UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF AMERICAN HISTORICAL ASSOCIATION, AMERICAN SOCIETY OF LEGAL HISTORY, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY OF AMERICAN ARCHIVISTS FOR ORDER DIRECTING RELEASE OF GRAND JURY MINUTES	Miscellaneous Action M-11-189

PETITIONERS' REPLY MEMORANDUM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PETITION OF AMERICAN HISTORICAL ASSOCIATION, AMERICAN SOCIETY OF LEGAL HISTORY, ORGANIZATION OF AMERICAN HISTORIANS, AND SOCIETY OF AMERICAN ARCHIVISTS FOR ORDER DIRECTING RELEASE OF GRAND JURY MINUTES	M-11-189 (PKL)

PETITIONERS' REPLY MEMORANDUM

The most remarkable feature of the government's opposition memorandum is what it leaves unsaid. Nowhere does the government say what purpose would be served by condemning the Hiss grand jury records to languish forever on archival shelves, out of reach of historians and political scientists. The government insists on secrecy even though it does not contend that *any* of the purposes underlying Rule 6(e) would be served by keeping the Hiss records locked away. And the government insists on secrecy even though 50 years have passed since Alger Hiss's indictment and conviction, even though all of the principals are long dead, even though the FBI has released over 46,000 pages of information relating to the Hiss-Chambers case, even though the National Security Agency has opened up the VENONA decrypts, and even though the Cold War has ended and the Russians have released many Soviet-era records revealing their espionage activities in the United States.

The government makes two arguments in opposing disclosure. First, it contends that Rule 6(e) establishes a categorical secrecy rule that renders the Court powerless to order the release of any grand jury records in the absence of an exception

explicitly mentioned in the Rule. As we show in Point I, the government's wooden reading of Rule 6(e) has been rejected by the courts, including the Second Circuit in *In re Craig*, 131 F.3d 99 (1997).

Second, the government contends that, even if a court may order the disclosure of grand jury records because of their historic value, no such circumstances exist here. On this issue as well, the most significant feature of the government's memorandum is what it does *not* say. As we discuss in detail in Point II, nowhere does the government mention the historical factors identified by *Craig,* even though the Second Circuit has directed that they be the focal point of the Court's inquiry. *See* 131 F.3d at 106. We also show why the government's efforts to denigrate the importance of the Hiss grand jury records are off-target. The voluminous record assembled by the petitioners - which goes unrebutted by the government - proves that the historical case for the disclosure is overwhelming. Thus, under *Craig*, the Hiss grand jury records should be made public.

Finally, in Point III, we respond to the government's estoppel and preclusion arguments and show why they are without merit.

I. THIS COURT HAS THE POWER TO ORDER THE HISS GRAND JURY RECORDS RELEASED.

Relying on two cases decided prior to the Second Circuit's ruling in *Craig*, the government contends that the "'special circumstances' exception postulated in *Craig* is invalid because

it is at odds with the Supreme Court's most recent rulings on the judiciary's extremely limited, if not nonexistent, 'supervisory authority' to fashion rules of grand jury procedure." Gov't Mem. at 14. Neither of the cases relied on by the government stands for the sweeping proposition announced in its memorandum, much less casts doubt on the validity of *Craig*.

The government relies mainly on *United States v. Williams*, 504 U.S. 36 (1992), which held that district courts may not invoke their supervisory powers over grand juries to prescribe standards of conduct for prosecutors in grand jury proceedings. *Id.* at 46-47. At issue in *Williams* was whether the federal courts may dismiss an otherwise valid indictment because the government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession. *Id.* at 37-38. The Tenth Circuit had ruled that, although such disclosure is not required by the Constitution, it could nonetheless be compelled under the courts' supervisory powers.

In reversing, the Court did not suggest — as the government does here — that federal courts have *no* supervisory power over grand juries. Rather, the thrust of *Williams* is that grand juries are, and should remain, operationally separate, and that the courts have "very limited" power to fashion rules of grand jury procedure. *Id.* at 50. But the opinion explicitly recognizes that courts retain a measure of supervisory power over grand juries, albeit one that "would not permit judicial reshaping of the grand jury institution, substantially altering

the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.* At bottom, *Williams* is about the allocation of power between grand juries and the courts as it relates to the operational functions of the grand jury (investigations, indictments and the like), and its holding forbids courts from arrogating to themselves the kind of powers that historically have been exercised by the grand jury.

