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. _____

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

Historian and author Elliot Carlson, the Reporters Committee for Freedom of the Press, and 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 (hereinafter, collectively, the "Coalition") hereby submit this Memorandum

of Law in support of the concurrently filed petition for an order unsealing the transcripts of certain witness testimony given before a grand jury in Chicago in August of 1942.

INTRODUCTION

By the concurrently filed Petition, the Coalition respectfully requests that the Court exercise its inherent supervisory authority to make public grand jury testimony of immense historical importance. The testimony sought was given in August of 1942 in connection with the first and, to date, only attempt by the U.S. government to prosecute a member of the mainstream press for alleged violations of the Espionage Act of 1917. The government's effort to obtain a grand jury indictment against the *Chicago Tribune* (the "*Tribune*") at the height of World War II 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. 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. For the reasons set forth herein, the Coalition requests that the Petition be granted, and the testimony given in the *Tribune* grand jury proceeding released.

FACTUAL BACKGROUND[1]

On June 7, 1942, the *Tribune* ran a front page story by war correspondent Stanley Johnston ("Johnston") headlined "NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA." The article, which cited "reliable sources in the naval intelligence," appeared to be based on a leaked classified Navy dispatch, and reported that the Navy had detailed information concerning

[1] The Coalition hereby incorporates by reference the detailed factual background concerning the *Tribune* article and ensuing grand jury investigation from the Declaration of Elliot Carlson (hereinafter "Carlson Decl."). (*See* Carlson Decl. at ¶¶ 3–4, 10–18, attached as Exhibit A hereto.)

the Japanese military's plan to attack U.S forces at Midway, several days in advance of the famed battle. Military and other government officials—including President Franklin D. Roosevelt—were incensed, believing that Johnston's Midway story revealed that the Navy had successfully cracked the radio code used by the Japanese forces to encrypt their communications.

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. The grand jury heard testimony from eight naval officers—Rear Admiral Frederick C. Sherman, Commander Morton Seligman, Lieutenant Commander Edward O'Donnell, Lieutenant Commander Edward Eldridge, and four unknown officers.[2] Johnston, J. Loy ("Pat") Maloney, and Wayne Thomis of the *Tribune* also testified before the grand jury, as did two editors of 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*. On August 19, 1942, the grand jury declined to issue any indictments. No one was ever prosecuted in connection with Johnston's Midway story.

In the more than 70 years since Johnston's story was first published, numerous documents and other information concerning the *Tribune* grand jury investigation have come to light, and been the subject of scholarly analysis, historical and legal discussion, and public debate. The testimony of the thirteen grand jury witnesses, however, has remained under seal.

ARGUMENT

I. Courts have inherent authority to order disclosure of grand jury records.

"[S]ince 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, 218–19 (1979); *see also Press-Enterprise Co. v.*

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

Superior Court, 478 U.S. 1, 10 (1986) (grand jury proceedings "have traditionally been closed to the public and the accused"). The U.S. Supreme Court identified the following reasons for maintaining grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 219 n.10 (internal citation and quotation omitted).

"The secrecy of grand jury testimony," however, "is not absolute." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973) (Friendly, J.). Courts have discretion to order the disclosure of grand jury material pursuant to their inherent supervisory authority over grand jury matters. *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (stating that federal courts "have been nearly unanimous in regarding disclosure [of grand jury material] as committed to the discretion of the trial judge"); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 286 (S.D.N.Y. 1999) (explaining that "federal courts historically have exercised supervisory power in this area to develop exceptions to the rule of secrecy when appropriate").

Federal Rule of Criminal Procedure 6(e), for example, codifies several specific exceptions to the rule of grand jury secrecy that have been developed over time by the federal courts. *See* Fed. R. Crim. P. 6(e)(3)(E).[3] As the advisory committee note to Rule 6(e) states, that

[3] None of the express exceptions to grand jury secrecy identified in Rule 6(e) speak directly to the situation here. Accordingly, the Coalition requests that the Court invoke its inherent supervisory authority to disclose the transcripts at issue, as other federal courts have done when faced with similar requests to unseal historically significant grand jury records.

rule "continues 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, advisory committee's note (citations omitted and emphasis added); *In re Am. Historical Ass'n*, 49 F. Supp. 2d. at 286 (stating that the "exceptions to the secrecy rule" found in Rule 6(e) "have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*") *see also Pittsburgh Plate Glass Co.*, 360 U.S. at 395 (stating that "Rule 6(e) is but declaratory of" the principle that disclosure of grand jury material is "committed to the discretion of the trial judge").

Several circuits have held that federal courts have inherent authority to order disclosure of grand jury records in special circumstances that fall outside the express wording of Rule 6(e). *See In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005) ("We now decide that [Rule 6(e)'s] phrasing can, and should, accommodate rare exceptions premised on inherent judicial power."); *In re Craig*, 131 F.3d 99, 101–02 (2d Cir. 1997) (analyzing at length the 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 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 Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007) (ordering disclosure of materials that had been revealed during trial or to the public, even though such disclosure was not explicitly authorized by Rule 6(e)).

The Seventh Circuit, albeit in dicta, has acknowledged that courts may have "discretion to slip entirely around Rule 6(e) and permit disclosure" of grand jury material in special circumstances. *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir.

1981), *aff'd on other grounds sub nom., United States v. Baggot*, 463 U.S. 476 (1983). In that case, the IRS sought certain evidence generated by a grand jury investigation against James Baggot, who pleaded guilty to misdemeanors under the Commodities Exchange Act, to aid tax collection. *In re Special February, 1975 Grand Jury*, 662 F.2d. at 1233. While the Seventh Circuit ultimately rejected the IRS's request for grand jury records because the agency "ha[d] other effective statutory means to accomplish its civil purposes," it was careful to emphasize that "testimony or documents presented to a grand jury" are not "forever foreclosed from future revelation . . . ." *Id.* at 1236–37. Rather, the court stated that "[w]e may not always be bound by a strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains . . . ." *Id.* at 1236.

This conclusion is supported by U.S. Supreme Court precedent concerning the secrecy of grand jury proceedings, which underscores the discretion and flexibility federal courts possess to determine whether disclosure is appropriate. *See id.* (discussing cases); *see also Douglas Oil*, 441 U.S. at 223 ("we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion"); *United States v. Sells*, 463 U.S. 418, 443 (1983) ("as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification").

In sum, it is "unquestionable that courts possess supervisory power to develop rules regarding this discrete aspect of grand jury procedure." *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 286. Exercise of a court's inherent discretion to order disclosure of grand jury material in special circumstances "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." *In re Craig*, 131 F.3d at 103.

II. Federal courts unseal historically significant grand jury testimony where the material is decades old, traditional justifications for secrecy have disappeared, and the witnesses are deceased.

The Seventh Circuit has not yet addressed the appropriate standard for disclosure when access to historic grand jury material is sought for the benefit of the public. However, federal courts that have confronted this issue agree that disclosure of grand jury testimony is appropriate where, as here: (1) the material is historically significant, (2) the testimony is decades old, (3) the traditional justifications for secrecy have disappeared, and (4) the witnesses are deceased.

In *In re Craig*, the leading case on unsealing historic grand jury testimony, the Second Circuit—while noting that "nothing . . . prohibits historical interest, on its own, from justifying release of grand jury material in an appropriate case," *In re Craig*, 131 F.3d at 105—identified nine non-exhaustive factors for courts to consider when confronted with petitions to unseal records for reasons other than those specified in Rule 6(e):

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury 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. Elaborating on these 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 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. The court added that "an argument that significant historical interest militates in favor of release is totally appropriate and even weighty." *Id.* at 106.

