No. 15-2972

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELLIOT 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
Honorable Rubén Castillo
Case No. 14-cv-09244

BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONERS-APPELLEES ELLIOT 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

Katie Townsend
Counsel of Record
Bruce D. Brown
Of Counsel
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310
ktownsend@rcfp.org

Brendan J. Healey
MANDELL MENKES LLC
One North Franklin Street
Suite 3600
Chicago, Illinois 60606
(312) 251-1000
(312) 251-1010 (fax)
bhealey@mandellmenkes.com

Counsel for Petitioners-Appellees Elliot 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

DISCLOSURE STATEMENT

The undersigned counsel of record for Elliot 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 hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party that the attorney represents in the case:

Elliot 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

(2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this Court:

Mandell Menkes LLC

(3) If such party or amicus is a corporation:

(i) Its parent corporation, if any: N/A

(ii) Any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

Dated: December 21, 2015

s/ Katie Townsend

Katie Townsend
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310
ktownsend@rcfp.org

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Dated: December 21, 2015

s/ Brendan J. Healey
Brendan J. Healey
MANDELL MENKES LLC
One North Franklin Street
Suite 3600
Chicago, Illinois 60606
(312) 251-1000
(312) 251-1010 (fax)
bhealey@mandellmenkes.com

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INTRODUCTION

This appeal arises from an order of the United States District Court for the Northern District of Illinois unsealing the transcripts of witness testimony given before a grand jury in August of 1942 in connection with the only attempt ever made by the United States to prosecute a major newspaper under the Espionage Act of 1917. The government's ultimately unsuccessful effort to obtain a grand jury indictment of the *Chicago Tribune* (the "*Tribune*") at the height of World War II is not only of immense historical significance, it implicates broader, fundamental issues concerning the relationship between government and the press in a democratic society that resonate powerfully today. That the *Tribune* grand jury investigation has continued over the course of more than seven decades to be a subject of intense interest among historians, scholars, the media, and the public, speaks volumes, and is but one of many factors that the District Court found merited the transcripts' release. The Chief Judge of the District Court's judicious determination that disclosure of the 73-year old transcripts was warranted on the record before him was an appropriate exercise of discretion and should not be disturbed on appeal.

The Government concedes that if the District Court had discretion to unseal the *Tribune* grand jury transcripts, it did not abuse that discretion. *See* Brief of Respondent-Appellant the United States ("Gov't Br.") at 36–37, n.3. The Government premises its appeal solely on its view that the District Court had no such discretion. Specifically, the Government argues that Rule 6(e) of the Federal Rules of Criminal Procedure prohibits a federal court from disclosing grand jury materials in any circumstances not listed in Rule 6(e)(3)(E), and, accordingly, that the District Court lacked any authority to even consider ordering the release of the *Tribune* grand jury transcripts. That argument, however, rests on inapposite case law, misconstrues both the

language and purpose of Rule 6(e), and has been resoundingly rejected by federal courts and by the Federal Advisory Committee on the Criminal Rules.

The District Court's unremarkable conclusion that federal courts possess inherent authority to release grand jury materials in appropriate circumstances other than those explicitly identified in Rule 6(e)(3)(E) finds ample—if not overwhelming—support in the origin and history of the Rule, which codifies the role that federal courts have traditionally played in the development of the law of grand jury secrecy, the language of the Rule, and case law interpreting it. Put simply, the exceptions to secrecy listed in Rule 6(e)(3) "were not intended to ossify the law." *In re Hastings*, 735 F.2d 1261, 1269 (11th Cir. 1984). Those exceptions have always been and continue to be "subject to development by the courts in conformance with the rule's general rule of secrecy." *Id*. This Court should join the Second Circuit and other federal courts in "reject[ing] the government's suggestion that [it] unsettle this area of good law" by concluding otherwise. *Craig v. United States (In re Craig)*, 131 F.3d 99, 103 (2d Cir. 1997) ("*Craig*").

The District Court's exercise of its inherent discretion to order disclosure of the *Tribune* grand jury transcripts was "fully consonant with the role of the supervising court and will not unravel the foundations of secrecy upon which the grand jury is premised." *Id*. Moreover, it will result in a more complete public record of a singular historical event in our nation's history and "in the long run, build confidence in our government by affirming that it is open, in all respects, to scrutiny by the people." *In re Am. Historical Ass'n*, 49 F.Supp.2d 274, 295 (S.D.N.Y. 1999) ("*Historical Ass'n*"). For these reasons, and all the reasons set forth herein, Petitioners-Appellees Elliot Carlson, 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 respectfully urge this Court to affirm the decision of the District Court.

STATEMENT OF JURISDICTION

This case presents an issue of federal law concerning the scope of a federal district court's inherent authority and the extent of its discretion under the Federal Rules of Criminal Procedure. Accordingly, the United States District Court for the Northern District of Illinois, the district where the 1942 *Tribune* grand jury convened,[1] had jurisdiction under 28 U.S.C. § 1331. The District Court issued a Memorandum Opinion and Order and entered final judgment on June 10, 2015. JA123–44.[2] The Government filed its notice of appeal on August 7, 2015. JA145. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether a federal district court has discretion to order the release of historical grand jury transcripts in appropriate circumstances not expressly listed in Rule 6(e)(3)(E) of the Federal Rules of Criminal Procedure.[3]

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[1] Petitions for the disclosure of grand jury materials are to be filed in the district where the grand jury convened. *See* Fed. R. Crim. P. 6(e)(3)(F); *Craig*, 131 F.3d at 102 n.2 ("[L]ike the authority to disclose grand jury records within the parameters set by Rule 6(e), the authority to determine whether outside of those parameters special circumstances warranting release exist should rest with the district court that initially supervised the grand jury.").

[2] Citations to documents found in the Government's Appendix are "A__." Citations to documents found in the Joint Appendix filed concurrently with the Government's Brief are "JA__." Citations to documents found in the Supplemental Appendix attached hereto are "SA__."

[3] Unless otherwise indicated, all references herein to the "Rules" are to the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On June 7, 1942, at the height of World War II, the *Chicago Tribune* (the "*Tribune*") ran a front-page story by war correspondent Stanley Johnston ("Johnston") headlined "NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA." A1. Citing "reliable sources in the naval intelligence," Johnston's article reported that the U.S. Navy had detailed information concerning the Japanese military's plan to attack U.S. forces at Midway several days in advance of that famed battle, which is widely considered to have been a turning point in the Pacific Theater of WWII, JA13–14; JA29; A1. The article appeared to be based on a classified Navy dispatch, and it raised the ire of high-ranking military and government officials, including President Franklin D. Roosevelt, who believed that Johnston's story revealed a closely guarded military secret: that the Navy had successfully cracked the code used by Japanese forces to encrypt their communications. JA14; A1–2. President Roosevelt himself, among others, called for a criminal investigation. A2.

In August of 1942, the U.S. Department of Justice convened a grand jury in Chicago to investigate whether Johnston and the *Tribune* had violated the Espionage Act of 1917 (the "Espionage Act"), JA14; A2.[4] The grand jury heard testimony from eight naval officers—Rear Admiral Frederick C. Sherman, Commander Morton Seligman, Lieutenant Commander Edward

[4] The Espionage Act prohibits, among other things, the "knowing[] and willful[]" "communicat[ion]" or "public[ation]" of "classified information" in "any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States." *See* 18 U.S.C. § 798.

O'Donnell, Lieutenant Commander Edward Eldridge, and four unknown officers.[5] JA14. Johnston, J. Loy ("Pat") Maloney, and Wayne Thomis of the *Tribune* also testified before the grand jury, as did the editors of two other newspapers that had also published Johnston's story: Ralph Sharp of the *New York Daily News*, and Frank Waldrop of the *Washington Times-Herald*. *Id.* The grand jury ultimately declined to issue any indictments, returning a "no bill" on August 19, 1942. A2. The *Tribune* heralded the grand jury's refusal to indict as a victory for the First Amendment. *Id*. The following day the *Tribune* ran a front-page political cartoon depicting Tribune Tower as a citadel for press freedom. JA8; A2.

The *Tribune* grand jury investigation remains the only time the United States has attempted to prosecute a major newspaper under the Espionage Act for publishing a news article. JA29–30; A2.

B. THE DISTRICT COURT PROCEEDINGS

On November 18, 2014, Elliot Carlson, 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 (the "Coalition" or "Appellees") filed a petition in the United States District Court for the Northern District of Illinois seeking to unseal the transcripts of witness testimony given before the 1942 *Tribune* grand jury. *See* JA5–10.

Noting that none of the express exceptions to grand jury secrecy listed in Rule 6(e)(3) spoke directly to the situation presented in its petition, JA15, the Coalition urged the District Court to exercise its discretion to order release of the *Tribune* grand jury transcripts pursuant to its inherent authority. *See* JA14–18. In doing so, the Coalition pointed to the "immense

[5] Conflicting press accounts from the time place the number of unidentified Navy officers who testified before the grand jury at either three or four. JA14.

historical importance" of the United States' attempt to obtain a grand jury indictment against a major newspaper—an extraordinary event in our nation's history that "speaks not only to the relationship between the government and the news media during wartime, but to broader, fundamental issues concerning democracy and freedom of the press"—as well as to its contemporary relevance. JA13 ("Particularly now, when the U.S. government is pursuing an unprecedented number of Espionage Act prosecutions aimed at alleged leaks of classified information, the public has a compelling interest in understanding this historically significant event."). The Coalition further argued, among other things, that disclosure would not "undermine any of the traditional justifications for grand jury secrecy," particularly in light of the more than 70 years that have passed since the investigation. JA22–25. In support of its petition, the Coalition submitted declarations from two historians and award-winning authors: Mr. Carlson, who is currently writing a book about the *Tribune*'s Midway story that is to be published by the Naval Institute Press, *see* JA28–38, and Dr. John Prados, JA53–55.

