No. 17-15016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARION PITCH,
The Personal Representative of the Estate of Anthony Pitch,

Petitioner-Appellee,

v.

UNITED STATES,

Respondent-Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

EN BANC BRIEF OF AMICI CURIAE AMERICAN HISTORICAL ASSOCIATION, AMERICAN SOCIETY FOR LEGAL HISTORY, NATIONAL SECURITY ARCHIVE, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY OF AMERICAN ARCHIVISTS IN SUPPORT OF PETITIONER-APPELLEE AND SUPPORTING AFFIRMANCE

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September 11, 2019

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-2, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal:

- American Historical Association – amicus curiae
- American Society for Legal History – amicus curiae
- Llewellyn, Patrick D. – counsel for amici curiae
- National Security Archive – amicus curiae
- Nelson, Scott L. – counsel for amici curiae
- Organization of American Historians – amicus curiae
- Public Citizen Litigation Group – law firm for amici curiae
- Society of American Archivists – amicus curiae
- Zieve, Allison M. – counsel for amici curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that amici curiae are all nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have an ownership interest in them.

/s/ Allison M. Zieve
Allison M. Zieve
Attorney for amici curiae
American Historical Association, et al.

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INTEREST OF AMICI CURIAE[1]

Amici curiae American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists have longstanding interests in the questions posed by this case. The American Historical Association, the nation's largest professional organization serving historians in all fields and all professions, was founded in 1884 and advocates for history education, the professional work of historians, and the critical role of historical thinking in public life. The American Society for Legal History is an international academic nonprofit membership organization dedicated to fostering scholarship, teaching, and study in the many fields of legal history around the world. The National Security Archive is a nonprofit organization that combines several functions, including investigative journalism, research on international affairs, and maintenance of a library and archive of declassified U.S. documents. The Organization of American Historians is the largest professional society for the teaching and study of American history. The Society of American Archivists is the oldest and largest national archival professional association in the

[1] This brief is accompanied by a Motion for Leave to File, as required by 11th Circuit Rule 35-8, to which all parties have consented. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici made a monetary contribution to the preparation or submission of this brief.

United States, dedicated to ensuring the identification, preservation, and use of records of historical value.

The five amici have been successful petitioners in prior cases seeking the release of grand jury records of great historical significance. For example, in 2008 and 2015, amici petitioned for release of grand jury records concerning the indictment of Julius and Ethel Rosenberg, successfully obtaining release of the records. *See In re Petition of Nat'l Sec. Archive*, No. 08 Civ. 6599, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008); *In re Petition of Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015). In 2011, four of the amici successfully petitioned for release of President Richard M. Nixon's thirty-five-year-old grand jury deposition testimony in connection with the third Watergate grand jury. *See In re Petition of Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011). In 1999, they successfully petitioned for release of some of the transcripts of the Alger Hiss grand jury proceedings. *See In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d 274, 285 (S.D.N.Y. 1999). The release of these records has helped to complete the historical record and shed light on the course of judicial proceedings in these historically important cases.

STATEMENT OF THE ISSUES

I. Do courts have inherent authority to disclose grand jury records for reasons not specified in Federal Rule of Criminal Procedure 6(e)?

II. If courts have inherent authority to disclose grand jury records for reasons not specified in Rule 6(e), may courts exercise this inherent authority to unseal grand jury records in matters of historical importance?

III. If courts may exercise inherent authority to unseal grand jury records in matters of historical importance, what test should courts apply when deciding whether to do so?

SUMMARY OF ARGUMENT

The general rule that grand jury proceedings are not open to the public, embodied in Federal Rule of Criminal Procedure 6(e)(3), serves important purposes: encouraging uninhibited deliberations by preserving grand jurors' anonymity, protecting witnesses from retaliation or intimidation, and avoiding alerting suspects to the grand jury's investigation. Where disclosure would not threaten those purposes, the federal courts have inherent authority to unseal grand jury records in exceptional circumstances beyond those listed in Rule 6(e). *See United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004) (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398–99 (1959), and *In re Petition to Inspect & Copy Grand Jury Materials* (*In re Hastings*), 735 F.2d 1261 (11th Cir. 1984)); *see, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (releasing grand jury material because it became "sufficiently widely known" that it

lost "its character as Rule 6(e) material" (internal quotation marks omitted)); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178–79 (10th Cir. 2006) (remanding to district court to decide whether case presented exceptional circumstances, without deciding question of courts' inherent authority). *But see McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019).

