

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAVY SEAL # 1, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States, et al.,

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DEFENDANTS' NOTICE OF INTENT TO RESPOND

Defendants hereby notify the Court that they intend to respond to the recently filed emergency motion. On February 1, 2022, Plaintiffs filed an Emergency Motion for a Temporary Restraining Order and supporting declarations. Plaintiffs admit receiving the challenged decisions several days ago, but did not confer with Defendants' counsel until the afternoon of February 1, 2022. *See* Pls. Ex. B, ¶12 (received Jan. 26); Pls. Ex. A ¶ 23 (received Jan. 28). Despite having the opportunity to confer on an expedited briefing schedule, Plaintiffs' motion nonetheless requests the Court rule tonight without the benefit of a response from Defendants.

Defendants are investigating Plaintiffs' allegations and intend to respond as quickly as possible. Defendants request at least a week in which to respond, by February 8, unless the Court directs an earlier response. There is no danger of imminent separation or other discipline, as that process typically takes many months,

and is not accurately described in Plaintiffs' submissions. *See* Merz Decl. ¶¶ 15-22, ECF No. 23-18 (Navy process); Furness Decl. ¶¶ 14-23, ECF No. 23-19 (Marines process). There is no threat of imminent or irreparable harm to Plaintiffs, which Plaintiffs must establish to be entitled to an immediate restraining order.

Plaintiffs appear to seek, for the first time, additional extraordinary relief, asking this Court to enjoin the Navy from removing the commander of a warship and to stop withdrawal of a Marine's command selection. And Plaintiffs freely admit that this is the first of many such motions with respect to other plaintiffs. Relief with respect to assignment, transfer, command, and deployability decisions is not justiciable under long-standing precedent. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); *Harkness v. Secretary of Navy*, 858 F.3d 437, 443 (6th Cir. 2017); *Cargill v. Marsh*, 902 F.2d 1006, 1007 (D.C. Cir. 1990); *Schlanger v. United States*, 586 F.2d 667, 671 (9th Cir. 1978); *Wilson v. Walker*, 777 F.2d 427, 429 (8th Cir. 1985); *Cortright v. Resor*, 447 F.2d 245, 254 (2d Cir. 1971); *Antonellis v. United States*, 723 F.3d 1328, 1332 (Fed. Cir. 2013). The Court should decline Plaintiffs' invitation to take command of the armed services assignment decisions, which are core constitutional responsibilities entrusted to the President as Commander in Chief. The Court could, for this reason alone, deny Plaintiffs' motion.

If the Court does not outright deny the motion, Defendants intend to file additional information and argument with respect to the likelihood of success on the merits. That information will show that senior military decision-makers reached

reasoned decisions with respect to these Plaintiffs' individual requests and in light of their individual circumstances.

As noted above, Defendants currently intend to respond within a week, but could if directed by the Court file a response as early as tomorrow, February 2, 2022. However, in light of the lack of imminent irreparable harm, the paucity of Plaintiffs' submissions, and the gravity of the relief requested in its interference with core military judgments, a more comprehensive briefing is warranted.

Dated: February 1, 2022

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