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' OBJECTION TO MAGISTRATE'S ORDER GRANTING PLAINTIFF'S MOTION TO VACATE APPOINTMENT OF PRO BONO COUNSEL AND ALLOWING PLAINTIFF LEAVE TO FILE MOTION TO COMPEL *PRO SE*

Pursuant to Fed. R. Civ. P. 72(a), defendants American Battle Monuments Commission, *et al.*, respectfully object to the Magistrate Judge's Order, entered July 16, 2014, granting Plaintiff's Motion to Vacate Appointment of *Pro Bono* Counsel and allowing plaintiff to proceed *pro se* in this action, and granting plaintiff leave to file, *pro se*, a motion to compel. See Order (ECF 71). Defendants object to the Order as clearly erroneous and contrary to law, and request that plaintiff's Motion to Compel be stricken.[1]

Allowing plaintiff to proceed *pro se* violates 28 U.S.C. § 1654, which provides that *pro se* plaintiffs may only pursue "*their own cases*" in federal court. 28 U.S.C. 1654 (emphasis added); *e.g.*, Simon v. Hartford Life, Inc., 546 F.3d 661, 664-65 (9th Cir. 2008) ("well-established that the privilege to represent oneself *pro se* provided by § 1654 is personal to the

[1] See Greater Southeast Community Hosp. Foundation, Inc. v. Potter, 586 F.3d 1, 5 (D.C. Cir. 2009) (affirming district court striking of document filed by non-lawyer on behalf of corporation; striking not a sanction for "misconduct" but appropriate response to document filed by unauthorized person). On July 28, 2014, the Magistrate Judge entered an Order Granting in Part and Denying in Part Plaintiff's Motion to Compel. ECF 77.

litigant and does not extend to other parties or entities. . . . Consequently, in an action brought by a *pro se* litigant, the real party in interest must be the person who 'by substantive law has the right to be enforced'") (*quoting* C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) and citing cases.

The statutory restriction on non-attorneys is designed to protect the legal process, not simply the outcome of the case. *E.g.*, Lattanzio v. Comta, 481 F.3d 137, 139 (2d Cir. 2007) ("principal rationale for ordinarily requiring representation by a licensed attorney is that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court . . . the lay litigant lacks many of the attorney's ethical responsibilities")(internal quotation and citation omitted). Accordingly, plaintiff's right to proceed *pro se*, if any, must be decided prior to his undertaking legal acts, such as filing motions.

As explained below, plaintiff has no substantive rights at stake in this matter, and he cannot proceed *pro se* in a representational capacity on claims alleged to be those of his cousin, Douglas Kelder. Accordingly, Defendants respectfully request that the Court reverse the Magistrate's Order allowing plaintiff to proceed *pro se* and strike his Motion to Compel. The Court must either appoint another attorney or allow plaintiff to find one. In the alternative, defendants urge the Court to rule on either of our dispositive motions, Defendants' Defendants' Motion to Dismiss, or, in the alternative, for Summary Judgment, pending since February 5, 2014, or their Suggestion of Mootness[2], filed July 8, before considering appointment of new *pro bono* counsel.

[2] On June 23, 2014, the Secretary of the Army approved the disinterment for identification of the ten sets of remains associated with common grave 717, which moots this case. The disinterments are scheduled to occur in August, 2014.

I. Background

Plaintiff is the first cousin, once removed, of PVT Arthur H. Kelder. PVT Kelder perished in 1942 in Cabanatuan prisoner of war camp in the Philippines and was believed to be buried in common grave 717 of the camp cemetery, along with thirteen others who perished the same day. After the war, the cemeteries were excavated and, for some five years, attempts were made to identify remains. Congress specified that the effort to repatriate remains would end on December 31, 1951, finding that "the date beyond which further continuance of the authority granted by this Act is not necessary in the public interest." 61 Stat. 779 (1947). Accordingly, all remains that the Army was unable to identify were buried as unknowns and memorialized in American Memorial Cemeteries overseas. PVT Kelder's remains are presumed to be buried in Manila American Cemetery and his name is inscribed on the Memorial Wall.

