No. 05-

IN THE
Supreme Court of the United States

JONATHAN JAY POLLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the District of Columbia Circuit, in a two-to-one ruling, held that the doctrine of separation of powers precludes the exercise of subject matter jurisdiction, by a United States district court, over a defendant's post-conviction motion to allow his successor counsel access to classified docket materials considered by the district court prior to sentencing, if the purpose of the desired access is to enable counsel to study the court record in order to make an application for executive clemency. The Court of Appeals reached this conclusion *sua sponte* even though the district court's protective order, pursuant to which the documents were placed under seal, expressly contemplated access by successor counsel with court approval.

The Court of Appeals held that, because the objective of the desired access was to enable counsel to prepare a clemency application with knowledge of the full court record, and because the decision whether or not to grant clemency is constitutionally allocated to the Executive Branch, it would somehow violate the doctrine of separation of powers if the court were to exercise its jurisdiction in order to decide whether or not to grant the motion for access to the court's own docket.

This extreme and unprecedented application of the doctrine of separation of powers is incompatible with longstanding principles established by this Court, and is in conflict with the approach to the doctrine followed in the Fourth, Fifth, Sixth, and Ninth Circuits.

This petition, which implicates the fundamental issue of the scope and breadth of the doctrine of separation of powers, presents the following question:

Where a federal district court has placed classified court docket materials under seal pursuant to a protective order which expressly provides for future access to the docket materials with court approval, does the separation of powers doctrine mandate that the court lacks subject matter jurisdiction to allow security-cleared successor counsel access to its docket materials simply because counsel's objective in seeking access is to study the court record in order to prepare and submit a clemency application?

THE PARTIES

The parties below are listed in the caption. In addition, the following appeared below as *amici curiae* on behalf of petitioner Jonathan J. Pollard: The National Association of Criminal Defense Lawyers; The American Civil Liberties Union of the National Capital Area; the American Association of Jewish Lawyers and Jurists; and various law professors and other distinguished individuals.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit dated July 22, 2005 is reported at *United States v. Pollard*, 416 F.3d 48 (D.C. Cir. 2005) (Appendix A).

The Court of Appeals affirmed:

(a) A Memorandum Order of the U.S. District Court for the District of Columbia dated and filed January 12, 2001, which denied Pollard's Emergency Motion to Add to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order. (Not reported.) (Appendix C) (A-440)[1]

(b) An Order of the U.S. District Court for the District of Columbia dated August 7, 2001 and entered August 9, 2001, which denied Pollard's Motion for Reconsideration of the January 12, 2001 Memorandum Order. (Not reported.) (A-635)

(c) An Order of the U.S. District Court for the District of Columbia, filed November 12, 2003, which denied Pollard's Motion for Modification of the Court's January 12, 2001 Memorandum Order Based Upon the Government's August 3, 2001 Letter. This Order is reported at *United States v. Pollard*, 290 F. Supp. 2d 165 (D.D.C. 2003). (Appendix B) (A-866)

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1. Citations in the form "A-__" are to the Joint Appendix below.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals entered its opinion and order on July 22, 2005. Petitioner filed a timely petition for rehearing *en banc*, which was denied on November 10, 2005. *See United States v. Pollard*, 2005 U.S. App. LEXIS 24393 (D.C. Cir. Nov. 10, 2005) (per curiam).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On July 22, 2005, a divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed, on separation of powers grounds, Orders of the United States District Court for the District of Columbia which denied the motion by petitioner Jonathan J. Pollard to allow his security-cleared counsel access to classified pre-sentencing memoranda and related materials that had been filed with the district court in 1987 (the "Access Motion"). The documents had been placed under seal pursuant to a protective order (A-72) (the "Protective Order") which explicitly contemplated future access by, inter alia, successor counsel with proper clearance, subject to court approval.

Petitioner was sentenced to life in prison in 1987, following a guilty plea. Prior to sentencing, the Government and the defense (through prior counsel) submitted pre-sentencing memoranda to the Court. Classified portions of the memoranda were redacted by the Court Security Officer. The redactions totaled approximately 40 pages. The unredacted materials (the "Docket Materials") were placed under seal by the district court pursuant to the Protective Order.

No subsequent representative of petitioner has seen the Docket Materials. Current counsel, who have the appropriate security clearance, seek access so that they can study the full record in order to prepare and submit an application for executive clemency. The Access Motion, made pursuant to the Protective Order, sought access to the Docket Materials in a secure Government facility, under strict conditions of confidentiality.

Because the Government below expressly conceded subject matter jurisdiction over the Access Motion, the issue was not briefed. However, at oral argument in the Court of Appeals, one member of the panel (Sentelle, C.J.) *sua sponte* questioned the court's jurisdiction.

In a written opinion by a divided panel issued July 22, 2005, the majority (Sentelle and Henderson, C.JJ.) held that, due to the constitutional allocation of the clemency power to the President, the doctrine of separation of powers mandates that federal courts lack jurisdiction to allow access to their own dockets if the objective of the access is to enable counsel to prepare and submit an application for executive clemency. *United States v. Pollard*, 416 F.3d 48, 56-57 (D.C. Cir. 2005).

The dissent (Rogers, C.J.) found that a federal district court unquestionably has jurisdiction to allow access to its own docket, and that the separation of powers does not mandate a contrary result even if the objective of the access is to prepare a clemency application. The dissent reasoned that allowing access to its own docket materials is plainly within the province of the court, is contemplated by the Protective Order, and would not interfere in any way with the President's clemency power. *Id*. at 58-61 (Rogers, J. dissenting).

Background

A. The Protective Order

On June 4, 1986, pursuant to a written Plea Agreement, petitioner pleaded guilty to conspiracy to commit espionage. Petitioner had delivered classified information to the State of Israel. (A-32)

Prior to sentencing, the Government and the defense each submitted memoranda to the Court. Pursuant to a Protective Order (A-72), a Court Security Officer redacted portions deemed classified. The classified portions were placed under seal. (A-295)

Inter alia, the Protective Order contemplated future access by security-cleared non-governmental persons (such as successor counsel) with permission of the Court:

> ***All other individuals*** other than defendant, above-named defense counsel, appropriately cleared Department of Justice employees, and personnel of the originating agency, ***can obtain access*** to classified information and documents only after having been granted the appropriate security clearances by the Department of Justice through the Court Security Officer ***and the permission of this Court***.

(A-73) (emphasis added).

Four documents were redacted: a Declaration of Secretary of Defense Caspar Weinberger (A-450-469); a memorandum personally prepared by petitioner (A-471-533);

a memorandum prepared by petitioner's then-attorney, Richard Hibey (A-535-582); and the Government's reply (A-584-609). In addition, the minutes of a sidebar conference held during sentencing were placed under seal. (A-612) The redactions totaled approximately 40 pages. (A-638)

Prior to sentencing, petitioner and his then-attorney were allowed access to the Docket Materials. (A-391) However, since the sentencing nearly 19 years ago, no one representing petitioner has been allowed to see the Docket Materials. (A-296) A heavily redacted version is in the public record. (A-450-613)

On March 4, 1987, petitioner was sentenced to life in prison. (A-155) He has been incarcerated continuously since his arrest on November 21, 1985. (A-28) Petitioner is currently serving his twenty-first year of a life sentence.

B. New Counsel Enter the Case and Obtain Security Clearance

On May 17, 2000, petitioner retained the undersigned (Eliot Lauer and Jacques Semmelman) as *pro bono* counsel.

Counsel applied for security clearance *for the express and sole purpose of seeing the Docket Materials*. On November 2, 2000, following a thorough investigation, the United States Department of Justice ("DOJ") granted Mr. Lauer "Top Secret" security clearance.[2] Nevertheless, the DOJ thereafter refused to stipulate to access under the Protective Order. (A-294)

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2. Mr. Semmelman, a former Assistant U.S. Attorney, received the same clearance shortly thereafter. (A-650)

C. The Government's Opposition to Executive Clemency

Seeking relief from his life sentence, petitioner has sought executive clemency on several occasions. Each application has been met with fierce opposition from the DOJ. (A-398-399, 403) The record below reflects that DOJ personnel have been unilaterally allowed access by the DOJ to copies of the sealed Docket Materials specifically in connection with the DOJ's opposition to executive clemency. (A-754, 766, 769, 773)

D. The Access Motion

On November 29, 2000, counsel for petitioner filed an Emergency Motion to Add to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order, which asked the Court, in accordance with the Protective Order, to add Mr. Lauer's name to the list of persons designated in the Protective Order as authorized to see the Docket Materials (the "Access Motion"). (A-289)

In an affidavit, Mr. Lauer explained that, with then-President Clinton in the final weeks of his administration, petitioner's counsel required access to the Docket Materials to represent petitioner in connection with a clemency application:

> In order to represent [petitioner] effectively, it is essential for counsel to see what is in the sealed docket materials, so that (consistent with maintaining the confidentiality of the materials) counsel may address and respond to arguments by those who oppose executive relief on the basis of what is set forth in the sealed materials.

(A-296)

The Access Motion was not a *discovery* motion. Counsel was only asking to see Docket Materials that had already been shown to petitioner and his prior counsel, and submitted to the Court prior to sentencing.