The United States (hereinafter, the "Government") opposed the Coalition's petition solely on the basis of its contention that the District Court lacked any authority to disclose grand jury materials under any circumstances other than those listed in Rule 6(e)(3)(E). *See* JA65; JA74; JA79–84.

On June 10, 2014, the Chief Judge of the Northern District of Illinois, the Honorable Rubén Castillo, entered an order granting the Coalition's petition. JA123. As set forth in his detailed Memorandum Opinion and Order, A1–20, Chief Judge Castillo rejected the government's argument that federal district courts lack any authority to release grand jury material in circumstances other than those expressly set forth in Rule 6(e)(3)(E). A14. Finding "considerable support for the conclusion that Rule 6(e) was not intended to cabin" a district

court's inherent authority in the language of the Rule itself, its history, and decisional law, A11, the District Court joined "numerous other federal 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)." A13–14.

The District Court further concluded that the Coalition's petition presented "appropriate circumstances" warranting the release of grand jury materials. A14–20. Observing that this Court has not previously "addressed this precise issue," A14, the District Court looked for guidance in making that determination to the "leading framework" developed by the U.S. Court of Appeals for the Second Circuit in *Craig*, 131 F.3d 99. A15. In *Craig*, the Second Circuit identified a series of non-exhaustive factors for district courts to consider when evaluating a request to release historical grand jury material, including, *inter alia*, "the identity of the party seeking disclosure," the "reasons for seeking disclosure and the specific information sought," and "how long ago the grand jury proceeding took place." A15–20. Finding the Second Circuit's framework "to be a reasonable approach, as it incorporates flexibility and a nuanced consideration of a variety of factual matters," the District Court applied each of the factors identified in *Craig*, *see id.*, found them to weigh in favor of disclosure, and concluded that release of the *Tribune* grand jury transcripts was "warranted." A20. The Government appealed. JA147.

SUMMARY OF THE ARGUMENT

The Government's appeal rests solely on its argument that the District Court lacked any authority to unseal the *Tribune* grand jury transcripts because, according to the Government, Rule 6(e) strips federal courts of any discretion to order the release of grand jury materials in any circumstances other than those expressly identified in Rule 6(e)(3)(E). *See* Gov't Br. at 12. The

Government's position, which, if accepted, would work a profound change to the law of grand jury secrecy, is fundamentally flawed and unsupported, and should be rejected for at least the following reasons.

1. It is well-established and undisputed that federal courts possess inherent supervisory authority over grand juries. *See United States v. Williams*, 504 U.S. 36, 45–50 (1992) (recognizing courts' inherent supervisory power over grand juries). While grand jury proceedings "have traditionally been closed to the public and the accused," *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986), "federal courts historically have exercised [their] supervisory power" to "develop exceptions to the rule of secrecy when appropriate." *Historical Ass'n*, 49 F. Supp. at 286. As its history makes clear, Rule 6(e) codifies that tradition; it is "but declaratory of" the longstanding principle that disclosure of grand jury material is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). Indeed, the "exceptions to the secrecy rule" found in Rule 6(e)(3)(E) "have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *Historical Ass'n*, 49 F. Supp. 2d. at 286 (quoting *In re Hastings*, 735 F.2d at 1268). Those exceptions "were not intended to ossify the law," *In re Hastings*, 735 F.2d at 1269, which remains subject to development by the courts in their sound discretion and in accordance with the general rule of grand jury secrecy.

2. Contrary to the Government's arguments, neither the language of Rule 6(e) nor the Supreme Court precedent cited by the Government offers any support for the argument that the exceptions to grand jury secrecy listed in Rule 6(e)(3)(E) are exclusive. The Government's newfound reliance on the phrase "[u]nless these rules provide otherwise" in Rule 6(e)(2)(B)—a different subdivision of Rule 6(e) that, by its own plain terms, does not apply to the decisions of

federal courts to permit disclosure of grand jury materials—is unavailing. As the District Court correctly concluded, consistent with Rule 6(e)'s history and purpose, nothing in the Rules expressly prohibits a federal court from unsealing grand jury materials in appropriate circumstances not listed in Rule 6(e)(3)(E).

Moreover, none of the Supreme Court cases relied upon by the Government adopt its cramped, erroneous reading of Rule 6(e). *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 may not exercise its inherent authority in a manner that directly contravenes an express mandate of the Rules, and *Williams*, 504 U.S. at 50, makes clear that a court's inherent supervisory authority over grand juries does not reach so far as to 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." Because a district court's discretionary decision to release historically significant grand jury material in appropriate circumstances is wholly consistent with the Rules and the traditional role of the supervising court, these cases are inapposite. The District Court correctly rejected the Government's arguments in reliance on this precedent.

3. Both before and after the Supreme Court's decisions in *Carlisle*, *Bank of Nova Scotia*, and *Williams*, numerous federal courts have not only recognized the inherent authority of a federal court to order the release of grand jury materials in appropriate circumstances not listed in Rule 6(e)(3)(E), they have specifically held that the unsealing of historically significant grand jury materials may be an appropriate exercise of a federal court's discretion in certain situations. For example, in many cases relying on the leading framework first articulated by the Second Circuit in *Craig*, 131 F.3d at 106, and applied by the District Court below, federal courts have

properly ordered the release of grand jury materials pertaining to decades-old investigations of Alger Hiss, *Historical Ass'n*, 49 F. Supp. 2d at 297, Jimmy Hoffa, *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *1 (M.D. Tenn. Apr. 14, 2009), and Julius and Ethel Rosenberg, *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008).

4. As the District Court found, the Federal Advisory Committee for the Federal Rules (hereinafter the "Advisory Committee"), a rulemaking body under the jurisdiction of the Judicial Conference Committee on Rules of Practice and Procedure, has also "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 Rule 6(e)(3)(E)]." A12. As the Government acknowledges, the Advisory Committee rejected a 2011 proposal by the Attorney General to amend Rule 6(e) to address "the release of historically significant grand jury records in specified circumstances" because it found "no need for a rule on the subject." Gov't Br. at 42. In the Advisory Committee's view, "in the rare cases where disclosure of historic materials had been sought," district courts "acted reasonably in referring to their inherent authority." *Id*.

5. Finally, the Government concedes that if the District Court had discretion to unseal the *Tribune* grand jury transcripts, the District Court did not abuse that discretion. Gov't Br. at 36–37 n. 3. Thus, this Court need not revisit that portion of the District Court's Memorandum Opinion and Order to affirm the District Court's decision on appeal. Yet this Court also need not overlook the careful, judicious manner in which the Chief Judge of the District Court evaluated the Coalition's petition to unseal. The Government repeatedly misstates the District Court's ruling, as well as the issue before this Court, when it asserts that the District Court ordered disclosure of the *Tribune* grand jury transcripts "solely on the basis of their historical significance." Gov't Br. at 2, *see also id*. at pp. 1, 3, 10, 13, 15, 25, 31, 32, 34, 38, and the

Government's suggestion that the District Court ordered disclosure of the *Tribune* grand jury transcripts to "vindicate" what it viewed to be a "socially desirable" "goal" is entirely baseless. *Id*. at 30; *see also id*. at 2, 13. Using the nine, non-exhaustive factors identified by the Second Circuit in *Craig* as a guide for its exercise of discretion, A15, the District Court undertook a detailed analysis involving a "nuanced consideration of a variety of factual matters," *id.*; *see* A15–20. The District Court's thoughtful approach recognized that the discretion of a trial court in deciding "'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.'" A14 (quoting *Craig*, 131 F.3d at 104). Its decision refutes any claim by the Government that recognition by this Court of the inherent supervisory authority vested in federal courts to order the release of grand jury materials in appropriate circumstances not identified in Rule 6(e)(3)(E) will somehow undermine the foundations of the grand jury institution.

STANDARD OF REVIEW

The Government asserts that this Court should review the District Court's order to unseal the *Tribune* grand jury transcripts for an abuse of discretion. Gov't Br. at 14. The Coalition agrees. *See Craig*, 131 F.3d at 107; *see also United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987) ("stress[ing]" that "wide discretion must be afforded to district court judges in evaluating whether disclosure [of grand jury materials] is appropriate"). Abuse of discretion is a "deferential" standard of review. *Dunning v. Simmons Airlines*, 62 F.3d 863, 872 (7th Cir. 1995). Because "the discretion of a trial court in deciding 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," the "deference due" the District Court makes the Government's "burden on appeal heavy indeed." *Craig*, 131 F.3d at 104.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT RULE 6(e) DID NOT PRECLUDE IT FROM EXERCISING ITS DISCRETION TO ORDER DISCLOSURE OF THE *TRIBUNE* GRAND JURY TRANSCRIPTS

A. Federal courts are, and have historically been, vested with inherent authority to order the release of grand jury materials in appropriate circumstances.

It has long been recognized that courts vested "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." *Degen v. United States*, 517 U.S. 820, 823 (1996); *see also* U.S. CONST. art. III, § 1 ("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."). "These powers are 'governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs . . . , '" *Chambers v. NASCO*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962)), and they include the power to, for example, "formulate procedural rules not specifically required by the Constitution or the Congress" in certain circumstances. *United States v. Hasting*, 46l U.S. 499, 505 (1983).

