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May 10, 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:


On behalf of petitioner Jonathan J. Pollard, we write in response to the letter from respondents (the "Government") dated May 10, 2016 [Docket No. 48].

In its letter, the Government states that its proposed *ex parte* submission of classified materials is not being relied upon for the purpose of meeting its required proof under 18 U.S.C. § 4209 and 28 C.F.R. § 2.40(b). Instead, the Government says it intends to offer the classified materials to "aid the Court in its review of the renewed Petition." (Letter at 1). This is, however, an adversarial proceeding. The Parole Commission has a burden to carry under the statute and regulations if it wishes to justify the imposition of special conditions of parole on Mr. Pollard, and it is offering the proposed classified submission to the Court in an effort to carry that burden, and for no other purpose.

The Government cannot have it both ways. If it intends to rely on classified materials to meet its statutory burden, then it has to allow Mr. Pollard's security-cleared attorneys to review the materials. In other words, by injecting the materials into the dispute, the Government creates the "need to know" contemplated in Executive Order 13526. While the executive branch is the initial decision-maker of who has "need to know," the Court is the ultimate arbiter of whether that determination was proper in this context. *See United States v. Libby*, 429 F. Supp. 2d 18, 25 (D.D.C. 2006); *see also Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993) ("It is simply not the case that all security-clearance decisions are immune from judicial review.").

The Government references in a footnote the previous unsuccessful efforts by Mr. Pollard's counsel to review classified information relating to his case. (Letter at n.2). Those efforts arose in the context of Mr. Pollard's efforts in making an application to the President for executive clemency. The United States Court of Appeals for the D.C. Circuit held that Mr. Pollard's counsel did not have a "need to know" classified information because clemency is a matter of executive grace, not subject to judicial review. *United States v. Pollard*, 416 F.3d 48, 57 (D.C. Cir. 2005), cert. denied, 547 U.S. 1021 (2006). That holding is entirely inapposite here, where the Parole Commission has granted mandatory parole, and yet issued a Notice of Action that imposes onerous special conditions of parole on Mr. Pollard on the purported basis that he might remember and disclose classified information he obtained 31 years ago. Mr. Pollard has statutory rights to challenge the Notice of Action under a defined statutory standard that affords him substantive rights that cannot be abridged without due process.

Respectfully submitted,



Eliot Lauer

cc: AUSA Rebecca S. Tinio (via ECF)

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