UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTGOMERY BLAIR SIBLEY, Plaintiff, v. YVETTE ALEXANDER, *et al.*, Defendants.	)	Civil Action No. 12-cv-01984

MOTION OF THE UNITED STATES FOR A STAY OF DISCOVERY OR, ALTERNATIVELY, TO QUASH SUBPOENAS, AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION WITH RESPECT TO THE DEPARTMENT OF STATE

INTRODUCTION

By this action, *pro se* Plaintiff Montgomery Blair Sibley seeks an injunction and declaratory relief barring Defendants Alexander, Dinan, and Lightfoot, the three electors who are participants in the Electoral College on behalf of the District of Columbia, from casting their electoral votes for President Barack Obama.[1] Compl. 1-2. The grounds for this lawsuit appear to be Plaintiff's belief that the president is somehow ineligible to hold office or to be re-elected to that office. Similar challenges have been raised throughout the president's first term and have repeatedly been rejected on procedural grounds and on the merits. *See, e.g.*, *Taitz v. Obama*, 707 F. Supp. 2d 1 (D.D.C. 2010) (Lamberth, C.J.); *Hollister v. Soetoro*, 601 F. Supp. 2d 179 (D.D.C. 2009) (Robertson, J.); *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *Kerchner v. Obama*, 669 F. Supp. 2d 477 (D.N.J. 2009), *aff'd* 612 F.3d 204 (3rd Cir. 2010); *Cook v. Good*, U.S. Dist.

[1] Pursuant to 3 U.S.C. § 7, the members of the Electoral College "shall meet and give their votes on the first Monday after the second Wednesday in December" (i.e., December 17, 2012). Because the electors have now convened and cast their ballots, Plaintiff's claims are moot.

LEXIS 126144 (M.D. Ga. 2009), *appeal dismissed* by dkt. no. 09-14698-CC (Feb. 26, 2010); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. Ct. App. 2009) ("persons born within the borders of the United States are 'natural born Citizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents"), *transfer denied* 929 N.E.2d 789 (Ind. 2010). Indeed, Plaintiff himself has filed at least two separate actions of this sort, seeking issuance of a writ of *quo warranto* against the president. The first was dismissed by this Court in June 2012 – a decision that was affirmed recently by the Court of Appeals. *See Sibley v. Obama*, 866 F. Supp. 2d 17 (D.D.C. 2012), *aff'd* No. 12-5198 (D.C. Cir. Dec. 6, 2012) (*per curiam*). The second was dismissed on December 19, 2012. *See Sibley v. Obama*, No. 12-cv-1832 (D.D.C.) (JDB).

This action was originally filed in D.C. Superior Court and removed by Defendants on December 12, 2012. Plaintiff moved to amend his complaint on December 14, 2012.[2] *See* Dkt. 8. Shortly after filing the original lawsuit, Plaintiff caused a series of at least seven subpoenas to be issued. The subpoenas purport to require the President, three federal agencies, and three educational institutions to produce, *inter alia*, "Original Certificates of Live Birth of Barack Hussein Obama, II;" I-94 immigration landing records for the period August 1st through and including August 10th, 1961; Social Security and Selective Service records concerning the

[2] Plaintiff's proposed amended complaint seeks to add as a defendant Vice President Joseph R. Biden, Jr., in his capacity as President of the Senate. *See* Dkt. 8. (To add further confusion to the matter, on the same day that Plaintiff moved to amend his complaint to add the Vice President, he also moved to remand the case to Superior Court. *See* Dkt. 6.) At this time the United States makes a special appearance for the limited purpose of responding to certain requests for discovery. By so appearing, the United States reserves all objections, including to improper service of the subpoenas and to the Court's lack of jurisdiction.

President and "Barry Soetoro;" and records concerning the President's academic studies. *See generally* Exs. 1-4.

Not content to wait for the various third parties to respond to the subpoenas, Plaintiff then immediately turned to the Court to demand further relief by filing numerous discovery motions. He asks the Court to issue show cause orders in his effort to seek contempt against the President, the Social Security Administration, and the Selective Service System. And he asks the Court to order disclosures by the Department of State, despite offering no indication that a subpoena has even been issued to that agency.

