UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

DEFENDANTS' SUGGESTION OF MOOTNESS AND MOTION TO STAY DISCOVERY PENDING DECISION ON MOOTNESS OR OTHER RESOLUTION

Defendants American Battle Monuments Commission, *et al.*, respectfully suggest to the Court that as of June 13, 2014, the claims of plaintiff John Eakin in this matter are moot. On that day, the Secretary of the Army, through his delegee, approved the disinterment for identification of the ten sets of remains associated with Cabanatuan common grave 717. See Declaration of Kelley E. Fletcher (Fletcher Decl.), attached as Exhibit A, at ¶ 9. These remains include unidentified remains known as X-816. X-816 are the remains that plaintiff believes to be those of his relative, PVT Arthur H. Kelder, and are those at issue in this action. On June 25, 2014, Douglas Kelder, PVT Kelder's next-of-kin, was notified of the planned disinterment by the Army Service Casualty Office. At approximately the same time, plaintiff was notified through his counsel. The disinterments are scheduled to occur between August 1 and August 14, 2014. Fletcher Decl. at ¶ 10.

As explained in Defendants' prior pleadings, no final decision whether to disinter X-816 had been made when the First Amended Complaint and Defendants' Motion to Dismiss were

filed. *See, e.g.*, 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 (ECF 54) at 2 n.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."); *id.* at 19-20 ("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."); Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, or, in the Alternative, for Summary Judgment (ECF 47), at 4 n.2; *id.* at 13 (citing Executive Order ("EO") 6614, February 26, 1934, and EO 10057, May 14, 1949, as amended by EO 10087, December 3, 1949)(Secretary of the Army has authority to approve disinterments).

As detailed in the attached Fletcher Declaration, the ten sets of remains will be exhumed on/about August 2014. After disinterment, the remains will be sent to JPAC Central Identification Laboratory (CIL) in Hawaii. DNA samples will be taken and sent to the Armed Forces DNA Identification Laboratory (AFDIL) for testing. The timeline for actual identification cannot be predicted, as it depends on a number of factors, including whether the presumptive association of the remains with common grave 717 is correct, whether (and/or to what extent) remains are commingled, whether family DNA reference samples are available, and other factors. Fletcher Decl. at ¶ 11 & 14.

I. The Decision to Disinter Remains Known as X-816 Moots this Case

"The Constitution permits this Court to decide legal questions only in the context of actual 'Cases' or 'Controversies.' U.S. Const., Art. III, § 2. An actual controversy must be

extant at all stages of review, not merely at the time the complaint is filed." Alvarez v. Smith, 558 U.S. 87, 93 (2009)(internal citations and quotations omitted). "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controvers [ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990)(internal quotations and citations omitted); Goldin v. Bartholow, 166 F.3d 710, 717 (5th Cir.1999) ("A moot case presents no Article III case or controversy ....").

Here, the only cognizable injury that plaintiff claims is that arising from defendants' alleged delay in deciding whether to exhume and identify X-816. Defendants have now agreed to do that, and have provided a time frame to do so. As set forth in the Declaration, defendants will exhume and seek to identify the remains at issue, along with nine other sets believed to have come from Cabanatuan common grave 717, in August 2014. If any of the remains are identified as those of PVT Kelder, they will be handled in accordance with the directions of the next of kin as mandated by established procedures. If the remains cannot be identified as those of PVT Kelder, plaintiff cannot (and presumably will not) assert any further claim to them. This is exactly the relief plaintiff sought from defendants, and moots this case. See Harris v. City of Houston, 151 F.3d 186, 189 (5th Cir.1998) ("[W]e find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined.").

Further, even assuming, for purposes of this motion, that plaintiff ever stated any actionable cause of action, his specific causes of action fail. Count Two, plaintiff's mandamus

action, seeks to have this Court order defendants to comply with alleged duties to identify and return remains. That Count is plainly moot as defendants have agreed to do that.

Plaintiff's due process claim is also moot. That claim is premised on an alleged constitutional property interest in remains. In Alvarez, the Supreme Court held that a similar due process challenge to a state's procedures for seizing property were moot when "there was no longer any dispute about ownership or possession of the relevant property." 558 U.S. at 92. The Court noted that:

> [t]he parties, of course, continue to dispute the lawfulness of the State's hearing procedures. But that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights. Rather, it is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other Illinois citizens. And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies."

Id.; see also Lewis, 495 U.S. at 479 ("Article III question is not whether the requested relief would be nugatory as to the world at large, but whether *[plaintiff]* has a stake in that relief. Even in order to pursue the declaratory and injunctive claims, in other words, [plaintiff] must establish that it has a specific live grievance against the application . . . and not just an abstract disagreemen[t] over the constitutionality of such application")(internal quotations and citations omitted)).

