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

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). To survive a motion to dismiss for failure to state a claim upon which relief can be granted "[a] Plaintiff's obligation to provide 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff here has failed to meet his burden either to show jurisdiction or state a claim and the case should be dismissed pursuant to Fed. R. Civ. P 12(b)(1) and (6).

Moreover, even were the Court to reach the merits of Plaintiff's claims, the record shows conclusively that defendants have complied with every legal duty, and have given Plaintiff's

claims full consideration in their actions and recommendations to date.[1] The record here shows no evidence that any violation of law occurred, much less that it was "was intentional or with reckless disregard of constitutional rights. . . . In these circumstances, courts have not hesitated to dismiss claims of constitutional violations." *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368, 373-4 (5th Cir. 1987). Accordingly, summary judgment for defendants is also warranted.

I. Plaintiff Lacks Standing

Because Plaintiff so manifestly lacks standing, because his lack of standing is dispositive of all of his claims, and because dismissal on standing avoids Plaintiff's broader constitutional claims, we address this issue first. In his Response, Plaintiff did not address any of defendants' arguments regarding his lack of standing in this action. *See* Plaintiff's Motion to Dismiss First Amended Complaint, or, in the Alternative, for Summary Judgment, Doc. 47, ("Motion" or "Mot.") at 27-32. Instead, he asserts that the District Court has previously found that he has standing. Response, Doc. 50 ("Resp.") at 9-10; Order, Doc. 34, at 15 (addressing standing for Bivens claim) and 16 (standing for mandamus claims based on AR 638-2). The District Court's findings, however, addressed a different complaint (plaintiff has not alleged a *Bivens* claim here), and applied the much more liberal standard applicable to motions for leave to amend.[2] Here, Plaintiff bears the burden to show his standing for each claim, and he has not met that burden.

Plaintiff's sole basis for standing rests on a power of attorney from his cousin, the primary next-of-kin to PVT Kelder. That power of attorney purports to grant to Plaintiff "the

[1] Because we believe that this matter should be resolved on jurisdictional and Rule 12(b)(6) grounds, we have not briefed the issue of ripeness. However, as explained below, the matter concerning PVT Kelder is still under review by defendants.

[2] The District Court found that, for purposes of leave to amend, "an argument can be made" that Plaintiff's allegation that "he suffered a due process injury in fact" might give him "a sufficiently concrete interest in the disposition of PVT Kelder's remains" to satisfy the injury-in-fact requirement of *Lujan*. Order at 15; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

right to act for me and in my name for disposition of the remains of Arthur H. Kelder and any actions related to such disposition including those under Title 10 U.S. Code §§ 1501-1513[3] or Army Regulation 638-2." It is revocable at will by the grantor, and terminates on the grantor's death. *See* Pl. Exh. 26.

There are two conceivable theories by which such a document might create standing: through an "assignment of claims," or through a third party standing theory. Neither applies here, however. To support standing on an assignment theory, the assignment must transfer a cognizable, tangible interest, sufficient to give the assignee a concrete interest. Plaintiff's power of attorney, by its terms, does not purport to assign all of the grantor's claims, much less the sort of tangible economic claims that *might* support standing. *Cf. Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269 (2008). Moreover, AR-639-2, while allowing for a power of attorney, makes clear that the right of the "Person Authorized to Direct Disposition" (PADD) is a personal one. AR-638-2 § 4-6 ("right to direct disposition of remains is a personal right"). Thus, for example, the PADD cannot designate a successor PADD. *Id.* § 4-5. Accordingly, the rights of the PADD are not property rights, and the status of PADD cannot be assigned, in the sense that a tangible property claim can.[4] Nor can one assign, through a power of attorney, one's constitutional rights. Such a right is a purely procedural one to appear before the agency, and cannot be a basis of standing for the assignee in his own right. Accordingly, the power of attorney cannot support standing here.

The third party standing doctrine is also inapplicable here. As both the Magistrate Judge and the District Court recognized, third party standing requires plaintiff to satisfy *Lujan's* injury

[3] As discussed in our Motion, the provisions allowing third party representation in the MSRP do not apply to this case. Mot. at 29, n. 10.