On December 8, 2000, the Government filed its Opposition to the Access Motion. (A-327) Inter alia, the Government asserted that counsel had no "need-to-know" what was in the Docket Materials. (A-331) The Government stated that the Docket Materials were *irrelevant* to clemency and the "mere possibility that those opposing executive relief may cite the sealed materials" was insufficient to demonstrate a "need-to-know." (A-331, 334)

At oral argument in the district court, the Government continued to insist that the Docket Materials were irrelevant to the clemency process. The Government asserted that there was no "need-to-know" because the Docket Materials were outdated, dormant, and of no conceivable relevance to a clemency determination. (A-427-428) The Government argued that "materiality" and "relevance" are the touchstones of "need-to-know." (A-428) Contending that "it doesn't make sense why President Clinton would be using a damage assessment that was written over a decade ago," the Government emphasized that "if the President isn't using Secretary Weinberger's materials, then there is no relevance and there is no materiality. . . . They haven't demonstrated such a use to this Court. And so they can't make the need to know." (A-426-427)

By Memorandum Order dated January 12, 2001, the district court (Johnson, J.) denied the Access Motion. (Appendix C) The court did not express any concern, based upon the separation of powers or otherwise, about its jurisdiction to adjudicate the Access Motion.

On January 19, 2001, counsel for petitioner filed a timely Motion for Reconsideration. (A-444) On August 7, 2001, the district court (Johnson, J.) issued an Order denying the Motion for Reconsideration. (A-635) Again, the court expressed no concern about the separation of powers or about its jurisdiction.

E. The Motion for Modification

In addition to opposing the Access Motion on the ground that there was no "need-to-know," the Government represented to the district court that, notwithstanding the security clearance bestowed on Mr. Lauer by the DOJ, Mr. Lauer was not eligible to see the Docket Materials because he did not have the *proper* security clearance, namely, Secure Compartmented Information ("SCI"). (A-333, 424, 438) The district court (Johnson, J.) accepted the Government's representation as another basis for denying the Access Motion. (A-440) However, the representation turned out to be untrue.

In the aftermath of the Government's representation to the district court that the DOJ had somehow granted defense counsel inadequate security clearance, defense counsel complained to the DOJ for having granted a security clearance now said to be inadequate for the sole purpose for which the clearance was sought, namely, to allow access to the Docket Materials. Counsel again requested that the DOJ accord the appropriate security clearance to enable counsel to have access to the Docket Materials. (A-659-660)

In response, by letter dated August 3, 2001 (the "August 3, 2001 Letter"), DOJ Court Security Officer Michael P. Macisso wrote:

> Even though ***your background investigations will support SCI access***, there are other criteria which must be met, including an SCI indoctrination briefing and a "need to know" determination from the Court or the government. . . . Absent a "need to know" ruling from the Court or the government, the Department of Justice will not be able to upgrade your clearance level or provide you access to this material.

(A-650) (emphasis added). The August 3, 2001 Letter thus conceded what the Government had effectively denied in Court—that the Government's background investigation "will support SCI access," and that (following a briefing) SCI access will be given *automatically* if counsel has a "need to know." (A-650)

The Government never told the district court that any impediment to SCI clearance would be obviated upon determination of a "need-to-know." To the contrary, the Government created the false impression that clearance would remain an insurmountable obstacle *even if* the Court found that counsel had a "need-to-know." (A-333, 424)

On August 16, 2001, counsel for petitioner filed a Motion for Modification of the Court's January 12, 2001 Memorandum Order Based Upon the Government's August 3, 2001 Letter. (A-650)

F. The Bryant Letter

On September 10, 2001, Assistant Attorney General Daniel J. Bryant responded to a request by Congressman Anthony Weiner of New York for information concerning who, if anyone, had been afforded access by the DOJ to copies of the Docket Materials since petitioner's sentencing in 1987. (A-663-664, 754) Mr. Bryant's letter contained another startling admission:

> With regard to the number of persons having access to the documents since Mr. Pollard's sentencing, we can only provide the number of visits recorded in the log of the Security and Emergency Planning Staff. ***There were 25 instances of access recorded between November 19, 1993 and January 12, 2001.*** In some instances, a single individual accessed the documents on more than one occasion.

(A-754) (emphasis added). This admission repudiated the premise of the Government's Opposition to the Access Motion that there was no "need-to-know" because the Docket Materials had become outdated and irrelevant, and were of no interest whatsoever. (A-331-334, 427-428)

Since the Government insists it has only allowed access to the Docket Materials to those with a "need-to-know" (A-655), the Bryant Letter effectively conceded that on 25 occasions between 1993 and 2001 the DOJ had unilaterally determined that someone had a "need-to-know."

The Bryant Letter did not disclose the circumstances under which the DOJ had allowed the 25 instances of access. However, since the Docket Materials comprise pre-sentencing

memoranda and sentencing minutes, and do not comprise defense or intelligence files, it is apparent that these instances of Government access were all in connection *with initiatives related to petitioner* (as opposed to unrelated inspections for defense or intelligence purposes). At least one instance of DOJ access has been directly linked to the DOJ's opposition to executive clemency in response to a request for clemency made by then-Israeli Prime Minister Yitzhak Rabin to then-President Clinton. (A-754, 766, 769, 773)

On May 9, 2002, counsel filed a Motion to Enlarge the Scope of the Pending Motion for Modification, to include the Bryant Letter. (A-749) The motion was granted. (A-783)

G. The November 12, 2003 Order

By Order dated March 4, 2002, the district court case was reassigned to Hon. Thomas F. Hogan. (A-734) On September 2, 2003, Judge Hogan heard oral argument on the Motion for Modification. (A-784) No jurisdictional objection was raised by the Government or by the Court. On November 12, 2003, Judge Hogan denied the Motion for Modification, without expressing any jurisdictional or separation of powers concerns. (A-865) *See United States v. Pollard*, 290 F. Supp. 2d 165 (D.D.C. 2003) (Appendix B).

H. The Decision of the Court of Appeals

Appellant timely appealed from the January 12, 2001 Order, the August 7, 2001 Order, and the November 12, 2003 Order. (A-665, 869)

In an opinion issued July 22, 2005, a divided panel of the D.C. Circuit affirmed. Even though the Government's brief had expressly conceded jurisdiction based upon the specific terms

of the Protective Order (Gov't Brief at p. 44 n.25), the majority (Sentelle and Henderson, C.JJ.) ruled *sua sponte* that, notwithstanding the terms of the Protective Order, due to the doctrine of separation of powers a federal court lacks jurisdiction to hear a motion for access to classified court docket materials if the objective of the desired access is to make a clemency application. *United States v. Pollard*, 416 F.3d 48, 56-57 (D.C. Cir. 2005) (Appendix A).

Judge Rogers dissented, finding, in light of the Protective Order, that jurisdiction plainly exists to allow access to the Docket Materials irrespective of the motivation for seeking access, and that granting access in this case would not infringe in any way on the President's clemency power or otherwise violate the separation of powers.[3] *Id*., 416 F.3d at 58-61 (Rogers, J., dissenting).

1. The Majority Opinion

The majority held that "we lack the authority to compel the executive branch to *disclose* any documents for the purposes of a clemency petition," and that "it is entirely out of our power to compel discovery of or access to documents for the sake of a clemency petition." *Pollard*, 416 F.3d at 57. The stated rationale was that "[t]he Constitution entrusts clemency decisions to the President's sole discretion" and clemency is "a matter of grace, over which courts have no review[.]" *Id*. at 57 (quoting *United States ex. rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950)).

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3. Judge Rogers concluded that counsel had no "need-to-know" what was in the Docket Materials. *Pollard*, 416 F.3d at 61-63 (Rogers, J., dissenting). The majority expressly did not reach the issue of whether counsel had a "need-to-know." *Id*., 416 F.3d at 56-57. Accordingly, should this Court reverse, the Court below would have to address the issue of "need to know."

2. The Dissent

In a dissenting opinion, Judge Rogers noted "the absence of legitimate separation of powers concerns" and concluded that the district court unquestionably had jurisdiction to grant access to the Docket Materials. *Pollard*, 416 F.3d at 58-61 (Rogers, J., dissenting).

The dissent observed that the Docket Materials "were created for [petitioner's] sentencing, filed with the district court, and sealed pursuant to a Protective Order." *Id*. at 58. The dissent also noted that "[p]ursuant to the Protective Order, persons not identified therein, such as [petitioner's] current counsel, may obtain access" after receiving security clearance, which includes a "need to know," and "obtaining the permission of the district court." *Id*. at 58. On these facts, "there is no jurisdictional bar to the court's consideration of the access motion[.]" *Id*. at 61.

The dissent explained that the majority's reasoning "ignore[d] the fact . . . that the documents at issue were created as part of a judicial process and are governed by the Protective Order." *Id*. at 59. While the Docket Materials are "nominally in the custody of the Justice Department's Security and Emergency Planning Staff," the district court "has continuing control over them on account of the perpetual Protective Order[.]" *Id*. at 59. The logical implication of the majority's view is that the district court "would be in the untenable position of lacking jurisdiction over motions that relate to documents that were filed with it and over which it has continuing control." *Id*. at 59.

The dissent noted that while the majority "hypothesizes a conflict with the President's clemency power under the

Constitution," neither the request for access nor the Court's grant of access "poses interference with the President's clemency power." *Id*. at 58. And

> the court today never explains how the district court's exercise of jurisdiction over the access motion impairs or interferes with the President's clemency power, and, indeed, it cannot because the motion does not involve the President's constitutional prerogative to grant clemency or even the process by which the President decides whether or not to grant clemency[.]

Id. at 60.

The dissent found that nothing in the Access Motion impaired in any way the workings of the Executive in the clemency process:

> The access motion does not relate to the President's decision regarding clemency, as he remains free to review, ignore, act on, or fail to act on any petition for clemency that Pollard's counsel might file, regardless of whether a court determines that his counsel may have access to classified documents to prepare such a petition. *Thus, the President's constitutional duty is not only unimpaired by the access motion, it is wholly unaffected by it.*

Id. at 60 (emphasis added).

The dissent concluded by observing that "[i]t is curious that the court relies on separation-of-powers principles to preclude federal court review, ***ignoring the logical implications of our precedent***." *Id*. at 61 (emphasis added).