The U.S. District Court for the District of Columbia applied these factors when it granted a request by a coalition of historians and historical associations to release President Nixon's 36-year-old grand jury testimony from the Watergate investigation. *In re Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011). The court 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 "traditional objectives of grand jury secrecy" were not implicated by the request, because Nixon, the witness, had passed away, and the investigation was closed. *Id.* at 49. The court rejected the argument that "disclosing thirty-six-year-old records for historical purposes will deter future witnesses from providing grand jury testimony," especially "'compared with far more immediate potential causes of disclosure, such as leaks, general press attention, public statements by witnesses and revelations at trial.'" *Id.* (quoting *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 292). Because Nixon and "many Watergate principals who are likely mentioned in his testimony are deceased," the Court found that privacy interests were minimal. *Id.*

The Southern District of New York likewise granted a petition by a coalition of historians to unseal testimony related to the investigation of Alger Hiss, a former high-ranking State Department official who was accused of being a Soviet spy. *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 277. After concluding that Rule 6(e) was not a barrier to such a request, the court found that there were no national security or privacy interests implicated by the 50-year-old grand jury testimony, and that disclosure would not undermine any of the rationales for grand jury secrecy. *Id.* at 291. The grand jury investigation had long ended, all appeals had been

resolved, the witnesses' involvement in the investigation was public knowledge, and most of the witnesses had since died. *Id.* at 292–93. The court concluded that any inhibiting effect of disclosure of old testimony on future grand juries was "negligible" and "insignificant," especially compared with the normal risks of disclosure accompanying any testimony. *Id.* at 292. The matter was of historical importance because it was widely publicized in its own time and continued to receive attention with the media, historians, and the public throughout the decades. *Id.* at 293–94. As the court explained:

> [t]he public must acquire, at an appropriate time, a significant, if not compelling, interest in ensuring the pages of history are based upon the fullest possible record. This would seem especially so where, as here, a case fosters vigorous and sustained debate not only about the case itself, but also about broader issues concerning fundamental and, at times, countervailing aspects of our democracy—freedom of expression, . . . governmental investigative power, . . . and the role and function of grand juries themselves.

Id. at 295.

Other district courts have similarly unsealed historically significant grand jury testimony. The Southern District of New York ordered disclosure of 57-year-old testimony related to the Julius and Ethel Rosenberg grand jury, in part because the witnesses had died or otherwise could not be located. *In re Nat'l Sec. Archive*, No. 08-civ-6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008). And the Middle District of Tennessee ordered disclosure of 46-year-old grand jury testimony related to the indictment of Jimmy Hoffa. *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *1 (M.D. Tenn. Apr. 14, 2009).

III. The 1942 *Tribune* grand jury testimony should be disclosed.

This Petition presents an extraordinary case in which the public has a compelling interest in disclosure of certain grand jury testimony, and time has eroded all justifications for continued secrecy. The Coalition seeks the testimony at issue to complete the historical record and inform the public about a key event in U.S. history that continues to foster discourse and debate

concerning fundamental aspects of our democracy, such as the scope of press freedom during wartime. Where, as here, the passage of time has rendered continued secrecy unnecessary, the "party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil*, 441 U.S. at 223; *see also In re Grand Jury Proceedings, Miller Brewing Co.*, 717 F.2d at 1138 (stating the standard for disclosure is "'highly flexible,' 'adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others'"). This Court should exercise its "substantial discretion" to determine whether grand jury testimony should be disclosed, and grant the Coalition's Petition. *In re Eyecare Physicians*, 100 F.3d at 518.

A. The grand jury testimony is historically significant.

The *Tribune* grand jury investigation remains the only time in American history that the government sought to prosecute a mainstream journalist and newspaper under the Espionage Act. (Carlson Decl. ¶ 4.) The investigation received widespread publicity at the time, and it continues to be the subject of significant media attention and scholarly discussion. (*See* Carlson Decl. ¶ 6 (listing a sample of recent discussions of the investigation in newspapers, magazines, scholarly publications, books, television and radio programs and online publications).) After more than seven decades, the ongoing discussion of this incident tends to prove "that the public's interest in release of the information is substantial." *In re Craig*, 131 F.3d at 107.

The *Tribune* case speaks directly to a fundamental tension at the core of our democracy, involving the public's right to know and the government's duty to protect its citizens in a time of war. Public debate about the government's response to leaks of sensitive national security information has rarely, if ever, been more robust or urgent. *See* Leonard Downie, Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America* (2013), *available at* https://www.cpj.org/reports/us2013-english.pdf (describing

how six government employees and two contractors have been subject to Espionage Act prosecutions for leaking information to the press since 2009, compared with three in all prior U.S. administrations). The existence of "vigorous and sustained debate" about the *Tribune* incident and the issues it represents militates strongly in favor of "ensuring the pages of history are based upon the fullest possible record." *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 295.

Moreover, historians disagree about how Johnston obtained information about the Navy's code-breaking, what Johnston and others at the *Tribune* intended to accomplish by publishing the story, whether the grand jury heard evidence that publication harmed national security, and why the grand jury did not return an indictment. (*See* Carlson Decl. ¶ 24; Declaration of Dr. John Prados ("Prados Decl.") ¶¶ 6-8, attached as Exhibit B hereto.) The incident also raises important policy questions about press freedom and national security, and the proper role of the judicial system in cases involving both. (*See* Carlson Decl. ¶ 25; Prados Decl. ¶¶ 6-8.)

Disclosure of the grand jury testimony will enhance the public's understanding of a significant historical event, fill in gaps in the historical record, and foster discussion in both popular media and scholarly journals. *See In re Kutler*, 800 F. Supp. 2d at 48 (finding that these facts weigh in favor of disclosure); *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 297 (same). (*See* Carlson Decl. ¶¶ 24-25 (describing gaps in the historical record); Prados Decl. ¶¶ 6-8 (highlighting questions of "continuing historical importance" that could be illuminated by release of the grand jury material).)

B. The testimony is 72 years old, and most of the people involved in the investigation died more than 40 years ago.

Seventy-two years have elapsed since the grand jury heard testimony in the *Tribune* case. That is twice the amount of time that had elapsed in the Watergate case (36 years). *See In re Kutler*, 800 F. Supp. 2d at 49. And it is significantly more time than had elapsed in the Hoffa

case (46 years), the Hiss case (49 to 52 years), and the Rosenberg case (57 or 58 years). *In re Tabac*, 2009 WL 5213717, at *1; *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 277; *In re Nat'l Sec. Archive*, 2008 WL 8985358, at *1.

Most of the people involved in the *Tribune* scandal passed away more than 40 years ago. (*See* Carlson Decl. ¶ 26 n.1 (identifying the year of death for sixteen of the principal players, including eight grand jury witnesses).) Only three or four of the known grand jury witnesses lived past the year 1976. The last confirmed death of a known grand jury witness occurred 17 years ago, when Frank Waldrop died at the age of 92.[4] Accordingly, no legitimate privacy interests weigh against disclosure. *See In re Kutler*, 800 F. Supp. at 49 (finding no privacy interests implicated when the testifying witness, and those likely mentioned in the testimony, had passed away); *In re Nat'l Sec. Archive*, 2008 WL 8985358, at *1 (ordering disclosure of testimony by witnesses now deceased); *In re Tabac*, 2009 WL 5213717, at *1 (same). The passage of time has eroded any need for continued secrecy.[5]

C. Disclosure would not undermine any of the traditional justifications for grand jury secrecy.

The traditional justifications for maintaining grand jury secrecy simply are no longer applicable to this case. *See Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990) (explaining that when a grand jury investigation ends, many of the reasons for secrecy disappear). The *Tribune* grand jury investigation concluded more than seven decades ago. There is no fear that a target of

[4] Although the Coalition cannot say with certainty whether the unidentified naval officers are still living, it is reasonable to infer that all of the witnesses are deceased. Most of the people involved in the investigation died more than 40 years ago, and any surviving witnesses would be approximately 100 years old.

