



December 14, 2010

**BY FAX & OVERNIGHT MAIL**

The Honorable Barack Obama  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, DC 20500

Dear Mr. President:

On behalf of Agudath Israel of America, a national Orthodox Jewish organization, I wish to renew our longstanding humanitarian plea that Jonathan Pollard, who has already served 25 years of his life sentence, be granted executive clemency. We have made this plea to several presidents over the years – but with each passing year that Mr. Pollard languishes in prison, the urgency of the plea is compounded.

We acknowledge, as we always have, that Pollard's crime was extremely serious. But we maintain, also as we always have, that the exceptional severity of his sentence is troubling. His espionage took place during a time of peace. The country for which he was charged with spying, Israel, was and is a staunch ally of the United States. He received his sentence after a plea bargain, not a trial. Each of these factors, on its own, should have softened the harshness of his sentence; taken collectively, they render his sentence of life in prison virtually incomprehensible.

Indeed, the 25 years Pollard has already served – let alone the life sentence imposed upon him – is entirely out of line with sentences served by others convicted of spying for friendly governments. As Representative Barney Frank and 38 of his colleagues wrote to you last month:

We believe that there has been a great disparity from the standpoint of justice between the amount of time Mr. Pollard has served and the time that has been served — or not served at all — by many others who were found guilty of similar activity on behalf of nations that, like Israel, are not adversarial to us. It is indisputable in our view that the nearly twenty-five years that Mr. Pollard has served stands as a sufficient time from the standpoint of either punishment or deterrence.

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We respectfully add our voice to those of Representative Frank and his colleagues in asking you to recognize that Jonathan Pollard has more than adequately repaid his debt to society through the quarter-century he has already spent in federal prison. The length of his incarceration, considering the nature of his crime and the fact that he entered into a plea bargain, is itself a compelling justification for the humanitarian exercise of your executive clemency authority.

There are, however, two additional factors that strongly militate in favor of clemency: the fact that the government, in a variety of ways, did not play fair in the process leading up to the imposition of Pollard's life sentence; and the fact that Pollard lost his opportunity to appeal his life sentence due solely to his own attorney's shoddy lawyering. It is fair to assume that Pollard is still sitting in jail today only because both the government and his lawyer deviated from the norms that characterize our system and sense of American justice. There is something very wrong with that picture, and we respectfully ask you to set it right.

Let me elaborate on these two additional points:

1. *The Government's Troubling Conduct:* After entering into a plea bargain agreement with Pollard, the government proceeded in a manner that was in substantial tension with the commitments it had made under the agreement. In the words of Judge Stephen Williams, the dissenting vote in the 1992 D.C. Circuit Court of Appeals 2-1 ruling rejecting Pollard's §2255 motion to withdraw his guilty plea:

On its side, the government made three promises of significance here. First, it would bring to the court's attention "the nature, extent and value of [Pollard's] cooperation and testimony" and would represent that the information supplied was of "considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws." Second, it would not ask for a life sentence (this promise was implicit but is not contested by the government), though it would be free to recommend a "substantial period of incarceration". Third, the government limited its reserved right of allocution to "the facts and circumstances" of Pollard's crimes. **The government complied in spirit with none of its promises; with the third, it complied in neither letter nor spirit.** [*United States v. Pollard*, 959 F2d 1011, 1034 (D.C. Cir. 1992) (Williams, J., dissenting) (citations omitted; emphasis added).]

These factors led Judge Williams to describe the government's conduct as "a fundamental miscarriage of justice." *Id.* at 1032.

The two judges who formed the court's majority disagreed with their colleague's bottom line, but they too acknowledged "the grudging nature of the government's compliance," 959 F.2d at 1026; that "the government's presentation was certainly not generous – it could well be thought stingy," *id.*; and that "the government was engaged in rather hard-nosed dealings with the defendant," *id.* at 1030. The majority took note of the "rather polemical tone" of Secretary Caspar Weinberger's pre-sentencing memorandum to the district judge, *id.* at 1017, conceding that the Secretary's words might accurately be characterized as "rank hyperbole." *Id.* at 1025. The majority did not disagree that the government's unflattering description of Pollard's character and motivation constituted a breach of its pledge to limit its allocution to the "facts and circumstances" of the case; it merely held that any such breach, "troublesome" though it may be (*id.* at 1026), did not rise to the level of a "fundamental defect" in the sentence that resulted in a "complete miscarriage of justice" sufficient to warrant §2255 collateral relief. *Id.* at 1028.