[4] It appears that the PADD here recognized that limitation as the power of attorney terminates on the PADD's death or when revoked.

requirement by demonstrating and injury to **himself**. R&R at 10; Order at 15. It is plaintiff's own injury that must provide the "concrete adverseness" necessary for the case or controversy requirement. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 192-94 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976).

Moreover, that injury cannot be to procedural right alone, much less a procedural right created by an agency. Mot. at 29-30, citing cases. Here, Plaintiff has no concrete interest of his own separate from that of the PADD, he simply seeks to assert the PADD's rights, claiming that he has been assigned those rights by a power of attorney. To find standing in such a situation would allow a real party in interest – the injured party – to simply "assign" his procedural rights to a willing plaintiff, who could then assert any procedural injury as his own "injury in fact." This would be bootstrapping of the first order and divest the *Lujan* requirements of all meaning.

In any event, unlike in the original Complaint before the District Court, Plaintiff is not claiming a procedural injury-in-fact here. Plaintiff here does not raise a *Bivens* claim based on tortious actions of agency officials in their dealings with him personally. Rather, the gist of the First Amended Complaint is that statutory and/or administrative scheme deprives Plaintiff of due process. However, to the extent that this claim is based on asserted constitutional rights (whether substantive or a due process property right), those "rights" would belong to the PADD, not to plaintiff. Plaintiff cannot claim a constitutional deprivation of someone else's right.

Plaintiff has failed to allege a cognizable, non-procedural, injury in fact particular to him. He has also failed to meet his burden under the causation and redressibility prongs of *Lujan*. *See* Mot. at 31-32 (not addressed in the Response). Accordingly, the Complaint should be dismissed.

II. Plaintiff's Mandamus Claims Should be Dismissed

Mandamus relief requires "(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); Mot. at 33. Pleading such a right and duty -- a non-discretionary, presently-existing, ministerial duty – is jurisdictional. *Wolcott v. Sebelius*, 635 F.3d 757, 766-67 (5th Cir. 2011); *Drake v. Panama Canal Comm'n*, 907 F.2d 532, 534-35 (5th Cir. 1990). In our Motion, we pointed out that Plaintiff had not only failed to allege such a right and duty but also that he conceded that none exists: "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).'" Mot. 34.

In his Response, Plaintiff does not point to any specific right or duty, but rather declares that the District Court previously found jurisdiction under the Mandamus Act.[5] Resp. at 9. The District Court appeared to suggest that, at least for purposes of leave to amend, AR 638-2 "requires Army officials to 'search for, recover, and identify eligible deceased personnel . . . . using all resources and capabilities immediately available." Order at 16. For reasons stated

[5] Plaintiff also argues that simply being re-appointed as next-of-kin cures his previous failure to identify the "ministerial, non-discretionary duty" owed to him that the Magistrate Court found lacking. Response at 10, citing Order at 8-9 (quoting R&R at 8). This is a misreading of the R&R. The Magistrate Court did not find (and defendants did not concede) that duties ("specific, ministerial act[s], devoid of discretion") were owed to next-of-kin so as to warrant mandamus relief. R&R at 8. The Court stated that "*to the extent these duties are owed to private persons under the statute*, they are owed to primary next-of-kin." *Id.* (emphasis added). But the only specific duty owed to a PNOK of an unknown under the MSPA is to establish a personnel file and allow family members reasonable access to it. 10 U.S.C. §§ 1509(d) and 1506(e). Plaintiff has not alleged that defendants have failed to comply with this requirement.

above, this finding is not dispositive here. *See* Order at 17 ("At this juncture, it is not clear that plaintiff's Bivens and mandamus claims …are futile and subject to dismissal.").

As discussed in our Motion, it is difficult to conceive of how such a duty – "to search for, recover, and identify" -- could be reduced to non-discretionary mandamus relief. Mot. at 23-24, 34. As Plaintiff has conceded, he has no "right" to a disinterment. He has no "right" to compel defendants to utilize particular identification techniques. He has no "right" to compel defendants to prioritize his case over those of others that the defendants deem to be a higher priority, for reasons ranging from the geopolitical to the likelihood of success. Moreover, there are no standards by which defendant or the Court can decide what "resources and capabilities are immediately available," or how those resources should be prioritized among the 80,000+ unaccounted for. In the absence of any such mandates or standards, the terms "search, recover and identify" simply cannot be read as compelling ministerial, non-discretionary tasks. *See Wolcott* at 767 (Jurisdiction requires allegation of non-discretionary duty to plaintiff).

