No. 15-2972

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELLIOTT CARLSON, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, NATIONAL SECURITY ARCHIVE, NAVAL HISTORICAL FOUNDATION, NAVAL INSTITUTE PRESS, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY FOR MILITARY HISTORY

Petitioners-Appellees,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 14-cv-09244 (Castillo, J.)

CORRECTED BRIEF FOR RESPONDENT-APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION

Rule 6(e) of the Federal Rules of Criminal Procedure "codifies the traditional rule of grand jury secrecy." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996). Enacted in relevant part directly by Congress, Rule 6(e) prohibits the disclosure of grand jury materials by non-witnesses "[u]nless these rules provide otherwise." Rule 6(e)(2)(B). The Rule identifies only a handful of narrowly tailored circumstances in which a court may authorize such a disclosure.

In this case, the district court granted a petition to disclose materials from a 1940s grand jury proceeding solely because the proceeding is of historical interest. The district court did not suggest that any provision of Rule 6(e) permits disclosure on this basis. Rather, the court concluded that it had "inherent authority" to authorize the release of grand jury materials—in their entirety, unconnected to any pending or anticipated judicial proceeding, and without any textual anchor in Rule 6(e)—solely on a showing of historical significance.

The district court's decision is incorrect and should be reversed. The text of Rule 6(e) prohibits the disclosure of grand jury materials "[u]nless these rules provide otherwise." It is undisputed that nothing in the Federal Rules permits the disclosure of grand jury materials solely on the basis of their historical significance. Nor can the district court's order rest on any plausible conception of a court's "inherent authority." Neither this Court nor the Supreme Court has ever suggested that a court's inherent authority extends to broader judgments of social policy, such as whether the rule of grand-jury secrecy should yield to particular claims of historical interest. No authority of that kind is "inherent" in the exercise of judicial power.

As a matter of policy, the United States would support the adoption of rules providing for public access to historically significant grand jury materials, subject to appropriate safeguards. That policy decision, however, must be made either by Congress or by the Supreme Court pursuant to its rulemaking authority. Absent legislation or rulemaking, there is no legal basis for the breach of grand jury secrecy ordered by the district court here.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 to decide a question of the court's authority to disclose grand jury materials under Federal Rule of Criminal Procedure 6(e). *See* JA6; JA11.[1] The district court entered an opinion and order granting the petition and entered final judgment on June 10, 2015. A20, 21. The United States filed a timely notice of appeal on August 7, 2015. JA145; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether, notwithstanding Rule 6(e) of the Federal Rules of Criminal Procedure, a district court may order the disclosure of secret grand jury testimony solely on a showing of historical interest.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

Rule 6 of the Federal Rules of Criminal Procedure governs the conduct of grand jury proceedings. *See generally* Fed. R. Crim. P. 6. The

[1] Citations to the documents in the Appendix are "A_." Citations to the documents in the separate Joint Appendix are "JA_."

Rule specifies, for example, who may be present when the grand jury is in session, and who may be present when the grand jury is voting. *See* Rule 6(d). It specifies that the attorney for the government shall "retain control" of any recording or transcript of the proceeding. *See* Rule 6(d)(1); Rule 1(b)(1) (defining "attorney for government"). And, as particularly relevant here, Rule 6(e) "codifies the traditional rule of grand jury secrecy." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996).

Rule 6(e) prohibits all participants in the grand jury proceeding (other than witnesses) from disclosing any "matter occurring before the grand jury," "[u]nless these rules provide otherwise." *See* Rule 6(e)(2(B). The Rule then identifies only five circumstances in which a district court may authorize the disclosure of a grand jury matter:

> The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
>
> > (i) preliminarily to or in connection with a judicial proceeding;

> (ii) 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;
>
> (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
>
> (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
>
> (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

Fed. R. Crim. P. 6(e)(3)(E).[2]

Most of Rule 6 was adopted pursuant to the Supreme Court's authority to propose rules for the conduct of criminal litigation in the

[2] The remaining provisions of Rule 6(e)(3) describe the circumstances in which prosecutors may disclose grand jury material without need for court approval (for example, to other government attorneys) and the procedures by which petitions for disclosure shall be filed. *See* Rule 6(e)(3)(A)-(D), (F)-(G).

federal courts, with the recommendations of the Judicial Conference's Committee on Rules of Practice and Procedure and its subcommittees. *See* Rules Enabling Act, 28 U.S.C. §§ 2072, 2073. Proposed rules become effective approximately six months after the Supreme Court reports them to Congress unless Congress suspends or modify the rules by enactment. *Id.* § 2074.

Congress itself, however, added the original language making the disclosure provisions of Rule 6(e) exclusive. As originally promulgated by the Supreme Court in 1946, Rule 6(e) allowed disclosure of grand jury materials to government attorneys and "[o]therwise" permitted disclosure "only when so directed by the court" for particular reasons. Fed. R. Crim. P. 6(e) (1946), 327 U.S. 821, 837-38. In 1977, however, Congress enacted legislation delaying the effective date of a revised version of Rule 6(e) "until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier." Pub. L. No. 94-349, § 1, 90 Stat. 822, 822.

Subsequently, Congress approved—by statute—an amended version of Rule 6(e) that prohibited disclosure "except as otherwise provided for in

these rules." *See* Pub. L. No. 95-78, § 2(a), 91 Stat. 319, 319 (1977) (amending Fed. R. Crim. P. 6(e)(1) (1977)); S. Rep. No. 95-354, at 7 (1977) (describing this as a "general rule of non-disclosure"). *See generally In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1087 (7th Cir. 1982) (discussing history of 1977 amendments); *In re Perlin*, 589 F.2d 260, 268 (7th Cir. 1978) (same). In 1979, pursuant to its authority under the Rules Enabling Act, 28 U.S.C. § 2072, the Supreme Court moved the same language to Rule 6(e)(2), which was entitled the "General Rule of Secrecy." *See* 441 U.S. 985; 18 U.S.C. app. at 610 (Supp. IV 1980). The current formulation of Rule 6(e)'s prohibition against disclosure dates to the general stylistic revision of the Criminal Rules in 2002.

In 2011, the Attorney General proposed an amendment to Rule 6(e) that would have permitted the release of historically significant grand jury records in specified circumstances. *See* Letter from Hon. Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Oct. 18, 2011), http://www.uscourts.gov/rules-policies/archives/suggestions/hon-eric-h-holder-jr-11-cr-c. The Judicial

Conference's Federal Advisory Committee on the Criminal Rules ("Rules Committee"), however, did not recommend taking the proposal to the Standing Committee on Rules of Practice and Procedure for its consideration and ultimate recommendation to the Supreme Court. The text of Rule 6(e), therefore, remains unchanged.

B. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

1. On June 7, 1942, the *Chicago Tribune* published a front-page story entitled "Navy Had Word of Jap Plan to Strike at Sea." JA7. The article, which appeared to be based on a classified Navy dispatch, suggested that the Navy had detailed information regarding the Japanese military's plan to attack U.S. forces at Midway prior to the attack. JA7-8. The article alarmed many military and political leaders, who believed it had revealed that the Navy had successfully cracked the radio code the Japanese military used to encrypt its communications. *Id.*

In August 1942, the Department of Justice impaneled a grand jury in Chicago to investigate whether *Tribune* staff had violated the Espionage Act. According to petitioners' allegations, the grand jury heard testimony

from a number of naval officers, as well as members of the *Tribune* staff. *See* JA8. The grand jury declined to issue any indictments. *Id.*

2. In November 2014, naval historian Elliot Carlson and several historical and archival organizations petitioned the United States District Court for the Northern District of Illinois to order the release of the grand jury transcripts from the 1942 proceeding. JA6-7. Prior to filing his petition, Carlson filed Freedom of Information Act requests and asserts that he obtained over 3000 pages of Department of Justice and FBI records, including summaries of dozens of interviews with witnesses and many of the materials submitted to the grand jury. *See* JA30 (Carlson Declaration). In addition, many records relating to the investigation are publicly available through the National Archives and Records Administration, including the July 14, 1942 memorandum of the Assistant Attorney General recommending to the Attorney General that the Department of Justice not pursue prosecution. *See* JA92.

In seeking disclosure of the grand jury transcripts, petitioners recognized that disclosure was not authorized under any of the exceptions

to grand jury secrecy recognized in Rule 6(e). Rather, the petition urged the district court to use its "inherent authority" to order disclosure of historically significant grand jury records, outside the strictures of Rule 6(e). JA16 (citing *In re Craig*, 131 F.3d 99 (2d Cir. 1997)). The government opposed the petition, explaining that Rule 6(e) does not authorize the release of secret grand jury materials simply because of their historical significance and that a district court has no inherent authority to circumvent Rule 6 or to fashion exceptions to its terms.

3. The district court granted the petition. *See* A20. Like petitioners, the district court acknowledged that disclosure of grand jury materials solely for their historical interest has no textual basis in Rule 6(e). Rather, the court declared that, "in appropriate circumstances, federal courts possess inherent authority to release grand jury materials for reasons other than those contained in Rule 6(e)." A14.

