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May 9, 2016

VIA ECF

Honorable Katherine B. Forrest  
United States District Judge  
United States Courthouse  
500 Pearl Street  
New York, New York 10007

Re: *Pollard v. United States Parole Commission, et al.*,  
No. 15 Civ. 9131 (KBF)

Dear Judge Forrest:

This firm represents petitioner Jonathan J. Pollard in this habeas proceeding. We write in response to the letter from respondents (the "Government") to the Court dated May 6, 2016 [Docket No. 44] (the "Government Letter"). In its letter, the Government states its intention to support the special parole conditions imposed upon Mr. Pollard (the "Special Conditions") by submitting classified intelligence information to the Court on an *ex parte* basis, denying Mr. Pollard's security-cleared attorneys an opportunity to review and address such information. The Government also requests a 30-day extension of its May 10 deadline to respond to Mr. Pollard's motion to renew his habeas petition [Docket No. 36].

Mr. Pollard strongly objects. The Government should not be permitted to justify substantial deprivations of Mr. Pollard's liberty with *ex parte* submissions. Mr. Pollard's attorneys have security clearances specifically issued by the Department of Justice in connection with their representation of Mr. Pollard.<sup>1</sup> The Government articulates no basis to deny Mr. Pollard's security-cleared attorneys access to the very materials the Government says it intends to use to justify the onerous Special Conditions.

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<sup>1</sup> See Classified Information Nondisclosure Agreements for Eliot Lauer and Jacques Semmelman, annexed here as Exhibits A and B. By granting security clearances after a thorough investigation, the Justice Department has manifested its confidence in the integrity of counsel and their suitability to be afforded access to classified information in connection with their representation of Mr. Pollard. Such disclosure can be made in a secure environment under conditions of strict confidentiality.

The issue in this habeas proceeding is whether the Government has a valid basis under the applicable statutory standards to impose the Special Conditions. Due process mandates that this determination be made on an adversarial basis. There is no basis or justification for excluding Mr. Pollard's counsel from their rightful place in this adversarial process.

As the Supreme Court has recognized, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993). In fact, "[i]t is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986).

There are exceptions to this rule, but they "are both few and tightly contained." *United States v. Libby*, 429 F. Supp. 2d 18, 24 (D.D.C. 2006). Courts have acknowledged three such exceptions. First, the "inspection of materials by a judge isolated in chambers may occur when a party seeks to prevent use of the materials in the litigation." *Id.* Second, "when the government has properly invoked, for example, the state secrets privilege, has demonstrated compelling national security concerns, and has disclosed, prior to any *in camera* examination, . . . as much of the material as it could divulge without compromising the privilege." *Id.* Finally, "*ex parte* proceedings are permitted when a statute expressly provides for such proceedings." Thus, "only in the most extraordinary circumstances does . . . precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute." *Abourezk*, 785 F.2d at 1061.

None of the exceptions listed above are applicable here. The Government does not seek to "prevent the use of the [classified] materials in litigation" – to the contrary, it seeks to affirmatively rely on the classified materials in order to justify depriving Mr. Pollard of basic liberties. The Government has not invoked state secrets privilege, and has invoked no statute that permits *ex parte* proceedings.

The Government mentions Executive Order 13526, but omits the applicable standard, which is that "[a] person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." 75 Fed. Reg. 707 (Jan. 5, 2010). Mr. Pollard's counsel satisfies all three criteria.

The Government attempts to skirt the applicable rules by mischaracterizing the nature of the parties' disagreement, stating the obvious principle that "the authority to classify and control access to national security information is committed to the President and the Executive Branch under Article II of the Constitution," and that "[n]o authority or precedent affords Petitioner or any other litigant a role in threshold executive classification decisions." (Government Letter at 2). Mr. Pollard does not challenge the authority of the Executive Branch to classify and control access to national security information. Rather, the issue is whether the United States Parole Commission ("Commission") should be permitted to justify the Special Conditions with an *ex parte* submission to the Court where Mr. Pollard's attorneys have been granted security

clearances specifically in connection with their representation of Mr. Pollard. It should not. Mr. Pollard has a due process right to challenge that submission, and no case cited in the Government Letter says anything to the contrary.

Citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), the Government claims that “an order directing the Government to provide Petitioner’s counsel with access to classified information would conflict with clear law that the authority to determine who may have access to classified information ‘is committed by law to the appropriate agency of the Executive Branch,’ which enjoys exclusive responsibility for the protection and control of national security information.” *Egan*, however, involved a challenge to the Navy’s denial of security clearance to an employee, and stands only for the proposition that “the protection of classified information must be committed to the broad discretion of the agency responsible,” including “broad discretion to determine who may have access to it.” *Egan*, 484 U.S. at 527. Such discretion does not, as the Government suggests, imply that courts are without authority to determine whether reliance on classified information submitted *ex parte* is warranted.