I. The *En Banc* Petition

Petitioner timely petitioned for *en banc* review. The Court of Appeals directed the Government to respond.

On November 10, 2005, the Court of Appeals denied the petition without opinion. *United States v. Pollard*, 2005 U.S. App. LEXIS 24393 (D.C. Cir. Nov. 10, 2005) (per curiam) (Appendix D).

REASONS FOR GRANTING THE PETITION

Summary Of Argument

The Court of Appeals' unprecedented application of the doctrine of separation of powers led it to conclude that, because the objective in seeking access is in connection with a clemency application, the doctrine deprived the district court of jurisdiction to decide who may have access to its very own Docket Materials. This approach to the doctrine of separation of powers is incompatible with longstanding principles established by this Court, and conflicts with the approach followed in the Fourth, Fifth, Sixth and Ninth Circuits.

Instead of basing its decision on the *objective* of the desired access, which is irrelevant to the separation of powers, the majority should have analyzed the practical impact of deciding the Access Motion on the Executive's clemency power, and should have made a determination regarding the potential for disruption of, or interference with, the President's power to grant or deny clemency.

The dissent conducted such an analysis and concluded that no separation of powers concerns were implicated. The

majority conducted no such analysis, basing its decision entirely on the untenable rationale that because clemency is an Executive function, the Judiciary lacks jurisdiction to decide a motion that seeks access to a judicial docket if the purpose is to see the court record in order to make an effective clemency application.

The D.C. Circuit's unprecedented decision has far-reaching implications. If allowed to stand, it would render the Judiciary powerless in the face of any linkage, however attenuated, to the processes of another Branch of government, even in the absence of *any* intrusion on the other Branch's constitutional authority.

The doctrine of separation of powers is not so restrictive. The D.C. Circuit's decision warrants review by this Court.

THE COURT SHOULD GRANT CERTIORARI TO DEFINE THE SCOPE AND BREADTH OF THE DOCTRINE OF SEPARATION OF POWERS, PARTICULARLY WITH RESPECT TO THE RELATIONSHIP BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES

Petitioner respectfully submits that the majority's application of the doctrine of separation of powers is incompatible with fundamental principles established by this Court, and is in conflict with the approach followed in other circuits, including the Fourth, Fifth, Sixth, and Ninth Circuits.

The D.C. Circuit's Opinion should not be allowed to stand unreviewed. This Court should grant certiorari in order to define the scope and breadth of the doctrine of separation of powers, particularly with respect to the relationship between the Executive and Judicial Branches.

The doctrine of separation of powers requires a careful and thorough analysis into the respective functions of the affected Branches. The analysis must evaluate the extent to which the proposed conduct of one Branch (in this case, the Judiciary) would interfere with or impede the workings of the other Branch (in this case, the Executive).

The majority below performed no such analysis, choosing instead to hold, in effect, that even absent *any* impact on the authority of the Executive Branch, the doctrine somehow prohibited the district court from exercising jurisdiction over a motion seeking access to its own Docket Materials.

A. The Doctrine of Separation of Powers Does Not Mandate A Rigid and Absolute Separation of the Three Branches of Government

This case does not involve *any* judicial intrusion whatsoever on the constitutional authority of the Executive Branch. Indeed, it is difficult to imagine a scenario that involves any lesser intrusion by the Judiciary into that authority. Yet, the majority held that, simply because clemency is petitioner's ultimate objective, judicial adjudication of the Access Motion under the Court's Protective Order would somehow constitute a violation of the separation of powers.

This Court has long held that the doctrine of separation of powers does not mandate a rigid and absolute separation of the three Branches of government. Rather, "each of the three general departments of government [must remain] entirely free from the *control or coercive influence*, direct or indirect, of either of the others[.]" *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (emphasis added).

In rejecting a rigid demarcation, this Court has expressly endorsed James Madison's flexible approach to the doctrine. According to Madison, separation of powers "d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* [sic] over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325-26 (J. Cooke ed. 1961) (emphasis in original) (cited with approval in *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 n.5 (1977)).

Madison's approach was later endorsed by Joseph Story, who wrote:

> But when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist.

1 Joseph Story, *Commentaries on the Constitution of the United States*, Section 525 (M. Bigelow, 5th ed. 1905) (cited with approval in *Nixon*, 433 U.S. at 443 n.5).

This fundamental principle—that the separation of powers is not rigid and absolute—has been reaffirmed by this Court time and time again. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government."); *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-443 (1977) (rejecting as "archaic" the notion of an "airtight" separation of authority among the three Branches); *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("the separate powers were not intended to operate with absolute independence").

At oral argument in the Court of Appeals, the Government had conceded that the Protective Order, by its terms, provides for access *beyond that allowed in other cases*. Whereas in other cases, protective orders typically confine access to the pre-conviction litigation process, the Protective Order in this case is not so circumscribed. Government counsel explained:

> [T]oday these protective orders—these CIPA protective orders are drafted more carefully, shall we say, to circumscribe their use more directly to the case—the criminal case, and not for other purposes.

(Tr. Mar. 15, 2005 oral argument at p. 29.) As petitioner's counsel urged (unsuccessfully) at oral argument, the majority should have found jurisdiction based upon the specific terms of the Protective Order, leaving for another day and another case the issue of whether the more circumscribed form of protective order in use today would likewise provide a basis

for jurisdiction. The majority chose not to take that approach, instead deciding this case under a rationale that creates a far-ranging precedent that defines the parameters of the doctrine of separation of powers in a way that cannot be reconciled with logic or precedent.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court observed that in the view of the founders of this nation:

> [A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Id. at 121. The D.C. Circuit's majority opinion not only imposes a "hermetic sealing off," but seals off the Branches to such degree that even *defense counsel's motivation* somehow results in the Judicial Branch losing its jurisdiction and control over its own Docket Materials. This illogical result cannot be reconciled with even the most rigid legitimate interpretation of the doctrine of separation of powers.

This Court should grant certiorari to repudiate the untenable approach to the separation of powers taken by the majority below.

B. The Doctrine of Separation of Powers Requires a Pragmatic Evaluation of the Impact of the Exercise by the Court of Subject Matter Jurisdiction Over the Access Motion on the President's Clemency Authority

The majority performed no analysis of the practical impact that a judicial exercise of subject matter jurisdiction would have on the President's clemency authority.

The majority did not explain, or attempt to explain, how allowing counsel access to materials in a court's docket would interfere with or impede in any way the President's power to grant or deny clemency, or how allowing such access would violate the principle that courts may not review clemency decisions.

While petitioner surely hopes that affording his counsel access to the Docket Materials will, ultimately, *affect* the President's discretionary clemency decision to his benefit, that is very far indeed from finding that allowing access would *interfere* with or *impede* the President's constitutional authority to make the clemency decision.

Indeed, the majority did not engage in any analysis into the appropriate functions of the Executive and Judicial Branches in this context, or how a judicial determination of the merits of the Access Motion could impact those functions. In the absence of interference with, or disruption of, the constitutional authority of the Executive Branch over clemency decisions, there is no violation of the separation of powers. *See Mistretta v. United States*, 488 U.S. 361, 410 (1988) ("negligible threat" to independence of one Branch is insufficient to constitute violation of separation of powers).

The majority also did not explain how allowing access to the Docket Materials—prepared for litigation, submitted to the district court, shown to petitioner and his prior counsel, and placed under seal by the district court pursuant to a Protective Order—would constitute inappropriate compulsion *of the Executive Branch* to disclose documents.

The Docket Materials were part of the adjudicatory process that resulted in petitioner's life sentence. They are unquestionably judicial records. *See Pollard*, 416 F.3d at 58-59 (Rogers, J., dissenting) (the Docket Materials are certainly judicial records); *see also United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) ("what makes a document a judicial record . . . is the role it plays in the adjudicatory process.").

The Government's brief had expressly conceded that "the classified information is contained in *court documents* and subject to a court-issued Protective Order" (Gov't Brief at p. 42) (emphasis added), and had also expressly conceded "the district court's jurisdiction over the access issue in this case because the terms of the Protective Order reserve that role for the court." (Gov't Brief at p. 44 n.25) Nevertheless, the majority held that allowing access to the Docket Materials would violate the separation of powers, without regard to the impact (if any) on the Executive's power that would result from the Court's exercise of jurisdiction over the Access Motion.

The dissent analyzed the impact of exercising jurisdiction and concluded that "the President's constitutional duty is not only unimpaired by the access motion, it is wholly unaffected by it." *Pollard*, 416 F.3d at 60 (Rogers, J., dissenting). The majority did not explicitly challenge this conclusion, but

instead treated it as irrelevant, and took the approach that the doctrine of separation of powers draws a rigid demarcation between the Executive and Judicial Branches without regard to the impact, if any, that the conduct of the Judiciary would have on Executive power.

The majority's approach is fundamentally incompatible with longstanding precedent in this Court.

In applying the doctrine of separation of powers, this Court has regularly examined the practical impact the exercise of authority by one Branch would have on the power of another Branch. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 380-83, 393 (1988) (in applying the doctrine of separation of powers, courts must utilize "flexible," functional analysis that examines "practical consequences"; in light of fact that three branches of government need not be entirely separate and distinct, doctrine requires caution against "aggrandizement or encroachment," rather than "a hermetic division among the Branches"); *Morrison v. Olson*, 487 U.S. 654 (1988) (applying pragmatic standard in upholding judicial appointment of independent counsel); *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-443 (1977) (taking into account "the contemporary realities of our political system," expressly reaffirming "the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story," and concluding no violation of separation of powers where statute which required former President to deliver archives to administrator did not "disrupt[] the proper balance between the coordinate branches" or "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions.").