The government's inappropriate handling of the case after it entered into the plea agreement extends beyond the manner in which it carried out its terms of the bargain with Pollard. As I pointed out in an article I wrote for the June 1997 *Middle East Quarterly*, it was only after the government had secured Pollard's guilty plea that it began speaking in terms of the harm Pollard caused to the United States. Pollard's indictment had charged him under the federal law that makes it a crime to deliver defense information "to the advantage of a foreign nation" – conspicuously avoiding charging him under the parallel law that makes it a crime to deliver such information "to the injury of the United States." Pollard thus had good reason to assume, when he agreed to plead guilty to a criminal charge of spying for an ally where there had been no charge of harm to the United States, that he would receive something less than a life sentence.

After his plea, though, the government began to sing a different tune, essentially converting the charge from the less morally culpable crime of benefiting a foreign nation to the more serious crime of injuring the United States. Thus, as elaborated in the aforementioned *Middle East Quarterly* article, the government submitted a Victim Impact Statement that spoke in various ways of the harm Pollard had caused to American interests; Secretary Weinberger submitted a declaration raising the specter that Pollard had endangered American lives; and then, in a second submission on the eve of sentencing, the Secretary went so far as to accuse Pollard of "treason" – a legal term that Article III, Section 3 of our Constitution defines as levying war against the United States or aiding America's enemies.

What happened, in other words, is that the government leveled a charge of lesser moral magnitude against Pollard, secured his guilty plea, and then post-facto changed the focus of the sentencing process by upping the ante on Pollard's crime. This may have been clever prosecutorial strategy – but it was not fair play.

2. *Pollard's Lawyer's Failure to Appeal the Sentence*: There is yet another reason why there is something fundamentally unfair about Pollard's life sentence. It is by now clear that Pollard's original lawyer made a number of serious tactical mistakes in his representation of Pollard – most egregiously his failure directly to appeal Pollard's life sentence.

The devastating consequences of that failure are spelled out quite clearly in the D.C. Court of Appeals' aforementioned 2-1 ruling against Pollard's §2255 motion to withdraw his guilty plea, in which the majority point out that “in a §2255 collateral challenge, an appellant, in order to gain relief under any claim, is obliged to show a good deal more than would be sufficient on a direct appeal from his sentence. §2255 is not a substitute for a direct appeal. ...**The mood, atmosphere or ‘rhetoric’ of the government’s allocution – upon which the dissent relies – might justify relief on direct appeal of the sentence, but it is unlikely to satisfy the rigorous test of §2255.**” (*United States v. Pollard*, *supra*, 959 F.2d at 1020, 1029-30 [emphasis added].) In other words, had Pollard's lawyer decided directly to appeal the life sentence on the grounds that the government had breached the plea bargain agreement, chances are that he would have prevailed on that appeal. But the lawyer, for whatever reason (or for no reason), did not file an appeal – and the rest is tragic history. It is therefore fair to ask as a matter of simple justice whether Pollard should be made to suffer such severe consequences – spending the rest of his life in prison – as a result of his lawyer's egregious mistake.

That Pollard committed an extremely serious crime and deserved to pay for it is clear. But it is also clear that for a man to spend his entire life in prison based on questionable tactics by the government in its prosecution of a case and an inexplicable blunder by his lawyer simply does not comport with fundamental fairness. It may be too late, under the applicable statutes of limitations, for a court of law to allow Pollard to withdraw his guilty plea or appeal his sentence on the basis of these considerations. *United States v. Pollard*, 290 F. Supp. 2d 153 (D.D.C. 2003). But it is not too late for the President of the United States to take them into account when considering Pollard's clemency application. The genius of our constitutional system is that the Chief Executive has the power, entirely independent of the courts, to act in a humanitarian manner that upholds our nation's most noble traditions of fair play and compassionate justice. This is a case that screams out for the exercise of such humanitarian executive authority.

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Let me conclude with a simple plea from the heart. By no means does Agudath Israel of America condone what Pollard did. He is no hero. But he committed his crime more than a quarter-of-a-century ago. He has expressed remorse for his actions. He has languished in prison for 25 years. He is in declining health. He is a broken man. We respectfully echo the words of former CIA director James Woolsey: "He's served long enough."

During this holiday season, Mr. President, Agudath Israel of America implores you, respectfully but urgently, to grant clemency to Jonathan Pollard.

Many thanks for your consideration of this plea – and many thanks for your courageous leadership of our great nation. As always, you have our blessings and every good wish.

Sincerely,

A handwritten signature in black ink, appearing to read "David Zwiebel". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Zwiebel".

Rabbi David Zwiebel, Esq.  
Executive Vice President

DZ/aa