In 2009, Congress amended the Missing Service Personnel Act (MSPA) to include World War II remains within the defendants' accounting mission (the mission had originally been limited to more recent conflicts, and gradually extended). 10 U.S.C. § 1509. Beginning in 2009, plaintiff began contacting defendants to request disinterment of the remains known as X-816, which plaintiff believed to be those of PVT Kelder. Not receiving the answer he sought in the time he desired, plaintiff filed suit. Plaintiff's original complaint sought relief under the MSPA and the Administrative Procedure Act. This Court dismissed, holding, among other things, that plaintiff lacked standing and that the MSPA precluded review of defendants' actions under the MSPA and the APA.

A. Plaintiff's First Amended Complaint

The Court granted leave to amend, however. The Court also appointed *pro bono* counsel for plaintiff. Plaintiff filed his First Amended Complaint on October 3, 2013. Plaintiff's First Amended Complaint sought relief on four counts: 1) under the Mandamus Act, alleging that

defendants had a non-discretionary duty to search for and identify remains; 2) under the Fifth Amendment, alleging that plaintiff had a due process property interest in the remains; 3) for a declaratory judgment that "families have an absolute right to the remains of their family member" and 4) for a declaratory judgment that the remains of X-816 were those of PVT Kelder. First Amended Complaint for Declaratory Judgment, Mandamus, and Injunctive Relief, ECF 39.

B. Defendants' Motion to Dismiss

Defendants filed a motion to dismiss, or in the alternative, for summary judgment. ECF 47. To summarize some of the many alternative arguments, defendants explained that:

1) Plaintiff lacks standing, since, among other reasons, plaintiff is not the next-of-kin and Article III standing cannot be transferred or assigned by power of attorney. ECF 47 at 27-30; ECF 54 (Reply to Response) at 2-4. Defendants also asserted that even the next-of-kin would lack standing since, among other reasons, the remains are unidentified (and therefore the claimed injury of the next-of-kin is speculative, as is causation and redressibility), and there is no statutory or constitutional right at stake, and, without a legal right, there is no legally cognizable injury. ECF 47 at 30 n. 11, 31-32.

2) Plaintiff's mandamus claims fail because he has not identified (and none exists) a presently-existing, non-discretionary and ministerial legal duty to exhume and seek to identify unknown remains. Without such a duty, this claim fails on sovereign immunity and standing grounds, and also fails to state a claim for relief. ECF 47 at 22-25 (sovereign immunity); 31 (standing); and 32-35 (failure to state a claim); ECF 54 at 5-7.

3) Plaintiff's due process claim fails because, among other reasons:

a) no one can have a property interest in remains that are *unidentified*; and further human remains are not "property" and there is no constitutionally-recognized property interest in human remains. ECF 54 at 11-14.[3]

b) there has been no government deprivation, since defendants' accounting program is a voluntary affirmative government program, not an exercise of government coercive power over property rights; the deprivation occurred at the hands of the Imperial Japanese. ECF 47, at 39-41; ECF 54 at 15-16.

Defendants also noted that a final decision had not been reached at the time the Motion to Dismiss was filed, and the final decision on plaintiff's request lay with the Secretary of the Army. ECF 47 at 4, n.2, 13; ECF 54 at 2 n.1, 19-20. Because plaintiff's complaint was without merit, however, defendants did not press the ripeness issue in the belief that the case would be dismissed prior to any final agency action on the disinterment request. Defendants' motion to dismiss for lack of jurisdiction has been briefed and pending since February 5, 2014.

C. Defendants' Suggestion of Mootness

As noted above, the Secretary of the Army has approved the disinterment for identification of the ten sets of remains associated with Cabanatuan Grave 717. Defendants filed their Suggestion of Mootness on July 8, 2104, notifying the Court of the Secretary's decision and that the disinterments were scheduled for the beginning of August.[4] ECF 64.

