

**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. _____

**PETITION FOR ORDER DIRECTING RELEASE OF TRANSCRIPTS OF CERTAIN
TESTIMONY FROM AUGUST 1942 GRAND JURY INVESTIGATION
OF THE *CHICAGO TRIBUNE***

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 petition this Court to exercise its inherent supervisory authority to unseal the transcripts of certain witness testimony given before a grand jury in Chicago in August of 1942. The records sought are located at the National Archives and Records Administration in College Park, Maryland (“NARAI”), and the Coalition is informed and believes that they are labeled as enclosures to serials 1 through 11 for file number 146-7-23-25.

PETITIONERS

1. Elliot Carlson is a naval historian and author of *Joe Rochefort’s War: The Odyssey of the Codebreaker Who Outwitted Yamamoto at Midway* (2011), which won four naval history awards in 2012, including the Samuel Eliot Morison Award for Naval Literature and the Roosevelt Naval History Prize.

2. Founded in 1970, the Reporters Committee for Freedom of the Press (the “Reporters Committee”) is nonprofit association of reporters and editors dedicated to preserving the freedom of the press guaranteed by the First Amendment. In its more than 40-year history, The Reporters Committee has represented numerous members of the news media as parties, and has intervened as both a member of the public and an advocate for the press in litigation presenting important issues that affect the public’s right to be informed of the activities of their government and elected representatives.

3. The American Historical Association is the largest professional organization in the United States devoted to the study and promotion of history and historical thinking.

4. Founded in 1985 by journalists and scholars to check rising government secrecy, the National Security Archive is a nonprofit organization dedicated to expanding public access to government information.

5. Established in 1926, the Naval Historical Foundation is a nonprofit organization dedicated to preserving and promoting U.S. naval history.

6. The Naval Institute Press is the publishing division of the United States Naval Institute (“USNI”). The USNI’s mission is to provide an independent forum for advancing the professional, literary, and scientific understanding of sea power and other issues critical to national defense.

7. Founded in 1907, the Organization of American Historians is the largest professional society dedicated to the teaching and study of American history, and promotes open access to historical resources and scholarship.

8. Established in 1933 as the American Military History Foundation, the Society for Military History is devoted to stimulating and advancing the study of military history.

FACTS

9. On June 7, 1942, at the height of World War II, the *Chicago Tribune* (the “*Tribune*”) ran a front-page story by war correspondent Stanley Johnston (“Johnston”) headlined “NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA.” Citing “reliable sources in the naval intelligence,” the article reported that the U.S. Navy had detailed information concerning the Japanese military’s plan to attack U.S forces at Midway several days in advance of that battle, which has long been considered a crucial turning point in the war.

10. Johnston’s story appeared to be based on a classified Navy dispatch, and government officials feared that its publication revealed a closely-held secret: that the U.S. Navy

had cracked the radio code used by the Japanese navy to encrypt communications. The apparent “leak” of the classified dispatch to Johnston, and the *Tribune*’s publication of the information it contained, thus sparked anger within the U.S. Navy and at the highest levels of President Franklin D. Roosevelt’s administration. Johnston’s story prompted calls by high-ranking government officials for an investigation, and for prosecution of the *Tribune*. Indeed, President Roosevelt, himself—whose strong dislike of both the *Tribune* (a newspaper highly critical of the President’s New Deal policies) and its publisher, Colonel Robert McCormick, was well known—pressed for charges to be brought.

11. In August of 1942, the U.S. Department of Justice convened a grand jury in Chicago to investigate whether Johnston and the *Tribune* had violated the Espionage Act of 1917 (hereinafter 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.¹ Johnston, J. Loy (“Pat”) Maloney, and Wayne Thomis of the *Tribune* also gave testimony before the grand jury. In addition, two editors of other newspapers that also ran Johnston’s story—Ralph Sharp of the *New York Daily News* and Frank Waldrop of the *Washington Times-Herald*—testified.

12. On August 19, 1942, the grand jury declined to issue any indictments. The *Tribune* heralded the occasion as a victory for the First Amendment, running a front-page political cartoon the following day that depicted Tribune Tower as a citadel for press freedom.

¹ Conflicting press accounts from the time place the number of unidentified U.S. Naval officers who testified before the grand jury at either three or four. This Petition assumes that there were four and, thus, that a total of thirteen witnesses testified.

13. The grand jury investigation of Johnston and the *Tribune* was the subject of widespread public interest and substantial media coverage at the time. More than 70 years later, it continues to capture the interest of historians, legal scholars, the press, and the public. And it has particular resonance now, at a time when suspected leaks of classified information to the press have led to an unprecedented number of Espionage Act prosecutions by the U.S. government.

14. The *Tribune* grand jury investigation marks the first and only time in U.S. history that the government has attempted to prosecute a member of the mainstream press for an alleged violation of the Espionage Act. The government's failed attempt to obtain an indictment against the newspaper tested the limits of the First Amendment's guarantee of a free press, and speaks directly to the relationship between the press and the government during wartime.

15. Because a full understanding of this historically significant event would be of immense benefit to the public, this Petition seeks to have the transcripts of the testimony of the thirteen witnesses who testified before the grand jury in August of 1942 released. Submitted in support of this Petition is the declaration of Elliot Carlson, a naval historian who is currently working on a book, to be published by the Naval Institute Press, chronicling the grand jury investigation that targeted the *Tribune*, and the events leading up to it. Among other things, Mr. Carlson's declaration provides background information concerning the investigation, details the widespread publicity and press coverage the investigation received at the time and in recent years, and describes his efforts to obtain documents and other material related to that investigation in connection with his research. Also submitted in support of this Petition is the declaration of Dr. John Prados, historian and Senior Fellow at the National Security Archive. Among other things, Dr. Prados is the author of *Combined Fleet Decoded*, a nonfiction book

about intelligence in the Pacific during World War II, which was nominated for the Pulitzer Prize, was awarded the annual book prize of the New York Military Affairs Symposium, and was named a Notable Naval Book of the Year by the United States Naval Institute.

16. WHEREFORE, the Coalition respectfully requests that this Court order the release of the transcripts of the testimony given by Frederick C. Sherman, Morton Seligman, Edward O'Donnell, Edward Eldridge, Stanley Johnston, J. Loy Maloney, Wayne Thomis, Ralph Sharp, Frank Waldrop, the four unidentified Naval officers, and any other witnesses who testified before the grand jury in August of 1942.

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