In *Nixon v. Administrator of General Services*, this Court held:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Id., 433 U.S. at 443.

This Court should grant certiorari to repudiate the approach taken by the majority below, in favor of a pragmatic approach that assesses the practical impact of the proposed conduct.

C. The Approach to the Separation of Powers Taken by the Majority Below Conflicts Directly With the Approach Taken by the Fourth, Fifth, Sixth and Ninth Circuits

In other circuits, the approach to the doctrine of separation of powers is pragmatic and flexible. In those circuits, a violation of the doctrine of separation of powers cannot be premised on conduct by one branch that has no impact whatsoever on the constitutional authority of the other branch. Indeed, in those circuits, violation of the doctrine requires more than some theoretical or incidental impact by the conduct of one branch on the authority of another branch.

See United States v. Moussaoui, 382 F.3d 453, 468 (4th Cir. 2004), *cert. denied*, __ U.S. __, 125 S. Ct. 1670 (2005) ("Separation of powers does not mean . . . that each branch is prohibited from *any* activity that might have an impact on another.") (emphasis in original); *Duplantier v. United States*, 606 F.2d 654, 667 (5th Cir. 1979)

> the separation of powers doctrine does not require 'three airtight departments of government.' Rather, the doctrine operates to prohibit one branch of government from *unduly impeding* the operation of a coordinate branch of government . . . '[T]he proper inquiry focuses on the extent to which it *prevents* the (affected branch) from accomplishing its constitutionally assigned functions. . . . Only where the potential for *disruption* is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.'

(internal citations omitted) (emphasis added); *United States v. Williams*, 15 F.3d 1356, 1360-64 (6th Cir.), *cert. denied*, 513 U.S. 966 (1994) (applying pragmatic test for violation of separation of powers, including whether exercise of authority by judiciary so disrupts the balance of power amongst the three branches as to undermine the purpose of the separation of powers, i.e., protecting against the danger of centralized power); *United States v. Ray*, 375 F.3d 980, 995 (9th Cir. 2004) (separation of powers doctrine mandates only that each branch be "entirely free from the control or coercive influence, direct or indirect, of either of the others") (internal citations omitted).

By contrast, the D.C. Circuit's majority opinion expands the scope of the separation of powers doctrine far beyond that of these other circuits, and holds that the doctrine can be violated readily (for example, based on defense counsel's state of mind), and without regard to the impact, if any, the proposed conduct would have on the other branch. By holding that exercising jurisdiction over the Access Motion would violate the separation of powers, the majority below redefined the doctrine. This Court should grant certiorari so it can repudiate the approach taken by the D.C. Circuit's majority.

D. The Majority's Approach Unwittingly Resulted in a Violation of the Doctrine of Separation of Powers

Ironically, in its zeal to establish a rigid demarcation and airtight separation between the Executive and Judicial Branches, the majority created a precedent that violates, rather than furthers, legitimate separation of powers concerns by effectively transferring an inherently Judicial function—control over access to a court's docket materials—to the Executive Branch.

The effect of the majority's holding is that the very same DOJ that is so opposed to executive clemency for petitioner is now entrusted with de facto control over judicial Docket Materials and given the unfettered power to decide who may or may not have access to those Docket Materials. The record below indicates that the DOJ has unilaterally afforded access to copies of the sealed Docket Materials specifically in connection with the DOJ's opposition to executive clemency. (A-754, 766, 769, 773) Yet, the DOJ denies access to counsel for petitioner with proper security clearance, who wish to review the Docket Materials in a secure government facility in order to prepare and submit a clemency application. The

DOJ is not neutral and is not an arm of the Judiciary. It should not be delegated the Judiciary's control over its own Docket Material.

By ruling as it did, the majority below established a precedent that raises extremely serious separation of powers concerns in a manner apparently not contemplated by the majority. Judge Rogers correctly noted that the majority was "ignoring the logical implications of our precedent." *Pollard*, 416 F.3d at 61 (Rogers, J., dissenting).

This Court should grant certiorari so that it can consider, upon full briefing and argument, whether to reverse a precedent that, we respectfully submit, incorrectly limits the jurisdiction of the federal courts, and incorrectly delineates the scope of the doctrine of separation of powers.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 22, 2005

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 01-3103

UNITED STATES OF AMERICA,

Appellee

v.

JONATHAN JAY POLLARD,

Appellant.

March 15, 2005, Argued
July 22, 2005, Decided

OPINION

SENTELLE, *Circuit Judge*.

Appellant Jonathan J. Pollard appeals from the dismissal of a second 28 U.S.C. § 2255 motion, collaterally attacking his 1987 life sentence on ineffective-assistance-of-counsel grounds, as requiring appellate certification under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), or, in the alternative, as untimely under that Act. Pollard also appeals from the district court's denial of his present counsel's petition for access to classified documents in his

sentencing file for the purpose of filing a clemency petition with the President of the United States.

We find that no "jurist of reason" could dispute the district court's conclusion that Pollard's successive § 2255 motion is untimely, because he actually knew the necessary facts supporting his ineffective-assistance-of-counsel claims before 2000, and decline to grant a certificate of appealability ("COA") in his case. In light of this decision, we need not reach the issue of whether the district court was correct in ruling that Pollard should have sought certification from this Court before filing his second § 2255 motion.

Further, because we conclude that the federal courts lack jurisdiction to review claims for access to documents predicate to Article II clemency petitions, we vacate the district court's denial of Pollard's motion to grant his current lawyers access to classified documents for the purposes of his clemency petition, and remand the motion for dismissal.

I. Background

A. *Habeas Petition*

In 1986, Pollard pleaded guilty to conspiracy to deliver national defense information to a foreign government, in violation of 18 U.S.C. § 794(c), pursuant to a plea agreement in which the Government agreed not to ask for a life sentence, and to limit its allocution to the facts and circumstances of Pollard's offenses. Nonetheless, Chief Judge Robinson of the U.S. District Court for the District of Columbia sentenced Pollard to life in prison on March 4, 1987. After sentencing,

Pollard's sentencing counsel, Richard Hibey, did not file a Notice of Appeal.

Subsequently, Pollard obtained new counsel, Hamilton Fox III. Working with Fox, Pollard filed a 28 U.S.C. § 2255 motion for the first time on March 12, 1990, that sought to withdraw his guilty plea on the grounds that the Government allegedly violated the terms of the plea agreement, by in effect seeking life imprisonment, attacking Pollard's character, and soft-pedaling the significance of his cooperation, through supplemental declarations and during its allocution. In that first habeas petition, Fox did not allege that Hibey had been ineffective in failing to file a Notice of Appeal, or object to the Government's alleged breaches at sentencing.

Chief Judge Robinson denied Pollard's petition on September 11, 1990, holding that the Government did not breach the plea agreement at sentencing. *United States v. Pollard*, 747 F.Supp. 797, 802-06 (D.D.C.1990) ("*Pollard I*"). This Court affirmed that denial, holding that Pollard had failed to show a fundamental defect in the sentencing proceedings resulting in a complete miscarriage of justice, as required for Pollard to succeed with his collateral attack. *United States v. Pollard*, 959 F.2d 1011, 1032 (D.C.Cir.1992) ("*Pollard II*").

Represented by a third set of counsel, Eliot Lauer and Jacques Semmelman, Pollard filed a second § 2255 motion on September 20, 2000, collaterally attacking his sentence on the basis that Hibey rendered ineffective assistance of counsel at the sentencing stage. This renewed effort, according to Pollard, was occasioned by a chance

conversation with a fellow inmate, who "expressed surprise that apparently no appeal had been taken from [Pollard's] sentence." According to Pollard, this encounter led him to engage Lauer and Semmelman, who, he alleges, "advised [him], for the first time, of . . . material and prejudicial deficiencies in Mr. Hibey's representation. . . ."

Before the district court, Pollard urged that Hibey rendered ineffective assistance of counsel by (1) failing to file a Notice of Appeal, (2) failing to argue that the government breached the terms of its plea agreement, (3) failing to request that sentencing proceedings be adjourned after the government submitted a supplemental declaration by Caspar Weinberger (that allegedly amounted to an "indirect but unambiguous" request for a life sentence), (4) failing to request a hearing to address the allegations in the supplemental declaration, (5) failing to inform the sentencing court that Pollard had been authorized to give a jailhouse interview to CNN journalist Wolf Blitzer (which apparently figured into his sentencing), (6) failing to demand a hearing in which the Government would have to prove that Pollard disclosed classified information during that interview, and (7) by breaching attorney-client privilege to tell the sentencing court that Pollard had given the CNN interview against his advice. On August 7, 2001, the district court dismissed on two alternative grounds. *United States v. Pollard*, 161 F.Supp.2d 1 (D.D.C.2001) ("*Pollard III*").

First, Judge Johnson held that Pollard's second § 2255 motion was subject to the AEDPA requirement that

> "[a] second or successive motion . . . be certified as provided in section 2244 by a panel of the

> appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Pollard III, 161 F.Supp.2d at 3-4, 5 (quoting 28 U.S.C. § 2255). This Judge Johnson held to be the case, despite the fact that Pollard was sentenced prior to AEDPA's passage. She relied upon and followed *United States v. Ortiz*, 136 F.3d 161, 166 (D.C.Cir.1998), in which this Court held that applying AEDPA's standards and procedures for filing *§ 2255* motions retroactively is not improper unless a defendant can show that "he would have met the former cause-and-prejudice standard under *McCleskey [v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)] and previously would have been allowed to file a second § 2255 motion, but could not file a second motion under AEDPA." *Pollard III*, 161 F.Supp.2d at 4. Rejecting Pollard's argument that his second counsel, Fox, concealed Hibey's alleged deficiencies from Pollard out of "self-imposed restraint," Judge Johnson held that Pollard could not show cause for his failure to file the ineffective-assistance-of-counsel claim in his first § 2255 motion. *Id.* at 7. Nor could Pollard meet the alternative fundamental-miscarriage-of-justice standard. *Id.* Judge Johnson therefore held that AEDPA's certification requirement did apply and that "[Pollard] must first move in the appropriate Court of Appeals for an order authorizing

the district court to consider the second § 2255 motion." *Id.* at 8 (citing 28 U.S.C. § 2244(b)(3)).

