases of death determinations explicitly specified in Section 1508. Doc. 34 at 5-7. Nothing in the construction or legislative history of the Act suggests Congress contemplated waiving sovereign immunity to allow review of other provisions, under the APA or otherwise.

3. Policy on Disinterment

As discussed above, 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. AR 003-004. That policy provides that a "decision to disinter must be based on sufficient

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

The policy further provides that the Central Identification Laboratory – Hawaii (now JPAC) will evaluate and prioritize cases that it believes meets this policy's criteria, and "will also consider cases brought to its attention by . . . families of servicemen missing in action." *Id.* at 3. On January 30, 2013, JPAC concluded its review of PVT Kelder's case and determined that the case did not meet the this criteria. Supp. AR at 2.

4. Authority to Disinter

The operative statute governing defendant American Battle Monuments Commission (AMBC) is 36 U.S.C. § 2104. That law provides that 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(4). The Secretary of the Army or designee is the authority for disinterment from cemeteries operated by the American Battle Monument Commission. Executive Order ("EO") 6614, February 26, 1934, and EO 10057, May 14, 1949, as amended by EO 10087, December 3, 1949. The AMBC has no authority to disinter remains.

B. Laws, Regulations and Policies Cited in Plaintiff's Complaint

In addition to the MSPA, which defendants contend governs this dispute, plaintiff lists a number of laws, regulations and policies that he claims impose non-discretionary duties on defendants to family members to identify missing service members. See Doc. 39 at ¶¶ 40, 42, 125, 130. As explained below, none of these create the type of non-discretionary duty to family members, or create a right of family members, that would be required for the relief plaintiff seeks.

1. 10 U.S.C. § 1481

This statute, entitled "Recovery, care, and disposition of remains: decedents covered," simply provides that "[t]he Secretary concerned may provide for the recovery, care, and disposition of the remains" of the persons enumerated therein. It is not mandatory, and does not provide for disinterment of an unknown.

2. DoD Directive Number 1300.22, May 25, 2011,
Subject: Mortuary Affairs Policy

This document is a high-level policy document that reflects no intent to create rights or duties towards the public. Plaintiff cites paragraph 4(a), which states: "It is DoD policy that . . . [t]he remains of deceased DoD-affiliated or covered persons, consistent with applicable law and regulation, who die in military operations . . . shall be recovered, identified, and returned to families as expeditiously as possible . . . ." Doc. 39 ¶ 132a. On its face this paragraph states noncontroversial policy; nothing in the document creates enforceable standards, procedures or specific duties to plaintiff with respect to this policy.

3. DoD Directive Number 2310.07E November 10, 2003
Subject: Personnel Accounting – Losses Due to Hostile Acts

By its terms this Directive establishes policy and assigns responsibilities within DoD and the Services for personnel accounting. Plaintiff cites to paragraph 4.1, to the effect that "It is DoD policy that … accounting for personnel lost as a result of hostile acts is of the highest national priority." Doc. 39 ¶ 132b. Neither this statement nor other provisions of the directive contain any rights or duties related to plaintiff, however.

4. DoD Instruction Number 1300.18 January 8, 2008
Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies and Procedures

This instruction encompasses, among other things, procedures for recording, notifying and assisting next-of-kin with respect to casualties and missing personnel. This document primarily describes the duties of Casualty Assistance Officers in dealing with family members in the aftermath of a death, injury or illness, or when a service member is missing. It does not address requests for disinterment of an unknown.

5. (CJCS) Joint Publication 4-06, Mortuary Affairs 12 October 2011, ¶ 2

Plaintiff cites Chapter 1, paragraph 2d which states that "[e]very reasonable effort will be made to identify human remains and fully account for unrecovered human remains of US military personnel . . . who die in military operations." Plaintiff also cites to Chapter 2, which requires geographic combatant commanders to conduct "tentative identification." However, this document on its face "provides joint doctrine for operations," to guide mortuary operations in ongoing and future conflicts or other operations. Chapter 2, which plaintiff relies on for its requirement that combatant commanders conduct tentative identifications, is entitled "Mortuary Affairs Support in a Theater of Operations." Manila American Cemetery is not a theater of operations. This document places no responsibly on DPMO or JPAC with respect to their accounting mission for past conflicts.

6. U.S. Army Regulation 638-2

Plaintiff cites the following paragraphs of AR 638-2 as a basis for defendants' "non-discretionary obligation:" ¶¶ 2-17, 8-1, 8-4, 8-9, 8-10. Paragraph 2-17 sets forth the mortuary benefits for which decedents are eligible. These benefits include "Recovery," which states that the "Army will search for, recover, segregate, and identify remains of eligible decedents." Again, this provision applies to ongoing procedures; it

does not apply to already recovered and interred remains deemed non-identifiable.

Chapter 8 provisions do provide for certain activities of JPAC (formerly CILHI, see ¶ 8-3). For example, paragraph 8-3 provides that the Army geographic commander or commander of [JPAC] will "search for, recover, and identify eligible deceased personnel." Paragraph 8-10 provides for the use of mitochondrial DNA in identifications in certain instances. However, these provisions on their face apply to the search, recovery and identification of remains in the field; there would be no sense in requiring a geographic commander to search for remains already recovered, found to be un-identifiable and interred in a Memorial cemetery.