Contrary to the government's suggestion, nothing in *Craig* derogates from this historic allocation of responsibility between the grand jury and the courts. As *Craig* itself points out, the job of reviewing requests for access to grand jury records has always been that of the supervising court, even prior to the adoption of Rule 6(e). 131 F.3d at 103. Thus, in stark contrast to *Williams*, where the Tenth Circuit had invoked "supervisory powers" to dictate procedural rules to grand juries, *Craig* respects the historic allocation of responsibility between grand juries and their supervising courts – an allocation that is in keeping with substantial Supreme Court precedent that goes unquestioned in *Williams*.

The government's argument under *Carlisle v. United States*, 517 U.S. 416 (1996), is even more strained. *Carlisle* held that the federal courts are not free to develop rules that "circumvent or conflict with the Federal Rules of Criminal Procedure." 517 U.S. at 426. Based on *Carlisle,* the government argues that *Craig* was wrongly decided because *Craig* permits the disclosure of grand jury records in circumstances not authorized by Rule 6(e). But

Craig neither circumvents nor conflicts with Rule 6(e). As the Second Circuit explains, *Craig* carries forward Rule 6(e)'s historic understanding that the standards for disclosure set forth in the Rule are not all-inclusive, but include special circumstances that are beyond the literal language of the exceptions, such as the one that justified the release of grand jury records in *In re Biaggi,* 478 F.2d 489 (2d Cir. 1973). *Craig,* 131 F.3d at 102-103. As the Eleventh Circuit put it in *Hastings,* the "history of Rule 6(e) indicate[s] that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts . . .." 735 F.2d at 1269.

Even more fundamentally, the arguments that the government makes here were raised, considered, and rejected by the Second Circuit in *Craig.*[1] The government has every right to preserve an issue for future litigation. But it offers no plausible reason why *Craig* is not binding on this Court. Although the government contends that the "historical interest" test adopted by *Craig* is *dicta* and is therefore not binding on this Court, Gov't Mem. at 14, that argument is demonstrably wrong. The Second Circuit ruled explicitly that courts may properly exercise their

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[1] The government's Second Circuit brief in *Craig* cited and discussed *Carlisle.* It did not cite *Williams.* The government did, however, argue at length that inherent "supervisory authority" of courts over grand juries did not provide the court authority to order disclosure of grand jury records in a manner not in accordance with Rule 6(e). *See* Brief for the United States in *Bruce Craig v. United States,* No. 96-6264, at 4-13 (2d Cir., March 3, 1997).

discretion to release grand jury records solely on the basis of the records' historical value. 131 F.3d at 105. And the Court emphasized that this ruling is holding, not *dicta*. "Lest there be any doubt about the matter . . . we today *hold* that there is nothing in *In re Biaggi's* 'special circumstances' test . . . that prohibits historical interest, *on its own,* from justifying release of grand jury material in an appropriate case." *Id.* (emphasis added). As the Second Circuit has often admonished, "[a] decision of a panel of this Court is binding until it is overruled by the Court *en banc* or by the Supreme Court." *Close v. State of New York*, 125 F.3d 31, 38 (1997) and cases cited therein. Thus, following *Craig*, it is settled in this Circuit that, in considering whether "special circumstances" are present, a Court must weigh the historical value of the records, and may rely on their historical value alone in ordering disclosure.

II. THE *CRAIG* FACTORS STRONGLY COUNSEL IN FAVOR OF DISCLOSURE OF THE HISS GRAND JURY RECORDS.

Apparently recognizing the futility of its contention that *Craig* is not binding, the government next argues that, even applying *Craig,* it should prevail. The government maintains the "special circumstances" test is so weighty "that it has been deemed satisfied in only a few, extraordinary cases." Gov't Mem. at 17. This case, the government contends, falls short of that exacting standard. *Id.* at 17-20.