In his Response, Plaintiff also cites Pub. Law No. 111-84, § 541(d)(2) ("Accounting for Goal") and 10 U.S.C. § 1513(3) (definition of "accounted for"). In the MSPA, Congress set two priorities: accounting for those missing who may still be alive; and to account for at least 200 "unaccounted for" per year by FY 2015. Although not clear from his Response, it appears that Plaintiff may be citing these provisions as an alleged source of a non-discretionary duty. As explained in our Motion, however, Congress' inclusion of the "Accounting for Goal" in the MSPA – to account for at least 200 of some 80,000+ -- is consistent with Congress' intent to vest discretion in defendants as to how they prioritize and carry out their mission, and is inconsistent with the idea that a specific, non-discretionary duty is owed to a particular family member. Congress created no specific duty to family members; indeed, the duty to account is owed

equally to those missing who have no family members, or whose family members have not shown the interest expressed by plaintiff.

Plaintiff has failed to identify any statute or regulation that establishes a mandatory, non-discretionary duty to plaintiff, or a right vested in plaintiff, with respect to how defendants carry out their mission. Rather, the relief Plaintiff seeks is to have the Court overturn defendants' current recommendation. This relief cannot be squared with this Court's prior determination that defendants' determinations are precluded from judicial review under the MSPA and APA. The mandamus claims here are the sort of attempted end-run on sovereign immunity and the APA that the Fifth Circuit refused to countenance in *Drake*. 907 F.2d at 534-5. Since plaintiff can specify no clear right or duty mandating the relief he seeks, the Complaint should be dismissed for lack of jurisdiction under Rule 12(b)(1), or, in the alternative, failure to state a claim under Rule 12(b)(6).

Lastly, even were the Court to consider the record in this case, there is no material issue of fact with respect to mandamus relief. The record, and the First Amended Complaint, document that Plaintiff has had multiple meetings with defendants, and that defendants have conducted a thorough review of PVT Kelder's case, including considering the materials that he submitted. Rec. at 10-28,199; Supp. Rec. 2. Plaintiff disagrees with defendants' recommendations to date, but points to no statute or regulation that requires defendants to do more. This is the type of case that might be reviewable under the arbitrary and capricious standard of the APA, were such review not otherwise precluded for all the reasons discussed in our first Motion to Dismiss, and found by this Court. However, there is no credible material issue of fact regarding the actions that defendants have taken. Plaintiff has failed to raise an issue of fact material to his mandamus claims, and summary judgment is appropriate.

III. Plaintiff's Due Process Claims Should Be Dismissed

Plaintiff alleges waiver of sovereign immunity, and therefore jurisdiction, solely on the District Court's Order. Resp. at 9 citing Order at 15. As Plaintiff recognizes, however, the Court's finding that he cites addresses "Plaintiff's request to include a claim for violation of his due process rights under *Bivens*." *Id.* A *Bivens* suit is not a suit against the sovereign, however, and therefore the doctrine of sovereign immunity does not apply. *E.g.*,*Williamson*, 815 F.2d at 373-4 (cited by the District Court at 15).

As discussed in our Motion to Dismiss, the First Amended Complaint fails to allege a waiver of sovereign immunity with respect to Plaintiff's due process claims and, for this reason alone, should be dismissed under Fed. R. Civ. P. 8. Moreover, the District Court has found that the MSPA precludes judicial review and that therefore there is no waiver of sovereign immunity under the APA. Order at 4-7. Under that ruling, the Court lacks jurisdiction to consider defendants' decisions with respect to his request for disinterment.

This preclusion also applies to his constitutional claims to the extent that they are grounded in complaints about his individual treatment or determinations regarding PVT Kelder. *Cf. Zuspann v. Brown*, 60 F.3d 1156, 1159-60 (5th Cir. 1995), *quoting Sugrue v. Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994) (jurisdictional inquiry focuses on whether complaint challenges decision to deny benefits, or whether it makes a facial challenge to an act of Congress; "federal district courts 'do not acquire jurisdiction to hear challenges to [nonreviewable] benefits determinations merely because those challenges are cloaked in constitutional terms'"); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1023-24 (9th Cir. 2012)(citing cases).

Here, Plaintiff's constitutional claims assert a due process "property interest" in human remains, and a substantive due process right to bury the dead.[6] In defining due process rights, the Court must examine closely the right asserted, however, and need not accept the description offered. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Despite Plaintiff's contention, this case does not present a case of refusing to return identified remains to family members for burial. Nor is it a case of refusing to attempt to identify a deceased service member prior to interment. Rather, the claimed constitutional interest is a right to disinter unidentified remains previously declared non-recoverable (or unidentifiable).

As in *Zuspann*, however, the gravamen of Plaintiff's complaint turns on individualized relief, rather than a facial challenge, and therefore review is precluded.[7] His complaint is premised on defendants' refusal to disinter and attempt to identify particular remains, and on their alleged refusal to consider particular evidence, rather than on a facial challenge to the MSPA. Accordingly, the Complaint in essence asks this Court to find a procedural or substantive entitlement to have particular remains disinterred and subjected to identification procedures (or, indeed, to have this Court declare them to be a particular person). That entitlement would of necessity involve the Court in determining when and under what circumstances such a disinterment should occur, what identifications techniques should be used, how long such efforts should continue, what resources should be used and so on. In fact, this is just the type of review that Plaintiff seeks. Complaint at p. 33-34 and *passim*. This review of the actions and decisions of defendants is precluded by the MSPA whether or not Plaintiff dresses it

[6] In his Response to Defendants' Motion to Dismiss ("Response", Plaintiff asserts that his due process claim is pursuant to the fifth and fourteenth amendments. As all the defendants here are federal entities, however, the claim should be read as under the fifth amendment. Defendant further claims to be alleging violations of both substantive and procedural due process.

[7] As discussed above, Plaintiff has no standing to bring a facial challenge.

in constitutional garb. *Cf. Veterans*, at 1027-28 (rejecting jurisdiction where, in order to provide the relief sought, court "would have to prescribe the procedures for processing … claims and supervise the enforcement of its order," "monitor individual []determinations . . . and determin[e] whether the VA handled those requests properly.").

Even if Plaintiff's Complaint can be read to make a constitutional challenge to the statutory scheme itself (or to the agency's administration of it), as opposed to the agency's determinations, judicial review is still precluded where Congress' intent to preclude it is clear. *Webster v. Doe*, 486 U.S. 692, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims [,] its intent to do so must be clear"). Under *Webster*, a "heightened showing" of congressional intent may be required. Here, in light of the history and context in which the MSPA was passed, the fact that the MSPA is enacted pursuant to Congress' Article I, § 8 authority, and the extremely limited judicial review provided, the intent of Congress to preclude judicial review even of Plaintiff's constitutional claims is apparent.

As stated in our first Motion to Dismiss, in the MSPA Congress created an extremely circumscribed administrative process providing for limited family participation and limited judicial review for death determinations only.[8] Congress declined to create any sort of process that provided rights to families of other "unaccounted for" service members. The statutory scheme and legislative history make preclusion of review clear and accordingly, the claims should be dismissed.

Finally, even if the Court finds that the MSPA does not meet the "heightened showing" of Congressional intent required by *Webster*, Plaintiff has failed to raise a colorable constitutional claim sufficient to invoke this Court's jurisdiction. As described below, Plaintiff has failed to allege a constitutionally protected property interest cognizable under the procedural

[8] See Motion to Dismiss (Doc. 18) at 29-30.

due process doctrine, or a fundamental right protected by substantive due process. For this reason, too, jurisdiction is lacking.