Paragraph 8-16 provides for the reconsideration of determinations of non-recoverability, which would seem facially to apply to plaintiff's request. However, as plaintiff was informed in 2011 by the Army office responsible for implementing the pertinent provisions of this Army regulation, because of the 2009 Amendments to the MSPA, paragraph 8-16 was no longer being implemented with regard to reconsideration of non-recoverability determinations. AR at 227-28.

Moreover, even were the provision still applicable, the regulation does not mandate the convening of a board of officers to consider a request from a Person Authorized to Direct Disposition (PADD). Rather, such a board "is established to assist the CDR, PERSCOM" in such cases. On its face, this regulation does not entitle a PADD to such a board. In a case like plaintiff's, where the relevant expertise and responsibilities are with JPAC, such a board of general officers would serve no purpose. In any event, nothing in AR 638-2 purports to establish a mandatory duty or right to disinter remains for identification.

7. U.S. Department of the Army Pamphlet 638-2

Plaintiff does not cite to any particular provision in this 140-page document. The stated purpose of this document is to "provide general guidance and procedures applicable to disposition of remains and disposition of personal effects actions," procedures for creating individual deceased personnel files, procedures for the care and disposition of remains (including escorts, travel orders, claims adjudication, etc.) and guidance and procedures for the disposition of personal effects. It does not address when to disinter remains for purposes of identification. Moreover, it does not, by its terms apply to defendants here, as it is limited to the Active Army, the Army National Guard, the Army Reserve, and personnel "who participate in the disposition of remains and personnel effects process at unit, installation, and casualty area command levels." AR PAM 638-2, p. i.

8. U.S. Army Field Manual FM 4-20-65 (FM 10-286), Identification of Deceased Personnel

Lastly, plaintiff cites the US Army Field Manual paragraphs 1-1 and 1-8 in support of his claim that defendants have a non-discretionary duty to identify remains. This document, however, "addresses the basic procedures and methodologies used in processing remains to support the final identification of deceased military and civilian personnel." FM 4-20-65, p. ix. It is a procedural. It does not address when to disinter remains for identification. Further, it does not apply to defendants in this case.

IV. Argument

A. Summary

Plaintiff's First Amended Complaint fails to cure the fatal jurisdictional defects of his initial complaint and, accordingly, should be dismissed. This Court lacks jurisdiction

over his mandamus claims because he has failed to any allege non-discretionary, ministerial duty owed to him. Plaintiff concedes that "[n]o statute or regulation published in the Code of Federal Regulations prescribes a process for family members" to request an exhumation (Doc 39 ¶ 89); to petition for identification of unidentified remains (¶ 90); or to "petition for consideration of new evidence concerning the identification of the remains of deceased American Servicemembers" (¶ 91). This admission is fatal to plaintiff's mandamus claims, in which he asks this Court to order defendants to provide exactly that relief. Without such presently-existing legal duties, plaintiff can point to no clear right of his to such acts or any clear non-discretionary and ministerial duty on the part of defendants. The existence of such a right and duty is a prerequisite to a waiver of sovereign immunity under the Mandamus Act, as well as to provide standing and state a claim on the merits. *Drake v. Panama Canal Comm'n*, 907 F.2d 532, 534-35 (5th Cir. 1990).

Plaintiff has alleged no waiver of sovereign immunity at all for his due process claim. The only possible waiver is Section 702 of the APA, and this Court has previously held jurisdiction under that section to be precluded by the MSPA. In addition, plaintiff lacks standing, because he has alleged no cognizable injury sufficient to provide this Court with jurisdiction under Article III, because his injury was not caused by defendants, and because his requested relief in any event will not likely redress his injury.

The Court need not reach the plaintiff's constitutional challenge because the Court lacks jurisdiction. However, that claim also fails on the merits.[7] Plaintiff has

[7] Although plaintiff does not specify whether his due process claim is substantive or procedural, or the property or liberty interest claimed, defendants assume that he is making a procedural due process claim because the relief he seeks is procedural in nature.

identified no property or liberty interest protected by the Due Process Clause. Plaintiff bases his claim upon a "mandatory" duty to identify remains, but such a duty does not exist and, in any event, is not sufficient to create a constitutionally-protected entitlement. As the Supreme Court has made clear: "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). As described above, Congress left the management of the accounting mission completely within the discretion of the expert agency.

Further, even if this Court were to find a duty to identify remains in some sense mandatory, "[m]aking the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people." *Id.* at 748. The duty to account for the missing and fallen is a public duty and a duty of the military to its own, as well as to the families. For this reason, the only specific obligation to families such as plaintiff's in the MSPA is to provide them with reasonable access to files; it does not create a statutory entitlement to cause defendants to pursue identification measures in a particular case at the request of a particular person.

Additionally, plaintiff's claim fails because the Due Process Clause addresses only deprivation caused by state action; it does not confer "an affirmative right to governmental aid or assistance, even if the aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). To the extent plaintiff has been deprived of any cognizable interest, which defendants dispute, that deprivation occurred at the hands of the Imperial Japanese Army. It, not defendants, caused PVT Kelder's remains to be placed in an unmarked mass grave, under conditions

which made post-war identification prove impossible. Efforts that defendants make now, with the presence of new technology and resources, do not give rise to new interest, and failure to use those resources as plaintiff urges is not a deprivation.