Federal courts' "inherent supervisory authority over grand juries" is, in particular, "well recognized." *In re United States*, 441 F.3d 44, 57 (1st Cir. 2006); *see also Williams*, 504 U.S. at 45–50 (recognizing courts' supervisory power over grand juries); *Bank of Nova Scotia*, 487 U.S. at 254–57 (same); *Craig*, 131 F.3d at 102–03; *In re Hastings*, 735 F.2d at 1268–69*; In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1235–37 (7th Cir. 1981), *aff'd on other grounds sub nom.*, *United States v. Baggot*, 463 U.S. 476 (1983). Such authority has been said to derive from a federal court's "power to call a grand jury into existence," as well as its "power to issue and [its] duty to enforce grand jury subpoenas." *In re Grand Jury Proceedings*, 507 F.2d 963, 964 n.2 (3d Cir. 1975); *see also In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 680 (8th

Cir. 1986) ("It is axiomatic that the grand jury derives its power from the district court and therefore acts under the inherent supervision of the court.").

"Since the 17th century," proceedings before a grand jury have generally "been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (stating that grand jury proceedings "have traditionally been closed to the public and the accused"). The "'long-established policy'" of grand jury secrecy is thus "older than our Nation itself." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (quoting *United States v. Procter*, 356 U.S. 677, 681 (1958)).

Yet the "'tradition'" of grand jury secrecy "'is not,'" and has never been, "'absolute.'" *Craig*, 131 F.3d at 103 (quoting *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973) ("*Biaggi*")). "[F]ederal courts historically have exercised [their] supervisory power" over grand jury matters "to develop exceptions to the rule of secrecy when appropriate." *Historical Ass'n*, 49 F. Supp. at 286 (finding it "unquestionable that courts possess supervisory power to develop rules regarding this discrete aspect of grand jury procedure."); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233–34 (1940) (acknowledging that "[g]rand jury testimony is ordinarily confidential," but stating that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."). Indeed, as discussed in more detail below, Rule 6(e) codifies several specific exceptions to the rule of grand jury secrecy that were developed over time by the federal courts. *See* Fed. R. Crim. P. 6(e)(3)(E).[6]

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[6] Rule 6(e)(3)(E) states:

> 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;

Federal courts are, and have historically been, afforded wide discretion to determine whether or not to order the disclosure of grand jury material in appropriate circumstances. *See Craig*, 131 F.3d at 102. As the Supreme Court noted in 1959, determinations as to whether grand jury material should be disclosed "have been nearly unanimous[ly]" regarded as "committed to the discretion" of the district courts. *Pittsburgh Plate Glass*, 360 U.S. at 399. Since that time, the Supreme Court has "repeatedly stressed" the "wide discretion" that "must be afforded to district court judges in evaluating whether disclosure [of grand jury material] is appropriate." *United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987); *see also Douglas Oil*, 441 U.S. at 223 ("[W]e emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.").

As set forth in more detail below, Rule 6(e) "is but declaratory of" the broad discretion historically afforded federal courts to determine whether the disclosure of grand jury material is warranted. *Pittsburgh Plate Glass*, 360 U.S. at 399. It does not, as the Government contends, supplant district courts' inherent authority to order the release of grand jury material in appropriate circumstances not expressly identified in the Rule. Rather it preserves district

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> (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.

courts' discretion to act outside the confines of Rule 6(e)(3)(e) in "'exceptional circumstances consonant with the rule's policy and spirit.'" *Craig*, 131 F.3d at 103 (quoting *In re Hastings*, 735 F.2d at 1269); *see also Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (rejecting the argument that Rule 6(e) eliminates "the discretion ordinarily reposed in a trial court to make such disclosure of grand jury proceedings as he deems in the public interest").

B. Rule 6(e) was intended to codify, not curtail, federal courts' discretion to release grand jury materials when warranted.

Rule 6(e) was enacted in 1944 to "continue[]"—not fundamentally alter—"the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944 (italics added) (citations omitted); *see also In re Report & Recommendation of June 5,1972 Grand Jury etc.*, 370 F. Supp. 1219, 1229 (D.D.C. 1974) (stating that Rule 6(e) "was not intended to create new law," and "remains subject to the law or traditional policies that gave it birth"); *Craig*, 131 F.3d at 102 (explaining that the Rule originated to "reflect[] rather than create[] the relationship between federal courts and grand juries").

The evolution of Rule 6(e) demonstrates that exceptions to grand jury secrecy have historically been, and continue to be, "subject to development by the courts." *In re Hastings*, 735 F.2d at 1269. It is undisputed that federal "courts' 'inherent power' has shaped the rule." *Id*. at 1268. "[A]s 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, 45–46 (D.D.C. 2011). Indeed, Rule 6(e) "has been repeatedly amended to incorporate subsequent developments wrought in decisions of the federal courts." *In re Hastings*, 735 F.2d at 1268; *see also Craig*, 131 F.3d at 102 (stating that exceptions to grand jury secrecy "have developed

historically alongside the secrecy tradition and, more recently, in the practice of the federal courts").

For instance, as the District Court highlights in its Memorandum Opinion and Order, "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." JA134 (citing *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 476–77 (E.D. Pa. 1971)). Thereafter, in 1977, "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." JA134–35 (citing Fed. R. Crim. P. 6(e)(3)(A)(ii), Advisory Committee Notes to 1977 Amendment); *see also United States v. Sells Eng'g,* 463 U.S. 418, 436–38 (1983) (describing the general history of the 1977 amendment). In connection with that amendment to Rule 6(e), the Advisory Committee explained that "'the trend [in the federal courts] seems to be in the direction of allowing disclosure to government personnel.'" *In re Hastings*, 735 F.2d at 1268 (quoting Fed. R. Crim. P. 6(e)(3)(A)(ii), Advisory Committee Notes to 1977 Amendment).

It was federal courts' "recognition of the occasional need for litigants to have access to grand jury transcripts [that] led to the provision" now found in Rule 6(e)(3)(E)(i) "that disclosure of grand jury transcripts may be made 'when so directed by a court preliminarily to or in connection with a judicial proceeding.'" *Douglas Oil,* 441 U.S. at 220. Similarly, "in 1979 the requirement that grand jury proceedings be recorded was added to Rule 6(e) in response to a trend among [federal] courts to require such recordings." *See* JA135; Fed. R. Crim P. 6(e)(1), Advisory Committee Notes to 1979 Amendment. And, when Rule 6(e) was amended in 1983 to permit disclosure of material from one grand jury for use in another, the Advisory Committee

again looked to the practices of the nation's courts, noting that "[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances." Fed. R. Crim. P. 6(e)(3)(C), Advisory Committee Notes to 1983 Amendment; *In re Hastings*, 735 F.2d at 1268–69.

The Government's attempt to dismiss this history as illustrative only of the "flexibility . . . of the rulemaking process" is unpersuasive. Gov't Br. at 28. The Rule's evolution demonstrates unequivocally that the "exceptions to the secrecy rule" found in Rule 6(e)(3)(E) were "developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *Historical Ass'n*, 49 F. Supp. 2d. at 286 (quoting *In re Hastings*, 735 F.2d at 1268). Both the origin and history of Rule 6(e) belie any claim that it was meant to be "a straitjacket on the courts." *Historical Ass'n*, 49 F. Supp. 2d at 284. Rather, it is and has always been "responsive to courts' interpretation of the appropriate scope of grand jury secrecy." *Id*.

II. NEITHER THE LANGUAGE OF THE RULE NOR THE CASE LAW CITED BY THE GOVERNMENT SUPPORTS ITS CONTENTION THAT RULE 6(e) DEPRIVED THE DISTRICT COURT OF ITS INHERENT AUTHORITY TO ORDER RELEASE OF THE *TRIBUNE* GRAND JURY TRANSCRIPTS

Notwithstanding the central role that "courts' 'inherent power'" has played in "shap[ing] the rule" since its enactment, *In re Hastings*, 735 F.2d at 1268 (citations omitted), the Government argues that Rule 6(e) should now be interpreted as having stripped federal courts of that power and halted any further judicial development of the law in this area. According to the Government, district courts have no discretion, whatsoever, to order the disclosure of grand jury materials under any circumstances other than those listed in Rule 6(e)(3)(E). *See* Gov't Br. at 15–16. In support of that immoderate view, the Government relies on three decisions of the Supreme Court—*Carlisle v. United States*, 517 U.S. 416 (1996), *United States v. Williams*, 504 U.S. 36 (1992), and *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988)—that do not

reach the issue, and language found in a different subdivision of Rule 6(e) that, on its face, does not limit the discretion of federal courts to disclose grand jury materials. As set forth below, nothing cited by the Government provides any support for its sweeping contention that federal courts no longer have a role to play in interpreting the appropriate scope of grand jury secrecy.

A. Nothing in the Rules forbids a district court from disclosing grand jury materials in appropriate circumstances not listed in Rule 6(e)(3)(E).

The Government devotes much of its brief to the argument that language found in Rule 6(e) purportedly limits federal courts' authority to disclose grand jury materials "to the circumstances identified in the Rule." Gov't Br. at 15. Specifically, the Government argues that the phrase "[u]nless these rules provide otherwise," which is found in subdivision (2)(B) of Rule 6(e), "imposes a flat prohibition against the disclosure of any grand jury matter by a non-witness participant in a grand jury proceeding . . . ." *Id.* This argument, however, rests on a patent misreading of the Rule.

Subdivision (2)(B), the provision of Rule 6(e) relied upon by the Government, states:

> (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 . . . [and]
>
> (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

Fed. R. Crim. P. 6(e)(2)(B).

By its own terms, this provision generally prohibits the disclosure of grand jury materials by certain, specified categories of "persons"; it does not speak to a district court's discretionary decision to release grand jury materials. The provision of Rule 6(e) that concerns court-ordered disclosures of grand jury materials is Rule 6(e)(3)(E), which states in pertinent part that "[t]he court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter," and identifies five specific situations where such disclosure may be appropriate. Fed. R. Crim. P. 6(e)(3)(E). Thus, the phrase "[u]nless these rules provide otherwise" in Rule 6(e)(2)(B) cannot be read as imposing any limitation on the circumstances under which *a federal court* may order the release of grand jury material. Indeed, that such language was included in subdivision (2)(B) of Rule 6(e), yet omitted from the relevant provision, subdivision (3)(E), only undercuts the Government's position.