A. There is No Constitutionally-Recognized Property Interest in Human Remains

Since the First Amended Complaint did not specify the alleged property interest at stake in Plaintiff's Due Process claim, defendants assumed the claim was an entitlement to disinterment. Plaintiff now argues that the property interest claimed is in the remains themselves. Resp. at 12. To support this claim, Plaintiff cites two Illinois[9] cases that find a "'right, somewhat akin, perhaps, to a property right, arising out of the duty of the nearest relatives to bury their dead.'" *Id., quoting Mensinger v. O'Hara*, 189 Ill. App. 48, 53-54 (1914).

None of the cases Plaintiff cites finds a constitutionally protected property interest in human remains. Under the allegations here, there is not even a colorable claim of such an interest for a myriad of reasons. First, and most obviously, all of the cases dealing with a common law interest involve interference with or mutilation of *identified* remains. The remains at issue here are *unidentified*. Any property interest must amount to a "legitimate claim of

[9] Plaintiff postulates that Illinois law controls because PVT Kelder was an Illinois resident. Even if state law had a role here, we do not believe Illinois law would be controlling. Rather, it would seem that the proper law to apply would be that of where the "property" is located. Ultimately, however, "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 757 (2005)(internal citations and quotations omitted). Since there is no federally protected interest, we have not addressed the choice-of-law issue.

entitlement," *Roth*, 408 U.S. at 577. Until remains are identified, no legitimate "property" claim can arise.[10]

Second, finding a property interest grounded in the common law of individual states would seem problematic in light of Art. 1, § 8, which vests authority in Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." *Cf.*, *Bell v. United States*, 366 U.S. 393, 401 (1961)("common law rules governing private contracts have no place in the area of military pay"). In the MSPA amendments in 2009, Congress considered the duties owed to families with respect to the unaccounted for, and did not recognize the type of property interest that plaintiff claims. Moreover, such a right would conflict with prior Congressional treatment of remains. As pointed out in our Motion, Congress determined that decisions to inter identified remains in ABMC cemeteries were final in 1952; families may not remove remains to, for example, reunite husbands and wives. Mot. at 38, n. 12. See also 36 U.S.C. § 2104("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."). These laws are not consistent with a view that the remains, even identified ones, are the property of the next-of-kin.

Third, the common law itself does not support a finding of a continuing property right in interred remains. Even with respect to identified and unburied remains, the law is, at best, divided. A District Court in California recently extensively reviewed the question of whether a cognizable property right existed in human remains. *Shelley v. County of San Joaquin*, -- F.Supp.2d ---, 2013 WL 3283532 (E.D. Cal. 2013). The issue arose in the context of a Section 1983 case, alleging deprivation of property consisting of the remains of a murder victim, buried in a well 27 years earlier. The bones were allegedly exhumed, along with other victims'

[10] Here, Plaintiff concedes that prior misidentifications may have occurred. Resp. at 16. This possibility substantially undermines his claimed "property interest" in the remains, vis that of other families.

remains, with a backhoe, causing destruction and commingling. After surveying the law exhaustively, the Court found the existence of any property right to be an open question. *Id.* *5. Notably, as discussed in the opinion, courts that have recognized such a right have done so in the very limited context of intentional interference with a corpse prior to burial – for example, by removing corneas from children without parental permission. That is a far cry from the broad right asserted here.

Finally, as stated in our Motion, the common law rule is that any "property right" ends with interment. *See Lascurain v. City of Newark*, 793 A.2d 731, 349 N.J. Super 251 (2002) (denying federal due process claim where cemetery was used by City for dump and storage, finding daughter had no entitlement to father's remains "decades after burial" and therefore no due process property interest in body; "'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.'"); 25A CJS § 4 ("personal right" to decedent's body extinguished upon burial, "and all that remains is an interest sufficient to challenge a disinterment").

Further, once buried, disinterment is not a right. 25A CJS § 20 ("Public policy frowns on the disinterment of a body and its removal to another burial place, and it is the policy of the law, except in cases of necessity or for laudable purposes, that the sanctity of the grave should be maintained and that a body once suitably buried should remain undisturbed."). Most analogous to the facts at hand, the common law rule is that disinterment for evidentiary purposes "requires a strong showing that the facts sought will be established by an exhumation or autopsy." 25 CJS § 29 ("The law will not reach into the grave in search of the facts except in the rarest of cases and not even then unless it is clearly necessary, and there is reasonable probability that such a violation of the sepulchre will establish that which is sought.").