In any event, it is impossible to argue that plaintiff did not receive due process in this case. In the military context, where "[j]udicial deference thus 'is at its apogee,'" the Court must ask "whether the factors militating in favor of the entitlement are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss v. U.S.*, 510 U.S. 163, 177 (1994), quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976); U.S. Const., Art. I, § 8. Even under a less deferential standard, due process requires an opportunity to be heard in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As plaintiff's complaint makes clear, and the administrative record makes clearer, plaintiff was heard on numerous occasions. His evidence was given due consideration. That plaintiff believes defendants are wrong does not amount to a denial of due process. The First Amended Complaint should be dismissed.

B. 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).

C. Plaintiff's First Amended Complaint Should Be Dismissed because This Court Lacks Jurisdiction

1. Sovereign Immunity Bars Plaintiff's Claims

Plaintiff asserts jurisdiction under 28 U.S.C. §§ 1331 and 2201 (Declaratory Judgment Act), as well as 18 U.S.C. § 1361 (Mandamus Act). As this Court previously found, 28 U.S.C. § 1331 provides for federal question jurisdiction, but it contains no waiver of sovereign immunity. See *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972).

As explained below, neither the Declaratory Judgment Act nor the Mandamus Act waive sovereign immunity in this case, and plaintiff has failed to plead any waiver for his due process claim. Accordingly, the complaint should be dismissed.

a. The Declaratory Judgment Act Does Not Waive Sovereign Immunity

As this Court previously held, the Declaratory Judgment Act "does not confer subject matter jurisdiction on a federal court where none otherwise exists." Doc. 30 p. 12; see also Doc. 34 p. 14. Moreover, the Mandamus Act does not grant jurisdiction "to consider actions asking for other types of relief – such as injunctive [or declaratory] relief." *Wolcott v. Sebelius*, 635 F.3d 757, 766-67 (5th Cir. 2011). Accordingly, for plaintiff's claims to proceed under the Declaratory Judgment Act, a waiver of sovereign immunity and other jurisdiction must be found in his due process claim. As discussed below, he has not pleaded a waiver for this claim and none exists. Accordingly, the Court lacks jurisdiction over plaintiff's claims under the Declaratory Judgment Act.

b. The Mandamus Act Does Not Waive Sovereign Immunity

Although the Fifth Circuit has stated that the "'the mandamus statute . . . waives, for some purposes, the sovereign immunity of the United States," the court subsequently has strictly limited that waiver. *Drake v. Panama Canal Comm'n*, 907 F.2d 532, 534-35, (5th Cir. 1990) quoting *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1987). In *Drake*, the Court clarified that "[i]n ruling that mandamus jurisdiction existed, allowing plaintiff a forum in federal court, we found that plaintiff sought only to require the Commission to perform its duty by taking subject matter jurisdiction over her claim, rather than 'to dictate the results' of that assertion of jurisdiction." *Id.* quoting *McClain* at 454. Distinguishing *McClain*, the *Drake* Court continued:

> The relief appellants seek by mandamus is not to require the Commission to exercise its jurisdiction to decide their claims or otherwise to perform a ministerial duty imposed on it by law; rather, appellants seek in essence to require the Commission to alter its decision on the merits of their claims. Such is not the function of mandamus. **To hold otherwise would be to create an open-ended breach in the doctrine of sovereign immunity and the below-noted limitations on judicial review under the APA**.

Drake at 534-5 (emphasis added). As the *Wolcott* Court clarified further, jurisdiction "exists if the action is an attempt to compel an officer or employee of the United States or its agencies to perform an allegedly nondiscretionary duty owed to the plaintiff." *Wolcott*, 635 F.3d at 766. Such a request cannot be a request to prohibit future actions; rather it must be to "compel the defendants to affirmatively perform a presently existing duty under the law." *Id.* at 767.

Plaintiff's mandamus claim, set forth in Count 2, does not meet these jurisdictional standards. This is not a case like *McClain*, where the plaintiff sought an order to compel the Commission to take jurisdiction in a matter before it – a discrete, nondiscretionary act. As support for his claim of a "non-discretionary" duty, plaintiff has simply listed a number of regulations, directives and other documents that broadly support the general proposition that the military, or specific components of it, have a duty to search for and identify missing and deceased personnel. But plaintiff here seeks a myriad of orders:

> c. An order that defendants shall promptly act to consider new evidence of the identity of unidentified remains when such evidence becomes available from any source;
> d. An order, that Defendants shall promptly act to identify the remains of all deceased Servicemembers whose remains were determined to be non-recoverable when advances in forensic technology provide reasonable belief that such remains might be identified using technology not previously available;
> e. An order, that Defendants shall promptly disinter for identification all unidentified remains upon a showing of a probability of their identification;

> f. An order, holding that the human remains designated as X-816 . . . are those of Arthur H. Kelder and all U.S. Government records, markers and actions shall reflect such identity.

Doc. 39 at p 34.[8]

These requests on their face do not describe a "presently existing duty under the law." Plaintiff has not identified any law, regulation or other document that imposes a duty to "consider new evidence of the identity of unidentified remains when such evidence becomes available from any source;" to "disinter for identification all unidentified remains upon a showing of a probability of their identification;" or to "identify the remains of all deceased Servicemembers whose remains were determined to be non-recoverable when advances in forensic technology provide reasonable belief that such remains might be identified using technology not previously available." Indeed, even the orders plaintiff seeks would still require defendants to make judgments based on a "reasonable belief," or a "showing of probability" – hallmarks of discretion and judgment. These are not the types of duties for which mandamus jurisdiction exists. *Cf. Wolcott* at 767.