The district court rejected the government's argument that Rule 6(e) forbids disclosure in these circumstances. In the court's view, the five specified exceptions to the rule of grand jury secrecy in Rule 6(e)(3)(E) are

merely exemplary: "[N]othing in the Federal Rules expressly *forbids* a district court from releasing grand jury materials based on their historical significance; the Rules simply do not expressly authorize it." A9. Likewise, the court found no significance in the Supreme Court's repeated admonition that federal courts lack the inherent authority to circumvent the Federal Rules of Criminal Procedure. In the court's opinion, decisions such as *Carlisle v. United States*, 517 U.S. 416 (1996) and *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), stand only for the proposition that a court's exercise of its inherent authority must not "conflict[] with the express provisions of the Federal Rules." *Id.*

Observing that Rule 6(e) has been amended over time in response to judicial decisions, the district court declared that federal courts possess the inherent discretion "to release grand jury materials for reasons other than those contained in Rule 6(e)." A14. The court also found it significant that the Rules Committee had declined to adopt the Attorney General's 2011 proposal to amend Rule 6(e) to permit the disclosure of historically significant materials in specified circumstances. A12-13. The district court

instead credited the approach of the Second Circuit in *In re Craig*, 131 F.3d 99 (2d Cir. 1997), which concluded that district courts have the discretion to release grand jury records in "special circumstances" beyond those identified in Rule 6(e) and declared that "historical interest, on its own," may "justify[] release of grand jury material in an appropriate case." *Id*. at 105.

SUMMARY OF ARGUMENT

Federal Rule of Criminal Procedure 6(e) imposes a blanket prohibition on disclosure of grand jury matters, and none of the Rule's express exceptions authorizes disclosure of the requested materials. In spite of the plain text of the Rule, the district court erroneously read the Rule not to forbid disclosure. The district court's belief that Rule 6(e)'s carefully tailored list of authorized disclosures is merely exemplary rather than exclusive disregards the text and structure of the Rule itself. Rule 6(e) plainly places an affirmative limit on court-ordered disclosure of grand jury materials.

Nor was the district court correct to rely on assertions of "inherent" authority. A federal court possesses inherent authority to protect the integrity of its own procedures: for example, by regulating the bar, enforcing decorum, and punishing contempts. But neither this Court nor the Supreme Court has ever suggested that a court's inherent authority extends to broader judgments of social policy, such as whether the rule of grand jury secrecy—promulgated by Congress and the Supreme Court—should yield to a finding of historical interest by a particular district court. No authority of that kind is "inherent" in the exercise of judicial power. And no notion of inherent authority can permit a court to disregard the plain terms of Rule 6(e). "Whatever the scope of [a court's] 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle v. United States*, 517 U.S. 416, 426 (1996).

This Court should decline to adopt the approach of courts that have approved the release of grand jury materials based solely on their historical significance. Those decisions cannot be squared with the Supreme Court's

holding in *Carlisle* that federal courts lack the inherent authority to vary from the Federal Rules of Criminal Procedure. And like the district court below, those courts made no attempt to reconcile their understanding of a court's "inherent authority" with the fact that Rule 6(e) was, in relevant part, directly enacted by Congress.

The United States supports, as a policy matter, the disclosure of historically significant grand jury materials in appropriate cases and with the relevant safeguards. Such disclosure, however, must be authorized by statute or through amendment to Rule 6 and not extratextual assertions of inherent authority. The district court's order holding otherwise should be reversed.

STANDARD OF REVIEW

This Court reviews a district court's order to disclose grand jury materials for an abuse of discretion. *See In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1088 (7th Cir. 1982) (citing *Douglas Oil Co. v. Petro Stops Nw.*, 441 U.S. 211, 223 (1979)). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*,

518 U.S. 81, 100 (1996); *see also United States v. Corry*, 206 F.3d 748, 750 (7th Cir. 2000).

ARGUMENT

THE DISTRICT COURT LACKED "INHERENT AUTHORITY" TO UNSEAL SECRET GRAND JURY TESTIMONY SOLELY FOR HISTORICAL INTEREST

As the district court recognized, Rule 6(e) "codifies the traditional rule of grand jury secrecy." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). Neither the district court nor petitioners have suggested that the text of the Rule authorizes the disclosure of grand jury material solely out of historical interest. The district court erred in believing that it nevertheless had "inherent authority" to authorize the unsealing of secret grand jury testimony on that basis.

A. Rule 6(e) expressly limits disclosures of grand jury materials to the circumstances identified in the Rule.

1. Federal Rule of Criminal Procedure 6(e) imposes a flat prohibition against the disclosure of any grand jury matter by a non-witness participant in a grand jury proceeding "[u]nless these rules provide otherwise." Rule 6(e)(2)(B). *See id.* ("[T]he following persons *must not disclose* a matter occurring before the grand jury." (emphasis added)).

Although the Rule contemplates various circumstances in which prosecutors may share grand jury information with other government agents, *see, e.g.*, Rule 6(e)(3)(A), the *only* circumstances in which the Rule otherwise authorizes a court to disclose grand jury matters, including testimony, are the five narrowly tailored exceptions set out in Rule 6(e)(3)(E).

None of those five exceptions even arguably encompasses a request from a member of the public at large for access to grand jury materials out of historical interest. Three of the five exceptions deal with disclosures to state, Indian, military, and foreign prosecutors and may be invoked, by their plain terms, only "at the request of the government." *See* Rule 6(e)(3)(E)(iii)-(v). The remaining two exceptions provided in the Rule—the only exceptions that contemplate disclosure to non-government officials—are equally inapposite. The Supreme Court has explained that Rule 6(e)(3)(E)(i), which permits disclosure of a grand jury matter "preliminarily to or in connection with a judicial proceeding," applies only where the purpose of the disclosure is "to assist in preparation or conduct of a judicial

proceeding" that is "pending or anticipated." *United States v. Baggot*, 463 U.S. 476, 480 (1983). And Rule 6(e)(3)(E)(ii) allows disclosure only "at the request of a defendant" seeking to dismiss an indictment.

Because none of the enumerated exceptions to grand jury secrecy applies, disclosure is prohibited under the express terms of Rule 6(e). *See* Rule 6(e)(2)(B) (prohibiting the unsealing of grand jury records "[u]nless these rules provide otherwise"). Rule 6 explicitly instructs the government to retain grand-jury records in secrecy "*to the extent and as long as necessary* to prevent the unauthorized disclosure of a matter occurring before a grand jury." Rule 6(e)(6) ("Sealed Records") (emphasis added). As the Supreme Court has stressed, Rule 6(e) "is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Baggot*, 463 U.S. at 479.

Moreover, it was Congress itself that enacted the language in Rule 6(e) prohibiting disclosures other than those authorized in the Rule. As originally promulgated in 1946, Rule 6(e) allowed disclosure to government attorneys and "[o]therwise" permitted disclosure "only when

so directed by the court" for particular reasons. Fed. R. Crim. P. 6(e) (1946), 327 U.S. 821, 837-38. In 1977, however, Congress enacted legislation delaying effective date of a revised version of Rule 6(e) "until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier." Pub. L. No. 94-349, § 1, 90 Stat. 822, 822 (1976). Subsequently, Congress approved—by statute—an amended version of Rule 6(e) that prohibited disclosure "except as otherwise provided for in these rules." *See* Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977) (amending Fed. R. Crim. P. 6(e)(1) (1977)). The Senate Report confirmed that this feature of the Rule is a "general rule of non-disclosure." S. Rep. No. 95-354, at 7. With minor stylistic changes, that statutory command has remained a defining feature of Rule 6(e). *See* Fed. R. Crim. P. 6(e)(2)(B) (prohibiting the unsealing of grand jury records "[u]nless these rules provide otherwise").

Indeed, it was because Congress directly enacted the prohibition against disclosure in Rule 6(e) that the D.C. Circuit held that grand jury records are exempt from disclosure under Exemption 3 of the Freedom of Information Act (FOIA). Exemption 3 precludes the release of records that

are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). In rejecting the contention that grand jury secrecy is protected only by rule rather than statute, the D.C. Circuit explained that "Fed. R. Crim. P. 6(e) was positively enacted by Congress." *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981); *see also In re Wade*, 969 F.2d 241, 246 (7th Cir. 1992) (affirming withholding under Exemption 3 of documents that would disclose grand jury proceedings). For that reason, if petitioners had filed a FOIA request for the grand jury transcripts they seek in this case, their request would have been denied under FOIA Exemption 3. Nothing in Rule 6(e) suggests that a different result should obtain merely because petitioners applied directly to the district court.

2. The linchpin of the district court's decision was its belief that Rule 6(e)(3)'s carefully tailored list of authorized disclosures is merely exemplary. The court declared that "nothing in the Federal Rules expressly *forbids* a district court from releasing grand jury materials based on their historical significance; the Rules simply do not expressly authorize it." A9.

The court stressed that "Rule 6(e) does not contain the type of negative language—such as 'only' or 'limited to'—that one would expect to find" in an exhaustive list. A11.

