UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE PETITION OF NATIONAL SECURITY)
ARCHIVE, AMERICAN HISTORICAL)
ASSOCIATION, AMERICAN SOCIETY OF LEGAL) Misc. No. 11-188
HISTORY, ORGANIZATION OF AMERICAN)
HISTORIANS, SOCIETY OF AMERICAN)
ARCHIVISTS, AND SAM ROBERTS)
FOR ORDER DIRECTING RELEASE OF)
GRAND JURY MINUTES)

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PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION TO UNSEAL GRAND JURY RECORDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .... *ii*

INTRODUCTION.. 1

I. **David Greenglass's Grand Jury Testimony Should Be Unsealed**..............

II. **The Brothman-Moskowitz Records Historically Valuable And Essential To A Compete Understanding Of The Rosenberg Case**...........

A. *Disclosure of the Brothman-Moskowitz Records is Necessary to Complete the Historical Record on the Rosenberg Case* 14

B. *The Government's Data Prove Nothing About The Brothman-Moskowitz Material*...18

C. *This Court Has Ordered Release of Grand Jury Records to Shed Light on Historically Important Prosecutions*...20

III. **The Court Should Apply A Presumption That Grand Jury Records May Be Disclosed Fifty Years After The Close of Proceedings**................

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 6

In re Am. Historical Ass'n, 49 F. Supp. 2d 284 (S.D.N.Y. 1999) . 1, 3, 5, 6, 11, 21, 22, 23, 26

In re Am. Historical Ass'n, 62 F. Supp. 2d 1100 (S.D.N.Y. 1999) 11

In re Biaggi, 4789 F. 2d 489 (2d Cir. 1973)... 12, 13

In re Craig, 131 F.3d 99 (2d Cir. 1997).. 1, 3, 5, 21

Executive Securities Corp. v Doe, 702 F.2d 406 (2d Cir. 1983)..24

In re May, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987)..................................5, 11, 22, 26

In re North, 16 F.3d 1234 (D.C. Cir. 1994)..6

Schrecker v. Dep't of Justice, 349 F.3d 657 (D.C. Cir. 2003)..25

Statutes and Rules:

5 U.S.C. § 552 25

18 U.S.C. § 3500 23

44 U.S.C. § 2107 14

Rule 26.2, Federal Rules of Criminal Procedure 23

Miscellaneous:

FBI, *The Rosenberg Espionage Conspiracy: "Look" Magazine* (Sept. 15, 1953) 17

Ronald Radosh & Joyce Milton, *The Rosenberg File* (2d ed. 1997) 6, 9

Sam Roberts, *The Brother: The Untold Story of Atomic Spy David Greenglass and How He Sent His Sister, Ethel Rosenberg, to the Electric Chair* (2001) 6

U.S. Senate Committee on the Judiciary, *Hearings before the Subcomm. to Investigate the Administration of the Internal Security Act and other Internal Security Laws, "Interlocking Subversion in Government Departments*," Hearings, 83rd and 84th Cong. (1953-56) 15

60 Minutes, *Cold War, Colder Brother, David Greenglass Tells CBS He Wanted to Save Himself* (Dec. 5, 2001) 7

60 Minutes, *Traitor, David Greenglass Testified Against His Own Sister* (July 16, 2003) 7, 8-10

U.S. Attorney's Manual, *Procurement/Property Management*, § 3-13-301(13).................... 14

Sidney Zion, *The Autobiography of Roy Cohn* (1988) 15, 22

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PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION TO UNSEAL GRAND JURY RECORDS

The government's memorandum in partial opposition to petitioners' motion to unseal the Rosenberg grand jury records takes, for the most part, a reasonable position on access to historically important grand jury records. In contrast to its position in prior cases, including the *Hiss* grand jury case, *In re American Historical Association*, 49 F. Supp. 2d 284 (S.D.N.Y. 1999), the government here acknowledges that significant historical importance constitutes a "special circumstance" that may justify the disclosure of grand jury material, and that the Rosenberg prosecution is a case of significant historical importance. Based on that understanding, the government agrees that the testimony of thirty-five of the forty-five Rosenberg grand jury witnesses should be made public. Although the government's "position is not dispositive," *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997), it "should be paid considerable heed." *Id.* Based on the undisputed historical importance of these records, and the lack of objection to disclosure, petitioners respectfully urge the Court immediately to enter an order unsealing the testimony of those thirty-five witnesses.

Although there is much on which petitioners and the government agree, there remain three points of disagreement that are the focus of this reply memorandum:

First, David Greenglass's grand jury testimony should be unsealed. The government argues that the Court should not unseal grand jury testimony of witnesses who have lodged objections to disclosure. Contrary to the government's suggestion, there is no categorical rule giving grand jury witnesses veto power over the disclosure of their testimony. As demonstrated below, Greenglass's testimony should be made public because he has waived any privacy interest he may have had in keeping his testimony confidential. Greenglass has repeatedly discussed the case with historians and journalists, and he admits he falsely testified that Ethel Rosenberg typed up his notes on the atomic bomb — the most damning testimony against Ethel — because he was pressured to do so by prosecutors. Having raised the specter of his own perjury and possible prosecutorial misconduct, Greenglass's effort to keep his testimony a secret is nothing short of audacious.