Indeed, plaintiff appears to concede that he has no presently-existing procedural right to the relief he requests, admitting that "[n]o statute or regulation published in the Code of Federal Regulations prescribes a process for family members" to request an exhumation (Doc 39 ¶ 89); to petition for identification of unidentified remains (¶ 90); or to "petition for consideration of new evidence concerning the identification of the remains of deceased American Servicemembers" (¶ 91). Doc 39 p 85-86, 89-9.

[8] Plaintiff may also be seeking other similar relief, see ¶ 35 and 36 of his Complaint, but these requests, to the extent they differ from the above, suffer from the same defect.

In the absence of such a procedural right or duty, mandamus does not exist. As in *Drake*, the relief plaintiff seeks is not to require defendants to act pursuant to a presently-existing duty, but rather to change their action on the merits. As is apparent from the record and, indeed, from plaintiff's complaint, defendants have investigated whether X-816 is a candidate for disinterment for identification, based on materials submitted by plaintiff and the historical and forensic record. Chambers Decl. ¶¶ 34-35, 43-45; Supp. AR at 1-2. Defendants have recommended against disinterment, based on the weakness of the individual association and the likelihood of commingled remains. Supp. AR at 1-2. Plaintiff simply disagrees with this recommendation.

The mandamus relief plaintiff requests is that the Court effectively rewrite the MSPA and regulations thereunder, in order to create the duties and result that plaintiff would like. To find jurisdiction here would, as the Fifth Circuit warned in *Drake*, "create an open-ended breach in the doctrine of sovereign immunity and the []limitations on judicial review under the APA and [the governing statute]." *Drake*, at 534-5; see also *Dist. Lodge No. 166, Int'l Ass'n of Machinists & Aerospace Workers v. TWA Servs., Inc.*, 731 F.2d 711, 717 (11th Cir. 1984) (refusing to allow plaintiffs to make an "end run" around the lack of a private right of action in the underlying statute by proceeding with a claim for mandamus relief). As this Court has already held that plaintiff's claims are barred by the MSPA and the APA, these cases are particularly instructive here. As plaintiff's complaint has not identified a right or specific duty owed, plaintiff's mandamus claims should be dismissed for lack of jurisdiction.

c. Plaintiff's Due Process Claim is Barred by Sovereign Immunity

Although not specifically stated, the basis of plaintiff's due process claim is presumably the Fifth Amendment. Plaintiff does not specify a waiver of sovereign immunity for this claim, and accordingly, it should be dismissed. See Fed. R. Civ. P. 8(a) (providing that a pleading must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends..."). The Constitution does not waive sovereign immunity. See *Lynch v. United States*, 292 U.S. 571, 582 (1934) (sovereign immunity "applies alike to causes of action arising under acts of Congress... and to those arising from some violation of rights conferred upon the citizen by the Constitution"); *Benvenuti v. Dep't of Defense*, 587 F. Supp. 348, 352 (D.D.C. 1984) (the "Constitution itself" does not "operate as such [a] waiver[]").

The only statute possibly capable of providing the requisite waiver for plaintiff's claims against defendants for injunctive and declaratory relief is the APA, 5 U.S.C. § 702. But Section 702, like all waivers of sovereign immunity, must "be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The waiver under Section 702 is limited by its own terms, which provide:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. As this Court pointed out: "[t]his provision [of Section 702] 'prevents plaintiffs from exploiting the APA's [immunity] waiver to evade limitations on suit

contained in other statutes.'" Doc. 30 at 6, *quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204-05 (2012).

Here, the Court has already held that Section 1508 of the MSPA precludes review under the APA – at least for plaintiff's claims in his first complaint. Doc. 30 at 6-7. Plaintiff's due process claim, like his previous APA claims, is also grounded in the MSPA. As explained in more detail below, the "property interest" at stake in plaintiff's claim is an entitlement to have unidentified remains disinterred and identified. The MSPA is the governing statute for defendants' accounting mission as it pertains to the "unaccounted for" from WWII. Since this is the only statute that places any duties on defendants in this regard, is would appear that the MSPA is the only source for such an entitlement.

As this Court found in dismissing plaintiff's first complaint, however, the MSPA impliedly precludes judicial review of plaintiff's claims. The subject matter of the controversy remains the same as in plaintiff's first complaint, as does the source of defendants' duties, if any, to plaintiff. Accordingly, the bar is equally applicable here and the Court lacks jurisdiction.

2. The Court Lacks Jurisdiction Because Plaintiff Lacks Standing

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.

Plaintiff bases his standing on a Power of Attorney that he has obtained from his cousin, Douglas Kelder, who is the Primary Next-of-Kin (PNOK) of Arthur H. Kelder.[9] Doc. 39 ¶ 2. He contends that, as the designated PNOK under Section 1501(d) of the MSPA, 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, AR 638-2 and "agency directives which require the Department of Defense to aggressively seek out the remains of missing service personnel and return them to their families for burial." Doc. 39 ¶ 2. For numerous reasons, this allegation fails to meet plaintiff's burden to show standing in this Court.