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[3] Plaintiff's due process claim is vague, but appears to be based primarily on an asserted property interest in unidentified remains. Without benefit of a clear pleading, defendants also addressed other possible iterations of this claim, including an entitlement to disinterment and identification (ECF 47 at 35-39), and substantive due process (ECF 54 at 14-15). Defendants also pointed out that the process provided, including consideration of plaintiff's materials and an opportunity to be heard, satisfies due process. ECF 47 at 41-42; ECF 54 at 16-21.

[4] Counsel has since been informed that the disinterments will take place beginning approximately August 12, 2014.

Defendants asserted that plaintiff's mandamus claim is moot because defendants are complying with the "duty" plaintiff claimed they are legally required to do. ECF 64 at 3-4. Likewise, defendants asserted that the due process claim is moot. Plaintiff's due process claim was based on the alleged failure of defendants to give sufficient due process to his request to disinter and identify X-816. Defendants have now granted that request, making any alleged procedural deficiencies moot.[5] Id. at 4.

Plaintiff has objected to dismissal of the case on mootness grounds, contending that such a dismissal would interfere with his ability to obtain discovery, and that the Court should continue to "oversee" the exhumation and identification process. Plaintiff further contends that the remains should be produced for testing by his experts. ECF 73.

D. Discovery

Over defendants' objection (ECF 55), the Magistrate Judge granted in part plaintiff's motion for discovery, allowing documentary discovery under Rules 33, 34 and 36. ECF 62. On May 5 and May 13, plaintiff served two Requests for Production totaling **one-hundred twenty** separate requests,[6] two sets of Requests for Admission and Interrogatories.

[5] Plaintiff's causes of action under the Declaratory Judgment Act cannot survive mootness of his due process claim. 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).

[6] Plaintiff's 120 requests demanded documents of all sorts for every missing person since Pearl Harbor (e.g., 29, 37, 40-42, 44-46, 59-61, 75, 77, 84, 94, 111); various personnel records for defendants' employees; documents alleging "misconduct by any person assigned to JPAC or DPMO" (63, see also 62); documents "which discussed or mentioned misconduct by any person employed by Defendants in any capacity," (#65, see also 72, 73); and a host of other irrelevant and ill-defined material. Plaintiff also requested the production of the ten sets of remains associated with the mass grave in which PVT Kelder was buried at Cabanatuan.

Over the next several months, defendants spent a considerable amount of time researching and responding plaintiff's requests and seeking to negotiate their scope with plaintiff's counsel. Plaintiff, however, consistently refused to allow his counsel to engage in "meet and confer" discussions required by Fed. R. Civ. P. 26.[7]

II. Plaintiff's Motion to Vacate Appointment of Counsel and for Leave to File Motion to Compel

On July 8, 2014, Plaintiff moved for leave to file his motion to vacate the appointment of his *pro bono* counsel. Notably, Plaintiff's motion to vacate was based on the grounds that his counsel "refused multiple requests from Plaintiff that he require Defendant's response to discovery requests." Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel (ECF 67) at 2. Plaintiff also sought leave to file a motion to compel, presumably that which his counsel declined to file. ECF 65.

Defendants took no position on the motion to vacate the appointment of counsel, but filed a response pointing out that, under 28 U.S.C. § 1654, Mr. Eakin could not proceed *pro se* as he is not the real party in interest. Defendants' Response to Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel (ECF 69).

III. The Magistrate's Order

At a status conference on Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel, held July 16, 2014, the Magistrate Judge indicated that he viewed defendants' statutory objection to allowing plaintiff to proceed *pro se* as simply a variant of defendants' Article III standing argument, briefed in defendants' long-pending motion to dismiss. The Magistrate

[7] Plaintiff's counsel failed to appear at a scheduled meet and confer conference on June 17 and later informed defendants' counsel that he had not been authorized to "negotiate" plaintiff's requests. Further efforts to limit the requests were also rebuffed. See Defendants' Response to Plaintiff's Motion to Compel, ECF 74.