[5] In the event the Court finds privacy interests to be implicated by the testimony, the proper remedy is to make minimal redactions necessary to address the privacy concern, not to withhold the entire testimony. *See In re Kutler*, 800 F. Supp. 2d at 50 (stating that the National Archives review procedures "allay any remaining privacy concerns" and "greatly diminish any interest in maintaining the secrecy of the requested documents").

the investigation will flee, that someone will tamper with or importune the grand jury, that the grand jurors will be inhibited in their deliberations, that witnesses will withhold information, or that an innocent accused will be revealed. *See Douglas Oil*, at 441 U.S. at 219 (enumerating these justifications for grand jury secrecy). There is no uncertainty about the identities of the targets of the grand jury or the scope of the government's investigation, and disclosure neither threatens an ongoing criminal investigation nor implicates privacy interests of innocent people. *See In re Eyecare Physicians of Am.*, 100 F.3d 514, 519 (7th Cir. 1996) (describing these concerns as reasons for grand jury secrecy). And, as other courts have recognized, given the passage of time, there can be little concern that disclosure will impact future grand jury witnesses. *See, e.g.*, *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 292 ("The inhibiting effect of such disclosure is insignificant"); *In re Kutler*, 800 F. Supp. 2d at 49 (concluding that disclosing 36-year-old records for historical purposes will not deter future witnesses from providing grand jury testimony, particularly in light of "far more immediate potential causes of disclosure, such as leaks, press attention, public statements by witnesses and revelations at trial") (quotation marks omitted).

Moreover, all of the grand jury materials, aside from the testimony at issue, have been made public, including transcripts of Department of Justice interviews with Johnston and Maloney. (*See* Carlson Decl. ¶ 7.) "[E]ven partial previous disclosure often undercuts many of the reasons for secrecy." *In re Craig*, 131 F.3d at 107; *In re Kutler*, 800 F. Supp. 2d at 49 (noting that because grand jury testimony of certain Watergate figures had been made public, the continuing privacy interests in keeping President Nixon's testimony sealed were "minimal"). Because so much is known about the *Tribune* grand jury proceedings, there can be little justification for maintaining the testimony of the grand jury witnesses under seal.

Finally, and tellingly, even the Office of Legal Counsel ("OLC") of the Department of Justice has determined that the need for secrecy related to the *Tribune* investigation has dissipated. Last year, the OLC published a volume of significant, previously secret legal opinions, including two by Oscar Cox, assistant solicitor general, concerning the prosecution of Johnston, Maloney, and the *Tribune*. *See* Oscar S. Cox, Memorandum Opinion for the Attorney General, *in* 1 Supplemental Opinions of the Office of Legal Counsel of the U.S. Dept. of Justice, at 93-105 (Nathan A. Forrester, ed., 2013). The OLC justified disclosure because "there are gaps in the public record of Attorney General and OLC opinions" and although the memos "are pre-decisional advice — they address the legality of contemplated action — and thus are covered by both the attorney-client and deliberative process privileges," the need for confidentiality has "recede[d]" with time. Nathan A. Forrester, 1 Supplemental Opinions of the Office of Legal Counsel of the U.S. Dept. of Justice, at viii (2013).

The same rationale applies in full force to the grand jury testimony now sought. There are gaps in the public record, and while prudential reasons once prevented the disclosure of the testimony, the need for confidentiality has receded. Because no legitimate need for secrecy remains, the compelling reasons the Coalition identified for unsealing the testimony are more than sufficient to justify disclosure.

CONCLUSION

This is an extraordinary case that continues to be of significant interest to historians, journalists and the general public 72 years after the grand jury concluded without issuing an indictment. As set forth in detail above, there is a compelling public interest in the material; the public is entitled to the fullest possible historical record about an incident that "fosters vigorous and sustained debate, not only about the case itself, but also about broader issues concerning

fundamental and, at times, countervailing aspects of our democracy — freedom of expression, . . . governmental investigative power, . . . and the role and function of grand juries themselves." *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 295. And "little traditional need for secrecy remains[.]" *In re Special February, 1975 Grand Jury*, 662 F.2d at 1236. Accordingly, weighing "all the factors which compete in grand jury matters," *In re Miller Brewing Co.*, 717 F.2d at 1138, disclosure is appropriate in this case.

For all the foregoing reasons, the Coalitions respectfully requests that the Court grant the Petition and order the grand jury testimony to be disclosed.

Dated: November 18, 2014

Respectfully submitted,

By: /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

Counsel for Petitioners

Exhibit A

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. _____

DECLARATION OF ELLIOT CARLSON

I, Elliot Carlson, hereby declare as follows:

1. I am a journalist, author and historian with a particular interest in American naval history. I submit this declaration to support of the above-captioned petition to unseal the transcripts of certain testimony before a federal grand jury convened in August of 1942 to investigate an article published by the *Chicago Tribune* (the "*Tribune*") about the U.S. Navy's interception of Japanese naval communications. In this declaration, I explain my interest in the grand jury investigation at issue, why this significant event in U.S. history continues to interest

the media and the public, and why unsealing this material would be of significant value to historians, like me, and the general public.

2. I am the author of *Joe Rochefort's War: The Odyssey of the Codebreaker Who Outwitted Yamamoto at Midway* (2011), which won four naval history awards, including the 2012 Samuel Eliot Morison Award for Naval Literature and the 2011 Theodore and Franklin Roosevelt Naval History Prize. In 2013, I was named the Naval Institute Press Author of the Year. I have written for such newspapers and magazines as *The Wall Street Journal* (staff writer, 1964-72), *Newsweek* (senior editor, business section, 1974-75), *The International Herald Tribune*, *The Honolulu Advertiser*, *The Toronto Star*, *Newsday*, *The Christian Science Monitor*, and *The New Republic*, among others. I have a bachelor's degree in political science from the University of Oregon and a master's degree in communications and journalism from Stanford University.

3. I have spent the past two years working on a new book, to be published by the Naval Institute Press, concerning the scandal that erupted on June 7, 1942, when the *Tribune* published a front-page story—headlined "NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA"—that appeared to be based on a classified Navy dispatch alerting Navy commanders to an impending attack at Midway Atoll. The U.S. victory at the Battle of Midway was a turning point in the Pacific theater of World War II. At the time, the fact that the U.S. Navy had broken the Japanese code was one of the government's most closely guarded secrets.

4. Following publication of the story, the U.S. Department of Justice opened a grand jury investigation targeting the *Tribune* and members of its staff, including Stanley Johnston, the author of the article, and J. Loy Maloney, the managing editor of the *Tribune*, but ultimately no indictments were issued. The *Tribune* grand jury remains the only time the U.S. government has

attempted to prosecute a major newspaper reporter for violating the Espionage Act. The *Tribune* grand jury investigation helps place in context present-day relations between the government and the free press. My book will be written as a narrative history, to help bring this incident alive for the general public in a manner that has never been published before.

5. To prepare my manuscript, I conducted extensive research of newspaper archives, presidential libraries and other repositories across the country, including the McCormick Research Center in Wheaton, Ill.; the Franklin Roosevelt Library in Hyde Park, N.Y.; the Wisconsin Historical Society in Madison; the New York Public Library; the Joseph Mark Lauinger Library at Georgetown University; the Library of Congress; and the Operational Archives, Naval History and Heritage Command, Washington Navy Yard.

6. I also filed Freedom of Information Act requests with the National Archives and Records Administration ("NARAII"), in College Park, Md., on September 4, 2012. On July 3 and July 18, 2013, I received approximately 2,500 pages of Department of Justice material (DOJ case file 146-7-23-25) and approximately 1,000 pages of FBI records (FBI case file 100-HQ-22351) related to the government's investigation of the *Tribune* article. These documents include DOJ, FBI and Navy Department memoranda, summaries of several dozen interviews of Navy personnel conducted by FBI and Navy investigators, transcripts of DOJ interviews with Johnston and Maloney, and correspondence from Navy, DOJ, FBI and *Tribune* executives and staffers. Taken together, these documents shed some light on how at least one of those coded messages, or a copy, could have ended up in Stanley Johnston's hands.

7. These DOJ documents (case file 146-7-23-25) were all submitted to the grand jury in August 1942 and are described by NARA archivists as grand jury records. They include all written material from the grand jury proceeding except the transcripts of testimony from 13

witnesses who appeared before the jury. The grand jury documents, along with the FBI records (case file 100-HQ-22351), were closed to the public. The grand jury documents are part of Record Group 60, located in boxes 771-772. The FBI records are part of Record Group 65.

8. Prior to obtaining the assistance of legal counsel, I informally requested that this Court unseal the grand jury testimony, by letters dated August 9, 2013 and January 2, 2014. True and correct copies of those letters are attached to this declaration, collectively, as Exhibit A.