Second, the Court should unseal the grand jury records relating to the Brothman-Moskowitz prosecution. The declarations of the numerous expert Cold War historians establish that the Brothman-Moskowitz prosecution — one of the early Cold War Soviet espionage trials — although important in its own right, is especially significant to understanding the Rosenberg-Sobell case because of the interlocking nature of the two prosecutions. This is not just petitioners' view; it has been the government's as well. The government treated these cases as interconnected because both cases: (a) involved the same prosecutors, government investigators, and trial judge; (b) focused on allegations of industrial espionage by Soviet spy-rings connected by Jacob Golos (who

managed both rings for a time) and by Harry Gold and Elizabeth Bentley; (c) were the product of the same FBI investigation; (d) were based on grand jury testimony heard at the same time; and (e) turned on key testimony from the two same witnesses: Elizabeth Bentley (the "red queen spy"), whose "this is Julius" testimony was the capstone of government's case in Rosenberg, and Harry Gold, the courier who served as go-between for the Soviets and David Greenglass, Abraham Brothman, *and* Klaus Fuchs and then turned FBI informer. Gold's testimony was pivotal in both prosecutions.

The government's arguments against disclosure are insubstantial. For one thing, the government's argument that the Brothman-Moskowitz case is not of exceptional importance conflicts with the uniform opinion of petitioners' expert historians. Tellingly, the government's view is not supported by a single historian or Cold War expert. Rather, the government relies solely on research of computer databases, which go back only to the mid-1960s. As petitioners' experts explain, this "research" proves nothing. The government also suggests that it would be improper for the Court to release the Brothman-Moskowitz records to shed light on the Rosenberg case. But this Court (Leisure, J.) did just that in *Hiss*, ordering the release of grand jury records compiled to indict Harry Dexter White because those records would shed light on the Hiss prosecution. *In re Am. Historical Ass'n*, 49 F. Supp. 2d at 290-91.

Third, the Court should reject the government's argument that the grand jury testimony of seven witnesses should remain sealed because the government cannot locate them or establish that they have died or that they would be more than one hundred years old. As a legal matter, the case law does not adopt a 100-year bright line test and this Court should reject the government's invitation to do so. As a factual matter, the

difficulty with the government's approach is that it fails to take into account the high likelihood that if the government cannot find a witness who testified in a grand jury proceeding nearly sixty years ago, that witness has passed away. Indeed, at least two of the witnesses placed in the "status unknown" category by the government, Perry Alexander Seay and William Perl, are in fact dead, and a third, Michael Sidorovich, likely is dead. The point is not that the government's efforts were lacking; to the contrary, petitioners recognize the substantial resources the government brought to bear in trying to determine the status of the witnesses. But if the government, with all its resources, cannot find a witness in a proceeding that occurred fifty-eight years ago, it is fair to assume, absent evidence to the contrary, that the witness is no longer living.

I. David Greenglass's Grand Jury Testimony Should Be Unsealed.

The government argues that the grand jury testimony of the three witnesses who object to disclosure should remain sealed, presumably until their deaths. The three witnesses are David Greenglass, William Danziger, and Max Elitcher. Petitioners recognize that, at this point, the privacy interests of Elitcher and Danziger may justify keeping their testimony under seal until their deaths.[1] David Greenglass, however, has

[1] Petitioners do not contest the government's argument that the grand jury testimony of Max Elitcher should remain sealed at this time. Although petitioners argued that Elitcher's grand jury testimony was provided to defense lawyers during trial — a point the government acknowledges — petitioners have been unable to locate copies of that testimony or references to it in other historical sources. Given the limited nature of this disclosure, the limited use of Elitcher's grand jury testimony at trial, Elitcher's unwillingness to describe the content of that testimony to historians or journalists, and the overall circumstances of this case, petitioners withdraw their claim to his testimony at this point. Danziger is a closer case. FBI records summarize his grand jury testimony in some detail, especially the role that he played in helping the FBI track down Morton Sobell in Mexico. Nonetheless, like Elitcher, Danziger has done nothing since his trial testimony to reveal his grand jury testimony or his role in the prosecution. For these reasons, petitioners withdraw their claim to his testimony as well at this point. However, as petitioners suggest in Point III, *infra*, the Court should enter an order requiring the disclosure of the grand jury testimony of Elitcher and Danziger — and those witnesses who cannot be located at this time — once they pass away.

forfeited any expectation of privacy in his grand jury testimony and there is no sound reason why it should not be unsealed forthwith. Indeed, given his confession of perjury and his accusations of prosecutorial misconduct, the case for unsealing his grand jury testimony is overwhelming.

The government's claim that grand jury witnesses have an entitlement to privacy is overstated. *See* Gov't Mem. at 18-21. Grand jury witnesses have no right to veto the release of their testimony. Indeed, courts have rejected the categorical approach the government urges because there are at least three reasons which may justify the release of grand jury testimony, notwithstanding the objections of the witness.

To begin with, where there already has been disclosure of the witness' testimony "many of the reasons for secrecy" have been "undercut." *In re Craig*, 131 F.3d 99, 107 (2d Cir. 1997); *see In re Petition of May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987) (ordering release of the William Walker Remington grand jury records in part because of partial disclosures); *In re North*, 16 F.3d 1234, 1244-45 (D.C. Cir. 1994) (upholding release of grand jury information regarding accusations against persons not indicted or convicted because information had been leaked to the press and widely publicized).

Next, where testimony may shed light on prosecutorial misconduct, the public's "strong interest in . . . the administration of justice" may trump objections to disclosure. *See In re Am. Historical Ass'n*, 49 F. Supp. 2d at 296-97 (ordering the disclosure of Hiss grand jury records in part because the grand jury foreman collaborated with Elizabeth Bentley in her efforts to publish her memoirs); *In re Petition of May*, slip op. at 4 (ordering release of the Remington grand jury records because of the public's need for "complete and accurate historical evidence" relating to possible grand jury abuses).