As the Second and Seventh Circuits have held, and the Advisory Committee on the Federal Rules of Criminal Procedure has agreed, one such exceptional circumstance in which courts may order release of grand jury records is where a case is one of significant historical importance. *See In re Petition of Craig*, 131 F.3d 99, 105 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016). Exceptional circumstances are by definition not the norm, and, accordingly, the number of cases unsealing grand jury records on the basis of historical importance is limited. Even so, such cases go back several decades. *See Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015) (ordering unsealing of certain grand jury testimony concerning the investigation of Julius and Ethel Rosenberg); *Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011) (ordering unsealing of grand jury transcripts of President Nixon's deposition concerning Watergate); *In re Petition of Tabac*, 2009 WL 5213717, at *1–2 (M.D. Tenn. Apr. 14, 2009) (ordering unsealing of grand jury material pertaining to the 1963 jury-tampering indictment of Jimmy Hoffa); *Nat'l Sec.*

Archive, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008) (ordering unsealing of certain grand jury records concerning the indictment of Julius and Ethel Rosenberg); *Am. Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (ordering partial unsealing of grand jury transcripts concerning the investigation of Alger Hiss); *In re Petition of O'Brien*, No. 3-90-X-35 (M.D. Tenn. 1990) (ordering, without issuing written opinion, disclosure of grand jury records from the investigation of the 1946 Columbia, Tennessee race riot), *cited in Am. Historical Ass'n*, 49 F. Supp. 2d at 293.

There is no evidence that the disclosures resulting from this line of cases have negatively affected the grand jury process. Conversely, there is no doubt that the release of these materials has contributed greatly to the historical record of significant events in our country's history. For example, the unsealed records from the Rosenberg grand jury showed that the grand jury testimony of a key witness concerning Ethel Rosenberg's role contradicted the same witness's later testimony at trial—a revelation suggesting that prosecutors presented trial testimony that they knew, or at least had reason to know, was false. The unsealed transcripts of the Alger Hiss grand juries showed that, unknown to Hiss and his defense counsel, two witnesses contradicted testimony of Whittaker Chambers, the key witness against Hiss. *See infra* pp. 22–23. As shown by these examples and others, the courts' ability

to exercise inherent authority to unseal grand jury records in cases of historical importance is a vital tool for completing the public record of significant events.

To guide their consideration of whether to release historically important grand jury records, courts balance the need to maintain secrecy against the general historical importance of the case and the specific historical importance of the grand jury material. The Second Circuit in *Craig*, 131 F.3d at 106, set forth a list of factors to guide courts' balancing. The government agrees that, if unsealing based on historical importance is within the courts' authority, the *Craig* factors are the appropriate considerations for evaluating requests to unseal grand jury records and that, applied here, application of those factors supports disclosure of the grand jury materials concerning the Moore's Ford Lynching.

ARGUMENT

I. The courts have inherent authority to unseal grand jury records in special circumstances.

A. Federal courts follow the "long-established policy that maintains the secrecy of the grand jury proceedings." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Grand jury proceedings are conducted secretly to preserve the anonymity of grand jurors, to facilitate uninhibited deliberations, to protect witnesses against tampering, to encourage full disclosure, and to avoid alerting suspects about the investigation and possible cooperating witnesses. *Douglas Oil*

Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979); *Aisenberg*, 358 F.2d at 1346. Nonetheless, grand jury secrecy "is not absolute." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). For example, a court may authorize disclosure of a grand jury matter "preliminarily or in connection with a judicial proceeding," Fed. R. Crim. P. 6(e)(3)(E)(i), or "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii).

Although Federal Rule of Criminal Procedure 6(e)(3) sets forth several exceptions to the general rule of secrecy, "the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court." *In re Hastings*, 735 F.2d at 1268. "Rule 6(e) is but declaratory" of the principle that "disclosure [is] committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co.*, 360 U.S. at 399; *see Douglas Oil Co.*, 441 U.S. at 223 (holding that a court has substantial discretion to determine whether grand jury transcripts should be released).

Accordingly, this Court and others have long held that courts have inherent authority to order release of grand jury material outside Rule 6(e)'s enumerated exceptions, when warranted by special circumstances. *See Aisenberg*, 358 F.3d at

1347 (citing *In re Hastings*, 735 F.2d 1261); *Craig*, 131 F.3d at 102–03; *see also In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir. 1981) (noting that the "court in rare situations may have some discretion" to permit disclosure outside Rule 6(e)), *aff'd on other grounds sub nom. United States v. Baggot*, 463 U.S. 476 (1983). These cases are consistent with the "history of Rule 6(e)," which "indicate[s] that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts." *In re Hastings*, 735 F.2d at 1269, *quoted in Aisenberg*, 358 F.3d at 1347 n.30; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (stating that courts should "not lightly assume" that the Federal Rules diminish "the scope of a court's inherent power").