Because Plaintiff has not identified a federally-protected property interest in any remains, much less unidentified ones, his procedural due process claim fails at the jurisdictional stage. Accordingly, Plaintiff's procedural due process claim should be dismissed.

B. Plaintiff has Not Alleged a Colorable Liberty Interest

Although the Complaint alleges no substantive due process claim *per se*, Plaintiff asserts such a claim in his Response (Resp. at 11). "'Substantive due process'" analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno*, 507 U.S. at 302 (internal citations omitted). Only fundamental rights and liberties which are "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty'" qualify for such protection. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (citations omitted); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring) ("While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577, (…) (1972), substantive due process rights are created only by the Constitution.").

As discussed above, and despite Plaintiff's contention, the claimed right here is not a right of the next-of-kin to possess or bury identified remains. The claimed constitutional interest is a right to disinter, or compel defendants to disinter, unidentified remains previously declared non-recoverable (or unidentifiable). The burden, if any, to Plaintiff's claimed right is defendants' policy to disinter remains for identification only when there is "sufficient circumstantial and anatomical evidence which when combined with current forensic science techniques would lead to a high probability of positive identification." *See* "Disinterment Policy for the Purpose of Identification" Supp. AR at 003-004 ("Slocombe Memo").

Plaintiff has presented no allegation that the right to disinter unidentified interred remains, decades after burial, is a continuing constitutional right of family members. Nor has Plaintiff alleged that this is a "right" rooted in this Nation's history and tradition to such a degree as to support its recognition as such. Indeed, on the contrary, Congress terminated efforts to identify WWII dead in 1951, and included them in the accounting program only in 2009. Conflicts prior to WWII are not within the program. The Nation honors its knowns and unknowns; the Tomb of the Unknown is a venerable and revered tradition.

As demonstrated above, no right to disinter even *identified* remains exists at common law, much less in the Constitution. 25A CJS § 20. Moreover, as we pointed out in our Motion, the tradition of protecting the sanctity of the grave appears to be at least as strong, if not stronger tradition in the common law than that of possessing remains for burial. *Compare Shelly* at *7-8 (discussing exceptions to family's right to remains, including retention for autopsies and other investigations), *with Matter of Sybers*, 583 N.W. 2d 890, 897-98 (requiring strong showing that facts sought would be established by exhumation, and finding family's objection to exhumation and autopsy substantially outweighed state's need for proof in criminal prosecution). In sum, Plaintiff has not alleged a colorable constitutional right to disinter unidentified remains and his substantive due process claim should be dismissed.[11]

C. There Has Been No Cognizable State Action

As explained in our Motion, at 39-40, defendants did not deprive Plaintiff of any right to bury PVT Kelder's remains. That was done by the Imperial Japanese. Even if one credits

[11] Even if there were such a right, the government would have a compelling interest in ensuring that there "was a high probability of positive identification" before such disinterments could occur. This standard is similar to the common law's requirement of a "strong showing that the facts sought will be established by an exhumation." Defendants' policy would be only reasonable to ensure that Plaintiff was choosing to exercise his "right" to disinter, and not infringing on another family's interest.

defendant's allegations that the AGRS was negligent in failing to make an identification, Resp. at 13, mere negligence is not actionable under the due process clause. The final agency action with respect to PVT Kelder was in 1950, when his remains were found to be non-recoverable. Any deprivation of a right to identification occurred in 1951when Congress ended identification efforts worldwide. Plaintiff's theory that the statute of limitations should be tolled from these actions has no basis. *See* Resp. at 13.

As explained in our Motion, defendants' current accounting program is not "an exercise of governmental *coercive* power" that deprives anyone of an existing right, but an effort to provide aid, which imposes no constitutional duty. Motion at 40-41, quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985). Plaintiff has not alleged a governmental deprivation of an existing right, and therefore his claims should be dismissed.