Here, as in Alvarez, there is no "actual controversy" about the "property" at issue. If the remains are identified as those of PVT Kelder, they will be buried or otherwise treated in accordance with the decisions of the next-of-kin. If they are not those of PVT Kelder, then no property interest can be asserted by plaintiff. Any complaint plaintiff may have regarding the procedures used to process his request is moot. And because plaintiff has no stake in his claims for relief for other hypothetical families, those claims are moot as well.

Lastly, plaintiff's declaratory judgment claims are also moot, in that there is no reasonable case or controversy with respect to plaintiff's requests.[1] "The question of the mootness *vel non* of appellants' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, becomes whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." Connell v. Shoemaker, 555 F.2d 483, 486 (5th Cir.1977) (internal quotation marks and citations omitted)); see also Lewis, *supra*.

Neither of plaintiff's requests presents such "sufficient immediacy and reality." In Count One, plaintiff seeks a declaratory judgment that "Family members have an absolute right to possession of remains." This case, however, never presented any controversy with respect to a family's right to *identified* remains. Plaintiff has never alleged that he or any family was denied possession of *identified* remains. Common sense dictates that the possession "right" that plaintiff claims could apply only to remains that have been *identified*. Until remains are *identified* as being an individual who was a member of a particular family, they may be the remains of a member of a different family. Accordingly, this request is mooted by defendants' agreement to return remains identified as those of PVT Kelder to the primary next-of-kin.

Likewise, Count IV must be interpreted with common sense and in light of plaintiff's other claims. Count IV seeks a declaratory judgment that the remains of X-816 are those of PVT Kelder based on the "clear and compelling" evidence that plaintiff produced to defendants. Plaintiff, however, cannot simultaneously demand exhumation and DNA testing, while claiming that he has already produced enough evidence to identify the remains as those of PVT Kelder.

[1] Moreover, Plaintiff's Declaratory Judgment and Mandamus counts fail if his due process claim is moot, as neither the Declaratory Judgment Act nor the Mandamus Act waives sovereign immunity. See Defendants' Motion to Dismiss Plaintif's First Amended Complaint (ECF 47) at 22.

Common sense dictates that Count Four is premised on identification of the remains through, inter alia, DNA testing. As defendants have agreed to do that, this claim is moot.

II. This Case Is Not "Capable of Repetition, Yet Evading Review"

The mootness doctrine has a well-known exception for cases that are "capable of repetition, yet evading review." To come within the exception, however, plaintiff must demonstrate that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975). As the Fifth Circuit recently explained:

> The plaintiffs bear the burden of proving both elements. Under the "capable of repetition" prong, the plaintiffs "must show either a 'demonstrated probability' or a 'reasonable expectation' that they will be subject to the same unlawful governmental action again." A "mere physical or theoretical possibility" is not sufficient to satisfy this prong.

Hancock County Bd. Of Supervisors v. Ruhr, – Fed. Appx. --, 2014 WL 1998998 (5th Cir. 2014)(internal citations omitted).

Plaintiff here can satisfy neither prong. The first prong asks whether the case is one that, because of its very nature, is prone to becoming moot. This type of case involves actions, for example, economic strikes or election-related claims "that do not last long enough for complete judicial review of the controversies they engender." Weinstein, 423 U.S. at 148 (internal citation omitted). This action plainly does not come within the first prong.

Plaintiff cannot credibly allege that he will be subject to the same governmental action again, and his case therefore fails under the second prong as well. To defendants' knowledge, plaintiff has no other relatives buried as unknowns in American cemeteries and therefore will not be requesting additional disinterments. With respect to PVT Kelder, plaintiff has based his

complaint on his unequivocal belief that PVT Kelder's remains are those buried as X-816. If plaintiff is correct, then he will obtain the relief he seeks. (Indeed, defendants will disinter all ten graves associated with common grave 717 thus helping to ensure the best chance of identifying PVT Kelder). If PVT Kelder's remains are not identified among those graves, despite Plaintiff's insistence that one of those graves does contain his remains, only a highly speculative and hypothetical set of facts would result in another disinterment request from plaintiff. Accordingly, another request to disinter cannot be reasonably anticipated, and therefore the allegedly wrongful behavior by defendants cannot reasonably be expected to reoccur. See Already LLC v. Nike, Inc., 133 S.Ct. 721, 727-29 (2013).

III. A Stay of Discovery Will Promote Judicial and Governmental Efficiency

Plaintiff has filed 120 separate Document Requests, as well as interrogatories and two sets of Requests for Admissions. Defendants have responded to the Requests for Admissions. Defendants have also spent, collectively, over forty hours reviewing plaintiff's document requests and *partially* obtaining information regarding the location and amount of potentially responsive documents.