In the first instance, "[t]he grant of a power of attorney ... is not the equivalent of an assignment of ownership; and, standing alone, a power of attorney does not enable the grantee to bring suit in his own name."). *Advanced Magnetics, Inc. v. Bayfront Partners Inc.*, 106 F.3d 11, 17-18 (2d Cir.1997). Whatever interest a PNOK may have in identifying remains, whether statutory or at common law, it is not an assignable tangible property interest such that the assignee can state a cognizable interest under Article III.

[9] Plaintiff also purports in places in his complaint to represent all families "similarly situated." However, there is no evidence in the complaint that he does so and he has not sought class action status. Accordingly, his standing must be based on his own injury, if any.

At best, a power of attorney would give plaintiff the authority to proceed in the shoes of the PNOK before the agency.[10]

And, whatever right the PNOK may have before the agency does not, in itself, create an injury for purposes of Article III. Cf. *Town of Castle Rock*, 545 U.S. at 764 (stating, in the context of a due process claim, "the problem with" plaintiff's claimed entitlement is that it "would be an entitlement to nothing but procedure-which we have held inadequate even to support standing, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); much less can it be the basis for a property interest"); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009) ("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"); *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)); *Hydro Investors, Inc. v. F.E.R.C.*, 351 F.3d 1192, 1197 (D.C. Cir. 2003)("If the party petitioning the agency lacks Article III

[10] However, Section 1501(d) does not apply to plaintiff. As explained in defendant's first motion to dismiss, Section 1501(d) provides 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 post-enactment cases ("any member of the armed forces on active duty") at the time the statute was enacted who becomes missing. There is no equivalent provision for family members of those service members not in missing *status*. Presumably, this is because the MSPA creates no benefit to the PNOK that is not also extended to the other members of the immediate family. See, e.g., 10 U.S.C. § 1506(e) (requiring the Secretary to make available the personnel file, required for preenactment cases by Section 1509, to "the primary next of kin, the other members of the immediate family, or any other previously designated person."). Therefore, this provision has no applicability to the question of standing.

standing, he has not been independently wronged simply because the agency denied his advisory request.").

Regardless, unlike his first complaint,[11] the present complaint is not based on procedural rights. In the current complaint, plaintiff has identified no injury stemming from any statutory or regulatory entitlement due the PNOK as such. Rather, he states generally that he is aggrieved by defendants' alleged failure to follow laws and regulations and "aggressively seek out the remains of missing service personnel and return them to their families for burial." This is the sort of allegation of injury that has been rejected repeatedly by the Courts, as this Court previously recognized. Doc. 30 at 10; see also *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 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").

[11] In his first complaint, plaintiff based his claims in large part on his alleged entitlement to certain procedures, such as status reviews and appointment of missing persons counsel, under the MSPA. Defendants argued that plaintiff lacked standing because, whoever was entitled to those procedures, clearly plaintiff was so not entitled, because he was not the PNOK. However, defendants never conceded that anyone, regardless of alleged relationship, could assert a cognizable interest under Article III. Defendant's Reply to Plaintiff's Response to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Doc. 29") at n 2. This is for the simple reason that, until remains are identified, no one can be the PNOK and no interest can arise.

For plaintiff to have standing under *Lujan*, he must allege a concrete and particularized injury to himself. But, as discussed above, none of the statutes or regulations create a duty to plaintiff (or the PNOK) specifically, such that defendants alleged failure to act creates a legal injury. "[I]f the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) (dismissing claim for lack of standing where statute on which claim was based does not impose the legal duty plaintiff claims); *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); see also *Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) (holding that appellants "lack standing because the injury they assert is to a nonexistent right"). Here, the obligation, if any, that defendants owe to plaintiff is purely discretionary. He cannot claim an injury based on their failure to act in the manner he would like.

Even were the Court to find a cognizable injury, plaintiff fails to meet his burden to allege causation and redressability under *Lujan*. At best, plaintiff's injury can be described as a deprivation of his alleged right to the identification of the remains of his family member. Even assuming such a right exists, however, causation and redressability are speculative at best. Defendants are not refusing to return identified remains. They are simply not aiding plaintiff, in the manner he would like, to seek to identify *unidentified* remains. Until the remains are identified, plaintiff has not concrete right to them, and injury from defendants' conduct is speculative at best.

Similarly, plaintiff cannot allege that the relief he seeks will redress his perceived injury. "The redressability inquiry poses a simple question: "If plaintiffs secured the

relief they sought, would it redress their injury?" *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (internal citation omitted). The answer here is no. For the most part, plaintiff seeks procedural relief: to order defendants to consider evidence, to order them to disinter remains "upon a showing of a probability of their identification," and so forth. But defendants *have* considered plaintiff's evidence, and they *have* determined that there is an insufficient likelihood of identification to support disinterment. Plaintiff has not alleged that the procedures he suggests, even were the Court to order them, would result in a different outcome in his case. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

The only relief plaintiff seeks that would possibly redress his claimed injury is in Count 3, in which he asks this Court to declare, presumably without disinterment, that the remains of X-816 are those of PVT Kelder. Plaintiff has not alleged, and defendants have not found, any legal basis on which the Court could award such relief. Accordingly, that claim, too, fails the redressability standard. Plaintiff lacks standing and the case should be dismissed.