Second, Judge Johnson held that Pollard's second § 2255

> motion was time-barred because Pollard could not show that he qualified for a codified exception to AEDPA's statute of limitations (which in his case would have cut off the possibility of filing a § 2255 motion after April 24, 1997). *Id.* Judge Johnson rejected Pollard's argument that his § 2255 motion fell under the exception for prisoners whose appeals were based on "newly discovered facts," on the basis that "the discovery of the prevailing professional norms [does not] constitute[ ] the discovery of 'facts,' " and further, the facts underlying such a contention were either known or could have been discovered "through the exercise of due diligence" well before 2000.

Id. at 9-10; 28 U.S.C. § 2255(4).

On October 5, 2001, Pollard applied to the district court for reconsideration of his § 2255 motion or, in the alternative, a COA. On November 12, 2003, Chief Judge Hogan denied reconsideration, affirming Judge Johnson's ruling substantially on the same grounds Judge Johnson had stated. *See United States v. Pollard*, 290 F.Supp.2d 153, 163 (D.D.C.2003) ("*Pollard IV*"). Chief Judge Hogan denied Pollard a COA, holding that "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed

further." *Id. at 164* (quoting *Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)*).

Pollard now appeals from the original district court decision, *Pollard III*, and seeks a COA from this court. He argues that the district court erred in holding that AEDPA's certification requirement applied to his case because he had failed to show cause for his failure to assert Hibey's alleged ineffective assistance on direct appeal. Pollard reasserts the argument that Fox was constrained by an undisclosed conflict of interest-a factor external to the defense that Pollard argues should not be imputed to him-that kept Fox from raising an ineffective-assistance-of-counsel claim in Pollard's first § 2255 motion, and asks that this Court reverse and remand for an evidentiary hearing as to Fox's actions. Pollard also argues that the district court erred in holding that his new § 2255 motion was barred by AEDPA's statute of limitations because the facts upon which his claim was based were not, or should not have been, "newly discovered," asserting that "[t]he unusual circumstances of this case-in which the Government's misrepresentation about Hibey's performance, and Fox's whitewash [of that performance], affirmatively misled Pollard away from a meritorious claim of ineffective assistance-warrant an evidentiary hearing on the issue of Pollard's diligence" in discovering those supporting facts. Appellant's Br. at 40. Pollard asks that this Court reverse and remand for an evidentiary hearing to determine why Pollard did not discover the "facts" supporting his new claim until 2000. *Id.* at 39.

Appendix A

B. *Access to Classified Documents*

While Pollard's second § 2255 motion was pending, one of his new attorneys, Elliot Lauer, sought a court order granting him access to classified pre-sentencing materials in Pollard's file for the purpose of filing a clemency petition with the President of the United States. By way of background, relevant Justice Department regulations provide that

> [n]o person may be given access to classified information or material originated by, in the custody, or under the control of the Department, unless the person (1)[h]as been determined to be eligible for access in accordance with sections 3.1-3.3 of Executive Order 12968; (2)[h]as a demonstrated need-to-know; and (3)[h]as signed an approved nondisclosure agreement.

28 C.F.R. § 17.41(a). Executive Order 12,968, in turn, defines "need to know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." 60 Fed.Reg. 19,825 § 4.1(c) (Apr. 17, 1995). Before the district court, Pollard argued that Lauer had a "need to know" the contents of the documents in Pollard's presentencing materials "so that . . . [counsel] may address and respond to arguments by those who oppose executive relief [for Pollard] on the basis of what is set forth in the sealed materials." The district court denied his motion on January 12, 2001, finding that Lauer did not have a need to

know, because: (1) the President has access to the materials, (2) there is no evidence that the President has asked about (or needs to know about) information contained therein to make his clemency decision, and (3) the President has memoranda available to him from Pollard's previous attorney that make arguments based on the facts contained in those materials. *See* Memorandum Order of January 12, 2001.

Pollard appeals from this decision, as well, arguing before this Court that his new counsel demonstrated a "need to know" what was in those materials in order to prepare his clemency petition. Clemency, Pollard urges, "is a lawful and authorized governmental function" as contemplated by the definition of "need to know" in Executive Order 12,968. Lauer requires access, Pollard argues, "to rebut insinuations by opponents of clemency as to what the Materials contain, and to defuse the campaign of disinformation" he alleges has been mounted by his opponents. Appellant's Br. at 31.

II. Discussion

A. *COA*

As enumerated above, Chief Judge Johnson denied Pollard's second § 2255 motion on two alternative procedural grounds: that (a) he lacked the certification required under 28 U.S.C. § 2244(b)(3) for filing a second successive § 2255 motion; and (b) that motion was untimely, regardless, because he could not show that he qualified for a codified exception to AEDPA's statute of limitations. Chief Judge Hogan, having taken over the case, denied reconsideration, and denied a COA.

Appendix A

Habeas petitioners cannot appeal a district court's final order in a proceeding under § 2255 without a COA. *See* 28 U.S.C. § 2253(c)(1). Under *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), where the district court dismisses the § 2255 motion on procedural grounds, a COA should issue only where (a) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (b) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Thus, to gain a COA, Pollard must show that a "jurist of reason" would find it debatable that both (1) the § 2244(b)(3) certification requirement does not apply in his case; and (2) the district court was incorrect in denying his § 2255 motion as untimely. Because we find that no jurist of reason could disagree with the district court that Pollard's second § 2255 motion is time-barred, we need not reach the issue of whether the 28 U.S.C. § 2244(b)(3) certification requirement applies in his case.

AEDPA's statute of limitations gives prisoners one year to file a habeas petition, with certain enumerated exceptions. *See* 28 U.S.C. § 2255. Pollard argues that he qualifies for the exception for newly discovered facts, which tolls the deadline to one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. § 2255(4), on the theory that he was unaware until 2000 of the possible ways in which he now alleges Hibey's assistance at sentencing was ineffective.

Appendix A

It could not have escaped Pollard's notice during the sentencing proceedings, at which he was present, that Hibey did not argue that the Government breached the terms of the plea agreement, request that sentencing proceedings be adjourned after the Government submitted the Weinberger declaration, inform the sentencing court that Pollard had authorization to give the Blitzer interview, or request a hearing to address the allegations in the supplemental declaration. Pollard's own declaration to the district court indicates that he knew that Hibey informed the sentencing court that Pollard had given the CNN interview against Hibey's advice. Knowing that, Pollard would have been aware that at sentencing Hibey did not demand a hearing for the Government to prove that Pollard disclosed classified information during that interview. *See Pollard III*, 161 F.Supp.2d at 9 n. 5. Finally, Pollard's first § 2255 motion, filed in 1990, indicates that he knew then that Hibey had not filed a Notice of Appeal. *Id.*

Nonetheless, Pollard argues that he still had no knowledge of those facts on the logic that "[i]f the defendant is unaware that the attorney should have performed a particular task, the defendant will not know of the attorney's omission[.]" Appellant's Br. at 49 (emphasis omitted). Going further, Pollard asserts that the logical follow-on of this is true-that "[t]he prevailing norms of the legal profession ... are *facts.*" *Id.* at 50 (emphasis in original).

This is simply nonsensical: Whether an attorney should have performed a particular task drives the *legal* inquiry into the existence of an ineffective-assistance-of-counsel claim. *See Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 560-63,

160 L.Ed.2d 565 (2004) (naming as "the inquiry generally applicable to ineffective-assistance-of-counsel claims: Did counsel's representation fall below an objective standard of reasonableness?") (quotation omitted). What the lawyer did or did not do in his representation of a prisoner is a "fact," defined for legal purposes as: "An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation[.]" BLACK'S LAW DICTIONARY 7th Ed. at 610. Pollard knew the facts; what he now claims not to have known is the legal significance of these facts.

Having been a witness to his own sentencing proceedings and aware that Hibey did not file a Notice of Appeal, Pollard at most may not have realized the potential legal significance of those facts until 2000. Given that the vast majority of prisoners could, like Pollard does before us, allege ignorance of the law until an illuminating conversation with an attorney or fellow prisoner, Pollard's alternative construction-that legal norms constitute "facts" for the purposes of § 2255(4)-would in effect write the statute of limitations out of AEDPA, rendering it a nullity. This we will not do. *See, e.g., United States v. Barnes*, 295 F.3d 1354, 1364 (D.C.Cir.2002) (rejecting an interpretation of text that would render the law a nullity, on the logic that a "statute should ordinarily be read to effectuate its purposes rather than frustrate them.") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C.Cir.1983)). As the Seventh Circuit puts it, for the purposes of § 2255(4), "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir.2000).

For these reasons, we conclude that no jurist of reason could dispute the district court's conclusion that Pollard, as a participant in his own sentencing proceedings, knew the underlying facts that support his habeas claims. This conclusion alone prevents us from granting Pollard a COA under *Slack v. McDaniel*, *see* 529 U.S. at 484, 120 S.Ct. 1595. We hasten to add, however, it is not at all clear that Pollard has made out a debatably valid claim of the denial of a constitutional right in this second § 2255 motion.

