

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, et al.

Defendants.

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Civ. A. No. SA:12-cv-1002-FB-HJB

**REPLY TO RESPONSE TO 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***

This is the eighty-second filing in a case in which this Court has never had jurisdiction, nor plaintiff a viable cause of action. This particular set of pleadings began with defendants’ objection to the Magistrate allowing plaintiff to proceed *pro se*, in violation of 28 U.S.C. § 1654. In his Response, plaintiff never mentions Section 1654. Instead, he argues that the Court should 1) declare the remains of X-816 to be those of PVT Kelder “based on the existing documentary evidence,” or 2) wait to dismiss the case until there is “a successful forensic examination of the remains,” presumably so he can challenge defendants’ procedures or any “unsuccessful” identification. *Plaintiff’s Response To 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* (“ECF 80”) at 6. Since this Court patently has no jurisdiction to

either declare the identity of remains or to entertain a challenge to defendants' procedures or factual determinations,¹ this case should be dismissed immediately.

I. 28 U.S.C. § 1654 Bars Plaintiff From Proceeding *Pro Se*

As noted above, plaintiff does not mention Section 1654 in his Response. Plaintiff thus apparently concedes that he cannot proceed *pro se* except on a claim that is personal to him. He does not identify any such claim, however. Rather, he asserts that he has standing based on this Court's decision allowing him to amend his Complaint to file a mandamus claim and a *Bivens* action. ECF 80 at 1, citing *Report and Recommendation of the United States Magistrate Judge* (ECF 30) and *Order Concerning Report and Recommendations of the United States Magistrate Judge and Further Orders of the Court* (ECF 34).

The analysis under Section 1654 is distinct, albeit similar to, that for standing under Article III.² The difference is in the underlying purpose of the statute vis Article III, and, accordingly, in the timing of the required analysis. The Court must decide whether a plaintiff can proceed *pro se* under Section 1654 before allowing plaintiff to proceed. Neither plaintiff nor the Magistrate Judge addressed this issue, and that is the basis of defendants' Objection to the Magistrate's Order allowing plaintiff to proceed *pro se*. *E.g.*, *Southwest Exp. Co., Inc. v. I.C.C.*, 670 F.2d 53 (5th Cir. 1982); *Greater Southeast Community Hosp. Foundation, Inc. v. Potter*, 586 F.3d 1, 5 (D.C. Cir. 2009); *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664-65 (9th Cir.

¹ Were defendants to conclude that X-816 is not the remains of PVT Kelder, the only possible legal basis for a challenge would be under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.* But this Court has already held that the Missing Service Personnel Act ("MSPA"), 10 U.S.C. §§ 1501 *et seq.*, precludes review of defendants' accounting determinations under the APA. *Order Concerning Report and Recommendations of the United States Magistrate Judge and Further Orders of the Court* (ECF 34) at 5-7.

² The burden on plaintiff to show standing is higher as, in addition to injury-in-fact, he must show causation and redressibility.

2008); Lattanzio v. Comta, 481 F.3d 137, 139 (2d Cir. 2007); Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998);); Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829, 830 (7th Cir. 1986). Should the Court allow this action to proceed without addressing standing, the Court must appoint an attorney or require plaintiff to retain one.

II. Efficient Use of Judicial Resources Counsel Consideration of the Court's Lack of Jurisdiction

To the extent, however, that judicial resources are optimized by considering the standing issue and defendants' other jurisdictional arguments now, rather than appointing another attorney for plaintiff, defendants welcome that action. Defendants have previously addressed plaintiff's contention that this Court, in its Order granting to leave to file an amended complaint, has already decided the standing issue in plaintiff's favor. *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 2-4; *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, or, in the Alternative, for Summary Judgment* (ECF 47) at 27-32).

As explained in defendants' previous filings, the Court's Order was based on a different complaint and was made under a different standard and therefore is not dispositive here. See ECF 34 at 14-16. Unlike the complaint that this Court gave plaintiff leave to file, the First Amended Complaint does not contain a *Bivens* claim. Although the Court allowed plaintiff to amend his complaint to allege a mandamus action, that decision employed the liberal standard applicable to a motion for leave to amend, not the standard for a motion to dismiss. Id.

