

# CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

ALMATY  
ASHGABAT  
ASTANA  
BEIJING  
BUENOS AIRES  
DUBAI  
FRANKFURT  
HOUSTON

ISTANBUL  
LONDON  
MEXICO CITY  
MILAN  
MUSCAT  
PARIS  
WASHINGTON, D.C.

ATTORNEYS AND COUNSELLORS AT LAW  
101 PARK AVENUE  
NEW YORK, NEW YORK 10178-0061

TELEPHONE 212-696-6000  
FACSIMILE 212-697-1559  
WWW.CURTIS.COM

WRITERS' DIRECT:  
TELEPHONE 212-696-6192  
E-MAIL: ELAUER@CURTIS.COM  
  
TELEPHONE 212-696-6067  
E-MAIL: JSEMELMAN@CURTIS.COM

October 30, 2014

President Barack H. Obama  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

**Re: Deeply Flawed Parole Process for Jonathan Pollard**

Dear Mr. President:

On January 9, 2014, after nearly 30 years in prison, our pro bono client Jonathan Pollard applied to the U.S. Parole Commission (the "Commission") for release on parole. A parole hearing was held on July 1, 2014. *Parole was denied.*

An examination of the record reflects a disingenuous and deeply flawed parole process that reached an unsound conclusion based on discredited 28-year old statements buried in a secret file, and in complete disregard of compelling contrary evidence.

In March 2013, during an interview on Israeli television, in response to a question about commuting Mr. Pollard's sentence, you stated that Mr. Pollard's avenue of relief is the U.S. parole system, and you specifically stated that Jonathan Pollard would be accorded a fair process, as any other American:

*"There is a justice system that allows for periodic review of his sentence and the potential for him ultimately being released.... I have no plans for releasing Jonathan Pollard immediately, but what I am going to be doing is to make sure that he, like every other American who has been sentenced, is accorded the same kinds of review and the same examination of the equities that any other individual would provide... I've got to make sure that every individual is treated fairly and equally."* Here is a link to the interview: <http://bit.ly/1nNBqBk>

The "review of his sentence" and "examination of the equities" Mr. Pollard received at the hands of the prosecution and the Commission bore no resemblance to the ideals of equality, justice and fairness you no doubt intended in your televised statement.

Quite the opposite. At the parole hearing, the prosecution falsely asserted, and the Commission accepted without scrutiny, that Mr. Pollard's activity "was the greatest compromise of US security to that date." That allegation was false. It was loosely based on 28-year old statements that have been thoroughly discredited in multiple ways. The prosecution's statement went wholly unchecked by an acquiescent Commission.

It is essential to note that the Commission is part of the very same Department of Justice (DOJ) that has been prosecuting Mr. Pollard, and that opposed parole at the July 1 hearing. The Commission's website is [www.justice.gov/uspsc/](http://www.justice.gov/uspsc/), a sub-page of the DOJ's website, and the Commission's email addresses use the domain name "@usdoj.gov."

At the parole hearing, the prosecution unfairly invoked secret evidence in the form of a largely-classified declaration submitted to the sentencing judge in 1987 by then-Secretary of Defense Caspar W. Weinberger (the "Weinberger Declaration"). The prosecution asserted that the secret portion of the Weinberger Declaration contained information sufficient to warrant denial of parole. The information itself was not disclosed.

Despite relying heavily on the Weinberger Declaration as a basis for opposing parole, the prosecution refused to allow Mr. Pollard's *security-cleared* counsel access to the document. The prosecution was thus able to freely characterize the contents of the Weinberger Declaration in a manner extremely detrimental to Mr. Pollard, without allowing the defense a fair opportunity to rebut the characterization.

Worse still, the prosecution chose to invoke the classified Weinberger Declaration knowing full well that the members of the Commission lack security clearances, and therefore would not have the opportunity to read the document and reach their own conclusions. The Commission itself raised no objection to the prosecution's tactic. Instead, it passively accepted the prosecution's characterization without challenge.