As already discussed, however, the Rule does contain the limiting language the district court sought: the plain language of Rule 6(e) expressly forbids disclosure of a matter occurring before the grand jury "[u]nless these rules provide otherwise." Rule 6(e)(2)(B). It further instructs the government to preserve grand jury records in secrecy "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Rule 6(e)(6). The district court did not acknowledge these explicit provisions of Rule 6(e) or explain how a federal court could permissibly disregard them. As the D.C. Circuit has stressed, "[t]he rule makes quite clear that disclosure of matters occurring before the grand jury is the exception and not the rule. It further sets forth in precise terms to whom, under what circumstances and on what conditions grand jury information may be disclosed." *Fund for Constitutional Gov't*, 656 F.2d at 868. The plain language of Rule 6(e) defines the universe of

circumstances in which a district court "may authorize disclosure . . . of a grand jury matter." Rule 6(e)(3)(E).

Nor did the district court attempt to reconcile its interpretation with the highly reticulated nature of the exceptions actually recognized by the Rule. Four of the five exceptions in Rule 6(e)(3)(E) apply only "at the request" of the government or the defendant, and even then the Rule permits disclosure only for specific purposes. *See, e.g.*, Rule 6(e)(3)(E)(iii) (permitting disclosure of grand jury materials "at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation"). The narrow respects in which the Rule has been amended over the years further underscores the carefully limited scope of the permissible disclosures. For example, the USA PATRIOT Act of 2001 amended the Rule to permit disclosure of grand-jury matters involving foreign intelligence or counterintelligence. *See* Fed. R. Crim. P. 6(e)(3)(D) & 2002 Comm. Note; Pub. L. No. 107-56, 115 Stat. 272, 279 (2001). Similarly, in 2002, Rule 6(e) was amended to permit disclosure to armed

forces personnel for the purpose of enforcing military criminal law. *See* Fed. R. Crim. P. 6(e)(3)(E)(v) & 2002 Comm. Note.

The Supreme Court, moreover, has rejected the mode of reasoning employed by the district court here. Believing (erroneously) that the Rule did not expressly forbid disclosures other than those enumerated in the Rule itself, the district court concluded that it was free to fashion a new exception. A9. The Supreme Court, however, has required courts to draw the opposite inference, insisting that courts must find "clear indication in a statute or Rule" before permitting a breach of grand jury secrecy. *Sells Eng'g*, 463 U.S. at 425 (explaining that "we must always be reluctant to conclude that a breach of this secrecy has been authorized").

The district court also emphasized the important public interest in permitting access to grand jury records of historical significance. A13. As the Supreme Court has explained, however, merely identifying a valid or important public interest does not authorize a court to permit disclosures not authorized by the text of the Rule. To the contrary, Rule 6(e) "reflects a judgment that not every beneficial purpose, or even every valid

governmental purpose, is an appropriate reason for breaching grand jury secrecy." *Baggot*, 463 U.S. at 480. In *Baggot*, the Supreme Court affirmed a decision of this Court concluding that Rule 6(e)'s exception for disclosure preliminary to or in connection with a judicial proceeding, *see* Rule 6(e)(3)(E)(i), did not permit the government to disclose grand jury records to the IRS to conduct a tax audit. The Supreme Court did not dispute the importance of the government's interest in the proposed disclosure. Yet the Court held that the text of the relevant exception did not permit it. In this sense, the Court stressed, Rule 6(e) "is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Id.* at 479; *see also United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009) (concluding that there is no common law right of access to grand jury materials and courts may not fashion a disclosure order in the absence of a recognized exception in Rule 6(e) (internal citations omitted)).

The district court cited this Court's dictum in *In re The Special February, 1975 Grand Jury*, 662 F.2d 1232, 1236-37 (7th Cir. 1981), *aff'd sub nom. United States v. Baggot*, 463 U.S. 476 (1983), that "we may not always

be bound by a strict and literal interpretation of Rule 6(e)." *See* A13. That dictum, however, was superseded by the Supreme Court's subsequent ruling in the same case that Rule 6(e) operates as "an affirmative limitation" on the court's authority to disclose grand jury materials. *Baggot*, 463 U.S. at 479. In any event, as discussed below, the Supreme Court subsequently made clear in *Carlisle v. United States*, 517 U.S. 416 (1996) that federal courts lack any inherent authority to circumvent the express terms of the Federal Rules of Criminal Procedure.

B. District courts have no "inherent authority" to circumvent the terms of Rule 6(e).

The district court nevertheless concluded that it possessed "inherent authority" to release the grand jury transcripts that petitioners seek in this case. A14. A district court, however, enjoys no inherent authority to contravene or circumvent the terms of Rule 6(e). Even if a court *could* invoke inherent authority to act outside of Rule 6(e) in rare circumstances, moreover, that extraordinary power would not extend to the disclosure of grand jury transcripts to members of the public for reasons of historical

interest alone—that is, for the sole purpose of revealing what transpired before the grand jury.

1. The Supreme Court has specifically held that a district court has no "inherent authority" to circumvent the rules of criminal procedure adopted by the Court in its rulemaking capacity. "Whatever the scope of [a court's] 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988) ("[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *Godoski v. United States*, 304 F.3d 761, 763 (7th Cir. 2002) ("[I]t is entirely inappropriate for the judiciary to invoke the common law to override limitations enacted by Congress.").

The Court in *Carlisle* held that a district court had no "inherent supervisory power" to grant a criminal defendant's motion for a judgment of acquittal filed outside of the time parameters specified by Federal Rule of Criminal Procedure 29(c). *See Carlisle*, 517 U.S. at 426. There, after

initially denying the defendant's untimely motion for acquittal, the district court later reversed course and granted the motion, notwithstanding the text of the Rule, reasoning that the untimeliness would not prejudice the United States. *Id.* at 418. The Supreme Court rejected that argument, explaining that the Court's precedents recognized no "inherent power to act in contravention of applicable Rules." *Id*. at 428. That was true, the Court emphasized, regardless whether the district court's action was characterized as the granting of an untimely motion or as "the *sua sponte* entry of a judgment of acquittal." *Id*. at 426.

Likewise, in *Bank of Nova Scotia*, the Supreme Court held that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." 487 U.S. at 254. The Court observed that it had promulgated the Criminal Rules pursuant to the Rules Enabling Act, which provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). "It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly

enacted by Congress." *Bank of Nova Scotia*, 487 U.S. at 255. "The balance struck by the Rule between societal costs and the rights of the accused," the Court explained, "may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.'" *Id*. (quoting *United States v. Payner*, 447 U.S. 727, 736 (1980)).

The same principles apply with particular force to Rule 6(e). As already discussed, Rule 6(e) was in all relevant respects directly enacted by Congress. *See* Pub. L. No. 95-78, § 2(a), 91 Stat. 319, 319 (1977). A district court has no inherent authority to act in contravention of a federal statute. *See Godoski*, 304 F.3d at 763. As the Court explained in *Bank of Nova Scotia*, "it is well established that '[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'" 487 U.S. at 254 (alterations in original)(quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985)). "To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" *Id*. (quoting *Payner*, 447 U.S. at 737).

The district court therefore erred in believing that Rule 6(e) reflects nothing more than the present embodiment of a fluid rule subject to common-law development in the federal courts. *See* A11. Just as a district court has no "inherent" authority to grant a judgment of acquittal in circumstances not permitted by Rule 29(c), *see Carlisle*, 517 U.S. at 426, or to dismiss an indictment notwithstanding the harmless-error inquiry of Rule 52, *see Bank of Nova Scotia*, 487 U.S. at 254, a court has no "inherent" authority to authorize the disclosure of grand jury material in contravention of Rule 6(e). The examples cited in the district court's opinion of situations in which the Rule was amended to reflect developments in the law, *see* A11-12, illustrate the flexibility and importance of the rulemaking process, not the freedom of district courts to deviate from the Rule.

The district court purported to distinguish *Carlisle* on the ground that it involved a court order that "contradicted the plain language" of the rules of criminal procedure. A9. Even if that characterization were correct, it would not distinguish this case: as discussed, Rule 6(e) sets out a

definitive, blanket prohibition on disclosure and enumerates only five circumstances in which a district court has discretion to order the disclosure of grand jury material, none of which encompasses petitioners' request. *Cf. Baggot*, 463 U.S. at 479 (Rule 6(e) "is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials.").

In any event, the district court read *Carlisle* too narrowly. The Supreme Court explained that a district court's inherent power "does not include the power to develop rules that *circumvent or conflict* with the Federal Rules of Criminal Procedure." 517 U.S. at 426 (emphasis added); *see also Bank of Nova Scotia*, 487 U.S. at 254. Thus, the Court explained that it did not matter whether the district court's ruling in that case was understood as the granting of an untimely motion (an express conflict with the Rule) or as the *sua sponte* granting of a judgment of acquittal (an extratextual authority that would circumvent the Rule). Either way, it was an assertion of inherent authority inconsistent with the terms of a duly promulgated Rule, and for that reason was invalid. The same is true here.

