

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF PETITION FOR
ORDER DIRECTING RELEASE OF MINUTES OF SPECIAL
FEDERAL GRAND JURY CONVENED IN 1948-1949
THAT PERTAIN TO THE INDICTMENT OF ALGER HISS

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Petitioners the American Historical Association, the American Society of Legal History, the Organization of American Historians, and the Society of American Archivists petition this Court for an order releasing fifty-year old grand jury records relating to the early Cold War era indictment of Alger Hiss. On December 15, 1948, Alger Hiss was indicted for and later convicted of two counts of perjury arising out of his denials under oath before the grand jury of having passed State Department documents to a Communist agent.

The conviction of Alger Hiss, accused of being a Soviet agent while serving in the State Department, was one of the defining political and legal events of the early Cold War Era.

The event convinced many Americans that the threat of Soviet subversion was real. The two sensational perjury trials riveted the nation. In the nearly fifty years since Hiss's conviction, the case has continued to excite public attention and controversy and has been the topic of study for many historians and the subject of scores of books.¹ Indeed, both Alger Hiss and his chief accuser, Whittaker Chambers, wrote books on the controversy. Alger Hiss, In the Court of Public Opinion (1957); Whittaker Chambers, Witness (1952). Despite all that is known about the Hiss-Chambers controversy, the contents of the grand jury records related to the Hiss indictment continue to be a subject of speculation for historians and others, because they remain secret.

As the detailed declarations submitted with this petition demonstrate, and as this memorandum spells out more fully below, the "special circumstances" of this case fall precisely within those recognized by the Second Circuit as warranting release of grand jury records to the public. In re Craig, 131 F.3d 99 (2d

¹ See, e.g., Allen Weinstein, Perjury: The Hiss-Chambers Case (Rev. ed. 1997); Sam Tanenhaus, Whittaker Chambers: A Biography (1997); John Chabot Smith, Alger Hiss: The True Story (1976); William Allen Jowitt, 1st Earl, The Strange Case of Alger Hiss (1953); Alistair Cooke, A Generation on Trial: USA v. Alger Hiss (1952).

Cir. 1997). Fifty years have passed since the grand jury's investigation concluded. During his lifetime, Alger Hiss, the subject of the investigation, persistently tried to have the records unsealed, and now that he is dead, both his son Tony Hiss and stepson Timothy Hobson support disclosure. Hiss's main accuser, Whittaker Chambers, as well as the other known principal witnesses -- Elizabeth Bentley, Richard Nixon, Adolf A. Berle Jr., Hede Massing, Meyer Schapiro, Harry Dexter White and Hiss's wife and brother -- are all dead. Much is already known about what transpired before the grand jury because of the availability of contemporaneous newspaper accounts, FBI records, the published accounts of the principals, contemporaneous notes taken by the Hiss defense team; most significantly, some of the grand jury testimony was presented at the two Hiss perjury trials.

Yet despite what is known, many unanswered questions -- questions about changed testimony, alleged judicial improprieties, and political interference with the legal process -- remain. As the accompanying declarations by historians and scholars attest, there is a tremendous public and scholarly interest in disclosure of these grand jury records. Indeed, even the government recognizes the significant historic interest in these records, since more than twenty years ago -- when some of

the principals were still alive -- it supported release of these very same Hiss grand jury records. Hiss v. Department of Justice, 441 F. Supp. 69, 71 (S.D.N.Y. 1977). In these extraordinary set of circumstances, the grand jury records should be disclosed. Accordingly, petitioners respectfully ask this Court to exercise its discretion under its inherent supervisory authority and the All Writs Act, 28 U.S.C. § 1651, to unseal the transcript of the grand jury testimony related to the Hiss indictment.

FACTUAL BACKGROUND

Once upon a time, when the Cold War was young, a senior editor of Time accused the president of the Carnegie Endowment of having been a Soviet agent. The Time editor made his charge stick, aided by an obscure young Congressman from the House Committee on Un-American Activities, a tough federal prosecutor, and the director of the FBI. As a result, the Endowment president spent forty-four months in jail and became a cause celebre; the magazine editor resigned and died a decade later, still obsessed with the case; the prosecutor became a federal judge; the director of the FBI lived to guard the republic against real or imagined enemies for another twenty-five years; and the young Congressman left obscurity behind to become the thirty-seventh President of the United States.

-- Weinstein, Perjury at xvii.

So begins one of the recent 14 published books on the Hiss-Chambers controversy that provides a vivid portrayal of why the case still captures the imagination of the public and spurs debate fifty years after the allegations against Hiss were first made. Not only are the facts reminiscent of spy fiction, but the Hiss case is of central importance to understanding the period of domestic anti-Communism during the early Cold War.

Accompanying this petition is the detailed declaration of Bruce Craig, a historian who recently completed an extensive research project into what is publicly known about the grand jury proceedings related to the indictment of Alger Hiss. The declaration chronicles the Hiss-Chambers controversy; outlines

what is known about the grand juries; canvasses the publicly available sources of information about the grand juries investigating the Hiss-Chambers controversy; summarizes allegations of improprieties by the grand juries; and describes the current location of and accessibility of the grand jury records. The highlights of this factual background are set forth below.²

A. The Hiss-Chambers Controversy

The allegations against Alger Hiss and his subsequent conviction for perjury were particularly shocking and

²Mr. Craig's sources include the transcripts of both Hiss perjury trials, United States v. Hiss, No. C. 128-402 (S.D.N.Y. filed May 31, 1949), and United States v. Hiss, No. C. 128-402 (S.D.N.Y. filed Nov. 17, 1949) (relevant portions attached as Exhibits 2 and 3 to the Craig Declaration); the Hiss Defense Files (now at the Harvard Law School Library), which contain the files of Alger Hiss's lawyers and others that relate to the Hiss defense effort (from 1950 on) and Hiss's 1977 effort to unseal the grand jury records, see Craig Decl. Exh. 4; the Hiss FBI files available in the FBI reading room in Washington, D.C.; contemporaneous newspapers, primarily the New York Times, see Craig Decl. Exh. 5; the Tom Clark papers (at the Truman Library); the Department of Justice Records (RG-118) on the Hiss perjury trials (Case No. 111692) and the U.S. Attorney Case File on Alger Hiss, at the National Archives and Records Administration in Washington, D.C. and the Northeast Region--New York; and the files of Victor Rabinowitz and Eric Seiff, attorneys of record for Hiss's 1977 petition asserting a right to have his grand jury records unsealed under the Freedom of Information Act, Hiss v. Department of Justice No. 76 Civ. 4672 (S.D.N.Y.), see Craig Decl. Exh. 6.

controversial at the time because Hiss typified the "best" of the New Dealers: He had been educated at Johns Hopkins and Harvard Law School, had clerked for Justice Oliver Wendell Holmes, and had worked at prestigious law firms. He entered the Federal government in 1933, working first for the Agricultural Adjustment Administration, later for the Nye Committee, the Justice Department, and finally, beginning in 1936, for the Department of State. Hiss helped organize the Dumbarton Oaks and San Francisco conferences, two of several international meetings that laid the groundwork for the United Nations, and he advised the Roosevelt administration on foreign relations. John Foster Dulles, Eleanor Roosevelt, Dean Acheson, Adlai Stevenson, and Felix Frankfurter were among his acquaintances and friends. See Craig Decl. ¶ 7.³