Through his vexatious use of the subpoena power, Plaintiff has already demonstrated an intent to harass numerous institutions and individuals with ill-conceived discovery requests and premature motions, with little regard for the rules of procedure, much less for relevance and need. It is apparent that there are serious questions about the Court's jurisdiction to hear this case, as Defendants have recently moved to dismiss (and to stay all discovery) on the grounds that Plaintiff lacks standing and this matter is moot. *See* Dkt. 9. The federal government respectfully asks that the Court stay all discovery in this matter until: (1) the Court has considered Defendants' jurisdictional objections; (2) the proper time for the commencement of discovery under Fed. R. Civ. P. 26; or (3) the Court has held an initial status hearing in this matter. A stay is warranted because the discovery Plaintiff has sought so far is wholly frivolous, and there is reason to suspect that yet more improper attempts to seek discovery and other relief may be forthcoming. This harassment should be stopped.

Alternatively, Plaintiff's subpoenas to the President and various agencies of the federal government should be quashed, as they do not comply with Federal Rule of Civil Procedure 45,

and his motion demanding documents from the Department of State should be denied. Each subpoena purports to require the production of documents in an unreasonably short period of time – as little as 52 minutes after service – while several have not yet been properly served. His subpoenas were issued by a court without authority to require production by federal agencies, and fail to comply with *Touhy* regulations adopted by those agencies. And he requests personal records about third parties – records that are protected from disclosure by federal laws including the Privacy Act. Finally, he has moved for an order that would require the Department of State to produce documents despite the fact that he has not even issued a subpoena to that agency.

Pursuant to Local Civil Rule 7(m), the undersigned has conferred with Plaintiff, who indicated that he opposes the relief requested herein. The undersigned has also conferred with counsel for Defendants Alexander, Dinan, and Lightfoot, who consent to the entry of a stay of discovery.

BACKGROUND

Plaintiff filed his complaint in D.C. Superior Court on November 11, 2012, originally suing three defendants: Yvette Alexander, Don R. Dinan, and William Lightfoot, collectively the three individuals designated as electors for the District of Columbia. After filing the complaint, Plaintiff immediately began to propound discovery and to file discovery motions with the Superior Court.

Thus far, Plaintiff has caused subpoenas to issue to the following:

(1) President Barack Obama (Ex. 1): issued on November 16, 2012 (though not properly served) and demanding the production of the President's "original certificates of live birth."

(2) Social Security Administration (SSA) (Ex. 2): issued on November 30, 2012 and demanding the production of all records related to Barack Hussein Obama II, Harrison J. Bounel, and Barry Soetoro.

(3) Selective Service System (Ex. 3): issued on December 3, 2012, served on December 12, 2012, and demanding the same-day production of the original Selective Service registration forms of Barack Hussein Obama II and Barry Soetoro.

(4) National Archives and Records Administration (NARA) (Ex. 4): issued on November 30, 2012 and demanding the production of the I-94 immigration landing records for a ten-day period in August, 1961.

(5) Occidental College: issued on November 16, 2012 and demanding production of all records related to Barack Hussein Obama, II and Barry Soetoro.

(6) Harvard Law School: issued on November 16, 2012 and demanding production of all records related to Barack Hussein Obama, II and Barry Soetoro.

(7) Columbia University: issued on December 3, 2012 and demanding production of all records related to Barack Hussein Obama, II and Barry Soetoro.

Plaintiff has, to date, also filed the following motions:

(8) "Verified Motion for Rule to Show Cause Why Barack Hussein Obama, II, Should Not Be Held in Contempt of Court."

(9) "Motion for Order to Release Privacy Act-Protected Records and Expedited Consideration" (Ex. 8) (requesting an order directing the Department of State to release President Obama's passport application).

(10) "Motion for Appointment of an Examiner to Take Out-of-State Deposition and Subpoena for Documents" (requesting the appointment of an examiner to take depositions and issue subpoenas in the State of Hawai'i).

(11) "Verified Motion for Rule to Show Cause Why the Social Security Administration and the Selective Service System Should Not Be Held in Contempt of Court" (Dkt. 5).

(12) "Plaintiff's First Emergency Omnibus Motion" (Dkt. 7) (requesting, *inter alia*, expedited rulings on various discovery matters).

The United States has attempted to comply with the subpoenas that have been properly served, whether by serving timely objections or even by making documents available to Plaintiff. For example, SSA informed Plaintiff that the records he requested are protected from disclosure by the Privacy Act and other applicable federal law, and invited him to submit signed consent forms authorizing release of the records. *See* Ex. 5. NARA responded to Plaintiff and informed him that, while his subpoena was deficient and thus gave the agency no obligation to respond, NARA would make the requested records available to Plaintiff in a NARA research room. *See* Ex. 6. Moreover, the President released his birth certificate on April 27, 2011. *See* http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate (last accessed Dec. 18, 2012). Plaintiff does not accept these efforts, but instead has continued to pursue discovery and unwarranted sanctions against the agencies.

On December 19, 2012, Defendants Alexander, Dinan, and Lightfoot filed a motion to dismiss Plaintiff's complaint, to stay all discovery, and for the entry of sanctions against Plaintiff. *See* Dkt. 9.

ARGUMENT

I. THE COURT SHOULD STAY ALL DISCOVERY IN THIS MATTER

Immediately after filing this suit, Plaintiff began to propound a series of improper discovery requests. Plaintiff has already sought discovery on a range of matters from numerous federal agencies, state officials, educational institutions, and the President himself. Yet Defendants have moved to dismiss the complaint because, among other reasons, Plaintiff lacks standing and his claims are moot. The Court should not permit Plaintiff to engage in such vexatious discovery until the question of jurisdiction has been considered by the Court.

A. The Court Should Stay All Discovery Until It Has Established Jurisdiction Over This Matter

The Supreme Court has made clear that, without jurisdiction, the only task left for the Court is to dismiss the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). While Defendants Alexander, Dinan, and Lightfoot have not yet responded to the complaint, and Plaintiff is actively seeking to add new parties, it is likely that each defendant will move to dismiss this action for lack of jurisdiction. Indeed, there are severe jurisdictional flaws apparent in Plaintiff's complaint, including his lack of standing and the mootness of his claims. It would thus be a tremendous waste of resources for the Court, the litigants, and third-party respondents such as the United States to proceed through vexatious discovery proceedings before the Court's jurisdiction is established. Accordingly, a stay of discovery is appropriate.[3]

It is a "settled proposition that a court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Farouki v. Petra Int'l Banking Co.*, 683 F. Supp. 2d 23, 26 (D.D.C. 2010) (internal quotation omitted). Indeed, "discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending," *Institut Pasteur v. Chiron Corp.*, 315 F. Supp. 2d 33, 37 (D.D.C. 2004).

Here, Plaintiff has already propounded what is largely frivolous discovery, and shows no sign of stopping, but such discovery will prove wholly unnecessary if this Court concludes that it lacks jurisdiction over his claim. That outcome is likely. It is apparent that Plaintiff lacks

[3] The United States specifically seeks a stay of all discovery against the federal government, but respectfully suggests that a global stay of all discovery is warranted. While Plaintiff has thus far caused subpoenas to issue to the President and three agencies, he has also filed a motion seeking to compel discovery from an agency that has received no subpoena, and he shows no sign of stopping. The arguments for a stay apply to all non-parties.

standing, given the repeated rulings dismissing similar cases on that basis, and Plaintiff's claims against Defendants are moot. While Plaintiff asks the Court to enjoin Defendants from casting their ballots as members of the Electoral College, that has already taken place, and there is no further conduct for the Court to enjoin. These doubts about the existence of jurisdiction strongly weigh in favor of a stay, as the Court lacks authority to review disputes over discovery if it lacks jurisdiction over this case. *See Steel Co.*, 523 U.S. at 94. "A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (quotation omitted). Indeed, a desire to avoid unnecessary litigation is an important reason why jurisdictional defenses should be raised at the outset of a case. *See Democratic Rep. of Congo v. FG Hemisphere Assocs.*, 508 F.3d 1062, 1064 (D.C. Cir. 2007).

Moreover, entry of a stay is especially appropriate where, as here, the plaintiff seeks to impose significant burdens on third-parties that include the President and numerous government agencies. "[P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases." *Community Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983). "Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pre-trial discovery," by, for example, permitting discovery against the government to proceed despite an unresolved – but likely to succeed – challenge to the court's jurisdiction, "would result in a severe disruption of the government's

primary function." *Id*. As the D.C. Circuit has recognized, "discovery under Rules 26 and 45 must properly accommodate 'the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994)).

For these reasons, the Court should immediately stay all discovery in this matter in order to permit the parties and the Court to address the issue of jurisdiction.

B. In The Alternative, The Court Should Defer All Discovery Until The Proper Period Of Discovery Contemplated By Fed. R. Civ. P. 26., or At Least Until a Hearing At Which the Court Can Consider How to Proceed In This Matter

If the Court determines not to prohibit discovery until the resolution of Defendants' dispositive motion, it should at least stay all discovery until the parties have held their Rule 26(f) conference. The Federal Rules establish clear restrictions on the timing of discovery. Rule 26(d) provides that:

> A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosures under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

Fed. R. Civ. P. 26(d)(1). *See also* 8A Wright, Miller, Kane & Marcus, Fed. Prac. & Proc. § 2046.1 (3d ed. 2010) ("Although the rule does not say so, it is implicit that some showing of good cause should be made to justify" an order allowing expedited discovery.)

The parties have had no Rule 26(f) conference and thus discovery is premature. It is true that Plaintiff commenced his discovery while the matter was pending in D.C. Superior Court, but he should not be rewarded for filing there and then rushing into wide-ranging discovery before Defendants had the opportunity to remove this matter to federal court. The Court should

exercise its discretion to stay discovery so that the case may proceed pursuant to the Federal Rules.

Alternatively, the Court could stay discovery for the purpose of having a conference at which the Court can consider how to proceed in this matter. Plaintiff has recently requested a conference, and Defendants Alexander, Dinan, and Lightfoot have consented to that request. *See* Dkt. 7 at 5. The United States is prepared to appear at that hearing for the purpose of addressing the matters discussed herein. Because Plaintiff has demonstrated that he will continue to propound discovery until the Court orders otherwise, the Court should stay all discovery in this matter at least until it can determine the best way to proceed.

II. THE FEDERAL SUBPOENAS SHOULD BE QUASHED, AND PLAINTIFF'S MOTION SEEKING RECORDS FROM THE DEPARTMENT OF STATE SHOULD BE DENIED

If the Court does not stay discovery, it should quash the subpoenas issued to the President, NARA, SSA, and the Selective Service System, pursuant to Federal Rule of Civil Procedure 45(c)(3). Each subpoena is unenforceable, violates Rule 45, and should be quashed for several reasons. First, federal executive agencies are immune from subpoena demands arising out of state-court actions irrespective of whether the subpoena is issued by a state court or a federal court. Second, the subpoenas are deficient because they fail to allow a reasonable time for compliance. Third, Plaintiff has failed to comply with the agencies' *Touhy* regulations and therefore has not yet exhausted his administrative remedies. And fourth, the subpoenas seek to compel disclosure of personally identifiable information protected by the Privacy Act, and are therefore improper under Rule 45. Moreover, Plaintiff's motion with respect to the Department of State is plainly without merit. He asks the Court to order the agency to produce the

President's passport application, and yet he has not even caused a subpoena to issue to the Department.

A. Plaintiff's Subpoenas From the D.C. Superior Court Are Unenforceable in This Action Against Federal Agencies

First, the subpoenas issued from the D.C. Superior Court are unenforceable because federal agencies are immune from subpoena demands arising out of state-court actions. *See Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1212-13 (D.C. Cir. 1996). State-court litigants like Plaintiff cannot evade the limitations on the subpoena powers of a state court. *See id.* at 1213 (noting that "the federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others"). The jurisdiction of the federal courts is limited and their subpoena power is properly exercised only:

1. when the federal court has subject-matter jurisdiction over the underlying action;
2. under circumstances in which an action is otherwise cognizable in a federal court, *see, e.g.*, Fed. R. Civ. P. 27(a); or
3. when the subpoena is "necessary for [a federal] court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."

See id. (quoting *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988)). None of those circumstances applies here. As the D.C. Circuit has recognized, "state court subpoenas present entirely different issues (because of the Supremacy Clause and sovereign immunity, and a state court litigant's only recourse from a federal agency's refusal to comply with a state court subpoena is to bring an APA claim . . . against the agency in federal court." *Watts*, 482 F.3d at 508 n.*.

Because Plaintiff seeks to compel production of documents from the federal government, the proper procedure is to make an administrative request in accordance with the agencies' *Touhy* regulations, not to issue a subpoena from the Superior Court of the District of Columbia. This Court thus lacks subject-matter jurisdiction over Plaintiff's subpoenas and cannot compel the Government's compliance with it; the subpoenas should be quashed.[4]

B. Plaintiff's Subpoenas Fail to Provide Sufficient Time for Compliance

Second, the subpoenas should be quashed because they fail to provide sufficient time for compliance. Pursuant to Superior Court Rule 45(c)(3)(A)(i), a court must quash or modify a subpoena that "fails to allow a reasonable time to comply."[5] Plaintiff's subpoenas do not provide reasonable time for compliance.

Most egregiously, Plaintiff's subpoena to Selective Service was served at 9:08 a.m. on December 12, 2012, but the subpoena demanded production by 10:00 a.m. that day. *See* Ex. Dkt. 3. All of the subpoenas similarly provide less than fourteen days for compliance. The subpoena issued to NARA was served on December 4, 2012, and yet it demanded production by December 12, 2012. *See* Ex. 4. The subpoena to SSA was served on December 3, 2012, and demanded production by December 12, 2012. *See* Ex. 2. And Plaintiff's subpoena to President

[4] Because his action has been removed to federal district court, Plaintiff could address this objection by causing new subpoenas to issue from this Court. A federal court litigant can, of course, seek to obtain production of documents from a federal agency by means of a federal subpoena because the United States has waived its sovereign immunity in federal-court actions. *See* 5 U.S.C. § 702. In such a case, neither the Federal Housekeeping Statute, 5 U.S.C. § 301, nor the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), authorizes a federal agency to withhold documents. *See Houston Bus. Journal*, 86 F.3d at 1212 (quoting *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774, 777-78 (9th Cir. 1994)).

[5] Federal Rule of Civil Procedure 45(c)(3)(A)(i) provides the same.

Obama was issued on November 16, 2012, and demanded the production of documents by November 26, 2012, but yet it still has not been properly served.[6] *See* Ex. 1.

Each of Plaintiff's subpoenas fail to provide a reasonable time for compliance, and thus should be quashed.

C. Plaintiff Has Failed to Exhaust His Administrative Remedies Because He Has Not Complied With the Agencies' *Touhy* Regulations

Third, Plaintiff has also failed to comply with the *Touhy* regulations governing requests for records from various federal government agencies. SSA, NARA, and the Executive Office of the President (EOP) each have regulations in force that provide a process by which individuals can obtain documents or testimony. An individual who fails to comply with those regulations prior to issuing a subpoena has failed to exhaust his administrative remedies, and his subpoena should be quashed. *See Houston Bus. Journal, Inc.*, 86 F.3d at 1212 ("[A] court cannot enforce a subpoena against an employee of the federal governmental agency when the agency has validly enacted a regulation . . . that withdraws from employees the power to produce documents."); *Santini v. Herman*, 456 F. Supp. 2d 69, 71-72 (D.D.C. 2006) (granting motion to quash subpoena on federal government agency where the issuer of the subpoena had failed to comply with the agency's *Touhy* regulations).

[6] While Plaintiff contends that he served the subpoena by mail, at the instruction of an unidentified agent of the Secret Service, first class mail does not constitute proper service of a subpoena. *See* Fed. R. Civ. P. 45(b); D.C. Sup. Ct. R. Civ. P. 45(b); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 361 (D.D.C. 2011). In an attempt to resolve any confusion, the undersigned counsel informed Plaintiff that he was authorized "to accept service of a valid subpoena issued from the federal district court, on behalf of the President in his official capacity." *See* Ex. 7. Plaintiff responded by e-mailing a copy of the subpoena previously issued from the D.C. Superior Court. *See id.* As a result, he has still not properly served the President.

Plaintiff has not complied with the *Touhy* regulations in force at SSA and NARA. Before a subpoena can issue to SSA, for example, the requester must provide the agency with a statement summarizing the records sought and explaining their relevance to the underlying proceeding. 20 C.F.R. § 403.120(a). For any subpoena requesting documents in less than thirty days (as is the case for Plaintiff's subpoena), the requester must also provide a detailed explanation of the need for expedited consideration. *Id.* § 403.120(b). Similarly, NARA's *Touhy* regulations provide that a request must include "a detailed description of how the information sought is relevant to the issues in the legal proceeding," and be submitted at least forty-five days before the documents are required. 36 C.F.R. § 1251.10(c), (e). Plaintiff has provided SSA and NARA with no such relevancy statements in support of his untimely requests.

Furthermore, Plaintiff's subpoena to the President is governed by the *Touhy* regulations applicable to EOP, set forth at 5 C.F.R. pt. 2502. Those regulations provide that no material may be produced without the prior approval of the Deputy Director of the Office of Administration, 5 C.F.R. § 2502.31, and because Plaintiff's subpoena to the President has not been properly served it has not yet been presented for consideration. As a result, the release of any documents is at best premature under the applicable regulation.

D. The Subpoena SSA Is Unenforceable Because the Privacy Act Prohibits Production of the Requested Information

Several of Plaintiff's subpoenas are also improper and should be quashed because they demand the disclosure of information protected by the Privacy Act, 5 U.S.C. § 552a. *See* Fed. R. Civ. P. 45(c)(3)(A)(iii) ("The issuing court must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter . . . .").

Plaintiff demands that SSA produce all records related to Barack Hussein Obama, II, Harrison J. Bounel, and Barry Soetoro. *See* Ex. 2. Such information is subject to the Privacy Act's requirement that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . except pursuant to written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. §552a(b). *See also* 20 C.F.R. § 401.180 (SSA regulation concerning disclosure of Privacy Act-protected information); Ex. 5 (letter from SSA informing Plaintiff that the requested records are protected, and providing opportunity to submit consent forms authorizing their release). None of the statutory exemptions to this requirement applies here, *see* 5 U.S.C. § 552a(b)(1)-(12).[7] Therefore, because compelled disclosure of the personally identifiable information Plaintiff seeks would cause SSA to violate the Privacy Act, the subpoena must be quashed.

E. The Subpoena to the President Imposes An Undue Burden

Finally, Plaintiff's subpoena to the President violates Rule 45 because (in addition to the deficiencies outlined above) it is a vexatious attempt to impose an undue burden on the President.

"When evaluating whether the burden of subpoena compliance is 'undue,' the court balances the burden imposed on the party subject to the subpoena by the discovery request, the relevance of the information sought to the claims or defenses at issue, the breadth of the discovery request, and the litigant's need for the information." *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 354 (D.D.C. 2011). "The Rule 45 'undue burden' standard

[7] Plaintiff contends that his subpoena to SSA satisfies 5 U.S.C. § 552a(b)(11), which permits disclosure "pursuant to the order of a court of competent jurisdiction." Under clear D.C. Circuit precedent, however, a subpoena does not constitute such an order. *Doe v. DiGenova*, 779 F.2d 74, 77-85 (D.C. Cir. 1985).

requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties." *Watts*, 482 F.3d at 509. When that third party is the President, courts should be even more mindful of such burdens.

Here, there is no justification for the demands set forth by Plaintiff. The subpoena demands that the President produce for inspection and copying the "original certificates of live birth of Barack Hussein Obama, II, copies of which are attached hereto as Exhibit 'A' & 'B'." Ex. 1. As Plaintiff's exhibits recognize, the President has already released the requested documents. On April 27, 2011, the White House released the President's long form birth certificate. http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate (last accessed Dec. 18, 2012). The President has thus already released the documents Plaintiff seeks. *See* Fed. R. Civ. P. 26(b)(2)(C) (requiring courts to consider whether the requested discovery is available from some other source). To the extent that Plaintiff's subpoena purports to require the President to provide Plaintiff with a chance to inspect the original documents, the subpoena imposes an undue burden and must be quashed. To find otherwise would expose the President to countless similar requests. *See Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1198 (11th Cir. 1991) (recognizing that potential "onslaught of subpoenas" warranted barring discovery out of concerns for "the cumulative impact of allowing" the request). Such a substantial burden heavily outweighs any supposed need Plaintiff has for access to the original documents.