2. Even if a district court *could* invoke its inherent authority to act outside of Rule 6(e) in rare circumstances, no plausible conception of that authority would extend to the circumstances of this case.

Federal courts do not possess the inherent authority to vindicate any goal that they conclude is socially desirable. The "inherent" powers of a court are those inherent in the judicial institution itself; they "deal strictly with the courts' power to control their *own* procedures." *United States v. Williams*, 504 U.S. 36, 45 (1992) (emphasis in original). Those powers include the power to punish contempt, to regulate admission to the bar, to discipline attorneys for misconduct, to dismiss suits for failure to prosecute, and to enforce silence and decorum in the courtroom. *Chambers v. NASCO*, 501 U.S. 32, 43-44 (1991). Inherent authority also includes the power to protect the integrity of judicial processes. *United States v. Hasting*, 461 U.S. 499, 505 (1983). Thus, before Rule 6(e) was amended to define the court's authority and regulate the practice, a federal court might have had inherent authority to allow a defendant to use grand jury testimony to impeach a government witness. *See Williams*, 504 U.S. at 46.

It is altogether a different matter, however, to suggest that a federal court may invoke its inherent powers to fashion new exceptions to grand jury secrecy, untethered to any pending judicial proceeding or protecting the integrity of any judicial process. Indeed, the asserted power to disclose secret grand jury records solely for their historical interest to the public at large—that is, the disclosure of grand jury records not for any reason related to judicial process, but *simply to find out what happened*—is incompatible with any recognized notion of "inherent" judicial authority. The Supreme Court held in *Williams*, for example, that a court's inherent authority could not support an order requiring a prosecutor to disclose substantial exculpatory evidence in his possession to a grand jury. *See* 504 U.S. at 45. The assertion of such a power, the Court explained, went beyond "enforcing or vindicating legally compelled standards," and amounted to "*prescribing* those standards of prosecutorial conduct in the first instance." *Id*. (emphasis in original); *cf. United States v. Fidelity & Deposit Co. of Md*., 986 F.2d 1110, 1120 (7th Cir. 1993) ("While a court has the authority to preserve the integrity and, indeed the viability, of the

judicial process, it does not have the prerogative to create substantive law by adding remedies not otherwise provided by law."). Likewise here, the "inherent power" asserted by the district court to disclose grand jury records—in their entirety, unconnected to any pending proceeding, and for reasons academic rather than judicial—sweeps far beyond anything inherent in the judicial institution.

The district court did not point to any tradition of courts exercising the power to release grand jury materials to the public for reasons of historical interest alone, such that the power might be said to be "inherent" in the exercise of judicial authority. If anything, the relevant tradition of the Judicial Branch is protecting the secrecy of grand jury proceedings—a tradition "older than our Nation itself." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959); *In re Grand Jury Proceedings, Special Sept., 1986*, 942 F.2d 1195, 1198 (7th Cir. 1991) ("Since the 17th Century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye. . . . The rule of grand jury

secrecy is an integral part of our criminal justice system."(citation omitted)).

Nor would such a power be consistent with the traditional "arm's length" relationship between the grand jury and the courts. *Williams*, 504 U.S. at 47. As the Supreme Court explained in *Williams*, the grand jury is not an arm of the Judicial Branch or subject to its general supervision. "In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *Id*. "The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised"—including the fact that it "deliberates in total secrecy." *Id*. at 48 (citing *Sells Eng'g*, 463 U.S. at 424-425). Consequently, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id*. at 50. The district court did not explain how its assertion of a broad

discretionary power to disclose secret grand jury records to the public for reasons of historical interest alone may be reconciled with these principles.

Nor is it evident how far the district court's conception of inherent power extends. If a court's inherent authority over grand jury records is not circumscribed by the plain language of Rule 6(e), *see* Rule 6(e)(2)(B) ("[u]nless these rules provide otherwise"), could a district court order the disclosure of grand jury records in any circumstance in which the court concludes that the public interest similarly favors disclosure—for example, for use in a state child-custody dispute, or a civil enforcement proceeding? *Cf*. Rule 6(e)(3)(E)(iv) (authorizing disclosure of grand jury records to state officials, provided the government "shows that the matter may disclose a violation of State . . . criminal law" and the disclosure is "for the purpose of enforcing that law"). Such a theory of inherent authority might even extend to permit courts to decide that in some contemporary matter the secrecy of grand jury materials must give way to a strong public interest in disclosure.

Similarly, if the touchstone of the court's inherent authority is not the protection and vindication of judicial processes, it is difficult to perceive any principled reason why broad historical significance (as opposed, for example, to political or economic significance, or historical significance to particular groups) should be the benchmark for disclosure. Likewise, although the district court emphasized petitioner Carlson's bona fides as a naval historian, it is unclear why any member of the public would not be entitled equally to seek disclosure of historical grand jury records for reasons of journalism, geneaology, or even idle curiosity.

The inescapably legislative nature of the judgment exercised by the district court in this case underscores the error of the court's assertion of "inherent" authority to depart from the text of Rule 6(e). If historical grand jury records are to be made available to the public, notwithstanding the present restrictions of Rule 6(e), that policy judgment should be exercised by Congress, or by the Supreme Court acting in its rulemaking capacity. To bless the district court's departure from that Rule here, untethered to any pending or anticipated judicial proceeding, is to "'confer on the

judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Payner*, 447 U.S. at 737).

3. In refusing to adhere to the text of Rule 6(e), the district court cited with approval the Second Circuit's decision in *In re Craig*, 131 F.3d 99 (2d Cir. 1997). *See* A14. The court of appeals in that case reaffirmed circuit precedent holding that district courts have the discretion to release grand jury records in "special circumstances" beyond those identified in Rule 6(e), and the court further declared in dicta that "historical interest, on its own," may "justify[] release of grand jury material in an appropriate case." *Id*. at 105. The court in *In re Craig* enumerated various factors for courts to consider in determining whether to exercise that atextual discretion, *id*. at 106, and the district court in this case applied those factors in determining that disclosure was appropriate here, A14-20.[3]

[3] As we have explained, the district court lacked the authority to order the release of the grand jury transcripts at issue outside of the constraints of Rule 6(e). The government does not separately challenge the

Continued on next page.

This Court should decline to endorse the Second Circuit's approach in *In re Craig* and should hold that a district court lacks the authority to order the disclosure of secret grand-jury testimony solely on a showing of historical interest. The court's dictum in *In re Craig* rested on and expressly reaffirmed the reasoning of the court's much earlier decision in *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), the wellspring of the Second Circuit's "special circumstances" exception to Rule 6(e). But *In re Biaggi* did not endorse a sweeping extratextual authority to disclose grand jury materials. Rather, it reasoned that both the government and the target of the investigation had waived the protections of Rule 6 by requesting disclosure of the target's own testimony. And any broader reading of *In re Biaggi* would run contrary to the Supreme Court's subsequent decisions in *Carlisle*, *Bank of Nova Scotia*, and *Williams*.

Indeed, *In re Biaggi* predates even Congress's direct enactment of Rule 6(e) in 1977, which surely undermines any claim that Rule 6(e)'s

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court's determination that the transcripts have sufficient historical value to warrant release under the *In re Craig* factors.

requirements may be bypassed under the rubric of inherent authority. Although the Second Circuit reaffirmed *In re Biaggi* in its 1997 decision in *In re Craig*, it did so without citing or discussing *Carlisle*, *Bank of Nova Scotia*, or *Williams*. That decision is therefore not persuasive precedent for the proposition that a district court possesses inherent authority to disclose grand jury materials other than pursuant to Rule 6(e), let alone to do so for reasons of historical interest alone.

The district court also cited this Court's footnote in *United States v. Corbitt*, 879 F.2d 224, 239 n.18 (7th Cir. 1989) as evidence that the Court had approved of the Eleventh Circuit's decision in *In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir. 1984). *See* A13 (citing *Corbitt*). The *Hastings* decision held that the district court had appropriately authorized disclosure of grand jury records to a judicial investigative committee, even though disclosure did not fit squarely within the express exceptions of Rule 6(e). *See id.* at 1268. The Eleventh Circuit emphasized that the unique circumstances presented in that case were "at least closely analogous" to judicial proceedings, for which the Rule

explicitly authorizes disclosure. *Cf. United States v. Blagojevich*, 594 F. Supp. 2d 993, 997 (N.D. Ill. 2009) (reasoning from *Hastings* that state legislative committee investigating misconduct in connection with an impeachment proceeding qualified as an "investigative officer" under statute permitting disclosure of wiretap communications).[4] The court also stressed that the request for disclosure in that case was "backed by a congressional mandate" that the investigative committee inspect grand jury materials, *id.* at 1270.