In particular, we find no indication that Hibey's decision not to file a Notice of Appeal from a sentence imposed after a guilty plea was not the norm among the defense bar at the time-which is, of course, the relevant time period, *see Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (instructing courts in ineffective-assistance cases to "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed *as of the time of counsel's conduct* [.]") (emphasis added). In fact, it was not until twelve years after Pollard's sentencing that the Supreme Court addressed the question of whether defense lawyers had a duty to file a Notice of Appeal for the first time, stopping short of holding that such a duty existed. *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Certiorari was granted in *Flores-Ortega* to resolve a split among the circuits on that issue that did not arise until 1991-four years after Pollard's sentencing-when the First Circuit became the first federal appeals court to rule that such a duty existed, in *United States v. Tajeddini*, 945 F.2d 458, 468 (1st Cir.1991)-a case that was, of course, overturned by *Flores-Ortega* itself. We further note that in pre-guideline cases such as Pollard's successful appeals after guilty pleas were rare indeed.

Moreover, Pollard's second § 2255 motion is untimely even assuming, as he contends, equitable tolling is available under AEDPA,[1] for he cannot demonstrate that "extraordinary circumstances beyond [his] control [made] it impossible to file a petition on time." *Cicero*, 214 F.3d at 203 (quoting *Calderon*, 128 F.3d at 1288) (internal quotation marks omitted). Pointing to caselaw holding that equitable tolling is available where "the [government's] conduct has somehow lulled the petitioner into inaction," *Curtiss v. Mt. Pleasant Correctional Facility*, 338 F.3d 851, 855 (8th Cir.2003), where a petitioner was "actively misled," *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir.2001), or where "an attorney's behavior may be so outrageous or so incompetent as to render it extraordinary," *Baldayaque*, 338 F.3d at 152 (2d Cir.), Pollard maintains that his initial habeas counsel's alleged ethical breaches, combined with the government's alleged misrepresentations of his trial counsel's performance,

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1. Eleven circuits have concluded that, under certain circumstances, equitable tolling of the statute of limitations in either § 2255 for federal prisoners and/or § 2244(d)(1) for state prisoners is possible. *See Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir.2004); *Baldayaque v. United States*, 338 F.3d 145, 150-51 (2d Cir.2003); *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir.2001); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir.2000); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir.2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir.1999); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir.1999) (per curiam); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999); *Miller v. N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir.1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir.1997). This circuit has yet to decide the question, *see United States v. Cicero*, 214 F.3d 199, 203 (D.C.Cir.2000), and there is no need to do so here.

require an evidentiary hearing to determine if equitable tolling is warranted. Pollard's allegations, however, do not rise to the level of unethical and outrageous behavior addressed in the cited cases, and there is no indication that the actions of either his initial habeas counsel or the Government made it impossible for him to file his second § 2255 motion within AEDPA's statute of limitations, as required. *See Cicero*, 214 F.3d at 203. As the district court noted, equitable tolling has been denied in far more grievous circumstances, as in *Cicero*, where the prisoner was unable to finish his legal research before the statute of limitations expired after being stabbed by another inmate, hospitalized, placed in protective segregation with highly limited access to a law library, and separated from his legal papers. *Id*. at 201, 203-04. Notwithstanding Pollard's claims that his habeas counsel failed to tell him about his trial counsel's allegedly deficient behavior and that the government advocated that his trial counsel was effective, there is nothing that prevented Pollard, a highly educated person who served as an Intelligence Research Specialist with the United States Navy prior to his arrest, from researching or further analyzing the facts that he knew to determine if they presented a valid claim.

B. *Counsel Access to Classified Documents*

The final aspect of Pollard's appeal, unrelated to his § 2255 motion, is whether the district court erred in declining to grant Pollard's current counsel access to classified materials in his pre-sentencing documents. Because we lack the authority to compel the executive branch to disclose any documents for the purposes of a clemency petition, we need not even reach the issue of whether Pollard's counsel has a

need to know the contents of Pollard's classified pre-sentencing memoranda in order to submit an effective clemency petition.

As a practical matter, granting Pollard or his counsel access to these materials would almost surely open a floodgate of similar requests. It may be unusual for documents relating to a prisoner's clemency petition to be classified. But surely, most federal prisoners who have run out of other avenues of appeal could, with some thought, conceive of something they could seek to discover from the Executive Branch that might be plausibly relevant to a clemency petition.[2] The undue burden such requests would impose on the Executive Branch alone cautions restraint. As the Supreme Court instructs, "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996).

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2. The dissent's dismissal of the problem on the basis that the District Court has issued a protective order heretofore does nothing to forestall the actual possibility of such a floodgate breach. Even in the present case, the existence of the protective order does not change the custody of classified documents from the Executive to the Judiciary. Nor is there any principled way to limit the perceived right of access to documents needed for clemency to those that are under such a protective order. On the facts of this case, as we discuss in the text, appellant's only claim of access is based on the possibility of a clemency petition. For the reasons set forth in the text, that is insufficient.

Appendix A

If due consideration for our co-equal branch counsels judicial restraint in this case, more fundamental constitutional principles absolutely dictate it. The Constitution entrusts clemency decisions to the President's sole discretion. U.S. CONST. art. II, § 2, cl. 1 (the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States ..."). Even when governed by legislation, such actions as regulatory enforcement and criminal prosecution, which are the "special province of the Executive Branch," are presumptively off-limits to the courts. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L.Ed.2d *714 (1985)*. Clemency, over which neither Congress nor the courts share any constitutional authority, is more properly the *exclusive* province of the Executive. As stated by Judge Learned Hand, "[i]t is a matter of grace, over which courts have no review[.]" *United States ex. rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir.1950). Thus, it is entirely out of our power to compel discovery of or access to documents for the sake of a clemency petition. We therefore remand this final claim for dismissal for lack of jurisdiction.[3]

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3. Our dissenting colleague correctly notes that the parties have not raised the jurisdictional question; however, we must nonetheless address it sua sponte. "Subject-matter delineations must be policed by the courts on their initiative even at the highest level." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (citing and following *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.")).

III. Conclusion

For the reasons stated above, we deny Pollard's motion for a COA. Further, we vacate the district court's denial of Pollard's motion that his current counsel be granted access to classified documents among his presentencing materials for lack of jurisdiction, and remand the motion for dismissal.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part.

I am in agreement with the court's denial of a certificate of appealability in No. 01-3127 to Jonathan Jay Pollard to contest the district court's dismissal of his second motion under 28 U.S.C. § 2255, and I therefore join Part II.A of the court's opinion. However, the court erects a jurisdictional bar in Nos. 01-3103 and 03-3145 to considering the request of Pollard's counsel for access to classified documents, which were filed with the district court during his sentencing and were sealed pursuant to a Protective Order, for use in preparing a clemency petition. Although the United States acknowledges that the documents are "subject to a court-issued Protective Order," Br. of Appellee at 42, and it therefore makes no jurisdictional challenge, *see id.* at 44 n. 25, the court nevertheless hypothesizes a conflict with the President's clemency power under the Constitution, *see* Op. at 56-57. Neither Pollard's counsel's request to the district court nor the court's potential granting of it, however, poses interference with the President's clemency power. Whatever documents compiled for Pollard's sentencing that the district court might make accessible to his counsel for purposes of preparing a clemency petition, the President's process for

considering clemency petitions and any decision he might make remain unimpaired; indeed, he can ignore the petition altogether. Rather than posing a jurisdictional bar, the President's clemency power affects the merits of counsel's request because, as the district court ruled, counsel has not shown a "need to know" under Executive Order 12,958, as amended, which has been incorporated into the Protective Order. Hence, under the "unusual circumstances of this case" where the Protective Order governs the requested documents, Br. of Appellee at 42, I would hold that the district court had jurisdiction to address the merits of the access motion and that the court did not err in denying the motion. I therefore respectfully dissent from Part II.B of the court's opinion.

I.

For purposes of preparing a clemency petition, Pollard's counsel seeks access to classified documents that were created for his sentencing, filed with the district court, and sealed pursuant to a Protective Order. The sealed documents include a Declaration of then-Secretary of Defense Caspar Weinberger, a memorandum personally prepared by Pollard, a memorandum prepared by Pollard's trial counsel, and the United States's reply. Pursuant to the Protective Order, persons not identified therein, such as Pollard's current counsel, may obtain access to the classified portions of the sentencing documents only after being granted the appropriate security clearance by the Department of Justice through the Court Security Officer, executing a Memorandum of Understanding prohibiting disclosure of such information, and obtaining the permission of the district court. The parties agree that as part of the security clearance process, a person

must have a "need to know" the information contained in the classified documents as that phrase is defined in Executive Order 12,958, as amended, to mean "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order 13,292, 68 Fed.Reg. 15,315, 15,332 (Mar. 25, 2003).

In holding that the district court lacked jurisdiction to consider Pollard's counsel's motion for access to the classified documents under the Protective Order, the court concludes that counsel's expressed desire to use the documents for a clemency petition is determinative of the jurisdictional inquiry because the court "lack[s] the authority to compel the executive branch to disclose any documents for the purposes of a clemency petition." Op. at 56. The United States, however, did not urge this restrictive interpretation of the district court's jurisdiction and thus neither party briefed it. In fact, the United States expressly stated on appeal that it "did not contest the district court's jurisdiction over the access issue in this case because the terms of the Protective Order reserve that role for the court." Br. of Appellee at 44 n. 25. The court nevertheless proceeds *sua sponte* to resolve this dispute on novel jurisdictional grounds, and, in so doing, ignores the fact, undisputed by the parties and the record, that the documents at issue were created as part of a judicial process and are governed by the Protective Order. *Cf.* 18 U.S.C. app. III, § 3 (2000).