Hiss's chief accuser was Whittaker Chambers, a self-confessed ex-courier for the Soviet underground in the 1930's. Chambers supported the story of Elizabeth Bentley (another self-confessed ex-Communist courier) who approached the FBI in the 1940s with allegations that certain government officials had or still belonged to underground Communist groups and that they had

³Justice Frankfurter, Justice Stanley Reed, Adlai Stevenson, and many other public figures testified for Hiss as character witnesses at his first perjury trial. See Weinstein, Perjury 399-400.

spied for the Soviet Union. At first, the FBI declined to investigate the allegations. But events, including the defection of Igor Gouzenko, a Soviet cipher clerk, to Canada in September 1945 demonstrated that the Soviets had indeed organized underground networks in the United States, Canada, and elsewhere and had obtained vast numbers of confidential documents. The FBI eventually pursued Chambers's and Bentley's leads. In early 1948, Chambers named individuals, including Hiss, who he thought to be Communists or fellow travelers but denied any knowledge of espionage.⁴ By December 1948, however, Chambers's story had changed: He made detailed assertions that Hiss had personally and deliberately provided him with State Department documents to convey to Soviet agents. See Craig Decl. ¶ 8.

By mid-1947, two government investigations into Soviet espionage within the government agencies had been initiated. The House Un-American Activities Committee ("HUAC"), led by Representatives Karl Mundt and Richard Nixon, carried on its own investigation on Congress's behalf, while the Justice Department impanelled a grand jury on June 15, 1947, to investigate

⁴ "Fellow travelers" were individuals who were not members of the Communist Party, but sympathetic to the Communists' objectives and those of the Soviet Union.

allegations of espionage in the United States. See Craig Decl. ¶ 9.

On August 3, 1948, in an attempt to confirm the basic story of Soviet espionage related to them weeks earlier by Elizabeth Bentley, HUAC subpoenaed Whittaker Chambers to testify on matters relating to alleged Communist penetration of government agencies during the Roosevelt administration. Chambers told HUAC that Alger Hiss had belonged to a Communist cell in the mid-1930's. Hiss asked to appear before HUAC, where under oath he denied the charges, and also denied ever knowing anyone by the name of Whittaker Chambers. In an attempt to clarify the stories of both principals, HUAC arranged for Hiss and Chambers to meet in a private executive session of HUAC on August 17, 1948. After questioning Chambers, Hiss proclaimed that he now recognized him, but claimed he knew him as a freelance writer named George Crosley. During this confrontation, an angered Hiss challenged Chambers to repeat his charges in a forum where they would not be privileged against suit for libel. On August 27, 1948, Chambers repeated on a nationwide broadcast of the popular radio program Meet the Press that "'Alger Hiss was a Communist and may still be one.'" In response, Hiss brought a \$50,000 defamation suit against Chambers. See Craig Decl. ¶ 12.

During discovery for the defamation suit, Chambers produced the so-called "Baltimore papers" -- memoranda in Hiss's handwriting and sixty-five typewritten sheets, all but one of which contained verbatim copies or paraphrased versions of official State Department documents dated from January to April, 1938. Chambers claimed that Hiss had sought to pass these materials along to Col. Boris Bykov, the head of Red Army intelligence in the United States from 1936 to 1939, and that Hiss knew Bykov ran a Soviet underground network. Hiss's attorneys turned these documents over to the Department of Justice; eventually these documents were entered in evidence at Hiss's perjury trials. See Craig Decl. ¶ 13; Exh. 2. The government alleged that the handwritten documents were in Hiss's handwriting and that the typed Baltimore documents had been typed on a typewriter once owned by Hiss. Id.

On December 2, 1948, a United Press report reprinted in the New York Times announced that "[t]he Justice Department's investigation of the Hiss-Chambers affair is about to die for lack of evidence." Craig Decl. ¶ 14; Exh. 5, Hiss Inquiry Lagging, N.Y. Times, Dec. 2, 1948, at L3. In response to the article, Nixon and Robert Stripling, HUAC's chief investigator, drove out to Chambers's Westminster, Maryland farm that afternoon

to discuss the news report and rumors that Chambers had still more evidence. The next evening, Chambers led HUAC investigators to his farm, where he retrieved from a hollowed-out pumpkin nestled in his pumpkin patch several rolls of thirty-five millimeter film. Once developed, some of the film revealed copies of State Department documents. Prints of these films became known as the "pumpkin papers," and HUAC eventually released many of them to the public. See Craig Decl. ¶ 15.

The federal grand jury that had been impanelled months before the case broke was reconvened on December 6 and began a focused investigation into the Hiss-Chambers controversy. Nixon appeared before the grand jury on December 13, 1948, at his own request. See Richard M. Nixon, Six Crises 60 (1962). Hiss's lawyers later alleged that Nixon's grand jury testimony may have been unduly influential, given Nixon's well-publicized belief that Hiss was guilty and his highly visible position on HUAC. See Craig Decl. ¶ 17; Exh. 3. Apparently, the grand jury seriously considered indicting Chambers for perjury even after it decided to indict Hiss. See Craig Decl. ¶ 16; Exh. 4. The realization that indicting Chambers for perjury would substantially weaken the government's case against Hiss apparently influenced the grand jury's decision not to indict

Chambers. See Craig Decl. ¶ 16; Exh. 4.

On December 15, 1948, the last day of its existence, the first grand jury indicted Hiss on two counts of perjury. Hiss was charged with perjuring himself when he testified that: (1) he had never handed government documents over to Chambers, and (2) he had not seen Chambers after January 1, 1937. See Craig Decl. ¶ 18; Exh. 3. The second charge was particularly significant because some of the documents Chambers produced referred to events in 1937 and 1938, after the date that Hiss claimed to have last seen Chambers. See Craig Decl. ¶ 18.

Following Hiss's indictment, the grand jury recommended that a new grand jury be impanelled to continue the investigation into the Hiss-Chambers controversy and into allegations of Communist espionage more generally. See Craig Decl. ¶ 19. This petition seeks access to the relevant testimony from both of these grand juries.

Hiss's first trial ended with a hung jury; his second ended with a conviction on both counts. Craig Decl. ¶ 20. On January 25, 1950, Hiss was sentenced to five years of prison on each count, to be served concurrently. See United States v. Hiss, 107 F. Supp. 128, 129 (S.D.N.Y. 1952). Hiss appealed; the Second

Circuit affirmed the convictions on December 7, 1950, see United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), reh'g denied, Jan. 3, 1951, see United States v. Hiss, 107 F. Supp. 128, 129 (S.D.N.Y. 1952), cert. denied, 340 U.S. 948 (1953); and Hiss's 1952 motion for a new trial was denied. United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), aff'd on opinion below, 201 F.2d 372 (2d Cir.), cert. denied, 345 U.S. 942 (1953). Hiss's 1982 petition for a writ of coram nobis was also denied. In re Hiss, 542 F. Supp. 973 (S.D.N.Y. 1982), aff'd without opinion, 722 F.2d 727 (2d Cir.), cert. denied, 464 U.S. 890 (1983).

The government's case against Hiss rested on the premise that Hiss had provided the hand-written notes and the Baltimore papers to Chambers, who passed them on to higher-ups in the Soviet underground, who ultimately forwarded them to the Soviet government. To prove its case, the government alleged that the four handwritten memos were in Hiss's handwriting, that the typed documents had been typed on a typewriter once owned by the Hisses, and that Hiss had helped arrange for the copying of the typed State Department documents. Furthermore, the government alleged that Hiss had been in touch with Chambers at least into 1938, the date of the most recent documents. The prosecution relied largely on evidence of Hiss's past association with

Chambers: The Hisses had provided Chambers with a Ford car in early 1936; they had let Chambers stay in their apartment in 1936; they had allegedly accepted from Chambers a gift from the Russian people -- a Bokhara rug; Hiss and Chambers had allegedly traveled to Peterboro, New Hampshire together in August 1936; and Hiss had allegedly lent Chambers \$400 in November 1937.

Both the grand jury and the trials focused heavily on the Baltimore papers and on the Hiss-Chambers relationship, and to a lesser extent on the pumpkin papers. The grand juries, especially the second, also explored Chambers's allegations of Soviet espionage more generally. Because the Hiss perjury trials turned on the witnesses' credibility, testimony from the first grand jury was used at both trials in efforts to impeach both prosecution and defense witnesses. Craig Decl. ¶ 21.

B. What is Known About the Grand Jury Proceeding

Although the official record of the grand juries' proceedings is sealed, a variety of sources have revealed considerable information about the proceedings. Verbatim passages from the minutes of the first grand jury proceeding were read into the record at Hiss's trials and witnesses at the trials also testified about their or others' grand jury appearances. Contemporaneous news reports based on unauthorized leaks and

witness interviews, FBI records, and notes made at the time by the participants reveal more information. See Craig Decl. ¶¶ 119-124.

Much is known, in particular, about the grand jury testimony of Alger and Priscilla Hiss, and to a lesser extent, the testimony of Whittaker Chambers, but claims about what else happened before the grand jury remain largely unconfirmed and historians know little more than the general thrust of other witnesses' testimony. Even less is known about what transpired before the second grand jury. Although the names of many of the second grand jury's witnesses and the subjects on which they were likely to have testified are known, there are few publicly available records relating to the testimony heard by the second grand jury.

It is unknown exactly how many witnesses testified before the two grand juries on allegations related to the Hiss-Chambers controversy. However, Exhibit 1 to the Craig Declaration lists the known witnesses before each grand jury on matters related to the Hiss-Chambers controversy, whether the witnesses are known to be still alive (most are not), and the dates on which they testified. We now summarize what is known about the grand jury proceedings from publicly available sources, and refer the Court

The influence the political climate -- and, in particular, Richard Nixon -- had on the grand juries has been the subject of speculation. See Craig Decl. ¶ 126. Indeed, Alger Hiss sought access to the grand jury testimony, in part, because it would allow the public to evaluate Richard Nixon's influence on the grand jury, an influence Hiss thought had been improper and an unwarranted legislative branch interference with a judicial function. Hiss Decl. ¶ 5. In his 1957 book, In the Court of Public Opinion, Alger Hiss discusses "indictment by committee," which he describes as the orchestrated campaign by Nixon and other members of the HUAC to pressure the grand jury to indict him, not Chambers. Nixon appeared before the grand jury to show it the pumpkin papers. Just before his appearance, he declared publicly that an indictment of Whittaker Chambers would "give the greatest encouragement to the communist conspiracy in this country." Access to Nixon's testimony would allow the public to determine whether Nixon's testimony influenced the grand jury. Hiss Decl. ¶ 5.

There is no question that the Hiss case was used to validate the investigatory work of Richard Nixon and HUAC, and thus not only helped to legitimize the Committee's investigations, but also greatly advanced Nixon's career. Declaration of Ellen W.

Schrecker (Schrecker Decl.) ¶ 2; see also Declaration of Harvey Klehr (Klehr Decl.) ¶ 3. Access to the grand jury records will provide insight into what Nixon's role was in securing the indictment of Hiss.

2. The Role of the FBI

The Hiss grand jury records will assist historians in understanding the role and policies of the FBI. According to historian Athan Theoharis, for example, released FBI records confirm a close, covert relationship between FBI officials, Nixon, and the Chair and Chief Counsel of HUAC for the period 1947-48, but do not provide a complete account of that relationship. Declaration of Athan G. Theoharis (Theoharis Decl.) ¶ 3. In addition, Theoharis has evidence that FBI officials destroyed records pertaining to Whittaker Chambers's relationship to Henry Julian Wadleigh. According to Theoharis, the "[g]rand jury records will offer insights into (1) whether senior Justice Department officials were aware of (some or all) FBI activities, and (2) the nature of the relationship between the Justice Department and the White House." Theoharis Decl. ¶ 3.

Similarly, Professor Schrecker is interested in access to

the grand jury records because several sets of FBI records suggest that the FBI and Justice Department were using the criminal process to mobilize public opinion against American communism: "Because criminal prosecutions were so central to the developing campaign against American communism, every stage of that process, including grand jury records, is of considerable historical importance." Schrecker Decl. ¶ 3.

Moreover, according to Professor Theoharis, recently released and formerly classified records deposited at the Roosevelt presidential library and others released by the CIA and NSA relating to the code-named VENONA program⁵ raise questions about FBI counterintelligence activities and prosecutive strategy. Of all those named by Bentley and Chambers, Alger Hiss was the only one indicted, and was indicted only for perjury relating to his grand jury testimony. Yet, according to Theoharis, government records confirm that the FBI knew as early as 1939 that J. Peters headed a Communist underground ring, and that in 1943-44 the FBI was already monitoring those whom Bentley subsequently named in 1945. Based on these findings, Theoharis

⁵ As part of the VENONA program, Soviet consular messages for the World War II period were intercepted and eventually partially decrypted.

asks: "Was information obtained from the FBI's wartime surveillance presented to the grand jury (if, only in the form of questions to grand jury witnesses)? And why, despite the great importance given by the FBI and the Justice Department officials to Chambers's and Bentley's accusations, were no other indictments returned in 1948?" Theoharis Decl. ¶ 6. Theoharis believes that access to the grand jury records will reveal whether prosecutors sought to use sensitive information to obtain Hiss's indictment but did not use this information during the trial. Theoharis Decl. ¶ 6; see also LaFeber Decl. ¶¶ 5-6.⁶

3. The Political Origins of Espionage Activities

In addition, historian John Haynes believes that release of the grand jury records would shed light on what Chambers, Hiss, and other witnesses testified to concerning the existence in the mid-1930s of a group of American Communists who worked for

⁶The FBI had information that was not directly usable at trial either because the information had been illegally obtained -- for instance, information obtained by the bugging of the Illinois Communist Party meeting that led to the discovery of Peters's role -- or because the information was based on intercepted Soviet consular messages. These Soviet messages acquired an additional sensitivity: Their public release would have confirmed not simply wartime Soviet espionage at a time of tense postwar United States-Soviet relations, but also the United States's interception of the consular messages of a wartime ally. Theoharis Decl. ¶ 6.