The Rules both anticipate and allow district courts, in their discretion, to "regulate practice in any manner consistent with federal law, these rules, and the local rules of the district." Fed. R. Civ. P. 57(b). Had the drafters of Rule 6(e) intended to eliminate the traditional authority of federal courts to order the release of grand jury materials in circumstances not listed in Rule 6(e)(3)(E), as the Government contends, it is reasonable to assume that they would have enacted such a radical change in existing law through clear, unambiguous, restrictive language in the applicable provision of Rule 6(e).[7] As the District Court correctly found, however, the Rule "does not contain the type of negative language—such as 'only' or 'limited to'—that one would

[7] The Rules' drafters clearly knew how to craft such restrictive language, and chose not to in the context of Rule 6(e)(3)(E). Rule 45, for example, establishes that a court generally may extend time on its own or for good cause. It includes, however, an express exception to that general rule: courts "may not extend the time to take any action under Rule 35, except as stated in that rule." Fed. R. Crim. P. 45(b). This language "makes it clear that the only circumstances under which extensions can be granted" for purposes of Rule 35 are expressly set forth therein. Fed. R. Crim. P. 45, Advisory Committee Notes to 1966 Amendment. As discussed herein, Rule 6(e)(3)(E), on the other hand, sets forth a permissive list, without any express limiting language.

expect to find if the list [in Rule (6)(e)(3)(E)] were intended to be exclusive." JA 134. Instead, the word "may" is used in Rule (6)(e)(3)(E)—a word that ordinarily connotes a permissive, not mandatory, rule. *See United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."); *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 151 (4th Cir. 1993) (quoting *Dalton v. United States*, 816 F.2d 971, 973 (4th Cir. 1987)) ("The word 'may in a statute . . . normally confers a discretionary power, not a mandatory power, unless the legislative intent, as evidenced by the legislative history, evidences a contrary purpose.'").[8] In short, the language of Rule 6(e) provides no basis to conclude that the Rule's drafters intended it to preclude federal courts from disclosing grand jury material in appropriate circumstances other than those listed in Rule 6(e)(3)(E). To the contrary, Rule 6(e)'s "phrasing can, and should, accommodate rare exceptions premised on inherent judicial power." *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005).

[8] The Government did not argue to the District Court that Rule 6(e) expressly prohibits the disclosure of grand jury material in all circumstances other than those set forth in Rule 6(e)(3)(E). Instead, in its briefing below, the Government argued that the maxim *espressio unius est exclusio alterius* precluded the District Court from interpreting the Rule to allow for disclosure for reasons other than those specified in subdivision (3)(E). *See* A10. That canon of construction, which means "the expression of one thing suggests the exclusion of others," has, as the District Court noted, "fallen upon somewhat 'disfavored status.'" *Id*. (quoting *Dahlstrom v. Sun-Times Media, L.L.C.*, 773 F.3d 937, 943 (7th Cir. 2015); *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"). The Government appears to have abandoned any attempt to rely on that canon on appeal, and understandably so. The Supreme Court has "held repeatedly" that it "does not apply to every statutory listing or grouping." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2013); *see also Ivey v. Harney*, 47 F.3d 181, 183 (7th Cir. 1995). And, here, "[j]ust as statutory language suggesting exclusiveness is missing," from Rule 6(e)(3)(E), "so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). Thus, as the District Court concluded, the canon is inapplicable to "the exceptions listed in Rule 6(e)," which are not "part of an 'associated group or series,'" but rather "describe distinct scenarios in which different individuals can seek disclosure of grand jury materials." A11 (quoting *Barnhart*, 537 U.S. at 168).

In its misplaced reliance on the phrase "[u]nless these rules provide otherwise" in Rule 6(e)(2)(B), the Government emphasizes that "it was Congress itself" that sought to include such language in the Rule. *See* Gov't Br. at 6–7, 17–18. The Government traces that language back to the phrase "except as otherwise provided for in these rules," which was included in an amended version of the Rule enacted by Congress in 1977, and moved into Rule 6(e) by the Supreme Court in 1979. *See* Gov't Brief at 6–7. Setting aside the fact that the language cited by the Government appears in a different provision of Rule 6(e) and does not, on its face, eliminate the discretion of federal courts to disclose grand jury materials in appropriate situations other than those identified in Rule 6(e)(3)(E), the history of the 1977 amendment to the Rule belies any claim that Congress intended it to do so. In fact, the legislative history reflects Congress's recognition of the critical role that federal courts' inherent authority plays in "shap[ing] the rule." *In re Hastings*, 735 F.2d at 1268.

The legislative history that accompanies the 1977 amendment makes clear that it was enacted as part of a larger effort to clarify "uncertainty" surrounding when government personnel assisting an "attorney for the government" may be given access to grand jury materials. *See* S. Rep. No. 95-354, at 7 (1977); *see also id*. at 5–9. As discussed in Section I.B, above, this effort codified a "trend" in the federal courts "'in the direction of allowing disclosure to government personnel . . . .'" *In re Hastings*, 735 F.2d at 1268 (quoting Fed. R. Crim. P. 6(e)(3)(A)(ii), Advisory Committee Notes to 1977 Amendment). Among other things, Congress's codification of that "trend" eased the burden on both the courts and the Government by removing the requirement that a federal court exercise its inherent discretion to permit such disclosures, which were not expressly provided for in the Rule, on a case-by-case basis. As the legislative history explains:

> The Rule as redrafted is designed to accommodate the belief . . . that Federal prosecutors should be able, *without the time-consuming requirement of prior judicial interposition*, to make such disclosures of gran[d] jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement.

S. Rep. No. 95-354 at 8 (italics added).

In sum, the Government's contention that the 1977 amendment to Rule 6(e) reflects an intent on the part of Congress to prohibit federal courts from exercising their discretion to disclose grand jury materials in appropriate circumstances not expressly addressed in the Rule is baseless. To the contrary, the legislative history demonstrates Congressional recognition and approval of the role that federal courts' inherent authority continues to play in developing the law "in conformance with the rule's general rule of secrecy." *Hastings*, 735 F.2d at 1269.

B. *Carlisle*, *Bank of Nova Scotia*, and *Williams* do not speak to the issue before this Court.

As the Government conceded below, the Supreme Court has not "'squarely addressed whether a district court's authority to disclose grand jury materials is cabined by Rule 6(e).'" JA131 (quoting JA79). Yet, the Government contends that three Supreme Court cases nevertheless lead inexorably to that conclusion. The Government is wrong. As the District Court correctly found, the Government's reliance on *Carlisle*, 517 U.S. 416, *Bank of Nova Scotia*, 487 U.S. 250, and *Williams*, 504 U.S. 36, is unavailing. *See* JA131–33.

1. In *Carlisle*, the district court granted a defendant's motion for a judgment of acquittal under Rule 29(c) even though the motion had been untimely filed. 517 U.S. at 418–19. The Sixth Circuit reversed the district court's order, and the Supreme Court affirmed. *Id.* at 419, 433. In doing so, the Court relied on the fact that the Rules in effect at the time *expressly prohibited* the district court from extending the deadline to file a Rule 29(c) motion. *Id.* at 419, 421, 433. Specifically, Rule 29(c) stated that motions for acquittal were required to be filed within seven

days of the jury being discharged, and Rule 45, while generally permitting courts to grant extensions of time, stated that "the court may not extend the time for taking any action under Rul[e] 29 . . . ." *Id.* at 420–21. In light of that express prohibition, the Supreme Court concluded that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal," *id.* at 421, reasoning that whatever the scope of a court's "inherent supervisory power," it "does not include the power to develop rules *that circumvent or conflict with* the Federal Rules of Criminal Procedure," *id.* at 426 (italics added). Thus, *Carlisle* addressed a situation in which the district court's ruling directly contravened an express prohibition set forth in the Rules.

Similarly, in *Bank of Nova Scotia*, the Supreme Court considered whether a district court erred when it exercised its inherent supervisory power over grand juries "to dismiss an indictment for prosecutorial misconduct," despite the fact that the misconduct did "not prejudice the defendants." 487 U.S. at 252. The Court held that the district court acted improperly because its decision directly contravened the harmless error standard in Rule 52(a), which mandates that "'[a]ny error, defect, irregularity or variance which does not affect substantial rights *shall be disregarded*.'" *Id.* at 255 (quoting Fed. R. Crim. P. 52(a)) (italics added). The Court in *Bank of Nova Scotia* recognized that "[i]n the exercise of its supervisory authority, a federal court 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'" *Id.* at 254 (quoting *Hasting*, 461 U.S. at 505). It concluded, however, that the district court's dismissal of the indictment was not a proper exercise of that authority because "federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* at 255.

To be sure, as the District Court acknowledged in its Memorandum Opinion and Order, the scope of a federal court's inherent authority "is not without limits." A4. "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Id*. (quoting *Chambers*, 501 U.S. at 44). And 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.'" *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985)) (italics added). As the District Court correctly concluded, both "*Carlisle* and *Bank of Nova Scotia* stand for [that] 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." A9 (citing *Carlisle*, 517 U.S. at 426).

Thus, neither *Carlisle* nor *Bank of Nova Scotia* speak to—let alone resolve—the issue before this Court. A9; *see also, e.g., United States v. Weston*, 36 F. Supp. 2d 7, 12 (D.D.C. 1999) (distinguishing *Carlisle* and exercising its inherent authority to order more than one psychological examination of a defendant because such an order did not conflict with any statute or rule). As discussed in detail above and in the District Court's Memorandum Opinion and Order, nothing in Rule 6(e), nor in any other Rule, expressly prohibits disclosure of historically significant grand jury transcripts in appropriate cases. As Rule 57(b) makes clear, in the absence of such a prohibition, a court has discretion to proceed "in any manner consistent with federal law, these rules, and the local rules of the district." Fed. R. Crim. P. 57(b); *see also G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (stating that 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").

