

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES S. PARS,)
)
)
 Plaintiff,)
)
 v.) Civil Action No. 16-2491 (CRC)
)
 CENTRAL INTELLIGENCE AGENCY,)
 et al.,)
)
 Defendants.)

**MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFF'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Preliminary Statement

In this case brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, seeking to challenge the alleged failure by the Central Intelligence Agency ("CIA") to comply with Presidential Policy Directive 19 ("PPD-19"), plaintiff has conceded that PPD-19 provides him with no cause of action. Nonetheless, plaintiff argues that even if he cannot maintain an action to enforce PPD-19, he somehow can maintain an action to enforce PPD-19 through the APA. Not surprisingly, plaintiff cites no support for this untenable theory that the APA grants him a cause of action to enforce the provisions of PPD-19 when PPD-19 unequivocally states that it creates no such rights in third parties.

Accordingly, for the reasons set forth in defendants' motion

to dismiss, and for those set forth below, this case should be dismissed.

ARGUMENT

Plaintiff's opposition to defendants' motion to dismiss ("Plaintiff's Opp.") is remarkable for the assertions defendants made that plaintiff does not contest. Plaintiff offers no response to defendants' statement of the facts and thus they should be taken as accurate. See Taylor v. F.D.I.C., 132 F.3d 753, 763 (D.C. Cir. 1997) ("Dignified silence is a dangerous tactic at best; here it proves fatal"). This includes the fact that plaintiff's reliance on "IC IG External Review Procedures" in his Complaint, id. at ¶¶ 51-56, is unavailing because they do not apply to plaintiff's factual claims. Compare generally Plaintiff's Opp. with Defendants' Motion to Dismiss ("Defendants' Mot.") at 7-8.

Plaintiff also does not dispute defendants' showing that PPD-19 is not a statute. Compare generally Plaintiff's Opp. at 2 with Defendants' Motion to Dismiss at 8. Although plaintiff argues that PPD-19's whistleblower protections have been codified in Section 601 of the Intelligence Authorization Act for FY 2014, 50 U.S.C. 3234, Plaintiff's Opp. at 2, plaintiff's Complaint does not seek to enforce any provision of 50 U.S.C. § 3234. See generally Complaint. Instead, plaintiff seeks to

enforce PPD-19's requirements concerning an administrative process established for employees seeking review of any personnel actions the employee asserts to be in retaliation for an alleged reporting of waste, fraud and abuse. Defendants' Mot., Ex. 2 at 2; Complaint, ¶¶ 52-56.

Finally, plaintiff argues that the APA authorizes a claim against an agency when the agency has failed to take action required by law. Plaintiff's Opp. at 3. Plaintiff argues that presidential policy directives have the force and effect of law and thus under the APA plaintiff can sue to enforce PPD-19. In support of this claim, plaintiff cites to an attached exhibit and to defendants' opening memorandum at 8, *citing Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Plaintiff's Opp. at 2-3.

Plaintiff's attached exhibit is an opinion from the Department of Justice's Office of Legal Counsel, advising that there is no "substantive legal difference between an executive order and a presidential directive." Plaintiff's Ex. 1 at 1. Nowhere in this opinion does it state that private parties have the right to sue to enforce executive orders or presidential directives. Id.

In defendants' opening memorandum, defendants cited Norton for the general proposition that "the only agency action that

can be compelled under the APA is action legally *required*." Defs. Mem. at 8, *quoting Norton*, 542 U.S. at 63 (emphasis in original). Plaintiff seizes on this one statement and conveniently ignores the rest of defendants' argument, which goes on to state that as a general rule private parties may not enforce compliance with executive orders and directives issued by the Executive branch. Defs. Mem. at 9-10, *citing Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995); *Zhang v. Slattery*, 55 F.3d 732, 747-48 (2d Cir. 1995); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) (executive order "was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action"). Plaintiff makes no attempt to respond to this proposition or the cases cited by defendants.

Plaintiff also offers no response to defendants' showing that where, as here, an executive order or policy directive explicitly disclaims the creation of any enforceable rights or rights of action, the courts have regularly held that the order is not enforceable, either directly or through the APA. Defs.

Mem. at 11, *citing* State of Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) ("Given this clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review, we hold that the Order provides no basis for rejecting EPA's final action."); Chai, 48 F.3d at 1339 ("Furthermore, an executive order is privately enforceable only if it was intended to create a private cause of action."); Zhang, 55 F.3d at 748 ("[I]t has long been held that the executive branch may promulgate [directives] without creating rights and obligations enforceable by third parties.") (quoting U.S. Dep't of Health & Human Servs. v. Federal Labor Relations Auth., 844 F.2d 1087, 1095 (4th Cir. 1987)).

It is undisputed that PPD-19 plainly states that it "does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Defs. Ex. 1 at 8. Plaintiff's attempt to have this Court create a judicially enforceable right in the fact of PPD-19's express disavowal of such a right should be readily rejected.

CONCLUSION

For the foregoing reasons, and those set forth in

defendants' prior memorandum, defendants' motion to dismiss should be granted.

Respectfully submitted,

CHANNING PHILLIPS,
D.C. Bar # 415793
United States Attorney
for the District of
Columbia

DANIEL F. VAN HORN,
D.C. BAR # 924092
Chief, Civil Division

/s/ Marina Utgoff Braswell
MARINA UTGOFF BRASWELL
D.C. BAR #416587
Assistant United States
Attorney
U.S. Attorney's Office
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2561
marina.braswell@usdoj.gov