Although the government says that it is applying *Craig*, Gov't Mem. at 17-20, it in fact disregards altogether *Craig's*

holding that the historical value of the records can justify disclosure. The government does not even mention the nine historical factors listed in *Craig*, 131 F.3d at 106 – a stunning omission because *Craig* makes clear that a trial court should consider them "when confronted with these highly discretionary and fact-sensitive 'special circumstance' motions." *Id.* And the omission is all the more telling because petitioners' opening memorandum and accompanying declarations explain why each of these factors weigh in favor of disclosure. Instead of confronting the *Craig* "historical value" test head-on, the government retreats to urge the Court to "deny the petition on the ground that mere 'historical interest' in the Hiss case is not a 'special circumstance' justifying release of the grand jury records." Gov't Mem. at 20. *Craig* explicitly forecloses that option.

When viewed in light of the factors identified by the Second Circuit, it is readily apparent that the case for disclosure of the Hiss grand jury records is overwhelming. In this brief, we identify those factors that the government, by its silence, apparently concedes favor release, and address the government's claims that certain factors cut against disclosure.

1. The Identity of the Parties Seeking Disclosure. The government does not contest the *bona fides* of the petitioners, nor could it. The petitioners include each of the major historical groups with a scholarly interest in the Cold War. Thus, this factor, which "carr[ies] great weight," *Craig*, 131

F.3d at 106, cuts in favor of disclosure.

2. The Position of the Defendant and the Government Regarding Disclosure. This factor too weighs in petitioners' favor. Here, there is no dispute that the defendant indicted by the grand jury — Alger Hiss — favored disclosure. Hiss's FOIA litigation confirms his interest in full disclosure of the grand jury records. Hiss's family has taken up the cause where Hiss left off, as is underscored by the declarations submitted by his son, Tony Hiss, and step-son, Timothy Hobson, urging release of the grand jury records.

Twenty years ago, the government also favored release of these records. Petitioners' opening memorandum stated (at pp. 3-4) that the government did not oppose Alger Hiss's motion to have these records unsealed during Hiss's FOIA case against the Department of Justice. *See Hiss v. Department of Justice*, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (pointing out that the "government does not oppose the application" by Hiss). The government complains that petitioners' statement "is misleading at best." Gov't Mem. at 9 n.8. The government's argument is that, although it did not oppose Hiss's application to have the records of the two grand jury proceedings unsealed, the records would nonetheless have been subject to FOIA exemption claims. Therefore, it contends, it "did not consent to the release of these records to Hiss or other members of the public." Gov't

Mem. 9.[2]

That simply is not so. The government understood in *Hiss*, when it signaled its willingness to have the grand jury records unsealed and reviewed under FOIA, that FOIA processing would inevitably lead to prompt and wholesale public disclosure. Although FOIA contains exemptions for national security, certain law enforcement, and personal privacy information, *see* 5 U.S.C. §§ 552(b)(1), (6) & (7), "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information." *Bartholdi Cable Co. v. FCC,* 114 F.3d 274, 282 (D.C. Cir. 1997); *see also Chrysler v. Brown,* 441 U.S. 281, 293 (1979). The August 17, 1975, statement by Deputy Attorney General Harold R. Tyler, Jr. (Exhibit 6 to Craig Declaration), directs that, in processing the Hiss papers to maximize public disclosure, FOIA exemptions "are to be invoked only if there is a compelling reason to do so."

Thus, the anti-disclosure position the government now espouses marks a sea change from its pro-disclosure position in *Hiss*. Although the government's reversal of field on disclosure is relevant, it is far from dispositive. *Craig* makes clear that,

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[2] Even on its own terms, the government's argument is wrong. The key in *Hiss*, as here, is having the records unsealed. Whether they are then processed under FOIA or reviewed by the Court is not material; the end result is the same. FOIA processing allows the redaction of certain national security, law enforcement, and personal privacy information. But the same would be true here. Petitioners have never suggested that in unsealing these records, the Court should release material that threatens national security, jeopardizes current law enforcement efforts, or unduly invades personal privacy.

just as "[g]overnment support cannot 'confer' disclosure, nor can government opposition preclude it." 131 F.3d at 106.

3. Why Disclosure is Being Sought. This factor favors petitioners because, as *Craig* explains, "an argument that significant historical interest militates in favor of release is totally appropriate and even weighty." *Id.* The declarations from a wide range of respected Cold War scholars and other academics underscore the enormous historical significance of the Hiss grand jury records.

Nonetheless, the government contends that "disclosure of the grand jury records will not contribute significantly to the vast scholarship relating to the case." Gov't Mem. at 25. Aside from the Orwellian overtone to the government's contention that it alone should decide the historical significance of these records, the government's position is bereft of any scholarly support. Not a single historian, political scientist, or archivist — indeed, no one — has come forward to embrace the government's view that Hiss grand jury records lack substantial historical value; the consensus is just the opposite.

Undeterred, and without any evidentiary support, the government does attempt to answer some, but by no means all, of petitioners' points about the value of the record. We review each of the government's responses briefly, but with the caveat that our initial submission concerning the historical significance of the grand jury records was nowhere as parochial as the government contends. Simply comparing our opening

memorandum on the issue of the records' historical value (at pp. 23-31 and 40-46) with the government's response (at pp. 26-30) demonstrates that our submission is far more extensive than the grab-bag of points raised by the government would suggest, and to which we now turn.

(i) *Nixon's Role.* The government claims that the historical record is clear that "Nixon attempted to persuade the grand jury to indict Hiss rather than Chambers" and therefore Nixon's actual testimony is of little historical value. Gov't Mem. at 26. What the government fails to acknowledge, however, is that the historical record of Nixon's grand jury testimony is based on Nixon's *own* account, which is hardly reliable. *See* Supp. Craig Decl., ¶11. Moreover, the government's position conflicts with the expert opinion offered by Professor Schrecker, who explains in her declaration (at ¶4) why the details of Nixon's testimony, and how the testimony influenced the grand jury, are important to scholars. Finally, Craig points out that an unanswered, "key question is whether what Nixon said did, in fact, subvert the judicial process, as Hiss maintained." Supp. Craig Decl., ¶11. Recently released White House Nixon-era audio tapes suggest "that, by Nixon's own admission, he played a formative role in the investigation – possibly by manipulating the grand jury and others into bringing the Hiss indictment. Only access to the complete grand jury transcript will reveal the exact nature of Nixon's pivotal role." *Id.* at ¶12 (footnote omitted).

(ii) *The FBI's Role.* The declarations of Professors Theoharris and Schrecker and historian Craig explain why the grand jury records are likely to shed light on a host of questions about the role the FBI, HUAC, and other congressional investigators played in the Hiss grand jury, and the extent to which these entities collaborated in their work. Schrecker Decl., ¶¶2-8; Theoharris Decl., ¶¶3-7. Nevertheless, the government again disparages the value of this information, arguing that, in view of the "already extensive knowledge of the FBI activities," disclosure would not be of value to historians. Gov't Mem. at 27. Not only does the government ignore the fact that petitioners' concerns extend beyond the FBI's role, but as Dr. Craig points out, "[t]he truth is that the FBI-FOIA materials released to date provide only a glimpse into the FBI's critical role in the Hiss prosecution," and access to the grand jury records "will illuminate this aspect of the Hiss-Chambers controversy." Supp. Craig Decl., ¶11; *see also id.* ¶3.[3]

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[3] The government also asserts that questions about the FBI's role are "answered by the 200,000 pages of FBI files released in the FOIA litigation." Gov't Br. at 27. Although the government offers no citation in support of this claim, it is repeated, again without citation, in paragraph 16 of the Declaration of Jonathan A. Willens, Esq. Insofar as petitioners are aware, that number is grossly inflated. As the Justice Department acknowledged in correspondence with lawyers handling the Hiss FOIA litigation, only 46,213 pages of FBI records relating to the Hiss had been released as of July 21, 1998. The Department explains the discrepancy between the 46,213 pages and higher numbers mainly due to double counting. *See* Letter from J. Kevin O'Brien, Chief, Freedom of Information-Privacy Acts Section, Department of Justice, to Victor Rabinowitz, Esq., dated July 21, 1998, which is the final document in Exhibit 8 to Craig Decl.

(iii) *Origins of Soviet Espionage.* The declaration of historian John Haynes lays out in detail why the grand jury records are likely to shed light on Chambers's, Hiss's, and other witnesses' testimony concerning the existence in the mid-1930s of a group of American Communists who worked for government agencies while concealing their political affiliations. Haynes Decl., ¶¶3-5. Both Chambers and Bentley testified at length about these networks, and both pointed accusing fingers at Hiss, alleging that he had originally been part of this group and later moved into espionage. *Id.* Although the existence of these networks has been confirmed by the VENONA decrypts, the origins of these networks in the American Communist Party's 1930's clandestine Washington organization is much less documented. *Id.*, ¶4; *see also* Kalman Decl., ¶¶5-7; Supp. Craig Decl., ¶13. The Hiss grand jury records are virtually certain to provide valuable insight into these questions. *Id.*

Arguing that the grand jury records will not shed light on the origins of Soviet espionage in the United States, the government contends that "[t]hose activities occurred in 1934 and earlier, while the Hiss indictment related to events in 1937 and 1938." Gov't Mem. at 28. This assertion is wrong for two reasons. First, it misconstrues petitioners' request, which asked for all of the grand jury records relating to the Hiss-Chambers controversy, not just for information relating to the two counts in the Hiss indictment. Second, it misstates history. In fact, as the Haynes, Kalman, and Craig declarations make

clear, the Hiss case turned, not simply on events that transpired in 1937-38, but on the relationships between Hiss and Chambers and other alleged subversives in the years well prior to Chambers' repudiation of communism in April 1938. Supp. Craig Decl., ¶13.

(iv) *Grand Jury Misconduct.* The government contends that the acknowledged misconduct of the second grand jury is not relevant here, because the grand jury foreman John Brunini's conflict of interest with Elizabeth Bentley related only to her accusations against William Remington. Gov't Mem. at 28. But the government's assertion that Bentley had no role in implicating Hiss is at odds with the historical record. In fact, Bentley's statements to the FBI led FBI Director J. Edgar Hoover to "shed the reluctance he previously had about labeling Hiss a security risk" and to seek approval to "install technical surveillance on Alger Hiss's Washington home." Supp. Craig Decl., ¶14; *see also* Weinstein, *Perjury*, at 316. Bentley also directly implicated Hiss in the Communist conspiracy, and her testimony against Hiss was pivotal. *Id.* Without Bentley, Hiss's only accuser was Chambers, an admitted perjurer. Historians believe that, without Bentley's corroboration, the Hiss investigation would have foundered. *Id.* Thus, the misconduct that infected the second grand jury — the close relationship between Bentley and the grand jury foreman — has a direct bearing on Hiss, whose fate was plainly influenced by Bentley's testimony.

(v) *Hiss's Guilt or Innocence.* The government proclaims the debate about Hiss's guilt or innocence "over" because Hiss was convicted of perjury, and his conviction was affirmed. Gov't Mem. at 29. Because the government believes that there is no room for debate about Hiss's guilt, it argues that "disclosure of the grand jury records could hardly provide any new information about Hiss's culpability." *Id.*

In assessing the government's argument on this score, two points merit emphasis. First, it is problematic to speak of Hiss's guilt or innocence without an understanding of what one means by those terms. Hiss was tried and convicted of perjury in a court of law. Before the public, however, Hiss was accused of, and, according to some, found guilty of, espionage. Whatever one may believe about the debate on the perjury charge, surely even the government would not contend that the evidence of espionage is decisive.

Second, once again, the government cites no historian who shares its view that the debate about Hiss's guilt is in fact over. To the contrary, the declarations petitioners submitted establish that historians generally do not subscribe to government's orthodoxy that Hiss's guilt is clear. Respected academics like Professors Anna Kasten Nelson, Walter LaFeber, Laura Kalman, Ronald Radosh, Ellen Schrecker, Harvey Klehr and Bruce Craig have submitted declarations explaining why they believe that the historical record is still inadequate to make definitive judgments about Hiss's guilt or innocence, which is

why they support this petition. Nelson Decl., ¶¶6-9; LaFeber Decl., ¶4; Kalman Decl., ¶¶5-7; Radosh Decl., ¶2-4; Schrecker Decl., ¶¶4-8; Klehr Decl., ¶¶4-8; Supp. Craig Decl., ¶4.

4. The Specific Information Sought. As is recounted in the Craig Declaration (¶¶1-3), and Exhibit 1 to it, petitioners diligently combed through every public source of information about the Hiss-Chambers controversy, Hiss's indictment, and the two perjury trials which led to Hiss's conviction, to make their request as specific and narrow as possible. Not only did petitioners identify each of the 63 witnesses known to have appeared before the grand jury, they provided the Court the publicly available information about the nature and substance of the testimony of each witness. Petitioners, through the declarations of Craig, other historians, political scientists, journalists, and archivists, have explained in depth the historic importance of these records and why they should be made public. Despite this mammoth effort, the government contends that the request is insufficiently particularized and overbroad. The government is wrong on both counts.

(a) As to the government's claim that petitioners have failed to demonstrate that the testimony of each witness has "specific significance," Gov't Mem. at 21-25, that argument is both tautological and off-target. It is tautological because the substance of each witness's testimony is still secret, available only to the government, and hence the government asks petitioners to do the impossible in explaining the "specific significance" of

the witness's secret testimony. If petitioners knew that, there would be little purpose to this petition.

The government's contention is off-target because the initial Craig Declaration explains in detail why the testimony of each of the 63 witnesses identified is historically important.[4] Moreover, by arguing that the Court should assess the importance of the witnesses' testimony one-by-one, the government asks this Court to blind itself to the nature of the historical inquiry. As Dr. Bruce Craig points out in his supplemental declaration, "the historical method involves the piecing together of bits of information. Even testimony of witnesses who seem to have only a marginal connection to the event can have enormous historical impact if it confirms or contradicts the testimony of a major witness, adds to our understanding of events, or sheds new light on prior evaluations. Thus, the idea that historians know in advance which pieces of the puzzle will be most significant historically is incorrect. Until the entirety of the historical record is open, questions will remain unanswered about the Hiss-Chambers controversy." Supp. Craig Decl., ¶20.

(b) The government also contends that the request is "overbroad" because it seeks access to the testimony of the witnesses who appeared before the second grand jury during its first three months. Gov't Mem. at 24-27. The government admits

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[4] A chart listing the names of every known witness and the paragraph(s) of the initial Craig declaration that discusses their testimony appears as an addendum to this memorandum.

that "[p]ublished accounts suggest that, from late December 1948 to February 1949, the second grand jury looked for additional evidence to corroborate Chambers' charges against Hiss," but then contends, in a feat of circularity, that this "post-indictment activity has no special historical significance because it could not have contributed to the Hiss indictment." Gov't Mem. at 24. We are at a loss to understand this argument. To be sure, the records of the first three months of the second grand jury did not contribute to the Hiss indictment. But the second grand jury was constituted specifically for the purpose of gathering additional evidence to be used at Hiss's trial — a fact the government does not and cannot deny. Moreover, many of the witnesses who testified before the second grand jury during this time period later appeared as government witnesses at trial, which only underscores the importance of having their testimony made public. *See* Supp. Craig Decl., ¶¶25-27. Thus, the argument that proceedings of the second grand jury are of little value historically is untenable.

5. How Long Ago the Grand Jury Proceedings Took Place. The government makes no argument on this factor, despite *Craig*'s observation that "timing . . . remains one of the most crucial elements." 131 F.3d at 107. Here, all of the considerations identified in *Craig* strongly support disclosure. "[H]istorical interest" in the Hiss case has "persisted over a number of years," which is an "important indication that the public's interest in release of information is substantial." *Id.* And the

passage of time also "erodes many of the justifications for continued secrecy." *Id.* Thus, this factor tips decidedly in petitioners' favor.

6. The Current Status of the Principals of the Grand Jury Proceedings and That of Their Families. This factor too favors petitioners. The government does not dispute that all of the principals to the controversy are long dead. The government suggests, however, that disclosure of the records would "ignore the wishes of Mrs. Hiss and Mrs. Chambers, both of whom opposed continued public discussion of the controversy." Gov't Mem. at 23 n.17. This statement is misleading, because it confuses those women's desire that they *themselves* not enter the Hiss-Chambers fray, *see* Supp. Craig Decl., ¶8, with whether they wanted to maintain the secrecy of information relating to the controversy. There is nothing to suggest that either woman ever took the position that the grand jury records should remain sealed. Indeed, Mrs. Hiss *supported* Alger Hiss's 1977 effort to have the grand jury records unsealed, *see* Supplemental Declaration of Tony Hiss, and nothing in the historical record shows that Mrs. Chambers offered her opposition at that point, or indeed ever, to the release of these records. In any event, both women have been dead for well over a decade (Mrs. Hiss in 1984; Mrs. Chambers in 1986, *Perjury,* at 485) and thus, at this point, neither has a privacy interest in keeping these records secret. Thus, this factor strongly supports petitioners.

principles. It is wrong on the facts because the government's speculation that Craig "acted on behalf of himself and the American Historical Association and other organizations who are petitioners here" (Gov't Mem. at 31) is false. The papers in *Craig* make it crystal clear that Craig was proceeding in his own right, and not on behalf of anyone else. *See* 131 F.3d at 101. The government's argument is also at odds with the law, since collateral estoppel or issue preclusion may be applied to non-parties only where a prior party was their fiduciary, *see, e.g., Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 593 (1974), or where they actually "assume[d] control over" the prior litigation. *Montana v. United States,* 414 U.S. 147, 143 (1979). No such claim can be made here. To the contrary, the government's argument — that a party may be bound by a prior judgment merely because the parties' interests are aligned — has been uniformly rejected. *See Hardy v. Johns-Manville Sales Corp.,* 681 F.2d 334 (5th Cir. 1982); *Pollard v. Cockrell,* 578 F.2d 1002, 1008-9 (5th Cir. 1978); *see also* § 41(1) RESTATEMENT (SECOND) OF JUDGMENTS (rejecting government's theory of privity).[5]

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[5] Even if there were some merit to the government's argument — and there is none — it would apply only to the grand jury testimony of Harry Dexter White, which was all that was at issue in *Craig.* Moreover, *Craig* itself leaves open the possibility that the court might reconsider access to the White testimony if "future developments . . . change matters." 131 F.3d at 107 n.11. One crucial development has, in fact, occurred since the Second Circuit's ruling; petitioners have ascertained that a central premise of the decisions in *Craig* — that "disclosure would involve some witnesses who are alive" — does not appear to be the case. 131 F.3d at 107.

Even more strained is the government's plea that this Court should defer to Judge Owen's 1977 ruling in *Hiss*. As noted above, this claim necessarily fails because the petitioners here were not parties or privies to parties in the litigation brought by Alger Hiss. But perhaps the best answer to this argument is the Second Circuit's in *Craig*. There the court emphasized that the passage of time "erodes many of the justifications for continued secrecy," "brings about the death of the principal parties," and signals "that the public's interest in release of the information is substantial." 131 F.3d at 107. Because the passage of over twenty years has wrought all of these changes, it is only appropriate that this Court take a fresh look at whether the grand jury records relating to Alger Hiss's prosecution should be made public.

CONCLUSION

For the reasons stated above and in petitioners' opening memorandum, this Court should order the release of the grand jury proceedings pertaining to Alger Hiss.

Respectfully submitted,

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ADDENDUM

GRAND JURY TESTIMONY - Alger Hiss case

(The paragraph numbers below correspond to those in the initial Craig Declaration)

Witness	First Grand Jury	Second Grand Jury
Carl Amatneik		96, 97
Donald Appell	70, 73	
Adolf Berle	78	
Carl Binger	52	
Alexander Campbell		109, 114, 124
David Carpenter	72	
Esther Chambers	78	
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