As a result of the courts' leading role, "exceptions to the secrecy rule generally have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *Am. Historical Ass'n*, 49 F. Supp. 2d at 286 (quoting *In re Hastings*, 735 F.2d at 1268). For example, in 1977, the Rule was amended to change the definition of "other government personnel" to whom disclosure may be made, following a trend in the courts of allowing disclosure to certain government personnel. *See* Fed. R. Crim. P. 6 advisory committee's note to 1977 amendment. In 1979, the Advisory Committee added a requirement that grand jury proceedings be recorded, another change in response to a trend among the

courts. *Id.*, advisory committee's note to 1979 amendment. And in 1983, the Committee explained that Rule 6(e)(3)(C) was being amended to state that grand jury materials may be disclosed to another grand jury, which "even absent a specific provision to that effect, the courts have permitted ... in some circumstances." *Id*., advisory committee's note to 1983 amendments; *see also Am. Historical Ass'n*, 49 F. Supp. 2d at 286 (listing additional examples in which Rule 6 was revised to conform to court practices).

Notably, the Advisory Committee agrees that courts have inherent authority to unseal grand jury records in appropriate circumstances. *See* Advisory Comm. on Crim. Rules, Minutes 7 (Apr. 2012), https://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2012.pdf (emphasis added), *discussed supra* at p. 19.[2]

B. The government argues that the text and structure of Rule 6(e) bar courts from making "exceptions" in addition to those listed in Rule 6(e)(3). Although a district court's exercise of inherent authority cannot contradict any express rule or statute, the court's inherent authority is not otherwise governed by rule or statute, *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891–92 (2016), and "a district court's ability to

[2] *See also* Advisory Comm. on Crim. Rules, Agenda Book 209–71 (Apr. 2012), https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf (documenting Committee's detailed assessment of Rule 6(e)'s text, history, precedent, and policy).

order release of grand jury materials has never been confined only to application of [those] exceptions," *Am. Historical Ass'n*, 49 F. Supp. 2d at 285. The text and structure of Rule 6(e) confirm that it poses no obstacle to the courts' exercise of inherent authority to order unsealing of records in other appropriate circumstances.

Rule 6(e)(2), entitled "Secrecy," states at subdivision (A): "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Subdivision B in turn provides that specified "persons must not disclose a matter occurring before the grand jury"—including grand jurors, interpreters, court reporters, government attorneys, and certain other government personnel. Thus, the Rule does not impose a blanket nondisclosure requirement, as it does not require secrecy by witnesses, their family members, or judges, for example. *See* Rule 6, advisory committee's note to 1944 Rule ("The rule does not impose any obligation of secrecy on witnesses."). Critically, Rule 6(e)(2) does not prohibit a *court* from disclosing grand jury matters.

Immediately following subdivision (2), entitled "Secrecy," is subdivision (3), entitled "Exceptions." Although this subdivision does not address exceptional circumstances such as significant historical interest, exceptions do not exist in a vacuum; they must be exceptions *to* something. In Rule 6(e), subdivision (3) states exceptions to the subdivision (2) secrecy requirement. But in cases such as this one,

the petitioner is not seeking an exception to subdivision (2) because, again, subdivision (2) does not impose a secrecy requirement on courts. Thus here, where the petitioner does not seek an order authorizing any of the "persons" listed in Rule 6(e)(2) to disclose grand jury material, there is no need to look for an exception in Rule 6(e)(3).

Another provision, Rule 6(e)(6), also reflects district courts' authority to unseal records in circumstances in which secrecy no longer serves the purposes of the general rule. That provision, entitled "Sealed Records," states: "Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Stated otherwise, records, orders, and subpoenas relating to grand jury proceedings need *not* be kept under seal when preventing the disclosure of a matter occurring before a grand jury is no longer necessary. This provision assumes that courts have authority, not otherwise specified in the Rule, to determine "the extent" to which and for how "long" it is "necessary" to maintain secrecy.

The government, arguing that courts lack the authority to order disclosure other than pursuant to Rule 6(e), looks to *United States v. Williams*, 504 U.S. 36 (1992). In that case, the Supreme Court held that district courts may not invoke their

supervisory powers over grand juries to prescribe standards of conduct for prosecutors in grand jury proceedings. *Id.* at 46–47. At issue in *Williams* was whether a federal court may dismiss an otherwise valid indictment because the government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession. *Id.* at 37–38. The Tenth Circuit had ruled that, although such disclosure is not required, it could nonetheless be compelled under the courts' supervisory powers. In reversing, the Supreme Court did *not* suggest—as the government does here—that federal courts have *no* supervisory power over grand juries. Rather, although the thrust of *Williams* is that grand juries are operationally separate from courts and that the courts have limited power to fashion rules of grand jury procedure, *id.* at 50, the Court explicitly recognized that courts retain a measure of supervisory power over grand juries, *id*.

The Court's point in *Williams* was that courts' supervisory power over grand juries does "not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id*. Thus, the district court had overstepped when it attempted to prescribe standards for prosecutorial conduct in a grand jury proceeding. In contrast, "none of the concerns expressed in *Williams* about the exercise of supervisory power over grand jury proceedings is implicated by the

'special circumstances' exception" that petitioners advocate here. *Am. Historical Ass'n*, 49 F. Supp. 2d at 287. Allowing disclosure in exceptional cases based on historical significance in no way derogates from the historical allocation of responsibility among the grand jury, the prosecutor, and the courts discussed in *Williams*. Rather, the job of reviewing requests for access to grand jury records has always been that of the supervising court, even prior to the adoption of Rule 6(e), *Craig*, 131 F.3d at 103, because the job of retaining the permanent record of grand jury proceedings is that of the supervising court, *see Douglas Oil Co.*, 441 U.S. at 225 (noting that grand jury "records are in the custody of the district court").

Thus, in stark contrast to *Williams*, where the Tenth Circuit had invoked supervisory powers to dictate procedural rules governing the conduct of prosecutors appearing before grand juries, disclosure here would show no disrespect to the historical allocation of responsibility for grand jury proceedings—an allocation in keeping with Supreme Court precedent that goes unquestioned in *Williams*. As the district court stated in rejecting this same argument in the case involving the Alger Hiss grand jury records, Rule 6(e) has developed in response to court decisions, and "[n]othing in *Williams* suggests the Court intended to halt this long-established and well-recognized process of development of the law of grand jury secrecy." *Am. Historical Ass'n*, 49 F. Supp. 2d at 286.

Citing *Carlisle v. United States*, 517 U.S. 416 (1996), and *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the government points out that courts may not exceed the limits of federal rules. Gov't En Banc Br. 29–30. That point presents no barrier to recognition of the courts' inherent authority over grand jury materials. As the Supreme Court confirmed in *Carlisle*, courts have "inherent authority" to formulate rules. 517 U.S. at 425. Although that authority "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure," *id*. at 425–26, a court order unsealing grand jury materials in cases of exceptional historical importance does not "conflict with" Rule 6(e) because, as explained above, the Rule does not address the situation here one way or another. *See also Dietz v. Bouldin*, 136 S. Ct. at 1891–92 (stating that although a district court's exercise of inherent authority cannot contradict any express rule or statute, courts' inherent authority is not governed by rule or statute).

The rule at issue in *Bank of Nova Scotia* offers a useful contrast. In that case, the Supreme Court held that a trial court had no authority to dismiss an indictment based on prosecutorial misconduct that the court agreed was harmless, because Federal Rule of Criminal Procedure 52(a) instructs that a harmless error "shall be disregarded"—a mandate that is obviously, and necessarily, directed to courts tasked with determining the legal effect of an error. *See* 487 U.S. at 255. In contrast,

although Rule 6(e) contains a "mandate" prohibiting disclosure by certain people, the plain language of the mandate does not apply to the courts. Of course, the drafters of the Federal Rules know how to impose requirements on courts when they want to do so. *Compare* Fed. R. Crim. P. 21(a) (providing that "court must transfer" in certain circumstances), *with id.* Rule 21(b) (providing that "court may transfer" in certain circumstances); *see also*, *e.g.*, *id.* Rule 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment ...."); Fed. R. Civ. P. 6(b)(2) ("court must not extend time to act" under specified rules); *id*. Rule 16(b)(1) ("district judge ... must issue a scheduling order"). Rule 6(e) does not contain the sort of mandatory language limiting courts' discretion that appears in Rule 52(a).[3]

Moreover, Federal Rule of Criminal Procedure 57(b)—stating that "when there is no controlling law ... [a] judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district"—expressly reflects that the Federal Rules are not designed to be comprehensive. Thus, although a "court is powerless to contradict the Rules where they have spoken, … it is Rule

[3] Rule 6(e)(5)'s requirement that "the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury" imposes a mandatory requirement on courts but is inapplicable here, where no hearing is at issue.

57(b), not *Carlisle* or *Bank of Nova Scotia*, that informs us what a court may do when the Rules are silent." *Carlson*, 837 F.3d at 762–63 (citations omitted); *see also Am. Historical Ass'n*, 49 F. Supp. 2d at 287 & n.6 (rejecting government's argument based on *Carlisle*).

In short, because Rule 6(e) does not impose a secrecy requirement on courts and exercise of a district court's inherent authority would not undermine any of the purposes of Rule 6(e), Rule 6(e) presents no barrier to the courts' exercise of inherent authority to unseal records in appropriate cases.

II. Courts may exercise their inherent authority to unseal grand jury records in cases of historical significance.

A. Exercising their inherent authority, courts in several notable instances have unsealed grand jury records in cases of particular historical interest—a special circumstance justifying release of grand jury records. Although the cases are few in number, they go back several decades.

For example, in 1987, historian Gary May successfully sought the release of the minutes of grand jury proceedings pertaining to William Remington, a prominent public official who was indicted for perjury in 1950 by the second of the two grand juries involved in the Alger Hiss investigation based on testimony from former Soviet spy Elizabeth Bentley, who accused Remington of being a Communist spy. *See In re Petition of May*, No. 11-189 (S.D.N.Y. Jan. 27, 1987, as amended Apr. 17,

1987) (copy attached). In 1990, in *O'Brien*, a court ordered the disclosure of grand jury records from the investigation of the 1946 race riot in Columbia, Tennessee. *See* No. 3-90-X-35 (no opinion issued), *cited in Am. Historical Ass'n*, 49 F. Supp. 2d at 293. And in 2009, in *Tabac*, 2009 WL 5213717, at *1–2, retired law professor William Tabac petitioned for the release of the grand jury testimony of four witnesses pertaining to the 1963 jury tampering indictment of Jimmy Hoffa. Finding the testimony to be "of great historical importance," the court held that the petitioner had satisfied his burden of demonstrating special circumstances and that the balance of factors weighed in favor of releasing the testimony of a witness who was deceased, and ordered release of that witness's grand jury testimony (while denying release of the testimony of three witnesses who might still be alive). *Id.* at *2.

Granting petitions of amici here, courts have also unsealed records concerning the grand jury proceedings leading to the indictments of Alger Hiss and of Julius and Ethel Rosenberg in light of the historical impact of those cases. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 287–88 (granting unsealing of portions of transcripts from Alger Hiss grand jury proceedings related to four specific issues of historical importance); *Nat'l Sec. Archive*, 2008 WL 8985358 (granting unsealing of transcripts of all witnesses in the Rosenberg grand jury proceeding who were deceased, had consented to the release of the transcripts, or were presumed to be indifferent or

incapacitated based on their failure to object); *Nat'l Sec. Archive*, 104 F. Supp. 3d at 629 (granting petition to unseal transcripts of two witnesses in the Rosenberg grand jury proceeding who had died since 2008). In 2011, another court granted the petition of four of the amici here, based on historical importance, to unseal the transcript of the deposition of Richard Nixon taken in 1975 in connection with proceedings of the third Watergate grand jury. *See Kutler*, 800 F. Supp. 2d at 50.

Importantly, the Advisory Committee on the Federal Rules of Criminal Procedure has endorsed the approach taken in these cases. In 2011, following the decision in *Kutler*, the Department of Justice requested that the Advisory Committee on Rules of Criminal Procedure amend Rule 6(e) to specify that courts *can* unseal grand jury records in matters of historical importance. Although the government in this case belittles the interest in unsealing of grand jury records in cases of historical importance as "simply to satisfy the public's curiosity," Gov't En Banc Br. 32, the Department agreed in its letter to the Advisory Committee that disclosure of grand jury records in cases of historical importance was often sensible: "After a suitably long period, in cases of enduring historical importance, the need for continued secrecy is eventually outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government." Letter from Attorney General to Advisory Comm. on Crim. Rules, Oct. 18. 2011, at 1, *reprinted in*

Advisory Comm. on Crim. Rules, Agenda Book 217, *supra* n.2. The Committee declined to revise the rule because it found that courts were aptly addressing this situation through exercise of inherent authority. The Committee minutes state: "Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, *district judges had reasonably resolved applications by reference to their inherent authority*." Advisory Comm. on Crim. Rules, Minutes 7, *supra* p.9 (emphasis added); *see also* Agenda Book, *supra* n.2, at 209–71 (documenting Committee's detailed assessment of Rule 6(e)'s text, history, precedent, and policy).

In its brief, the government reiterates an argument—made to and rejected by the Advisory Committee—that a court's inherent authority to act does not permit it to release grand jury records based on historical importance. According to the government, a court's inherent authority extends to grand jury matters only where necessary to a proceeding occurring before the court because the courts do not have operational control over grand jury proceedings. To begin with, as the government recognizes, the precedents it cites "have only limited application to the grand jury." Gov't En Banc Br. 33. In any event, the extent of court authority over ongoing grand jury proceedings does not determine the issue here, which is not about a court's relationship to ongoing grand jury proceedings. Here, the grand jury has long since

been discharged; the records belong to the court, and the issue is one of the court's control over its own historical records.

Although the government tries to portray the recently enacted Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, as suggesting otherwise, that Act is fully consistent with the conclusion that courts have the authority to decide whether historical importance warrants unsealing of grand jury records. To assist in creating a historical archive of materials from civil rights cold cases, the Act directs the creation of a Review Board charged with accessing court records and other information on civil rights cold cases. *Id.* § 5(i). With respect to material held by a court under seal, the Act provides that the Review Board may ask the Attorney General to petition the court to release the material. *Id.* § 8. If the material is grand jury material, the Board's request "shall be deemed to constitute a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure." *Id.* § 8(a)(2). Although creation of an archive is not an exception specified in Rule 6(e), the Act assumes both that the courts have authority to release grand jury materials and that courts may do so on a "showing of particularized need." Both assumptions fully support the petitioner here.

B. Importantly, court orders unsealing historically significant grand jury records not only have advanced general understanding of our nation's history, but

also have provided important insight into the functioning of the judicial processes in important cases—a goal that the government itself seems to agree is a proper basis for exercise of the courts' inherent authority. *See* Gov't En Banc Br. 32 ("The touchstone of a court's inherent authority has always been the protection and vindication of the judicial process."). For example, the records from the Rosenberg 1950 grand jury that were unsealed in 2015 showed that Ethel Rosenberg's brother David Greenglass, himself part of the spying conspiracy, had testified that Ethel was not involved: "[H]onestly, this is a fact: I never spoke to my sister about this at all." *See* Nat'l Sec. Archive, *New Rosenberg Grand Jury Testimony Released*, July 14, 2015, https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/. At trial, however, he testified that Ethel had typed handwritten notes for delivery to the Soviets and operated a microfilm camera hidden in a console table. *Id.* (noting that Greenglass later admitted that he had lied on the stand to protect his wife). The released grand jury testimony thus suggests that prosecutors presented trial testimony concerning Ethel Rosenberg's role that they knew or had reason to know was false. *Id.* (stating "that the documents provided answers to three key questions: Were the Rosenbergs guilty of spying? Yes. Was their trial fair? Probably not. Did they deserve the death penalty? No."). The international news coverage of revelations from the records speaks to their significant historical importance. *See,*

e.g., Robert MacPherson, *Grand jury testimony brings up questions on Ethel Rosenberg guilt*, The China Post, July 17, 2015, *available at* https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/The%20China%20Post.pdf; Sam Roberts, *Secret Grand Jury Testimony from Ethel Rosenberg's Brother Is Released*, N.Y. Times, July 15, 2015, https://www.nytimes.com/2015/07/16/nyregion/david-greenglass-grand-jury-testimony-ethel-rosenberg.html; Mahita Gajanan, *'Atom spy' Ethel Rosenberg's conviction in new doubt after testimony released*, The Guardian, July 15, 2015, https://www.theguardian.com/us-news/2015/jul/15/ethel-rosenberg-conviction-testimony-released-atom-spy.

Grand jury records unsealed in other cases have made similarly important contributions to the historical record, including by shedding light on judicial proceedings. The unsealed transcripts of the Alger Hiss grand juries show that, unknown to Hiss and his defense counsel, testimony of Whittaker Chambers, the key witness against Hiss, was contradicted by two grand jury witnesses. *See* The Alger Hiss Story, https://algerhiss.com/history/new-evidence-surfaces-1990s/the-grand-jury-minutes/. Conversely, release of redacted grand jury transcripts concerning the 1963 indictment of Jimmy Hoffa by the court in *In re Tabac* suggest that concerns about prosecutorial misconduct in that proceeding are unfounded. *See* Edecio Martinez, *What Jimmy Hoffa Knew: Did Powerful Teamsters Boss Plot to Ambush*

the FBI?, CBS News, July 27, 2009, https://www.cbsnews.com/news/what-jimmy-hoffa-knew-did-powerful-teamsters-boss-plot-to-ambush-fbi/.

In *May*, the court's order unsealing the records about the grand jury proceedings concerning accused Communist William Remington itself reflects concern about the "vindication of judicial processes" similar to that which the government argues is a proper basis for courts' exercise of inherent authority to unseal grand jury records. Gov't En Banc Br. 32. The court noted "the alleged abuses of [this] grand jury which have been the subject of published decisions" gave the public a "strong interest" in "understanding of the administration of justice" in this case of "undisputed historical interest." *May*, slip op. at 4 (attached in Addendum) (citing *United States v. Remington*, 208 F.2d 567 (2d Cir. 1953); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951)).

As these examples show, courts' ability to exercise inherent authority to unseal grand jury records in cases of historical importance is a vital tool for completing the public record of significant events, including the record of the functioning of the judicial process in historically significant cases.

III. The "special circumstances" test articulated in *Craig* is an appropriate approach to determining whether to order release of grand jury materials in cases of historical importance.

The "special circumstances" test articulated in *Craig* and applied by district courts in several subsequent cases provides an appropriate framework for evaluating requests to open grand jury records. *Craig* sets forth a fact-intensive inquiry in which the court, weighing nine factors, balances the historical importance of the grand jury records against the need to maintain secrecy: (1) the identity of the parties seeking disclosure, (2) whether the government or the defendant in the grand jury proceeding opposes disclosure, (3) why the disclosure is sought, (4) what specific information is sought, (5) the age of the grand jury records, (6) the current status—living or dead—of the grand jury principals and of their families, (7) the extent to which the grand jury records sought have been previously made public, either permissibly or impermissibly, (8) the current status—living or dead—of witnesses who might be affected by disclosure, and (9) any additional need for maintaining secrecy. *See Craig*, 131 F.3d at 105–06; *cf. Douglas Oil Co.*, 441 U.S. at 223 (stating that, under Rule 6(e), "we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion" (citing *Pittsburgh Plate Glass Co.*, 360 U.S. at 399)).

Opinions in prior cases opening grand jury records show that the test does not result in automatic granting or denial of petitions, but guides thoughtful consideration to ensure that unsealing occurs only when doing so does not threaten the rationale for secrecy and does serve the public interest in a complete record in cases of historical interest. *See, e.g.*, *Craig*, 131 F.3d at 106 (affirming denial of petition); *Tabac*, 2009 WL 5213717, at *2 (after weighing *Craig* factors, granting petition); *Am. Historical Ass'n*, 49 F. Supp. 2d at 297 (after weighing *Craig* factors, granting petition as to part of the record and denying as to part). As the government seems to agree, *see* Gov't En Banc Br. 42, release of records under the *Craig* test does not threaten grand jury proceedings or undermine the purposes that support secrecy generally. Significantly, the government does not suggest that grand jury materials released on this basis have caused any problems for witnesses, targets, or prosecutors, or in any way undermined grand jury proceedings. Its silence is important because "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil Co*., 441 U.S. at 223.

CONCLUSION

For the foregoing reasons, the Court should reaffirm its decision in *In re Hastings* and affirm the district court's decision below.

Respectfully submitted,

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September 11, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 5,758 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on September 11, 2019.

/s/ Allison M. Zieve
Allison M. Zieve

ADDENDUM

In re Petition of May for an Order Directing Release of Grand Jury Minutes,
Memorandum & Order, No. 11-189 (S.D.N.Y. Jan. 27, 1987),
and Amended Order (Apr. 17, 1987).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
IN RE PETITION OF GARY MAY FOR AN ORDER DIRECTING RELEASE OF GRAND JURY MINUTES

MEMORANDUM & ORDER

M 11-189

----------X

APPEARANCES

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WHITMAN KNAPP, D. J.

Gary May, an associate professor of history at the University of Delaware, petitions for an order releasing the minutes of the Special Federal Grand Jury sitting from December 16, 1948 through June 15, 1950 that pertain to William Walter Remington. Professor May is writing a book about Remington, a prominent public official who was accused during the McCarthy era of being a Communist. The Government opposes May's petition.

It is clear that petitioner's request does not fall within the legislatively defined exceptions of Fed. R. Crim. P. 6(e). It has, however, been established in this circuit that in an extraordinary case the court need not confine itself to the strictures of Rule 6(e), but may exercise its discretion to permit disclosure. In Re Biaggi (2d Cir. 1973) 478 F.2d 489.

Five objectives for maintaining grand jury secrecy have been identified by the Supreme Court:

> 1) To prevent the escape of those whose indictment may be contemplated; 2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3) to prevent subornation of

> perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; 4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; 5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Procter and Gamble Co. (1958) 356 U.S. 677, 681-82, n.6, quoting United States v. Rose (3d Cir. 1954) 215 F.2d 617, 628-29.

None of those objectives has the remotest application to the situation at bar. The events which occurred in and were explored by the grand jury happened over 35 years ago, and the trial has similarly long since concluded. The principals involved in the grand jury proceedings are all dead, with the exception of Remington's former wife, who has already been interviewed by Professor May. Moreover, there has been extensive prior disclosure of the grand jury proceedings. The only possible interest involved here is the policy of encouraging free disclosures by persons who have information with respect to the commission of crimes. Given the circumstances just described, we do not believe that permitting disclosure of the minutes will deter individuals

with information helpful to future grand juries from coming forward [1]

In determining whether to disclose grand jury materials, we must balance the public interest in disclosure against the interest in continued grand jury secrecy. Douglas Oil Co. of California v. Petrol Stops Northwest (1979) 441 U.S. 211, 223. In the circumstances of this case, we find a considerable public interest in disclosure and no interest in secrecy. Given the alleged abuses of the grand jury which have been the subject of published decisions by our Court of Appeals, United States v. Remington (2d Cir. 1953) 208 F.2d 567, cert. denied 347 U.S. 913 (1954); United States v. Remington (2d Cir. 1951) 191 F.2d 246, cert. denied 343 U.S. 907 (1952) (Black, J. and Douglas, J. dissenting from denial of certiorari), and the undisputed historical significance of the Remington episode, the public has a strong interest in having its understanding of the administration of justice in this case based on complete and accurate historical evidence.[2]

1/ At oral argument, the government did not dispute our suggestion that no witness would have been deterred from testifying had he or she been informed that the grand jury minutes might be disclosed after the passage of 35 years.

2/ The situation is quite different from the one presented in Hiss v. Department of Justice (S.D.N.Y. 1977) 441 F. Supp. 69. There, the defendant in a criminal case was seeking to use the Freedom of Information Act to obtain discovery not available under the Federal Rules of Criminal Procedure, and the count was apprehensive of establishing a "mischievous precedent," id. at 71. No such risk is presented by the situation at bar.

In the exercise of our discretion, we grant the petition. Entry of this Order is stayed for 15 days to permit the Government to appeal. However, the Government's application for a further stay is denied.

SO ORDERED.

DATED: New York, New York
January 20, 1987

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

IN RE PETITION OF GARY MAY FOR AN ORDER DIRECTING RELEASE OF GRAND JURY MINUTES	:	AMENDED ORDER M 11-189 M 11-188

- - - - - - - - - - - - - - - - - - -x

Upon the consent of the parties, this Court's Memorandum and Order dated January 20, 1987 is hereby amended as follows:

1. Within 90 days of the date the parties affix their agreement and consent to this order, the United States Attorney's Office shall provide to Petitioner one copy, without charge, of the minutes of the Special Federal Grand Jury convened from December 16, 1948 to June 15, 1950, insofar as those minutes pertain to the investigation of William Walter Remington. If petitioner desires additional copies of the minutes, the United States Attorney's Office will provide such additional copies at 20¢ per page.

2. The United States Attorney may redact such portions of the minutes as would be subject to exemption from disclosure under the Freedom of Information Act ("the Act"), 5 U.S.C. § 552(b). The United States Attorney shall not, however, rely on Rule 6(e), Federal Rules of Criminal Procedure, as a basis for redaction, nor shall the United States Attorney rely on exemption 3 of the Act, 5 U.S.C. § 552(b)(3), insofar as exemption 3 incorporates Rule 6(e). In the event any redactions

are made, the United States Attorney shall provide petitioner an index of the redactions, including references relied upon, in accordance with the procedures set forth in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

3. The parties shall thereafter endeavor in good faith to resolve any issues concerning the applicability of such exemptions. In the event any issues concerning the applicability of such exemptions remain unresolved by the parties, any such issues may be presented to the Court for resolution consistent with the principles and procedures for determining the applicability of exemptions claimed under 5 U.S.C. § 552(b) and caselaw thereunder. The Court will retain jurisdiction for such purposes.

4. In the event the United States Attorney requests that the Court withdraw its prior Memorandum and Order in this matter from publication in the Federal Supplement, petitioner agrees to take no position on such request.

5. It is understood that petitioner may apply for an award of costs and attorneys fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, and it is understood that the Government may oppose such application. In the event such application is made, petitioner agrees to seek no more than $20,000 total in costs, attorneys fees and expenses, for any services performed up to and including the date the parties affix their agreement and consent to this order.

6. The United States Attorney agrees to move in the Court of Appeals for dismissal of its appeal in this matter with prejudice.

Dated: New York, New York

April 17, 1987

SO ORDERED:

UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

April 7, 1987

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