American government agencies while concealing their political affiliation; members of that group purportedly met in secret caucuses to coordinate their activities in accordance with Communist party directives and to report to party officials on their activities. Chambers stated that Hiss had originally been part of this group and only later moved into espionage. Elizabeth Bentley testified that these groups of concealed Communists, initially engaged in covert political activity, formed the foundation of two large espionage networks working for Soviet intelligence agencies during World War II. The existence of these espionage networks has been confirmed by the recent release of the VENONA cables. The origins of these networks in the American Communist party's 1930's clandestine Washington organization, however, is much less documented. An understanding of those origins is important for an accurate assessment of the United States postwar internal security policies and the government's attitude toward American Communists. According to Haynes, the testimony before the Hiss grand juries would greatly clarify these issues. Declaration of John Haynes, ¶ 4; see also Declaration of Laura Kalman (Kalman Decl.) ¶¶ 5-7.

4. Improprieties in Connection With the Second Grand Jury

Although allegations of improprieties have been made about

both grand juries, more questions revolve around the successor grand jury's activities. Indeed, the second grand jury is the same one that indicted William Remington for perjury, after proceedings riddled with alleged improprieties. See Gary May, Un-American Activities: The Trials of William Remington 180 (1994). The grand jury records relating to Remington's indictment were unsealed ten years ago partly in response to the allegations of improprieties. In re Petition of May, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987). Although Remington's indictment was not part of the Hiss-Chambers controversy, the central issue was Communist espionage and the conflicts of interest that tainted the Remington indictment extended back to the earlier investigation of Hiss. See Craig Decl. ¶¶ 127-29; see also Theoharis Decl. ¶ 6.

Even before Remington's indictment, however, the second grand jury apparently embarked without the Justice Department's wholehearted approval on a wide-ranging investigation of Soviet espionage in the United States generally. See Craig Decl. ¶¶ 84-85. On March 30, 1949, the grand jury decided in an executive session that it wanted to hear in the near future the testimony of Representatives Nixon and Mundt, Stripling (the chief HUAC investigator), HUAC Research Director Benjamin Mandel, and

Assistant Attorney General Alexander Campbell. See Craig Decl. ¶ 109; Exhs. 4 & 5. The grand jury even attempted to call J. Edgar Hoover as a witness, apparently unsuccessfully. Moreover, despite the claims of grand jury foreman John Brunini that the presentment handed up by the grand jury on July 26, 1949, which recommended that the United States espionage laws be tightened, had been the grand jury's own idea, the Justice Department had sent a draft of the presentment to the FBI twelve days before it was handed up. Except for changes in capitalization and the transposition of two words, the draft was identical to the actual presentment. The presentment endorsed the Attorney General's recommendations on espionage legislation, praised the FBI, and strongly recommended that all espionage investigations be conducted in secret -- a recommendation that was seen as an implied criticism of HUAC. It is unclear whose recommendations the presentment really embodies. See Craig Decl. ¶¶ 130-31. Release of the grand jury records may well answer that question.

5. The Question of Hiss's guilt

Finally, despite the passage of fifty years since the indictment of Alger Hiss, public debate about his innocence or guilt continues. See Klehr Decl. ¶¶ 4-8; Nelson Decl. ¶ 7. Many scholars and historians believe the case against Hiss has been

definitively proved. See, e.g., Declaration of William F. Buckley, Jr., (Buckley Decl.) ¶ 9; Declaration of John Berresford ¶ 3. Many still believe Hiss was innocent. See Hiss Decl. ¶¶ 3,6; Declaration of Timothy Hobson ¶ 2. There is no dispute, however, that the grand jury records will shed light on this fifty-year old question. See Declaration of Victor S. Navasky ¶¶ 3-7; Kalman Decl. ¶¶ 5-7; LaFeber Decl. ¶¶ 5-7.

E. The Grand Jury Records

The transcripts of the grand juries that investigated the Hiss-Chambers controversy are located at the National Archives and Records Administration, Northeast Region, in New York, as part of Record Group 118, Records of United States Attorneys and Marshals, United States Attorney for the Southern District of New York, United States v. Alger Hiss, Case No. 11692. Not only are the transcripts sealed, but any records related to the grand jury proceedings are also sealed. See Craig Decl. ¶¶ 132 & 134; Exh. 8. Moreover, any references to what transpired before the grand jury are withheld from the more than 46,000 pages of FBI records concerning Alger Hiss that are available to the public. See Craig Decl. ¶ 135; Exh. 8.

During his lifetime, Alger Hiss repeatedly attempted to have

these grand jury records unsealed. In both his trials, with his motion for a new trial, with his *coram nobis* petition, and with his Freedom of Information Act (FOIA) efforts, Alger Hiss tried to have the grand jury materials released. Hiss Decl. ¶¶ 3-4.

For example, in 1977, Alger Hiss filed a motion to unseal the minutes of the two grand juries related to the indictment of Alger Hiss. Hiss v. Department of Justice, 441 F. Supp. 69 (S.D.N.Y. 1977); see Craig Decl. 133; Exh. 6 (motion and supporting papers). The motion was filed after Hiss had submitted FOIA requests for records relating to grand jury witnesses and been told that the records could not be released because of Rule 6(e) of the Federal Rules of Criminal Procedure.

As the Deputy Attorney General of the United States explained in 1975:

Only if the appropriate court removes the barrier created by the operation of Rule 6(e) from all or any portion of these grand jury minutes, will the Department of Justice review the minutes under the Freedom of Information Act and my implementing guidance pertaining to the records of the Hiss case. At this time, I perceive no reason why the Department would oppose a motion to the court to release the portions of

the minutes requested by you from the operation of Rule 6(e).

See Craig Decl. ¶ 133; Exh. 6, Letter from Harold R. Tyler, Jr., Deputy Attorney General, to Randlett Walster, Rabinowitz, Boudin & Standard (Nov. 6, 1975), Exh. A to Walster Affidavit (emphasis added). When the motion was filed, the Department of Justice and the United States Attorney for the Southern District of New York did not object to the unsealing of the records. The motion was denied, however, and the records remain sealed.

It is not surprising that the government did not oppose Hiss's 1977 motion. In 1975, Deputy Attorney General Harold Tyler announced in a press release that he had instructed all those in the Justice Department concerned with the Hiss and Rosenberg cases "to release as much information on those cases as possible, with as little delay as possible," because of the cases' "historical significance and the unusual problems which they present." Craig Decl. ¶¶ 125, 133; Exh. 6, Press Release, Department of Justice (Aug. 17, 1975). Furthermore, Tyler opined that "those involved in the criminal conduct in the two cases, as well as the principal witnesses, have no general privacy interest in the subject matter sufficient to justify the withholding of any of these records." Id.

