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

IN RE PETITION OF

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

Miscellaneous Action No. 14-cv-09244

Chief Judge Ruben Castillo

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR ORDER DIRECTING RELEASE OF TRANSCRIPTS OF CERTAIN TESTIMONY FROM AUGUST, 1942 GRAND JURY INVESTIGATION OF THE *CHICAGO TRIBUNE*

In opposing the Coalition's Petition, the U.S. Department of Justice ("DOJ") does not contend that there is any need for ongoing secrecy with respect to the grand jury transcripts at issue, which are now more than 70 years old. Nor does it offer any serious challenge to the showing made by the Coalition, a group of prominent historians and organizations, as to the historical significance of the 1942 *Tribune* grand jury investigation, which stands as the U.S.

government's first and only attempt to prosecute a member of the mainstream media under the Espionage Act for the publication of leaked national security information. Instead, the DOJ argues that Federal Rule of Criminal Procedure 6(e) forbids disclosure of the requested grand jury material and, accordingly, that this Court has no authority or discretion to order disclosure. This argument is premised on inapposite case law, misconstrues the language of the Rules, and has been rejected by virtually every federal court to address it, as well as by the Judicial Conference's Committee on Rules of Practice and Procedure. For the reasons set forth in the Coalition's opening memorandum, and below, the Court should grant the Petition and order the release of the transcripts of testimony from the 1942 *Tribune* grand jury investigation.[1]

I. Courts have discretion to order disclosure of historical grand jury material in appropriate circumstances pursuant to their inherent authority.

Although the DOJ suggests that U.S. Supreme Court precedent prohibits disclosure in this case, the DOJ concedes, as it must, that the Supreme Court has in fact never "addressed whether a district court's authority to disclose grand jury materials is cabined by Rule 6(e)." Opp'n at 15. Instead, the Supreme Court has made clear 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). And the overwhelming weight of federal case law recognizes district courts' discretion to disclose material outside the confines of Rule 6(e) in special cases. *See infra* Part I.c. Contrary to the DOJ's arguments, the Supreme Court's decision in *Carlisle v. United States*, 517 U.S. 416 (1996), did not eliminate that discretion. Indeed, it did not even address Rule 6(e), or involve circumstances analogous to the situation now before this Court. Rule 6(e) does not expressly or implicitly prohibit disclosure of the historically significant grand jury testimony at issue, *Carlisle* is inapposite, and disclosure is warranted.

[1] All references to the Rules are to the Federal Rules of Criminal Procedure.

a. *Carlisle* does not preclude this Court from ordering disclosure.

Citing *Carlisle* for the proposition that "a court's inherent power 'does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure,'" the DOJ argues that a district court has no authority to order the disclosure of grand jury material for any reason not expressly enumerated in Rule 6(e). Opp'n at 1. However, *Carlisle* concerned Rules 29 and 45—not Rule 6(e)—and its holding is simply inapplicable here.

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. *Carlisle*, 517 U.S. at 418–19. The Sixth Circuit reversed the district court's order, and the Supreme Court affirmed. In doing so, the Supreme 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) provided that motions for acquittal had to be filed within seven days of the jury being discharged, and Rule 45, while generally permitting courts to grant extensions of time, expressly 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," 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 421, 426. In short, *Carlisle* addressed a situation in which the district court's ruling directly contravened an express prohibition set forth in Rules 29 and 45.

Here, in contrast, nothing in Rule 6(e) expressly prohibits disclosure of historically significant grand jury material in appropriate cases. And, 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 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 a ruling did not conflict with a statute or rule). Because disclosure of the 1942 *Tribune* grand jury transcripts is not contrary to Rule 6(e), *Carlisle* does not limit this Court's ability to exercise its inherent authority to disclose them. *See In re Kutler*, 800 F. Supp. 2d 42, 46–47 (D.D.C. 2011) (holding that disclosure of historically significant material is not contrary to *Carlisle* and fully consonant with Rule 6(e)); *see also In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (deciding post-*Carlisle* that Rule 6(e)'s "phrasing can, and should, accommodate rare exceptions premised on inherent judicial power").

b. The provisions of Rule 6(e) authorizing disclosure are not exclusive.