D. Even if this Court Found Jurisdiction, Plaintiff's Claims under the Mandamus Act and the Constitution Fail to State a Claim

1. Plaintiff Has Not, and Cannot, Allege a Duty Cognizable Under the Mandamus Act

As explained above, plaintiff has identified neither a right nor a duty cognizable under the Mandamus Act, and therefore the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Even were this Court to find jurisdiction over plaintiff's

mandamus claims, however, such relief is not appropriate here, as the complaint fails to state a claim under Rule 12(b)(6).

> It is hornbook law that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling cases. Though it is a legal remedy, it is largely controlled by equitable principles and its issuance is a matter of judicial discretion. Generally speaking, before the writ of mandamus may properly issue, three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.

Carter v. Seamans, 411 F.2d 767, 773 (5th Cir.1969)(internal citations omitted); see also *Consol. Edison Co. of New York, Inc. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) ("A drastic remedy, to be invoked only in extraordinary situations, mandamus is inappropriate except where a public official has violated a ministerial duty.") (internal quotations omitted).

"Such a duty must be 'so plainly prescribed as to be free from doubt and equivalent to a positive command... . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Id.* (quoting *Wilbur v. United States*, 281 U.S. 206, 218-19 (1929)). "Courts do not have authority under the mandamus statute to order *any* government official to perform a discretionary duty." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) (emphasis in original). "Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary [i.e. ministerial] if it involves enforcement or administration of a mandatory duty at the operational level." *Id.* (internal citation omitted).

Plaintiff concedes that he has no procedural or substantive right through statute or regulation to request an exhumation (Doc. 39 ¶ 89), petition for identification of unidentified remains (Doc. 39 ¶ 90), or "petition for consideration of new evidence concerning the identification of the remains of deceased American Servicemembers" (Doc. 39 ¶ 91). His only possible right is grounded in his assertion of a non-statutory, "non-discretionary" right to have remains identified, with an accompanying "non-discretionary" duty in defendants. Doc. 39 *passim*. However, such a right and duty, even if they exist and apply to military casualties buried overseas, is far from clear. As the record and defendants' policy make clear, the application of this alleged right and duty to any particular case involves policy judgment, scientific and historical expertise and experience, and decisions regarding the application of scarce resources. If this Court were to find such a right or duty applied to unidentified remains, it would appear to be a case of first impression. That is hardly the type of "clear right" or ministerial duty that warrants mandamus relief.

Finally, mandamus relief is not appropriate when the relief sought is to overturn or dictate the results of agency action. As plaintiff's own complaint demonstrates, his disagreement with defendants is not based on their failure to apply their judgment, exercise of discretion and policy. His disagreement is with the result of that application. See, e.g., Doc. 39 ¶ 145 ("Defendant Webb went on to further itemize specific reasons the case should not be further investigated. All of these reasons for denial of further investigation were without basis in fact."); Doc. 39 ¶ 147 (conclusion of Scientific Director of Central Identification Laboratory that "No definitive individual associations

could be established" with respect to PVT Kelder was "without basis in fact."); *Drake*, 907 F.2d at 534-35.

2. Plaintiff Has Not, and Cannot, Allege a Due Process Violation

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *White Oak Property Dev. v. Washington Tp.*, 606 F.3d 842, 854 (6th Cir. 2010). Only if the court determines that the interest asserted is protected by the Due Process Clause, does the question then become "what procedures are required to protect that interest." *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1581 (6th Cir. 1990).

a. Plaintiff Has Not Alleged a Property or Liberty Interest

As an initial matter, Plaintiff has not identified any constitutionally protected property or liberty interest that warrants the protection of due process. Indeed, plaintiff's Count 4 does not specify the property (or liberty) interest claimed, or whether the alleged deprivation is a violation of substantive or procedural due process. Plaintiff alleges nothing but his claimed entitlement to "rights to due process" including "clear, unambiguous, standards for disinterment, identification, appeal and reasonable limits on the time to perform each as well as the right to be treated honestly and forthrightly by officials of the U.S. Government." Doc. 39 p 151.

Because plaintiff 's due process claim seeks procedural relief, defendants assume that plaintiff intends to assert a procedural due process claim. However, "[e]ntitlement to nothing but procedure cannot be the basis for a liberty or property interest protected by the Due Process Clauses. *Hanson v. Wyatt*, 552 F3d 1148, 1158 (10th Cir. 2008) (internal

quotations omitted); *Town of Castle Rock*, 545 U.S. at 764. Accordingly, because plaintiff asserts throughout his complaint that defendants have a "non-discretionary" duty to identify remains, defendants assume that the asserted interest is an entitlement to identification of remains, a necessary predicate to any return of such remains.

As the Supreme Court explained, "[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* Moreover, "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005), citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-463, (1989); see also *Jago v. VanCuren*, 454 U.S. 14, 20-21 (1981) (per curiam) (no liberty interest when government maintains discretion regarding how to proceed).

Here, the presumed source of the claimed entitlement is the MSPA, as well as the numerous regulations, directives and instructions that plaintiff cites in his complaint and that are discussed in the statutory scheme section above. As discussed above in the context of plaintiff's mandamus claims, however, even assuming a general duty to identify remains, none of the statutes or regulations cited specify the parameters of that duty, or constrain defendants' discretion sufficiently to create an entitlement in plaintiff.