D. Because Plaintiff Has Received Any Process Due, He Has Failed to Allege Either a Procedural or Substantive Due Process Violation

1. Procedural Due Process

Even if the Court were to find a property interest, and find that the defendants somehow deprived him of that interest, Plaintiff's claims still fail. As set forth in our Motion, the essence of procedural due process is the opportunity to be heard. Adversarial proceedings are not required. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326-27 (1985).

As we explained in our Motion (at 42-43), defendants' informal, non-adversarial process meets a number of interests, including defendants' need to treat families equally, to protect the rights and wishes of all families and to consider cases of missing without family as well. Formal hearings would be infeasible where many families' interests are impacted, or their cooperation needed. The additional administrative costs and burden on resources of a formal hearings process would be considerable. *Cf. Walters* at 326 (greater administrative costs result in less

money reaching beneficiaries, and that "[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding [of a violation] of due process.").

Plaintiff does not describe how his proposed system would satisfy the government's interest or reduce "erroneous deprivations" as a whole. For example, while he is "not unsympathetic" to the possibility of prior misidentifications, Resp. at 16, he apparently does not believe that the prospect of exhuming remains of one or more persons other than PVT Kelder requires any consideration of their family's wishes or rights. *Id.* He further argues that defendants' concerns regarding resources do not apply here because the remains are in a cemetery and local contractors could perform the work. *Id.* Again, this argument presumes that the remains are those of (and solely those of) PVT Kelder. In any event, adequacy of procedures "does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" *Walters* at 320, *quoting Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). Plaintiff has not met his burden to show that the hearing and appeal he requests would reduce the risk of error at all, much less that the need for the procedures is "so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. 25, 44 (1976); Mot. at 41-43.

2. Substantive Due Process

"[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)(citation omitted). Plaintiff alleges that defendants have violated his rights to "substantive due process by

their arbitrary and inconsistent invocation of various, often unpublished and frequently conflicting policies." Resp. at 11.

The record here shows that Plaintiff first contacted defendants on November 17, 2009 (Rec. 106). He received information regarding family updates and, the next day, a DNA swab kit. Rec. at 162, 164. On March 10, 2010, Plaintiff was mailed PVT Kelder's file. Rec. at 167. On March 20, 2010, Plaintiff attended a family member update. Rec. at 10, 167. On November 10, 2010, in response to Plaintiff's inquiry, Plaintiff received an 18-page single-spaced memorandum regarding historical research concerning the individuals associated with Cabanatuan Common Grave 717, researched and written by a DPMO historian. Rec. at 10-28. The memo clearly explains the problems with the association of the fourteen sets of remains, thought to include those of PVT Kelder, to Grave 717; the problems with the prior identifications of four sets of remains from the grave (including the fact that one set was identified as having perfect teeth post-mortem, while a cavity was present at enlistment); and the eroded and jumbled state of the remains, making misidentification and commingling likely. *Id.*

On January 14, 2011, a JPAC historian conducted a second review. Rec. at 199. This memo clearly indicates that the material submitted by Plaintiff regarding PVT Kelder's alleged gold inlays was considered. *Id.* The memo then makes the following recommendation:

> Having reviewed the relevant documents, this section generally concurs with Heather Harris's findings. Physical evidence, already in an exceedingly poor state in the 1950s, will have further deteriorated and will provide no additional information. This leaves the documentary records, which have been shown to be inconsistent and unreliable. Because misidentifications may have been made in the four resolved cases from Grave 717, JPAC suggests that the Central Identification Laboratory examine the records of all fourteen individuals and all fourteen unknowns to determine prospects for identification. In particular, because x-815 and x-816 note the presence of gold dental work in 1946, the Historical Section recommends a comparison of those files against Pvt Kelder.

Id. On February 25, 2012, at Plaintiff's request, he met with defendant Johnny Webb among other officials from JPAC and DPMO. Rec. at 169. At this meeting, Defendant Webb explained the current recommendation. First Amended Complaint at ¶ 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."). At this meeting, however, defendants agreed that JPAC would further review the evidence. Rec. at 169. The contemporaneous note states:

> The exhumation of PVT Arthur Kelder was discussed. Plan of Action will be for JP AC Historians to review the evidence, then pass it to the JP AC scientists for review, they will either recommend disinterment or not. If they recommend disinterment the normal process will be followed. JPAC could not tell the Eakin [sic] how long this would take to finalize. DPMO did not how ever [sic] recommend disinterment with the current information that is present.