The District Court's exercise of its discretion to order the release of the *Tribune* grand jury transcripts not only does not contravene or circumvent any express prohibition in the Rules, it is fully consonant with the text, history, and purpose of Rule 6(e), which, among other things, was intended to codify such discretion. *See* Section I.B. *Carlisle* and *Bank of Nova Scotia* are thus, as the District Court and other courts have found, simply inapposite here. A9; *Kutler*, 800 F. Supp. 2d at 46–47 (holding that disclosure of historically significant material is not contrary to *Carlisle* and is consistent with Rule 6(e)).

2. The Supreme Court's decision in *Williams*, 504 U.S. 36, likewise offers no support for the Government's position. In *Williams*, the Court held that a court's inherent supervisory power over grand juries did not extend to creating a rule that would require prosecutors to present exculpatory evidence to grand juries. 504 U.S. at 55. In reaching that conclusion, the Court observed that the supervisory power does "not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.* at 50. The Court in *Williams* reasoned that if courts required prosecutors to disclose exculpatory evidence to grand juries, a right the Court found was not traditionally afforded to suspects in this country or in England, it would radically redefine the grand jury institution. *Id.* at 50–52 (explaining that "it has always been thought sufficient" for the grand jury, in "assess[ing] whether there is adequate basis for bringing a criminal charge," to "hear only the prosecutor's side"). As the District Court correctly determined, the type of profound change to the grand jury institution considered by the Court in *Williams* "is not remotely what [the Coalition is] requesting here." A10.

A district court's discretionary disclosure of historically significant grand jury transcripts in appropriate circumstances "has no bearing on the process by which the grand jury makes

charging decisions, and does not involve the use of any remedy that could upset those decisions once made." *Historical Ass'n*, 49 F. Supp. at 287 (distinguishing *Williams*, 504 U.S. at 47, 53). Moreover, "unlike the conduct-regulating rule at issue in *Williams*," the District Court's order releasing the *Tribune* grand jury transcripts "does not prescribe standards for governmental presentations to the grand jury or, indeed, purport to alter accepted rules as to any form of participation in those proceedings." *Id.* (distinguishing *Williams*, 504 U.S. at 47). In short, it does not approach the type of "judicial reshaping of the grand jury institution" that was at issue in *Williams*. 504 U.S. at 50.

To the contrary, far from fundamentally altering "the traditional relationships between the prosecutor, the constituting court, and the grand jury," *id*., a federal court's exercise of its discretion to order disclosure of grand jury transcripts in an appropriate case is consonant with the courts' traditional, supervisory role, as codified in Rule 6(e). *See* Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944 (stating that the Rule "continues the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*") (italics added). Exceptions to grand jury secrecy have historically been "subject to development by the courts," *In re Hastings*, 735 F.2d at 1268, making such discretionary disclosures entirely consistent with the history of the grand jury institution. "Nothing in *Williams* suggests the Court intended to halt this long-established and well-recognized process of development of the law of grand jury secrecy." *Historical Ass'n*, 49 F. Supp. 2d at 286.

III. THE GOVERNMENT'S ERRONEOUS INTERPRETATION OF RULE 6(e) HAS BEEN RESOUNDINGLY REJECTED

A. Federal case law overwhelmingly recognizes courts' discretion to disclose grand jury materials in appropriate circumstances not listed in Rule 6(e)(3)(E), including when materials are historically significant.

1. Both before and after the Supreme Court's decision in *Carlisle*, federal courts of appeals across the country rejected—either explicitly or implicitly—the flawed, cramped interpretation of Rule 6(e) urged by the Government. *See, e.g., In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007) (ordering disclosure of grand jury materials for reasons not explicitly authorized by Rule 6(e), explaining that "'[g]rand jury secrecy is not unyielding' when there is no secrecy left to protect") (citation omitted); *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (concluding that Rule 6(e)'s "phrasing can, and should, accommodate rare exceptions premised on inherent judicial power"); *Craig*, 131 F.3d at 101–02 (analyzing court's "inherent supervisory authority" over grand juries and concluding that "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule"); *In re Hastings*, 735 F.2d at 1268, 1272 (stating that "it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule" and holding that "a district court may act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power" in certain situations).[9]

Indeed, while this Court has never decided the precise issue now before it, it has previously observed, albeit in dicta, that courts "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

[9] While the Government criticizes the District Court's citation to *In re Hastings*—claiming that "nothing" in *In re Hastings* "plausibly supports" the District Court's exercise of its inherent authority in this case, *see* Gov't Brief at 39—that criticism is plainly misplaced. As the Second Circuit noted in *Craig*, the 11th Circuit's thorough, well-reasoned opinion in *In re Hastings* makes it "the seminal case on non-6(e) grand jury disclosure." *Craig*, 131 F.3d at 103.

need for disclosure in the interest of justice, and little traditional need for secrecy remains." *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir. 1981) (noting that "testimony or documents presented to a grand jury" are not "forever foreclosed from future revelation") *aff'd on other grounds sub nom., United States v. Baggot*, 463 U.S. 476 (1983);[10] *see also United States v. Corbitt*, 879 F.2d 224, 239, n.18 (7th Cir. 1989) (observing, in dicta, that "disclosure of grand jury materials in situations not governed by Rule 6(e) should be an uncommon occurrence").

2. In accordance with the principle that federal courts possess inherent authority to order the disclosure of grand jury materials in special circumstances that fall outside the express wording of Rule 6(e)(3)(E), a number of federal courts, including the District Court below, have ordered the release of historically significant grand jury materials when certain criteria have been met. As the District Court noted, the Second Circuit's post-*Carlisle* decision in *Craig*, 131 F.3d 99, is the "leading" example. A14.

Craig involved a petition for disclosure of the transcript of the 1948 grand jury testimony of Harry Dexter White, a former Assistant Secretary of the Treasury who was accused of having been a communist spy. *Craig*, 131 F.3d at 100–01. The petition was submitted to the U.S.

[10] The Government contends that this dictum was "superseded" by the Supreme Court's subsequent ruling in the same case, *United States v. Baggot*, 463 U.S. 476 (1983). Gov't Br. at 24. In affirming this Court's decision, however, the Supreme Court in *Baggot* held only that an IRS civil tax audit is not a "judicial proceeding" within the meaning of what is now Rule 6(e)(3)(E)(i), and made clear that its holding was limited to that narrow question. *See Baggot*, 463 U.S. at 477–79. The Supreme Court was not called upon to decide, nor did it address, whether a district court has inherent authority to disclose grand jury materials in situations other than those enumerated in Rule 6(e)(3)(E). *See id*. at 478. Accordingly, whatever was intended by the Government's assertion that dicta in *In re Special February, 1975 Grand Jury*, 662 F.2d at 1235–36, was "superseded," it does not mean that the Supreme Court in *Baggot* ruled that district courts lack any discretion to order the release of grand jury materials in appropriate circumstances not contemplated by the Rule. Gov't Br. at 24. The Supreme Court made no such ruling. *See Baggot*, 463 U.S. at 477–79; *see also* A8.

District Court for the Southern District of New York by Bruce Craig, a doctoral candidate at American University, who was writing his dissertation on White. *Id*. at 101. Craig contended that the transcript was essential to his research. *Id*. The district court rejected Craig's request, concluding that "while disclosure of grand jury testimony is permissible outside of the boundaries of Rule 6(e)," Craig's petition "did not present sufficiently extraordinary circumstances to justify the release" of White's testimony. *Id*. The Second Circuit affirmed.

In doing so, the court "recognized that there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." *See id.* at 102. It expressly rejected the Government's argument that the district court "did not have authority to go beyond the six exceptions of Rule 6(e)(3)," and reaffirmed its "recognition that permitting departures from Rule 6(e) is fully consonant with the role of the supervising court and will not unravel the foundations of secrecy upon which the grand jury is premised." *Id*. at 103.

While the Court held that "nothing . . . prohibits historical interest, on its own, from justifying release of grand jury material in an appropriate case," *id*. at 104–05, it set forth a "non-exhaustive list" of "factors" for district courts to consider when making such "highly discretionary and fact-sensitive" determinations.[11] Elaborating on those factors, the Second Circuit explained that the "timing of the request remains one of the most crucial elements," because continued historical interest in the information "serves as an important indication that

[11] The factors identified by the Second Circuit in *Craig* are: "(i) the identity of the party seeking disclosure; (iii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question." *Id*. at 106.

the public's interest in release of the information is substantial," and because "the passage of time erodes many of the justifications for continued secrecy." *Id.* at 107.

In 2011, the U.S. District Court for the District of Columbia applied the *Craig* factors when it granted a request by a coalition of historians and historical associations to unseal President Richard Nixon's 36-year-old grand jury testimony from the Watergate investigation. *Kutler*, 800 F. Supp. 2d at 43. The district court in *Kutler* found that the records were of great historical importance and that disclosure "would likely enhance the existing historical record, foster further scholarly discussion, and improve the public's understanding of a significant historical event." *Id.* at 48. The district court also found that "traditional objectives of grand jury secrecy" were not implicated by release of the testimony, since the witness, President Nixon, and "many Watergate principals who are likely mentioned in his testimony [were] deceased," and the investigation was closed. *Id.* at 49.