Judge ruled that plaintiff could proceed on all claims, but would presumably only be able to prevail on those claims determined to be his own. The Magistrate declined to rule on which, if any, claims involved substantive rights of the plaintiff before allowing plaintiff to proceed *pro se*. The Magistrate granted plaintiff's Motion to Vacate, and allowed plaintiff to file his motion to compel. Order (ECF 71).

IV. The Magistrate Judge's Decision to Allow Plaintiff to Proceed Without Determining which, if Any, Claims Belong to Plaintiff, is Error.

The Magistrate Judge clearly erred in allowing plaintiff to proceed with this case *pro se*. It is well-established that a non-attorney plaintiff cannot represent another person in federal court. *E.g.*, Simon, 546 F.3d at 664-65 (9th Cir. 2008) ("well-established that the privilege to represent oneself *pro se* provided by § 1654 is personal to the litigant and does not extend to other parties or entities. . . . courts have routinely adhered to the general rule prohibiting *pro se* plaintiffs from pursuing claims on behalf of others in a representative capacity.")

The rule cannot be circumvented by granting a power of attorney or assigning claims. As explained by the D.C. Circuit:

> We think the words 'the parties,' as used in the statute, mean the parties in interest- the real, beneficial owners of the claims asserted in the suite, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counselors at law. It cannot be doubted, we think, that an assignment of a claim against another, made solely for the purpose of permitting the assignee- not an attorney- to conduct the litigation in proper person, would be colorable only and, therefore, insufficient to accomplish the purpose; and this, for the reason that such an assignment would transfer only the naked legal title or, perhaps more accurately, no more than an agency- a power without an interest;- and in such case there would be lacking that element of personal interest which alone permits the management of an action at law in a court by someone other than an attorney at law.

Heiskell v. Mozie, 82 F.2d 861, 863 (D.C. Cir. 1936); see Southwest Exp. Co., Inc. v. I.C.C., 670 F.2d 53 (5th Cir. 1982)(rejecting corporate assignment of interest in suit to president to permit

president to continue case *pro se*); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264 (E.D.Wis.1991) (sole-member LLC cannot be represented by non-attorney owner, even where corporation assigned interest in lawsuit to owner).

Moreover, the rule against representation of third parties has been applied routinely regardless of the closeness of the plaintiff's affinity with the real party in interest. *E.g.*, Southwest Exp. Co., Inc., 670 F.2d 53 (president cannot represent corporation *pro se*); Lattanzio v. Comta, 481 F.3d 137 (2d Cir. 2007) (sole member and executive director of LLC cannot represent LLC *pro se*); Harris-Thomas v. Christina School Dist., 145 Fed.Appx. 714, 715, 2005 WL 1625234 (3rd Cir. 2005) (unpublished) (*pro se* parent cannot represent child; vacating judgment against child entered by district court); Lindstrom v. State of Ill., 632 F.Supp. 1535 (N.D.Ill.1986) (non-attorney cannot represent spouse); Silver v. D.C. Metropolitan Police Dept., 939 F.Supp. 2d 20 (*pro se* arrestee cannot bring claims on behalf of grandmother and uncle) (D.D.C. 2013). Finally, a right of non-attorneys to represent a party before an agency does not translate into such a right in federal court. Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998).

Contrary to the statement of the Magistrate Judge, the statutory bar prohibits plaintiff from *proceeding* on another's claim, not simply from *prevailing* on that claim. Id. ("threshold question becomes whether a given matter is a plaintiff's own case or one that belongs to another"). This is because (unlike Article III, which arguably primarily protects against poorly-defined decisions not limited by a true case or controversy) the rule against non-lawyer representation primarily protects against burdens associated with the litigation process itself. [8]

[8] Many courts have noted that the rule also protects the real party-in-interest from being bound by, and potentially having claims waived by, a non-attorney who may not fully represent the third party's best interests. *E.g.*, Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829, 830 (7th Cir. 1986). Conversely, at least one appellate court has vacated a judgment against a minor whose

Thus the rule protects the court and adversary from the "unusual burdens" of litigating against a party not bound by an attorney's ethical responsibilities and not trained in the law. *See* Lattanzio, 481 F.3d at 139 ("principal rationale for ordinarily requiring representation by a licensed attorney is that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court . . . the lay litigant lacks many of the attorney's ethical responsibilities")(internal quotation and citation omitted); Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829, 830 (7th Cir. 1986) ("the lay advocate lacks many of the attorney's ethical responsibilities – for example, to avoid litigating unfounded or vexatious claims"); Capital Group, 768 F.Supp. at 265 ("This rule further protects the court and the public from irresponsible behavior by lay advocates who lack many of the attorney's ethical and legal responsibilities").

Accordingly, while, as the Magistrate suggested, the substantive analysis for purposes of 28 U.S.C. § 1654 may be similar to that of Article III, the timing for that analysis is different.[9] To allow plaintiff to practice law (by, for example, filing a motion to compel), incurs the harm that the limitation on non-attorney representation is designed to prevent.[10] Consequently, before

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mother erroneously was allowed by the district court to assert the minor's claims *pro se*. Harris-Thomas, 145 Fed.Appx. at 715.

[9] While courts have recognized that it is the "better practice" to resolve jurisdictional issues, including standing, before requiring the government to invest substantial and scarce resources responding to discovery, defendants recognize that this is somewhat within the court's discretion. *E.g.*, U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79-80 (1988) ("It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters."); Rutman Wine Co. v. E & J Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987)("[i]t is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.").

[10] This rationale is manifestly applicable here, where defendants were required to respond to, and the Magistrate Judge to rule on, a motion to compel on, *inter alia*, 120 document requests – a motion that plaintiff's *pro bono* counsel declined to file.

allowing plaintiff to proceed *pro se*, the Court must determine whether any of plaintiff's claims are his own substantive rights, or whether his claims are asserted in a representational capacity. Here, it is plain that plaintiff lacks **any** substantive right of his own.

A. The Power of Attorney Does Not Convey Substantive Rights

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. Doc. 39 ¶ 2. The power of attorney itself purports to grant to Plaintiff "the 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 or Army Regulation 638-2." *See* Pl. Exh. 26 (emphasis added). The document authorizes Eakin "to perform all necessary acts, and to sign and deliver all documents in the execution of the aforesaid authorizations with the same validity as I could have effected if personally present." The Grant is revocable at will by the grantor, and terminates on the grantor's death. Id.

As discussed above, courts have routinely rejected allowing such attorneys-in-fact to proceed *pro se* on behalf of the true party in interest. *E.g.*, Heiskell v. Mozie, 82 F.2d at 863. Here, the document on its face does not purport to convey any substantive rights, but merely authorizes plaintiff to represent the grantor. As the above-cited cases make clear, however, he cannot do so in federal court.

B. The Right to Appear Before the Agency, Even if It Applied, Does Not Convey Substantive Rights

In relevant part, the First Amended Complaint states that

> Douglas Kelder has designated his cousin, John Eakin, as his Attorney in Fact for all purposes regarding the disposition of the remains of Arthur H. Kelder . . . as provided for by 10 U.S.C. § 1501(d). Plaintiff, as the designated Primary Next of Kin (PNOK) 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. Plaintiff is thus a proper plaintiff . . .

Doc. 39 ¶ 2.

Section 1501(d) states:

> **Primary next of kin.**--The individual who is primary next of kin of any person **described in subsection (c)** may **for purposes of this chapter** designate another individual to act **on behalf of** that individual as primary next of kin. The Secretary concerned shall treat an individual so designated as if the individual designated were the primary next of kin **for purposes of this chapter**. **A designation under this subsection may be revoked at any time by the person who made the designation.**

10 U.S.C. § 1501(d) (emphasis added).

Designation under Section 1501(d) does not convey any substantive rights to plaintiff, however. As a preliminary matter, Section 1501(d) does not apply to plaintiff at all because PVT Kelder is not a person "described in subsection (c)". Subsection (c) states that Section 1502 applies "in the case of any member of the armed forces **on active duty** – (A) who becomes involuntarily absent … and … who is unaccounted for." 10 U.S.C. § 1501(c) (emphasis added). Section 1502, in turn, provides for the initial report, preliminary assessment and so forth by the various commanders when a person becomes missing. In other words, "covered persons" under 1501(c) are active duty personnel (and certain civilians) who go missing after the date of the statute; it does not apply to "Pre-enactment cases," like PVT Kelder's, which are described in Section 1509.