Nothing in *Hastings* plausibly supports the district court's extraordinary assertion of inherent authority in this case. Moreover, this Court's passing reference to *Hastings* in *Corbitt*—a case about the release of presentence reports, not grand jury records—evinced this Court's

[4] In *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the D.C. Circuit refused to disturb the disclosure of grand jury materials to the Judiciary Committee of the House of Representatives in an investigation related to Watergate, over an objection that Rule 6(e) precluded the disclosure. In a later unpublished decision, however, the D.C. Circuit concluded that "historical importance, without more," was insufficient to justify a departure from Rule 6(e)'s general rule of secrecy. *In re Petition of Newman*, No. 87-5345 (D.C. Cir. Apr. 20, 1988), *reproduced at* JA101-103.

reluctance to follow the Eleventh Circuit's reading of Rule 6, not an embrace of such an assertion of authority. *See id.* ("Whatever the merits of [*Hastings*], it is clear that disclosure of grand jury materials in situations not governed by Rule 6(e) should be an uncommon occurrence."). And in any event, it is clear that this remark conflicts with the Supreme Court's later ruling in *Carlisle*.

The remaining cases cited by the district court, A11-12, either do not squarely hold that inherent authority permits the release of historically significant grand jury materials solely for that reason,[5] or rely on *In re Craig* and other cases that predate *Carlisle*, *Bank of Nova Scotia*, and *Williams*.

C. The United States supports the disclosure of historically significant grand jury records, subject to appropriate safeguards, but that disclosure must be authorized by statute or rule.

As a matter of policy, the United States shares the district court's sense that, in criminal cases of enduring historical importance, the need for continued grand jury secrecy may eventually be outweighed by the

[5] *In re Grand Jury Proceedings*, 417 F.3d 18 (1st Cir. 2005) did not address a petition for disclosure but concluded that the court could impose additional restrictions on a witness.

public's legitimate interest in preserving and accessing the documentary legacy of our government. For that reason, in 2011, the Attorney General proposed an amendment to Rule 6(e) that would have permitted the release of historically significant grand jury records in specified circumstances. *See generally* Letter from Hon. Eric H. Holder, Jr., Att'y Gen. to Hon. Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Oct. 18, 2011), http://www.uscourts.gov/rules-policies/archives/suggestions/hon-eric-h-holder-jr-11-cr-c. The Attorney General's proposal explained that federal courts have no "inherent authority" to develop rules that circumvent or conflict with the requirements of Rule 6(e), but that the inclination of district court judges to provide public access to historical materials was understandable. The Attorney General therefore proposed an amendment to the Rule that would regularize the practice, provide appropriate procedural safeguards, and thereby preserve the primacy of Rule 6(e) as the authoritative codification of the rule of grand jury secrecy. *See id.*

That proposal, however, was rejected by the Federal Advisory Committee on the Criminal Rules in June 2012. *See* Judicial Conference Comm. on Rules of Practice and Procedure, Minutes of Meeting June 11-12, 2012, at 44, http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2012 (Comm. Minutes). The minutes of the Committee meeting indicate that the Advisory Committee for the Criminal Rules perceived "no need for a rule on the subject," evidently concluding that "in the rare cases where disclosure of historic materials had been sought," district courts "acted reasonably in referring to their inherent authority." Committee Minutes at 44. The result is that the text of Rule 6(e) remains unamended and, now as before, provides no legal basis for the district court's order here.

The United States therefore respectfully asks this Court to reverse the district court's order and hold that, absent legislation or an appropriate amendment to Rule 6(e), a district court lacks the authority to order the disclosure of grand jury transcripts solely for reasons of historical interest.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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DECEMBER 2015

ADDENDUM

Federal Rule of Criminal Procedure 6

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson--or another juror designated by the foreperson--will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A)No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A)Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand juror's vote--may be made to:

(i) an attorney for the government for use in performing that attorney's duty;
(ii) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been

made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) 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;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Recordcords, 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.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) “Indian Tribe” Defined. “Indian tribe” means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

No. 15-2972

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELLIOTT CARLSON, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, NATIONAL SECURITY ARCHIVE, NAVAL HISTORICAL FOUNDATION, NAVAL INSTITUTE PRESS, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY FOR MILITARY HISTORY

Petitioners-Appellees,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 14-cv-09244 (Castillo, J.)

APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELLIOT CARLSON, *et al.*,	)	
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	)	**No. 14 C 9244**
	)	
v.	)	**Chief Judge Rubén Castillo**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Elliot Carlson ("Carlson"), a naval historian and author, along with the Reporters Committee for Freedom of the Press, the American Historical Association, the National Security Archive, the Naval Historical Foundation, the Naval Institute Press, the Organization of American Historians, and the Society for Military History (collectively, "Petitioners") filed a petition (the "Petition") requesting the release of transcripts of witness testimony given during a grand jury investigation of the *Chicago Tribune* (the "*Tribune*") in August 1942. (R. 1, Pet. at 2; R. 4, Pet'rs' Mem. at 1-2.) For the reasons stated below, the Court grants Petitioners' request.

BACKGROUND

On June 7, 1942, the *Tribune* published a front-page story headlined, "*Navy Had Word Of Jap Plan to Strike At Sea.*" (R. 4, Pet'rs' Mem. at 2.) The author was *Tribune* war correspondent Stanley Johnston, who had been traveling aboard the U.S. Naval ship the *USS Barnett*. (*Id.*; R. 4-1, Carlson Decl. ¶ 11.) The article cited "reliable sources in naval intelligence" and suggested that the Navy had detailed information regarding Japan's military plan to attack the United States at Midway in advance of the battle. (R. 4, Pet'rs' Mem. at 2-3.) The article appeared to have been based on a classified dispatch revealing that the Navy had

successfully cracked the radio codes used by the Japanese to encrypt their communications. (*Id.* at 3.) Other newspapers, including the *New York News* and the *Washington Times-Herald*, re-published the *Tribune* story. (R. 4, Pet'rs' Mem. at 3; R. 4-1, Carlson Decl. ¶ 16.) The *Tribune* article angered high-ranking military officials, as well as President Franklin D. Roosevelt, who called for a federal investigation of the *Tribune* for violations of the Espionage Act of 1917.[1] (R. 4, Pet'rs' Mem. at 3.)

In August 1942, the United States Department of Justice ("DOJ") convened a grand jury in Chicago to investigate whether *Tribune* staff, including Johnston and managing editor J. Loy Maloney, had violated the Espionage Act. (*Id.*) The grand jury heard testimony from Rear Admiral Frederick C. Sherman, Commander Morton Seligman, Lieutenant Commander Edward O'Donnell, Lieutenant Commander Edward Elridge, and four unknown officers. (*Id.*) Maloney and Wayne Thomis of the *Tribune* also testified, as did Ralph Sharp of the *New York Daily News* and Frank Waldrop of the *Washington Times-Herald*. (*Id.*) On August 19, 1942, the grand jury declined to issue any indictments. (*Id.*) The *Tribune* proclaimed this decision as a victory for the First Amendment, and the following day ran a front-page story that included a depiction of the Tribune Tower as a citadel for press freedom. (R. 1, Pet. at 4.) The *Tribune* investigation marks the first and only time in U.S. history that the federal government attempted to prosecute a major newspaper for an alleged violation of the Espionage Act. (*Id.* at 5.)

On November 18, 2014, Petitioners filed the Petition requesting that the Court unseal the transcripts of witness testimony given during the grand jury investigation of the *Tribune*. (R. 1, Pet.) Carlson is in the process of writing a book to be published by the Naval Institute Press

[1] The Espionage Act prohibits, among other things, the disclosure of classified information that has been limited or restricted by the federal government for national security reasons. *See* 18 U.S.C. § 798.

concerning the *Tribune* scandal. (R. 4-1, Carlson Decl. ¶ 3.) In researching his book, he has spent the past two years conducting extensive research of newspaper archives, presidential libraries, and other repositories of historical information. (*Id.* ¶ 5.) He has also filed several Freedom of Information Act ("FOIA") requests, and as a result has received extensive information related to the government's investigation of the *Tribune*, including 2,500 pages of DOJ materials and 1,000 pages of Federal Bureau of Investigation ("FBI") records. (*Id.* ¶ 6.) These files include summaries of interviews of Navy personnel conducted by government investigators, transcripts of DOJ interviews with Johnston and Malone, and correspondence between the Navy, DOJ, FBI, and *Tribune* staff members. (*Id.* ¶¶ 6-7.) These records, however, did not include the transcripts of the witnesses' testimony before the grand jury. (*Id.*) At present, the transcripts remain under seal at a National Archives and Records Administration ("NARA") facility in College Park, Maryland.[2] (*Id.* ¶ 9.)

Carlson and a coalition of historical organizations now seek to have the transcripts released. (R. 4, Pet'rs' Mem. at 2-3.) They argue that the public has a compelling interest in the release of this information because of the historical significance of the *Tribune* investigation. (*Id.* at 3-4.) The government opposes Petitioners' request, and argues that "historical significance" is not a permitted reason for disclosing grand jury transcripts under the Federal Rules of Criminal Procedure. (R. 11, Gov't's Opp'n at 7.) In reply, Petitioners argue that this Court has inherent authority to order disclosure of grand jury transcripts in special circumstances, and that it is appropriate to do so in this case. (R. 13, Pet'rs' Reply at 1-2.)

