

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

FRED HOLLANDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 08-99-JL
	)	
JOHN McCAIN and	)	
THE REPUBLICAN NATIONAL COMMITTEE,	)	
	)	
Defendants.	)	
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**MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES CITIZENSHIP  
AND IMMIGRATION SERVICE’S MOTION TO QUASH  
PLAINTIFF’S THIRD-PARTY SUBPOENA**

I. INTRODUCTION.

On March 21, 2008, pro se plaintiff, Fred Hollander, served Senator John McCain and the Republican National Committee (“Defendants”) with a complaint alleging that Senator McCain is ineligible to be President of the United States because he is not a naturally born United States citizen as required by Article II, Section I of the United States Constitution. DN 6. Defendants’ answer is not due until April 30, 2008. See Order dated 4/28/08.

Despite discovery not having commenced, on April 2, 2008, Plaintiff sent a third-party subpoena, via certified mail, to the Manchester office of the United States Citizenship and Immigration Service (“USCIS”) seeking the production of copies of the “certificate of citizenship” and “certificate of birth” of “Senator John Sidney McCain III, son of John S. McCain, Jr. and Roberta Wright.” See Declaration of Simon Nader (“Nader Dec.”), attached as Exhibit A to USCIS’ Motion to Quash, at Attachment 1. USCIS moves to quash this subpoena on several grounds: (1) the subpoena is in the wrong form; (2) the subpoena was improperly

served; (3) the subpoena was prematurely issued; (4) Plaintiff failed to comply with the relevant Touhy v. Ragen, 340 U.S. 462 (1951), regulations; and (5) the Privacy Act prohibits disclosure of the requested information under the circumstances.

II. THE SUBPOENA IS IN THE WRONG FORM BECAUSE IT IS NOT SIGNED BY THE CLERK OF THE COURT.

Federal Rule of Civil Procedure 45 governs the procedures for serving subpoenas on nonparties to litigation. Under Rule 45(a)(3), a subpoena must be signed by either the clerk of the court or an attorney. See generally, Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 2453 (3d ed. 2008). Where, as here, a party is unrepresented, all subpoenas issued by that party must be signed by the clerk. See Fletcher v. Brown County, 2007 WL 2248097, at \*2 n.1 (D. Neb. Aug. 2, 2007).

Plaintiff has not complied with this rule. The subpoena sent to USCIS is signed only by the Plaintiff; the clerk of court's signature appears nowhere on the document. See Nader Dec. at Attachment 1. Accordingly, the subpoena does not comply with the requirements of Rule 45(a)(3) and "is a nullity." Burns v. Bank of Am., 2007 WL 1589437, at \*7 (S.D.N.Y. June 4, 2007) (granting motion to quash subpoena served by pro se plaintiffs which did not comport with Rule 45(a)(3)). For this reason, the Court should quash the subpoena.

III. THE SUBPOENA WAS NOT PROPERLY SERVED BECAUSE IT WAS SENT BY MAIL.

\_\_\_\_\_ Plaintiff served his subpoena by sending it certified mail to USCIS' Manchester office. Nader Dec. at ¶ 2. Because this mode of service is invalid, the Court should quash the subpoena as improperly served.

Federal Rule of Civil Procedure Rule 45(b)(1) provides that a subpoena must be served by “delivering” a copy to the person named therein. “The majority rule is that personal service of a subpoena is required, and that service by mail or other substituted service is insufficient.” James Wm. Moore, Federal Practice § 45.21[1] (2008). While USCIS is aware of no cases on point in the First Circuit, federal courts nationwide have routinely invalidated subpoenas that were not served personally. See Chima v. United States Dep’t of Defense, 23 Fed. Appx. 721, 724 (9th Cir. 2001); Fed. Trade Comm. v. Compagnie De-Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1312 (D.C. Cir. 1980); Scottsdale Ins. Co. v. Educ. Mgmt. Inc., 2007 WL 2127798, at \*3 (E.D. La. Jul. 25, 2007); McClendon v. TelOhio Credit Union, Inc., 2006 WL 2380601, at \*2 (S.D. Ohio Aug. 14, 2006); Terre Haute Warehousing Servs., Inc. v. Grinnell Fire Protection Sys., Co., 193 F.R.D. 561, 563 (S.D. Ind. 1999); Agran v. City of New York, 1997 WL 107452, at \*1 (S.D.N.Y. Mar. 11, 1997).<sup>1</sup> Because Plaintiff failed to personally serve USCIS with the subpoena as required by Rule 45(b)(1), this Court should quash the subpoena.

IV. THE SUBPOENA WAS PREMATURELY ISSUED BECAUSE DISCOVERY HAS NOT OPENED.

\_\_\_\_\_ Plaintiff’s subpoena is premature because discovery in this case has not begun. “Rule 45 Subpoenas, which are intended to secure the pre-trial production of documents and things, are encompassed within the definition of discovery, as enunciated in Rule 26(a)(5) and, therefore, are subject to the same time constraints that apply to all of the other methods of formal discovery.”

Alper v. United States, 190 F.R.D. 281, 284 (D. Mass. 2000) (quoting Marvin Lumber & Cedar

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<sup>1</sup>Some courts have permitted service of a subpoena by certified mail, e.g., Doe v. Hersemann, 155 F.R.D. 630, 631 (N.D. Ind. 1994), but this is the “minority” position. Hall v. Sullivan, 229 F.R.D. 501, 504 (D. Md. 2005).

Co. v. PPG Indus., Inc., 177 F.R.D. 443, 443 (D. Minn. 1997)); accord Williamson v. Horizon Lines LLC, \_\_ F.R.D. \_\_, 2008 WL 366128, at \*4 (D. Me. Feb. 11, 2008). Federal Rule of Civil Procedure 26(d)(1) provides that a “party may not seek discovery from any source before the parties have conferred as required by” Fed. R. Civ. P. 26(f). (Emphasis supplied).

As Plaintiff has only recently served the complaint, Defendants have not answered, and the Court has not scheduled a Rule 16(b) scheduling conference, the Rule 26(f) conference has not occurred. Thus, Plaintiff is not yet permitted to conduct discovery from any source, including through the use of a Rule 45 subpoena.<sup>2</sup> Fed. R. Civ. P. 26(d)(1). Accordingly, this Court should quash Plaintiff’s subpoena as premature. See, e.g., Brinkley v. Three Unknown Corr. Officers of S.C. Dep’t of Corr., 2008 WL 786271, at \*1 (D.S.C. Mar. 21, 2008); CareToLive v. von Eschenbach, 2008 WL 552431, at \*3 (S.D. Ohio Feb. 26, 2008); Reiman v. Does 1-1000, 2007 WL 1575307, at \*2 (W.D. Wash. May 22, 2007); Crutcher v. Fidelity Nat. Ins. Co., 2007 WL 430655, at \*3 (E.D. La. Feb. 5, 2007).

V. PLAINTIFF DID NOT COMPLY WITH THE APPLICABLE TOUHY REGULATIONS.

Under the Housekeeping Act, 5 U.S.C. § 301, federal agencies may promulgate regulations establishing conditions for the disclosure of information. Commonwealth of P.R. v. United States, 490 F.3d 50, 61 (1st Cir. 2007), cert. denied, \_\_ U.S. \_\_, 2008 WL 833302 (2008). These regulations are known as Touhy regulations, after the Supreme Court decision upholding the validity of such regulations. See Touhy v. Ragen, 340 U.S. 462 (1951). Touhy regulations

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<sup>2</sup>A party may seek discovery in advance of the Rule 26(f) conference by court order or stipulation. Fed. R. Civ. P. 26(d)(1). There is nothing to indicate that Plaintiff obtained such an order or stipulation here.

do not establish an “independent privilege . . . to withhold information” but rather “set forth administrative procedures to be followed when demands for information are received.”

Commonwealth of P.R., 490 F.3d at 61. Agencies are permitted to insist on compliance with their Touhy regulations, and courts will quash subpoenas where the issuing party has not complied. See Lerner v. District of Columbia, 2005 WL 2375175, at \*3 (D.D.C. Jan. 7, 2005) (collecting authority).

Under Department of Homeland Security (“DHS”) regulations,<sup>3</sup> only the Office of General Counsel is authorized to receive and accept a subpoena in a matter in which the United States is not a party. 6 C.F.R. § 5.43(a). If service of a subpoena is effected on an employee of DHS, he must immediately forward a copy of the document to the Office of General Counsel. Id. § 5.43(a). He may not appear as a witness or provide any information or documentation in response to the subpoena, unless he is expressly authorized to do so by the Office of General Counsel. Id. § 5.44 (a), (b). Thus, under these regulations, no DHS employee may respond to a request for information, even if made in conjunction with pending litigation, unless the employee is authorized to release the information by the Office of General Counsel. Id. § 5.44. To obtain such permission, the regulations require that the party seeking such information “set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought.” Id. § 5.45(a).

Plaintiff failed to follow these regulations as he did not serve the subpoena on DHS’ Office of General Counsel, sending it instead to the Manchester Office of USCIS. Nader Dec.

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<sup>3</sup>USCIS is a component agency of DHS. 6 U.S.C. § 271.

at ¶ 1. Moreover, the subpoena does not provide the sort of detailed written statement identifying the nature and relevance of the information sought that is contemplated by the regulation. Indeed, the subpoena merely makes a terse demand for Senator McCain's birth certificate and certificate of citizenship without any explanation of the need for the information. Thus, Plaintiff has failed to fulfill his Touhy obligations as he issued the subpoena to the wrong place and did not provide the agency with the requisite information. This failure is another ground for granting USCIS' motion to quash. See Lerner, 2005 WL 2375175, at \* 3 (granting motion to quash subpoena served on the Secret Service because the issuing party failed to comply with Touhy regulation requiring that the party "set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought").

VI. THE PRIVACY ACT PRECLUDES COMPLIANCE WITH THE SUBPOENA IN THESE CIRCUMSTANCES.

\_\_\_\_\_ Subject to certain exceptions, the Privacy Act precludes a federal agency from disclosing any record about an individual contained in a system of records, unless the individual provides prior written consent. 5 U.S.C. § 552a(b). The Act defines a record as an item of information about an individual maintained by an agency, 5 U.S.C. § 552a(a)(4), and a system of records as any group of records maintained by an agency that can be retrieved through personal identifying information, such as an individual's name, id. § 552a(a)(5). The records Plaintiff has subpoenaed certainly fall within these definitions. To the extent that USCIS has the information requested, the records sought contain personal information about Senator McCain and would be retrieved from USCIS' files through the use of his name. Accordingly, unless an exception applies, the Privacy Act bars production.

The only potentially relevant Privacy Act exception is the exception for disclosure “pursuant to the order of a court of competent jurisdiction.” 5 U.S.C. § 552a(b)(11). However, this exception does not apply because a Rule 45 subpoena does not constitute a court order under § 552a(b)(11). Courts have reasoned that such subpoenas are not court orders under the Act because they can be issued without the direct involvement of a judge. See Doe v. DiGenova, 779 F.2d 74, 80-81 (D.C. Cir. 1985); Stiles v. Atlanta Gas Light Co., 453 F. Supp. 798, 800 (N.D. Ga. 1978); see also Moore v. United States Postal Serv., 609 F. Supp. 681, 682 (S.D.N.Y. 1985) (observing that there is “merit in the notion that a federal subpoena issued by the clerk pursuant to Rule 45(a) of the Federal Rules of Civil Procedure does not constitute a ‘court order’”). Accordingly, the Privacy Act precludes disclosure of the demanded material, and the Court should quash Plaintiff’s subpoena on this basis.

VII. CONCLUSION.

\_\_\_\_\_ For the reasons stated, the Court should grant USCIS’ motion and enter an order quashing Plaintiff’s subpoena.

Respectfully submitted,  
THOMAS P. COLANTUONO  
United States Attorney

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By: /s/ Seth R. Aframe  
Seth R. Aframe, MA Bar No. 643288  
Assistant United States Attorney  
U.S. Attorney’s Office  
53 Pleasant Street, Fourth Floor  
Concord, NH 03301-3904  
603-225-1552  
seth.aframe@usdoj.gov