This case, therefore, does not involve the traditional request for access to classified documents that are within

the Executive Branch's possession, and hence, the court's concern that exercising jurisdiction over the access motion could open the floodgates to similar motions, *see* Op. at 56 - 57, is misplaced. Further, as the United States acknowledged at oral argument, protective orders now are drafted "more carefully . . . to circumscribe their use more directly to the . . . criminal case, and not for other purposes," Tr. of Proceedings (Mar. 15, 2005), and, thus, it is quite unlikely that courts will be confronted with even a trickle, much less a flood, of similar requests. Although the documents are nominally in the custody of the Justice Department's Security and Emergency Planning Staff, the district court, as the United States acknowledges, has continuing control over them on account of the perpetual Protective Order that it may still enforce through its contempt power. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781-82 (1st Cir.1988); *cf. Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). "[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court," *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir.1993), and "[s]o long as [the court's records and files] remain under the aegis of the court, they are superintended by judges who have dominion over the court," *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir.2004). Thus, in the absence of legitimate separation-of-powers concerns, the district court, under these circumstances, had jurisdiction to adjudicate the access motion, for otherwise it would be in the untenable position of lacking jurisdiction over motions that relate to documents that were filed with it and over which it has continuing control. Although the court professes to be unable to find a "principled way" to limit the potential right of access to

documents filed pursuant to a Protective Order, Op. at 56 n. 1, as is clear from the above cases, the principle is that the Protective Order results in the district court's retention of control, and thus jurisdiction, over the documents at issue so long as there is no violation of the separation of powers.

To reach its jurisdictional conclusion, the court imagines a conflict between that President's clemency power and the district court's exercise of jurisdiction over the request for access to documents. It is undeniable that the President's constitutional power to grant clemency is robust, U.S. CONST. art. II, § 2, cl. 1, and that courts long have been loathe to review the President's clemency decisions, *see, e.g.*, *Schick v. Reed*, 419 U.S. 256, 260, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974); *United States v. Klein*, 13 Wall. 128, 80 U.S. 128, 147-48, 20 L.Ed. 519 (1871); *cf. Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (plurality); *id.* at 289, 118 S.Ct. 1244 (O'Connor, J., joined by Souter, Ginsburg, and Breyer, JJ., concurring in part and concurring in the judgment). The President's clemency power, however, is not absolute; rather, it is limited by other constitutional provisions. *Schick*, 419 U.S. at 266- 67, 95 S.Ct. 379. In reviewing clemency decisions to ensure that they comport with other constitutional protections, the Supreme Court has never suggested that federal courts lack jurisdiction over such matters, let alone over matters where a prisoner's counsel seeks access to documents filed with the district court for use in petitioning for executive clemency. *See, e.g.*, *id; Hart v. United States*, 118 U.S. 62, 67, 21 Ct.Cl. 505, 6 S.Ct. 961, 30 L.Ed. 96 (1886); *Knote v. United States*, 95 U.S. 149, 154, 13 Ct.Cl. 517, 24 L.Ed. 442 (1877); *Ex parte Garland*,

4 Wall. 333, 71 U.S. 333, 381, 18 L.Ed. 366 (1866); Ex parte Wells, 59 U.S.(18 How.) 307, 312, 15 L.Ed. 421 (1855).

At the same time, the Supreme Court has cautioned courts "to avoid *interference* with the . . . clemency powers vested in the Executive Branch," *Affronti v. United States*, 350 U.S. 79, 83, 76 S.Ct. 171, 100 L.Ed. 62 (1955) (emphasis added), and has stated that "pardon and commutation *decisions* . . . are rarely, if ever, appropriate subjects for judicial review." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981) (emphasis added). While "the separation-of-powers doctrine requires that a branch not *impair* another in the performance of its constitutional duties," *Loving v. United States*, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (emphasis added), the court today never explains how the district court's exercise of jurisdiction over the access motion impairs or interferes with the President's clemency power, and, indeed, it cannot because the motion does not involve the President's constitutional prerogative to grant clemency or even the process by which the President decides whether or not to grant clemency, *cf. Affronti*, 350 U.S. at 83, 76 S.Ct. 171; *United States v. Moussaoui*, 382 F.3d 453, 468-69 (4th Cir.2004). Nor did the United States suggest to the contrary in response to the court's jurisdictional observation during oral argument. The access motion does not relate to the President's decision regarding clemency, as he remains free to review, ignore, act on, or fail to act on any petition for clemency that Pollard's counsel might file, regardless of whether a court determines that his counsel may have access to classified documents to prepare such a petition. Thus, the President's constitutional duty is not only unimpaired by the

access motion, it is wholly unaffected by it. *Cf. Razzoli v. Fed. Bureau of Prisons,* 230 F.3d 371, 376 (D.C.Cir.2000).

Neither of the two cases relied on by the court for its novel jurisdictional holding have force in this context, for at most they support an undisputed proposition that the President's clemency power is fulsome, subject to few limits. Judge Learned Hand's statement about the clemency power in *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir.1950), is not as unqualified as the court suggests, for the judge acknowledged some limits, and, in any event, it is dictum in a case concerning the Attorney General's discretionary power to suspend deportation. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), with its discussion of regulatory enforcement actions, is plainly distinguishable, for while the Supreme Court held that decisions not to initiate enforcement actions are presumptively unreviewable under the Administrative Procedure Act because they are "committed to agency discretion," *id*. at 832, 105 S.Ct. 1649 (quoting 5 U.S.C. § 701(a)(2)), the Court went on to hold that "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," *id*. at 832-33, 105 S.Ct. 1649. In erecting a jurisdictional bar that precludes federal court review of access motions to classified documents when the asserted reason for access is to assist in the preparation of a clemency petition, the court, unlike the Supreme Court in *Chaney*, fails to look to the underlying legal regime in the Protective Order to determine whether relief is available.

If the requested documents were not subject to the Protective Order, then the United States maintains Pollard would be required to proceed under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000). Caselaw under FOIA fails to reveal any suggestion that it is beyond the power of the federal courts to entertain requests for Executive Branch documents related to clemency proceedings. In fact, courts have analyzed requests for the Executive Branch to release documents related to individual clemency applications under FOIA, relying on the statutory exemptions to deny release of certain documents, but never raising any jurisdictional concerns. *See, e.g.*, *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1193-94 (9th Cir.1983); *Crooker v. Office of Pardon Attorney*, 614 F.2d 825, 828 (2d Cir.1980). While no case has expressly addressed the jurisdictional issue, as with analogous FOIA requests for information related to clemency proceedings, the request by Pollard's counsel for access should be viewed under the regulatory regime in place to address those requests. The inconsistency between the federal courts exercising their power to adjudicate FOIA requests for information generated or compiled by the Executive Branch during the clemency process and federal courts lacking the power to adjudicate requests for access to documents filed with the district court that may be used in preparing a clemency petition is self-evident.

Moreover, when the court addressed the application of FOIA to general information about the clemency process, there was no hint of any jurisdictional obstacles. In *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C.Cir.2004), the court refused to apply the presidential

communications privilege, which is derived from separation-of-powers concerns and anchored in FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to protect all documents authored by Executive Branch employees that are generated in the course of preparing clemency recommendations for the President. The court reasoned that the documents that were prepared in the Office of the Pardon Attorney were not in close proximity to the President and the exercise of his clemency power to warrant protection under the presidential communications privilege. 365 F.3d at 1114-15, 1120. The documents here are even farther removed from the President and the exercise of his clemency power, as they were generated in the course of a judicial proceeding and their use by Executive Branch employees in the clemency process is speculative at best. It is curious that the court relies on separation-of-power principles to preclude federal court review, ignoring the logical implications of our precedent. Because I conclude there is no jurisdictional bar to the court's consideration of the access motion, I turn to the merits.

II.

The district court ruled that Pollard's counsel did not have a "need to know" because the President has access to the classified documents and can review them without assistance, there is no evidence that the President has asked Pollard's counsel questions about the contents of the classified documents, and the President has access to memoranda from Pollard's previous counsel that comments on the classified documents. The district court denied Pollard's motion for reconsideration, as well as his subsequent motion for modification. On appeal, the parties

agree that the only issue as to the access motion is whether Pollard's counsel has a "need to know" the contents of the classified documents. Whether the district court's denial of access is reviewed *de novo* as a legal determination, as Pollard argues, *cf. Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir.2002); *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir.2000), or for abuse of discretion, as the United States argues, *cf. United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C.Cir.1998), Pollard fails to show that the district court erred.

Although the President's "quintessential and non-delegable" power to grant clemency does not affect the court's jurisdiction in this instance, *Judicial Watch*, 365 F.3d at 1119, it significantly affects Pollard's contention that his counsel has a "need to know" the contents of the classified documents filed with the district court. The "need-to-know" standard, which the parties agree is implicitly incorporated into the Protective Order, authorizes access to specified classified information only where one "requires access ... in order to perform or assist in a lawful and authorized governmental function." Exec. Order 13,292, 68 Fed.Reg. 15,315, 15,322. The President's decision to grant or to deny clemency is such a function. *See* U.S. CONST. art. II, § 2, cl. 1; *Biddle v. Perovich*, 274 U.S. 480, 486, 47 S.Ct. 664, 71 L.Ed. 1161 (1927). In seeking to justify access as necessary "[t]o submit an effective clemency petition," Br. of Appellant at 31, Pollard, however, conflates his petition for clemency with the President's decision to grant or to deny clemency, much as the court does in erecting a jurisdictional bar; it is only the President's decisionmaking process that is "a lawful and authorized *governmental* function." Therefore, to come

within the "need-to-know" standard, Pollard's counsel must require access to assist the President's determination and not simply to assist his client, which, by contrast, would be in the nature of a private act.