In *Town of Castle Rock*, the Supreme Court considered an analogous situation. In that case, plaintiff had obtained a restraining order against her husband. The order, and the statute that authorized it, contained mandatory language directed to the police that required the police to arrest, seek a warrant or enforce the restraining order. On the day of the events at issue in the case, the plaintiff's three daughters disappeared from their home. Over a period of 10 plus hours, plaintiff sought the help of the police to search for the girls, whom she feared had been taken by her husband. Finally,

> [a]t approximately 3:20 a.m., respondent's husband arrived at the police station and opened fire with a semiautomatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.

Town of Castle Rock, 545 U.S. at 754.

Despite the mandatory nature of the restraining-order statute in question, however, the Court found the language insufficient to overcome the discretionary nature of the duty, particularly in light of the entitlement claimed. Of relevance here, the Court stated:

> Respondent does not specify the precise means of enforcement that the Colorado restraining-order statute assertedly mandated-whether her interest lay in having police arrest her husband, having them seek a warrant for his arrest, or having them "use every reasonable means, up to and including arrest, to enforce the order's terms," Brief for Respondent 29-30. Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed "entitled" to something when the identity of the alleged entitlement is vague. See *Roth*, 408 U.S., at 577, 92 S.Ct. 2701 (considering whether "certain benefits" were "secure[d]" by rule or understandings); cf. *Natale v. Ridgefield*, 170 F.3d 258, 263 (C.A.2 1999) ("There is no reason ... to restrict the 'uncertainty' that will preclude existence of a federally protectable property interest to the uncertainty that inheres in [the] exercise of discretion").

Id. at 763-4 (footnote omitted).

Plaintiff's claimed entitlement here is even more indeterminate and uncertain. Even if the Court assumes a mandate to identify remains, would enforcement of that mandate require disinterment, use of mtDNA testing, or simply all "reasonable means"? What if the disinterment does not lead to identification of PVT Kelder? Does the entitlement require disinterment of different remains? If efforts are unsuccessful, when if ever does the entitlement end? Cf. *Town of Castle Rock* at n. 15, citing *Donaldson v. Seattle*, 65 Wash.App. 661, 671-672, 831 P.2d 1098, 1104 (1992) ("There is a vast difference between a mandatory duty to arrest [a violator who is on the scene] and a mandatory duty to conduct a follow up investigation [to locate an absent violator].... A mandatory duty to investigate ... would be completely open-ended as to priority, duration and intensity").

Creating even more uncertainty, plaintiff does not specify how his entitlement would be reconciled with the presumed entitlements that would vest in other families. As discussed in defendants' Preliminary Statement, other families may claim an entitlement in the same unidentified remains. Those families may seek to prevent disinterment or other disturbance to the grave (a right more firmly grounded in the common law than any right to disinter).[12]

Finally, the statutes and regulations that plaintiff cites sets forth no method for allocating resources among those who would be entitled to claim them. As the D.C. Circuit explained, where limited resources mean that administrators are left with discretion in determining who receives a benefit, there is no entitlement in such a benefit,

[12] If the Court were to find such an entitlement, or enter any relief such as mandamus requiring disinterment, the effect would not be limited to plaintiff. At least some subset of family members of other unknowns would be necessary parties under Fed. R. Civ. P. 19, as their rights might also be implicated by any disinterment.

even where the plaintiff meets non-discretionary eligibility requirements. *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36-37 (D.C. Cir. 1997) (no entitlement of eligible families to emergency shelter where eligibility procedures "do not restrict the discretion . . . to select the method of allocating scarce shelter space among eligible families"); see also *Eidson v. Pierce*, 745 F.2d 453, 462 (7th Cir. 1984)(no property interest in housing subsidy where landlord has discretion to judge whether applicant "otherwise acceptable").

Although plaintiff notes that the MSPA requires a "fully resourced program," Congress also set a "goal" of identifying 200 missing a year – a goal that is inconsistent with personal entitlement to identification that would be vested in tens of thousands of families. As the Supreme Court stated in *Town of Castle Rock*, the creation of a duty, even a mandatory duty, does not "necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people." *Town of Castle Rock*, 545 U.S. at 764-5; see also *Walker v. Rowe*, 791 F.2d 507, 512 (7th Cir. 1986)(the order of government priorities "is determined by political and economic forces, not by juries implementing the due process clause.")

b. Defendants' Actions Have Not Deprived Plaintiff of any Current Property Interest and There is No Due Process Right to Affirmative Aid

Plaintiff's claim also fails as he has not alleged that his deprivation was caused by state action. The deprivation at issue here – the inability to identify and thus bury his family member -- was not caused by defendants. Plaintiff's injury was caused by the Imperial Japanese, who caused PVT Kelder to perish and be buried in a mass unmarked

grave. Certainly a reasonable entitlement to due process in identifying remains at the time would have been satisfied by the five years of post-war efforts by the AGRS.[13] That effort was definitively ended by due process of law. Congress, after four years of global war, and five years of efforts to identify and repatriate the dead, ended the identification effort in 1950.[14]

The Due Process Clause "was intended to prevent the government from abusing its power"; it "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (internal quotations omitted); *Town of Castle Rock*, 545 U.S. at 755.

