

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM :  
COLLITON, M.D.; RICHARD P. :  
DELANEY, M.D.; GAETANO :  
MOLINARI, M.D.; RICHARD LORIA, :  
M.D.; LORENZO MARCOLIN, M.D.; :  
JAMES RONAN, M.D.; EDWARD :  
SHERIDAN, M.D.; EDWARD SOMA, :  
M.D.; and RONALD UCINSKI, M.D., :  
:  
Plaintiffs, :

v. :

C.A. No. 8:10-CV-00017-PJM

BARACK HUSSEIN OBAMA, in his :  
official capacity as President of the United :  
States, :

Defendant. :

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS AND REPLY TO  
DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR A PRELIMINARY  
INJUNCTION**

**INTRODUCTION**

Plaintiffs, by and through undersigned counsel, hereby submit this memorandum of law in opposition to Defendant's Motion to Dismiss and in reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

**ARGUMENT**

**I. Plaintiff Physicians Have Standing.**

Defendant acknowledges (Def. Mem. In Opp., p. 6) that the affidavit of Plaintiff Richard Delaney, M.D., states that if either the House Bill or the Senate Bill becomes law, that law will (1) "force physicians to practice medicine deficiently" and (2) will

impair the physician-patient relationship by “eliminat[ing] that sacred binding of the dedicated physician and the sick patient” and forcing sick patients “into an impersonal system,” with waiting periods for treatment and care “extending to months or even years.” (Delaney Aff., at pp. 3, 4.) Defendant nevertheless argues that “none of these purported harms to the medical profession constitutes a legally cognizable injury to Plaintiffs.” (Def. Mem. In Opp., p. 6.)

Each of the Plaintiff physicians, however, has standing to raise his own rights. *Carhart v. Stenberg*, 972 F. Supp. 507, 520 (D. Neb. 1997). To the extent that either of the health care bills, if enacted into law, will prevent Plaintiffs from practicing medicine in a safe and effective manner, i.e., that either bill, if enacted into law, will force them to practice medicine “deficiently,” by requiring them to subject their patients to increased medical risk (by, for example, subjecting their patients to long waiting periods for treatment and care), Plaintiff physicians “have a strong personal stake in the argument.” *See id.* at 520-521. Similarly, Plaintiff physicians have standing to the extent that they claim either bill, if enacted into law, will impair their constitutional right “to freely practice medicine to the highest medical standards without arbitrary outside restraints.” *See Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (8<sup>th</sup> Cir. 1974), *cert. denied and appeal disp’d*, 419 U.S. 891 (1974).

Plaintiff physicians also have standing to the extent that either of the health care bills, if enacted into law, will irreparably impair the patient-physician relationship between Plaintiffs and their patients, which has been described as “a unique fiduciary-like relationship that exists between doctor and patient.” *See Carhart v. Stenberg*, 973 F. Supp. at 521; *see also Planned Parenthood of Southern*

*Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1376 (D. Ariz. 1997).

These harms are both concrete and particularized, as they would directly affect each of the Plaintiff physicians in their practice of medicine, and would implicate interests that are not common to the entire public. Furthermore, as will be discussed at greater length below, the harm in question is imminent, given that Defendant is actively seeking to have the House of Representatives pass the Senate Bill. It is therefore not “pure conjecture to believe that” the Senate Bill may shortly be enacted into law. *See Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 323 (4<sup>th</sup> Cir. 2002).

## **II. The Redressability Requirement Is Met Because The Court Can Order Injunctive and Declaratory Relief Against The President And Other High Executive Officials To Prevent Them From Encroaching On The Powers Of The Legislative Branch Of Government.**

Defendant argues that, given that the requested declaratory and injunctive relief “would operate upon the President himself, in his official capacity, and in the performance of non-ministerial actions,” “[a]ll of its is accordingly beyond the Court’s power to grant.” (Def. Mem. In Opp., p. 9.) Defendant further quotes from the opinion of the Supreme Court in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), to the effect that “*in general* ‘this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.’” *Id.* at 802-803 (emphasis added), quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866).

While this is the general rule, there are exceptions. In particular, the President and other high officials in the Executive Branch can be enjoined from undertaking or pursuing actions, regardless of whether those actions are ministerial or discretionary in character, that unlawfully encroach upon the powers of the Legislative Branch. *See Youngstown Sheet*

*& Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Indeed, “*Youngstown Sheet & Tube Co. v. Sawyer*, in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials.” *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (collecting cases). Defendant himself admits that that “presidential immunity ‘does not bar every exercise of jurisdiction over the President of the United States,’” quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753-754 (1982). (Def. Mem. In Opp., p. 10.)