ARGUMENT

I. THE COURT HAS DISCRETION TO UNSEAL HISTORICALLY SIGNIFICANT GRAND JURY RECORDS WHEN SPECIAL CIRCUMSTANCES ARE SHOWN.

Although there is a tradition in the United States that proceedings before a grand jury generally remain secret, the rule of secrecy is not without exceptions. Those exceptions have developed historically together with the tradition of secrecy and are codified in Rule 6(e) of the Federal Rules of Criminal Procedure. In re Craig, 131 F.3d 99, 102 (2d Cir. 1997); see also In re Hastings, 735 F.2d 1261, 1268-69 (11th Cir.), cert. denied, 469 U.S. 884 (1984). Rule 6(e) explicitly permits district courts, as part of their supervisory authority over grand juries, to determine whether disclosure of records is appropriate when one or more of the listed exceptions to grand jury secrecy apply. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 223 (1979); In re Craig, 131 F.3d at 102.

Although Rule 6(e) governs almost all requests for the release of grand jury records, this Circuit recognizes that there are certain "special circumstances" in which disclosure of grand jury records is appropriate when the rule's specific exceptions are not fulfilled. In re Craig, 131 F.3d at 102; In re Biaggi,

478 F.2d 489, 492-93 (2d Cir. 1973). Indeed, in a case involving the second grand jury at issue here, a history professor sought access to the grand jury transcripts pertaining to the indictments of William Remington, a prominent public official who was accused by Elizabeth Bentley of being a Communist spy. In re Petition of May, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987) (a copy of this decision is attached as Exhibit 7 to the Craig Declaration). Judge Whitman Knapp exercised the court's discretion and unsealed the grand jury transcripts based on the historical interest in the case. Id. at 2199; cf. In re Craig, 942 F. Supp. 881 (S.D.N.Y. 1996) (court recognized it had authority to unseal records, but decided not to).

The Second Circuit recently reaffirmed the "special circumstances" exception to grand jury secrecy, and specifically held that historical interest, without more, could justify release of grand jury material in an appropriate case. In re Craig, 131 F.3d at 105. As demonstrated below, the petition here presents just such a case.

II. THE SPECIAL CIRCUMSTANCES SURROUNDING THE HISS-CHAMBERS CONTROVERSY WARRANT RELEASE OF THE HISS GRAND JURY RECORDS.

The Second Circuit has emphasized that the "special circumstances" test is a flexible one, requiring a fact-intensive

inquiry. In re Craig, 131 F.3d at 105. Recognizing that there is "no talismanic formula or rigid set of prerequisites," the Court set forth a "non-exhaustive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions":

(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.

In re Craig, 131 F.3d at 106. As demonstrated below, each of these nine factors supports release of the Hiss grand jury records.

1. The Identity of the Party Seeking Disclosure

This petition is filed on behalf of the American Historical Association, the American Society of Legal Historians, the Organization of American Historians, and the Society of American Archivists; these organizations represent historians and

archivists across the country.⁷ In addition, prominent Cold War era historians, and archivists have filed declarations in support of this petition.⁸ This is not a petition "dressed up as a

⁷The American Historical Association (AHA) is the oldest and largest association of historians in the nation, with a membership of approximately 15,000 historians. Founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, AHA is a non-profit association serving as an umbrella organization for historians working in all regions of the world and in all time periods. The American Society of for Legal History (ASLH) is a non-profit membership organization dedicated to fostering scholarship, teaching, and study concerning the law and institutions of all legal systems, both Anglo-American and international. Founded in 1956, ASLH sponsors a series of book-length monographs, publishes a newsletter reporting developments in the field, and promotes scholarship and interaction among teachers, practitioners and students interested in legal history. The Organization of American Historians (OAH) was founded in 1907 and is the largest association dedicated to research and teaching in the United States, with 12,000 members. OAH is committed to ensuring access to and the preservation of the written records that are indispensable to understanding American history. The Society of American Archivists (SAA), founded in 1936, serves the educational and informational needs of its members and provides leadership to help ensure the identification, preservation, and the use of the nation's historical record. Among other things, the SAA publishes newsletters, conducts educational workshops, and engages in educational programs to enhance the training of archivists.

⁸See Declarations of John W. Berresford (author of a number of scholarly articles on Hiss); William F. Buckley, Jr. (eminent journalist and close personal friend of Whittaker Chambers); John Earl Haynes (Manuscript Historian for 20th Century Political History at the Library of Congress and author of several books on the American Communist Party); Tony Hiss (son of Alger Hiss and author of a number of books and articles about Alger Hiss); Timothy Hobson (stepson of Alger Hiss); Laura Kalman (Professor of History at the University of California, Santa Barbara and

'significant project of historical scholarship" that cannot be distinguished from journalistic intrigue, public curiosity, or the subjective opinion of family and friends, In re Craig, 131 F.3d at 105 n.8, but rather is a petition supported by a broad range of scholars, historians and archivists in the United States. The identity of the party seeking disclosure should "carry great weight," In re Craig, 131 F.3d at 106, and in this case, the identity of the petitioners weighs significantly in favor of disclosure.

author of a book on McCarthy era); Harvey Klehr (Andrew W. Mellon Professor of Politics and History at Emory University and author of several books on American communism); Walter LaFerber (Marie Underhill Noll Professor of American History at Cornell University and author of several books on the Cold War); John Lowenthal (documentary film maker; produced and directed the documentary film "The Trials of Alger Hiss"), Victor S. Navasky (publisher and editor of The Nation magazine and author of book on the politics of the McCarthy era); Ronald Radosh (Senior Research Associate at the Center for Communitarian Policy Studies, George Washington University, and author of several books on the history of American communism); Anna Kasten Nelson (Distinguished Adjunct Historian in Residence at the American University and expert on the Cold War); Ellen W. Shrecker (Professor of American History at Yeshiva University and author of several books on the anticommunist political repression of the McCarthy era); Athan G. Theoharis (Professor of History at Marquette University and author of numerous books on Hiss and the Cold War); and Robert M. Warner (University Historian at the University of Michigan and former Archivist of the United States).

2. Whether the Defendant or Government Opposes Disclosure

The defendant to the grand jury proceeding, Alger Hiss, is dead, but during his lifetime he actively sought access to the very grand jury records sought here. See Hiss Decl. ¶¶ 3-6. Indeed, in 1977, he filed a motion in this Court to have the grand jury records unsealed. Hiss v. Department of Justice, 441 F. Supp. 69 (1977). His son Tony Hiss and stepson Timothy Hobson both support disclosure of the records. See Hiss Decl., Hobson Decl.

The government did not oppose Alger Hiss's motion to have these very records unsealed back in 1977. Hiss v. Department of Justice, 441 F. Supp. at 71; see Craig Decl. 133; Exh. 6. Indeed, in 1975, Deputy Attorney General Harold Tyler announced in a press release that he had instructed all those in the Justice Department concerned with the Hiss and Rosenberg cases "to release as much information on those cases as possible, with as little delay as possible," because of the cases' "historical significance and the unusual problems which they present." Id. (Press Release, Department of Justice (Aug. 17, 1975)).

Thus, in this case, both the defendant and government supported unsealing of these records more than twenty years ago. See In re Biaggi, 478 F.2d at 492-93 (both Biaggi and government

supported disclosure of grand jury records). Again, this factor weighs in favor of disclosure.

3. Why Disclosure Is Being Sought

The Second Circuit advises that the reason disclosure is sought should be explored in some detail, and that "an argument that significant historical interest militates in favor of release is totally appropriate and even weighty." In re Craig, 131 F.3d at 106. Here, it is hard to imagine anyone contesting the enormous historical value of the Hiss grand jury records -- an interest in these records that the government itself recognized more than twenty years ago. See Craig Decl. ¶¶ 125, 133; Exh. 6.

As spelled out in detail in the historians' declarations in support of this petition, the Hiss case remains central to debates about the nature and origins of American anti-Communism, the Cold War, and the New Deal. Although an enormous amount of material bearing on the case has been turned up by scholars and partisans, and significant troves of documents have been released by both the Russian and American governments in the past decade, unanswered questions remain that only the grand jury records can illuminate. See, e.g., Radosh Decl. ¶¶ 8-9.

For example, what did Nixon say to the grand jury? How influential was Nixon's testimony? See Schrecker Decl. ¶ 6; Hiss Decl. ¶ 5; Kalman Decl. ¶¶ 5-6. How did Chambers avoid indictment? Had the United States Attorneys who were running the investigation decided to focus only on Hiss? If so, how was that decision presented to the grand jury? See Schrecker Decl. ¶ 6. What role did the FBI play? See Theoharis Decl. ¶¶ 3-6; Schrecker Decl. ¶ 3. Was the FBI's typewriter evidence before the grand jury consistent with the evidence presented at trial? See Hiss Decl. ¶ 6. What did Whittaker Chambers say to the grand jury? See Schrecker Decl. ¶ 5 (Chambers changed his story several times as the Hiss case unfolded; "understanding when, how, and why that story changed requires us to see the entire historical record"). Many of the grand jury witnesses also testified before HUAC; how did their grand jury testimony compare to their HUAC testimony? See Radosh Decl. ¶ 3. Several witnesses before the grand jury are named in VENONA cables as Soviet agents -- Sam Carr, Harold Glasser, Abraham George Silverman, Anna Louis Strong and Harry Dexter White. Their grand jury testimony may well offer information and details that will allow historians to evaluate their credibility. See Khler Decl.

¶ 7. Was Alger Hiss a spy; was he no more than a communist sympathizer; or was he, as he maintained, a patriot? See Nelson Decl. ¶ 7; Hiss Decl. ¶ 6.

The grand jury records will provide invaluable insights into an important and still controversial case. As Professor Schrecker explains, the "specific language of such proceedings can tell us much about the way in which the campaign against domestic communism developed," and therefore, it is important to "see how federal attorneys framed [the Hiss] case when they were presenting it to the grand jury." Schrecker Decl. ¶ 7.

Moreover, significant questions have been raised about improprieties before the grand juries -- particularly the second. Craig Decl. ¶¶ 127-31. Disclosure of the Hiss grand jury records permits "public scrutiny of the conduct of courts and prosecutors." United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988). The need to keep a "watchful eye" on the criminal justice system extends to important pretrial proceedings. See Haller, 837 F.2d at 86-87 (plea agreements); Application of the Herald Co., 734 F.2d 93, 98-99 (2d Cir. 1984) (suppression hearings). Grand jury proceedings, no less than criminal trials, are subject to abuse of power and official malfeasance. See, e.g., United

States v. Briggs, 514 F.2d 794, 805-06 (5th Cir. 1975); Boudin, "The Federal Grand Jury," 61 Geo. L.J. 1 (1972). Although secrecy concerns generally require the contemporaneous sealing of grand jury records, the disclosure of the Hiss records -- from a period presenting questions about the limits of government authority -- will enhance public awareness of the uses, and abuses, of official power through the grand jury process and will promote public discussion of the proper limits of that power. Moreover, as the Supreme Court has recognized, the threat of eventual disclosure of grand jury records has the salutary effect of discouraging official misconduct in the present. See Butterworth v. Smith, 494 U.S. 624, 635-36 (1990); see also Advisory Committee Note to 1977 Amendment to Rule 6(e)(1) (recording grand jury proceedings described as "the most effective restraint" upon prosecutorial misconduct). There is no surer invitation to official malfeasance than the secure knowledge that the record of one's deed shall be locked away forever. See In re Groban, 352 U.S. 330, 352 (1957) (Black, J., dissenting) ("Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power." (footnote omitted)).

Disclosure of the Hiss grand jury records will also serve the compelling interest that the public has in knowing its history. Courthouse records have proven an invaluable resource for the historians who have examined and written about the Nation's famous trials.⁹ Access to the Hiss grand jury records will allow historians to gain insight into the grand jury proceeding itself: Disclosure may reveal prosecutorial improprieties and conflicts in testimony, and may also present witnesses' testimony in a form less shaped by the prosecutor's or defendant's theory of the case than testimony presented during trial. Not surprisingly, in other instances, access to grand jury records has enhanced the thoroughness and scholarly insight of academic studies of controversial cases and investigations with political overtones. See, e.g., G. May, *Un-American*

⁹See, e.g., D. Kirschner, *Cold War Exile: The Unclosed Case of Maurice Halperin* (1995); G. Cowan, *The People v. Clarence Darrow* (1993) (documenting the bribery trial of Clarence Darrow); M. Smith & R. Eaton, *Eugene O'Neill in Court: Documents in the Case of George Lewys v. Eugene O'Neill* (1993) (documenting the plagiarism trial of Eugene O'Neill); R. Radosh & J. Milton, *The Rosenberg File: A Search for Truth* (1983); P. Boyer & S. Nissenbaum, eds., *The Salem Witchcraft Papers: Verbatim Transcripts of the Legal Documents of the Salem Witchcraft Outbreak of 1862* (1977); J. Kirkwood, *American Grotesque* (1970) (documenting the trial of Clay Shaw for conspiring to assassinate President John Kennedy); J. Cornell, *The Trial of Ezra Pound; A Documented Account of the Treason Case by the Defendant's Lawyer* (1966).

Activities: The Trials of William Remington (1994); H. Hunt, The Case of Thomas J. Mooney & Warren K. Billings (1971); W. Young & D. Kaiser, Postmortem: New Evidence in the Case of Sacco and Vanzetti (1985). Petitioners and the public have an interest in full and accurate disclosure of events that have shaped this country's political history.

This interest in disclosure was recognized in Petition of May, where Judge Knapp unsealed grand jury transcripts because of the public interest in an accurate and complete historical record of the McCarthy-era perjury trial of William Remington. Petition of May, slip op. at 4. Judge Knapp emphasized the "undisputed historical significance" of that matter, and concluded that "the public has a strong interest in having its understanding of the administration of justice in this case based on complete and accurate historical evidence." Id. at 4. Similarly, in Petition of O'Brien, the United States District Court for the Middle District of Tennessee released grand jury records concerning a 1946 race riot in Columbia, Tennessee; petitioner had argued that the public had a strong historical interest in that important episode in post-war race relations. Petition of O'Brien, Gen. Docket No. 3-90-X-35 (M.D. Tenn. May 16, 1990).

With respect to the Hiss case, there has been speculation

about what actually occurred before the grand jury for fifty years. Releasing the grand jury transcripts related to the Hiss indictment will contribute to a more accurate understanding of this critically important case and the era for which it remains a symbol. See Nelson Decl. ¶¶ 6-10; Berresford Decl. ¶¶ 5-8; Kalman Decl. ¶ 5.

4. Specific Information Being Sought

This petition seeks access to the grand jury transcript related to the Hiss indictment. The grand jury that indicted Hiss was originally convened in June 1947 and indicted twelve United States Communist leaders a year later, but this petition does not seek testimony related to the grand jury's earlier proceedings. See Craig Decl. ¶ 22. Similarly, this petition does not seek the transcript of the testimony before the second grand jury, except as it relates to the Hiss case. Exhibit 1 to the Craig Declaration lists all the known witnesses who testified before the grand jury regarding the Hiss-Chambers controversy. This petition is limited in scope to that testimony relevant to the landmark perjury trials of Alger Hiss.

5. How Long Ago The Proceedings Took Place

The grand jury proceedings at issue here took place fifty years ago. The Second Circuit found that, for three reasons, the

"timing of the request remains one of the most crucial elements."
In re Craig, 131 F.3d at 107. First, "if historical interest in a specific case has persisted over a number of years, that serves as an important indication that the public's interest in release of the information is substantial." Id. Here, fifty years have passed, the principal witnesses have died, and yet the public's interest in the case has not subsided. Indeed, two extensively reviewed books were published on the Hiss case just last year. Allen Weinstein, Perjury: The Hiss-Chambers Case (Rev. ed. 1997); Sam Tanenhaus, Whittaker Chambers: A Biography (1997). Second, "the passage of time erodes many of the justifications for continued secrecy." In re Craig, 131 F.3d at 106; see Douglas Oil, 441 U.S. at 222 (noting that the interests in grand jury secrecy are reduced after the grand jury has ended its activities). Third, "the passage of time eventually, and inevitably, brings about the death of the principal parties involved in the investigations, as well as that of their immediate families." In re Craig, 131 F.3d at 106. Here, the principal parties involved -- Whittaker Chambers, Alger Hiss, Elizabeth Bentley, and Richard Nixon -- are all dead.

It has also been recognized in other contexts that interests

in secrecy diminish over time. See Exec. Order No. 12,958, 60 Fed. Reg. 19825 (1995) (classified records are automatically declassified when they are more than 25 years old with limited exceptions). Schmerler v. FBI, 696 F. Supp. 717, 721, 722, reh'g denied, 700 F. Supp. 73 (D.D.C. 1988) (interests in secrecy of FBI investigation greatly diminished under Freedom of Information Act after passage of 50 years).

6. The Current Status of the Principals and Their Families

As noted above, the principal parties involved in the grand jury proceedings are all dead. The son and stepson of the defendant Alger Hiss support this petition. See Hiss Decl.; Hobson Decl. Whittaker Chambers's wife Esther is dead, and William F. Buckley, a friend and colleague of Chambers, supports this petition and declares that Chambers would not oppose it: "Indeed, I suspect that Chambers would strongly support the release of these materials as they would present all the evidence upon which the grand jury relied in indicting Hiss, and would provide another counterpoint to what Chambers believed were the false and incomplete accounts of the evidence, and the personal attacks on him, that emanated from Alger Hiss in the decades after Hiss's conviction." Buckley Decl. ¶ 9.

Thus, the sixth factor militates in favor of disclosure

here. See In re May, slip op. at 3-4 (concluding that, in light of the death of the principals, "we find a considerable public interest in disclosure and no interest in secrecy").

7. The Extent of Prior Disclosures

There have been significant disclosures of what transpired before both grand jury proceedings related to the Hiss-Chambers controversy. Perhaps most importantly, verbatim passages from the minutes of the first grand jury proceeding were read into the record at Hiss's trials and witnesses at the trials also testified about their or others' grand jury appearances. See Craig Decl. ¶ 119. Both Hiss and Chambers have written about their testimony in their autobiographies. See Chambers, Witness 5-6, 723-28, 776-77; Hiss, In the Court of Public Opinion 182-83, 193, 196-98 (1957). Additional information about the grand jury proceedings was published in newspapers as a result of interviews with witnesses or through unofficial leaks. See Craig Decl. ¶¶ 119-124; Exh. 5.

Moreover, Alger and Priscilla Hiss dictated detailed personal notes on their grand jury appearances, and FBI documents released under FOIA include the names of most of the witnesses who testified regarding the Hiss-Chambers controversy. See Craig

Decl. ¶122; Exh. 4. Many grand jury exhibits, including the Baltimore papers and typewriting exemplars, were entered in evidence at trial and are now publicly available. See Transcript of Second Trial Vols. 6-9.

The records and reports of HUAC are another source of information related to the grand jury proceedings. HUAC held hearings while the grand jury was in session, and called many of the same individuals who appeared before the grand jury as witnesses; they were similarly interrogated regarding the same issues the grand jury investigated. See Craig Decl. ¶ 122, Exh. 1.¹⁰

Based on this publicly available information, it is known who testified before the grand jury and when, see Craig Decl. ¶ 122; Exh. 1, and in many instances, the substance of the testimony is either known or can readily be surmised. See Craig Decl. ¶¶ 22-118. Thus, there has already been significant disclosure of what transpired before the grand jury.

¹⁰In addition to the press releases concurrent with the HUAC proceedings, HUAC also published transcripts of witnesses' testimony in open session and issued two reports dated August 8, 1948 and December 31, 1948. However, much of HUAC's investigation was conducted in closed executive sessions, and HUAC's transcripts will be sealed until the year 2026. See Craig Decl. ¶ 123 n.67.

The extent to which the grand jury material in the Hiss case has already been made public strongly supports disclosure in this case, because "even partial previous disclosure often undercuts many of the reasons for secrecy." In re Craig, 131 F.3d at 107; see, e.g., In re May, slip op. at 3 (permitting disclosure because, among other reasons, there had "been extensive prior disclosure of the grand jury proceedings"); In re North, 16 F.3d 1234, 1244-45 (D.C. Cir. 1994) (finding that widespread media release might compromise secrecy to the point that Rule 6(e) would no longer prohibit the release of certain records).

8. Whether Witnesses Are Still Alive

We know for certain that more than half of the witnesses who testified before the Hiss grand juries are no longer alive. See Exhibit 1 to Craig Decl. For most of the remaining witnesses, we do not know whether they are alive or dead, but given the passage of fifty years, the majority are likely to be dead. See id.; Hall v. Department of Justice, ___ F. Supp.2d ___, 1998 WL 758371 (D.D.C. 1998) (establishing rebuttable presumption that if an FBI document is more than 50 years old, informant is dead). Indeed, of all the witnesses who testified before the grand jury, only two are known to be alive. One of the living witnesses, Timothy Hobson, affirmatively supports disclosure of his own testimony.

See Hobson Decl. ¶ 2-3.

In the FOIA context, death "certainly diminish[es]," if not extinguishes altogether, any privacy interest an individual has in keeping records secret. See Summers v. Department of Justice, 140 F.3d 1077, 1084 (D.C. Cir. 1998) (Silberman, J., concurring); Davin v. Department of Justice, 60 F.3d 1043, 1058-59 (3d Cir. 1995); Diamond v. FBI 707 F.2d 75, 77 (2d Cir. 1983). For those witnesses who are dead, therefore, there is no interest in secrecy. See Petition of May, slip op. at 3-4 (in light of death of principals, there is "no interest in secrecy"). For those who are still alive, the extent of the witnesses' privacy interest is entitled to some weight. However, as further discussed in the following section, any privacy interest living witnesses may have in this case is minimal because the public already knows that they testified and can even speculate as to the substance of their testimony. See Craig Decl. ¶¶ 119-124; Exh. 6 (Tyler Press Release).

9. The Need for Maintaining Secrecy

The Supreme Court has identified five traditional rationales for maintaining grand jury secrecy, none of which applies here:

- 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 untrammelled disclosures by persons who have information with respect to the commission of crimes; 5) to protect the 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.

United States v. John Doe I, 481 U.S. 102, 110 n.5 (1987) and Douglas Oil, 411 U.S. at 219 n.10 (quoting United States v. Procter & Gamble Co., 356 U.S. at 672, 681 n.6 (1958)). Where continued grand jury secrecy serves none of these legitimate interests, courts have allowed disclosure of grand jury records. See Butterworth v. Smith, 494 U.S. 624 (1990) (Court struck down statute prohibiting witness from disclosing his grand jury testimony because free speech concerns outweighed interests in continuing grand jury secrecy); see also United States v. Hughes, 413 F.2d 1244, 1255-57 (5th Cir. 1969).

The first three reasons for secrecy no longer apply where, as here, the grand jury has concluded its investigation and has been discharged. See United States v. Moten, 582 F.2d 654, 663 (2d Cir. 1978); The Judge Hastings Case, 735 F.2d at 1274; see also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940) ("[A]fter the grand jury's functions are ended, disclosure

is wholly proper where the ends of justice require it.") Similarly, the fifth justification for secrecy -- protection of the innocent -- is inapplicable because Hiss was indicted and convicted for perjury, and his conviction was sustained.

The only remaining rationale for grand jury secrecy is the general goal of encouraging free disclosure before grand juries by those who have information about crimes. This rationale continues even after a grand jury has been discharged because "[f]ear of retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." Douglas Oil, 411 U.S. at 222.

However, in Petition of May, the court found that disclosure of grand jury transcripts 35 years after the fact would not have any such deterrent effect, noting that "the government did not dispute our suggestion that no witness would have been deterred from testifying had he or she been informed that the grand jury minutes might be disclosed after the passage of 35 years." Slip op. at 3-4, n.1. Even more so than in Petition of May, disclosure of the Hiss grand jury records will not discourage candid witness disclosure before grand juries for three reasons.

First, there is no possibility of reprisal from the now-deceased subject of the investigation. Even prior to Hiss's

death, disclosure of the grand jury transcripts would not have increased the possibility of retaliatory action because Hiss and his friends knew, from the HUAC hearings and from the perjury trials, of the damaging testimony against him. See Douglas Oil, 411 U.S. at 222 n.13 (prior disclosure to witnesses' employers lessened likelihood that further court-ordered disclosure would lead to retaliation). Second, to the extent that nondisclosure would be predicated on a desire to protect witnesses from retribution or embarrassment, that purpose will not be served here, where the principal grand jury witnesses -- Elizabeth Bentley, Whittaker Chambers, and Richard Nixon -- are now dead. The prior public revelation of the identities and charges of most (if not all) of the grand jury witnesses lessens the possible deterrent effect that disclosure of the transcripts may have. Thus, release of the transcripts will not significantly heighten the risk of embarrassment to those witnesses whose identities are already known. Moreover, the courts have recognized that, where there has been extensive disclosure of witnesses' statements, the reasons for continued secrecy are diminished. See The Watergate Case, 370 F. Supp. 1219, 1229-30 (D.D.C. 1974) (court determined that the need for disclosure outweighed any remaining interest in grand jury secrecy, in part because those other individuals

identified in Watergate grand jury report had already been the subject of considerable public testimony apart from the report).

Thus, since most of the witnesses testified before congressional committees or at Hiss's perjury trials, and also discussed their charges openly and often, any disclosure of the substance of their grand jury statements will have no deterrent effect.

Accord Douglas Oil, 441 U.S. at 222 n.13; United States Industries, Inc. v. United States District Court, 345 F.2d 18 (9th Cir. 1965).

Third, the routine disclosure of grand jury testimony weakens any argument that disclosure will deter future witnesses from testifying before grand juries. As a result of the 1970 amendments to the Jencks Act, 18 U.S.C. § 3500, and the 1977 amendments to the Federal Rules of Criminal Procedure, codified in Rule 26.2, a trial witness' grand jury testimony is now automatically disclosed to a defendant after the witness testifies at trial or at a pretrial hearing, and hence the release of grand jury testimony has become an everyday occurrence. Thus, as the Second Circuit has concluded:

Every sophisticated grand jury witness knows that, if he becomes a witness at trial, his grand jury testimony will most likely be revealed to the public. For future witnesses trying to decide whether to testify before grand juries, the marginal deterrent effect of

releasing one more transcript on the facts of this case can only be trivial.

Executive Securities Corp. v. Doe, 702 F.2d 406, 409-10 n.4 (2d Cir.), cert. denied, 464 U.S. 818 (1983). Although this factor, standing alone, could support release of a wide range of grand jury testimony, in conjunction with the other factors, it weighs strongly in favor of disclosure. In the circumstances here, it is implausible to claim that release of 1948 transcripts in 1998 will have any deterrent effect on future grand jury witnesses.

In sum, the reasons for grand jury secrecy are virtually eliminated here with the discharge of the grand jury, the passage of fifty years, and the deaths of all of the major participants.

Although grand jury secrecy serves an important function during, and shortly after, the grand jury proceedings, the justifications for secrecy have little weight decades after the proceedings have ended and when most of the principals have died.

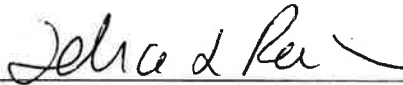
Thus, in this case, the traditional rationales for grand jury secrecy no longer apply.

CONCLUSION

As demonstrated above, all nine factors set forth by the Second Circuit in In re Craig support disclosure of the grand jury records related to the indictment of Alger Hiss. In the special circumstances presented here, petitioners respectfully request that this Court order release of the records of these grand jury proceedings.

Respectfully submitted,

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