Moreover, the cases cited by the Government in support of its claim that “[n]umerous courts have denied litigants’ requests for access to classified information in a variety of contexts” are inapposite. (Government Letter at 3). This is not a case like *Doe v. CIA*, 576 F.3d 95, 98-99 (2d Cir. 2009), in which a plaintiff seeks to rely upon classified information in support of a money damages claim against an agency and the agency invokes the state secrets privilege to avoid answering the complaint, or a case like *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983) (no relation to petitioner), in which a plaintiff requests information under the Freedom of Information Act and an agency seeks to exempt classified documents from disclosure. Mr. Pollard does not seek to rely affirmatively upon the classified information in support of his habeas claim. Rather, the Government has chosen of its own accord to rely upon certain classified documents in an effort to meet the statutory standard required to justify a deprivation of Mr. Pollard’s liberty. Having chosen to proceed in this manner, the Government should not be permitted to deprive Mr. Pollard’s counsel access to those documents.

The merits issue in this proceeding, as set forth in this Court’s December 16, 2015 Order (the “Remand Order”) [Docket No. 26], is whether Mr. Pollard has classified information *in his head* that could support the imposition of the challenged Special Conditions. This requires the Court to make a series of related inquiries, such as whether Mr. Pollard in fact accessed the classified information the Government seeks to rely upon, whether the details have been publicly disclosed in any other form, whether it is realistic that Mr. Pollard could possibly have retained the type of data at issue after 31 years, and whether the information could still possibly implicate national security concerns after the passage of 31 years. The Government bears the burden of proof with respect to these findings, and it would be impossible for Mr. Pollard’s counsel to respond to its contentions without an opportunity to review the Government’s submission. Mr. Pollard’s long-time pro bono attorneys are intimately familiar with the case and will play a pivotal role in the process of reviewing the documents and advocating Mr. Pollard’s rights to the court.

The Government simply cannot, consistent with due process, deprive Mr. Pollard of his liberty on the basis of *ex parte* submissions.

\* \* \*

Separately, Mr. Pollard opposes Respondents' last-minute request for a 30-day extension, which is just the latest move in an unfortunate series of delay tactics by respondents in this proceeding.

Immediately after the Court issued its Order of April 12, 2016 [Docket No. 40], directing the parties to meet and confer about the standards applicable to the Court's review in this proceeding, Mr. Pollard's counsel made a detailed proposal to the Government. The Government did not respond in any manner until late afternoon of Friday, May 6, just two business days before its submission was due, informing counsel of its intention to proceed *ex parte* and to seek an additional 30 days to make its submission.

Respondents have had ample time to respond to Mr. Pollard's motion to renew his habeas petition, which he filed more than one month ago to challenge the Supplemental Notice of Action ("SNOA") that the Commission published more than two months ago, on March 2, 2016, but which it failed to provide to Mr. Pollard until March 10, 2016 because of an "administrative error." [See Docket No. 33].

The SNOA itself was the product of substantial delay by respondents, having been provided to Mr. Pollard nearly *three months* after the Court issued its Remand Order directing the Commission to publish factual support for the Special Conditions. Thus, respondents have already had *five months* to justify the Special Conditions, and all they have come up with since the Remand Order is the conclusory letter from Intelligence Director Clapper stating that the documents Mr. Pollard accessed 31 years ago are still classified, and the 21-year old letter from then-Acting CIA Director Studeman opposing parole for Mr. Pollard at that time. [See Docket No. 38-1, Exs. B and D]. Respondents have had five months to address the Court's direction that they supply contemporaneous evidence that Mr. Pollard could remember something of intelligence value *today*, and they still have not done so.

Meanwhile, Mr. Pollard is suffering under the Special Conditions. He is unable to work because of the internet restriction, and is substantially burdened in his daily life and in his religious practice because of the GPS condition. Respondents should make their presentation on May 10, 2016, the date *they proposed* in the briefing schedule submitted to the Court for approval on April 12, 2016 [Docket No. 39], or relieve Mr. Pollard from the Special Conditions until they are ready to make their submission. Indeed, Mr. Pollard has been living in New York City since his release more than six months ago, meeting and conversing with anyone he wants to converse with, in person, in writing and by telephone. There is no suggestion from respondents or anyone else that he has done anything but follow instructions and be a model parolee.

