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DJ # 145-1-2979

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November 24, 2017

Ms. Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell Jr. Courthouse & Annex
1100 East Main Street, Suite 501
Richmond, VA 23219

RE: *IRAP v. Trump*, No. 17-2231(L)

Dear Ms. Connor:

The government has received the Court's letter of November 22, 2017, indicating that the Court has voted to request that the government supplement the record in this consolidated appeal with two reports referenced in Proclamation No. 9645 and the government's opening brief: a report submitted to the President on July 9, 2017; and a report submitted to the President on Sept. 15, 2017. The Court's letter appears to envision that those materials would be publicly filed with the Court.

The reports requested by the Court, which were not submitted in district court and are not part of the record on appeal under Federal Rule of Appellate Procedure 10(a), contain national-security information that has been classified at the Secret level under Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). In addition, the reports are protected by various privileges, including the presidential-communications privilege and the deliberative-process privilege. Requiring the government to disclose the reports publicly, or to opposing counsel, would improperly compel the government to turn over classified information to persons who neither hold the requisite security clearance nor have a need to know

the information. In addition, compelled disclosure of the documents to the public or to opposing counsel could wrongly strip the reports of their privileges.

The government believes that this case can be decided based on the existing record. Should the Court nevertheless decide to review the reports, however, the government respectfully requests that the Court order their submission *in camera* and *ex parte*, so as to preserve the protections afforded to the reports as classified and privileged material. *See, e.g., Tabaa v. Chertoff*, 509 F.3d 89, 93 n.1, 96-106 (2d Cir. 2007); *Bassiouni v. FBI*, 436 F.3d 712, 722 n.7 (7th Cir. 2006); *Jifry v. FAA*, 370 F.3d 1174, 1184 (D.C. Cir. 2004).

Sincerely,

/s/ Sharon Swingle

Sharon Swingle
Attorney for Appellants-Defendants

cc: All counsel via CM/ECF