

Give Pollard a Chance

Jonathan Pollard's lawyers need to see the evidence against clemency.

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Richard Jones, the U.S. ambassador to Israel, issued a public apology on May 22 for stating that Jonathan Pollard, our pro bono client, had committed "treason," and that "[t]he fact that he wasn't executed is the mercy that [he] will receive" from the U.S. government.

The ambassador's statements had caused an uproar. Pollard delivered classified information to Israel, an ally of the United States. He was never charged with treason, which entails aiding an enemy of the United States. And Pollard's crime, espionage, was not a capital offense.

This incident raises the question of why he remains in prison after nearly 22 years. What harm did he actually cause the United States, and does it warrant continued incarceration?

To this day, about 40 pages of the court docket upon which Pollard was sentenced remain under seal, at the direction of the U.S. government. The sealed portions contain the government's projections, circa 1987, of possible harm from Pollard's conduct that might arise after sentencing. More than 20 years later, the government refuses to allow us, Pollard's security-cleared attorneys, access to these portions of the docket.

The likely explanation for this stonewalling is that the government's projections did not materialize. Importantly, this renders invalid the premise underlying Pollard's life sentence and the justification for keeping this man in custody.

On Nov. 21, 1985, Pollard was arrested on a charge of delivering classified information to Israel. He has been incarcerated since that day.

In 1986, pursuant to a written plea agreement, he pleaded guilty to conspiracy to commit espionage. Although he was never charged with intending to harm the United States, in 1987 he was sentenced to the maximum sentence, life in prison.

Before sentencing, then-Defense Secretary Caspar Weinberger submitted a declaration to the court, specifying the claimed harm caused by Pollard. Portions were designated classified and placed under seal. Before sentencing, they were shown to

Pollard and to his attorney. We, however, have never seen the classified portions of the Weinberger declaration.

The publicly available Victim Impact Statement filed by the government before sentencing describes the actual damage to the United States: "Mr. Pollard's unauthorized disclosures have threatened the U.S. [*sic*] relations with numerous Middle East Arab allies, many of whom question the extent to which Mr. Pollard's disclosures of classified information have skewed the balance of power in the Middle East. Moreover, because Mr. Pollard provided the Israelis virtually any classified document requested by Mr. Pollard's coconspirators, the U.S. has been deprived of the quid pro quo routinely received during authorized and official intelligence exchanges with Israel, and Israel has received information classified at a level far in excess of that ever contemplated by the National Security Council."

Although this was the actual harm caused by Pollard, we know from the public record that the sealed portions of the Weinberger declaration contain projections of *possible* future harm that might occur from Pollard's conduct. Pollard's lawyer noted to the court that the Weinberger declaration did not allege that the United States "has lost the lives or utility of any agents, that it has been obligated to replace or relocate intelligence equipment, that it had to alter communication signals, or that it has lost other sources of information, or that our technology has been compromised. Indeed, the memorandum only discusses the *possibility* that sources may be compromised in the future" (emphasis in original). The government responded by urging the court to consider "the reasoned concerns of a U.S. Cabinet member as to the real *potential* for further injury resulting from defendant's crimes" (emphasis added).

In sum, the thrust of the Weinberger declaration was to project what *might* happen, and to urge the court to sentence Pollard as if those projections *had* already happened. The court was evidently persuaded, as it sentenced Pollard to life in prison.

OVERLY AGGRESSIVE

There is real reason to believe that Weinberger's projections were overly aggressive. In a second declaration, Weinberger

inappropriately described Pollard's crime as "treason." Four years later, the Justice Department admitted that it was "regrettable" that Weinberger had used the term "treason."

In 1992, addressing Pollard's habeas corpus petition, Judge Stephen Williams of the U.S. Court of Appeals for the D.C. Circuit went much further. He called the government's misuse of the word "treason," in conjunction with other government misconduct at sentencing, a "fundamental miscarriage of justice requiring relief" from the life sentence. Williams was outvoted, 2-1, largely on the basis of procedural impediments to relief, such as the heavy burden of proof on habeas review.

Pollard's only remaining avenue of relief is executive clemency. If Weinberger's projections have failed to materialize, we can present a compelling argument for clemency because the premise underlying Pollard's life sentence will have been invalidated.

In 2000, we took Pollard's case pro bono. We applied for, and were granted by the Justice Department, the requisite security clearances needed to see the sealed portions of the Weinberger declaration. But despite our security clearances, the Justice Department refused to consent to our viewing the sealed portions, even under strict conditions of confidentiality. The department claimed we had no "need to know."