[2] As a general matter, a petition for disclosure of grand jury materials is to be filed "in the district where the grand jury convened." Fed. R. Crim. P. 6(e)(3)(F).

LEGAL STANDARD

Article III of the U.S. Constitution provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III § 1. It has long been recognized that federal courts are vested with certain inherent authority in the exercise of their duties. *See Degen v. United States*, 517 U.S. 820, 823 (1996) ("Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities."); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" (citation omitted)). "These powers are 'governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962)). Thus, federal courts may, in certain circumstances, "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983).

The scope of this inherent authority, however, is not without limits. "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *see also Degen*, 517 U.S. at 823 ("The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."). In particular, courts are not permitted to exercise their inherent authority to create new laws or invalidate existing laws, as "courts can only interpret congressional acts. They cannot legislate." *De Soto Sec. Co. v. Comm'n of Internal Revenue*, 235 F.2d 409, 411 (7th Cir. 1956); *see also*

Bank of Novia Scotia v. United States, 487 U.S. 250, 254 (1988) ("It is well established that 'even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'" (citation omitted)). Any other interpretation "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980).

ANALYSIS

I. Whether the Court has Authority to Release the Transcripts

There is a long-standing tradition in the United States, "older than our Nation itself," that grand jury proceedings are to be kept secret. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The Supreme Court has outlined several reasons for maintaining grand jury secrecy:

> (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; 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.

Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 219 n.10 (1979) (citation omitted). Because of these considerations, "courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury." *Id.* at 219.

Yet the rule of grand jury secrecy is not absolute. For instance, the secrecy requirement does not apply to grand jury witnesses, who are permitted to publicly disclose the questions they were asked and the answers they gave. *See* Fed. R. Crim. P. 6(e)(2) (providing that "[n]o obligation of secrecy may be imposed on any person" other than grand jurors, interpreters,

operators of recording devices and transcribers, and government personnel); *see also Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) ("[T]he secrecy provision in Rule 6(e) applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their positions in the criminal justice system.").

Similarly, Federal Rule of Criminal Procedure 6(e) addresses several situations in which the Court can order the release of grand jury materials. That Rule provides:

> The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter:
>
> > (i) preliminarily to or in connection with a judicial proceeding;
> >
> > (ii) 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;
> >
> > (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
> >
> > (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
> >
> > (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

Fed. R. Crim. P. 6(e)(3)(E).

The parties are in agreement that none of the exceptions contained in Rule 6(e) directly apply in the present case. (R. 11, Gov't's Opp'n at 10; R. 4, Pet'rs' Mem. at 4 n.3.) The source of their disagreement is over whether this Court has authority to order release of grand jury materials for reasons other than those enumerated in Rule 6(e). (*See* R. 4, Pet'rs' Mem. at 3-9; R. 11, Gov't's Opp'n at 15-23.) Petitioners argue that this Court has inherent authority to release

grand jury transcripts for reasons other than those specified in Rule 6(e), including historical significance. (R. 4, Pet'rs' Mem. at 3-9; R. 13, Pet'rs' Reply at 3-11.) The government counters that this Court has no such authority. (R. 11, Gov't's Opp'n at 9-31.) In the government's view, Supreme Court jurisprudence does not permit any non-textual exceptions to Rule 6(e). (*Id.* at 21-25.) If the government is correct that Supreme Court precedent precludes the Court from granting Petitioners' request, this would necessarily end the Court's analysis. Accordingly, the Court begins there.

In support of its argument, the government cites to *United States v. Baggot*, 463 U.S. 476 (1983), in which the Supreme Court held that a district court was not authorized to release records from a grand jury investigation related to certain commodity futures transactions. (*See* R. 11, Gov't Opp'n at 21.) In that case, the government sought disclosure of the records so that the Internal Revenue Service ("IRS") could conduct an audit to determine whether the target of the investigation was subject to civil income tax liabilities. *Baggot*, 463 U.S. at 477-78. The district court concluded that a civil tax audit did not fall within the "in connection with a judicial proceeding" exception set forth in Rule 6(e)(3)(E)(i), but nevertheless ordered release of the records under its "general supervisory powers over the grand jury." *Id.* at 478. The U.S. Court of Appeals for the Seventh Circuit reversed, and the government appealed, seeking certiorari solely on the issue of whether a civil tax audit constitutes a "judicial proceeding" under Rule 6(e)(3)(E)(i). *Id.*

In affirming the Seventh Circuit's decision, the Supreme Court held that an IRS civil tax audit is not a "judicial proceeding" as defined by Rule 6(e). *Id.* at 482-83. The Supreme Court was not called to decide, nor did it otherwise address, whether a district court has inherent authority to disclose grand jury materials in situations other than those enumerated in Rule 6(e).

See id. at 478. The government concedes as much here when it acknowledges: "[A]lthough it came close in *Baggot*, the Supreme Court has not yet squarely addressed whether a district court's authority to disclose grand jury materials is cabined by Rule 6(e)." (R. 11, Gov't's Opp'n at 21.) Instead, the sole issue in *Baggot* was the interpretation of a particular provision of Rule 6(e). *See Baggot*, 463 U.S. at 478. Therefore, the Court does not find *Baggot* dispositive.

The government additionally relies on *Carlisle v. United States*, 517 U.S. 416 (1996), and *Bank of Nova Scotia*, 487 U.S. at 253-55, in support of its argument. (R. 11, Gov't Opp'n at 21-25.) In *Carlisle*, the Supreme Court addressed whether a court could use its inherent authority to permit the untimely filing of a motion for acquittal under Federal Rule of Criminal Procedure 29. *Carlisle*, 517 U.S. at 417-18. In that case, the defendant filed a motion for a judgment of acquittal under Rule 29, but failed to meet the time deadline contained in Rule 29(c). *Id.* The district court nevertheless permitted the untimely filing in an exercise of discretion, and then granted the motion for acquittal. *Id.* at 419-20. The Sixth Circuit Court of Appeals reversed the district court's ruling, and the Supreme Court affirmed. *Id.* at 418. The Supreme Court observed that although Federal Rule of Criminal Procedure 45(b) generally permitted extensions of deadlines based on excusable neglect, that Rule expressly provided that that "the court may not extend the time for taking any action under Rule 29." *Id.* at 420. Thus, the Supreme Court held, the district court could not use its inherent authority to grant an extension outside the deadline contained in Rule 29, as such action violated the express provisions of the Federal Rules. *Id.* at 424-26. In other words, courts cannot use their inherent authority to construe the Federal Rules of Criminal Procedure "to mean something other than what they plainly say[.]" *Id.* at 424.

Similarly, in *Bank of Nova Scotia*, the district court dismissed charges against a criminal defendant based on prosecutorial misconduct in connection with a grand jury proceeding, even

though there had been no prejudice to the defendants. *Bank of Nova Scotia*, 487 U.S. at 253-54. The Supreme Court held that this was not a proper exercise of the court's inherent authority over grand juries, given the prescription in Federal Rule of Criminal Procedure 52 that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *Id.* at 255 (quoting Fed. R. Crim. P. 52(a)). The Supreme Court held that the district court could not use its inherent authority to "circumvent" the harmless error standard contained in Rule 52(a), because "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* at 254-55.

As this Court reads them, *Carlisle* and *Bank of Nova Scotia* stand for the unremarkable and long-standing principle that a federal court cannot exercise its inherent authority in a manner that conflicts with the express provisions of the Federal Rules. *See Carlisle*, 517 U.S. at 426 ("Whatever the scope of this 'inherent power' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure."). In this case, unlike in *Carlisle* or *Bank of Nova Scotia*, nothing in the Federal Rules expressly *forbids* a district court from releasing grand jury materials based on their historical significance; the Rules simply do not expressly authorize it. This distinction is critical. As the Seventh Circuit has recognized, the "mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition." *See G Heilman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1989).) The Federal Rules specifically provide that, in the absence of express authority to the contrary, the Court can proceed "in any manner consistent with federal law, these Rules, and the local rules of the district." Fed. R. Crim. P. 57(b). Therefore, the Court disagrees with the government's contention that Supreme Court case law

precludes the disclosure of grand jury testimony for reasons other than those enumerated in Rule 6(e).[3]

The government additionally argues that the maxim *espressio unius est exclusio alterius* precludes the Court from interpreting Rule 6(e) to allow disclosure for reasons other than those specified. (R. 11, Gov't's Opp'n at 11-12.) This canon of construction, meaning "the expression of one thing suggests the exclusion of others," has fallen upon somewhat "disfavored status." *Dahlstrom v. Sun-Times Media, L.L.C.*, 777 F.3d 937, 943 (7th Cir. 2015); *see also Exelon Generation Co., L.L.C. v. Local 15, Intern. Broth. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 571 (7th Cir. 2012) (referring to the maxim as "much-derided"). As the Seventh Circuit has explained, "one might chant the words *espressio unius est exclusio alterius*, but this maxim never answers the question whether the statutory list is designed as a floor or a ceiling." *Ivey v. Harney*, 47 F.3d 181, 183 (7th Cir. 1995). In addition, the Supreme Court has "repeatedly" held that the canon "does not apply to every statutory list or grouping[.]" *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Rather, the canon "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Id.* (citation omitted). In other words, the canon should be applied only if "it is fair to suppose that Congress considered the unnamed possibility and intended to say no to it." *Id.*

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[3] The government also cites to *United States v. Williams*, 504 U.S. 36 (1992), in support of its argument, (*see* R. 11, Gov't's Opposition at 15), but that case merely reaffirmed the principle that grand juries operate separately from the Judiciary; the Supreme Court held that a trial judge's authority over grand juries does not permit "judicial reshaping of the grand jury institution, [or] substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.* at 50. That is not remotely what Petitioners are requesting here.