Prior to the parole hearing, we had reviewed the Commission's file on this case, and had seen that the prosecution was invoking the Weinberger Declaration as its primary basis for opposing parole. We filed a motion with the United States District Court for the District of Columbia, seeking access to the Weinberger Declaration so that we could respond effectively on behalf of Mr. Pollard at the parole hearing. Opposing access, the prosecution argued, and the court ruled, that the court lacked jurisdiction to allow us access to the Weinberger Declaration, but that the Executive Branch has the authority to do so. (*United States v. Pollard*, No. Cr. 86-207, ECF 101, Tr. Feb. 28, 2014, at pp. 31-35.) The prosecution has repeatedly invoked the Weinberger Declaration, not only in opposition to parole but also in opposition to clemency. We therefore respectfully urge you, as the head of the Executive Branch, to allow us access to the Weinberger Declaration so that we may fairly respond to its use by the prosecution.

In the nearly 28 years since the Weinberger Declaration was prepared, considerable information has emerged that completely discredits its reliability.

First, in recent years, senior U.S. government officials who served with Mr. Weinberger in the Reagan Administration have come forward to describe Mr. Weinberger's intense bias against Israel, and the distortive effect of that bias on his characterization of Mr. Pollard's conduct, which led to the unfair life sentence. The Commission disregarded these statements.

Second, in addition to these officials, a broad array of distinguished former U.S. government officials – including a former Attorney General, two former Secretaries of State, a former Director of the CIA, and four former Chairs of the Senate Select Committee on Intelligence – have gone on record as calling for Mr. Pollard's release in the interests of justice. Again, the Commission disregarded these statements.

Third, Mr. Weinberger himself, in a published 2002 interview, downplayed the Pollard case as *“a very minor matter, but made very important.”* Thus, whatever he might have been thinking in 1987, by 2002 he was thinking very differently. And a 1987 CIA Study that was partially released in 2012 discloses that Mr. Pollard's espionage related to Israel's hostile Arab neighbors and their military capabilities, resources, suppliers, and advisers (especially the Soviet Union), but specifically *excluded “US military activities, plans, capabilities, or equipment.”*

So that you can understand more fully the deficiencies in Mr. Pollard's parole process, as well as the unfairness of the Commission's denial of parole and the appropriateness of executive clemency, we provide in the attached Addendum a more detailed summary of the documentary evidence that demonstrates that any fair “review” of the sentence and any fair “examination of the equities” should have resulted in Mr. Pollard's release. Mr. Pollard received neither a fair “review” nor a fair “examination of the equities.”

Mr. Pollard has been in prison for 29 years and is about to enter his 30<sup>th</sup> year of incarceration this month. His petition for executive clemency in the form of commutation has been pending for four years.

For nearly three decades, the DOJ has failed to provide fair treatment for Mr. Pollard despite the manifest injustice of his grossly disproportionate sentence. Contrary to your stated desire to see that “every individual is treated fairly and equally,” Mr. Pollard has been singled out for uniquely unfair treatment.

We therefore respectfully ask that you heed the urgings of so many distinguished Americans, and that you exercise your constitutionally-mandated authority to terminate this longstanding injustice by commuting Mr. Pollard's sentence to time served.

Respectfully,



Eliot Lauer



Jacques Semmelman

cc: Deborah Leff, Esq., Acting U.S. Pardon Attorney

## ADDENDUM

This Addendum further describes the documentary evidence that illustrates the deficiencies in the parole process, and the unfairness of the Commission's denial of parole.

### A. The Weinberger Declaration Has Been Completely Discredited

The Weinberger Declaration consists largely of *projections* of possible future harm, as opposed to *actual* harm. This is evidenced by Mr. Pollard's then-counsel's response to the Weinberger Declaration (to which he had full access):

Secretary Weinberger nowhere alleges 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, thus requiring countermeasures.***

(Defendant Jonathan J. Pollard's Second Memorandum in Aid of Sentencing, served Feb. 27, 1987, at p. 5) (underlining in original; italics added).

The prosecution responded with these words:

[D]efendant argues that the Court should disregard the reasoned concerns of a U.S. cabinet member as to the real ***potential*** for further injury resulting from defendant's crimes. In short, defendant says that if the government cannot state with certainty that all the damage which could reasonably occur in fact has occurred before sentencing, an espionage defendant should not be held accountable for ***potential harm*** which he alone has wrought.

. . . [D]efendant does not address the specific, reasoned ***projections of damage*** resulting from the compromise of these documents which the Weinberger Declaration contains.

(Government's Reply to Defendant's Sentencing Memorandum, served Mar. 3, 1987, at p. 19) (emphasis added). Thus, the government's pre-sentencing submission (prepared more than 13 months after Mr. Pollard's arrest) reflected ***potential*** future harm.

The public record does not disclose what Mr. Weinberger's projections were. The projections were marked classified and were placed under seal. Mr. Weinberger died in 2006.

The passage of time has underscored that any harm to the United States projected in the Weinberger Declaration has not materialized, and never will. In a published 2002 interview with respected journalist and author Edwin Black ("IBM and the Holocaust"), Mr. Weinberger *himself* described the Pollard case as "a very minor matter, but made very important." He reiterated

during the interview that “the Pollard matter was comparatively minor. It was made far bigger than its actual importance.” Thus, whatever Mr. Weinberger may have written in 1987, by 2002 he had come to recognize that Mr. Pollard’s case was “very minor.” Despite that acknowledgement, at the parole hearing the prosecution relied on the Weinberger Declaration as if it were current and valid. And it did so while continuing to withhold from security-cleared defense counsel the very document it was invoking as a principal basis for denying parole.

Finally, the Commission ignored written submissions by two former high-ranking U.S. government officials who served side-by-side with Mr. Weinberger in the Reagan administration, and who attest to his severe bias against Israel and to the distortive effect it had on Mr. Pollard’s punishment:

- Robert C. “Bud” McFarlane served as U.S. National Security Adviser in the Reagan Administration, and worked closely with Secretary Weinberger. In a letter dated February 9, 2012, Mr. McFarlane wrote that “the affidavit filed by former Secretary of Defense Caspar Weinberger, was surely inspired in large part by his deeply held animus toward the State of Israel. His extreme bias against Israel was manifested in recurrent episodes of strong criticism and unbalanced reasoning when decisions involving Israel were being made.” Mr. McFarlane went on to say that the “imprisonment of Mr. Pollard for more than 26 years is more than excessive,” and “a great injustice[.]”
- Dr. Lawrence J. Korb served as Assistant Secretary of Defense under Mr. Weinberger and worked closely with him from 1981 to 1985 (a period that includes Mr. Pollard’s arrest). In a letter dated September 27, 2010, Dr. Korb wrote, “[b]ased on my first-hand knowledge, I can say with confidence that the severity of Pollard’s sentence is a result of an almost visceral dislike of Israel and the special place it occupies in our foreign policy on the part of my boss at the time, Secretary of Defense Caspar Weinberger.” Dr. Korb went on to say that “[j]ustice would best be served by commuting Pollard’s sentence to the time he has already spent in prison.”

Again, the Commission wholly ignored this evidence.

#### **B. The 1987 CIA Study Reveals There Was No Disclosure of US Information**

The absence of reliable evidence that there was serious harm to U.S. national security is further underscored by an October 30, 1987 Central Intelligence Agency Study titled “The Jonathan Jay Pollard Espionage Case: A Damage Assessment” (the “CIA Study”), which was released December 14, 2012 by the National Security Archive at George Washington University. Although portions of the CIA Study remain classified, the now-public portions reveal that Mr. Pollard delivered information to Israel regarding Arab and Pakistani nuclear intelligence; Arab military capability and weaponry (including biological and chemical weapons); Soviet aircraft, missiles, and air defenses; Soviet advisers in Syria and Soviet training of Syrian personnel; the PLO’s Force 17; the PLO’s headquarters in Tunis, and Libyan and Tunisian air defenses; and the RASIN (Radio Signal Notation) Manual, which was requested by Israel to help in the decryption of intercepted communications of Soviet military advisers in Damascus. (CIA

Study at ¶¶ 4, 51-62.) Significantly, the CIA Study reveals that *Israel never requested information from Mr. Pollard concerning “US military activities, plans, capabilities, or equipment.”* (*Id.* at ¶ 63.) (emphasis added).

**C. Many Prominent Former U.S. Government Officials Urge Release**

The Commission ignored written submissions from a distinguished array of former senior U.S. government officials, each of whom has urged that Mr. Pollard be released. In addition to Messrs. McFarlane and Korb (quoted above):

- In a letter dated December 21, 2010, former U.S. Attorney General Michael B. Mukasey wrote that “a life sentence can only be considered utterly disproportionate to the crime,” and that “Pollard has suffered confinement well beyond the severity of what he did.”
- In a letter dated January 11, 2011, former U.S. Secretary of State George P. Shultz wrote that Mr. Pollard had already “paid a huge price for his espionage on behalf of Israel and should be released from prison.” Mr. Shultz was Secretary of State from 1982 to 1989, *a period that encompassed all of the events in Mr. Pollard’s underlying case*. Secretary Shultz served alongside Secretary Weinberger in the Reagan Cabinet.
- In a letter dated March 3, 2011, former U.S. Secretary of State and former U.S. National Security Adviser Dr. Henry A. Kissinger wrote that “justice would be served by commuting the remainder of Pollard’s sentence of life imprisonment.”
- In a letter published in the Wall Street Journal on July 5, 2012, R. James Woolsey, a former Director of the Central Intelligence Agency, wrote of Mr. Pollard that he “support[s] his release” and that it is time to “free him.”
- In a letter dated October 26, 2011, four former chairs of the U.S. Senate Select Committee on Intelligence – Senators David Durenberger, Dennis DeConcini, Birch Bayh, and the late Arlen Specter – each urged that Mr. Pollard be released. They, along with fourteen other former U.S. Senators, described Mr. Pollard’s sentence as “severely disproportionate” and “a gross miscarriage of justice.” They urged that, as a matter of “American justice,” Mr. Pollard’s sentence be commuted to “time served.”
- In a letter dated January 2, 2014, former Senator David Durenberger wrote that he knows “the circumstances surrounding the case as well as anyone,” having “served on the Senate Select Committee on Intelligence from 1979-1986 and as its Chair during the 1985-86 session of the Congress,” i.e., at the very time the underlying case was underway. Mr. Durenberger decried “the harshness of [Mr. Pollard’s] sentence” as “uncalled for,” and urged Mr. Pollard’s release.
- As far back as July 2, 1996, former Senator Dennis DeConcini, who had served on the U.S. Senate Select Committee on Intelligence at the time of Mr. Pollard’s arrest and guilty plea, and who later served as Chair of that Committee, wrote that Mr. Pollard had

already “served adequate time and should be considered for parole[.]” Former Senator DeConcini renewed his request by letter dated January 5, 2009, and specifically noted that “deterrence has been achieved[.]”

The fact that the Secretary of State (at the pertinent time), the National Security Adviser (at the pertinent time), and four former Chairs of the Senate Select Committee on Intelligence (including Mr. Durenberger, who occupied the post at the pertinent time) have all come out strongly in favor of release should have been accorded far more weight than the discredited Weinberger Declaration. These materials were submitted to the Commission. The Commission ignored them.

**D. The Victim Impact Statement Says Nothing About Harm to National Security**

As its name suggests, a “victim impact statement” is a statement to the sentencing court made by a victim of a crime that describes, in the victim’s own words, the impact of the crime on the victim. In cases of espionage, the victim is the government itself. Thus, Mr. Pollard’s Presentence Report includes a Victim Impact Statement (VIS) prepared by the DOJ and submitted to the sentencing judge in 1987, that describes the alleged harm to the United States.

As the instrument designed by law to allow the victim’s voice to be heard on the issue of harm, the VIS contains the government’s most forceful and comprehensive description of the harm it claims to have suffered as a result of the offense committed. In Mr. Pollard’s case, the VIS makes reference, in very general terms, to the “breadth and scope” of the information delivered to Israel. Nowhere, however, does the VIS say, as the Commission erroneously found, that this “was the greatest compromise of US security to that date.” Indeed, the VIS does not address national security at all, other than to say that “[t]he specific instances of damage to the national security caused by Mr. Pollard’s offense will be described in a classified damage assessment affidavit to be submitted to the Court in camera.” (Presentence Report at p. 7) (emphasis in original). That “classified damage assessment affidavit” is the Weinberger Declaration. As discussed above in detail, the Weinberger Declaration has been discredited in multiple ways.

Silent with respect to any alleged harm to national security, the VIS focuses instead on relations with Middle Eastern countries, and on the lack of a quid pro quo for information the United States could have otherwise bartered with Israel:

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. The obvious result of Mr. Pollard's largesse is that *U.S. bargaining leverage with the Israeli government in any further intelligence exchanges has been undermined*. In short, Mr. Pollard's activities *have adversely affected U.S. relations* with both its Middle East Arab allies and the government of Israel.

(Presentence Report at p. 7) (emphasis added.)

The VIS thus reflects friction between the United States and Middle East Arab allies, and temporary reduction in bargaining leverage by the United States. It says nothing at all about harm to national security, and certainly does not allege, in words or in substance, that this was the greatest compromise of national security up to that time.

Once again, the Commission ignored this evidence.