In the First Amended Complaint, plaintiff has failed to allege a ministerial, non-discretionary duty to him sufficient to support a mandamus claim. Plaintiff cites a hodgepodge of regulations, directives, policy statements and the like that describe general procedures to be taken when personnel become missing or die while on active duty. None of these contain a

specific duty to plaintiff. Without a showing of a clear, non-discretionary, ministerial duty to himself, plaintiff has failed to meet his burden to show standing under the Mandamus Act. *Perales v. Casillas*, 903 F.2d 1043, 1047 (5th Cir. 1990) (stressing that the lack of legislative standards meant that the alleged injury was not legally cognizable).³ Further, as explained in defendants' Motion to Dismiss, Article III standing cannot be assigned through a power of attorney (nor can plaintiff proceed *pro se* on such basis).

III. Plaintiff's Request for Declaratory Judgment is Frivolous

As noted above, plaintiff states that one of two non-moot remedies he seeks is for this Court to declare, based on the evidence plaintiff has submitted, that the remains of X-816 are those of PVT Kelder. As this Court has previously found, the Declaratory Judgment Act "does not confer subject matter jurisdiction on a federal court where none otherwise exists." ECF 30 p. 12; see also ECF 34 p. 14. This Court has no jurisdiction to identify remains, and should not force defendants to continue litigation on this claim for relief.

IV. Plaintiff's Request to Prolong Litigation Pending Identification is Without Basis

Plaintiff's other proposed remedy, which he contends would make "dismissal [] appropriate," is the "successful forensic examination of the remains." ECF 80 at 6. Plaintiff argues that this Court has jurisdiction to await this outcome for two reasons. First, he contends

³ Without repeating all of the arguments made in defendants' Motion to Dismiss, defendants note that, in the MSPA, Congress created a discretionary program to account for the missing. In 2009, the program was expanded to encompass remains from World War II. In the law, Congress created specific rights and duties owed to the Primary Next-of-Kin of persons in missing status, but did not create any rights or duties to family members such as plaintiff. Indeed, Congress went so far as to preclude judicial review of the program except in very limited cases related to death determinations. If the general duties cited by plaintiff to, e.g., "search for, recover, and identify eligible deceased personnel . . . using all resources and capabilities immediately available," AR 638-2, were sufficient to provide standing to compel defendants to act in a particular case, the entire MSPA statutory scheme would be irrelevant. Defendants would be under a continual non-discretionary duty to search for all deceased personnel, under threat of a mandamus suit by any relative, or person with a Power of Attorney of a relative.

that defendants have made only an “unenforceable statement of intent to disinter and attempt to identify the remains.” *Id.* at 2. Such a statement by defendants, however, is sufficient to support mootness. The government is entitled to a presumption of good faith, and there is no credible evidence that defendants will reverse the Secretary of the Army’s decision to disinter and seek to identify the remains. *Cf., Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014) (Government actors in their sovereign capacity accorded a presumption of good faith; claim that plaintiff may be subjected again to policy “too speculative to avoid mootness,” (internal quotations omitted)). Plaintiff’s speculation that defendants may not do what they have agreed to do is not sufficient to create a case or controversy.

Plaintiff’s second reason appears to be that, despite his overwhelming confidence that the remains are those of PVT Kelder, he fears that defendants will be unable to confirm the identification. These worries are speculative at best, and do not raise a current case or controversy sufficient to avoid mootness. Moreover, plaintiff’s concerns are irrelevant because this Court has no jurisdiction to either “oversee” defendants’ laboratory practices (should plaintiff object to defendants’ methodologies) or to review defendants’ determinations (should defendants determine the X-816 is not PVT Kelder). Any review of the former would entail the Court entertaining a *de novo* challenge to defendants’ scientific methods, which this Court lacks jurisdiction to do. Review of defendants’ ultimate determination could only be had under the APA, and the Court has already found that review to be precluded. However, nothing prevents plaintiff from seeking review of that agency action, if and when it occurs. Waiting for such a hypothetical adverse action cannot prolong this case.

IV. Conclusion

Plaintiff cannot proceed in this action *pro se*, as he has no personal right at issue in this action. 28 U.S.C. § 1654. Under the same analysis applicable to 28 U.S.C. § 1654, it is apparent

that plaintiff lacks standing. Further, a review of plaintiff's Response makes clear that the Court lacks jurisdiction to grant the relief he now seeks. Rather than prolong this action by appointing another attorney for plaintiff, the Court should take this opportunity to dismiss this matter for any and all of the reasons set forth in Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, and Defendants' Suggestion of Mootness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 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