Defendant nevertheless argues that *Youngstown Sheet & Tube* “is inapposite, as it involved no injunction on the President; rather the Court enjoined the Secretary of Commerce from enforcing a presidential order.” (Def. Mem. In Opp., pp. 10-11.)

It is true that, because the President is a party to the present action, the decision in *Youngstown Sheet & Tube* “can be formally distinguished.” *Nixon v. Sirica*, 487 F.2d at 709. But as the D.C. Circuit recognized in *Nixon v. Sirica*, such a distinction exalts form over substance:

As Judge Sirica noted, however, to rule that this case turns on such a distinction would be to exalt the form of *Youngstown Sheet & Tube* over its substance. Justice Black, writing for the *Youngstown* majority, made it clear that the Court understood its affirmance effectively to restrain the President. *There is not the slightest hint in any of the Youngstown opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.*

*Id.* (footnote omitted and emphasis added). See also *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611, 613 (D.C. Cir. 1974) (“As noted *supra* . . ., it would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the

President and one or more of them can be named as a defendant.”) (footnote omitted).

As the D.C. Circuit pointed out in *Nixon v. Sirica*, “[t]he practice of judicial review would be rendered capricious -- and very likely impotent -- if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own.” 487 F.2d at 709. Furthermore, as the D.C. Circuit later recognized, “[u]nder our system of law, the judiciary has a duty envisioned by the constitutional principle of checks and balances to keep both the Executive and Congress within their respective constitutional domains in order to prevent that concentration of power which the Founding Fathers so feared.” *National Treasury Employees Union v. Nixon*, 492 F.2d at 612 (footnote omitted), citing *The Federalist*, No. 51.

Judge Wilkey, in his dissenting opinion in *Nixon v. Sirica*, also recognized that “*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or *Chief Executive himself*, is above the law.” 487 F.2d at 793 (Wilkey, J., dissenting) (emphasis added).

Defendant also relies on language from *Nixon v. Fitzgerald*, which held that the President is “entitled to absolute immunity *from damages liability* predicated on his official acts.” 457 U.S. at 749 (emphasis added). The Court in *Nixon v. Fitzgerald* reasoned that, “[b]ecause of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.” *Id.* at 751.

But the Court in *Nixon v. Fitzgerald* further recognized that

When judicial action is needed to serve broad public interests – *as when the Court acts, not in derogation of the separation of powers, but to maintain their*

*proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra, . . . the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.*

457 U.S. at 754 (emphasis added and footnote omitted).

Thus, in the context of an action seeking declaratory and injunctive relief and “serv[ing] broad public interests” to prevent the Chief Executive from encroaching on the powers of Congress, the consideration of promoting “the effective functioning of government” is not nearly so weighty. In *National Treasury Employees Union v. Nixon*, the Government contended, much as it does here, that “if the President is not held immune from this and similar lawsuits, there will be intolerable interference with the effective functioning of Government.” 492 F.2d at 611. In rejecting this contention, the D.C. Circuit stated as follows:

[A]s Mr. Justice Brandeis observed in his dissenting opinion in *Myers v. United States*, 272 U.S. 52, 293 . . . (1927), the doctrine of separation of powers was established in the Constitution not to promote governmental efficiency *but to prevent arbitrary power.*

\* \* \* The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. \* \* \*

*Id.* at 611-12 (emphasis added).

Of course, “[a]s a matter of comity, courts should normally direct legal process to a lower Executive official *even though the effect of the process is to restrain or compel the President.*” *Nixon v. Sirica*, 487 F.2d at 709 (emphasis added). Plaintiffs are perfectly willing to have the Court, as a matter of comity, direct any injunctive or declaratory relief against the White House Chief of Staff, Rahm Emmanuel, instead of the President, so long as the

effect of the process is to restrain the President from further ultra vires actions in using his Executive powers to coerce members of Congress to vote in favor of a health care reform bill. If necessary, Plaintiffs are further willing to amend their Complaint to make the White House Chief of Staff a party to this action.

In short, the Court has the power to grant the relief that Plaintiffs request, and, thus, the requirement for standing of redressability is fully met. Defendant's arguments that "[e]ven if the Court could grant some of the relief that Plaintiffs request, this suit would still lack redressability," are meritless.<sup>1</sup> (Def. Mem. In Opp., p. 14.) Enjoining the President from coercing and intimidating members of Congress to vote in favor of a particular piece of health care reform legislation, through threats to exercise his Executive powers to the disadvantage of the members' constituents, would fully redress the complained of arbitrary abuse of power and aggrandizement of Legislative powers by the Defendant. Defendant further argues that "it is sheer speculation that if this Court were to" grant the requested declaratory and injunctive relief, "then no similar health care reform bill would become law." (Def. Mem. In Opp., p. 14.) It is not pure speculation, however, that granting the requested declaratory and injunctive relief would prevent an unconstitutional concentration of power in the Executive Branch of government and allow any similar health care reform bill to be considered by the Congress on its merits without unconstitutional interference from the Executive Branch.

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<sup>1</sup> Defendant argues that Plaintiffs are seeking "to enjoin the President from involvement in health care reform, or to declare the pending bills void[.]" (Def. Mem. In Opp., p. 14.) This is a gross distortion of the relief sought by the Plaintiffs. Plaintiffs only seek (1) to enjoin the President from aggrandizing to himself Legislative powers by using his Executive powers to leverage the exercise of Legislative power, specifically by using his Executive powers to coerce or intimidate members of Congress to vote for a particular health care reform bill, or (2) to invalidate any health care reform bill that is passed with the aid of such coercion or intimidation.

### **III. Whether The President Has Violated The Separation Of Powers Doctrine Is A Justiciable, Not A Political Question.**

Defendant contends that the Court cannot consider the merits of the separation-of-powers issue raised by the instant lawsuit “without evincing a lack of respect for both Congress and the President.” (Def. Mem. In Opp., p. 16.) He argues that addressing this issue would “interject the Court into political discussions about bills before Congress and would seriously interfere with the relationship between the political branches.” (*Id.*, pp. 16-17.)

First, “[i]t is correct this controversy may, in a sense, be termed ‘political,’” but “the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.” *INS v. Chadha*, 462 U.S. 919, 943 (1983). “Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by [the President].” *Id.*

Secondly, the President appears to be arguing that judicial intervention regarding the constitutionality of the actions of the President in threatening to use his Executive powers as a means of pressuring members of Congress to vote for or against a particular piece of legislation, shows a lack of respect because Congress itself has the ability to defend its powers from encroachment by the President. In other words, the “political branches” can adequately regulate their “relationship” and keep each other within proper bounds regarding pending legislation without judicial intervention. The Supreme Court, however, has held that “the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require

that the Judiciary remove itself from the controversy by labeling the issue a political question.” *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990).

Defendant further asserts that “the issue of presidential influence on pending legislation is textually committed to the political branches.” (Def. Mem. In Opp., p. 17.) However, as pointed out above, “[u]nder our system of law, *the judiciary has [the] duty envisioned by the constitutional principle of checks and balances to keep both the Executive and Congress within their respective constitutional domains* in order to prevent that concentration of power which the Founding Fathers so feared.” *National Treasury Employees Union v. Nixon*, 492 F.2d at 612 (footnote omitted and citation omitted). Thus, “[t]he courts routinely adjudicate separation-of-powers claims.” *Zivotovsky v. Secretary of State*, 571 F.3d 1227, 1238 (D.C. Cir. 2009) (Edwards, J., concurring). Furthermore, “[i]f a federal court finds that a political branch has overreached in its claim of constitutionally committed authority, the court will decide the matter that is properly before it for resolution on the merits.” *Id.* As the Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962), “[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, *and is a responsibility of this Court as ultimate interpreter of the Constitution.*” (Emphasis added). *Accord, Powell v. McCormack*, 395 U.S. 486, 521 (1969).

Defendant points to (Def. Mem. In Opp., p. 17) the constitutional powers of the President to sign a bill or to return a bill passed by Congress (the veto power), and the power “to recommend to their Consideration such Measures as he shall judge necessary

and expedient.” U.S. Const., Art. I, § 7; Art. II, § 3. It is respectfully submitted that the President’s actions in using his Executive powers to leverage the exercise of Legislative powers by threatening to exercise his Executive powers to the disadvantage of the constituents of a member of Congress in order to cajole that member into voting for a particular piece of legislation far exceed the powers committed to the President by Articles I and II of the Constitution. Consequently, the political question doctrine does not preclude this Court from deciding this case on its merits.

Defendant argues that *Baker v. Carr* “held that challenges to the ‘enacting process’ for legislation generally present political questions.” (Def. Mem. In Opp., p. 17, citing *Baker v. Carr*, 369 U.S. at 214-215.) The Supreme Court in *Baker* actually recognized a much narrower principle, namely that “[t]he respect due to coequal and independent departments, and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied *with all requisite formalities.*” *Baker v. Carr*, 369 U.S. at 214-215 (citation omitted). In this case, Plaintiffs are not challenging a failure by the Congress or the President to comply with mere formalities, but rather actions of the President that amount to an aggrandizement by the Chief Executive of legislative powers that are exclusively allocated to the Congress by our Constitution.

Finally, “[t]here are not lacking judicially discoverable standards for resolving the dispute in this case.” *National Treasury Employees Union v. Nixon*, 492 F.2d at 605. The standards for determining when a President improperly encroaches upon powers of the Legislative Branch are well summarized in the majority and concurring opinions in *Youngstown Sheet & Tube*. Defendant nevertheless argues that no standards exist “by which the judiciary is to separate legitimate ‘presidential discussions with members of Congress’

from supposedly illegitimate presidential ‘coercion’ and ‘intimidation’ of Congressmen.” (Def. Mem. In Opp., p. 18.) But Plaintiffs do not seek to enjoin all forms of presidential coercion and intimidation of members of Congress: the President is free to use veto threats, the power of the bully pulpit, appeals to political loyalty, etc., to coerce and intimidate members of Congress into voting for, or against, legislation. Plaintiffs only seek to enjoin a particularly pernicious form of coercion and intimidation, namely the making of threats regarding the use of the President’s Executive powers in ways that are adverse the constituents of one or more members of Congress in order to pressure those members into voting for (or against) legislation. This practice involves the use or abuse of the President’s Executive powers to leverage control over the Legislative branch, thereby leading to the concentration of powers in a single branch of government that allows for the exercise of arbitrary power and tyranny.

It is respectfully submitted that the standards set forth in *Youngstown Sheet & Tube* and similar cases are sufficient for determining when the President has engaged in this most pernicious and dangerous form of coercion and intimidation that violates the separation of powers doctrine, as opposed to the more benign forms of coercion and intimidation that all Presidents have used in order to obtain the passage of legislation in a desired form and which do not run afoul of that fundamental constitutional doctrine. “Those standards forestall reliance by this Court on nonjudicial ‘policy determinations’ or any showing of disrespect for a coordinate branch.” *INS v. Chadha*, 462 U.S. at 942.

In short, the issues raised by Plaintiffs’ Complaint are justiciable, and the Court may adjudicate them without running afoul of the political question doctrine.

#### **IV. Plaintiffs Are Likely To Suffer Irreparable Harm Absent Preliminary Relief.**

Defendant argues that Plaintiffs cannot meet the standard that irreparable harm is likely or imminent in the absence of a preliminary injunction because it is “speculation that bills currently pending in Congress might become law, and that this hypothetical law might be enforced in a way that would harm the medical profession, of which Plaintiffs are members.” (Def. Mem. In Opp., p. 19.)

Defendant, however, is reportedly “upping the ante on health care” and “lay[ing] the groundwork for his party to try pushing its [health care reform] legislation through Congress without Republican support.” (“Obama Renews Health Push: Retooled \$950 Billion Plan Aims to Get Legislation Through Over Republican Objections,” *Wall Street Journal*, p. A1, col. 3, Feb. 23, 2010.) Defendant and his party are “going to play by Chicago Rules and try to dragoon [a health care reform bill] into law on a narrow partisan vote via Congressional rules that have never been used for such a major change in national policy.” (“Obamacare at Ramming Speed”, *Review & Outlook*, p. A18, col. 2, Feb. 23, 2010.)

Thus, it is certainly not speculation that Defendant intends, in the near future, to try to ram a health care bill, specifically the Senate Bill (with some modifications), through Congress, by a narrow partisan vote if necessary. In opposing Plaintiffs’ motion for a preliminary injunction, it must be emphasized that Defendant has not denied the allegations of the Plaintiffs’ Complaint, nor has he produced any affidavits disputing these allegations.

Plaintiffs submit that there is a realistic and imminent threat that Defendant will use the same kind of coercion as was brought to bear on Senator Nelson to secure passage of the Senate Bill, on other members of Congress as part of his renewed push to secure

passage of the Senate Bill by the House of Representatives, in violation of the separation of powers doctrine, absent issuance of a preliminary injunction. Furthermore, Plaintiffs are “immediately in danger of sustaining some direct injury” as a result of the Defendant’s unconstitutional actions, *see Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 599 (2007), namely imminent passage of a health care reform bill that will have a direct, profound and immediate impact on the Plaintiffs’ practice of medicine and their relationship with their patients.

Defendant further argues that the allegation that the President is violating the Constitution’s separation of powers principle does not constitute irreparable harm because Plaintiffs have not made “any further showing that the supposed constitutional violation will injure the plaintiff at all.” (Def. Mem. In Opp., p. 20.) Essentially, Defendant is arguing that “a person suing in his individual capacity has no direct interest in our constitutional system of separation of powers, and thus has no corresponding right to demand that the Judiciary ensure the integrity of that system.” *United States v. Munoz-Flores*, 495 U.S. at 393. In rejecting this contention as erroneous, the Supreme Court in *Munoz-Flores* pointed out that “[t]his Court has repeatedly emphasized that “the Constitution diffuses power the better to secure liberty.”” *Id.* at 394, quoting *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (in turn quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring)). It further recognized that “the Court has repeatedly adjudicated separation-of-power claims brought by people acting in their individual capacities.” *United States v. Munoz-Flores*, 495 U.S. at 393 (citation omitted).

Plaintiffs have therefore met the requirement of a clear showing that they are likely to be irreparably harmed absent preliminary relief.

## **V. The Balance Of The Equities Weighs In Favor Of Granting Equitable Relief.**

Defendant argues that issuance of a preliminary injunction would be “exceedingly burdensome” for the President and Congress and “would damage the public interest.” (Def. Mem. In Opp., p. 21.) He further argues that it “would deprive Congress of his guidance on a major issue facing the public, to the detriment of the political branches and the public itself.” (*Id.*).

As the D.C. Circuit has recognized, however, Mr. Justice Frankfurter, in his concurring opinion in *Youngstown Sheet & Tube*, “eloquently expressed the necessity for a judicial check upon the unconstitutional assertion of power by the President, *even if that check may in the short run adversely affect the public interest*, in order to avoid even an initial step toward tyranny[.]” *National Treasury Employees Union v. Nixon*, 492 F.2d at 610 (emphasis added). As Mr. Justice Frankfurter himself said, “[t]o deny inquiry into the President’s power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action.” *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. at 596 (Frankfurter, J., concurring). As Justice Frankfurter warned, “[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.” *Id.* at 594.

In short, any short term harm to the asserted public interest in health care reform must be weighed against the great and ever present danger to the public of a drift toward the exercise of arbitrary power and tyranny if the President is allowed unchecked to usurp

Legislative powers through the abuse of his Executive powers to coerce the votes of members of Congress. When this balance is undertaken, it can readily be seen that the public interest weighs in favor of preliminary injunctive relief.

The preliminary injunction would leave the President entirely free to meet with members of Congress, to express his views on pending health care legislation, to urge members to pass such legislation, to threaten to veto legislation on policy grounds if its provisions are not to his liking, to exercise the power of the bully pulpit, and otherwise to continue to undertake a major “role in the debate over health care reform.” (See Def. Mem. In Opp., p. 21.) The President would only be restrained from engaging in a quite extraordinary and pernicious abuse of his Executive powers to leverage the exercise of Legislative powers which, under our Constitution, are the within exclusive domain of Congress. Thus, the burden on the President and Congress of the grant of the preliminary injunction would be relatively minimal and would not unduly interfere with “the functioning of [these] co-equal branches of government.” (Def. Mem. In Opp., p. 21.)

In view of the above, the balance of the equities weighs heavily in favor of granting the requested preliminary injunction.

## **CONCLUSION**

In view of the arguments made and authorities cited above, the Plaintiffs respectfully request that the Plaintiffs' Motion for a Preliminary Injunction be granted, and that the Defendant's Motion to Dismiss be denied.

Respectfully submitted,

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