Other federal district courts have likewise exercised their discretion to order the disclosure of historically significant grand jury materials in situations not expressly identified in Rule 6(e)(3)(E), after engaging in a similar careful weighing of various competing considerations. *See Historical Ass'n*, 49 F. Supp. 2d at 297 (granting petition of a coalition of historians to unseal 50-year old testimony from a grand jury investigation of Alger Hiss, a former high-ranking State Department official accused of being a Soviet spy, where the court found, *inter alia*, that no national security or privacy interests were implicated); *see also In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *1 (M.D. Tenn. Apr. 14, 2009) (granting petition to unseal 46-year old testimony from grand jury investigation of Jimmy Hoffa); *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008) (granting petition to unseal 57-year old testimony from grand jury investigation of Julius and Ethel Rosenberg); *In*

re Petition of Nat. Sec. Archive, No. 08-civ-6599, 2015 WL 2391313 (S.D.N.Y. May 19, 2015) (unsealing additional materials from the Rosenberg grand jury).

3. This unbroken line of cases represents a uniform understanding, amply supported by the text of the Rules and the origin and evolution of Rule 6(e), that "a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule." *Hastings*, 735 F.2d at 1268; *see also Craig*, 131 F.3d at 103 (describing the "proper role of Rule 6(e) as guiding, not fettering, a court's exercise of discretion"). The Government's attempt to dismiss all of this precedent as incorrectly reasoned and wrongly decided is unpersuasive.

Indeed, the Government places great weight on the flawed premise that these cases should be disregarded because they "rely on [*Craig*] and other cases that predate *Carlisle*, *Bank of Nova Scotia*, and *Williams*." Gov't Br. at 40. The Second Circuit's 1997 decision in *Craig*, however, *postdates* the Supreme Court's 1996 decision in *Carlisle*, as well as its decisions in *Bank of Nova Scotia* and *Williams*, which were decided in 1988 and 1992, respectively. In fact, the Government's assertion that the Second Circuit's decision in *Craig* is "not persuasive precedent" because it "reaffirmed *In re Biaggi* . . . without citing or discussing *Carlisle*, *Bank of Nova Scotia*, or *Williams*" is patently misleading. Gov't Br. at 38. In its brief to the Second Circuit in *Craig*, the Government made essentially the same argument it does now—that, in light of the Supreme Court's holdings in *Bank of Nova Scotia* and *Carlisle*, there is "no support for the proposition [] 'that the traditional rule of grand jury secrecy should yield to any claimed interest of the public . . . whatever . . . [the] historical significance may be." *See* Supplemental Appendix ("SA") at 15–16 (Brief for the United States of America, *In re Craig*, 131 F.3d (No. 96-6264)); *see also Craig*, 131 F.3d at 101 (noting the "government . . . devote[d] much of its response to

asserting that the district court had no authority even to consider departing from the confines of Rule 6(e).").

The Second Circuit in *Craig* thus considered—and "decline[d] to" adopt—that argument. *Id*. at 103. Instead, it "endorse[d] the powerful holding of Chief Judge Friendly [in *Biaggi*] that while there is a long 'tradition' of grand jury secrecy, it 'is not,' however, 'absolute.'" *Id.* (quoting *Biaggi*, 478 F.2d at 492); *see also id*. ("We therefore reaffirm the continued vitality of our 'special circumstances' test of *Biaggi*, and reject the government's suggestion that we unsettle this area of good law."). It cannot be said that the Second Circuit failed to take into account *Carlisle*, *Bank of Nova Scotia*, or any other authority cited by the Government in that case. The more appropriate conclusion to draw from the court's opinion in *Craig* is that it found that authority inapposite. The Second Circuit would not be alone in that regard. *See* A8–9*; see also Kutler*, 800 F. Supp. 2d at 47 (rejecting the Government's arguments based on *Carlisle* and *Bank of Nova Scotia*); *Historical Ass'n*, 49 F. Supp. 2d at 285–87, n.6 (rejecting the Government's arguments based on *Williams*, *Carlisle*, and *Bank of Nova Scotia*, and describing the Government's reliance on *Carlisle* and *Bank of Nova Scotia* as "an argument the Government repeats from the *Craig* appeal").

B. The Advisory Committee has recognized that courts have inherent authority to unseal historical grand jury materials in appropriate circumstances.

In a final effort to support its claim that federal courts lack any authority to order the disclosure of historically significant grand jury material under any circumstances, the Government points to a failed 2011 proposal to amend Rule 6(e) made by the Attorney General to the Advisory Committee. Gov't Br. at 41–42. Yet, far from supporting the Government's position, the Advisory Committee's rejection of that proposed amendment is a powerful

recognition of the discretion that district courts possess to order the release of historic grand jury material in appropriate cases.

As the Advisory Committee's Minutes make clear, the proposal was made in response to cases in which district courts had ordered the release of historic grand jury materials pursuant "to their inherent supervisory authority." Committee on Rules of Practice of Procedure, Minutes of Meeting of June 11–12, 2012, at 44, *available* at www.uscourts.gov/file/14904/download (hereinafter, "Minutes"); *see also* Gov't Br. at 41. The Government at the time—as it continues to do before this Court—"questioned whether that inherent authority existed in light of" Rule 6(e) and, accordingly, recommended that the rule be amended to establish express procedures for disclosing historically significant grand jury material, as well as to establish "a specific point in time at which it [would be] presumed" that all grand jury materials "may be released." *Id*.; *see also* Gov't Br. at 41. Rejecting the Government's premise that in the absence of an amendment to Rule 6(e) district courts lacked the authority to release historically significant grand jury material in appropriate cases, the Advisory Committee concluded that such an amendment was unnecessary.

Specifically, the full Advisory Committee "concluded that in the rare cases where disclosure of historic materials had been sought, *the district judges acted reasonably in referring to their inherent authority*. Therefore, there is no need for a rule on the subject." *Id*. (italics added); *see also* Gov't Br. at 42 (same). Thus, the Advisory Committee's rejection of the Attorney General's proposed amendment to Rule 6(e) lends further support to the Coalition's position that the District Court "acted reasonably" and well within the bounds of its discretion

"in referring to [its] inherent authority" to order disclosure of the *Tribune* grand jury transcripts.[12]

IV. THE GOVERNMENT CONCEDES THAT IF THE DISTRICT COURT HAD DISCRETION TO ORDER THE RELEASE OF THE *TRIBUNE* GRAND JURY TRANSCRIPTS IT DID NOT ABUSE THAT DISCRETION, AND ITS ORDER SHOULD BE AFFIRMED

The Government does not challenge the District Court's conclusion that the showing made by the Coalition, including as to the historical significance of the 1942 Espionage Act investigation of the *Tribune*, is sufficient to warrant release of the *Tribune* grand jury transcripts pursuant to the District Court's inherent authority. The Government did not argue in the District Court, nor does it contend on appeal, that there is any need for ongoing secrecy with respect to the transcripts, which are now more than 70 years old. *See* A15–16 (finding that "the government's opposition rests on its belief that this Court lacks authority to disclose the transcripts," and noting that "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"). To the contrary, far from offering any argument that would suggest disclosure is unjustified, the Government explicitly concedes "that the transcripts have sufficient historical value to warrant release under the *In re Craig* factors." Gov't. Br. at 37 n.3. Accordingly, should this Court conclude that district courts possess authority to release historical grand jury material in appropriate circumstances not listed in Rule 6(e)(3)(E)—the sole issue presented by the Government's appeal—it should affirm.

In doing so, however, this Court need not and should not overlook the detailed, thoughtful analysis conducted by the District Court in determining whether to exercise its inherent authority

[12] The Advisory Committee's interpretation of Rule 6(e) is generally considered to be of some "weight," *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986), and entitled to "respectful consideration," *United States v. Dawson*, 434 F.3d 956, 958 (7th Cir. 2006).

to unseal the *Tribune* grand jury transcripts. "[C]ognizant 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,'" A14 (quoting *Craig*, 131 F.3d at 104), the District Court looked to the experiences of other federal courts to help "guide [its] exercise of discretion," A15. Finding the "*Craig* framework to be a reasonable approach, as it incorporates flexibility and a nuanced consideration of a variety of factual matters," the District Court carefully applied each of the factors identified by the Second Circuit in *Craig*. *Id*.

In addition to finding that the historical significance of the *Tribune* grand jury transcripts favored disclosure, the Court took into account a series of other considerations, including the significant passage of time since the grand jury investigation, the lack of any impact of disclosure on the principals, witnesses, or their families, and the fact that a "substantial amount of material from the *Tribune* investigation has already been released" by the Government. A18–19. The Court also looked to the identities and interests of the Coalition's members—which include the nation's largest organizations of historians, as well as the Reporters Committee for Freedom of the Press, among others—and considered "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." A17 (noting the current existence of "a robust public debate" surrounding the government's prosecution under the Espionage Act of "leaks" to members of the press) (citations omitted). The District Court weighed all of these factors in determining that disclosure of the *Tribune* grand jury transcripts was an appropriate exercise of its discretion. Thus, the Government patently mischaracterizes the District Court's ruling, as well as the issue before this Court, when it asserts that the District Court ordered disclosure of the *Tribune* grand jury transcripts "*solely* on the basis of their

historical significance," Gov't Br. at 2 (italics added); *see also id*. at 1, 3, 10, 13, 15, 25, 31, 32, 34, 38, or to "vindicate" what the District Court deemed a "socially desirable" "goal." *Id*. at 30; *see also id*. at 2, 13.

The District Court's Memorandum Opinion and Order reflects precisely the type of "restraint and discretion" befitting the appropriate exercise of a court's "inherent powers," *Chambers*, 501 U.S. at 44, and it belies any assertion on the part of the Government that district courts' use of such power to unseal historically significant grand jury materials in appropriate cases will somehow unsettle the tradition of grand jury secrecy. As the Advisory Committee has acknowledged, "in the rare cases where disclosure of historic materials has been sought, the district judges [have] acted reasonably in referring to their inherent authority." Minutes at 44. The District Court's decision below is no exception.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order unsealing the transcripts of witness testimony from the 1942 grand jury investigation of the *Chicago Tribune*.