F. Plaintiff's Motion Demanding Documents From the Department of State Is Without Merit

Finally, Plaintiff's motion seeking "an Order directing the Department of State to release the passport applications and supporting evidence of United States nationality of Barack Hussein

Obama, II" is plainly without merit. Plaintiff asks the Court to require the Department of State to produce documents despite the fact that the Department is not a party to this case and has not, to its knowledge, been served with a subpoena in this matter. Moreover, the records Plaintiff requests are, as he recognizes, protected by the Privacy Act, 5 U.S.C. § 552a, and he fails to show that disclosure is permissible under the law.

Rather than request documents from the Department and allow it to respond, Plaintiff attempts to invert the normal discovery process by turning first to the Court. Plaintiff's motion is a flagrant abuse of the discovery process and should not be permitted. To allow a party to cut corners as he has done would impose tremendous burdens on third parties in particular by awarding relief to litigants without prior notice to the subject of the discovery. Plaintiff's motion should be denied, and he should be required to proceed through normal discovery procedures authorized by the Federal Rules.

Plaintiff's motion is also without merit because the records he seeks are protected from disclosure. Even if Plaintiff had submitted a proper request to the State Department by means of a subpoena, he is not entitled to unfettered access to the private affairs of other citizens. *See Billington v. Dep't of Justice*, 11 F. Supp. 2d 45, 63 (D.D.C. 1998) (Although public officials in some circumstances have diminished privacy, they maintain privacy interests in nonpublic information), *aff'd in part, vacated in part on other grounds*, 233 F.3d 581 (D.C. Cir. 2000). To the contrary, statutory and regulatory provisions such as the Privacy Act have been created to balance the public interest in disclosure of government information with an individual's right to privacy. *See Blazy v. Tenet*, 194 F.3d 90, 96 (D.C. Cir. 1999).

The Department of State has promulgated regulations applicable to subpoenas and requests for documents in connection with litigation to which the agency is not a party. *See* 22 C.F.R. pt. 172. The regulations provide information regarding the office to which a subpoena may be directed, *see* 22 C.F.R. § 172.3(a), and require a requester to "set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought," *id.* § 172.5(a). In determining whether to comply with a request, the Department must consider "whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information," *id.* § 172.8(a)(2), and the regulations expressly recognize that compliance will ordinarily not be authorized when it would violate a statute, *id.* § 172.8(b)(1).

It is beyond dispute that Plaintiff, in seeking access to the President's passport records by seeking relief from the Court, has failed to comply with these regulations. He has failed to submit a request to the agency or provide a written explanation of the relevance of the requested information. Rather than attempt to comply with these regulations, Plaintiff has instead asked the Court to require disclosure under 5 U.S.C. § 552a(b)(11). But Plaintiff misunderstands the application of the statute. The Privacy Act generally bars an agency from disclosing certain protected information, "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). The law provides a series of exceptions in the form of situations where disclosure is not prohibited. (Of relevance to Plaintiff's motion is Section 552a(b)(11), which applies to disclosures made "pursuant to the order of a court of competent jurisdiction.") But the fact that a disclosure is not prohibited plainly does not mean that it therefore is required. In such situations, the requester must still satisfy the other requirements governing his request. *See, e.g.*, 22 C.F.R. § 171.32(c)(3) (State

Department regulation providing that Privacy Act requests for third-party information must include "a signed statement, either notarized or made under penalty of perjury, authorizing and consenting to access by a designated person or persons"). Here, Plaintiff has failed to satisfy the requirements for disclosure of a third party's protected information.

CONCLUSION

For the foregoing reasons, the Court should stay all discovery in this matter. Alternatively, the Court should quash the subpoenas issued to the President, NARA, SSA, and the Selective Service, and deny Plaintiff's motion for documents from the Department of State.

Dated: December 20, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2012, I caused a true and correct copy of the foregoing to be served upon Plaintiff by first class United States mail, postage prepaid marked for delivery to:

Montgomery Blair Sibley
4000 Massachusetts Ave. NW #1518
Washington, DC 20016

I also caused a true and correct copy of the foregoing to be served upon Andrew J. Saindon, counsel for Defendants Alexander, Dinan, and Lightfoot, by filing with the Court's CM/ECF system by means of electronic mail to dcd_cmecf@dcd.uscourts.gov.

/s/ Scott Risner
Scott Risner