Section 1501(d) is also unavailing to plaintiff because by its terms any designation is limited to the "purposes of this chapter." The only benefit "for purposes of this chapter" that applies to plaintiff is found in10 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." *Cf.* Iannacone, 142 F.3d at 558 (statute permitting non-attorneys to represent claimants before Social Security Commission did not, by its terms, allow such representation in federal court).

Finally, Section 1501(d) does not purport to allow the transference of substantive legal right. Section 1501(d) merely permits a designee to act "on behalf of" the PNOK, and further makes that designation revocable at will. This designation does not create a substantive legal right in the designee.

C. Plaintiff Has No Substantive Rights In His Mandamus Action or Under the Due Process Clause

As explained above, neither the Power of Attorney nor the MSPA conveyed substantive legal rights to plaintiff. The only remaining issue is whether plaintiff has any substantive legal right of his own in his mandamus or due process claims. In support of his mandamus claims, plaintiff lists a number of regulations, directives and publications governing defendants' various search, recovery and accounting missions. All of these describe a general mission to search for, recover, identify and return remains of missing servicemen. None of these describe a non-discretionary, ministerial duty of the type required for a mandamus action. More to the point here, none of them describe any duty to anyone, much less extended family members such as plaintiff, to search for or identify remains.

The only arguable legal "right" referenced by plaintiff is that vested in the Person Authorized to Direct Disposition of Remains (PADD), which as the name implies, is the right to direct disposition of remains. Such a right cannot arise, however, until there are identified remains (and thus an identified PADD) so that disposition can be directed. If and when PVT Kelder's remains are identified, Plaintiff may act on behalf of the PADD, assuming Douglas Kelder is still the PNOK and the Power of Attorney is still in effect. That does not mean any

substantive right is plaintiff's – Douglas Kelder may revoke the designation at any time, or, in the event of Kelder's death, PADD status passes to the next closest relative. In any event, plaintiff is not seeking to enforce this right through his mandamus action. Such an action would not be ripe and, in any event, defendants have not indicated that they will not honor any disposition request.

Likewise, plaintiff has no due process interest in PVT Kelder's remains. As explained at length in defendants' motion to dismiss, there is no constitutional due process interest at stake in this case – no matter how such interest is described. Plaintiff's main argument, however, appears to be based on an asserted property interest in remains. Even assuming remains can be property (which no court has found), the property would presumably belong to the next-of-kin. Nothing in the Power of Attorney purports to convey a property right to the remains themselves, and constitutional rights cannot be "assigned" through a power of attorney. Plaintiff clearly does not have his own "due process interest" in the remains. Accordingly, he cannot proceed *pro se* on the due process claim.

V. Conclusion

The Magistrate Judge erred in allowing plaintiff to proceed *pro se* without determining whether plaintiff has any substantive right of his own in this matter and what that right is. Allowing plaintiff to litigate substantive rights of a third party contravenes 28 U.S.C. § 1654, and perpetuates harm to defendants and the Court that the law was intended to prevent. Accordingly, plaintiff's Motion to Compel should be stricken. To continue this litigation in a representative capacity, plaintiff must obtain an attorney. Of course, obtaining an attorney will obviate the statutory concerns of Section 1654, but will not solve plaintiff's Article III standing deficiencies

(or other jurisdictional flaws). Accordingly, defendants urge the Court to rule on, and grant, either or both of defendants' pending motions to dismiss rather than continuing this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th 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