Id. On October 18, 2012, Plaintiff filed this lawsuit.

On January 28, 2013, Dr. Thomas D. Holland, Scientific Director, of the JPAC Central Identification Laboratory, sent a memorandum to the Commander, Joint POW/MIA Accounting Command reflecting the completion of the review promised to Plaintiff. Supp. Rec. at 2. In his Memorandum, Dr. Holland advised that the "CIL has reviewed the historical background and available records . . . . No definitive association could be established based on the available documentation." *Id.* Accordingly, he concluded that "the existing and available data do not meet the level of scientific certainty required by current DoD disinterment guidance." *Id.* In a memorandum dated January 30, 2013, from Major General Kelly K. McKeague, U.S. Air Force, Commander, JPAC, to Deputy Assistant Secretary of Defense for POW/Missing Personnel Office [sic], with Mr. Holland's memo as an enclosure, Major General McKeague affirmed Dr. Holland's review and conclusion. Supp. Rec. 1. As noted above, the matter is now pending

before the Deputy Assistant Secretary of Defense/Director, DPMO. Once DPMO has completed its review, the recommendation will go to the Secretary of the Army, who is the approval authority for cases such as this.

In sum, the record does not support a finding of any arbitrary action by defendants, much less action that "shocks the conscious."[12] The record clearly demonstrates that defendants considered the new material presented by plaintiff. Rec. at 199. That material consisted of a recollection of PVT Kelder's older brother that PVT Kelder had gold inlays.

From this alleged fact, Plaintiff extrapolated that PVT Kelder's remains must be those of X-816, because X-816 was one of only two remains *associated with Common Grave 717* with gold in their teeth. But Plaintiff's opinion does not account for defendants' finding that the entire subset of remains from Cabanatuan Common Grave 717 may have been misidentified. Rec. at 10-28,199; Supp. Rec. 2. This strong possibility is supported by the near contemporaneous refusal of the relevant officials to confirm the group identification in 1949, based on prior problems with the Cabanatuan Burial Report. Chambers Decl. at ¶ 20, citing Rec. at 3, 6, 753 and 760-61. It is also supported by defendants' finding that four identifications made from site 717 were "problematic" based on review of the physical records. *See* Chambers Decl. at ¶ 13 (describing discrepancies in dental record and physical comparisons). If the association of the set of remains with the gravesite was incorrect, then Plaintiff's purported association of X-816 with his dental evidence has no basis.

Moreover, even if the association was correct, Plaintiff does not allow for the strong possibility that remains have been mixed up or commingled. Rec. at 10-28,199; Supp. Rec. 2.

[12] Plaintiff also complains that the Army determined that the provision of § 8-16 of AR-638-2 (concerning boards of officers) was no longer being implemented in light of the MSPA. Complaint at ¶ 144. Plaintiff has not challenged that interpretation by the agency, however, and, most importantly, has not alleged any credible prejudice, given the thorough review his claim received (and is still receiving) from JPAC and DPMO.

While he is correct that the records indicate that a single set of remains is buried as X-816, the evidence demonstrates the possibility that 1) the remains ultimately buried as X-816 may not be the remains previously noted to have gold inlays, or 2) that the "set" of remains may be commingled with other remains. *Id.*

To survive a motion to dismiss for failure to state a claim upon which relief can be granted "[a] Plaintiff's obligation to provide 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Even assuming he were to clear his jurisdictional hurdles, the record does not support Plaintiff's claim that he has been deprived of due process, in either the procedural or substantive sense. "In these circumstances, courts have not hesitated to dismiss claims of constitutional violations." *Williamson*, 815 F.2d at 373-4 (citations omitted).

IV. Conclusion

For the reasons set forth above and in our previous pleadings, Plaintiff's First Amended Complaint should be dismissed alternatively under Rule 12(b)(1), 12(b)(6), or 56.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2014, 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 Plaintiff

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney