

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' REPLY IN
SUPPORT OF CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Noted for March 23, 2018

INTRODUCTION

Plaintiffs and Intervenor mischaracterize Defendants’ arguments in support of dismissal of the President as a defendant in this case. Defendants do not argue, as Plaintiffs contend, that the President “is above the law.” Pls.’ Opp. at 7, ECF No. 207. Nor do Defendants argue, as Intervenor contends, that “no court has jurisdiction to review the constitutionality of the President’s official actions.” Int.’s Resp. at 1, ECF No. 209; *see also id.* at 3, 6. Instead, Defendants argue that a court lacks authority to maintain a suit or grant injunctive or declaratory relief against the President for his official, non-ministerial conduct, particularly where, as here, relief granted against subordinate Executive officials would provide full relief to Plaintiffs and Intervenor. As set forth below, Plaintiffs and Intervenor effectively abandon any claim for injunctive relief, and rest on the view that declaratory relief against the President would be appropriate. The separation-of-powers concerns that foreclose injunctive relief against the President also foreclose declaratory relief.

ARGUMENT

As explained in Defendants’ motion, courts lack authority to issue injunctive relief against the President for non-ministerial actions that he has taken in his official capacity. *See* Defs.’ Mot. at 22–24, ECF No. 194 (citing, *inter alia*, *Mississippi v. Johnson*, 71 U.S. 475, 499–501 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992)). The rationale behind this doctrine is “painfully obvious”:

the President, like Congress, is a coequal branch of government, and for the President to be ordered to perform particular executive . . . acts at the behest of the Judiciary, at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers.

Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996) (quotation omitted).

Plaintiffs and Intervenor do not seriously contend that injunctive relief is available against the President.¹ The separation-of-powers concerns with respect to declaratory relief against the President are indistinguishable.

¹ Intervenor makes no argument regarding the propriety of issuing injunctive relief against the President for his official, non-ministerial actions. *See* Int.’s Resp. at 6. For their part, Plaintiffs, by “not object[ing] to omitting the President from injunctive relief,” Pls.’ Opp. at 2, 7, 9, ECF No. 207, effectively concede that the Court should not issue an injunction against the President in this case. Despite this concession, Plaintiffs argue that “*Mississippi* stands only for the limited proposition that a Court generally cannot enjoin the President from executing the laws of Congress—nothing more.” *Id.* at 7. But the Supreme Court has not limited *Mississippi* to the narrow reading that Plaintiffs advocate. *See Franklin*, 505 U.S. at 802–03 (“[I]n general, ‘this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.’” (quoting *Mississippi*, 71 U.S. at 501)). It is irrelevant, as Plaintiffs argue, whether an order would seek

1 With respect to Executive Branch officials, a “declaratory judgment is the functional
2 equivalent of an injunction.” *Comm. on the Judiciary, U.S. House of Reps. v. Miers*, 542 F.3d 909, 911
3 (D.C. Cir. 2008) (citation omitted). Therefore, “similar considerations regarding a court’s power to
4 issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment.”
5 *Swan*, 100 F.3d at 976 n.1. As Justice Scalia explained in *Franklin*:

6 For similar reasons, I think we cannot issue a declaratory judgment against the
7 President. It is incompatible with his constitutional position that he can be
8 compelled personally to defend his executive actions before a court The
9 President’s immunity from such judicial relief is “a functionally mandated incident
of the President’s unique office, rooted in the constitutional tradition of the
separation of powers and supported by our history.”

10 505 U.S. at 827–28 (Scalia, J., concurring) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)).
11 Following *Franklin*, the D.C. Circuit determined that “declaratory relief” against the President for
12 his non-ministerial conduct “is unavailable.” *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir.
13 2010); see also *Newdow v. Bush*, 391 F. Supp. 2d 95, 106 (D.D.C. 2005) (finding that the Court was
14 “without the authority” to issue a declaratory judgment against the President).

15 Plaintiffs’ and Intervenor’s arguments to the contrary are unavailing. They rely on a 1974
16 case, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (“*NTEU*”). Pls.’ Opp.
17 at 4; Int’s Resp. at 4–5. Because *NTEU* pre-dates *Franklin*, however, “[i]t is not entirely clear, of
18 course, whether, and to what extent, [this] decision[] remain[s] good law after *Franklin*.” *Swan*, 100
19 F.3d at 978.

20 But even if *NTEU* remains good law, that case is readily distinguishable in two ways. First,
21 as the D.C. Circuit repeatedly acknowledged, *NTEU* involved a Presidential action that allegedly was
22 “ministerial” and not discretionary. 492 F.2d at 591, 602, 605, 606 n.42. As the *NTEU* Court
23 recognized, the Supreme Court in *Mississippi* “specifically left open” the question of “whether a court
24 can compel the President to perform a ministerial act.” *Id.* at 607 (citing *Mississippi*, 71 U.S. at 498–
25 99). A ministerial duty is “a simple, definite duty” that is “imposed by law” where “nothing is left

26 to “enjoin only the President’s unconstitutional policy.” Pls.’ Opp. at 8. Citing *United States v. Nixon*, 418 U.S. 683
27 (1974), and *Boumediene v. Bush*, 553 U.S. 723 (2008), Plaintiffs also argue that “[t]he Supreme Court has regularly upheld
28 injunctions against the President.” Pls.’ Opp. at 9. But neither case involved an injunction against the President. *Nixon*
involved the President’s motion to quash a subpoena issued by the district court in a criminal case, 418 U.S. at 686, and
Boumediene addressed whether an enemy combatant could file a petition for a writ of habeas corpus, 553 U.S. at 732.

1 to discretion.” *Mississippi*, 71 U.S. at 498. The President’s actions involving the formation of military
2 policy unquestionably involve “judgment, planning, or policy decisions” and are not ministerial. *See*
3 *Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (defining discretionary
4 duties) (quotation omitted). Indeed, by making no argument to the contrary, Plaintiffs and
5 Intervenor implicitly concede this point. *See generally* Pls.’ Opp.; Int.’s Resp.

6 The *NTEU* case differs from this suit against the President in a second way. In *NTEU*, the
7 D.C. Circuit found that there were no other defendants the plaintiffs could sue in lieu of the
8 President. 492 F.2d at 614–15. In that case, the plaintiffs suffered their alleged injuries because the
9 President failed to take a statutorily required action, and he had not delegated authority to take the
10 action to any subordinate Executive official. *Id.* at 615. To afford the plaintiffs a remedy, the Court
11 concluded that “the sole defendant they can appropriately name in asserting their claims is the
12 President of the United States.” *Id.* The Court contrasted the facts of that case with those of
13 *Mississippi* and *Suskin v. Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969), where dismissal of claims against the
14 President did not leave the plaintiff without redress because “other defendants were suable.” *Id.* at
15 606 n.42, 614–15. Here, dismissal of the President as a defendant will not leave Plaintiffs and
16 Intervenor without redress because “other defendants [are] suable,” *id.* at 606 n.42, which Plaintiffs
17 and Intervenor implicitly acknowledge by naming the Department of Defense (“DoD”) and its
18 Secretary as defendants.

19 Plaintiffs argue that the Court should not dismiss the President from the case because “a
20 declaration applicable to inferior officers would not suffice to remedy the stigmatic injuries inflicted
21 by *the President himself*.” Pls.’ Opp. at 6. But maintaining the President as a defendant merely to
22 vindicate a purported stigmatic injury finds no support in the law and cannot overcome the
23 significant separation-of-powers concerns raised by Plaintiffs’ proposed declaration. Plaintiffs and
24 Intervenor may receive the relief they seek—a judgment “declaring the Ban and the current
25 accessions bar unconstitutional” and an order enjoining the “enforc[ement] [of] the Ban or the
26 current accessions bar,” Pls.’ Am. Compl. at 39, ECF No. 30; *see also* Int.’s Compl. ¶¶ 39–43, ECF
27 No. 104 (requesting similar relief)—without the President as a named defendant in this case.
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1 A similar course of action was taken by the district court, and affirmed by the Supreme Court,
 2 in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the Supreme Court
 3 considered “whether the President was acting within his constitutional power when he issued an
 4 [executive] order directing the Secretary of Commerce to take possession of and operate most of the
 5 Nation’s steel mills.” *Id.* at 582. Although the President was not a defendant in the case, the Court
 6 held that the President’s order was unconstitutional and affirmed the district court’s decision
 7 enjoining the Secretary of Commerce from carrying out the order. *See id.* at 585–89; *see also Hawaii*
 8 *v. Trump*, 859 F.3d 741, 788 (9th Cir.), *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017)
 9 (referring to *Youngstown* and vacating the preliminary injunction as it ran against the President upon
 10 concluding that “Plaintiffs’ injuries can be redressed fully by injunctive relief against the remaining
 11 Defendants”). Assuming Plaintiffs and Intervenor were to prevail on the merits, the Court could do
 12 the same here. And even assuming, *arguendo*, that the President, as Plaintiffs and Intervenor contend,
 13 “unilaterally” decided to “ban” transgender individuals from military service,² Pls.’ Opp. at 2; *see also*
 14 Int.’s Resp. at 5, DoD and the Secretary of Defense would necessarily effectuate any policy regarding
 15 military service by transgender individuals.³ Therefore, the Court could dismiss the President from
 16 the case and then still be able to find that the policy regarding military service by transgender
 17 individuals is unconstitutional and issue injunctive or declaratory relief against DoD and the
 18 Secretary of Defense.⁴ Providing any relief in this fashion would avoid the fundamental separation-
 19 of-powers intrusion that arises with the Judiciary enjoining or entering declaratory relief against the
 20 head of the Executive Branch. *See Swan*, 100 F.3d at 978–79.

21 Plaintiffs and Intervenor also argue that because other courts have issued declaratory
 22 judgments against the President, it is proper for the Court to do so in this case. *See* Pls.’ Opp. at 3–
 23 4; Int.’s Resp. at 4–6. Although the courts in the cases cited by Plaintiffs and Intervenor issued

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 25 ² Defendants contest Plaintiffs’ and Intervenor’s characterization of the President’s actions. *See, e.g.*, Answer to Pls.’ Am.
 26 Compl. ¶¶ 4, 172, 176, 177, ECF No. 193; Answer to Int.’s Compl. ¶¶ 12, 25, ECF No. 192.

27 ³ Enlistments and appointments in the Armed Forces and the National Guard are generally governed by Titles 10 and
 28 32 of the U.S. Code, with specific delegations of authority to the Secretary of Defense and the Service Secretaries. *See*
 10 U.S.C. §§ 504, 505, 532, 1169; 32 U.S.C. § 302; 32 C.F.R. § 66.6.

⁴ Dismissing the President would not render him “above the law,” as Plaintiffs contend. Pls.’ Opp. at 7. The Supreme
 Court addressed a similar argument in *Fitzgerald* and found it to be “wholly unjustified.” 457 U.S. at 758 n.41. “It is
 simply error to characterize an official as ‘above the law’ because a particular remedy is not available against him.” *Id.*

1 declaratory judgments against the President (or permitted a suit for declaratory relief to continue
 2 against the President), only *NTEU* discussed whether it was proper to do so.⁵ See *Clinton v. City of*
 3 *New York*, 524 U.S. 417, 425 n.9 (1998)⁶ (stating only that “the plaintiffs sought a declaratory
 4 judgment that the Line Item Veto Act is unconstitutional and that the particular cancellation was
 5 invalid; neither set of plaintiffs sought injunctive relief against the President”); *Schubardt v. President*
 6 *of the United States*, 839 F.3d 336, 353 (3d Cir. 2016) (“hold[ing] only that [the plaintiffs] second
 7 amended complaint pleaded his standing to sue for a violation of his Fourth Amendment right to be
 8 free from unreasonable searches and seizures”); *Romer v. Carlucci*, 847 F.2d 445, 447, 464 (8th Cir.
 9 1988) (reversing a district court’s finding that a claim challenging the adequacy of the Air Force’s
 10 environmental impact statement was nonjusticiable); *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C.
 11 Cir.), *vacated*, 444 U.S. 996 (1979) (“regard[ing] the only issue here to be whether the constitutional
 12 allocation of governmental power between two branches requires prior legislative consent to the
 13 termination of this treaty”); *City of New York v. Dep’t of Commerce*, 739 F. Supp. 761, 764–68 (E.D.N.Y.
 14 1990) (determining that plaintiffs’ claims related to the census were justiciable and ripe); *Foley v.*
 15 *Carter*, 526 F. Supp. 977, 982 (D.D.C. 1981) (considering whether the court could enter a declaratory
 16 judgment on the constitutionality of an expired statute). In addition, in recent cases contesting the
 17 President’s Executive Order that temporarily suspended the entry of certain foreign nationals into
 18 the United States, neither the Ninth Circuit nor the Fourth Circuit, in considering appeals from the

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 20 ⁵ Other cases cited by Plaintiffs were dismissed on other grounds and were likewise silent on whether a court has
 21 authority to issue a declaratory judgment against the President. See *Edwards v. Carter*, 580 F.2d 1055, 1056–57 (D.C. Cir.
 22 1978) (in affirming the dismissal of a complaint for failure to state a claim, providing reasons for addressing the merits
 23 as opposed to considering numerous jurisdictional challenges); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987)
 24 (declining to exercise jurisdiction “in light of prudential considerations associated with the exercise of equity jurisdiction
 25 and the constraints of the political question doctrine”); *McClure v. Carter*, 513 F. Supp. 265, 271, 271 n.9 (D. Idaho 1981)
 26 (dismissing the case upon finding that a Senator does not have standing to challenge the validity of the appointment of
 27 a federal judge and not reaching any additional issues in the case); *Murphy v. Ford*, 390 F. Supp. 1372, 1372–75 (W.D.
 28 Mich. 1975) (dismissing the plaintiff’s claim that a pardon was void upon finding that President Ford had the
 constitutional power to pardon President Nixon for his offenses against the United States). And a recent Fourth Circuit
 case cited by Plaintiffs does not address the propriety of entering any form of equitable relief against the President. See
generally Int’l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018).

⁶ Plaintiffs argue that the Supreme Court in *Clinton* “never even hinted” that a declaratory judgment against the President
 would be improper “despite the fact that the Court thoroughly analyzed and satisfied itself of jurisdiction to hear the
 case.” Pls.’ Opp. at 3. But the Supreme Court did not consider the question of whether it was proper to issue a
 declaratory judgment against the President and instead analyzed three jurisdictional issues—jurisdiction under 2 U.S.C.
 § 692(a)(1), whether the constitutionality of the Line Item Veto Act was nonjusticiable, and whether the plaintiffs suffered
 an injury-in-fact sufficient to establish standing. See *Clinton*, 524 U.S. at 428–35.

1 granting of injunctive relief, addressed the availability of declaratory relief against the President or
 2 considered whether the President should be dismissed from the case.⁷ *See Hawaii*, 859 F.3d at 788
 3 (finding only that the district court erred by entering a preliminary injunction against the President);
 4 *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *vacated and remanded on other grounds*,
 5 138 S. Ct. 353 (2017) (same).

6 The Court may not infer from the silence of these courts that they found that authority
 7 existed to issue a declaratory judgment against the President for his official, non-ministerial conduct.
 8 Indeed, as the Supreme Court has found, even when a potential defect is “jurisdictional” and the
 9 defect “is neither noted nor discussed in a federal decision, the decision does not stand for the
 10 proposition that no defect existed.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45
 11 (2011) (citations omitted); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 63, n.4 (1989). Because the
 12 cases cited by Plaintiffs and Intervenor are silent on whether a court may enter a declaratory
 13 judgment against the President for his official, non-ministerial conduct, their reliance on them is
 14 misplaced.

15 Finally, Intervenor argues that because “Defendants fail to adduce any evidence to justify
 16 the unconstitutional Transgender Military Service Ban,” “Defendants’ motion should be denied for
 17 this reason alone.” Int.’s Resp. at 1; *see also id.* at 3, 4. But the President should be dismissed from
 18 the case *as a matter of law* based on the separation-of-powers principles at issue in the Government’s
 19 motion, and wholly apart from the Court’s further consideration of the merits of their claims.

20 CONCLUSION

21 For these reasons, and for the reasons set forth in Defendants’ motion, the Court should
 22 grant Defendants’ cross-motion for partial summary judgment and dismiss the President from the
 23 case. The Court should also dissolve the preliminary injunction as to the President.

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 28 ⁷ Nor did the Government present the issue of declaratory relief to the courts in its briefs. The Government was challenging preliminary *injunctive* relief that had actually been entered, and it argued that those injunctions could not run against the President. *See* Brief for Appellants at 56, Reply Brief for Appellants at 29, *Hawaii*, 859 F.3d 741 (No. 17-15589), ECF Nos. 23, 281 (arguing that the preliminary injunction was overbroad because it “violates the 150-year-old rule that federal courts cannot issue an injunction that runs against the President himself” (citing *Mississippi*, 71 U.S. at 501)); Brief for Appellants at 55, Reply Brief for Appellants at 26, *Int’l Refugee Assistance Project*, 857 F.3d 554 (No. 17-1351), ECF Nos. 36, 221 (making the same arguments as in appellants’ briefs before the Ninth Circuit).

Dated: March 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing Reply in Support of Defendants’ Cross-motion for Partial Summary Judgment using the Court’s CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 23, 2018

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