Finally, where the witness was in fact prosecuted and convicted of the crime charged any concern about tarnishing the reputations of the innocent and unindicted vanishes. Grand jury secrecy functions to "protect[] the reputations and well-being of innocent subjects of grand jury investigations, by attempting to keep them and the public at large ignorant of the proceedings, or at least by confining the extent of public disclosure." *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 218-19 (1979). This Court in *In re American Historical Ass'n*, 62 F. Supp. 2d 1100, 1102 (S.D.N.Y. 1999), echoed that sentiment, noting that the "cornerstone of the grand jury secrecy rule is the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but who are never indicted." These interests are not served by protecting the grand jury testimony of someone who not only confessed to his crime but also admits that he perjured himself. Each of these factors counsels in favor of the release of David Greenglass's grand jury records.

First, there has been widespread disclosure *by Greenglass himself* of his testimony relating to the Rosenbergs. Greenglass has told his side of the story to historians, including Ronald Radosh, co-author of *The Rosenberg File*, and Sam Roberts, author of *The Brother: The Untold Story of Atomic Spy David Greenglass and How He Sent His Sister, Ethel Rosenberg, to the Electric Chair*. Greenglass also chose to discuss the case in detail with the media, including extensive taped interviews with *60 Minutes*, which formed the centerpiece of two feature stories on Greenglass's role in the Rosenberg prosecution.[2]

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[2] *Cold War, Colder Brother, David Greenglass Tells CBS He Wanted To Save Himself* (Dec. 5, 2001) (hereinafter "*60 Minutes, Cold War*"), available at: http://www.cbsnews.com/stories/2001/12/05/60II/main320135.shtml?source=search_story; *The Traitor, David Greenglass Testified Against His Own Sister* (July 16, 2003) (hereinafter "*60*

Greenglass did not put his grand jury testimony off-limits in any of these interviews. As Sam Roberts put it in his Supplemental Declaration, Greenglass agreed to meet with him subject to only two conditions: "he wanted to be paid," and "he did not want his current identity to be revealed." Supplemental Declaration of Sam Roberts at ¶ 4 (hereinafter Roberts Supp. Decl.). Other than those conditions, "[d]uring 50 hours or so of otherwise no-holds barred interviews, Greenglass never placed any additional restrictions on our conversations concerning his grand jury testimony, his interviews with federal agents or prosecutors, or anything else. The fact that he agreed to speak for compensation suggests that no other inhibition was compelling enough to dissuade him from being interviewed by me fully and extensively." *Id.* at ¶ 5. Professor Ronald Radosh recounts a similarly unimpeded interview with Greenglass, although he did not have to pay him, but instead just bought dinner for David and Ruth Greenglass and their lawyer. According to Radosh, "The agreed upon terms of the interview was that nothing regarding the case was off limits. We were particularly interested in the obvious discrepancies between what he told the FBI, as revealed in the Bureau's files on the case, and his testimony at the trial." Radosh Supp. Decl. ¶ 2. David Greenglass's paid interviews with *60 Minutes* also were conducted without limitations, other than Greenglass's demand that *60 Minutes* "disguise his face and voice." *See* Roberts Supp. Decl. ¶ 5; *60 Minutes*, *The Traitor*.[3]

Minutes, Traitor"), available at:
http://www.cbsnews.com/stories/2003/07/14/60II/main563126.shtml?source=search_story.

[3] Greenglass's willingness to tell all comers his story — including about his appearance before the grand jury — make the public disclosure and waiver arguments far more compelling here than in cases like *North*, 16 F.3d 1234, where the grand jury information was leaked to the press and involved individuals who did nothing to waive their privacy interest in grand jury secrecy.

In the face of these multiple, unrestricted and marathon interviews with historians and journalists, Greenglass's plea for privacy comes as too little too late. He has waived whatever privacy interests he once may have had. Professor Radosh makes the point well: "[H]is claim of privacy makes no sense. Greenglass has already by his own words said things that portray him in an unfavorable way, and has spoken completely about every aspect of his testimony and about the case. Therefore, as a historian and writer about the case, I would argue that release of his testimony would provide the final remaining evidence from Greenglass about his role and activities, as well as that of Juilius and Ethel Rosenberg. For the sake of historical truth and accuracy, the public deserves that the transcript be released." Radosh Supp. Decl. ¶ 5.

Second, Greenglass's grand jury testimony will shed light on both alleged prosecutorial misconduct and Greenglass's own perjury. Among other things, Greenglass acknowledges that he confessed and cooperated with the FBI to ensure that his wife, Ruth Greenglass, who passed atomic secrets from Greenglass to Harry Gold and may have typed David Greenglass's notes about the atomic bomb, was not indicted for her role in the conspiracy. Greenglass told Sam Roberts that he "cooperated with the government from the very beginning for two reasons and only two: to spare his wife, Ruth, prosecution; and to win leniency for himself." Roberts Supp. Decl. ¶ 7. Greenglass repeated the point to *60 Minutes*: "That is what I told the FBI. . . . I said that 'if you indict my wife, you can forget it. I'll never say a word about anybody.'" *60 Minutes*, *The Traitor*.

At trial, Greenglass delivered the most damning evidence presented against Ethel Rosenberg. Greenglass testified that Ethel — Greenglass's sister — typed his notes on

the design of atomic bomb. But Greenglass did not tell this to the FBI when he was questioned. FBI interview notes show that Greenglass was repeatedly interrogated about Ethel's role but — until the eve of trial — always denied she was present when he and Julius Rosenberg discussed Greenglass's espionage activity. Prosecutor Myles Lane asked Greenglass point-blank: "Was Ethel present on any of these occasions [when he gave Julius information]?" Greenglass replied, "Never." Lane followed up by asking: "Did Ethel ever talk to you about it?" Greenglass responded: "Never spoke to me and that's a fact." Radosh and Milton, *The Rosenberg File* 164-65 (2d ed. Yale Univ. Press 1997) (recounting this exchange). Ruth Greenglass too had been repeatedly interviewed by the FBI but never mentioned any involvement of Ethel. *Id.*