9. My research has revealed that the sealed grand jury testimony currently is housed at the NARAII in College Park, Md. The material is labeled as enclosures to serials 1 through 11 for file number 146-7-23-25.

A. BACKGROUND CONCERNING THE 1942 *TRIBUNE* GRAND JURY

10. On May 31, 1942, Admiral Chester Nimitz, Commander in Chief of the U.S. Pacific fleet, sent a secret dispatch to all commanders of the Pacific Fleet alerting them to an impending attack by the Japanese navy on the Midway Atoll. The message included the names and formations of the Japanese ships, and the timetable for the attack. The U.S. Navy obtained this information by intercepting and decrypting Japanese naval communications. The fact that the United States had broken the Imperial Japanese Navy's main operational code was a closely guarded secret.

11. Word of the impending attack reached the USS *Barnett*, which was a transport ship conveying survivors of the destroyed carrier USS *Lexington* back to California. Among the *Lexington* survivors on the *Barnett* were Commander Morton Seligman and Stanley Johnston, a war correspondent for the *Tribune*.

12. The Battle of Midway was fought from June 4 to June 7, 1942. The U.S. Navy's victory was a turning point in the Pacific theater of operations.

13. On June 6, 1942, Johnston wrote an article for the June 7 issue of the *Tribune* revealing that the United States had known that the Japanese would attack Midway.

14. The *Tribune* story alarmed the White House and the Navy. Admiral Ernest J. King, the Commander in Chief of the U.S. Navy, wrote to the *Tribune*'s publisher, Colonel Robert McCormick, that the article "quoted almost verbatim a secret dispatch whose contents were of such nature as to indicate, unmistakably, that we — the United States — had acquired information which could only come from a certain enemy source." On June 9, 1942, Frank Knox, Secretary of the Navy, wrote to Attorney General Francis Biddle, recommending that "immediate action be taken . . . to obtain indictments under the Espionage Act" against Johnston, Maloney, and others.

15. The FBI investigated the leak, interviewing more than a dozen naval officers who had been aboard the *Barnett* and the *Lexington*. The Navy conducted its own investigation. These investigations revealed the Johnston and Seligman shared a suite on the *Barnett* and suggested that Johnston gained access to the dispatch from Seligman, which both men denied.

16. On August 7, 1942, Attorney General Biddle announced that a grand jury would be convened in Chicago to hear the case against the *Tribune*. The grand jury heard testimony from Johnston; Maloney; Seligman; Rear Admiral Frederick C. Sherman, who was Seligman's executive officer; Ralph Sharp, an editor of the *New York News*, which had also published the *Tribune* story; Frank Waldrop, an editor at the *Washington Times-Herald*, which also published the story; Wayne Thomis, a *Tribune* staffer; Lieutenant Commander Edward O'Donnell, Lieutenant Commander Edward Eldridge, and three or four unknown Navy officers.[1]

[1] Press accounts conflict on the number of unidentified officers who testified.

17. At some point, Secretary Knox decided not to make available certain Navy witnesses who had been expected to testify that the article threatened national security.

18. The grand jury ultimately decided that no indictments should issue.

B. *TRIBUNE* GRAND JURY PUBLICITY & CONTINUING INTEREST

19. The grand jury investigation of the *Tribune* received intense media attention at the time. Across the nation, press outlets published detailed accounts of the proceedings, including the names of some witnesses who testified. *See* George A. Brandenburg, *7 Navy Officers Appear Before Federal Jury on Tribune Story*, Editor & Publisher, Aug. 15, 1942 at 6. The incident provided fodder for political cartoons and commentary, and sparked a debate about the effect that the government investigation would have on freedom of the press, and whether the *Tribune* had crossed ethical lines and threatened the war effort.

20. In addition to my freedom of information requests, other researchers have sought and obtained documents related to the 1942 grand jury through Freedom of Information Act requests, including from the FBI, the Justice Department, and the Navy.

21. Stanley Johnston's article and its aftermath continue to be discussed in newspapers, magazines, scholarly publications, and books, on television and radio, and online. *E.g.*, Michael S. Sweeney & Patrick S. Washburn, *'Aint Justice Wonderful': The Chicago Tribune's Battle of Midway Story & the Government's Attempt at an Espionage Act Indictment in 1942*, 16 Journalism & Commc'n Monographs 7 (2014); Carey Shenkman, *70 Years Later, Still Playing Politics With Freedom of the Press*, Huffington Post (June 18, 2014, 10:00 A.M.), http://www.huffingtonpost.com/carey-shenkman/freedom-of-the-press_b_5503196.html (last visited on Sept. 18, 2014)[2]; *On the Media: A Historic Case for Prosecuting Journalists Who*

[2] All websites cited herein were last visited on Sept. 18, 2014.

Report Leaks (WNYC/NPR broadcast Aug. 2, 2013); Seth Lipsky, *Two tales of the press on trial*, N.Y. Post, June 5, 2013; Steven Aftergood, *Government Monitoring of Journalists, Then and Now*, Federation of American Scientists (May 22, 2013), http://fas.org/blogs/secrecy/2013/05/monitoring-journalists; Capt. Lawrence B. Brennan, *Spilling the Secret – Captain Morton T. Seligman, U.S. Navy (Ret.), U.S. Naval Academy Class of 1919*, Naval Historical Foundation (Feb. 28, 2013), http://www.navyhistory.org/2013/02/spilling-the-secret-captain-morton-seligman; Thomas C. Hone, *The Battle of Midway: The Naval Institute Guide to the U.S. Navy's Greatest Victory* (2013); Editorial, *Obama's Secrets*, N.Y. Sun, Aug. 3, 2012, *available at* http://www.nysun.com/editorials/obamas-secrets/87926; Bill Keller, *Secrecy in Shreds*, N.Y. Times Sunday Magazine, Apr. 3, 2011, at MM11; Peter Duffy, *Keeping Secrets: How censorship has (and hasn't) changed since World War II*, Colum. Journalism Rev., Sept./Oct. 2010, at 58; Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, & the Rule of Law* (2010); Alan Bisbort, *Media Scandals* (2008); Norman Pearlstine, *Off the Record: The Press, the Government, & the War over Anonymous Sources* (2007); *News War: Secrets, Sources & Spin, Part II* (PBS Frontline broadcast Feb. 13, 2007); Geoffrey R. Stone, *Top Secret: When Our Government Keeps Us in the Dark* 94-95 (2006); Douglas McCollam, *The End of Ambiguity*, Colum. Journalism Rev., July/Aug. 2006, at 21-27; Max Boot, *Loose lips win Pulitzers*, L.A. Times, Apr. 26, 2006; Leonard Ray Teel, *The Public Press, 1900-1945: The History of American Journalism* (2006); Michael S. Sweeney, *Secrets of Victory: The Office of Censorship & the American Press & Radio in World War II* (2001); Jeffrey A. Smith, *War & Press Freedom: The Problem of Prerogative Power* (1999); Margaret A. Blanchard, *History of Mass Media in the United States: An Encyclopedia* (1998); Richard Norton Smith, *The Colonel: The Life & Legend*

of Robert R. McCormick, 1880-1955 (1997); David Kahn, *The Code-Breakers: The Comprehensive History of Secret Communication from Ancient Times to the Internet* (1996).