We filed a motion, asking the U.S. District Court for the District of Columbia to allow us access. We explained that we were applying for executive clemency from then-President Bill Clinton and that we needed to be able to address authoritatively what harm Pollard had actually caused. The government argued that we had no need to know the contents of the court docket. It stated that the sealed docket materials were irrelevant, intimating that they had lain dormant and unread by anyone since the sentencing. The district court refused to grant us access.

In the face of the government's insinuation that the materials had not been accessed since the 1987 sentencing, Rep. Anthony Weiner (D-N.Y.) demanded that the Justice Department inform him whether any persons had been permitted access to the department's copies of the sealed materials since the 1987 sentencing, and if so, provide the details of the access. The Justice Department admitted that between 1993 and 2001, it had unilaterally allowed access to its copies of the sealed materials on at least 24 separate occasions. None of those instances of access were by anyone representing Pollard. It was apparent from the dates that access had been allowed precisely at times when initiatives were under way to obtain executive clemency for Pollard—clemency that the Justice Department has consistently opposed.

Since, by law, no one could see the materials without a "need to know," the Justice Department conveniently determined on at least 24 occasions that someone had such a need to know because the purpose was to oppose clemency for Pollard.

In 2001, we moved for reconsideration based upon this newly discovered information. Surely, if opposing clemency provided government personnel with a need to know the contents of the documents, seeking clemency should provide security-cleared defense counsel with a corresponding need. Basic fairness mandated such a result.

In 2003, our motion for reconsideration was denied. We then appealed to the D.C. Circuit.

NO JURISDICTION?

At oral argument on our appeal in 2005, Judge David Sentelle *sua sponte* expressed the unprecedented view that the D.C. Circuit lacked jurisdiction to allow us access to the sealed docket materials because our motivation for access was in conjunction with a contemplated clemency application and the separation of powers would somehow be violated were the court to allow us to see materials in its docket.

The documents in question were created as part of a judicial process, are governed by a court-issued protective order, and were filed with the court under seal pursuant to that protective order. The protective order expressly contemplates that, in the future, additional persons may obtain access to the sealed materials. And, while jurisdiction is not conferred by stipulation, it is noteworthy that neither the district court below, nor the government, our adversary, had ever expressed the slightest concern about jurisdiction. To the contrary, the government had expressly conceded that there was jurisdiction.

Nevertheless, in a 2-1 decision, Judges Sentelle and Karen LeCraft Henderson of the D.C. Circuit ruled in 2005 that it had no jurisdiction to consider our motion for access to the sealed docket, because the doctrine of separation of powers provides the executive branch with sole jurisdiction to decide who may have access to court docket materials if the access is to make a clemency application.

A dissenting opinion by Judge Judith Rogers vigorously rejected the reasoning of the majority, stating "Neither Pollard's counsel's request to the district court nor the court's potential granting of it . . . poses interference with the President's clemency power" and therefore implicates no separation-of-powers concerns. In the absence of any such concerns, the majority's ruling placed the district court "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." The dissent further noted that because this case does not involve the typical request for access to classified documents within the executive branch's possession, there was no concern that the court's exercising jurisdiction could open the floodgates to similar motions.

The Supreme Court denied certiorari.

FACT, NOT SURMISE

The courts have thus left the decision whether to allow us access to the materials squarely with the executive branch.

To make a serious and effective application for clemency based on fact and not on surmise, we should be permitted to see the sealed docket materials. This is not a discovery request. We are asking to see only documents previously shown to Pollard and his counsel. We have the appropriate security clearances, and we have the "need to know." The Justice Department has never questioned our integrity.

If, as we anticipate, Weinberger's projections did not materialize, the appropriateness of clemency after 22 years in prison will be manifest.

Basic fairness mandates that we be provided access to these materials so that we can make a fact-based presentation in support of clemency for a man sentenced to life in prison on the basis of projections of harm that, most likely, have never come to pass and never will.

Our system of justice is predicated on the constitutional protection of checks and balances, so that those in political control are prevented from wielding the authority of government to deny justice to those who are disliked or unpopular. It is the role of the judiciary to protect the individual against prosecutorial overreaching. Unfortunately, the judiciary did not fulfill that role in this case, and the executive branch remains unchecked.

Where a life sentence is, in all likelihood, unfairly premised on projections that, two decades later, have not materialized, justice requires access to the sentencing docket materials by security-cleared counsel. We need to be able to make a viable clemency application to right the wrong of Pollard's continued imprisonment.

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