As drafted, Rule 6(e) does not contain the type of negative language—such as "only" or "limited to"—that one would expect to find if the list were intended to be exclusive. *See* Fed R. Crim. P. 6(e)(3)(E). Nor are the exceptions listed in Rule 6(e) part of an "associated group or series." *Barnhart*, 537 U.S. at 168. Rather, they describe distinct scenarios in which different individuals can seek disclosure of grand jury materials. *See* Fed. R. Crim. P. 6(e)(3)(E)(i)-(v). Under these circumstances, there is little basis to conclude that Congress intended Rule 6(e)(3) to preclude disclosure of grand jury materials in all situations other than those listed. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) ("Just as statutory language suggesting exclusiveness is missing, so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication.").

On the other hand, there is considerable support for the conclusion that Rule 6(e) was not intended to cabin the Court's inherent authority. First and foremost, the Court considers the history of Rule 6, which reflects that it was not intended to "ossify" the law as of 1944, when the Rule was enacted; rather, the evolution of Rule 6 suggests that the exceptions contained within it are "subject to development by the courts." *In re Hastings*, 735 F.2d 1261, 1269 (11th Cir. 1984). History shows that "as new exceptions outside of those enumerated in Rule 6(e) have gained traction among the courts, the scope of the rule has followed suit[.]" *In re Kutler*, 800 F. Supp. 2d 42, 45 (D.D.C. 2011). For instance, in 1971, a district court went beyond the express language of Rule 6(e)—which at that time permitted disclosure of grand jury materials only to government attorneys—to permit disclosure to government employees who were not attorneys. *See In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 476-77 (E.D. Pa. 1971). Thereafter, Rule 6(e) was amended to include a provision for releasing grand jury materials to government personnel who were assisting government attorneys in the performance of their duties. *See* Fed.

R. Crim. P. 6(e)(3)(A)(ii), Advisory Committee Notes to 1977 Amendments. Similarly, in 1979, the requirement that grand jury proceedings be recorded was added to Rule 6(e) in response to the trend among courts to require such recordings. *See* Fed. R. Crim. P. 6(e)(1), Advisory Committee Note to 1979 Amendments. This history suggests that the "exceptions to the secrecy rule generally have developed through conformance of Rule 6 to the 'developments wrought in decision of the federal courts,' not *vice versa*." *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 285 (S.D.N.Y. May 13, 1999) (quoting *Hastings*, 735 F.2d at 1268)).

The Court also considers that the Federal Advisory Committee on the Criminal Rules, a rulemaking body under the jurisdiction of the Judicial Conference Committee on Rules of Practice and Procedure, has interpreted Rule 6(e) in a manner supporting the view that courts have inherent authority to release grand jury materials for reasons outside of those enumerated. In June 2012, the Committee rejected a proposal by the DOJ to amend Rule 6(e) to establish an exception allowing disclosure of grand jury materials on grounds of their historical significance if certain conditions are satisfied. *See* Judicial Conference Committee on Rules of Practice and Procedure, Minutes of Meeting June 11-12, 2012, at 44. In reaching its decision, the Committee considered the history of Rule 6(e), the relationship between the courts and grand juries, and the case law pertaining to a federal court's inherent authority. *Id.* Ultimately, the Committee concluded that "there is no need for a rule on the subject." *Id.* In the Committee's view, "in the rare cases where disclosure of historic materials had been sought, the district judges acted

reasonably in referring to their inherent authority."[4] *Id.* Although not dispositive, the Committee's interpretation of Rule 6(e) is entitled to this Court's "respectful consideration." *United States v. Dawson*, 434 F.3d 956, 958 (7th Cir. 2006).

In addition, although the Seventh Circuit has not yet decided this precise issue, it previously observed in dicta: "We may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains." *In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1236 (7th Cir. 1981), *aff'd on other grounds sub nom. Baggot*, 463 U.S. at 483. In a later case, the Seventh Circuit again appeared to recognize the possibility, though rare, of situations in which grand jury materials could be disclosed for reasons other than those specified in Rule 6(e). *See United States v. Corbitt*, 879 F.2d 224, 239 n.18 (7th Cir. 1989) ("it is clear that disclosure of grand jury materials in situations not governed by Rule 6(e) should be an uncommon occurrence").

In keeping with this principle, numerous other federal courts have concluded that courts have inherent authority to disclose grand jury materials for reasons other than those specified in Rule 6(e), including where the materials have historical significance. *See, e.g.*, *In re Craig*, 131 F.3d 99, 102 (2d Cir. 1997) ("this court has recognized that there are certain 'special

[4] The government argues that the Committee's action actually supports its position, (*see* R. 11, Gov't's Opposition at 24-25), because the Committee chair noted during their discussions that "[a] change of that magnitude. . . would have to be accomplished through legislation, rather than a rule change," Judicial Conference Committee on Rules of Practice of Procedure, Minutes of Meeting June 11-12, 2012, at 44. However, the Committee chair was referring to the DOJ's proposal that grand jury records be open to the public *as a matter of course* after the passage of a certain number of years. *See id.* ("[I]t would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years."). That is distinct from what Petitioners are advocating here—that the Court may exercise its discretion to release grand jury transcripts in appropriate circumstances.

circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule"); *In re Hastings*, 735 F.2d 1261, 1272 (11th Cir. 1984) ("[A] district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power."); *In re Nichter*, 949 F. Supp. 2d 205, 213 n.12 (D.D.C. 2013) ("[T]he Court believes that it does, indeed, have the authority to look outside Rule 6(e)" to order release of historically significant grand jury transcripts in appropriate cases); *Historical Ass'n*, 49 F. Supp. 2d at 285 ("[A] district court's ability to order release of grand jury materials has never been confined only to the secrecy rule specifically enumerated in Rule 6(e)."); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006) (observing in dicta that there was "substantial support for Appellants' 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)'" (citation omitted)); *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) ("[Rule 6(e)'s] phrasing can, and should, accommodate rare exceptions premised on inherent judicial power").

The Court now joins these courts in concluding that in appropriate circumstances, federal courts possess inherent authority to release grand jury materials for reasons other than those contained in Rule 6(e).

II. The Appropriate Standard for Disclosing Grand Jury Transcripts

The Court must next consider what criteria to use in evaluating Petitioners' request for release of the transcripts in this case. The Court is cognizant that "whether to make public the ordinarily secret proceedings of a grand jury investigation is one of the broadest and most sensitive exercises of careful judgment that a trial judge can make." *Craig*, 131 F.3d at 104. Although the Seventh Circuit has not addressed this precise issue, the Second Circuit has developed a leading framework for deciding whether to release grand jury transcripts based on

their historical significance. *See Craig*, 131 F.3d at 106. The Circuit observed that there is no "talismanic formula or rigid set of prerequisites" for deciding whether to release transcripts on this ground. *Id.* Instead, it identified nine non-exhaustive factors for courts to consider: (1) the identity of the party seeking disclosure; (2) whether the government or the defendant in the grand jury proceeding objects to disclosure; (3) why disclosure is being sought in a particular case; (4) what specific information is being sought; (5) how long ago the grand jury proceeding took place; (6) the current status of the principals and their families; (7) the extent to which the material has been previously made public; (8) whether witnesses to the grand jury proceedings who might be affected by the disclosure are still alive; and (9) any additional need for maintaining secrecy in a particular case. *Id.* at 106.

The *Craig* factors have been applied by numerous district courts when deciding whether to release grand jury materials based on their historical significance. *See, e.g.*, *In re Kutler*, 800 F. Supp. 2d 42, 47-50 (D.D.C. 2011); *Historical Ass'n*, 49 F. Supp.2d at 291-97; *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *1-*2 (M.D. Tenn. Apr. 14, 2009). Like those courts, this Court finds the *Craig* framework to be a reasonable approach, as it incorporates flexibility and a nuanced consideration of a variety of factual matters to guide the Court's exercise of discretion. Accordingly, the Court will apply the *Craig* factors in this case.

As to the first factor, the parties seeking disclosure consist of an author/historian and a coalition of historical groups. (*See* R. 1, Pet. at 2-3.) This militates in favor of disclosure. *See Kutler*, 800 F. Supp. 2d at 48 (concluding that first factor weighed in favor of releasing transcripts, where petitioners consisted of scholars and "major historical groups"). Second, although the government opposes the disclosure, it has not identified any specific reason that

releasing the grand jury transcripts will threaten national security or otherwise cause harm. *See Historical Ass'n*, 49 F. Supp. 2d at 291 (second factor weighed in favor of disclosure where the government offered only "generic objections" to disclosure rather than advancing specific concerns about security or privacy). Instead, the government's opposition rests on its belief that this Court lacks authority to disclose the transcripts—an argument the Court has already rejected. (*See* R. 11, Gov't Opp'n at 9-31.) Accordingly, this second factor also weighs in favor of Petitioners.

The third and fourth factors—the reasons for seeking disclosure and the specific information sought—also favor Petitioners. Petitioners seek the transcripts for scholarly purposes and to create a more complete public record of the *Tribune* investigation, which are worthy goals. *See Historical Ass'n*, 49 F. Supp. 2d 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."). The *Tribune* investigation not only received media coverage at the time it occurred, but has continued to receive media attention in recent years. *See, e.g.*, Carey Shenkman, *70 Years Later, Still Playing Politics With Freedom of the Press*, Huffington Post (Jun. 18, 2014) (available at http://www.huffingtonpost.com/carey-shenkman/freedom-of-the-press_b_5503196.html); Peter Duffy, *Keeping Secrets: How Censorship Has (And Hasn't) Changed Since World War II*, Columbia Journalism Review, Sept/Oct. 2010, at 58. Among other matters, historians continue to debate how Johnston obtained information about the Navy's code-breaking, what the *Tribune* hoped to accomplish by publishing the story, and what the government hoped to accomplish by pursuing the investigation. (*See* R. 1, Pet. at 4-5; R. 4-1, Carlson Decl ¶ 24; R. 4-3, Prados Decl. ¶¶ 6-8.) This decades-long interest in the case suggests that the public has a significant interest in

disclosure of the transcripts. *See Craig*, 131 F.3d at 107 ("[I]f 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.").

The Court also considers that the *Tribune* investigation implicates broader principles, namely, the relationship between the government and the press in a democratic society, particularly as to matters impacting national security. Even now, there is a robust public debate surrounding the government's prosecution of members of the press for violations of the Espionage Act. *See, e.g.*, Trevor Timm, *Guilty Plea In Fox News Leak Case Shows Why Espionage Act Prosecutions Are Inherently Unfair to Sources*, Freedom of the Press Foundation (Feb. 7, 2014) (available at https://freedom.press/blog/2014/02/guilty-plea-fox-news-leak-case-shows-why-espionage-act-prosecutions-are-inherently); Leonard Downie, *Obama's War On Leaks Undermines Investigative Journalism*, Washington Post (May 23, 2013) (available at http://www.washingtonpost.com/opinions/leonard-downie-obamas-war-on-leaks-undermines-investigative-journalism); Michael Barone, *More Than All Past Presidents, Obama Uses 1917 Espionage Act To Go After Reporters*, Washington Examiner (May 25, 2013) (available at http://www.washingtonexaminer.com/michael-barone-more-than-all-past-presidents-obama-uses-1917-espionage-act-to-go-after-reporters/article/2530340). Other courts have permitted disclosure of grand jury materials where the petitioners sought to explore similarly important events and themes. *See Historical Ass'n*, 49 F. Supp. 2d at 295 (finding disclosure of grand jury testimony pertaining to Alger Hiss, a high-ranking State Department official accused of espionage, of historical importance in light of the "vigorous and sustained debate not only about the case itself, but also about broader issues concerning fundamental and, at times, countervailing aspects of our democracy"); *In re Pet. of Nat'l Sec. Archive*, 2008 WL 8985358,

at *1 (finding that "substantial historical importance" justified the disclosure of grand jury records relating to Julius and Ethel Rosenberg and other American citizens accused of espionage during the Cold War). Accordingly, the third and fourth factors also favor Petitioners.

The fifth factor—how long ago the grand jury proceeding took place—also weighs in favor of disclosure. The *Tribune* investigation took place more than 70 years ago, and other courts have released grand jury transcripts based on historical significance when less time has passed. *See In re Kutler*, 800 F. Supp. 2d at 49 (disclosing transcripts from 36 years earlier based on their historical significance); *Historical Ass'n*, 49 F. Supp. 2d at 291 (disclosing transcripts from 50 years earlier based on their historical significance). As these courts have recognized, after so many years the traditional reasons for maintaining grand jury secrecy have typically dissipated. *See Craig*, 131 F.3d at 107 ("[T]he passage of time erodes many of the justifications for continued secrecy."); *Historical Ass'n*, 49 F. Supp. 2d at 292 (observing that the primary reasons for maintaining secrecy "dissolved" some 50 years earlier when the grand jury investigation ended). The age of the transcripts therefore weighs in favor of disclosure.

The sixth and eighth factors—the impact that disclosure might have on the principals, witnesses, or their families—appears to be a minimal concern in this case. Petitioners assert, without contradiction by the government, that most of the parties involved in the investigation passed away more than 40 years ago, and that the last confirmed death of a known grand jury witness occurred in 1997, when Waldrop died at the age of 92. (R. 4-1, Carlson Decl. ¶ 26). Although Petitioners cannot confirm whether the unidentified naval officers are still alive, it is reasonable to infer that that they are not, given that they would now likely be more than 100 years old. (*See* R. 4, Pet'rs' Mem. at 12 n.4.) The Court also considers that the Petition has been pending since November 2014, and to date no witnesses, family members, or other third parties

have come forward to express concerns about the transcripts being made public.[5] *See Nat'l Security Archive*, 2008 WL 8985358, at *1 (because of the "ease and efficiency of expressing any objection," witnesses who failed to come forward to object to release of grand jury transcripts were presumed to be either "indifferent to release, or lack[ing] capacity (because of death or otherwise)"). These factors also weigh in favor of release.

The seventh factor—the extent to which the grand jury materials have been made public—also favors Petitioners. As outlined above, a substantial amount of material from the *Tribune* investigation has already been released by the government, including summaries of DOJ interviews with grand jury witnesses Johnston and Maloney, and an internal memorandum by government attorney outlining the government's view of the case and the reasons why a prosecution should not be pursued. (*See* R. 4, Pet'rs' Mem. at 14; R. 4-1, Carlson Decl. ¶ 7; R. 11, Gov't's Opp'n, Ex. A, Mitchell Mem.) The fact that these sensitive materials have already been disclosed suggests that the need for continued secrecy has eroded. *See Craig*, 131 F.3d at 107 ("[E]ven partial previous disclosure often undercuts many of the reasons for secrecy."). Thus, this factor weighs in favor of disclosure.

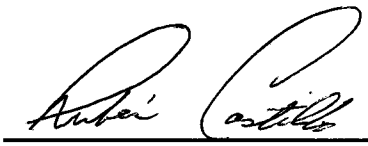
The final factor requires the Court to consider any additional reasons for maintaining secrecy that exist in the case. *Craig*, 131 F.3d at 106. As noted, the government has not identified any national security concerns or other reason why disclosure would be harmful, nor can this Court discern any reason why the transcripts should be kept from the public at this point. *See Douglas Oil*, 441 U.S. at 223 ("[A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing

[5] The Court notes that the filing of the Petition received media coverage in the *Tribune* several months ago. *See* Editorial Board, *Breaking The Code On A Chicago Mystery From WWII*, Chicago Tribune, Nov. 21, 2014.

justification."). The grand jury proceedings ended more than 70 years ago, and most of the parties involved have died. No one other than the government has come forward to object to the disclosure, and many of the details related to the *Tribune* scandal have already been made public. Accordingly, the Court finds that release of the transcripts is warranted. Disclosing the transcripts will not only result in a more complete public record of this historic event, but will "in the long run, build confidence in our government by affirming that it is open, in all respects, to scrutiny by the people." *Historical Ass'n*, 49 F. Supp. 2d at 295.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Petition (R. 1) and orders the release of the grand jury transcripts from the 1942 investigation of the *Chicago Tribune*.

ENTERED: 

Chief Judge Rubén Castillo
United States District Court

Dated: June 10, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Elliot Carlson, et al.,

Plaintiff(s),

v.

United States of America,

Defendant(s).

Case No. 14 C 9244
Judge

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment entered in favor of the Petitioners, Elliot Carlson, Reporters Committee for Freedom of the Press, American Historical Assn., National Security Archive, Naval Historical Foundation, Naval Institute Press, Organization of American Historian, and Society for Military History and against the Respondent, the United States of America.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Ruben Castillo on a motion for order directing release of grand jury transcripts.

Date: 6/10/2015

Thomas G. Bruton, Clerk of Court
Ruth O'Shea, Deputy Clerk

CIRCUIT RULE 30(d) STATEMENT

I hereby certify that the Appendix and Joint Appendix to this brief contain all the material required by Circuit Rules 30(a) and (b).

/s/ Jaynie Lilley
JAYNIE LILLEY

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a) (5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,915 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Jaynie Lilley
JAYNIE LILLEY

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Jaynie Lilley*
JAYNIE LILLEY