22. Moreover, the topic of prosecuting journalists and leakers under the Espionage Act is of great public interest and concern in the present political climate. *E.g.*, Trevor Timm, *Guilty Plea In Fox News Leak Case Shows Why Espionage Act Prosecutions Are Inherently Unfair to Sources*, Press Freedom Foundation (Feb. 7, 2014), https://pressfreedomfoundation .org/blog/2014/02/guilty-plea-fox-news-leak-case-shows-why-espionage-act-prosecutions-are-inherently; Leonard Downie Jr. & Sara Rafsky, *The Obama Administration & the Press: Leak investigations and surveillance in post-9/11 America*, Committee to Protect Journalists (2013), *available at* http://cpj.org/reports/us2013-english.pdf; Cora Currier, *Charting Obama's Crackdown on National Security Leaks*, ProPublica (July 30, 2013, 3:40 PM), http://www. propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks; Alison Frankel, *Journalists and the Espionage Act: Prosecution risk is remote but real*, Reuters (June 24, 2013), http://blogs.reuters.com/alison-frankel/2013/06/24/journalists-and-the-espionage-act-prosecution-risk-is-remote-but-real; Michael Barone, *Obama and the 1917 Espionage Act*, National Review (May 27, 2013, 12:00 AM), http://www.nationalreview.com/ article/349372/obama-and-1917-espionage-act; Ann E. Marimow & Scott Wilson, *President Obama says journalists should not be prosecuted for soliciting information*, The Washington Post, May 21, 2013, *available at* http://www.washingtonpost.com/world/national-security/ president-obama-says-journalists-should-not-be-prosecuted-for-soliciting-information/2013/ 05/21/a66b611c-c24c-11e2-8c3b-0b5e9247e8ca_story.html; Bill Dedman, *U.S. v. WikiLeaks: espionage and the First Amendment*, NBCNews.com (2013), http://www.nbcnews.com/id/

40653249/ns/us_news-wikileaks_in_security/t/us-v-wikileaks-espionage-first-amendment; David Carr, *Blurred Line Between Espionage and Truth*, The New York Times, Feb. 27, 2012 at B1.

C. IMPORTANCE OF UNSEALING GRAND JURY TESTIMONY

23. The transcripts of the 1942 *Tribune* grand jury testimony are of significant value to historians and the public. Despite the wealth of media attention and the revelations contained within the documents obtained from the government through FOIA requests, questions linger about how Stanley Johnston obtained the information, what the witnesses told the grand jury, and why the investigation ended when it did. We do not know what the grand jury heard — or did not hear — and how the government arrived at the decision to close the investigation. Releasing the grand jury testimony will fill in important gaps in the existing historical record and will provide valuable perspective on the relationship between the government and the press during national security crises — a subject that has never been more relevant.

24. Historians and writers still disagree about details of the *Tribune* scandal. *See* Brennan, *Spilling the Secret*, *supra* ("There are three public versions of how a *Chicago Tribune* reporter, Stanley Johnston, obtained access to highly classified messages . . . ."). Some theories of how Johnston obtained the information have been largely discredited — including a theory involving Adlai E. Stevenson — but the grand jury testimony could settle the dispute. Recent scholarship purports to take readers behind the scenes of the grand jury, but historians will not be able to confirm or dispute these accounts unless the transcripts from the actual proceedings are released. For example, how did Stanley Johnston obtain the information about the Navy's code-breaking? What was Johnston's and the *Tribune*'s intent in writing the article? Did the *Tribune* transgress censorship regulations in its handling of Johnston's story? Did the grand jury hear testimony about the consequences of disclosing the Navy's code-breaking activity? Was the

scoop portrayed as a national-security issue? Was there evidence that the country's security was harmed by the *Tribune* story? Are there clues as to why the grand jury did not return an indictment?

25. Other policy questions raised by the *Tribune* incident continue to resonate today. Where does one draw the line between press freedom and abuse of that freedom in a time of war or national crisis? What can the government gain by prosecuting journalists under the Espionage Act? What does the nation lose when reporters are compelled to name their sources or face serious criminal penalties and lengthy jail sentences? What is the government's responsibility in protecting national defense secrets? The press's?

26. Most of the people involved in the *Tribune* scandal passed away more than 40 years ago.[3] Only two of the known grand jury witnesses lived into the 1980s. The last surviving grand jury witness (of those who have been identified), Frank Waldrop, died 17 years ago, in 1997, at the age of 92.

27. In recent years, the government has released a wealth of information related to the *Tribune* investigation. Portions of the grand jury records and FBI records have been declassified. Just last year, the DOJ released a previously secret legal memorandum by assistant solicitor general, Oscar Cox, written in July 1942, advising then-Attorney General Francis Biddle about the *Tribune* matter.

---

[3] Biddle (d. 1968); Cox (d. 1966); Johnston (d. 1962); King (d. 1956); Knox (d. 1944); Maloney (d. 1976); McCormick (d. 1955); William D. Mitchell, former Attorney General who presented the case to the grand jury (d. 1955); Nimitz (d. 1966); O'Donnell (d. 1991); Seligman (d. 1967); Sharp (d. 1970); Sherman (d. 1957); Thomis (d. 1988); Waldrop (d. 1997).

Robert E. Dixon, a lieutenant commander in the U.S. Navy who had been aboard the *Barnett*, told his eye-witness account of the *Tribune* scoop to Robert Mason, editor of *The Virginian-Pilot*, in Norfolk, Va., but instructed the editor "wait till I'm dead before you write it." Dixon died in 1981, and Mason published the story in the U.S. Navy's *Proceedings* magazine in 1982. *See* Robert Mason, *Eyewitness*, Proceedings, June 1982, at 40-41.

28. Today, the *Tribune* incident is often referenced in discussions of contemporary examples of reporters and whistleblowers divulging sensitive information that implicate national security. In fact, the government, in support of its leak prosecution against Pfc. Bradley Manning, cited the Cox memorandum.

29. Seventy-two years after the grand jury investigation was closed, the transcripts remain sealed.

30. The *Tribune* investigation remains a significant illustration of the constitutional tension between the free press and the national security interests of the United States. A better understanding of these historical events would benefit historians and the public.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 2014 in Silver Spring, Maryland.

Elliot Carlson

EXHIBIT A

TO CARLSON DECLARATION

August 9, 2013

Chief Judge Ruben Castillo
Northern District of Illinois
Eastern Division
219 South Dearborn St., 20th Floor
Chicago, Illinois 60604

Dear Judge Castillo:

I'm a retired journalist who has turned a long-standing interest in naval history into writing books about it. My first effort was published in 2011 by the Naval Institute Press under the title, *Joe Rochefort's War: The Odyssey of the Codebreaker Who Outwitted Yamamoto at Midway.* The book did quite well, winning four naval history awards in 2012. Among them were the Samuel Eliot Morison Award for Naval Literature and the Roosevelt Naval History Prize.

Now I'm working on another book, this one concerning the Navy scandal that erupted in June 1942 when the *Chicago Tribune* printed a story that appeared to be based on a Top Secret Navy dispatch. As you will see from the attached petition, Government officials feared that publication of the article would tip off the Japanese that the U.S. Navy had broken their main naval code and cause them to change it, thereby drying up this critical source of information.

The Justice Department convened a Grand Jury to investigate key *Tribune* staffers, its war correspondent, Stanley Johnston, and its managing editor, J. Loy Maloney, for possible violation of the Espionage Act of 1917. The Jury received testimony from a number of Navy witnesses, but for reasons given in the petition, it declined to indict the *Tribune* people.

The Naval Institute Press has asked me to do a history of this episode in which I will lay out the merits of the Government's case and the culpability of the *Tribune* staffers. Crucial to this project will be my access to the testimony of the witnesses who testified before the Grand Jury in June 1942. Seventy-one years later this testimony remains sealed, its location unknown.

In this petition, I'm humbly asking the Court to unseal this testimony and make it available to me. The attached petition lays out the central facts of the case and provides a rationale for the unsealing. The petition notes the historical significance of the *Tribune* matter in that it is a forerunner of many cases today involving the media and national security issues. Unsealing this testimony will resolve long-standing questions surrounding the case. This action also will provide historical perspective on the role of the press in the national security arena and thereby serve the public interest.

I thank the Court in advance for consideration of this petition.

Elliot Carlson
10101 Green Holly Terrace
Silver Spring, Maryland 20902

January 2, 2014

Chief Judge Ruben Castillo
Northern District of Illinois
Eastern Division
219 South Dearborn St., 20th Floor
Chicago, Illinois 60604

Dear Judge Castillo:

Simply to let you know of my continued interest in this 1942 Grand Jury proceeding, I'm resending the petition I mailed you last August requesting the unsealing of the testimony pertaining to that case. I'm also resending my cover letter which describes the background of this case, my rationale for seeking this testimony, and the reasons why history would be served by the release of these documents.