The Document Requests are attached as Exhibits 2 and 3. Even a cursory review shows that they are overbroad, vague, and duplicative. Potentially responsive documents could be in the possession and control of at least ten different agencies or components of the Department of Defense and span a timeline from the beginning of World War II to the present. For example, Plaintiff's request number 49 is for case files and lists of all missing or unaccounted for military personnel from WWII "for whom any person has filed a request for the remains, or the identification, of such missing person." Such requests, may be located, for example, in any one of the more than 70,000 individual deceased personnel file (IDPF) for WWII missing personnel,

but also could be located in other repositories, such as the correspondence files of DPMO, JPAC, the casualty assistance offices for all the Services, and in archives of other offices that may no longer exist. Finding responsive documents would require developing a new methodology for searching many tens of thousands of multi-page records that are stored in different locations and storage systems by different offices and DoD components around the world, and which were created over a period beginning with the first years of WWII and extending until the present.

While approximately 24,000 of the more than 70,000 IDPFs for WWII missing personnel have been "scanned" or digitized as of May 1, 2014, the vast majority of these documents and records are hard-copy only documents. For those that have been digitized, the digital versions cannot be searched using optical character recognition tools because the records contain too much hand-written text and/or faded typewritten text. Accordingly, each of the 70,000-plus WWII IDPF file records would need to be searched page-by-page to see if the record contained any such requests for a service member's identification or the service member's remains. Based on metrics associated with DPMO's ongoing project to digitize all the WWII IDPFs, DPMO has determined that the average length of an IDPF for missing military personnel from WWII contains approximately forty pages of documents. Accordingly, to satisfy just Plaintiff's request number 49, DPMO would need to conduct a page-by-page manual search of more than 2,800,000 pages (70,000 IDPFs times 40 pages average).

To help put this into context, the Department has only initiated research and conducted some document searching for approximately 10,000 of these records (and thus, 40,000 pages) in the last 10-plus years. The page-by-page search needed to provide documents responsive only to Plaintiff's request number 49 would require using all the research analysts employed by DPMO and JPAC, and would take decades to accomplish, using current and projected resources.

Many of plaintiff's other requests are at least as broad, and many request documents or information that is highly sensitive, such as family DNA information, or protected by special statutes, such as the such as the "McCain Bill" (50 USC §435, Public Law 102-190). Pursuant to the McCain Bill, the Department of Defense is required to obtain written consent from the primary-next-of-kin prior to the release of any information relating to the treatment, location, and/or condition of military personnel unaccounted-for from the Vietnam War (and, in certain instances, from the Korean War and the Cold War). Thus, for example, Plaintiff's requests numbered 28, 37, 41, 42, 58 and 60, list categories of information that are not limited to WWII missing personnel (e.g., documents relating to all requests or recommendations for disinterments of unknowns and other military personnel lost in any conflict (number 28) and documents referencing a JPAC incident number and which involve an unknown or a disinterment, including current and completed cases (number 37). These requested documents, as well as other requested information, would likely include information subject to the McCain Bill or other statutes, and thus would require extraordinary resources to review and redact such information.

Plaintiff's counsel and the undersigned have not had a "meet and confer" as yet on these requests (with the exception of Plaintiff's Second Request for Production Nos. 1 and 5). Defendants believe that, if necessary, plaintiff's counsel will reasonably and in good faith engage in an attempt to better define and limit these requests. However, even the process of obtaining information sufficient to discuss 120 separate requests is highly burdensome to defendants' operations, and the process of going through these requests with agency and then plaintiff's counsel could be a matter of days and not hours. Based on preliminary discussions, it is unlikely

that all disagreements between the parties will be resolved, and highly likely that the Court involvement will be required.[2]

Accordingly, in light of defendants' agreement to exhume the contested remains, and defendants' position that this action moots this matter, defendants respectfully request that discovery be stayed. In the unlikely event that the Court finds any aspect of plaintiff's case to be not moot, defendants request that the Court stay discovery pending either resolution of Defendants' Motion to Dismiss, or the outcome of the identification process. Given the pending dispositive motions and the decision by defendants that will resolve this matter in any event, engaging in the meantime in protracted and likely contentious discovery is not an efficient use of the Court's or the government's resources.

IV. Conclusion

For the above-stated reasons, defendants respectfully request that this case be dismissed as moot. Fed. R. Civ. P. 12(b)(1). In the alternative, defendants request that the case be dismissed for lack of jurisdiction and/or failure to state a claim, or summary judgment granted, for the reasons set forth in Defendants' Motion to Dismiss the First Amended Complaint, or, in the Alterative, for Summary Judgment. Defendants additionally ask that discovery be stayed pending resolution of the dispositive motions or the resolution of the identification process.

[2] Shortly before filing this Motion, the undersigned received a phone call from plaintiff's counsel. Counsel informed the undersigned that plaintiff has filed a motion to vacate the appointment of counsel and a motion to compel. Defendants have not yet seen these documents, but the situation plainly will complicate any continued discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 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