With no evidence directly linking Ethel to the conspiracy, prosecutors were worried that they could not make out a case against her. Then, during a pre-trial preparation session with prosecutors less than two weeks before trial, Ruth Greenglass belatedly "remembered" that Ethel had typed Greenglass's notes about the atomic bomb. *Id.; see* Roberts Supp. Decl. ¶ 7. Sam Roberts explains Greenglass's about-face this way: "Confronted with his wife's account and fully cognizant of the government's tenuous bargain with him and his wife, David corroborated it. 'My wife put her in,' he told me. 'So what am I gonna do, call my wife a liar?'" *Id.* ¶ 8. The prosecution would not have introduced this testimony without David Greenglass's corroboration; David testified that Ethel did his typing and Ruth followed on the stand as a corroborating witness. *Id.* ¶ 8. Their testimony sent Ethel Rosenberg to the electric chair. *Id.* ¶ 9.

Greenglass has since told Sam Roberts, *60 Minutes*, and others that "he had lied in his testimony, that he had no recollection — then or now — as to whether Ethel typed his

notes or not." Roberts Initial Decl. ¶ 8; *60 Minutes, The Traitor*. Indeed, Greenglass told Roberts, "I frankly think that my wife did the typing, but I don't remember." *Id*. Greenglass claims that he was pressured into placing the blame on Ethel by prosecutor Roy Cohn. Greenglass said "he had no recollection then or since that Ethel typed those notes, but was pointedly reminded by prosecutors — Assistant United States Attorney Roy Cohn, in particular — that the government could withdraw at any time its agreement not to indict Ruth and could still recommend a harsher sentence for him." Roberts Supp. Decl. ¶ 8. Greenglass's account to *60 Minutes* also accuses the prosecution of forcing him to lie on the stand. When asked why he lied, Greenglass told *60 Minutes* "Roy Cohn, an assistant prosecutor in the Rosenberg case, made him do it." *The Traitor*.

Greenglass's testimony was crucial in securing the government's conviction of Ethel Rosenberg. As Sam Roberts point out, Greenglass's "testimony made the government's case [against Ethel], was cited by the chief prosecutor and judge in justifying the death penalty against Ethel and sealed the bargain not to prosecute Ruth and to grant David a lesser sentence than other defendants." Roberts Supp. Decl. ¶ 9.

The allegations of prosecutorial misconduct in the Rosenberg prosecution amply justify unsealing Greenglass's grand jury testimony. Greenglass has alleged publicly and repeatedly that he was pressured to lie by prosecutors. Greenglass's claim of prosecutorial misconduct, moreover, is backed up by the FBI's extensive interviews with both David and Ruth Greenglass, which demonstrate an about-face on Ethel's role in the conspiracy so abrupt, troubling, and beneficial to the prosecution that scholars uniformly worry that Ethel was convicted on the basis of testimony prosecutors knew to be at best unreliable and at worst rank perjury.

At least twice before, grand jury records have been released, at least in part, to uncover alleged prosecutorial misconduct less weighty than that at issue here. In the *Hiss* case, this Court found that possible abuses before the John Doe II grand jury justified release of much of the testimony. There, the grand jury foreman, John Brunini, had collaborated with Elizabeth Bentley, a key witness, to publish her memoir. *In re Am. Historical Ass'n*, 49 F.2d at 296-97. In the *Remington* grand jury case as well, this Court (Knapp, J.) found that allegations of abuse of witnesses — including of Ann Remington, the wife of William Remington, who later was indicted and tried for perjury — justified release of the grand jury transcripts. *In re Petition of May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987). As noted, the allegations of prosecutorial conduct are far more serious here. For this reason as well, the Court should order David Greenglass's grand jury testimony released.

Third, having raised the specter of his own perjury and possible prosecutorial misconduct, the effort by Greenglass to keep his grand jury testimony a secret is nothing short of audacious. As noted above, the "cornerstone of the grand jury secrecy rule is the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but who are never indicted." *In re Am. Historical Ass'n*, 62 F. Supp. 2d 1100, 1102 (S.D.N.Y. 1999). Having cast himself in the role of perjurer, there is nothing we could learn from the grand jury testimony that would do damage to Greenglass's reputation that he has not already inflicted on himself. Nor does the law require the continued sealing of his testimony. Greenglass waived whatever reasonable expectation of privacy he might otherwise have had by speaking freely with historians and journalists,

by admitting that he lied under oath, and by pointing an accusing finger at prosecutors who he claims pressured him to lie.

In addition to the authorities cited above, Greenglass's plea for secrecy runs counter to the Second Circuit's ruling in *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). That action was the centerpiece of then-Congressman Mario Biaggi's effort to manipulate the grand jury process to gain political advantage. After Biaggi was called before a federal grand jury investigating his finances and his role in immigration matters, the *New York Times* reported that, according to "an authoritative source," Biaggi had repeatedly invoked the Fifth Amendment. *Id.* at 490-91. Biaggi then moved the district court to appoint three judges to determine whether he had in fact invoked the Fifth Amendment to avoid answering questions about his finances. The U.S. Attorney moved for an order disclosing *all* of Biaggi's testimony, redacted only to protect the names of other persons. The district court granted the U.S. Attorney's motion. Biaggi then moved to have his testimony released without redactions, but the court denied his motion.

The Second Circuit (Friendly, J.) affirmed. Having sought the disclosure of his own testimony, the Court reasoned, Biaggi waived the protection ordinarily accorded to grand jury records. *Id.* at 493. In a supplemental opinion, the Court went on to point out that Biaggi's initial motion for a three-judge review of his grand jury testimony "was framed, wittingly or not, in such a manner as to create a false impression in light of the publicity that had given rise to it." *Id.* at 494. Once disclosed, the minutes demonstrated that Biaggi had in fact refused to answer seventeen questions. The Court was unwilling to be party to Biaggi's gamesmanship, and accordingly affirmed the disclosure of grand jury records.

The same concern is present here. Greenglass cannot plausibly claim that he retains any privacy interest in his grand jury testimony. Greenglass has told his story repeatedly to anyone who would pay him, and even to some like Ronald Radosh who simply bought him dinner. Acceding to Greenglass's request to keep his grand jury testimony sealed would serve none of the purposes of grand jury secrecy outlined in *Douglas Oil* or *In re Craig*, but would undermine the strong public interest in getting to the bottom of his claims that he lied under oath at trial, resulting in the execution of his sister, and that he did so because he was pressured by the prosecution.

II. The Brothman-Moskowitz Records Are Historically Valuable And Essential To A Complete Understanding Of The Rosenberg Case.

The government contends that the Brothman-Moskowitz prosecution was not sufficiently important as an historical matter to trigger the special circumstances exception. It therefore opposes the release of any of the grand jury testimony, even to shed light on the Rosenberg prosecution. Gov't Mem. at 30-33. The government even disputes that the Brothman-Moskowitz trial served as a "dress rehearsal" for the Rosenberg case. *Id.* at 32 n.17. What is telling about the government's argument is the government's inability to find a single, reputable historian willing to espouse this position. It is not as if the government lacks access to Cold War historians. The Rosenberg and Brothman-Moskowitz records are in the possession of the National Archives and Records Administration (NARA), which is staffed by historians and archivists and headed by eminent Cold War historian Allen Weinstein.

Why then has the government relied on rhetoric rather than expert historical evidence? The answer is this: Regardless of whether the Court agrees with petitioners' experts that the Brothman-Moskowitz prosecution is sufficiently important in its own

right to justify release of the records,[4] there is a consensus among historians that, because of the interlocking nature of the two prosecutions, examination of the Brothman-Moskowitz grand jury material is critical to an understanding of the Rosenberg case. This consensus is not based on "petitioners' own conjecture," as the government argues, but hard historical facts.

Petitioners show below that there is a clear linkage between the two prosecutions and that the Brothman-Moskowitz grand jury records are certain to shed light on the Rosenberg case. Petitioners then explain why the government's historical argument proves nothing. Finally, petitioners demonstrate that the courts have approved disclosure of grand jury records to shed light on historically important prosecutions.

A. *Disclosure of the Brothman-Moskowitz Records is Necessary to Complete the Historical Record on the Rosenberg Case*.

As is set forth in petitioners' initial submissions, and in the supplemental declarations of noted Cold War historians Bruce Craig, Sam Roberts, Steve Usdin, Ronald Radosh, and Allen Hornblum, the Brothman-Moskowitz and Rosenberg prosecutions were together the centerpiece of what the government itself understood as interlocking prosecutions of individuals who were part of a coordinated Soviet industrial espionage effort. Here are just some of the indicia of the inter-connections:

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[4] *See, e.g.*, Craig Supp. Decl. ¶ 6 (pointing out that the U.S. Attorney's Office and NARA have determined that the Brothman-Moskowitz case is sufficiently important as a historical matter that all records relating to the case merit preservation and have been placed in the NARA's "permanent" collection). That determination is not made lightly. *See* 44 U.S.C. § 2107 (requiring that material added to NARA's permanent collection "have sufficient historical or other value to warrant their continued preservation"). Most grand jury records do not qualify under this test and are destroyed after all proceedings have closed. Craig Supp. Decl.¶ 6; *see also* U.S. Attorney's Manual, *Procurement/Property Management*, § 3-13.310(13) (setting timetable for destruction of grand jury records). The government nowhere explains how its position in this case can be reconciled with NARA's determination to add the Brothman-Moskowitz records to its permanent collection.

* The word “interlocking” is not petitioners’; it is the United States Senate’s. The Senate Judiciary Committee investigated what it termed “Interlocking Subversion in Government Departments” — an inquiry that focused a spotlight on the Gold-Brothman-Moskowitz-Rosenberg prosecutions and resulted in a massive, thirty-part hearing record. *See* Committee on the Judiciary, Subcomm. to Investigate the Administration of the Internal Security Act and other Internal Security Laws, “*Interlocking Subversion in Government Departments*,” Hearings, 83d and 84th Cong. (1953-56).

* Professor Ronald Radosh is not the only one to observe that “the Brothman-Moskowitz trial served as a tune-up for the more important Rosenberg-Sobell trial to come.” Radosh & Milton, *The Rosenberg File* at 153. Roy Cohn, one the principal prosecutors in both cases, said the same thing. In his autobiography, Cohn says he saw “the Brothman-Moskowitz as a dry-run of the upcoming Rosenberg trial. We were able to see how Gold and Bentley fared on the stand, and we were able to see how *we* fared, Saypol and I.” Sidney Zion, *The Autobiography of Roy Cohn* 66 (Lyle Stuart 1988) (emphasis in original); *see id.* at 75 (discussing the relevance of the cross-examination of Harry Gold in the Brothman-Moskowitz trial to the Rosenberg prosecution).

* The Brothman-Moskowitz and Rosenberg prosecutions were products of the same FBI investigation. Usdin Supp. Decl. ¶¶ 3-9; Craig Supp. Decl. ¶ ¶ 3-16. Indeed, one of the ironies here is that although the government suggests that the prosecutions were compartmentalized, the U.S. Attorney’s file-keeping practices refute that contention. The government’s investigations into Harry Gold, Abraham Brothman, Miriam Moskowitz, David and Ruth Greenglass, Julius and Ethel Rosenberg, and Morton Sobell, were a single, integrated investigation. For that reason, the U.S. Attorney’s office

stored all of its investigatory records in one file system — what Bruce Craig describes as a "single, sequential subseries numbering system" — apparently the technical term for an integrated filing system. Craig Supp. Decl. ¶ 9. Professor Craig points out that "it would have been impractical, if not impossible, for the U.S. Attorney's office to compile and use the case files in any other way." *Id.* He cites Harry Gold as an example: "Harry Gold's testimony — and the witnesses called in the government's investigation into Gold's activities — relate not only to Gold's admissions of guilt and his trial, but to the alleged activities of Brothman, Moskowitz, the Rosenbergs, Klaus Fuchs, and others. After all, Gold served as a Soviet go-between not just with David Greenglass (having visited Greenglass in New Mexico to carry back atomic secrets), but also with Abraham Brothman, Klaus Fuchs and others. This testimony could not have been as compartmentalized as the government's argument suggests." *Id.*

* The FBI's files reflect the coordinated nature of its investigation. For instance, the FBI described the fortuity for the FBI of Harry Gold's simultaneous participation in both the "Brothman" and "Rosenberg" spy rings in a summary of the Rosenberg case prepared for *Look* magazine in September 1953. *See* Usdin Supp. Decl. ¶ 8. The FBI reported that it "is interesting to note that the Soviet intelligence services, in utilizing Gold to contact Greenglass, made a mistake in security which ultimately led to the uncovering of the Rosenberg spy ring, a network independent of the one Gold was involved in." *See* FBI Memorandum: *The Rosenberg Espionage Conspiracy: "Look" Magazine* at 43 (Sept. 15, 1953), available at: http://foia/fbi.rosen/rosen1.pdf. The summary notes that standard Soviet practice was to keep networks distinct, with members of one network absolutely ignorant of the composition of other networks, "so that in the

event one network is detected [by counterintelligence], the other will not be compromised." By using Gold to communicate with both Brothman and Julius Rosenberg's brother-in-law David Greenglass, the KGB violated this principle. "The Soviets have undoubtedly found good reason to regret this error in judgment," the FBI summary noted, since the error brought down both espionage rings. *Id.*

* More than anything else, the facts themselves underscore the relationship between the two prosecutions. As the supplemental declarations of Craig, Radosh, Usdin, Roberts and Hornblum all stress,[5] the common threads that tie the two case together are that both (a) involved the same prosecutors, government investigators, and trial judge; (b) focused on allegations of industrial espionage by an interlocking spy ring, initially connected by Jacob Golos — a key Soviet operative — and later by Harry Gold and Elizabeth Bentley; (c) were the outgrowth of the same FBI investigation; (d) were based on grand jury testimony heard before the same grand jury at the same time (indeed, Harry Gold's testimony in his own case ends at grand jury transcript page 9085, and his testimony in the Rosenberg matter begins on the following page); and (e) turned on key testimony from the two same witnesses: Elizabeth Bentley (the "red queen spy"), whose "this is Julius" testimony was the theatrical capstone of government's case in Rosenberg, and Harry Gold, the courier-turned-FBI-informer who served as go-between for the Soviets and David Greenglass, Abraham Brothman, *and* Klaus Fuchs. Gold's testimony was pivotal in both prosecutions.

[5] *See* Craig Supp. Decl. ¶¶ 3-16; Radosh Supp. Decl. ¶¶ 6-11; Usdin Supp. Decl. ¶¶ 3-9; Roberts Supp. Decl. ¶¶ 11 & 12; Hornblum Supp. Decl. ¶¶ 2-14.

B. *The Government's Data Prove Nothing About the Significance of the Brothman-Moskowitz Material*.

In the face of all of this evidence, the government provides no factual or scholarly support for its position. Instead, it offers an unconvincing hodge-podge of data drawn from modern source materials — mostly dating back only to the mid-1970s or later — to claim that the Brothman-Moskowitz prosecution, which took place in 1950, lacks significant historical importance. None of the databases the government searched includes historical material contemporaneous with the "Red Scare," the espionage trials, their aftermath, or even the bulk of the historical debate over Soviet espionage in the United States. Nor do these databases cover scholarly books and articles — contemporary or historic — which are the key sources on the Rosenberg case and address the Brothman-Moskowitz trial in great depth. By way of illustration, Radosh and Milton's *The Rosenberg File*, perhaps the most comprehensive and respected exposition of the Rosenberg case, devotes dozens of pages to Brothman and Moskowitz. *See* Craig Supp. Dec. ¶¶ 11 & 12.

The government's methodology in trying to ascertain the historical importance of Brothman-Moskowitz is so Procrustean that its results tell one virtually nothing about the historical significance of the case. As explained in the declaration of Kristin Adair, for the most part, the government searched only databases containing *recent* news articles: the *New York Times* database, 1969 to the present, goes back the furthest while the *Los Angeles Times'* coverage begins in 1985. Adair Decl. at ¶ 8. The results, of course, would have been strikingly different had the government broadened its search to reach the 1950s and 1960s. Ms. Adair conducted additional searches for news coverage of the Brothman-Moskowitz trial and not surprisingly there are many articles. Her search of the

New York Times through the ProQuest Historical Newspapers database found 44 *Times* articles on the trial, most of which were published in 1950-51. *Id.* at ¶ 9. Using the same database, her search of *The Washington Post* uncovered 22 articles about the case. *Id.*

To compare the recent coverage of Brothman-Moskowitz to the recent coverage of defendants in other high-profile 1950s-era trials, Ms. Adair conducted a broad news search on William Remington, who was tried and convicted of perjury in two related trials in 1950 and 1953. She found only 30 recent matches, and only a few of those focused on Remington or his perjury trial. *Id.* at ¶ 10. Nonetheless, in *In re Petition of May*, this Court ordered the Remington grand jury records released. To determine whether Ethel Rosenberg remains a matter of ongoing controversy, Ms. Adair searched Ethel's name for just 2007; her search turned up 151 results, which is consistent with the government's findings. *Id.* at ¶ 11. But unlike the government, Ms. Adair did not just *count* stories, she actually *read* them. It turned out that "most were articles with only passing reference to Mrs. Rosenberg — for example, obituaries of individuals involved in espionage activities in the 1950s, book reviews, arts and theater items that reference the Rosenbergs, and mention of Ethel's execution in stories about other women who have been given the death penalty." *Id.* Thus, it is hard to see what, if anything, the government's statistics about the recent news coverage of the Brothman-Moskowitz case prove. *See also* Craig Supp. Dec. ¶¶ 11 & 12.