I certainly understand that you are busy with a heavy caseload, and I realize that asking you to attend to my request might well mean an extra burden. I regret having to do so. Yet, as I continue my work on this book, I'm constantly reminded of the importance of this testimony. In the hope you will see the merits of this petition, I'm resubmitting my request.

I thank the Court in advance for consideration of this petition.

Elliot Carlson
301-681-3849
10101 Green Holly Terrace
Silver Spring, Maryland 20902

AUGUST 5, 2013

TO: CHIEF JUDGE RUBEN CASTILLO
U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

SUBJECT: MOTION TO RELEASE GRAND JURY TESTIMONY FROM PROCEEDINGS INITIATED BY U.S. DEPARTMENT OF JUSTICE AGAINST TWO EMPLOYEES OF THE *CHICAGO TRIBUNE* ON 7 AUGUST 1942, CONTINUING THROUGH 20 AUGUST 1942; DOJ CASE FILE 146-7-23-25, LOCATED AT NATIONAL ARCHIVES AND RECORDS ADMINISTRATION II, COLLEGE PARK, MARYLAND

CENTRAL FACTS OF THE CASE:

1 ON 31 MAY 1942, ADMIRAL CHESTER NIMITZ, COMMANDER IN CHIEF, U.S. PACIFIC FLEET, RADIOED A "SECRET" DISPATCH (311211) TO ALL COMMANDERS OF THE PACIFIC FLEET ALERTING THEM TO AN IMPENDING ATTACK BY THE IMPERIAL JAPANESE NAVY ON MIDWAY ATOLL. NIMITZ'S MESSAGE INCLUDED THE NAMES OF THE JAPANESE SHIPS ASSEMBLING, THE FORMATIONS INTO WHICH THEY HAD BEEN DIVIDED, AND THE TIMETABLE FOR THE ACTION.

2 PACIFIC FLEET SHIPS RECEIVING THE MESSAGE INCLUDED THE USS *BARNETT*, A VESSEL TRANSPORTING TO THE WEST COAST SURVIVORS FROM THE USS *LEXINGTON*, AN AIRCRAFT CARRIER SUNK BY THE JAPANESE DURING THE BATTLE OF THE CORAL SEA, 7-8 MAY 1942. SURVIVORS INCLUDED COMMANDER MORTON SELIGMAN, THE *LEXINGTON*'S EXECUTIVE OFFICER, AND ONE WAR CORRESPONDENT, STANLEY JOHNSTON OF THE *CHICAGO TRIBUNE*. NIMITZ'S MESSAGE WAS CIRCULATED TO SOME *LEX* OFFICERS, INCLUDING SELIGMAN.

3 THE INFORMATION IN THE ADMIRAL'S DISPATCH WAS DERIVED FROM IMPERIAL JAPANESE MESSAGES INTERCEPTED IN HAWAII AND DECRYPTED BY THE U.S. NAVY'S TOP SECRET CODE-BREAKING UNIT AT PEARL HARBOR. THE FACT THAT AMERICA'S NAVY HAD BROKEN THE JAPANESE CODE WAS ONE OF THE GOVERNMENT'S MOST CLOSELY GUARDED SECRETS OF WORLD WAR II.

4 ON 7 JUNE 1942, THE *CHICAGO TRIBUNE* PUBLISHED A FRONT PAGE ARTICLE UNDER THE HEADLINE: "NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA." THE DISPATCH STATED THAT U.S. NAVAL CIRCLES KNEW DAYS IN ADVANCE THE STRENGTH OF JAPANESE FORCES MOBILIZING TO ATTACK MIDWAY ISLAND ON 4 JUNE 1942. THE ARTICLE THEN LISTED THE NAMES, TONNAGES AND ARMAMENTS OF THE JAPANESE SHIPS EXPECTED TO TAKE PART IN THE ACTION.

5 DRAWING ON THE SECRET INFORMATION SUPPLIED BY ITS DECRYPT UNIT, THE U.S. NAVY ACHIEVED A STUNNING VICTORY AT MIDWAY, SINKING FOUR JAPANESE CARRIERS IN A BATTLE THAT MANY HISTORIANS BELIEVE TURNED THE TIDE OF WAR AGAINST JAPAN IN THE PACIFIC.

6 THE 7 JUNE *TRIBUNE* ARTICLE ALARMED THE WHITE HOUSE AND THE NAVY. ON 9 JUNE 1942 FRANK KNOX, SECRETARY OF THE NAVY, WROTE TO THE ATTORNEY GENERAL, FRANCIS BIDDLE, RECOMMENDING THAT "IMMEDIATE ACTION BE TAKEN ... TO OBTAIN INDICTMENTS UNDER THE ESPIONAGE ACT (50 USC 31) AGAINST MR. STANLEY JOHNSTON ... MR. J.O. MALONEY AND SUCH OTHER INDIVIDUALS AS ARE IMPLICATED IN THE UNAUTHORIZED PUBLICATION OF A NEWSPAPER ARTICLE WHICH APPEARED ON JUNE 7, 1942."

7 THE ACT PROHIBITED, AMONG OTHER THINGS, DELIVERING INFORMATION RELATING TO "NATIONAL DEFENSE" TO PERSONS NOT "ENTITLED TO HAVE IT."

8 IN A 12 JUNE LETTER TO THE *TRIBUNE'S* PUBLISHER, COLONEL ROBERT McCORMICK, ADMIRAL ERNEST J. KING, COMMANDER IN CHIEF, U.S. NAVY, STATED THAT THE *TRIB* STORY "QUOTED ALMOST VERBATIM A SECRET DESPATCH WHOSE CONTENTS WERE OF SUCH NATURE AS TO INDICATE, UNMISTAKABLY, THAT WE — THE UNITED STATES — HAD ACQUIRED INFORMATION WHICH COULD ONLY COME FROM A CERTAIN ENEMY SOURCE."

9 ADMIRAL KING ARGUED: "OBVIOUSLY, THE GAINING OF SUCH KNOWLEDGE BY THE ENEMY — THROUGH THE PUBLICATION OF THE ARTICLE — COULD ONLY LEAD TO HIS DRYING UP THE SOURCE." McCORMICK ANSWERED THAT JOHNSTON HAD NOT BASED HIS ARTICLE ON IMPROPER ACCESS TO THE SECRET DISPATCH, BUT ON HIS OWN THOROUGH KNOWLEDGE OF THE JAPANESES FLEET.

10 DURING JUNE, THE FEDERAL BUREAU OF INVESTIGATION PROBED THE ALLEGED LEAK , INTERVIEWING AT LEAST A DOZEN NAVAL OFFICERS WHO HAD BEEN ABOARD THE *BARNETT* DURING THE TIME OF ITS PASSAGE TO THE WEST COAST. THE U.S. NAVY DID ITS OWN INVESTIGATION THROUGH A BOARD OF INQUIRY. THE TWO PANELS ESTABLISHED THAT *TRIB* REPORTER JOHNSTON SHARED A SUITE ABOARD THE *BARNETT* WITH COMMANDER SELIGMAN AND ANOTHER OFFICER FROM THE *LEXINGTON*; THE TWO PANELS SUGGESTED THAT JOHNSTON GAINED ACCESS TO THE DISPATCH, EITHER INTENTIONALLY OR UNINTENTIONALLY, FROM SELIGMAN — A CONTENTION BOTH MEN DENIED.

11 SECRETARY KNOX INSISTED THE CASE GO FORWARD. HE CHARGED: "THE CONTENTS OF THE ARTICLE ... LEAVES NO ROOM FOR REASONABLE DOUBT IN THE MIND OF ANY INTELLIGENT PERSON THAT MR. JOHNSTON 'LAWFULLY OR UNLAWFULLY' CAME INTO POSSESSION OF THE SAID DISPATCH AND WILLFULLY COMMUNICATED THE SAME TO HIS PUBLISHERS ..."

12 ON 7 AUGUST 1942, ATTORNEY GENERAL BIDDLE ANNOUNCED TO THE NATION THAT AN INVESTIGATION WAS UNDER WAY AND THAT A GRAND JURY WAS TO BE CONVENED IN CHICAGO TO HEAR THE CASE. BIDDLE ASKED WILLIAM D. MITCHELL, ATTORNEY GENERAL DURING THE HOOVER ADMINISTRATION, TO PRESENT THE CASE TO THE GRAND JURY.

13 ON 13 AUGUST, THE GRAND JURY STARTED HEARING TESTIMONY. AMONG THOSE TESTIFYING WERE SEVEN NAVAL OFFICERS: REAR ADMIRAL FREDERICK C. SHERMAN, CAPTAIN IN COMMAND OF THE *LEXINGTON*; COMMANDER SELIGMAN, SHERMAN'S EXECUTIVE OFFICER; AND FIVE OFFICERS NOT IDENTIFIED. THE OFFICERS WERE ASKED TO EXPLAIN THE HANDLING OF SENSITIVE MATERIAL ABOARD WARSHIPS AND TO SHED LIGHT, IF THEY COULD, ON HOW NIMITZ'S MESSAGE MIGHT HAVE BEEN CONVEYED TO JOHNSTON.

14 JURORS ALSO HEARD TESTIMONY FROM FIVE JOURNLISTS. AMONG THEM: REPRESENTATIVES FROM TWO NEWSPAPERS WHICH ALSO HAD PUBLISHED THE *TRIB* STORY: FRANK SHARP, NIGHT NEWS EDITOR OF THE *NEW YORK NEWS*, AND FRANK WALDROP, FOREIGN AND POLITICAL EDITOR OF THE *WASHINGTON TIMES-HERALD*. THEY WERE QUIZZED ABOUT THE ORIGINS OF THE *TRIB* STORY.

15 TWO *TRIB* JOURNALISTS TESTIFIED: J. LOY MALONEY, *TRIBUNE* MANAGING EDITOR; WAYNE THOMIS, A REWRITE MAN ON THE *TRIBUNE* STAFF; AND STANLEY JOHNSTON. THEY WERE ASKED TO TELL WHAT THEY KNEW ABOUT HOW THE *TRIBUNE*'S 7 JUNE ARTICLE CAME INTO EXISTENCE.

16 NAVY SECRETARY KNOX, AFTER INITIALLY URGING ATTORNEY GENERAL BIDDLE TO PURSUE THE CASE, RECONSIDERED. WHILE THE GRAND JURY PROCEEDINGS WERE UNDER WAY HE DECLINED TO MAKE AVAILABLE TO JURORS EXPERT NAVY WITNESSES EARLIER PROMISED. THESE WITNESSES WERE EXPECTED TO PROVIDE TESTIMONY TO BOLSTER THE NAVY'S CLAIM THAT NATIONAL SECURITY HAD BEEN DAMAGED BY *TRIBUNE* ARTICLE.

17 KNOX TOLD BIDDLE HE WAS CONCERNED ABOUT PUBLICITY SURROUNDING THE CASE; HE CONTENDED THAT IF THE JAPANESE GOT WORD THE U.S. NAVY HAD BROKEN THEIR NAVAL CODE, THAT REVELATION COULD POSE A "GRAVE RISK" TO THE PROTECTION OF AMERICA'S CODE-BREAKING EFFORT.

18 ON 19 AUGUST 1942, THE GRAND JURY DECIDED THAT NO INDICTMENT SHOULD BE RETURNED AGAINST JOHNSTON OR THE *TRIBUNE*. WITHOUT EVIDENCE THAT HARM HAD BEEN DONE TO NATIONAL SAFETY, THE JURORS CONCLUDED THERE HAD BEEN NO VIOLATION OF THE LAW. THE CASE WAS CLOSED. NO FURTHER ACTION WAS TAKEN AGAINST JOHNSTON OR THE *TRIB*.

19 THE *TRIB* CASE ENDED IN AUGUST, 1942, BUT QUESTIONS REMAIN THAT REVERBERATE TODAY IN THE CONTINUING DEBATE ABOUT THE PROPER ROLE

OF THE PRESS IN THE NATIONAL SECURITY ARENA. WHAT IS THE LINE BETWEEN LEGITIMATE PRESS FREEDOM AND ABUSE OF THAT FREEDOM IN TIME OF WAR OR NATIONAL CRISIS? DID STANLEY JOHNSTON CROSS THAT LINE? HOW DID HE GET THAT 7 JUNE 1942 STORY? DID HE VIOLATE HIS TRUST WITH THE NAVY BY WRITING IT? DID HE IMPAIR NATIONAL SECURITY?

20 UNTIL THESE QUESTIONS ARE ANSWERED, A SHADOW WILL BLOT THE REPUTATION AND CAREER OF JOHNSTON. RIGHTLY OR WRONGLY, HIS 1942 ARTICLE—AND THE CONTROVERSY SURROUNDING IT—IS OFTEN COMPARED WITH INCIDENTS TODAY INVOLVING REPORTERS AND WHISTLE-BLOWERS WHO HAVE DIVULGED SENSITIVE NATIONAL SECURITY INFORMATION, IN SOME INSTANCES BREAKING FEDERAL LAWS IN DOING SO.

21 THUS, AS A FORERUNNER OF MANY CURRENT DISPUTES CONCERNING THE ROLE OF THE MEDIA, THE JOHNSTON MATTER HAS HISTORIC SIGNIFICANCE. RELEASE OF GRAND JURY TESTIMONY FROM THIS LEGAL PROCEEDING WOULD SHED LIGHT ON JOHNSTON'S ALLEGED TRANSGRESSIONS AND OTHER MAJOR ISSUES SURROUNDING THE CASE. IT WOULD ALSO PROVIDE PERSPECTIVE ON PRESS-RELATED NATIONAL SECURITY CASES NOW MAKING HEADLINES.

22 THE TESTIMONY COULD DETERMINE WHETHER THE JOHNSTON CASE REPRESENTS A MODEL THAT DEFINES THE LIMITS OF PRESS FREEDOM IN A DEMOCRATIC SOCIETY IN TIME OF WAR AND GRAVE THREAT TO U.S. SECURITY.

23 LEGAL SCHOLARS GENERALLY RECOGNIZE: "COURT RECORDS SHOULD BE SEALED TO KEEP CONFIDENTIAL ONLY WHAT MUST BE KEPT SECRET, TEMPORARILY OR PERMANENTLY AS THE SITUATION REQUIRES."X

24 THE REQUIREMENT FOR SECRECY IN THE JOHNSTON MATTER NO LONGER SERVES A PURPOSE. THAT REQUIREMENT ENDED, FIRST, WITH AMERICA'S VICTORY OVER JAPAN IN WORLD WAR II AND THE GRADUAL CIRCULATION THROUGH BOOKS AND MOVIES OF INFORMATION ABOUT THIS COUNTRY'S WWII CODE-BREAKING PROGRAM: THERE IS NO LONGER A SECRET TO PROTECT.

25 THE REQUIREMENT ENDED, SECOND, WITH THE PASSAGE OF TIME. SEVENTY-ONE YEARS HAVE FLOWED BY SINCE GRAND JURORS HEARD TESTIMONY IN THE JOHNSTON CASE IN AUGUST 1942. THE INDIVIDUALS WHO WERE PARTIES TO THAT CASE AND WHOSE PRIVACY MIGHT HAVE BEEN INVADED BY DISCLOSURE OF THEIR TESTIMONY ARE LONG DECEASED.

26 COURTS INCREASINGLY UNSEAL GRAND JURY TESTIMONY TO RESOLVE ENDURING MYSTERIES SURROUNDING EVENTS OF HISTORIC IMPORTANCE:

- CHIEF U.S. DISTRICT JUDGE ROYCE ON JULY 29, 2011, GRANTED A PETITION TO UNSEAL PRESIDENT NIXON'S GRAND JURY TESTIMONY FROM JUNE 23 AND 24, 1975, PLUS RELATED WATERGATE SPECIAL PROSECUTOR FORCE MATERIALS. "THE SPECIAL CIRCUMSTANCES PRESENTED HERE—NAMELY, UNDISPUTED HISTORICAL INTEREST IN THE REQUESTED RECORDS—FAR OUTWEIGH THE NEED TO MAINTAIN SECRECY OF THE RECORDS," LAMBERTH WROTE. X

JUDGE LAMBERTH ADDED: "THE COURT IS CONFIDENT THAT DISCLOSURE WILL GREATLY BENEFIT THE PUBLIC AND ITS UNDERSTANDING OF WATERGATE WITHOUT COMPROMISING THE TRADITION AND OBJECTIVES OF GRAND JURY SECRECY." X

- U.S. DISTRICT COURT JUDGE TODD CAMPBELL OF NASHVILLE ON APRIL 15, 2009, AGREED TO UNSEAL THE GRAND JURY TESTIMONY OF A KEY WITNESS IN THE INDICTMENT FOR FORMER TEAMSTER LEADER JIMMY HOFFA FOR OBSTRUCTION OF JUSTICE.

- U.S. DISTRICT COURT JUDGE ALVIN K. HELLERSTEIN, OF THE SOUTHERN DISTRICT OF NEW YORK, ON JULY 23, 2008, AGREED TO RELEASE THE GRAND JURY TESTIMONY OF THREE DOZEN WITNESSES IN THE ESPIONGE CASE AGAINST JULIUS AND ETHEL ROSENBERG, EXCEPTING ONLY THE TESTIMONY OF ETHEL ROSENBERG'S BROTHER, DAVID GREENGLASS. HISTORIAN DAVID OSHINSKY TOLD THE *NEW YORK TIMES* THAT THE TESTIMONY MAY SHED MORE LIGHT ON THE ROLE OF ETHEL ROSENBERG IN THE SPY CASE. X

- U.S. DISTRICT COURT JUDGE PETER K. LEISURE, OF THE SOUTHERN DISTRICT OF NEW YORK, ON MAY 13, 1999, ORDERED THE GOVERNMENT TO UNSEAL THOUSANDS OF PAGES OF GRAND JURY TESTIMONY FROM THE INVESTIGATION OF ALGER HISS AND UNDERGROUND COMMUNIST MOVEMENT IN THE U.S. JUDGE LEISURE CITED THE LONGSTANDING DEBATE ABOUT THE CASE. HE NOTED THE CONTINUING QUESTIONS ABOUT RICHARD NIXON'S ROLE AND WHETHER HE SOUGHT TO LOBBY THE GRAND JURY TO INDICT HISS. X

"THE COURT IS CONFIDENT THAT DISCLOSURE WILL FILL IN IMPORTANT GAPS IN THE EXISTING RECORD," JUDGE LEISURE WROTE, ADDING THAT RELEASING THE DOCUMENTS WOULD LEAD TO NEW DEBATE AND NEW HISTORICAL WORKS, "ALL TO THE IMMENSE BENEFIT OF THE PUBLIC." X

26 UNSEALING THE TESTIMONY IN THE STANLEY JOHNSTON CASE WILL ALSO FILL IN IMPORTANT GAPS IN THE EXISTING RECORD AND, THIS WRITER BELIEVES, WORK "TO THE IMMENSE BENEFIT OF THE PUBLIC."

27 THIS WRITER CALLS THE COURT'S ATTENTION TO A COMPLICATING ISSUE: THE LOCATION OF THE GRAND JURY TESTIMONY IN JOHNSTON CASE IS UNKNOWN. THAT IT HAS BEEN PRESERVED IS VERY LIKELY. ON JULY 1, 2013, THE FREEDOM OF INFORMATION STAFF AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION IN COLLEGE PARK, MARYLAND (NARAII), RELEASED TO THIS AUTHOR APPROXIMATELY 2,000 PAGES OF GRAND JURY DOCUMENTS IN THE JOHNSTON CASE. THIS MATERIAL IS KNOWN AS CASE FILE 146-7-23-25, AND IS LOCATED IN BOXES 771-772 AND SHELVED AT STACK 631: 56/27/02-56/2703.

28 THIS CASE FILE CONSISTS OF MANY IMPORTANT JUSTICE DEPARTMENT DOCUMENTS RELATING TO THE CASE, BUT NOT THE GRAND JURY TESTIMONY ITSELF. A SEARCH MOUNTED BY FOIA STAFF HAS CONFIRMED THAT THE TESTIMONY IS NOT AT NARAII. ADDITIONAL CHECKING HAS TURNED UP THAT THE DOCUMENTS ARE NOT AT NARA'S REGIONAL BRANCH IN CHICAGO. NOR ARE THEY ON FILE WITH THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

29 GIVEN THIS SITUATION, THIS WRITER HUMBLY REQUESTS THAT THE COURT ORDER AN INTENSIFIED SEARCH FOR THIS TESTIMONY AND, WHEN LOCATED, BE UNSEALED AND RELEASED TO AUTHOR ELLIOT CARLSON.

30 WITH THIS REQUEST THE AUTHOR THANKS THE COURT IN ADVANCE AND MAKES KNOWN HIS WILLINGNESS TO PROVIDE ANY ADDITIONAL INFORMATION RELATING TO THE JOHNSTON CASE.

ELLIOT CARLSON
10101 GREEN HOLLY TERRACE
SILVER SPRING, MARYLAND 20902
301-681-3849

Exhibit B

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. _____

DECLARATION OF DR. JOHN PRADOS

I, John Prados, hereby declare as follows:

1. I am a senior fellow at the National Security Archive at George Washington University, in Washington, D.C., where I am the project director of documentation projects for Vietnam and the CIA.

2. I am the author of more than 20 books on national security, foreign affairs, and military subjects, including *Combined Fleet Decoded: The Secret History of American Intelligence and the Japanese Navy in World War II* (1995), which won a book award from the

New York Military Affairs Symposium; *Safe for Democracy: The Secret Wars of the CIA* (2009); *The Family Jewels: The CIA, Secrecy and Presidential Power* (2013); and *Keepers of the Keys: A History of the National Security Council from Truman to Bush* (1991). I have edited other collections, including *Inside the Pentagon Papers* (2004), and my writing has appeared in *The New York Times*, *Washington Post*, *The Journal of National Security Law & Policy*; the *Journal of American History*; *The Quarterly Journal of Military History*; and *Naval History*, among many other publications.

3. I hold a Ph.D. in political science from Columbia University.

4. I have written about the *Chicago Tribune* grand jury investigation in 1942 in my book, *Combined Fleet Decoded*, and consider the investigation to be of historical significance.

5. The grand jury in this case examined issues surrounding one of the central intelligence developments of the time, the breaking of Japanese Navy codes in a way that enabled the United States to anticipate enemy military moves. Because this activity was highly classified at the time, the publication, on June 7, 1942 (immediately following the battle of Midway) of details that had appeared in the intelligence reporting, appeared suspect.

6. Subsequent declassification of documents and other historical research has established that the actual source of the leak as reported in the *Tribune* was not the codebreaking material but rather a U.S. Navy internal memorandum issued from Pearl Harbor by Pacific fleet commander Admiral Chester Nimitz and shown to the responsible reporter by a friend who was a naval officer. There are several questions regarding this record which the public has an interest in resolving. One is the question of what the grand jury was told about U.S. codebreaking, since the Navy sought to keep this secret and, absent a showing of that sort, it would seem difficult to prove a violation of the Espionage Act.

7. A second question is whether the prosecutors aimed at the reporter, the naval officer, the newspaper, or all three. The direction prosecutors took is directly relevant to issues of freedom of the press which are still contested today. The grand jury's reasoning in balancing considerations involved in this solicitation for an indictment can shed light on similar legal actions attempted against reporters and news outlets more recently. Only release of the testimony can show whether the action against the *Chicago Tribune* which Attorney General Francis Biddle sought amounted to a persecution on punitive grounds. That could be the case if the Navy had established prior to August 7, 1942, when Biddle moved action, that the reporter's source was other than a leak of codebreaking material.

8. A third question that may be resolved by release of these grand jury proceedings is whether the prosecutors were attempting by this effort at indictment to punish the *Tribune* for articles it had run on U.S. defense policy even before the war began. These are questions of continuing historical importance on which light can reasonably be expected to be shown by the release of these grand jury records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 3, 2014, in Silver Spring, Maryland.

Dr. John Prados