Respectfully submitted,



Eliot Lauer



Jacques Semmelman

# EXHIBIT A

**CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT**AN AGREEMENT BETWEEN ELIEZER (ELIOT) LAVER AND THE UNITED STATES*(Name of Individual - Printed or typed)*

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 13526, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in sections 1.1, 1.2, 1.3 and 1.4(e) of Executive Order 13526, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of sections 641, 793, 794, 798, \*952 and 1924, title 18, United States Code; \*the provisions of section 783(b), title 50, United States Code; and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I agree that I shall return all classified materials which have, or may come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of sections 793 and/or 1924, title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

*(Continue on reverse.)*

11. These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 13526 (75 Fed. Reg. 707), or any successor thereto section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b) (8) of title 5, United States Code, as amended by the Whistleblower Protection Act of 1989 (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); sections 7(c) and 8H of the Inspector General Act of 1978 (5 U.S.C. App.) (relating to disclosures to an inspector general, the inspectors general of the Intelligence Community, and Congress); section 103H(g)(3) of the National Security Act of 1947 (50 U.S.C. 403-3h(g)(3)) (relating to disclosures to the inspector general of the Intelligence Community); sections 17(d)(5) and 17(e)(3) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g(d)(5) and 403q(e)(3)) (relating to disclosures to the Inspector General of the Central Intelligence Agency and Congress); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, \*952 and 1924 of title 18, United States Code, and \*section 4 (b) of the Subversive Activities Control Act of 1950 (50 U.S.C. section 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling.

12. I have read this Agreement carefully and my questions, if any, have been answered. I acknowledge that the briefing officer has made available to me the Executive Order and statutes referenced in this agreement and its implementing regulation (32 CFR Part 2001, section 2001.80(d)(2)) so that I may read them at this time, if I so choose.

\* NOT APPLICABLE TO NON-GOVERNMENT PERSONNEL SIGNING THIS AGREEMENT.

SIGNATURE <i>[Signature]</i>	DATE 9/16/2014	SOCIAL SECURITY NUMBER (See Notice below) [REDACTED]
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ORGANIZATION (IF CONTRACTOR, LICENSEE, GRANTEE OR AGENT, PROVIDE: NAME, ADDRESS, AND, IF APPLICABLE, FEDERAL SUPPLY CODE NUMBER) (Type or print)

CURTIS, MALLET-PREVOST, COLT & MUSIE  
101 PARK NE  
NY NY 10178

WITNESS		ACCEPTANCE	
THE EXECUTION OF THIS AGREEMENT WAS WITNESSED BY THE UNDERSIGNED.		THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT.	
SIGNATURE <i>[Signature]</i>	DATE 9/16/14	SIGNATURE <i>[Signature]</i>	DATE 9/16/14
NAME AND ADDRESS (Type or print) DOJ		NAME AND ADDRESS (Type or print) DOJ	

**SECURITY DEBRIEFING ACKNOWLEDGEMENT**

I reaffirm that the provisions of the espionage laws, other federal criminal laws and executive orders applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or organization; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information, and that I (have) (have not) (strike out inappropriate word or words) received a security debriefing.

SIGNATURE OF EMPLOYEE	DATE
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NAME OF WITNESS (Type or print)	SIGNATURE OF WITNESS
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**NOTICE:** The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Number (SSN) is Public Law 104-134 (April 26, 1996). Your SSN will be used to identify you precisely when it is necessary to certify that you have access to the information indicated above or to determine that your access to the information indicated has been terminated. Furnishing your Social Security Number, as well as other data, is voluntary, but failure to do so may delay or prevent you being granted access to classified information.

# EXHIBIT B



**CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT**AN AGREEMENT BETWEEN Jacques Semmelman AND THE UNITED STATES*(Name of Individual - Printed or typed)*

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 13526, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in sections 1.1, 1.2, 1.3 and 1.4(e) of Executive Order 13526, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of sections 641, 793, 794, 798, \*952 and 1924, title 18, United States Code; \*the provisions of section 783(b), title 50, United States Code; and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I agree that I shall return all classified materials which have, or may come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of sections 793 and/or 1924, title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

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*(Continue on reverse.)*

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12. I have read this Agreement carefully and my questions, if any, have been answered. I acknowledge that the briefing officer has made available to me the Executive Order and statutes referenced in this agreement and its implementing regulation (32 CFR Part 2001, section 2001.80(d)(2)) so that I may read them at this time, if I so choose.

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SIGNATURE <i>Jacques Semmelhorn</i>	DATE 9-18-14	SOCIAL SECURITY NUMBER (See Notice below) [REDACTED]
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ORGANIZATION (IF CONTRACTOR, LICENSEE, GRANTEE OR AGENT, PROVIDE: NAME, ADDRESS, AND, IF APPLICABLE, FEDERAL SUPPLY CODE NUMBER) (Type or print)

*Curtis Mallet - Prevost, Salt + Mallet LLP  
101 Park Ave  
New York, NY 10178*

WITNESS		ACCEPTANCE	
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NAME AND ADDRESS (Type or print) <i>DOT</i>		NAME AND ADDRESS (Type or print) <i>DOT</i>	

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