In the absence of any newly-created right, then, (and plaintiff has identified none), government actions since 2009 have not deprived him of any right without due process of law. The agency's refusal to act here is not "an exercise of governmental *coercive* power over an individual's liberty or property rights." Cf. *Heckler v. Chaney*, 470 U.S. 821, 831

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[13] Even if one were to credit plaintiff's allegations of post-war negligence by the AGRS, see Doc. 39 at at ¶¶ 44-49, those claims are now long-barred by the statute of limitations. 28 U.S.C. § 2401(a); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("… failure to sue the United States within the limitations period is not merely a waivable defense. It operates to deprive federal courts of jurisdiction.").

[14] Even with respect to identified remains, the family's rights to the body are not unlimited. Under the common law, any right of the family ends with burial, when custody vests in the State. See *Lascurain v. City of Newark*, 793 A.2d 731, 349 N.J. Super 251 (2002) (denying due process claim where cemetery was used by City for dump and storage, finding no entitlement of family to body "decades after burial;" "'Once a body is buried it is in the custody of the law, and removal or other disturbance of it is within the jurisdiction of our courts with equitable powers.'"). Similarly, Congress limited the rights of families who, after WWII, decided to have their loved ones' remains interred overseas. These families have no current right to disinter them for purposes on removing them to another burial place; the decisions were made final in 1952.

(1985). Rather, defendants' program is an effort to provide aid and assistance. Such government efforts, voluntarily undertaken, do not impose a duty on the government to act in any particular manner, or to continue to act at all. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317–318 (1980); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Moreover there is no duty to act "correctly;" even if the Court agrees with plaintiff that defendants' decision in incorrect on the facts, "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised [] decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976).

c. The Process Offered Plaintiff Satisfies Constitutional Requirements

In the context of military procedures, the Supreme Court has said that "in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8'." *Weiss v. U.S.*, 510 U.S. 163, 177 (1994), quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). In such contexts, where "[j]udicial deference thus 'is at its apogee,'" the Court must ask "whether the factors militating in favor of the entitlement are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44. Even under a much less deferential standard, the Due Process clause means providing an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Because due process is a flexible concept, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews*, 424 U.S. at 348.

Here, procedures of the type plaintiff suggests are not feasible, much less desirable, for achieving the accounting mission established by Congress. As explained above, any entitlement to identification of unidentified remains is likely to have overlap with the same entitlement in other families where group burials occurred or commingling of remains is possible. Thus, sorting out "rights" would require participation of those parties. In addition, such individualized determinations do not take into account the resources needed and the factors affecting the likelihood of success of missions, which vary dramatically from case to case. Defendants must plan recovery operations far in advance to ensure that the needed personnel and equipment can be assembled, transported and lodged at remote locations, a process which must take into account weather challenges in the pertinent location, the need to take personnel from other units, and other considerations that vary greatly and that change over time.

Finally, competition for agency resources, among families and organizations from different conflicts, is a given. Indeed, plaintiff's complaint, criticizing defendants' priorities as discriminatory, is evidence of this problem. Creating of an individual right would complicate immensely the ability to prioritize missions in order to account for the likelihood that remains will be destroyed or rendered inaccessible (due to, for example, highly acidic soil conditions or a host nation's plan to build on a site).

Congress mandated that families be given access to personnel files, in order to allow them to make their case to the agency. Congress did not mandate boards of review or other procedures of the type it provided for status determinations. Nor did Congress create a petition system, in which only those families who sought help would receive it. Nor did Congress provide the funding that would support procedures of the type plaintiff

seeks. Rather, Congress set a goal of 200 returns/year by 2015; this goal acknowledges the discretion vested in defendants to prioritize. In administering its mandate, the agency, through family outreach briefings, provides families access to information and the ability to be heard in a non-adversarial process. Even if the Court were to find an entitlement here, there is no showing that "the factors militating in favor of the entitlement are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44.

Finally, the record in this case, and plaintiff's complaint, demonstrate that plaintiff had multiple hearings with high-level agency officials, where he was given the opportunity to present his case. Doc. 39 ¶ 74-75, 145; Chambers Decl. ¶¶ 34, 42-43. The evidence he submitted was considered by the agency. Doc. 39 ¶¶ 145, 147. His petition was given thorough consideration, and the recommendations based on it are now pending. AR at 1-2; Doc. 39 ¶ 147. Plaintiff's complaint is not that he was not given an opportunity to be heard, it is simply that he disagrees with the agency's decision. Doc. 39 ¶¶ 145, 147. Plaintiff's due process claim should be dismissed.

E. Plaintiff's Declaratory Judgment Claims Should Also Be Dismissed

Even were the Court to find jurisdiction to consider plaintiff's Declaratory Judgment Act claims, they should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In Count 1, plaintiff seeks an order "declaring that family members have an absolute right to possess for burial the remains of members of their family who perished during military service." Doc. 39 ¶ 33. Such relief goes well beyond the scope of the facts in plaintiff's complaint, even taken as true, and the jurisdiction of the Court. The issue here is not the right of families to recovered and identified remains, but the

extent of the duty, if any, owed to families by defendants to recover and identify unidentified remains.

Likewise, Count 3, which requests that this Court confirm the remains buried as X-816 in the Philippines as those of PVT Kelder, has no basis in law or fact. Plaintiff has not specified on what basis this Court would have jurisdiction to so declare, and accordingly the claim should be dismissed.

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 16th day of December, 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:

Jefferson Moore
Counsel for John Eakin

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney