

resolve that threshold issue before continuing this case any longer either through discovery or the continuing “oversight” that plaintiff seeks.

Plaintiff has no statutory or constitutional right in this matter, and the Court should not continue to compel defendants to litigate as if there were such a right. Such continuing interference in the executive function is tantamount to a separation of powers violation. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Ex parte McCordle, 7 Wall. 506, 514, 19 L.Ed. 264 (1868); *e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (“Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society”)(internal quotations omitted); Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 94-95 (1998) (“The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception”) (internal quotations and citations omitted). Judicially “overseeing” discretionary government programs and wasting government resources in litigation without jurisdiction is offensive to the constitutional scheme.

As defendants’ stated in our Suggestion of Mootness, in order to present a case or controversy either plaintiff’s mandamus claim or his due process claim must survive. Unless the due process claim survives, this Court has no jurisdiction over plaintiff’s Declaratory Judgment claims. See Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint (ECF 47) at 22, citing Wolcott v. Sebelius, 635 F.3d 757, 766-67 (5th Cir. 2011) (Mandamus Act does not

grant jurisdiction “to consider actions asking for other types of relief – such as injunctive [or declaratory] relief.”).

The mandamus claim is obviously moot as defendants are doing the “duty” plaintiff claimed they are legally required to do. Mandamus requires a “pre-existing” nondiscretionary ministerial duty. Mandamus cannot require defendants to do something different, such as conduct identification in the manner that plaintiff thinks best.

Likewise, the due process claim is moot. Plaintiff’s due process claim was based on the alleged failure of defendants to give sufficiently due process to his request to disinter and identify X-816. Defendants have now granted that request, making any alleged procedural deficiencies moot.

In response to the defendants’ motion, plaintiff does not address defendants’ arguments or the causes of action in his First Amended Complaint. Instead, he seeks two novel forms of judicial relief.

First, he argues that this case is not moot because he has outstanding discovery requests. That point barely merits discussion. Of course, one must have a case to get discovery; discovery is not supposed to be the endpoint of the case, and desire for discovery is not a cause of action.¹ Plaintiff’s allegations of defendants’ “misconduct” in considering his request are also beside the point since the request has been granted.

Plaintiff next contends that dismissing this case “would deny Plaintiff any recourse to challenge the adequacy or integrity of the exhumation and examination process.” Response at 1-2. For example, a dismissal would deny “Plaintiff a hearing on any potential controversy or

¹ Although discovery may be at least part of plaintiff’s goal here. As discussed in Defendants’ Response to Plaintiff’s Motion to Compel, most of the documents that plaintiff requested are those he sought to obtain for free and expedited in his previous FOIA case, a request this Court denied.

irregularity arising during exhumation or examination of the remains.” Id. at 3-4. Desire for judicial oversight of the executive is not a cause of action, however.

The due process claim in the First Amended Complaint complained of lack of procedures to consider plaintiff’s petition to disinter, not lack of Court oversight of the exhumation and examination process after defendants granted plaintiff’s requested relief. There is no operable complaint in this case containing any such cause of action.

In addition, plaintiff’s new complaints are speculative at best and address future harms and contingencies that may never occur. In essence, he is complaining that defendants may not be able to identify X-816. That claim does not state “a concrete, particularized injury” for standing purposes, is not ripe and cannot keep this case alive.² See Lewis v. Casey, 518 U.S. 343, 357 (“[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”).

Finally, plaintiff’s insistence that this Court should find jurisdiction to “oversee” defendants’ actions reflects a misunderstanding of the Article III limitations on federal courts, restricting courts to resolving only live cases or controversies. If a plaintiff could obtain Court oversight of every governmental process the plaintiff believed he could do better, the Courts would be rather busy. In the absence of an injury to a statutory or constitutional right, Congress, not the Court, exists to oversee defendants’ policies and procedures. As plaintiff points out, Congress is actively doing so. Id. at 5-6, quoting GAO report. See 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.”). Moreover, as this Court previously found, Congress has largely precluded judicial review of defendants’ accounting

² And also fails for all the other jurisdictional reasons set forth in our Motion to Dismiss, incorporated here by reference.

decisions (except certain death determinations), making such “oversight” even more problematic as there is no waiver of sovereign immunity. 10 U.S.C. § 1508; Report and Recommendations of United States Magistrate Judge (ECF 30) at 5-7.

As pointed out above and *passim*, the Court has yet to determine that plaintiff has any protected due process interest in this case, or that there has been any government deprivation. "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). Defendants should not be required to come to court to explain why each step of the identification process meets the requirements of the due process clause, unless and until this Court makes new law by determining that there is a constitutional due process interest in unidentified remains, and that plaintiff has standing to assert it. Even assuming that plaintiff could surmount these and other threshold issues (such as standing and waiver of sovereign immunity), the due process clause simply provides for due process, not an infallible process. Bishop v. Wood, 426 U.S. 341, 350 (1976) (“[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised [] decisions.”).

CONCLUSION

For the reasons set forth above and in our Suggestion of Mootness and in our Motion to Dismiss, or in the Alternative, for Summary Judgment, defendants respectfully request that this case be dismissed under Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 56. Defendants further request that the Court enter a Protective Order against discovery. Defendants’ withdraw their request, made in the alternative, that the Court stay discovery pending completion of identification procedures, and object to any such stay. A proposed order for a Protective Order was filed with Defendants’ Response to Plaintiff’s Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th 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:

John Eakin
Plaintiff *pro se*

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney