UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE PETITION OF STANLEY KUTLER, AMERICAN HISTORICAL ASSOCIATION, AMERICAN SOCIETY FOR LEGAL HISTORY, ORGANIZATION OF AMERICAN HISTORIANS, and SOCIETY OF AMERICAN ARCHIVISTS.	)	Misc. Action No. 10-mc-00547

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR ORDER DIRECTING RELEASE OF TRANSCRIPT OF RICHARD M. NIXON'S GRAND JURY TESTIMONY OF JUNE 23-24, 1975, AND ASSOCIATED MATERIALS OF THE WATERGATE SPECIAL PROSECUTION FORCE

Thirty-six years ago this July, the last of the three grand juries convened to investigate Watergate and related matters was terminated. In the decades since, nearly every major figure in the Watergate scandal has published books or articles about the events, and testimony from the trials and congressional hearings has long been available to the public. The one significant piece of the story still inaccessible to historians is the sworn testimony of President Richard Nixon. Through their petition, Stanley Kutler, the American Historical Association, American Society for Legal History, Organization of American Historians, and Society of American Archivists seek an order directing release of President Nixon's two days of testimony, from June 24 and 25, 1975.

Opposing the petition, the Department of Justice (DOJ) makes three points. First, it argues that the Court can release grand jury records only pursuant to Federal Rule of Criminal Procedure 6(e), which does not apply here. Second, it argues that the Court should reject the Second Circuit's established test for deciding whether to release grand jury records, again because the test is not based on Rule 6(e). Third, DOJ takes a brief stab at suggesting that the facts presented here do not satisfy the Second Circuit's test. None of these arguments has merit.

I. Rule 6(e) Does Not Limit District Courts' Supervisory Authority Over Grand Jury Proceedings.

As discussed in petitioners' opening memorandum (at 15, 36) and DOJ's opposition (at 4), the general rule that grand jury proceedings are not open to the public serves important purposes, such as encouraging uninhibited deliberations by preserving grand jurors' anonymity, protecting witnesses from retaliation or intimidation, and avoiding alerting suspects to the grand jury's investigation. None of these purposes would be at all threatened by release of the decades-old records at issue here, and DOJ does not argue otherwise. Rather, DOJ argues the Court lacks authority to order release for any reason not specified in Rule 6(e).

First, DOJ notes that courts are "reluctant" to open grand jury records unless authorized by a statute or rule. DOJ Opp. 4 (citing *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983)). Reluctance, however, is not a bar. Thus, many courts, including the D.C. Circuit and the Second, Seventh, and Eleventh Circuits, have permitted disclosure in circumstances where the exceptions listed in Rule 6(e) do not apply. *See In re Petition of Craig*, 131 F.3d 99, 103 n.3 (2d Cir. 1997) (citing cases); Memo in Sppt. of Pet. 17 (citing cases). Moreover, the Second Circuit's exceptional circumstances test, *see In re Petition of Craig*, 131 F.3d at 106, which petitioners ask the Court to apply here, is consistent with the cases on which DOJ relies and respectful of the general rule in favor of grand jury secrecy.

In fact, "a district court's ability to order release of grand jury materials has never been confined only to application of the exceptions" enumerated in Rule 6(e)(3). *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d 274, 285 (S.D.N.Y. 1999). Instead, the Rule has been revised over the years to conform to the disclosure practices observed in the courts. *See* Rule 6, Adv. Comm.

Notes to 1977 amendment (change in definition of "other government personnel" to whom disclosure may be made follows trend in the courts of allowing disclosure to certain government personnel); *id*. at Adv. Comm. Notes to 1979 amendment (requirement that grand jury proceedings be recorded adopted in response to trend among courts); *id*. at Adv. Comm. notes to 1983 amendments (Rule 6(e)(3)(C) amended to state that grand jury materials may be disclosed to another grand jury, which "even absent a specific provision to that effect, the courts have permitted ... in some circumstances"); *see also In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 286 (listing additional examples in which Rule 6 was revised to conform to court practices).

As these examples show, "exceptions to the secrecy rule generally have developed through conformance of Rule 6 to the 'developments wrought in decisions of the federal courts,' not *vice versa*." *Id*. (quoting *In re Pet. to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984) (hereinafter *In re Hastings*)). The Supreme Court made a similar point in *Pittsburgh Plate Glass Co. v. United States*: "[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it." 360 U.S. 395, 399 (1959) (footnotes omitted).

For this reason, DOJ's reliance on *Carlisle v. United States*, 517 U.S. 416 (1996), is misplaced. *Carlisle* held that federal courts are not free to develop rules that "circumvent or conflict with the Federal Rules of Criminal Procedure." *Id*. at 426. *See also Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (court cannot invoke its supervisory power as a basis for disregarding mandate of Rule 52(a)), *cited in* DOJ Opp. 12. The cases in which courts have ordered the release of grand jury records based on historical significance, however, neither circumvent nor

conflict with Rule 6(e). As the Second Circuit explained, these cases carry forward Rule 6(e)'s historical 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. *In re Petition of Craig*, 131 F.3d at 102-03. These cases are consistent with the "history of Rule 6(e)," which "indicate[s] that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts . . . ." *In re Hastings*, 735 F.2d at 1269.

Second, although DOJ is correct that Rule 6(e) does not provide a basis for granting the petition in this case, it likewise does not provide a basis for denying it. The rule lists certain "exceptions" to grand jury secrecy, but those exceptions can be understood only in the context of the Rule as a whole. Specifically, Rule 6(e)(2), entitled "Secrecy," states at subdivision (A): "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Subdivision B in turn provides that specified "persons must not disclose a matter occurring before the grand jury"—including grand jurors, interpreters, court reporters, government attorneys, and certain other government personnel. Thus, the Rule does not impose a blanket non-disclosure requirement, as it does not require secrecy by witnesses, their family members, or judges, for example. *See* Rule 6, Advisory Comm. Note to 1944 Rule ("The rule does not impose any obligation of secrecy on witnesses.").

Immediately following subdivision (2), entitled "Secrecy," is subdivision (3), entitled "Exceptions." As DOJ discusses at some length, this subdivision does not address exceptional circumstances such as significant historical interest. However, exceptions do not exist in a vacuum; they must be exceptions *to* something. In Rule 6(e), subdivision (3) states exceptions to the subdivision (2) secrecy requirement. But petitioners do not seek an exception to subdivision (2). To

the extent that the records sought are court records, subdivision (2) does not impose a secrecy requirement on courts. It addresses specific "persons," not including judges and not mentioning courts (other than a court reporter). And to the extent that the records sought are held by the government, the government as an entity is also not among the "enumerated categories of *individuals*," to borrow DOJ's phrase (DOJ Opp 5), of whom secrecy is required. Importantly, Rule 6(e) recognizes that government employees and the government itself are distinct. *Compare* Rule 6(e)(2) & (3)(A)(i) & (ii) (discussing "attorney for the government" and "government personnel"), *with* Rule 6(e)(3)(E)(iii)-(v) (discussing requests of "the government"); *cf. Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985) (distinguishing suit against government employee in personal capacity from suit against employee in official capacity, which is directed to the "entity, *qua* entity"). In sum, petitioners do not seek an order authorizing any of the "persons" listed in subdivision (2) to disclose grand jury material. And absent a requirement of secrecy under Rule 6(e)(2), there is no need to look for an exception in Rule 6(e)(3).

Consistent with subdivision (3)'s limited role as stating exceptions to subdivision (2), the D.C. Circuit has recently evaluated requests that the court release grand jury material without addressing the exceptions. *See In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006). Instead, the appellate court has looked to subdivision (6) of Rule 6(e), which provides: "Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Notably, this restriction on disclosure incorporates considerations of time ("as long as") and appropriateness ("to the extent ... necessary"), and prohibits only "unauthorized

disclosure," which does not encompass disclosure pursuant to court order. DOJ has not suggested that Rule 6(e)(6) bars disclosure here.

The text of Rule 6(e) further shows why *Bank of Nova Scotia* presents no obstacle to granting the petition here. In *Bank of Nova Scotia*, the Supreme Court held that a trial court had no authority to dismiss an indictment based on prosecutorial misconduct that the court agreed was harmless, because Rule 52(a) instructs that a harmless error "shall be disregarded." *See* 487 U.S. at 255. In contrast, although Rule 6(e) contains a "mandate" prohibiting disclosure by certain people, the plain language of the mandate does not apply to the courts. Of course, the drafters of the Federal Rules know how to impose requirements on courts when they want to do so. *Compare* Fed. R. Crim. P. 21(a) (providing that "court must transfer" in certain circumstances), *with id.* Rule 21(b) (providing that "court may transfer" in certain circumstances); *see also*, *e.g.*, Fed. R. Crim. P. 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment ...."); Fed. R. Civ. P. 6(b)(2) ("court must not extend time to act" under specified rules); *id*. Rule 16(b)(1) ("district judge ... must issue a scheduling order"). Rule 6(e) does not contain the sort of mandatory language limiting courts' discretion that appears in Rule 52(a).[1]

Finally, arguing that courts lack the authority to order disclosure other than pursuant to Rule 6(e), DOJ looks to *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 a federal court may dismiss an otherwise valid indictment because the government failed to disclose to the grand

[1]Rule 6(e)(5)'s requirement that "the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury," while it imposes a mandatory requirement on courts, is inapplicable here because no hearing is at issue.

jury "substantial exculpatory evidence" in its possession. *Id.* at 37-38. The Tenth Circuit had ruled that, although such disclosure is not required, it could nonetheless be compelled under the courts' supervisory powers. In reversing, the Supreme Court did not suggest—as DOJ 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 limited power to fashion rules of grand jury procedure. *Id.* at 50. But the Court explicitly recognized 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*.

"[N]one of the concerns expressed in *Williams* about the exercise of supervisory power over grand jury proceedings is implicated by the 'special circumstances' exception" that petitioners advocate here. *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 287. Allowing disclosure in exceptional cases based on historical significance in no way derogates from the historical allocation of responsibility between the grand jury and the courts discussed in *Williams*. In fact, 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). *In re Petition of Craig*, 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, disclosure here would show no disrespect to the historical allocation of responsibility between grand juries and their supervising courts—an allocation in keeping with Supreme Court precedent that goes unquestioned in *Williams*. As the district court stated in rejecting this same DOJ argument in the case involving the Alger Hiss grand jury records, Rule 6(e) has developed in response to court decisions, and "[n]othing in *Williams* suggests the Court intended to

halt this long-established and well-recognized process of development of the law of grand jury secrecy." *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 286.

II. The D.C. Circuit Has Held That Courts May Release Grand Jury Material Outside The Confines of Rule 6(e).

As discussed above (*supra* p. 5), in recent cases, the D.C. Circuit has not required a Rule 6(e)(3) exception to apply before allowing unsealing of grand jury records. Rather, it has evaluated third-party requests to unseal under Rule 6(e)(6)—which does not bar (and DOJ has not argued bars) unsealing here. In addition to these cases, more than three decades ago, in another Watergate-related matter, the D.C. Circuit rejected the assertion that "the discretion ordinarily reposed in a trial court to make such disclosure of grand jury proceedings as he deems in the public interest is, by the terms of Rule 6(e) of the Federal Rules of Criminal Procedure, limited to circumstances incidental to judicial proceedings" or other exceptions stated in the Rule. *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974).

Haldeman v. Sirica was an appeal from the decision *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974). There, Judge Sirica considered whether to release a report prepared by the first Watergate grand jury to the House Judiciary Committee. "The only significant objection to disclosure," the court found, was the contention that the release was "absolutely prohibited by Rule 6(e)," *id*. at 1227, because it did not fall within an exception. Pointing to the same language highlighted by DOJ here (DOJ Opp 5), the objectors to disclosure argued that the court could release the report only "preliminary to or in connection with a judicial proceeding." Judge Sirica rejected this argument, explaining that the Advisory Committee notes show that this language in Rule 6(e) codified "a rather narrow area" of "traditional practice of secrecy" and derived

from cases where the question of disclosure arose at or prior to trial. *In re Report & Recommendation*, 370 F. Supp. at 1227. He found "no justification for a suggestion that this codification of a 'traditional practice' should act, or have been intended to act, to render meaningless an historically proper function of the grand jury by enjoining courts from any disclosure of reports in any circumstance." *Id*. at 1228. And agreeing with the Second Circuit in *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), Judge Sirica held that "Rule 6(e), which was not intended to create new law, remains subject to the law or traditional policies that gave it birth." *In re Report & Recommendation*, 370 F. Supp. at 1229.

Furthermore, Judge Sirica considered the traditional bases for grand jury secrecy as set forth in cases such as *Pittsburgh Plate Glass Co.*, 360 U.S. 395, and *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), and noted that the pertinent facts—the grand jury had ended, there was no need to protect against flight, no concern about jury tampering, no concern with safeguarding unaccused persons through secrecy, no objection from the person on whom the report focused (President Nixon), no objection from the President, considerable public testimony of individuals not under indictment, and the opportunity for individuals under indictment to respond at trial to any references to them in the report—"might well justify even a *public* disclosure." *Id*. at 1229-30 (emphasis added).

On appeal, the D.C. Circuit affirmed in a brief opinion. It stated: "We are in general agreement with [Judge Sirica's] handling of these matters, and we feel no necessity to expand his discussion." *Haldeman*, 501 F.2d at 715. DOJ tries to explain away the D.C. Circuit's decision by suggesting that it rests on the Rule 6(e) exception for disclosure "preliminarily to or in connection with a judicial proceeding." DOJ Opp. 21. In reality, although Judge MacKinnon's *concurrence*

rested on that basis, *see* 501 F.2d at 717, the majority opinion does not mention it and quickly disposes of the theory that Rule 6(e) limits the power of trial courts to release grand jury material "as he deems in the public interest." *Id*. at 715.

While minimizing the holding in *Haldeman*—a published, precedential D.C. Circuit decision flatly at odds with DOJ's position here—DOJ asks this Court to look instead to *In re Newman*, No. 87-5345 (D.C. Cir. Apr. 20, 1988), an unpublished, non-precedential decision. *See* D.C. Cir. Rule 32.1(b). In *Newman*, the D.C. Circuit held that an order denying release of grand jury records was "appropriate" where the petitioner sought release based on historical importance because that ground falls outside of Rule 6(e). DOJ Opp. 21-22 (quoting *In re Newman*). In its opposition to a subsequent petition for certiorari, DOJ described *Newman* very differently than it suggests here, stating that "the District of Columbia Circuit has not rejected the 'inherent authority' rationale for disclosure in all cases." Br. for U.S. in Opp. 9, *Newman v. United States*, 109 S. Ct. 784 (1989) (No. 88-548). DOJ was correct because, in *Haldeman*, the D.C. Circuit had already rejected the broad argument (made again here) that Rule 6(e) sets forth the only circumstances in which courts may order release of grand jury material.

III. The Second Circuit's Test Properly Balances The Interests In Secrecy Against The Historical Interest In Disclosure, And That Balance Supports Release Of The Records Sought Here.

The Second Circuit's test for assessing when historical importance warrants unsealing of grand jury material turns on consideration of a range of factors reflecting concern for the traditional bases for grand jury secrecy, the effect of the passage of time, and the historical significance that may make certain cases "exceptional." *See In re Petition of Craig*, 131 F.3d at 106; *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 291-97.

A. While DOJ argues that courts have absolutely no authority to allow disclosures that do not fall within a Rule 6(e)(3) exception, DOJ also concedes that many courts, including the D.C., Second, and Eleventh Circuits, and this District Court, have done so. *See* DOJ Opp. 10, nn. 4-5. It thus argues that, if its rigid view that courts lack authority to unseal records outside the scope of Rule 6(e) is again rejected, a rigid rule against disclosure based on historical importance should be adopted. DOJ does not explain why the possibility of disclosure on this ground should be subject to a firm prohibition—it does not suggest any way in which release of records under the Second Circuit's test would threaten grand jury proceedings or undermine the purposes that support secrecy generally; it does not identify any flaw in the Second Circuit's balancing test; it does not intimate that grand jury materials released on this basis have caused any problems for witnesses, targets, or prosecutors. *See In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009)**;** *In re Petition of Nat'l Sec. Archive*, Summary Order, 08 Civ. 6599 (S.D.N.Y. Aug. 26, 2008), ECF No. 3; *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 287-88; *In re Petition of O'Brien*, No. 3-90-X-35 (M.D. Tenn. 1990) (cited in *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 293) (no opinion issued); *In re Petition of May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987) (copy attached to Memo in Sppt. of Pet.). Thus, if unsealing for historical importance is permissible, DOJ would seem to have no objection to application of the Second Circuit's test.

B. DOJ argues that, even if the Court applies the Second Circuit's test, the petition should be denied. Under that test, "merely asserting a public and/or historical interest in grand jury materials will not suffice;" a "'fact-intensive' analysis of the reasons" justifying disclosure is required. *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 284. DOJ does not suggest that petitioners here have not satisfied that burden. Indeed, DOJ's own factual discussion relies entirely on petitioners'

declarations. *See* DOJ Opp. 3. Nonetheless, DOJ argues that the petition should be denied because a few factors, according to DOJ, weigh against disclosure. DOJ's arguments on even those factors is flawed. And notably, although the Second Circuit states a balancing test, DOJ fails to mention most of the factors, much less to discuss the balance, which weighs heavily in favor of petitioners.

First, the identity of the parties seeking disclosure weighs in favor of petitioners. Petitioners include major scholarly groups with an interest in American history and the preservation of historical material. Moreover, petitioners are supported by a major figure in the Watergate scandal and the Nixon Administration (John Dean), one of the prosecutors present when Mr. Nixon testified before the grand jury (Richard Davis), and numerous Nixon and Watergate scholars. DOJ does not address this factor.

Second, the next factor, the position of the defendant and the government, does not affect the balance here. The grand jury handed down no indictments after the Nixon testimony, so there is no defendant. And because the only witness involved, Mr. Nixon, is deceased, he can have no position on the matter. Although the government opposes disclosure, it is plain from the case law, *see In re Petition of Craig*, 131 F.3d at 106, that this factor does not encompass the government's blanket opposition to releases in all circumstances. Rather, the test assumes that release for historical importance is permissible in exceptional circumstances and looks to the government's view of release in the particular case. DOJ's opposition on the ground that release is never appropriate thus is not a factor in the test, and DOJ's only independent bases for opposing release in this case are its brief discussion of two other factors—privacy implications and age of the records. In this case, the government's position therefore has no weight independent of those two factors.

Third, both the reason why disclosure is being sought and the specific material sought also favor petitioners. As the Second Circuit has stated, "an argument that significant historical interest militates in favor of release is totally appropriate and even weighty." *Id*. The request is for a narrow category of records, related to a single witness, and petitioners have explained in depth the historical importance of the records and the need to make them public. DOJ agrees that the records sought are "historically significant." DOJ Opp. 23 n.8.

Fourth, the age of the records—36 years next month—weighs in favor of petitioners. When the testimony was taken, the Vietnam War had only just ended, a gallon of gas cost less than 50 cents, and the average new car cost $4,250. Despite the many changes we have seen since then, historical interest in Watergate and the scandals of the Nixon Administration has "persisted over a number of years"—an "important indication that the public's interest in release of the information is substantial." *In re Petition of Craig*, 131 F.3d at 107. Indisputably, the passage of time "erodes many of the justifications for continued secrecy." *Id.* And grand jury material of comparable age to the material requested here has been released on the basis of historical interest without detriment to the forward-looking interest in grand jury record secrecy. *See In re Petition of May* (copy attached to Memo in Sppt. of Pet.) (ordering release of 35-year-old records of William Remington's grand jury testimony in Hiss case). Nonetheless, DOJ (at 24) says that the records are too "young" to be released. To begin with, by counting from the date when the Watergate Special Prosecution Force "closed its doors," rather than from the date of the grand jury proceedings at issue, DOJ subtracts nearly three years from the age of the material. DOJ Opp. 24 (stating that WSPF ended 33 years ago). More accurately, the grand jury's term expired on July 3, 1975, and the records sought here relate to testimony taken in June 1975. Moreover, it is noteworthy that DOJ does not impose this age-based

objection because of concern about the integrity of grand jury proceedings, but "to protect the privacy of named individuals and their families." Thus, the minimal privacy interest, discussed below, would seem to answer DOJ's comment on the age of the records.

Fifth, the next two factors—current status of the principals of the grand jury proceedings and their families and whether the witness at issue is still alive—also favor release. The only witness whose testimony is sought, President Nixon, has been deceased for seventeen years, and his wife pre-deceased him. *See Richard M. Nixon, 37th President, Dies*, Wash. Post, Apr. 23, 1994, at A1. A large number of other Watergate figures are also deceased. *See* Memo in Sppt. of Pet. 38-39. Coincidentally, then-Congressman Nixon was an important witness in the Alger Hiss grand jury proceedings, the transcripts of which were unsealed in 1999, without objection from Mr. Nixon's family. *See In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d at 280; *Nixon Lobbied Grand Jury to Indict Hiss in Espionage Case, Transcripts Reveal*, N.Y. Times, Oct. 12, 1999.

DOJ, without directly saying that disclosure would invade anyone's privacy, says that disclosure "implicates" privacy concerns. Its primary concern seems to be for people who were not indicted but whose names are mentioned in the transcript. DOJ does not indicate how many such individuals are mentioned or whether they are alive—a fact crucial to assessment of any privacy interest. *See Shrecker v. DOJ*, 254 F.3d 162, 168 (D.C. Cir. 2001) (under Freedom of Information Act's privacy exemptions, death diminishes any privacy interest that might otherwise justify withholding). DOJ also does not indicate whether the names of such people are already part of the public story of the Nixon Administration. Yet many are likely among the 122 who testified before the Senate or at one of the four criminal trials—the transcripts of which were and remain available

to the public.[2] Numerous other Watergate figures wrote books and/or spoke to the media about the events, discussing both their own roles and the roles of other people (both indicted and unindicted). *See* Memo in Sppt. of Pet. 22 n.6 (listing books published in 1970s by Watergate figures), 26 n.8 (listing later books by Watergate figures), 31 (citing book by H.R. Haldeman), 32 (citing Nixon memoir). Moreover, as discussed in more detail in petitioners' earlier memorandum, other portions of Watergate grand jury testimony have been made public. *Id*. at 40-42. Given the tremendous volume of public testimony and the extent to which Watergate figures have testified, written, and spoken about the Nixon White House and the people who worked for the Nixon Administration, DOJ's cursory objection seems entirely theoretical. *Cf. In re Grand Jury Subpoena, Judith Miller*, 493 F.3d at 154 (grand jury information that is sufficiently widely known need not be kept secret under Rule 6(e)(6)); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (same).

Furthermore, if there were a valid privacy concern that was not outweighed by the public interest in disclosure, the Court could address it by ordering that the names of specific people be redacted. DOJ suggests in a footnote that "it is possible" that redaction would render entire portions of the transcript meaningless. DOJ Opp. 24 n.10. Notably, DOJ does not say that such an extensive redaction would in fact be called for—and for good reason, because the public testimony and subsequent publications of so many Watergate figures make any privacy interest minimal at best for most, if not all, of the people involved in the events.

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[2]The Senate Watergate Committee's published report is available online at http://www.maryferrell.org/wiki/index.php/Watergate_Documents, and is available for purchase at http://www.amazon.com/Senate-Watergate-Report-Committee-Initiated/dp/0786717092. The transcripts of the four criminal trials are published in *A Guide to Watergate in Court* (Univ. Publ'ns of Am. 1975) (index available at http://www.lexisnexis.com/documents/academic/upa_cis/1951_Watergatein Court.pdf).

Sixth, DOJ does not dispute that there have been significant disclosures of what transpired before the Watergate grand juries investigating Watergate and the Nixon Administration. *See* Memo in Sppt. of Pet. 40-42. This factor too weighs in favor of petitioners.

Seventh, the last factor looks to the need to maintain secrecy. DOJ does not address it. DOJ's 25-page memorandum gives no explanation of how keeping the Nixon testimony secret serves any legitimate governmental purpose. And if continued secrecy serves no purpose underlying Rule 6(e), then the government's argument that Rule 6(e) trumps in every case is an empty formalism.

On balance, the factors set forth by the Second Circuit weigh overwhelmingly in favor of disclosure. Accordingly, the Court should order release of the requested records.

CONCLUSION

For the foregoing reasons, the petition for an order directing release of the specified records should be granted.

Dated: May 2, 2011

Respectfully submitted,

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