The DOJ urges this Court to adopt the extreme position that district courts lack any authority to disclose grand jury materials under any circumstances other than those expressly enumerated in Rule 6(e)(3)(E). Such an immoderate interpretation of Rule 6(e), however, conflicts not only with federal case law recognizing and relying upon the inherent supervisory authority of the courts, but also with the language and history of the Rules themselves.

Although the DOJ argues that the circumstances cited in Rule 6(e)(3)(E) should be viewed as exhaustive because the Rule does not employ the word "including" or state that the enumerated circumstances are mere examples, *see* Opp'n at 5, 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). Thus, the controlling omission in Rule 6(e) is any language *prohibiting* disclosure for reasons not expressly set forth in the Rule. Indeed, the Rules' drafters clearly knew how to compose language to permit certain actions only under enumerated circumstances. Rule 45, for example,

establishes that a court generally may extend time on its own or for good cause, and then provides an express exception that 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's note. Had Rule 6(e) been intended to exhaust the circumstances in which a court may disclose grand jury testimony, one would expect it to contain language like that found in Rule 45—i.e., language forbidding courts from ordering the disclosure of grand jury materials except as expressly provided therein. Instead, Rule 6(e)(3)(E) sets forth a permissive list, without express limitation.

Further, the *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others") canon of construction does not apply to Rule 6(e). This tool of construction is to be used only if "it is fair to suppose that [the drafter] considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Here, it is not fair to suppose that the members of the rules committee responsible for drafting Rule 6(e) "meant to say no" to disclosures of historical grand jury material pursuant to the inherent authority of district courts. To the contrary, as explained in more detail below, *see* Part I.d, the Advisory Committee recently declined to amend Rule 6(e) to expressly authorize the disclosure of historically significant material, not because it "meant to say no" to such disclosures, but because it deemed such an amendment unnecessary. The Advisory Committee concluded that since Rule 6(e) does not prohibit disclosure of historic grand jury material, and district judges may "reasonably" refer "to their inherent authority" to disclose such material, no amendment

was needed.[2]

Rule 6(e) originally developed, and has been subsequently amended, to reflect decisions rendered by federal courts. It has not been, and should not be, viewed as an absolute, inflexible limit on courts' discretion. The well-established tradition of courts responding to unusual circumstances not contemplated by Rule 6(e) by invoking their inherent authority was discussed at length in *In re Hastings*, 735 F.2d 1261, 1268 (11th Cir. 1984). The Eleventh Circuit observed that "courts' 'inherent power' has shaped the rule" and that the rule "has been repeatedly amended to incorporate subsequent developments wrought in decisions of the federal courts." *Hastings*, 735 F.2d at 1268. In 1977, for instance, when Rule 6(e) was amended to authorize additional disclosures, the Advisory Committee recognized that "'the trend seems to be in the direction of allowing disclosure to government personnel . . . .'" *Id.* (quoting Notes of Advisory Committee on Rules, following Rule 6(e)). When the rule was amended again in 1983 to permit disclosure of materials from one grand jury for use in another, the Advisory Committee notes recognized that "'[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances.'" *Id.* at 1268–69. As this history makes clear, "exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy." *Id.* 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").

[2] Committee on Rules of Practice of Procedure, Minutes of Meeting of June 11–12, 2012, at 44, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2012-min.pdf (hereinafter, "Minutes").

c. Federal courts overwhelmingly recognize a court's discretion to disclose material outside the bounds of Rule 6(e).

Both before and after the Supreme Court's decision in *Carlisle*, federal courts across the country have rejected—either explicitly or implicitly—the arguments advanced by the DOJ. *See In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007) (ordering disclosure of grand jury materials in a manner not explicitly authorized by Rule 6(e)); *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) (embracing exceptions to Rule 6(e) "premised on inherent judicial power"); *In re Craig*, 131 F.3d 99, 101–02 (2d Cir. 1997) (concluding that special circumstances permit disclosure of grand jury materials outside of Rule 6(e)); *In re Hastings*, 735 F.2d 1261, 1272 (11th Cir. 1984) (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); *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir. 1981) (stating that courts may have "discretion to slip entirely around Rule 6(e) and permit disclosure" of grand jury material in special circumstances), *aff'd on other grounds sub nom., United States v. Baggot*, 463 U.S. 476 (1983); *In re Kutler*, 800 F. Supp. 2d at 50 (ordering disclosure of historically significant grand jury materials for reasons not enumerated in Rule 6(e)); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 297 (S.D.N.Y. 1999) (same); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *1 (M.D. Tenn. Apr. 14, 2009) (same); *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008) (same). The DOJ's assertion that all of this precedent was incorrectly reasoned and wrongly decided is unpersuasive, and the handful of cases cited by the DOJ offer no support for such an argument.

For instance, the DOJ cites *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009) for the proposition that Rule 6(e) must expressly authorize disclosure. Yet *McDougal* has never been cited, let alone followed, by any federal court in the Seventh Circuit, and its cursory

analysis can hardly be deemed persuasive. The opinion simply states, without elaboration, that "there is no provision in Rule 6(e) specifically authorizing disclosure at the conclusion of the proceedings." *McDougal*, 559 F.3d at 841. The Eighth Circuit did not address any of the precedent cited by the Coalition, nor did it cite any authority for the proposition that district courts lack discretion to order disclosure in extraordinary circumstances. The DOJ's reliance on the D.C. Circuit's unpublished opinion in *In re Petition of Newman*, No. 87-5345 (D.C. Cir. Apr. 20, 1995), is likewise flawed. Not only is the decision unpublished, but the DOJ ignores the fact that the D.C. Circuit later reached a contrary conclusion in its published decision in *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d at 154–55. In *Miller*, the D.C. Circuit ruled that disclosure of grand jury matters may be appropriate if the material becomes sufficiently widely known—a circumstance not expressly identified in Rule 6(e). *Miller*, 493 F.3d at 154. While the DOJ asserts that the D.C. Circuit "did not release grand jury testimony pursuant to any exception to grand jury secrecy, express or otherwise, and did not rely on any inherent authority to do so," Opp'n at 12, the D.C. Circuit plainly exercised its discretion to conclude that the testimony at issue could appropriately be disclosed on a basis not expressly found in the text of Rule 6(e).

The DOJ further argues that the Supreme Court's narrow holding in *United States v. Baggot* should somehow limit the Court's discretion in this case. Opp'n at 10–11. But in *Baggot*, the government sought records under the Rule 6(e)(3)(C)(i) exception (now codified at 6(e)(3)(E)(i)), and the Supreme Court held only that an IRS investigation to determine a taxpayer's civil tax liability was not "preliminar[y] to or in connection with a judicial proceeding." 463 U.S. at 477. The Supreme Court expressly limited its holding "to the meaning

of (C)(i)." *Id.* at 479 n.3. Here, by contrast, the Petition does not turn on the meaning of that provision. *Baggot* does not counsel against disclosure under the present circumstances.

Other cases cited by the DOJ do not preclude disclosure here. The Tenth Circuit decision in *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006), did not hold that courts lacked inherent authority to disclose records outside of Rule 6(e); to the contrary, the Tenth Circuit stated that "some relief may be proper under the court's inherent authority" and remanded to the district court for further proceedings. The district court opinions in *United States v. Velez*, 344 F. Supp. 2d 329, 330 (D.P.R. 2004) (government agency seeking copies of checks for the purpose of investigating the use of public funds received by independent contractors), and *In re Electronic Surveillance*, 596 F. Supp. 991 (E.D. Mich. 1984) (seeking disclosure of surveillance materials that were not presented to the grand jury), *abrogated on other grounds*, *In re Grand Jury 89-4-72*, 932 F.2d 481 (6th Cir. 1991), implicate different sets of privacy concerns than this Petition and do not involve historically significant testimony, and therefore are inapposite.

d. The Advisory Committee confirmed that courts possess the inherent authority to release historically important grand jury records.

In support of its contention that this Court lacks authority to order the disclosure of historically significant grand jury material under any circumstances, the DOJ points to a failed 2012 proposal it made to the Advisory Committee on Criminal Rules to amend Rule 6(e). *See* Opp'n at 24–25. Far from supporting the DOJ's position, however, the Advisory Committee's rejection of that 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 proposed amendment was indeed a response to cases in which district courts had ordered the release of historic grand jury

materials pursuant "to their inherent supervisory authority." Minutes, *supra* note 2, at 44. The DOJ 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*. Rejecting the DOJ'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, the Advisory Committee concluded that amendment was unnecessary. Specifically, the full 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*. Thus, the Advisory Committee's rejection of the 2012 proposed amendment to Rule 6(e) lends further support to the Coalition's position that this Court may reasonably exercise its inherent authority to order disclosure of the grand jury transcripts at issue.[3] Courts place significant weight on recommendations of the Advisory Committee when interpreting federal rules. *See United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979) (describing "the recommendations of the Advisory Committee" as "a useful guide to the federal courts"); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("the construction given by the Committee is 'of weight'").

[3] The DOJ's concern about the "potential proliferation of requests to unseal based on historical interest" is unfounded. Opp'n at 23. As the Advisory Committee recognized, such petitions are "rare." Minutes, *supra* note 2, at 44. Indeed, the DOJ asserts this Petition presents an issue of "first impression" in this Circuit, Opp'n at 1, and the parties have identified only a limited number of such cases around the country, particularly at the federal appellate level. This is unsurprising given the extraordinary circumstances involved, as well as the government's decision not to appeal the district court decisions ordering disclosure of historically significant grand jury material in *In re Kutler*, *In re Am. Historical Ass'n*, *In re Tabac*, or *In re Nat'l Sec. Archive*. In short, experience belies the DOJ's claim that granting the Coalition's Petition would open the floodgates for future petitions.

II. The Coalition has demonstrated that disclosure of the testimony from the 1942 *Tribune* grand jury investigation is a proper exercise of this Court's discretion.

Notwithstanding its filing of a 25-page opposition, the DOJ devotes a mere footnote to the Coalition's showing as to the historical significance and continued relevance of the 1942 *Tribune* grand jury investigation. Opp'n at 25 n.9. That the DOJ would effectively concede the importance of the government's failed attempt to prosecute the *Chicago Tribune* under the Espionage Act—both as a singular event in our nation's history, and as a mechanism for obtaining a fuller understanding of the relationship among the news media, the government, and the First Amendment in times of war—is unsurprising. The wealth of scholarship examining this event, and the continued public interest in it over the past seven decades, is irrefutable. *See* Declaration of Elliot Carlson ¶ 21 [ECF No. 4-1] (listing some of the many articles, books, and other programs that have discussed the *Tribune* investigation). Indeed, the identities and interests of Petitioners—who include the nation's largest organizations of historians as well as the Reporters Committee for Freedom of the Press—speaks to the ongoing significance of the *Tribune* grand jury investigation to historians, legal scholars, journalists, and the general public.

Yet, the DOJ mischaracterizes the Coalition's effort as seeking the disclosure of grand jury materials "based on historical interest alone." Opp'n at 1. As set forth in the Coalition's opening memorandum, disclosure is appropriate here because of the historical significance of the material coupled with (1) the significant passage of time, (2) the erosion of any need for secrecy, and (3) the relevance of the material to an active policy debate about the prosecution of journalists and leakers. *See* Mem. of Law in Support of Pet. at 11–14 [ECF No. 4]. The DOJ does not dispute that the traditional justifications for grand jury secrecy no longer apply in this case. *See id*. at 12–14. All of the known witnesses in the underlying investigation are deceased, and extensive disclosures by the government have made information about the grand jury

investigation widely known, eliminating the need for continued secrecy. Releasing the requested transcripts under these circumstances will not have a chilling effect on grand jury testimony. *See, e.g.*, *In re Kutler*, 800 F. Supp. 2d at 48. Moreover, the testimony at issue here is not only of historical value, it also informs the contemporary public debate concerning the government's prosecution of "leaks" of national security information to journalists. *See* Mem. of Law in Support of Pet. at 10–11. All of these factors serve to make the disclosure sought by the Petition an appropriate exercise of this Court's discretion.

III. Conclusion

For the reasons set forth above and in its opening memorandum, the Coalition respectfully requests that this Court order disclosure of the materials specified in the Petition.

Dated: January 9, 2015

Respectfully submitted,

By: /s/*Brendan J. Healey*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF PETITION FOR ORDER DIRECTING RELEASE OF TRANSCRIPTS OF CERTAIN TESTIMONY FROM AUGUST, 1942 GRAND JURY INVESTIGATION OF THE *CHICAGO TRIBUNE*** has been served on January 9, 2015 via the Court's CM/ECF system on all counsel of record who have consented to electronic service:

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