C. *This Court Has Ordered the Release of Grand Jury Records to Shed Light on Historically Important Prosecutions*.

Petitioners submit that the Brothman-Moskowitz grand jury records are sufficiently important as a historical matter to warrant their release under the "special circumstances" test laid down in *In re Craig*. Even if the Court disagrees, the Brothman-Moskowitz grand jury records should be disclosed because of the considerable light they will shed on the Rosenberg case.

The government contends that this argument amounts to an effort by petitioners "to piggyback on the notoriety surrounding the Rosenberg matter to unseal records in a far less important, and distinct case." Gov't Mem. at 33. The government goes on to contend that there is "absolutely no authority for the proposition that the extraordinary 'special circumstances' exception . . . extends so far as to encompass cases that are alleged to be important only insofar as they have some nexus to another case of historical interest." *Id*. The government is wrong on both counts. Petitioners have already shown that Brothman-Moskowitz is hardly a "far less important, and distant case."

But the government also misses the mark in arguing that this Court has not released grand jury records in related proceedings to shed light on historically important prosecutions. Indeed, the government itself cites the key case on this point, *In re American Historical Ass'n*, but then ignores the opinion's discussion of this issue. Gov't Mem. at 33. To be sure, as the government notes, the *American Historical Association* Court observes that the Harry Dexter White petition was denied because the petitioner failed to substantiate the alleged public interest in disclosure, *id*. (citing 49 F. Supp. 2d at 284), but the government then disregards the Court's subsequent decision *to release* the

Harry Dexter White records precisely because they would shed light on the Hiss prosecution. *See* 49 F. Supp. 2d at 290-291. As the Court put it:

> Craig's petition sought only the testimony of White before the Doe I grand jury. The instant petition seeks a much broader range of materials spanning both special grand jury proceedings. In addition, to the extent the petitions overlap, the evidence submitted in support of disclosure, and the rationale for disclosure, is different in each case. Craig sought disclosure of White's testimony based on its asserted relevance to the allegations against White. *See Craig*, 131 F.3d at 101. Petitioners, on contrast, seek that testimony based on its alleged relevant to allegations against a different and undisputedly more important historical figure, Hiss, as well to a number of broader historical issues.

In re Am. Historical Ass'n, 49 F. Supp. 2d at 290-91. Based on those considerations, and the fact that the Hiss grand jury records "would provide additional and historically important insight" about the "extent of Soviet espionage activity in the United States during and following World War II," the Court ordered the White testimony released, notwithstanding the prior ruling in *In re Craig*. *Id.* at 296.

This case is no different. Even assuming that the Brothman-Moskowitz material does not meet the significant historical interest standard in its own right (a proposition petitioners' dispute), under the logic of *In re American Historical Association* the material should be released nonetheless, because it relates to "allegations against a different and undisputedly more important historical figure, [the Rosenbergs], as well to a number of broader historical issues." *Id.* at 291.[6]

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[6] At a minimum, the Court should order the release of the grand jury transcripts of Harry Gold and Elizabeth Bentley. As noted above, they were key witnesses in both trials and Bentley was not called before the Rosenberg grand jury although she did testify at the Rosenberg trial. Moreover, although the *Hiss* Court ordered her grand jury testimony in that case released, the government could not locate it and it has not been made public. Gold's testimony is especially important since, as Roy Cohn points out, although he was subject to withering cross in the Brothman-Moskowitz case and had "admitted to living a life of lies," the lawyer for the Rosenbergs did not cross examine Gold, committing what Cohn claims was a "strategic disaster,"

III. The Court Should Apply A Presumption That Grand Jury Records May Be Disclosed Fifty Years After The Close Of Proceedings.

The government has identified seven witnesses whose status is "unknown." The government contends that, because none of these witnesses would be over 100 years old if alive, the Court should refuse to unseal their grand jury testimony at this time. The government claims that this rule is required both to protect the integrity of the grand jury process and to avoid an invasion of the privacy interests of witnesses who are still living. Gov't Mem. at 18-25. The government acknowledges that on proof of death, or the passage of 100 years, the testimony of these witnesses should be unsealed.

Petitioners have three responses to these contentions. First, the government overstates the threat disclosure of decades-old grand jury records for historical purposes would pose either to the grand jury process or as a deterrent to witness participation. Second, the government's approach results in the withholding of much more information than is necessary to protect the integrity of the grand jury process and will engender repeated petitions to unseal portions of grand jury records. And third, the more sensible approach would be for the Court to order release of all of the grand jury records, but stay that order where a witness comes forward with a privacy-based objection to the disclosure of his or her testimony — as petitioners ask the Court to do here with Max Elitcher and William Danziger.

First, the government overstates the threat the release of historically valuable grand jury records would pose to the willingness of witnesses to testify before grand juries in the future. This Court, in both *In re Petition of May,* and *In re American*

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particularly because Gold's "I come from Julius" testimony was suspect; he could well have been referring to a different Julius, Julius Streicher. *See The Autobiography of Roy Cohn, supra*, at 75.

Historical Ass'n, addressed identical concerns and rejected them. In *Petition of May*, the Court found that disclosure of grand jury transcripts 35 years after-the-fact would not have a 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 grand jury records might be disclosed after the passage of 35 years." Slip op. at 3-4, n.1. Similarly, the *In re American Historical Ass'n* Court found "negligible" the "inhibiting effect" of releasing grand jury records "for historical reasons fifty years after the proceedings had ended." 49 F. Supp. 2d at 292. The Court went on to explain that there are other factors, "such as leaks, general press attention, revelations at trial, the often extensive contemporaneous attention given to the case," more likely to influence jurors than "the possibility of disclosure decades hence based on historical interest." *Id.*

Moreover, the government treats grand jury records as if ordinarily they are locked in a vault and never aired in public. But since at least 1970 that is not so. Grand jury testimony is now routinely disclosed at trial, so no witness has any assurance that his or her grand jury testimony will remain secret. 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 routinely disclosed to a defendant after the witness testifies either at trial or at a pretrial hearing. Thus, release of grand jury records has become an everyday occurrence, not the rarity the government suggests. As the Second Circuit observed 25 years ago:

> 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. 1983).

Second, the government's approach — which requires definitive proof of a witness' death as a precondition to disclosure — will result in the withholding of records that should be released. Establishing whether a witness who testified before a grand jury fifty-eight years ago is alive or not is a formidable undertaking, especially if one lacks access to social security numbers, as is ordinarily the case for petitioners. Even though the government had access to social security numbers and expended great effort in trying to locate these witnesses, it was unable to make an accurate determination in seven cases. Information that petitioners have obtained since the government's submission shows that at least two, and likely three, of the witnesses whose status was "unknown" are in fact dead. William Perl died in September 1976; Perry Alexander Seay died in November 1992; and it appears that Michael Sidorovich died sometime before 2005, since his wife Anne's obituary says that she was "preceded in death by her husband Michael Sidorovich." Adair Decl. at ¶¶ 4-6. Part of the problem, of course, is that names often change and occasionally are misspelled. For instance, the government asserts that Vivian Glassman's status is unknown, but FBI records show that her name was changed to Vivian Glassman Pataki. Edith Levitov, also listed as "status unknown," was referred to in an obituary for Morton Sobell's wife Helen as Edith Levitov Garduk, living in Bethesda, Maryland. And the government's difficulty in locating Michael Sidorovich might be attributable to its misspelling of his name (the government lists both Michael and Anne as Sid**a**rovich) even though the FBI and others consistently spell their name with an "o" and not an "a."

The point is not to suggest that the government effort here was not substantial. It was. But if the government, with access to otherwise private, personal information and with all the resources it can bring to bear, cannot find witnesses in a proceeding that occurred fifty-eight years ago, it is fair to assume, absent evidence to the contrary, that the witnesses are no longer living. Certainly that appears to be the case here, where petitioners have determined that three out of the seven "status unknown" witnesses have died.

For these reasons, the Court should reject the government's suggested presumption that, unless a witness would be more than 100 year old, the witness should be presumed to be still alive, absent conclusive proof to the contrary. The government's suggestion is based solely on *Schrecker v. Dep't of Justice*, 349 F.3d 657 (D.C. Cir. 2003), which concerned the processing of requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. There are a number of problems with adopting such a presumption. For one thing, birth dates often are not available and thus the rule quickly dissolves into guess-work. For another, the statistics recounted in *Schrecker* show that the 100-year rule far exceeds actual life-expectancy in the United States or elsewhere. And for another, the government's approach will require petitioners to file petitions each time a witness dies or passes the 100-year mark, engendering wasteful litigation. Finally, a FOIA-based rule — designed to cover a host of diverse possible situations — is not well suited to a grand jury access cases, where the grand jury sits for a set term, an individual's testimony occurs on a date-certain, and the individual is, except in rare cases, an adult. Where grand jury records are concerned, a more sensible rule would be measured from the date the grand jury ended or the witness testified, and should be no

longer than fifty years. That approach is more protective than the one followed by the Court in *In re Petition of May,* slip op. at 3 (finding 35 years sufficient), and in accord with that used *In re American Historical Association*, 49 F. Supp. 2d at 292-92 (finding 50 years sufficient). It should be followed here.

Third, petitioners urge the Court to order *all* of the grand jury testimony released. With respect to Max Elitcher and William Danziger, petitioners ask the Court to order their testimony released, but subject to a stay until there is information satisfactory to the government (such as the social security death index) that demonstrates that Max Elitcher and William Danziger have passed away. With respect to the seven "status unknown" witnesses, petitioners assume that, once the government has had an opportunity to review Ms. Adair's declaration and Exhibits, it will withdraw its objection to the release of the testimony of William Perl, Perry Alexander Seay and Michael Sidorovich.

Petitioners urge the Court to order release of the testimony of the remaining four "status unknown" witnesses: Vivian Glassman Pataki, Edith Levitov Garduk, Sarah Powell, and Frank Wilenz. At this juncture, the government and the petitioners have independently made concerted efforts to determine their status and have failed. As Sam Roberts put it somewhat colorfully in his supplemental declaration, "If the government cannot find them (we're not talking about Osama bin Laden), after more than half a century, they should either be presumed dead or living under other names that would not be compromised by the release of grand jury testimony." Roberts Supp. Dec. ¶ 2. If the Court rejects this argument, petitioners urge that it order their testimony released as well, but subject to a stay until there is information confirming their deaths. This approach would avoid the necessity of follow-up petitions to unseal.

CONCLUSION

For the reasons stated above, in petitioners' opening memorandum, and in the declarations that have been filed in support of this motion, petitioners' motion should be granted in all respects.

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