Simply asserting that one's assistance is needed does not make it so, especially since executive clemency is a matter of grace, *Woodard*, 523 U.S. at 280-81, 118 S.Ct. 1244 (plurality), such that the President controls the process by which such decisions are made. The Justice Department's pardon regulations, 28 C.F.R. §§ 1.1, 1.11 (2005), do not afford Pollard's counsel a right to assist the President in making his clemency decision, let alone, as Pollard seems to seek, an opportunity to present an "effective petition" in response to the claimed unyielding opposition of Executive Branch officials to granting him clemency. Similarly, Executive Order 12,958, as amended, does not provide his counsel a right of access equal to that of attorneys within the Justice Department or an enforceable right to access classified documents under the Protective Order. *See* Exec. Order 13,292, 68 Fed.Reg. 15,315, 15,333. Further, absent the Protective Order, his counsel could not gain access to classified documents under FOIA, regardless of the status of counsel's security clearance. *See* 5 U.S.C. § 552(b)(1). Thus, if Pollard's counsel desires to assist the President's clemency determination, then under the "need-to-know" standard, the President must seek his assistance and thereby involve counsel in the "lawful and authorized governmental function." The record, however, does not reveal that either the President, who himself has access to the classified information, or his designee has sought the assistance of Pollard's counsel in considering the request for executive clemency.

Consequently, although the district court's adjudication of the access motion, even if it would have ordered access, does not itself infringe on the separation of powers, the nature of executive clemency as a matter of Presidential grace means that under the "need-to-know" standard governing access to classified information under the Protective Order, it cannot be said that counsel requires access to assist the President. Whatever bias may exist against his cause, Pollard can point to no authority that would enable his counsel, under these circumstances, to have access to the classified documents he would require to present an "effective petition." Accordingly, I would affirm the judgment denying the access motion based on the district court's determination that Pollard's counsel does not have a "need to know."

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED NOVEMBER 12, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CR.86-0207 (TFH)

UNITED STATES OF AMERICA,

v.

JONATHAN J. POLLARD,

Defendant.

November 12, 2003, Decided
November 12, 2003, Filed

MEMORANDUM OPINION

THOMAS F. HOGAN, *Chief Judge*.

Pending before the Court is Defendant's "Motion for Modification of the Court's January 12, 2001 Memorandum Order Based Upon the Government's August 3, 2001 Letter." While captioned differently, Mr. Pollard's instant motion is merely a request for this Court to reconsider his motion to reconsider which was denied by Chief Judge Johnson. This is Mr. Pollard's fourth attempt to gain access to certain classified information. His first three attempts were denied in September 1990 by Chief Judge Robinson in the context of Mr. Pollard's first collateral attack upon his conviction

and sentence under 28 U.S.C. § 2255 and in January 2001 and August 2001 by Chief Judge Johnson.

In sum, Mr. Pollard and his counsel state that their "objective is to access the [classified] documents for use in connection with applications for executive clemency and related initiatives." The main argument in this fourth attempt is based on the August 3, 2001 letter written by Court Security Officer Michael P. Macisso (the "Macisso Letter"). Mr. Pollard speculates that certain sentences within this letter reveal alleged government misrepresentation as to whether allowing counsel access to the documents would pose a grave risk to national security. Further, he claims that Department of Justice officials were afforded access to the documents on no less than twenty-five occasions, and that such access must necessarily have been related to his case and not to intelligence or defense matters unrelated to his case.

The Court finds that in fashioning his claim, Mr. Pollard takes sentences in the Macisso Letter out of context. This letter could not be more clear in stating that "[a]bsent a 'need to know' ruling from the Court or the government, the Department of Justice will not be able to upgrade your clearance level or provide you access to this material." Further, as stated by government counsel during the oral argument on September 2, 2003, the twenty-five occasions in which the documents have been accessed by government officials include Chief Judge Johnson and instances of personnel from other government agencies who indeed had a "need to know."

More important, however, is that Mr. Pollard and his attorneys have offered no new justification for this Court to determine that any of them have a "need to know" and can thereby be granted the appropriate Sensitive Compartmented Information (SCI) clearance. He has presented no credible evidence that the current President is any more willing to grant him clemency than the previous three Presidents who declined to do so. When the complete absence of any such evidence is considered in light of the current security threats faced by our nation since September 11, 2001, the Court finds it even less likely than before that Mr. Pollard's attorneys will require access to classified documents in support of a speculative possibility of executive clemency. "[C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege. . . ." *United States v. Yunis*, 867 F.2d 617, 623 (D.C.Cir.1989).

For the reasons stated above, the Court will deny Mr. Pollard's "Motion for Modification of the Court's January 12, 2001 Memorandum Order Based Upon the Government's August 3, 2001 Letter." An appropriate Order will accompany this Memorandum Opinion.

November 12, 2003

Thomas F. Hogan
Chief Judge
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED JANUARY 12, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. Action No. 86-0207 (NHJ)

UNITED STATES OF AMERICA,

v.

JONATHAN J. POLLARD,

Defendant.

MEMORANDUM ORDER

Presently before the Court is defendant's Emergency Motion to Add to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order. In early 1987, the government and defense counsel each submitted sentencing memoranda and related materials to the Court. Pursuant to the terms of the October 24, 1986, Protective Order entered by Judge Aubrey Robinson, a Security Officer would review the sentencing memoranda and related materials for classified information and redact those portions deemed classified. Copies of the sentencing memoranda and related materials that have had the classified information redacted are on the public record. Pursuant to the terms of the Protective Order, only specified individuals were permitted to view those documents containing classified

materials. The Protective Order did allow counsel for Mr. Pollard at the time of sentencing to review the classified materials.

Mr. Pollard, however, has since retained different counsel, Eliot Lauer. Mr. Lauer cannot have access to the classified materials without court order and requests permission to view the classified materials for the purpose of representing Mr. Pollard in executive clemency proceedings before President Clinton.

The Protective Order requires that persons not directly named therein must do the following to view the classified materials: (1) obtain a security clearance from the Department of Justice through the Court Security Officer; (2) execute appropriate nondisclosure agreements; and (3) sign a sworn memorandum of understanding set forth in the protective order. However, even if an individual completes the above three steps, he or she still must obtain the permission of the Court to view the classified materials. Mr. Lauer has obtained top secret security clearance, executed a nondisclosure agreement, and signed a memorandum of understanding. Mr. Lauer now seeks the permission of the Court to view these classified materials.

The government opposes the motion of defense counsel to view the classified materials. It argues that the disclosure of the classified materials would pose a risk to national security. Moreover, the government claims that defense counsel has not established a "need to know" the classified materials, and thus, the motion should be denied.

Appendix C

After careful consideration of the motion, the response thereto, and oral argument, the Court finds that the motion of Mr. Lauer must be denied.

II. Discussion

The Supreme Court has "long recognized that a legitimate government privilege protects national security concerns." *United States v. Yunis*, 867 F.2d 617, 622-23 (D.C. Cir. 1989) (citing *In C. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). The government argues that the disclosure of the classified materials to Mr. Lauer posts a risk to national security. The government asserts: "The presence of the Protective Order and guarantees of trustworthiness among defense counsel also do not fully protect the government's interest in preventing disclosure of classified information. Any unnecessary dissemination of classified information creates a greater risk that it will be compromised." *United States v. China National Aero-Technology Import and Export Corp.*, Criminal No. 99-0353, slip op. at 5 (D.D.C. 2000) (citing *United States v. Poindexter*, 727 F.Supp. 1470, 1480 n.22 (D.D.C. 1989)).

The Court has viewed the classified materials and finds that the exceptionally grave concern over national security is warranted. These documents contain information that if disclosed, even accidentally, would pose a grave risk to national security. Despite the fact that Mr. Lauer has obtained security clearances and signed the appropriate nondisclosure agreements, this does not outweigh the concern over national security.

Appendix C

The Court has considered the assertion of Mr. Lauer that he has a "need to know" the contents of the classified materials. Mr. Lauer claims that he has a "very real and pressing need . . . to see these documents, in order to make an accurate and complete presentation to the President and his staff." Reply Affidavit of Mr. Lauer, at 2. Defendant has submitted a written application for clemency and commutation of sentence to the President. *See id*. Defense counsel also met in Washington, D.C. with members of the President's staff involved in the clemency proceeding. *See id*. In support of his motion for access to the classified materials, Mr. Lauer states that the persons opposed to clemency for defendant invoke the sealed court materials as a basis for their opposition. Thus, "the only fair way for me as Pollard's counsel to challenge those arguments is to allow me to see the documents so that I can properly address these arguments with the President's staff, while maintaining the strictest confidentiality of the information itself." *Id.*

The Court finds that Mr. Lauer has not demonstrated a "need to know" the contents of the classified materials. First, the President has access to the classified materials and has authority to independently review them without the assistance of Mr. Lauer. Second, there is no evidence that the President, who has the authority to make the decision on whether to grant or deny clemency, has specifically asked Mr. Lauer questions about the contents of the sealed materials. Third, the President has available for review the memoranda prepared by defendant's previous attorney, who had access to the classified materials and commented extensively on the classified materials at the time of sentencing.

Appendix C

The Court notes that the decision to deny Mr. Lauer access to the classified materials makes no statement regarding the success or failure of his clemency application before the President. This decision is confined to whether the Court should grant access to classified materials under the October 24, 1986, protective order.

Accordingly, it is this 12th day of January, 2001,

ORDERED that defendant's Emergency Motion to Add to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order be, and hereby is, DENIED.

s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 10, 2005

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 01-3103 Consolidated with 01-3127, 03-3145

UNITED STATES OF AMERICA,

Appellee

v.

JONATHAN JAY POLLARD,

Appellant.

November 10, 2005, Filed

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam