UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF NATIONAL SECURITY ARCHIVE, AMERICAN HISTORICAL ASSOCIATION, AMERICAN SOCIETY FOR LEGAL HISTORY, ORGANIZATION OF AMERICAN HISTORIANS, SOCIETY OF AMERICAN ARCHIVISTS, AND SAM ROBERTS FOR ORDER DIRECTING RELEASE OF GRAND JURY MINUTES	:	Misc. No. 11-188

GOVERNMENT'S MEMORANDUM OF LAW IN PARTIAL OPPOSITION TO THE PETITION FOR THE RELEASE OF GRAND JURY RECORDS

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Preliminary Statement

The United States of America (the "Government"), through its attorney, Michael J. Garcia, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in partial opposition to petitioners' request for an Order unsealing the grand jury minutes and transcripts relating to the indictments of: (1) Julius and Ethel Rosenberg for conspiracy to commit atomic espionage on behalf of the former Soviet Union (the "Rosenberg Grand Jury Materials"); and (2) Abraham Brothman and Miriam Moskowitz for, *inter alia*, conspiracy to obstruct justice, based on Brothman's false testimony before a prior grand jury regarding the nature of his relationship with Harry Gold, an admitted Soviet spy (the "Brothman/Moskowitz Grand Jury Materials").[1]

Petitioners' request is based upon a non-textual "special circumstances" exception to Rule 6(e) of the Federal Rules of Criminal Procedure, which permits a district court to disclose grand jury materials in a case of significant historical interest. Among other relevant considerations, where a prosecution stoked contemporaneous public interest and concerned matters of historical significance, the public interest in the case has persisted over time, and a substantial period of time has elapsed since the conclusion of the grand jury proceedings, the "special circumstances" exception *may* justify the public disclosure of grand jury records. Importantly, a party asserting the "special circumstances" exception bears a burden heavier than the "particularized need" standard governing requests pursuant to one of Rule 6(e)'s enumerated exceptions.

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[1] Between the two grand jury proceedings, petitioners have identified a total of 53 grand jury witnesses, whose testimony totals approximately 1500 pages. Binders containing copies of the witnesses' grand jury testimony have been separately filed with the Court under seal.

In determining whether to permit disclosure, courts must carefully consider the need for disclosure against the salutary interests in maintaining continued secrecy underlying Rule 6(e), such as ensuring that future grand jury witnesses are not dissuaded from testifying out of fear that their testimony someday might be divulged against their will. Indeed, this concern is particularly acute in cases of widespread notoriety – such as those forming the basis of a "special circumstances" petition – as witnesses fearing public scrutiny might not come forward and cooperate if the very notoriety surrounding the case can serve as a basis for the non-consensual disclosure of their testimony during their lifetime.

Here, the Government does not dispute that the Rosenberg atomic spy trial is a case of significant historical importance within the meaning of the "special circumstances" exception, and does not oppose the entry of an Order unsealing the grand jury testimony of those Rosenberg grand jury witnesses who are deceased[2] or who consent to disclosure, *i.e.* 35 of the 45 witnesses who testified before the grand jury. The Government, however, opposes disclosure of the testimony of the remaining witnesses who either: (1) object to disclosure; or (2) are not deceased and cannot be located to determine their position on disclosure. As to these witnesses, the public's forward looking interest in ensuring that future grand jury witnesses are not dissuaded from coming forward and testifying in high profile cases trumps the need for disclosure at this time. Importantly, this need not be the final word on disclosure, as petitioners can renew their

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[2] In addition to those witnesses who are confirmed dead, for the purposes of the petition only, the Government is presuming that witnesses whom we are unable to locate, but who would be over one hundred years old at this time, are dead. *See* Declaration of Andrew M. McNeela ("McNeela Dec.") at ¶ 5. *Cf. Schrecker v. United States Dep't of Justice*, 349 F.3d 657, 660, 664-65 (D.C. Cir. 2003) (finding reasonable FBI's "100-year rule" in FOIA context, pursuant to which person is presumed dead where responsive records indicate that he or she would be over 100 years of age).

application with respect to the remainder of the Rosenberg Grand Jury Materials when these witnesses have passed away, or when a substantial period of time has passed such that they can be presumed dead.

Finally, the Government opposes the disclosure of any of the Brothman/Moskowitz Grand Jury Materials. Unlike the Rosenberg matter, the Brothman/Moskowitz case is not one of significant historical importance. Indeed, in petitioners' brief and numerous supporting declarations, the Brothman/Moskowitz prosecution is but an afterthought that is alleged to be significant only insofar as it may possibly inform aspects of the Rosenberg prosecution. Petitioners' attempt to piggyback on the notoriety surrounding the Rosenberg case only underscores that the Brothman/Moskowitz prosecution is not, in and of itself, a case whose place in history justifies a departure from the time-honored rule of grand jury secrecy.[3]

FACTUAL BACKGROUND

The facts as related in this section are derived from the public record of the Rosenberg and Brothman/Moskowitz prosecutions, the declaration of Doctor Bruce Craig, Ph.D., submitted by the petitioners, and the following books: Sam Roberts, *The Brother, The Untold Story of the Rosenberg Case* (Random House 2003), and Ronald Radosh & Joyce Milton, *The Rosenberg File* (Yale University Press, 2d ed. 1997).

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[3] The Central Intelligence Agency ("CIA") and the National Security Agency ("NSA") both have reviewed the Rosenberg and Brothman/Moskowitz Grand Jury Materials, and do not have any objections to disclosure based on the presence of classified information or other CIA or NSA equities. The Federal Bureau of Investigation ("FBI"), however, is still in the process of reviewing the Grand Jury Materials, and the Government expressly reserves the right to object to the disclosure of any of the Grand Jury Materials, in whole or in part, once the FBI has completed its review.

A. The Grand Jury Proceedings

1. *The Rosenberg Grand Jury*

The events leading to the indictment of the Rosenbergs began with the arrest of Klaus Fuchs, a Canadian physicist associated with the Manhattan Project, who confessed to British Intelligence in 1950 that he had provided sensitive information to the Soviets regarding the atomic bomb in the early to mid-1940's. In his confession, Fuchs implicated, among others, a United States soldier who acted as his courier and whom he knew only by the code-name "Raymond." The FBI soon determined that "Raymond" was Harry Gold, a Columbia educated chemist, who confessed to providing Fuchs with secret atomic information, and recounted that he, in turn, had been provided with such information by a soldier stationed at the secret atomic-bomb research facility in Los Alamos, New Mexico. This soldier was later revealed to be David Greenglass, Ethel Rosenberg's brother. During his interrogation by the FBI, Greenglass soon confessed and implicated his wife, Ruth Greenglass, and his brother-in-law, Julius Rosenberg.

Based on information provided by David and Ruth Greenglass, and obtained during the FBI's interrogation of Julius Rosenberg, a criminal complaint was filed against Julius in the United States District Court for the Southern District of New York on July 17, 1950. Julius was arrested and arraigned that same day. After refusing to testify before the grand jury, Ethel was arrested on August 11, 1950. On August 17, 1950, after seventeen days of testimony, the federal grand jury returned an indictment charging the Rosenbergs with conspiracy to commit espionage, in violation of § 2 of the Espionage Act, 50 U.S.C. § 34. The same grand jury returned

substantially similar superseding indictments on October 10, 1950, and January 31, 1951.[4] On February 2, 1951, the Rosenbergs appeared before the district court and entered pleas of not guilty. They were convicted on March 29, 1951, sentenced to death on April 5, 1951, and executed via the electric chair at Sing Sing Prison on June 19, 1953.

2. *The Brothman/Moskowitz Grand Jury*

Abraham Brothman, a.k.a. "the Penguin," was first called before the special grand jury in 1947 to answer allegations made by one-time Soviet spy Elizabeth Bentley that Brothman's Queens County engineering firm had served as a clearinghouse for Soviet industrial espionage. Although there was insufficient evidence at that time to indict Brothman, subsequent testimony provided by former spy turned Government witness Harry Gold, led to Brothman's arrest in 1950 for obstruction of justice, on the ground that he testified falsely before the special grand jury in 1947 regarding his business relationship with Harry Gold. Miriam Moskowitz, Brothman's business partner, was arrested and charged with conspiracy to obstruct justice based on assistance she provided to Brothman in concocting his false testimony. Brothman and Moskowitz appeared before the grand jury in July of 1950, went to trial on November 8, 1950, and were convicted as charged on November 22, 1950. Brothman received a seven year sentence, while Moskowitz received a two year sentence.

B. The Petition

Petitioners are the National Security Archive, a non-profit institution affiliated with George Washington University; four other national associations of historians and archivists; and

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[4] The final superceding indictment named as co-defendants Morton Sobell and Soviet Vice Consul Anatoli Yakovlev.

a reporter for the New York Times. Petitioners argue that the release of the Rosenberg Grand Jury Materials is justified by the extraordinary historical importance of that case, and because none of the factors favoring grand jury secrecy is present here. *See* Brief of Petitioners ("Br.") at 1-3, 14-46. In particular, petitioners stress that more than 50 years have passed since the prosecution, the principal parties to the prosecution are all dead, as well as several of the grand jury witnesses, the children of the Rosenbergs and their co-defendant, Morton Sobell, favor disclosure, and information regarding aspects of the grand jury proceedings has already been made publicly available in several sources, thereby purportedly significantly reducing any privacy interests pertaining to such materials. *See id.* at 16-25, 38-46.

In addition to the general historical significance of the Rosenberg case, petitioners contend that disclosure of the grand jury materials will likely shed light on numerous ongoing points of academic debate, including: (1) the reasons underlying the prosecution's decision to call a small percentage of the grand jury witnesses to testify at trial; (2) whether Ethel Rosenberg was as deeply involved in the espionage activities as the prosecution claimed, or whether her indictment was brought as a means of pressuring Julius to confess; (3) the extent of alleged inconsistencies between David Greenglass' grand jury and trial testimony; (4) whether the evidence presented against Morton Sobell was sufficient to warrant his inclusion in the indictment on the conspiracy charge; and (5) whether the grand jury was presented with evidence gathered pursuant to the United States' counter-intelligence activities. *See id.* at 28-36.

In support of their application, petitioners have submitted fifteen declarations from various professors and historians; a correspondent for the New York Times; a staff attorney at the Media Bureau of the Federal Communications Commission; Morton Sobell; and Robert

Meerpol, one of the Rosenbergs' sons. The majority of the declarants opine about the continued historical importance of the Rosenberg case, and the alleged need to release the requested materials.[5]

ARGUMENT

THE COURT SHOULD ONLY DISCLOSE THE TESTIMONY OF THE ROSENBERG GRAND JURY WITNESSES WHO EITHER ARE DECEASED OR CONSENT TO DISCLOSURE, AND SHOULD NOT DISCLOSE ANY OF THE BROTHMAN/MOSKOWITZ GRAND JURY MATERIALS

A. The Rule of Grand Jury Secrecy

1. Principles Underlying Grand Jury Secrecy and the "Particularized Need" Standard

"There is a tradition in the United States, a tradition that is 'older than our Nation itself,' that proceedings before a grand jury shall generally remain secret." *In re Craig*, 131 F.3d 99, 101 (2d Cir 1997) (quoting *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973)). This tradition, as the Supreme Court consistently has recognized, stems from the fact "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Indeed, the rule of grand jury secrecy has been justified by the important ways it is said to contribute to the success of grand juries and to the protection of the witnesses who appear before them. The rule's purposes are:

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[5] Although the identities of grand jury witnesses are generally shielded from disclosure by the rule of grand jury secrecy, *see United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988), petitioners were able to identify each of the grand jury witnesses here because the regional office of the National Archives and Record Administration's Northeast Region revealed their identities when it provided researchers with an index that identified the non-public grand jury records. Such information has been included in petitioners' public filing with the district court in this matter. *See* Declaration of Bruce Craig in Support of the Petition ("Craig Dec."), at Appendix 1.

> (1) [t]o 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 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; [and] (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 & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958) (internal marks omitted). These interests are embodied in Rule 6(e) of the Federal Rules of Criminal Procedure. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (citing *Procter & Gamble*, 356 U.S. at 681); *see also* Fed. R. Crim. P. 6(e)(2).[6]

"The rule of secrecy, however, is not without exceptions." *In re Craig*, 131 F.3d at 102; *see also* Fed. R. Crim. P. 6(e)(3). "These exceptions gradually have been adopted to reflect traditional practices of courts and evolving views as to the desirability of disclosure in certain circumstances." *In re American Historical Ass'n*, 49 F. Supp. 2d 274, 283 (S.D.N.Y. 1999) (citing advisory committee notes to Fed. R. Crim. P. 6). A private party requesting disclosure of grand jury materials bears the "burden of demonstrating particularized need, *i.e.*, that (a) the material sought is needed to avoid possible injustice, (b) the need for disclosure is greater than the need for secrecy, and (c) the request is structured to cover only material so needed." *Cullen v. Margiotta*, 811 F.2d 698, 715 (2d Cir. 1987); *see also Douglas Oil*, 441 U.S. at 222 (same);

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[6] Pursuant to Rule 6(e), grand jurors, interpreters, court reporters, operators of recording devices, persons who transcribe recorded testimony, attorneys for the Government, and persons to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii), are, subject to certain limited exceptions, prohibited from disclosing a matter occurring before the grand jury. *See* Fed. R. Crim. P. 6(e)(2).

United States v. Sells Engineering, 463 U.S. 418, 443 (1983) (requiring "a strong showing" of particularized need for grand jury materials before any disclosure). This showing must be made even where the grand jury whose material is being sought has concluded its operations. *Douglas Oil*, 441 U.S. at 222.

2. Significant Historical Importance as a "Special Circumstance" Justifying the Disclosure of Grand Jury Materials

In this case, petitioners have not argued that their request is covered by one of Rule 6(e)'s limited exceptions to grand jury secrecy, or that it meets the "particularized need" standard that governs the application of those exceptions. Instead, petitioners contend that "special circumstances" justify disclosure of the grand jury materials, even though none of Rule 6(e)'s specific exceptions is satisfied. The asserted "special circumstances" in this case are the purported significant historical importance of the Rosenberg and Brothman/Moskowtiz prosecutions. Petitioners' argument rests primarily on three decisions: *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973); *In re Craig*, 131 F.3d 99 (2d Cir. 1997); and *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999), each of which is discussed in turn.[7]

i. *In re Biaggi*

The Second Circuit first recognized the vitality of non-textual exceptions to the rule of grand jury secrecy in *In re Biaggi*, which involved an appeal from an order granting the motion

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[7] No other circuit court of appeals has recognized significant historical importance as an exception to grand jury secrecy, although a few courts have recognized the viability of other non-textual exceptions to Rule 6(e). *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006) (noting that there was "substantial support" for position that "a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in" Rule 6(e)) (internal marks omitted). The Supreme Court, however, has not yet decided whether a district court's authority to disclose grand jury materials is cabined by Rule 6(e). *See id.*

of the United States Attorney for the Southern District of New York to publicly disclose the grand jury testimony of Mario Biaggi, then a member of the House of Representatives and a candidate in the Democratic primary for nomination for mayor of New York City. *See* 478 F.2d at 490. The United States Attorney's motion was occasioned by Biaggi's public statements that he sought to air his grand jury testimony to refute allegations that he had asserted his Fifth Amendment right against self-incrimination in response to several questions posed by the grand jury regarding his personal finances. *See id.* Biaggi did not contest the release of his testimony in general, but objected to the portion of the district court's order directing that such materials be "redacted so as not to reveal the names of other persons or businesses mentioned therein." *Id.* Biaggi asserted that such redactions would lead "to endless speculation about the blanked-out names, and would perhaps involve him in libel suits were he to reveal such names himself." *See id.* at 490-91.

In assessing the appropriateness of the district court's order directing disclosure of Biaggi's grand jury testimony, the Court began its analysis by noting that none of the exceptions codified in Rule 6(e) was applicable. *See id.* at 492. Moreover, commenting on the public intrigue surrounding the matter, the Court observed that "[n]o matter how much, or how legitimately, the public may want to know whether a candidate for high public office has invoked the privilege against self-incrimination before a grand jury, or has lied about having done so, that interest must generally yield to the larger one of preserving the salutary rule embodied in Rule 6(e)." *Id.* at 493.

Nonetheless, the Court affirmed the district court's decision, holding that Rule 6(e) does not impose an absolute limit on a district court's exercise of its "sound discretion," and that

grand jury materials may be released outside the specific confines of Rule 6(e) when "the special circumstances" of the case warrant. *Id.* at 494. The Court found that "special circumstances" were present, given that both Biaggi and the Government had waived any protections/benefits owing under Rule 6(e) by requesting disclosure to address an issue of significant public importance, and that "the interests of the grand jurors [would] not be affected" because "they asked no questions and their names could be redacted if they had." *Id.* Finally, the Court noted that the privacy interests of those individuals mentioned in Biaggi's testimony could be accommodated through redaction, which the district court had ordered. *See id.*

ii. *In re Craig*

In *In re Craig*, the district court (Judge Scheindlin) denied the application of Bruce Craig, then a doctoral candidate at American University (and currently a declarant in the instant action), for an order directing the release of grand jury records pertaining to Harry Dexter White, a former Assistant Secretary of the Treasury who had been accused of being a Communist spy. *See* 942 F. Supp. 881, 882 (S.D.N.Y. 1996). Although the petitioner conceded that none of the exceptions to grand jury secrecy applied, he argued that the significant historical and public interest in the grand jury records justified their disclosure pursuant to the court's "inherent supervisory authority" over grand juries. *Id.* at 882. The district court disagreed, distinguishing prior cases in which historians had been granted access to grand jury records regarding accused Soviet spies,[8]

[8] For example, the district court noted that although "the court granted a scholar's request to disclose the grand jury testimony of a public official accused of being a Communist spy," in *In re Petition of May*, No. M 11-189 (S.D.N.Y. Jan. 20, 1987) (slip opinion available at 13 Med. L. Rep. (BNA) 2198 (S.D.N.Y. 1987)), "it did so only because the conduct of the grand jury had been the subject of litigation, and there had already been extensive prior disclosure of the grand jury proceedings." *In re Craig*, 942 F. Supp. at 883 (internal marks omitted).

and noting that "if courts granted disclosure whenever the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated." *Id.* at 883.

In upholding the district court's decision, the Second Circuit reaffirmed the *Biaggi* "special circumstances" exception to grand jury secrecy, and further explained the exception's rationale and proper application. *See* 131 F.3d at 101-04. The Second Circuit explained that the disclosure of grand jury materials pursuant to the "special circumstances" exception is not only consistent with the broad discretion vested in courts regarding matters of grand jury secrecy, but also with the principle that Rule 6(e) is not a straightjacket on the exercise of such discretion. *See id.* at 102 ("Although . . . Rule 6(e)(3) governs almost all requests for the release of grand jury records, this court has recognized that there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule.").

Importantly, however, the Second Circuit cautioned that disclosure under the "special circumstances" exception is warranted only upon a fact-intensive analysis of the basis for disclosure, and only if the movant has satisfied a "burden . . . *greater*" than the "particularized need" standard governing requests pursuant to one of Rule 6(e)'s enumerated exceptions. *See id.* at 105-06 & n.10 (emphasis added). With respect to the kind of "special circumstances" that may justify disclosure, the Second Circuit emphasized that significant historical interest in grand jury materials may, "in an appropriate case," constitute a "special circumstance." *See id.* at 105 ("Lest there be any doubt in the matter . . . we today hold that there is nothing . . . that prohibits historical interest, on its own, from justifying release of grand jury material in an appropriate case."). In this connection, the Second Circuit noted that, for example, had President Lincoln's assassination or Aaron Burr's conspiracy to create an independent nation in the center of North

America resulted in grand jury investigations, the public's interest in such materials "might now overwhelm any continued need for secrecy." *See id.* at 105

The Court then enumerated a non-exhaustive list of factors "that a trial court may consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions," which include:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceeding and that of their families; (vii) the extent to which the desired material -- either permissibly or impermissibly -- has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Id. at 106.

Elaborating on these factors, the Court observed that both the identity of the requestor and the position of the Government should be accorded "great weight." *See id.* at 106. Thus, as the Court explained, "if a third-party stranger wished to obtain the release of data about secret meetings over the objection of the defendant . . . then the trial judge should be extremely hesitant to grant release of the grand jury material." *Id.* Conversely, where the Government consents to disclosure, "that should serve as preliminary indication that the need for secrecy is not especially strong." *Id.*

The Court added that the specificity of the request "is significant in at least two ways": there are "obvious differences between releasing one witness' testimony, the full transcript, or merely the minutes of the proceeding"; and "it is highly relevant whether the disclosure is general or limited to a specified number of people under special circumstances." *Id.* at 106-07.

Meanwhile, the "timing of the request remains one of the most crucial elements." *Id.* at 107. If historical interest has persisted over the passage of many years, that serves as an important indication that public interest in the release of such materials is substantial. *Id.* In addition, "the passage of time erodes many of the justifications for continued secrecy," such as by bringing about the death of the principal parties involved in the investigation. *Id.* "Finally, the extent to which the grand jury material in a particular case has been made public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy." *Id.*

Notably, in affirming the district court's decision, the Second Circuit held that the district court did not abuse its discretion in rejecting the petitioner's request on the ground that, *inter alia*, "the current disclosure would involve some witnesses who are still alive." *Id.* at 107 ("Under the circumstances, we conclude that [the district court's] ultimate decision that the public interest and other factors involved in the petitioner's case did not justify disclosure was not an abuse of discretion.").

iii. *In re American Historical Ass'n*

The final case in the "special circumstances" trilogy, and the only district court decision in this Circuit to have applied the *Craig* factors, is *In re American Historical Ass'n*. There, a coalition of petitioners similar to those in the instant case sought the release of grand jury records regarding the Alger Hiss prosecution. *See* 49 F. Supp. 2d at 277-78. Although petitioners admitted that their request was not rooted in any exception to grand jury secrecy enumerated in Rule 6, they asserted that "the manifest historical importance of the materials justifies disclosure

pursuant to the 'special circumstances' exception to grand jury secrecy." *Id.* at 283.[9]

The Government opposed disclosure pursuant to a blanket assertion of grand jury secrecy, arguing, *inter alia*, that: "(i) the special circumstances exception is not viable under controlling Supreme Court precedent; [and] (ii) even if it is viable, historical interest alone cannot constitute a 'special circumstance.'" *Id.* at 285. The district court rejected both of the Government's arguments. *See id.*

Addressing the first argument, the district court (Judge Leisure) held that the "special circumstances" exception to grand jury secrecy had been explicitly endorsed by the Second Circuit in *Craig*, *see id.*, and was not inconsistent with Supreme Court precedent holding that a district court's supervisory power to fashion rules of grand jury secrecy was limited, *see id.* at 285-86 (observing that *Craig*, which was decided five years after the Supreme Court cases relied upon by the Government, implicitly rejected the Government's reading of those cases). The district court then held that *Craig* foreclosed the Government's second argument that historical interest, itself, cannot suffice to constitute a "special circumstance." *See id.* at 287-88 (quoting *Craig*, 131 F.3d at 105).

Turning to the merits of the petition, the district court found "that petitioners [had] satisfied their burden to show an *especially significant*, particularized need justifying disclosure

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[9] In support of their motion, petitioners "submitted an extensive declaration by Craig that summarizes publicly-available information regarding the Hiss matter and the grand jury proceedings, and that sets forth specific reasons why disclosure is allegedly warranted. Petitioners also . . . submitted declarations by ten other historians who attest to various allegedly historically significant aspects of the Hiss case and of the grand jury records . . . [and] attesting to the continued public interest in the Hiss case." *Id.* at 281-82. In addition to the general historic importance of the Hiss case, petitioners also identified several specific areas of ongoing academic debate that might benefit from the public disclosure of the grand jury materials. *See id.* at 295-97.

of most of the requested materials," and that aside from "its generic objections to disclosure, the Government does not contend there is any particular reason to keep secret the fifty-year old grand jury materials at issue." *Id.* at 291 (emphasis added). In particular, the court noted that the Government did not assert a national security interest in maintaining the materials' secrecy or proffer an "argument that disclosure would undermine any of the rationales for maintaining grand jury secrecy." *Id.* Nonetheless, the court independently examined whether disclosure of the grand jury materials was appropriate under the specific circumstances of that case, and observed that "[s]everal of the reasons for maintaining grand jury secrecy dissolved when the special grand jury investigation ended in 1950," such as the need to keep information from the targeted individual to lessen the risk of flight, or to prevent the importuning of grand jury witnesses. *Id.* (citing *Butterworth v. Smith*, 494 U.S. 624, 632-33 (1990)). Moreover, because all appeals on convictions stemming from the special grand jury had long since been resolved, "the goal of protecting from tampering or retaliation grand jury witnesses who could be called at trial also disappeared." *Id.*

Accordingly, the court identified only two remaining interests possibly justifying continued secrecy: "(i) the forward-looking interest in ensuring future grand jurors and grand jury witnesses will not be inhibited due to the possibility of subsequent disclosure of proceedings based on historical interest; and (ii) an interest in protecting the privacy of any subjects of the [grand jury] investigation whose identities have not previously been disclosed." *Id.* Although the district court noted that "[t]he first interest should not be underestimated . . . [because] careful consideration must always be given to 'the possible effect upon the functioning of future grand juries,'" *id.* at 292 (quoting *Douglas Oil Co.*, 441 U.S. at 222), it nonetheless dismissed this

admittedly weighty interest as "negligible," *id.* (determining that "inhibiting effect" of historical interest disclosure "is insignificant, especially when compared with far more immediate potential causes of disclosure, such as leaks, general press attention, public statements by witnesses and revelations at trial").

The district court further found that "[p]rivacy concerns are also of limited importance," observing that the substance of certain of the grand jury witnesses' testimony had already been publicly disclosed, "most of the relevant witnesses had died," or had consented to disclosure, and the Government did "not dispute petitioners' contention that the witnesses whose status is not known are likely to be deceased." *Id.* at 293. The district court, however, did request additional briefing "on a small number" of witnesses the Government identified in an *ex parte* submission as potentially raising specific privacy concerns. *Id.* at 293. After further investigation, the Government withdrew its privacy objections for all but two of the grand jury witnesses, based on its determination that most of "the relevant individuals either are deceased, have consented to public disclosure, or have been publicly identified in connection with the subjects of the relevant grand jury testimony." *In re American Historical Ass'n II*, 62 F. Supp. 2d 1100, 1102 (S.D.N.Y. 1999). The district court agreed that the testimony of the two individuals identified by the Government should remain secret, observing that "each relevant individual was accused during the special grand jury proceedings of having engaged in illegal activities," and that a "wide range of published materials has not . . . revealed any mention of the individuals in connection with those allegations." *Id.* at 1103.

B. The Rosenberg Grand Jury Materials Should Not Be Disclosed In Full

1. The Government Does Not Oppose the Entry of an Order Authorizing Public Disclosure of the Grand Jury Testimony of Witnesses Who Are Either Deceased or Who Have Consented to Disclosure, But Opposes Disclosure Under Any Other Circumstance

The Government does not dispute that the Rosenberg prosecution is a case of significant historical importance within the meaning of the *In re Craig* "special circumstances" rubric. Nor does the Government oppose the entry of an Order requiring disclosure of the testimony of those Rosenberg grand jury witnesses who are deceased or who consent to the release of their testimony, as such disclosure likely would not undermine the Government's forward looking interest in ensuring the unfettered cooperation of future grand jury witnesses. Of the 45 witnesses who testified before the Rosenberg grand jury, 35 fall within this category. *See* McNeela Dec. at ¶¶ 3-9 & Exs. B, D (identifying, *inter alia*, those witnesses who are deceased or who consent to disclosure).

However, the Government opposes disclosure of the testimony of the ten remaining Rosenberg grand jury witnesses – those who actively oppose disclosure or who cannot be contacted to determine their position regarding disclosure, *see* McNeela Dec. at ¶¶ 10-11, Exs. C, D (indicating that three witnesses oppose disclosure and that the Government has been unable to locate another seven witnesses) – on the grounds that permitting disclosure on historical interest grounds of a living witness's testimony without his or her explicit consent may dissuade future witnesses from coming forward and testifying, especially in cases of widespread contemporaneous notoriety. *See generally In re Craig*, 131 F.3d at 106 ("the government's position should be paid considerable heed").

As the Supreme Court has repeatedly admonished, "courts must consider not only the immediate effects upon a particular grand jury but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties." *Douglas Oil Co.*, 441 U.S. at 222; *see also Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 566-67 n.11 (1983) ("stringent protection of the secrecy of completed grand jury investigations may be necessary to encourage persons to testify fully and freely before future grand juries"). Of particular resonance here, "[f]ear of . . . social stigma may act as [a] powerful deterrent[] to those who would come forward and aid the grand jury in the performance of its duties." *Douglas Oil Co.*, 441 U.S. at 222; *see also In re May*, 602 F. Supp. 772, 775 (E.D.N.Y. 1985) ("To the extent that persons called before a grand jury are concerned that their testimony may one day be released, they may fear future retribution or social stigma, both described by the Supreme Court as 'powerful deterrents' to the giving of grand jury testimony.") (quoting *Douglas Oil*, 441 U.S. at 219, 222).

Indeed, the Second Circuit in *In re Craig* recognized that a "special circumstances" petition may properly be denied where it would require the release of living witnesses' testimony. 131 F.3d at 107 (district court did not abuse discretion in denying petition where disclosure would "involve some witnesses who are still alive"); *cf. In re American Historical Ass'n*, 49 F. Supp. 2d at 293 (granting disclosure where "[a]s to the remaining witnesses whose status has been identified . . . all but two are dead, and one of those witnesses . . . has submitted a declaration in favor of disclosure" and where "[t]he Government does not dispute petitioners' contention that the witnesses whose status are not known are likely to be deceased").

Here, there are three grand jury witnesses who affirmatively oppose disclosure,[10] and an additional seven witnesses who cannot be presumed dead and whose status (and consequently position on disclosure) the Government has been unable to determine. *See* McNeela Dec. at ¶¶ 10-11 & Exs. C, D. The testimony of these witnesses should not be made public against their will, or without knowing whether they consent to disclosure. *Cf. In re Biaggi*, 478 F.2d at 490, 493 (granting disclosure where target of investigation sought only the release of his own testimony). Such a holding potentially could undermine one of the fundamental purposes of Rule 6(e) – to encourage people with information about criminal conduct to come forward and testify. *See Procter & Gamble*, 356 U.S. at 681-82 n.6.[11]

Certainly the scrutiny leveled upon criminal investigations that garner widespread contemporaneous public attention, as well as the likely controversial/political nature of such cases (here espionage on behalf of a foreign power), will weigh heavily on the minds of potential grand jury witnesses. *See Douglas Oil Co.*, 441 U.S. at 222 (describing "social stigma" as a "powerful deterent[]" to potential witnesses). This concern is particularly acute in cases falling within the "special circumstances" exception to grand jury secrecy, as such cases, by definition,

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[10] In response to the Government's mailing, which enclosed a consent form requesting that grand jury witness indicate whether or not he opposed disclosure, *see* McNeela Dec. at ¶ 8 & Ex. A, grand jury witness Max Elichter responded that he refused to answer pursuant to rights guaranteed to him by the Fifth Amendment to the Constitution of the United States, *see id.* at Ex. C. The Government interprets Mr. Elichter's response as opposing the release of his grand jury testimony.

[11] Although the Government has been unable to contact Vivian Glassman, academic works suggest that she opposes any inquiry into her involvement with the Rosenberg matter. *See* Ronald Radosh & Joyce Milton, *The Rosenberg File*, at 128 (Yale University Press, 2d ed. 1997) ("Today Vivian Glassman lives in New York . . . . She still refuses to comment, saying only that . . . the record speaks for itself.").

will involve very high profile prosecutions of extreme significance. *See generally In re Craig*, 131 F.3d at 105 (citing to the John Wilkes Booth and Aaron Burr conspiracies as cases in which historical interest may overcome grand jury secrecy); *In re American Historical Society*, 49 F. Supp. 2d at 292-93 (noting that Hiss matter was "one of the most important" anti-Soviet espionage investigations, and that "cases of historical moment" are often accompanied by "extensive contemporaneous attention"). Because witnesses to these highly scrutinized matters may already be reluctant to testify, the potential for "special circumstances" disclosures of a living witness's grand jury testimony without his or her consent may inject further doubt in the witness's decision making process. *In re Craig*, 942 F. Supp. at 883 ("The rule [of grand jury secrecy] was intended to provide a reliable statement of the law in this area, and would be rendered meaningless if departures were freely sanctioned.").

Finally, the Government's position will not permanently hamper petitioners' efforts to complete the historical record of the Rosenberg case. Petitioners, or other interested parties, can always petition for disclosure of the remainder of the Rosenberg grand jury materials once those grand jury witnesses who have not consented to disclosure have passed away or can be presumed dead.

2. Petitioners' Arguments That the Government's Forward Looking Interests in Continued Grand Jury Secrecy Are Not Implicated in This Case Are Mistaken

Petitioners rely primarily on *In re American Historical Ass'n* in arguing that disclosure of the Rosenberg grand jury materials would not run afoul of the forward looking interest in ensuring that "future grand jury . . . witnesses will not be inhibited due to the possibility of subsequent disclosure." *American Historical Ass'n*, 49 F. Supp. 2d at 292. The district court's

analysis in that case, however, is flawed and should not be followed by this Court.

In *In re American Historical Ass'n*, the district court recognized that the forward looking interest in continuing grand jury secrecy "should not be underestimated"; nonetheless the Court declared this interest "negligible" in the context of high profile cases that fit within "special circumstances" exception. 49 F. Supp. 2d at 292. Specifically, the district court opined that:

> [w]ere this Court to order disclosure, it would be for historical reasons fifty years after the proceedings ended. The inhibiting effect of such disclosure is insignificant, especially when compared with far more immediate potential causes of disclosure, such as leaks, general press attention, public statements by witnesses and revelations at trial. Indeed, in cases of historical moment, the often extensive contemporaneous attention given to the case is likely to magnify the importance of those more proximate causes of disclosure in the minds of potential jurors and witnesses, and make the possibility of disclosure decades hence based on historical interest seem a trifling concern, or even an inevitability.
>
> Moreover, insofar as jurors and witnesses are made aware of how disclosure lawfully may occur, the effect of release of the Hiss materials is attenuated by the fact that historical interest already has been invoked in other cases to disclose grand jury materials, including materials of a younger vintage at the time of disclosure than those sought here.

American Historical Ass'n, 49 F. Supp. 2d at 292.

As a preliminary matter, the decision in *In re American Historical Ass'n* is distinguishable because in that case, unlike here, none of the living witnesses expressly objected to disclosure and the "Government [did] not dispute the petitioner's contention that the witnesses whose status is not known are likely to be deceased." *Id.* at 293.

More to the point, the district court's analysis is unpersuasive as it essentially renders the admittedly weighty forward looking interest in ensuring the proper functioning of future grand juries a nullity in all cases of notoriety, contrary to the Supreme Court's mandate that this interest be jealously guarded. *Abbott & Assocs., Inc.*, 460 U.S. at 566-67 n.11 ("stringent protection" of

rule of grand jury secrecy "may be necessary to encourage persons to testify fully and freely before future grand juries"). The district court asserts *ipse dixit* that in cases of widespread notoriety, the forward looking interest in continued grand jury secrecy is greatly lessened because of the alleged likelihood of irregularities in the grand jury process, such as leaks, press attention or public statements by certain of the witnesses. *See American Historical Ass'n*, 49 F. Supp. 2d at 492. However, it cannot and should not be the rule that the decision to maintain grand jury secrecy turns on the possibility, or even the probability, of leaks in violation of Rule 6(e).[12]

Moreover, the district court does not explain why a witness who is concerned with the public revelation of his or her testimony would discount the possibility of a "special circumstances" disclosure to the point of non-existence, merely because there are other possible avenues for the witness's testimony to be made public. *See American Historical Ass'n*, 49 F. Supp. 2d at 292. At least in certain circumstances, a concerned witness may view yet another avenue of publication – here, the "special circumstances" exception – as the straw that breaks the camel's back in determining whether to cooperate.

The district court's reasoning also erroneously presumes that the historical importance of a given case will always be manifest at the time of the grand jury proceedings, such that a potential witness would be aware of, and therefore could consider, the possibility of a "special circumstances" disclosure in the future. *See id.* Not only does this ignore the broader argument

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[12] An unauthorized leak of grand jury testimony is obviously a violation of Rule 6(e), as is, presumably, the kind of "press attention" that could result in the public disclosure of grand jury testimony, as the proper functioning of the rule would prevent the publication of anything other than speculation about the contents of a particular witness's testimony.

that such disclosures in the case of living witnesses may dissuade future witnesses from testifying, it also ignores that, in certain situations, the historical impact of a case may only reveal itself with the fullness of time, as is the case where subsequent developments increase the importance of an event that may have been seemingly unremarkable at its inception.

Finally, petitioners contend that grand jury materials in other cases "have been released on the basis of historical interest without detriment to the forward looking interest in grand jury secrecy." Br. at 39 (citing, *inter alia*, *In re American Historical Ass'n*; *In re May*, 13 Med. L. Rep. (BNA) 2198 (S.D.N.Y. 1987)). This assertion is somewhat remarkable, as it is virtually unknowable whether a potential witness has been dissuaded from cooperating with an investigation due to the possibility of a future disclosure. In any event, even if petitioners' assertion were true, that would not change the result here as the vast majority of prior "special circumstances" disclosures involved witnesses who were deceased or consented, not living witnesses some of whom affirmatively oppose disclosure. *See, e.g.*, *In re Craig*, 131 F.3d at 107 ("[i]n distinguishing *In re Petition of May*, the district court also was clearly aware of the fact that, unlike the situation in *May*, the current disclosure would involve some witnesses who are still alive"); *In re American Historical Ass'n*, 49 F. Supp. 2d at 293 ("As to the remaining witnesses whose status has been identified . . . all but two are dead, and one of those witnesses . . . has submitted a declaration in favor of disclosure. The Government does not dispute petitioners' contention that the witnesses whose status is not known are likely to be deceased.") (citation omitted).

Because the district court in *In re American Historical Ass'n* did not properly weigh the forward looking interest in ensuring the proper functioning of future grand juries, its analysis

should not be followed. Rather, the "special circumstances" exception should not apply where the witness affirmatively opposes disclosure or has not consented to disclosure (either because he or she cannot be located or failed to respond to a request for consent) and cannot be presumed dead. Accordingly, the Court should only order the release of the testimony of those Rosenberg grand jury witnesses, thirty-five in total, who are deceased or who have consented to disclosure. *See In re Craig*, 131 F.3d at 107 (affirming district court's decision not to release grand jury records where, *inter alia*, certain of the witnesses were still alive).[13]

3. There Has Been No Prior Disclosure of Grand Jury Materials Sufficient to Justify the Release of the Testimony of Those Witnesses for Whom the Government Objects to Disclosure

In their brief to this Court, petitioners argue that the substance of the testimony of certain of the Rosenberg grand jury witnesses -- including several witnesses for whom the Government opposes disclosure -- has been revealed, or at least alluded to, publicly. *See* Br. at 43-45. Although prior disclosure of grand jury testimony is one of several relevant factors under the "special circumstances" test, *see Craig*, 131 F.3d at 106, the alleged disclosures here are *de minimus* and otherwise do not justify the release of these witnesses' testimony.

For example, petitioners assert that during the Senate Permanent Subcommittee on Investigations's *Army Signal Corps – Subversion and Espionage* hearings, Perry Alexander Seay noted that he had been questioned before the grand jury about a dinner he had at Morton Sobell's

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[13] Petitioners note that prior releases of grand jury materials based on historical interest have yielded innovative scholarship, and assert that the release of the Rosenberg materials "will similarly serve to provoke additional scholarship." Br. at 41. While this may well be the case, it does not nothing to mitigate the Government's concern that the forward looking interest in maintaining grand jury secrecy will be undermined by disclosure of the testimony of witnesses who are not verifiably deceased and who have not consented to disclosure.

house. *See* Br. at 43. This limited reference to one question before the grand jury, however, is insufficient to waive grand jury secrecy, especially considering that Mr. Seay likely believed his testimony before the Senate was confidential since it was made during a closed session, *see id.* at 42-43. Moreover, while petitioners note that Max Elichter's grand jury testimony was made available to the Rosenberg defendants during their criminal trial, *see* Br. at 44, petitioners admit that such transcripts "were excluded from the official public transcript," Craig Dec. at ¶ 152 n.55. Similarly, the fact that FBI notes obtained pursuant to a FOIA request indicate that Vivian Glassman refused to answer any questions before the grand jury does nothing to reveal the substance of her testimony in the absence of the predicate questions. *See* Br. at 45; *see also* Ronald Radosh & Joyce Milton, *The Rosenberg File*, at 128 (Yale University Press, 2d ed. 1997) (1983) (noting that Glassman refused to testify, but not revealing the substance of the questioning). Finally, although petitioners claim that William Perl's grand jury testimony was revealed during his subsequent perjury prosecution, *see* Br. at 44, Professor Craig acknowledges that reports only "*suggest* that portions of Perl's grand jury testimony . . . *may* have been introduced into the Perl trial record," Craig Dec. at ¶ 237 (emphasis added).

C. The Court Should Not Authorize Public Disclosure of Any of the Brothman/Moskowitz Grand Jury Materials Because Petitioners Failed to Establish That the Case Is One of Significant Historical Importance

This Court should deny petitioners' request to unseal any of the Brothman/Moskowitz grand jury materials, *see* McNeela Dec. at Ex. E (identifying the Brothman/Moskowitz grand jury witnesses), because petitioners have failed to meet their formidable burden of establishing that the matter is of sufficient historical importance to trigger the "special circumstances" exception to Rule 6(e). *See generally American Historical Ass'n*, 49 F. Supp. 2d at 284 ("the *Craig*

decision clarifies that historical interest in grand jury materials *may, in an appropriate case*, constitute a 'special circumstance' warranting disclosure") (emphasis added).

1. To Satisfy the Special Circumstances Exception, Historical Interest in a Case Must Be Significant, the Case Must Have Received Contemporaneous Widespread Attention and Interest in the Case Must Have Persisted Over Time, and the Case Must Be of Interest to the Public at Large

As the Second Circuit made clear in *In re Craig*, "[c]ourts may order disclosure pursuant to the 'special circumstances' exception only upon a 'fact-intensive' analysis of the reasons allegedly justifying disclosure, and only if the movant has satisfied a 'burden . . . greater' than the 'particularized need' standard governing requests pursuant to an enumerated exception to the secrecy rule." *American Historical Ass'n*, 49 F. Supp. 2d at 274 (quoting *In re Craig* 131 F.3d at 105-06 & n.10) (ellipses supplied by *American Historical Ass'n*); *see also id.* at 291 (holding that petitioner's had established "*especially significant*, particularized need justifying disclosure of most of the requested materials"). Although the courts have not defined the level of "historical interest" sufficient to meet the "special circumstances" exception, they have offered several guideposts.

First, blanket assertions that the release of grand jury materials is justified by the public or historical importance of the records sought are patently insufficient. *See In re Craig*, 131 F.3d at 105 ("the 'special circumstances' test cannot be satisfied by a blanket assertion that the public has an interest in the information contained in the grand jury transcripts"); *American Historical Ass'n*, 49 F. Supp. 2d at 284 ("the *Craig* decision makes clear that merely asserting a public and/or historical interest in grand jury materials will not suffice"); *id.* (noting that application to release grand jury materials relating to Harry Dexter White "was denied in part due to

[petitioner's] failure to substantiate the alleged public interest in disclosure") (citing *In re Craig*, 942 F. Supp. 881, 882 (S.D.N.Y. 1997)).

Second, the alleged "historical interest" must be significant. *See In re Craig*, 131 F.3d at 106 (stating that "significant historical interest" is a factor militating in favor of disclosure under the "special circumstances" test); *id.* at 105 ("the [district] court quite correctly held that if courts granted disclosure whenever the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated") (internal quotation marks omitted); *American Historical Ass'n*, 49 F. Supp. 2d at 283 ("[t]he petition . . . asserts that the manifest historical importance of the materials justifies disclosure"); *In re Craig*, 942 F. Supp. at 883 ("Other courts have disclosed grand jury materials in situations not contemplated by Rule 6(e). However, like the Second Circuit, they have done so only in *truly exceptional circumstances*.") (emphasis added); Sara Sun Beale, *et al.*, *Grand Jury Law and Practice* § 5.19 (2d ed. 2005) ("The courts . . . have recognized an 'inherent authority' to disclose grand jury materials, although they have confined that authority to exceptional cases."); Br. at 13 (*In re Craig* held "that when historical interest is sufficiently substantial, historical interest alone will justify the release of grand jury records.").[14] Indeed, in describing the types of cases in which the public's interest in a complete historical record would likely overcome the continued need for grand jury secrecy, the Second Circuit cited the John Wilkes Booth and Aaron Burr conspiracies, both watershed moments in United States history. *See In re Craig*, 131 F.3d at 105; *cf. American Historical Ass'n*, 49 F. Supp. 2d at 293 ("Of all the events pertaining to [Soviet espionage against the United States], the Hiss case is among *the*

[14] In this connection, petitioners have described the Rosenberg case as the "trial of the century," Br. at 3, and the "defining moment of the early Cold War," *id.* at 11, and have characterized the public's interest in the Grand Jury Materials as "overwhelming," *id.* at 2.

most historically important.").

Third, a case must have generated widespread contemporaneous public attention and sustained such interest over time. *See In re Craig*, 131 F.3d at 107 ("if historical interest in a specific case has persisted over a number of years, that serves as an important indication that the public's interest in release of the information is substantial"); *American Historical Ass'n*, 49 F. Supp. 2d at 294 (noting that the Hiss case, [i]n its own time . . . was widely publicized," that it "continued to receive significant attention in the decade following Hiss's conviction," and that "[t]o the present day, interest in the case persists among historians and the public"); *id.* ("Indeed, if anything, attention given to the case has recently intensified."); Br. at 16-23 (explicating the "Widespread Contemporaneous Interest" and the "Continuing Historical Interest" in the Rosenberg case) (italics omitted).

Fourth, the case must be of concern to the public at large, and not merely to some subset of interested individuals. *In re Craig*, 131 F.3d at 107 (discussing "public's interest" in release of grand jury information); *id.* at 105 n.8 ("Historical interest is thus distinguishable from journalistic intrigue, public curiosity, or even a subjective importance to family and friends."); *American Historical Ass'n*, 49 F. Supp. 2d at 294 (noting that interest in Hiss case continued "among historians *and the public*") (emphasis added); *id.* at 295 ("*The public* must acquire, at an appropriate time, a significant, if not compelling interest, in ensuring the pages of history are based upon the fullest possible record.") (emphasis added).

2. Petitioners Have Failed to Establish That the Historical Interest in the Brothman/Moskowitz Prosecution Is Sufficient to Overcome the Rule of Grand Jury Secrecy

Against the above backdrop, the instant petition fails because petitioners have not established that the Brothman/Moskowitz prosecution received contemporaneous and sustained widespread attention or that the general public has an interest in the release of these materials sufficient to overcome the rule of grand jury secrecy.

As a preliminary matter, it is simply not the case that one speaks of Boothe's assassination of President Lincoln at the Ford Theater, Burr's scheme to establish an independent nation in the center of North America, and the obstruction of justice prosecution of Brothman and Moskowitz in the same breath. *See In re Craig*, 131 F.3d at 105. Indeed, while the Rosenberg atomic spy prosecution stands in good company with the foregoing examples, *see* Br. at 3 (describing Rosenberg case as the "trial of the century"), the Brothman/Moskowitz prosecution has not held and does not hold the same place in the public's consciousness.[15]

This commonplace observation is supported by even a casual reading of petitioners forty-seven page brief, which discusses at great length the public's "overwhelming" historical interest in the Rosenberg Grand Jury Materials to the exclusion of any serious analysis of the purported

[15] Nor does the Brothman/Moskowitz prosecution compare favorably with other cases in which grand jury materials have been released based on significant historical interest. *See American Historical Ass'n*, 49 F. Supp. 2d at 274 (granting the release of the grand jury records of Alger Hiss, a high-ranking State Department Official); *In re May*, 13 Med. L. Rep. (BNA) 2198 (S.D.N.Y. 1987) (disclosing grand jury records pertaining to William Remington, a prominent public official). Those cases, unlike the Brothman/Moskowitz case, involved the compelling issue of Soviet infiltration at high levels of our Government. Indeed, petitioners do not, and could not, seriously contend that the Brothman/Moskowitz grand jury proceedings are more historically significant than those relating to Harry Dexter White, a former Assistant Secretary of the Treasury and alleged Soviet agent. *See In re Craig*, 131 F.3d at 107 (affirming district court's refusal to release the Harry Dexter White grand jury records).

importance of the Brothman/Moskowitz matter. *See* Br. at 16-46 (discussing the general and specific historical interest in the Rosenberg case, and that such interest outweighs the need for grand jury secrecy). Nowhere do petitioners contend that the Brothman/Moskowitz obstruction of justice prosecution garnered even a fraction of the widespread contemporaneous coverage of the Rosenberg matter, *see* Br. at 16-18, or that it has stoked continued public interest of any note, *see id.* at 18-23 (cataloging numerous articles and publications over the years regarding the Rosenberg matter); *cf. In re American Historical Ass'n*, 49 F. Supp. 2d at 294 ("Indeed, if anything attention given to the [Hiss] case has recently intensified.").

Indeed, a search of several legal and/or media databases shows that the Brothman/Moskowitz matter has received scant recent attention. *See* McNeela Dec. at ¶¶ 14-16 & Exs. F, G, H. For example, on Westlaw's "Law Journals and Law Reviews" database, "Miriam Moskowitz" yielded zero matches and "Abraham Brothman" yielded only two matches while "Ethel Rosenberg" was mentioned in over 211 articles. *See* McNeela Dec. at ¶ 14 & Ex. F. Similarly, a Lexis/Nexis search of the "Magazine Stories, Combined" and "News, All (English, Full Text)" databases netted six hits a piece for Brothman and Moskowitz[16], while "Ethel Rosenberg" is mentioned in over 3,000 articles. *See* McNeela Dec. at ¶ 15 & Ex. G.

Nor do petitioners contend that, in addition to general historical interest, the release of the Brothman/Moskowitz grand jury materials is necessary to answer issues of specific historical interest regarding that case. *See In re American Historical Ass'n*, 49 F. Supp. 2d at 295 (declining to address whether general historical importance alone is sufficient to justify release of

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[16] The name "Miriam Moskowitz," in fact, yielded nineteen "hits," but thirteen of those references were to different Miriam Moskowitzs than the one at issue here.

grand jury materials "because petitioners do not rest their case solely or even principally upon such general arguments. Rather, in addition to establishing that the Hiss case generally is of great historical importance, petitioners have asserted several specific reasons why disclosure of the requested grand jury materials is necessary . . . ."); *see also* Br. at 28-36 (identifying six issues of specific historical importance that may be answered by the release of the Rosenberg grand jury materials).

Rather, in those few instances in which petitioners discuss the Brothman/Moskowitz prosecution, they essentially concede that it is not, in and of itself, a case of significant historical importance, but argue instead that disclosure of the grand jury records is justified because such materials may possibly be relevant to an understanding of the Rosenberg prosecution. *See* Br. at 30 (theorizing that "[t]he testimony of Brothman and Moskowtiz, who were believed to be connected with Harry Gold and Elizabeth Bentley, may also reveal other evidence the prosecution used to pursue charges against the Rosenbergs"); Craig Dec. at ¶¶ 3, 129-30 (referring to the Brothman/Moskowitz prosecution as a dress rehearsal for the Rosenberg case).[17]

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[17] Notably, petitioners contention that the Brothman/Moskowitz prosecution served as a "dress rehearsal" for the Rosenberg case and "provided the opportunity for prosecutors to test the tactics and some of the key witnesses that they planned to use against the Rosenbergs," Craig Dec. at ¶¶ 129-30, is supported by any authority other than petitioners' own conjecture. Although petitioners observe that the same district judge and prosecutors were involved in both cases, and that a few of the grand jury witnesses overlap, petitioners do not dispute that the defendants in the Rosenberg and Brothman/Moskowitz prosecutions were separately indicted and tried on wholly separate charges. Indeed, petitioners own account of the public record regarding these cases makes clear that the 1950 Brothman/Moskowitz grand jury proceedings investigated whether Brothman had lied when he previously testified before the same grand jury in 1947 regarding his relationship with Harry Gold. *See* Craig Dec. at ¶¶ 4, 56-58, 131-40. That Brothman did, in fact, lie was the basis for the indictment the grand jury returned against Brothman and Moskowitz for conspiracy to obstruct justice, and their subsequent convictions. *See id.* Petitioners have pointed to nothing in the public record remotely indicating that the Brothman/Moskowitz grand jury proceedings in any way involved the Rosenbergs.

In essence, petitioners are trying to piggyback on the notoriety surrounding the Rosenberg matter to unseal the records in a far less important, and distinct case. Petitioners, however, cite absolutely no authority for the proposition that the extraordinary "special circumstances" exception to the rule of grand jury secrecy extends so far as to encompass cases that are alleged to be important only insofar as they have some nexus to another case of historical interest. *In re Craig*, 942 F. Supp. at 883 (non-textual exceptions to Rule 6(e) applied in only "truly exceptional circumstances") (emphasis added); Sara Sun Beale, *et al.*, *Grand Jury Law and Practice* § 5.19 (2d ed. 2005) (same).

Accordingly, this Court should not unseal any of the Brothman/Moskowitz grand jury materials, *see* McNeela Dec. at Ex. E, because petitioners have not "satisfied their burden to show an especially significant, particularized need justifying disclosure." *In re American Historical Ass'n*, 49 F. Supp. 2d at 291; *see also id.* at 284 (noting that application to release grand jury materials relating to Harry Dexter White "was denied in part due to [petitioner's] failure to substantiate the alleged public interest in disclosure") (citing *In re Craig*, 942 F. Supp. at 882).

Conclusion

The Court should deny the petition to the extent it seeks the release of the testimony of those Rosenberg grand jury witnesses who either objected to disclosure or whose status cannot be determined, and should deny the release of any of the Brothman/Moskowitz grand jury materials.

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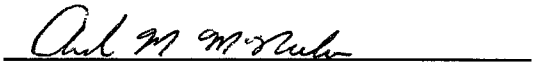
Attorney for the United States of America

By: 

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