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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

STATE OF HAWAI'I and
ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

No. 1:17-cv-00050-DKW-KSC

**NOTICE OF *IN CAMERA*,
EX PARTE LODGING OF
REPORT CONTAINING
CLASSIFIED
INFORMATION AND
OBJECTION TO REVIEW
OR CONSIDERATION OF
REPORT**

Judge: Hon. Derrick K. Watson

Hearing: None Requested

**NOTICE OF *IN CAMERA*, *EX PARTE* LODGING OF REPORT
CONTAINING CLASSIFIED INFORMATION AND OBJECTION
TO REVIEW OR CONSIDERATION OF REPORT**

On October 10, 2017, this Court entered an Order directing Defendants to “provide, with its response to Plaintiffs’ filings, a copy of the September 15, 2017 Report submitted by the Secretary of Homeland Security, which is referenced in Section 1(h) of Proclamation No. 9645,” and to do so “no later than 6:00 AM H.S.T. on October 14, 2017.” Dkt. No. 371. The report that the Court directed the government to provide contains information that is classified SECRET. As explained below, Defendants respectfully object to (A) the Court’s Order requiring submission of the report, which was entered without any prior notice and opportunity to brief the propriety of requiring the government to provide the report; and (B) the Court’s consideration or review of the report in adjudicating plaintiffs’ pending motion for a temporary restraining order (TRO). Defendants are nevertheless furnishing the report to the Court *in camera* and *ex parte*, subject to those objections and in compliance with the Court’s Order.

Because the report contains information that is classified SECRET, Defendants are not submitting the report publicly or serving it on opposing counsel. Instead, Defendants hereby provide Notice that they have lodged a copy of the report with a properly cleared security officer in the United States Attorney’s Office for the District of Hawaii, who will contact the Court’s chambers and, if it is

determined that review of the report is appropriate, will arrange to make the report available for the Court’s review in a secure setting. The report is being provided subject to applicable regulations governing the handling of classified information.

See, e.g., 28 C.F.R. § 17.17 (providing that classified information may be disclosed by Justice Department attorneys to a court, as long as proper security measures are taken); *id.* § 17.46(c) (providing that Article III judges “do not require a determination of their eligibility for access to classified information” but that “[a]ll other . . . Judicial personnel including . . . court reporters, typists, secretaries, [and] law clerks . . . must be determined eligible by the Department Security Officer”).

1. Notwithstanding Defendants’ *ex parte* furnishing of the report, Defendants respectfully object to the Order. Defendants submit that the Court should not direct the government to provide internal communications and deliberations of the Executive Branch, here in the form of a classified report to the President, on matters of national security and foreign policy without first providing the government with notice and an opportunity to brief the relevant issues, including whether the Court’s consideration of the report is appropriate and necessary in the case. The Court’s Order here was entered without any prior notice or an opportunity for the government to brief the legal issues involved.

2. Defendants also respectfully object to the Court’s review or consideration of the report in connection with its decisions in this case. As will be

explained in Defendants' forthcoming opposition to Plaintiffs' TRO motion, the plaintiffs' claims are not justiciable. But even if they were, any review by this Court of the legality of the President's Proclamation should be limited to the four corners of that document and the national-security and foreign-policy judgments of the President that it sets forth, which the Court may not "look behind." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) (stating that "[t]he Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat," and that even if the government did "disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy"). Consideration of any material beyond the Proclamation—let alone a classified submission to the President—is contrary to those precedents. The Government's forthcoming opposition will not rely on the contents of the report beyond the descriptions set forth in the Proclamation itself, and therefore the briefing in this case also does not provide a basis for the Court's review of the underlying report.

Moreover, the report cannot be discussed on the record or provided to opposing counsel for two reasons. First, the report contains classified information. *Cf. Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President has "authority to classify and control access to information bearing on national security and to

determine whether an individual is sufficiently trustworthy to . . . give that person access to such information,” and that authority “flows primarily” from his role as Commander in Chief and “exists quite apart from any explicit congressional grant”).

Second, the report is privileged. The report is protected by the presidential-communications privilege because it involves confidential, indeed classified, communications to the President of the United States. *See Cheney v. United States* District Court, 542 U.S. 367, 389-90 (2004); *United States v. Nixon*, 418 U.S. 683, 706 (1974); *In re Sealed Case*, 121 F.3d 729, 744-53 (D.C. Cir. 1997). The report is also protected by the deliberative-process privilege. It is pre-decisional and deliberative, because it contains the Acting Secretary of Homeland Security’s recommendations about what entry restrictions the President should adopt. *See generally* Proclamation No. 9465, § 1(h) (describing the report as “recommending entry restrictions and limitations on certain nationals”). Accordingly, the report is not subject to disclosure. *See Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (“[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”).

For these reasons, Defendants respectfully submit that the Court should not review or consider the contents of the report in connection with its decisions in this

case. Until further order of the Court, however, a copy of the report will remain in the custody of the security officer in the United States Attorney's Office for the District of Hawaii.

Dated: October 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October, 2017, by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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Date: October 13, 2017

/s/ Daniel Schwei

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