Respectfully submitted this 21st day of December 2015.

s/ Katie Townsend
Katie Townsend
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310
ktownsend@rcfp.org

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,877 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I also hereby certify that I had 15 copies sent to the Clerk's office by a third-party commercial carrier for delivery within 3 days.

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s/ Katie Townsend
Katie Townsend
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310
ktownsend@rcfp.org

CIRCUIT RULE 30(D) STATEMENT

The undersigned attorney hereby certifies, pursuant to Circuit Rule 30(d), that all material required under Circuit Rule 30(a) and (b) is included in the Appendices.

s/ Katie Townsend
Katie Townsend
Counsel of Record
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310
ktownsend@rcfp.org

SUPPLEMENTAL APPENDIX

96-6264

To be Argued by:
JENNIFER L. BORUM

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 96-6264

BRUCE CRAIG,

Petitioner-Appellant,

– v. –

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

MARY JO WHITE,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

JENNIFER L. BORUM,
JOHN M. MCENANY,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 96-6264

BRUCE CRAIG,

Petitioner-Appellant,

– v. –

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Bruce Craig appeals from an order entered on August 20, 1996, in the United States District Court for the Southern District of New York by the Honorable Shira A. Scheindlin, United States District Judge, denying his petition for disclosure, for historical research purposes, of certain grand jury testimony taken in 1948.

This action was commenced on July 3, 1996, by the filing of a Notice of Motion under the district court's "inherent supervisory powers and the All Writs Act, 28 U.S.C. §1651." Argument was heard on August 13, 1996, and on August 16, 1996, Judge Scheindlin issued the Memorandum and Order denying the

defendant's motion. (JA 3).* Noting petitioner's concession that none of the exceptions enumerated in Fed. R. Crim. P. 6(e) applied to his action, Judge Scheindlin ruled that there was "nothing presented in this petition warranting such extraordinary relief" as "disclosure that does not fall under the Rule 6(e) exceptions." (JA 4).**

Statement of Facts

There being no material issue in dispute, the relevant facts may be stated very briefly.*** In 1948, Dr. Harry Dexter White, who had been an Assistant Secretary of the Treasury and American Executive Director of the International Monetary Fund, was accused by Whittaker Chambers and Elizabeth Bentley of being a Communist spy. An investigation was opened by the Federal Bureau of Investigation (JA 51-52) and on March 24 and 25, 1948, Harry White was called before a grand jury of the United States District Court for the Southern District of New York and gave testimony, recorded in a transcript of 79 pages. (JA 53,62). Later, on August 13, 1948, White testified publicly before the House Un-American Activities Committee. (JA 53 ¶27). Two days later Harry White died. (JA 54 ¶30.)

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* "JA" refers to the Joint Appendix; "Br." refers to the petitioner's brief on appeal.

** The District Court's opinion is reported at 942 F. Supp. 881 (S.D.N.Y. 1996).

*** The historical background is taken principally from petitioner's own affidavit, the accuracy of which is assumed for present purposes.

The accusations against White and the circumstances surrounding them are of historical interest to students of the McCarthy era, including petitioner, a doctoral candidate at American University writing his dissertation on Harry White. (JA 41 ¶1). Petitioner, while admitting that "[v]ery little is actually known about [White's grand jury] testimony" (JA 53 ¶ 26), speculates that "[e]xamination of the grand jury transcripts is of critical importance in determining the veracity of White's accusers and the truthfulness of White's own answers." (JA 59 ¶37). Petitioner accordingly seeks disclosure of that testimony.

ARGUMENT

On appeal, petitioner argues that the District Court committed legal error by failing to exercise its "inherent supervisory authority" to conduct a balancing test, supposedly required by Supreme Court precedent, that would weigh the public interest in disclosure against the interest in continued secrecy of the grand jury testimony. (Br. 13, 14). In fact, disclosure of this grand jury testimony is flatly prohibited by Fed. R. Crim. P. 6(e). While some cases have authorized disclosure of grand jury testimony under circumstances not permitted by Rule 6(e), the courts have no inherent supervisory authority to release grand jury testimony guided by nothing more than a "balancing test" in contravention of the terms of Rule 6(e). In any event, to the extent the District Court did have discretion to order disclosure of grand jury testimony, it did not abuse its discretion by refusing to do so in this case.*

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* The American Historical Association and others have filed an *amici* brief supporting petitioner's

POINT I

Disclosure Of Harry White's Grand Jury Testimony Is Prohibited By Rule 6(e) Of The Federal Rules Of Criminal Procedure

The circumstances under which grand jury testimony may and may not be disclosed are set forth in Fed. R. Crim. P. 6(e), which provides in pertinent part as follows:

> (2) General Rule of Secrecy. A grand juror . . . an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Fed. R. Crim. P. 6(e)(2).

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arguments, and also alleging a First Amendment right of access to grand jury testimony. Inasmuch as the First Amendment argument was not raised below, this Court should not entertain it now, *see United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995), particularly insofar as the asserted right of access might be construed as a factor that the District Court should have weighed in the "balancing test" petitioner advances, or as to which other findings should have been made, *cf. In re New York Times, Co.*, 828 F.2d 110, 116 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (specific findings required to close criminal proceedings in face of qualified First Amendment right of access). In any event, it is established that there is no First Amendment right of access to grand jury material. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509-10 (1st Cir. 1989).

Rule 6(e), the Supreme Court has stated, "codifies the traditional rule of grand jury secrecy." *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983).*

Rule 6(e) provides only six circumstances under which grand jury testimony may be disclosed: "to an attorney for the government for use in the performance of such attorney's duty;" to government personnel assisting a government attorney in enforcing federal criminal law; "preliminarily to or in connection with a judicial proceeding;" in aid of a defendant's motion to dismiss because of matters occurring before the grand jury; to another federal grand jury; and to state criminal authorities. Fed. R. Crim. P. 6(e)(3)(A)(I), (ii) & 6(e)(3)(C)(I)-(iv). Petitioner concedes that he does not fit within any of the exceptions. (Br. 4 n.1). Instead, citing "inherent supervisory authority" and general policies underlying Rule 6(e), he cobbles together a "balancing test" not found within the terms of the Rule. However, subsequent to the cases petitioner principally relies on,** the Supreme Court has made clear that

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* *See also United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (The Rule "embodies a long established policy of the federal courts to maintain the secrecy of grand jury proceedings"), citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)) and *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings").

** *See In re New York Times, Co.*, 828 F.2d 110 (2d Cir. 1987); *In re Petition to Inspect and Copy Grand Jury Materials (Alcee Hastings)*, 735 F.2d 1261

"inherent supervisory power" and policy considerations do not provide a basis to circumvent or contravene the specific language of the Federal Rules of Criminal Procedure.

For example, "policy arguments" were specifically addressed in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), which ruled that Department of Justice attorneys who had conducted a criminal antitrust investigation could use grand jury material in preparing a civil complaint. In that case, the Court stated:

> Because we decide this case based on our reading of the Rule's plain language, there is no need to address the parties' arguments about the extent to which continued use threatens some of the values of grand jury privacy identified in our cases and cataloged in *Sells Engineering*, 463 U.S., at 432-433. While such arguments are relevant when language is susceptible of more than one plausible interpretation, we have recognized that in some cases "[w]e do not have before us a choice between a 'liberal' approach toward [a Rule], on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language." . . . As for the policy arguments, it suffices to say that, as the Court of Appeals recognized, the implications of our construction are not so absurd or

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(11th Cir.), *cert. denied*, 469 U.S. 884 (1984); *In re Application of Johnson*, 484 F.2d 791 (7th Cir. 1973).

> contrary to Congress' aims as to call into question our construction of the plain meaning of the term "disclosure" as used in this Rule.

Id. at 109-10 (footnotes and internal citations omitted.)* The intersection of "supervisory authority" with the federal rules was specifically addressed in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), which reversed a dismissal, under supervisory powers, of an indictment obtained following irregularities that constituted harmless error under Fed. R. Crim. P. 52(a). The Court there stated:

> In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." Nevertheless, it is well established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts

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* In this regard, while much may be said for policies that place a time limit on secrecy, *cf.* Exec. Order No. 12,958, 60 Fed.Reg. 19825 (1995) (classified records generally declassified after 25 years), or that recognize the potential historic interest of grand jury material, Congress simply has not followed that path, either on any of the many occasions in which it has addressed Rule 6, or in the Freedom of Information Act, which comprehensively addresses public access to official records, and which prohibits access to grand jury material. *See* 5 U.S.C. §552(b)(3); *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 867-69 (D.C. Cir. 1981).

> with constitutional or statutory provisions." To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing."

Id. at 254 (internal citations omitted.)* *Accord Carlisle v. United States*, 116 S. Ct. 1460, 1466, 1468

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* The Court also affirmed the controlling authority of the Federal Rules of Criminal Procedure:

> The Rule [Rule 52] was promulgated pursuant to 18 U.S.C. §687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. § 3771), which invested us with authority "to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict...." Like its present-day successor, §687 provided that after a Rule became effective "all laws in conflict therewith shall be of no further force and effect." It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power." *United States v. Payner*, 447 U.S. 727, 736 (1980).

250 U.S. at 255.

(1996), ("scope of . . . 'inherent power' . . . does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure;" in case where motion for judgment of acquittal was untimely filed, "we are not at liberty to ignore the mandate of [Fed. R. Crim. P.] 29 in order to obtain 'optimal' policy results").

In this case, petitioner relies principally on *In Re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973), as a source for "discretionary power to disregard the considered limitations" of Rule 6. *Bank of Nova Scotia*, 487 U.S. at 254. In that case, Congressman Mario Biaggi, then running in the New York City mayoral primary, reacted to leaks that he had asserted the Fifth Amendment in recent grand jury appearances by publicly denying that he had done so. Moreover, following a public statement by Biaggi that he would request judicial review of his testimony to "determin[e] whether or not [he] took the Fifth Amendment," 478 F.2d at 491, and a pre-emptive motion by the Government for disclosure (with certain names redacted) of the grand jury testimony, Biaggi "moved for full disclosure of the minutes of both his grand jury appearances." *Id.* The district court ordered the disclosure, redacted as requested by the Government. On appeal, all three members of the Court recognized that this disclosure was not authorized by Rule 6(e). However, two members of the Court, identifying "the exercise of a sound discretion under the special circumstances of this case," *id.* at 493, voted to affirm the disclosure order; in so

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Many of the provisions of Rule 6, of course, have direct legislative origins. *See* Fed. R. Crim. P. 6, Historical Notes.

doing, they made clear that key to their decision were not only the dual motions for disclosure by Biaggi and the Government, but also--if not principally--the fact that Biaggi's first request for judicial review "was framed . . . as to create a false impression in light of the publicity that had given rise to it," in that Biaggi had, in truth, "refused to answer" 17 questions. *Id.* at 492. Given the Supreme Court's restriction of "discretionary power" in areas covered by the Federal Rules of Criminal Procedures, the Government respectfully submits that *Biaggi*, should be limited to the facts of that case, not likely to recur.*

The other authority petitioner has gleaned from outside this Circuit for disclosure beyond the bounds of Rule 6(e) is equally inapt. In *In re Petition to Inspect and Copy Grand Jury Materials (Alcee Hastings)*, 735 F.2d 1261 (11th Cir. 1984), the Eleventh Circuit authorized disclosure of grand jury minutes underlying the indictment of Southern District of Florida Judge Alcee Hastings (who was acquitted at trial) to the Investigating Committee of the Judicial Council of the Eleventh Circuit. While noting that Rule 6(e) is normally controlling, and citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398-99 (1959), for the proposition that "disclosure [is] committed to the discretion of the trial judge," *(Alcee Hastings)*, 735 F.2d at 1268,** the Eleventh Circuit

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* *Biaggi* has not since been relied on by this Court to justify disclosure of grand jury minutes outside of Rule 6(e).

** *Pittsburgh Plate Glass* does not in fact support the concept of discretionary authority to disclose grand jury testimony outside the terms of Rule 6(e). Instead, the motion for disclosure in that case was

also stressed that the Investigating Committee's purpose was "very similar" to that of a "judicial proceeding" in the sense of Rule 6(e)(3)(C)(I). Other obvious factors--the need to maintain judicial integrity, and the non-public nature of the disclosure, equally distinguish *Alcee Hastings* from the instant case. In *Application of Johnson*, 484 F.2d 791 (7th Cir. 1973), the Seventh Circuit merely denied a motion to expunge, 35 months after it had been publicly filed, a grand jury report relating to the Black Panthers that had already been widely disseminated.*

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unquestionably brought "in connection with a judicial proceeding"--petitioners were defendants in a criminal trial who demanded production of the grand jury testimony of witnesses who had testified against them. Noting that 18 U.S.C. §3500, as then drafted, did not cover grand jury minutes, the Supreme Court stated, 360 U.S. at 399, that "[p]etitioners concede, as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim.Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress." It was in that context that the Supreme Court stated that the "[c]ourts . . . have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge." *Id.*

* Petitioner also relies on *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974) (dealing with non-public transmittal of Watergate-related grand jury report to the House Committee on the Judiciary); and *In re Presentment of Special Grand Jury Impaneled January 1969*, 315 F. Supp. 662 (D. Md. 1970), in which the district court published a redacted indictment proposed by the grand jury, that the Government had

The Government recognizes that there are cases where district courts have authorized disclosure of grand jury minutes outside the scope of Rule 6(e), particularly where opposition has not been interposed by the Government. *See Petition of O'Brien to Unseal Grand Jury Records*, Dkt.No. Gen. 3-90-X-35 (M.D. Tenn., memo endorsed May 16, 1990) (JA 40) (granting, without opposition by Government, petition for disclosure of grand jury records relating to 1946 race riot); *In Re Petition of Gary May for an Order Directing Release of Grand Jury Minutes*, Dkt. No. M 11-189 (S.D.N.Y. Jan. 20, 1987) (Knapp, *J.*) (JA 8) (relying on *Biaggi*, court, over Government opposition, orders disclosure of grand jury transcripts relating to William Walter Remington, a McCarthy-era figure); *cf. In re Possible Violations* of 18 U.S.C. §201, Dkt.No. Misc. 88-253 (D.D.C. Sept. 2, 1988) (JA 21) (with concurrence of Department of Justice, disclosure ordered of grand jury materials concerning a member of Congress to Committee on Standards of Official Conduct of the United States House of Representatives). However, given the Supreme Court's teachings in *John Doe, Inc. I*, *Bank of Nova Scotia*, and *Carlisle*, the Government respectfully submits that the better rule was stated by Judge Owen in *Hiss v. Department of Justice*, 441 F. Supp. 69 (S.D.N.Y. 1977), where Alger Hiss himself, without opposition from the Government, sought release of the testimony of a number of witnesses before grand juries that had investigated him. In that case, Judge Owen found no support for the proposition,

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refused to countersign. Both cases deal with the unique issue of grand jury reports. These unique cases provide little authoritative or practical guidance to the case at hand.

> that the traditional rule of grand jury secrecy should yield to any claimed interest of the public (or, one may conjecture, any specific individual) in a thirty-year-old case, whatever its historical significance may be. In any event, and notwithstanding the government's lack of opposition in *this* case, in my opinion, a contrary ruling would be a mischievous precedent for this Court to establish.

Id. at 71. The Government respectfully submits that Judge Owen correctly stated the rule that should be applied in this case.*

POINT II

The District Court Did Not Abuse Its Discretion In Denying The Petition For Disclosure

As demonstrated above, petitioner's contention, that the district court has "inherent supervisory authority" outside the scope of Rule 6(e) to conduct a balancing test that would weigh the public interest in disclosure against the interest in continued secrecy of the grand jury testimony (Br. 13, 14), does not survive the limitation placed by the Supreme Court on the exercise of inherent supervisory power that contravenes a particular federal rule. Accordingly, there

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* Petitioner has also noted an unpublished D.C. Circuit case reaching the same result as *Hiss. In re Petition of Robert P. Newman*, Dkt.No. 87-0230 (D.C. Cir. April 20, 1988) (JA 14)(affirming denial of application of historian for McCarthy-era grand jury transcripts appropriate as falling outside scope of Rule 6(e)(3)), *cert. denied*, 488 U.S. 1005 (1989).

is a substantial question as to what, if any, discretion remains in the district court when faced with a petition for disclosure that is not authorized by Rule 6(e). At present, *In re Biaggi*, *Alcee Hastings*, and the other cases relied on by petitioner can, at most, be read for the proposition that in exceptional circumstances, the court may order disclosure outside the bounds of Rule 6(e).

However, there is nothing exceptional about the fact that grand jury investigations, which not infrequently involve events of intense public interest, may, with the passage of time, slip into the arena of historical scholarship. Certainly Judge Scheindlin cannot be said to have been clearly erroneous in determining the absence of "special circumstances" in this case. *See* 942 F. Supp. at 883; *see* Fed. R. Civ. P. 52(a).

Implicitly conceding that he cannot satisfy an "exceptional circumstances" test, petitioner complains that the District Court failed properly to apply a "balancing test," supposedly derived from *Douglas Oil Co. of Calif. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979) (*See* Br. 13-14). *Douglas Oil*, however, was a civil antitrust case where plaintiffs sought disclosure under Rule 6(e)(3)(C)(I) of grand jury transcripts underlying criminal antitrust charges brought against the civil defendants and others. Based on the standards that guide the court's decision on such motions,* petitoner suggests a loose balancing test,

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* The Supreme Court has recently summarized as follows the applicable standards:

> Rule 6(e)(3)(C)(I) simply authorizes a court to order disclosure "preliminarily to or in

ignoring, among other things, the contextual requirement that the moving party "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding." *Douglas Oil Co.*, 441 U.S. at 222. In any event, even in cases where the *Douglas* test is applicable, "a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion." *Id.* at 223. Under the

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> connection with a judicial proceeding." Neither the text of the Rule nor the accompanying commentary describes any substantive standard governing issuance of such orders. We have consistently construed the Rule, however, to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted. We described the standard in detail in *Douglas Oil*: "Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.... In sum, ... the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material ...

United States v. Sells Engineering, Inc., 463 U.S. at 442-43 (citations omitted).

circumstances of this case, even if the District Court had discretion to release Harry White's grand jury testimony, it can scarcely be said to have abused that discretion under a *Douglas*-derived "balancing test" in failing to do so where petitioner's only professed need for the material is based on the public's general interest in the testimony and where he already has substantial information about the allegations against Harry White and his response to those allegations, including substantial disclosures by the FBI under FOIA and Harry White's own testimony before Congress.*

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* See *e.g. United States* v. *Umans*, 368 F.2d 725 (2d Cir. 1966)(refusal to disclose grand jury materials not abuse of discretion where grand jury minutes "would have added nothing to appellant's arsenal of information"), *cert. dismissed*, 389 U.S. 80 (1967).

CONCLUSION

The order of the District Court denying disclosure of Harry White's grand jury testimony should be affirmed.

Dated: New York, New York
March 3, 1997

Respectfully submitted,

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney of the United States
of America.

JENNIFER L. BORUM
JOHN M. MCENANY,
Assistant United States Attorneys,
of Counsel.