

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----)
IN RE PETITION OF NATIONAL SECURITY)
ARCHIVE, AMERICAN HISTORICAL)
ASSOCIATION, AMERICAN SOCIETY FOR LEGAL) Miscellaneous Action
HISTORY, ORGANIZATION OF AMERICAN)
HISTORIANS, SOCIETY OF AMERICAN)
ARCHIVISTS, AND SAM ROBERTS)
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 1950-1951 THAT PERTAIN TO THE INDICTMENT AND
CONVICTION OF JULIUS AND ETHEL ROSENBERG**

Debra L. Raskin (DR 5431)
Vladeck, Waldman, Elias & Engelhard, P.C.
1501 Broadway
New York, New York 10036
(212) 403-7300

Meredith Fuchs
National Security Archive
Gelman Library
George Washington University
2130 H Street, NW
Washington, DC 20037
Of Counsel

David C. Vladeck
Kathryn A. Sabbeth
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540
Attorneys for Petitioners

TABLE OF CONTENTS

Introduction 1

Factual Background..... 3

I. The Government’s Case Against the Rosenbergs. 4

A. Cracking the Atomic Spy Ring...... 4

B. Prosecuting the Rosenbergs...... 7

II. The Rosenberg Grand Jury Records. 9

A. Existing Information on the Grand Jury Proceedings. 9

B. The Grand Jury Records...... 10

Argument..... 11

I. The Court Has Discretion to Unseal Historically Significant Jury Records in Special Circumstances...... 12

II. The Special Circumstances Surrounding the Rosenberg Controversy Warrant Release of the Rosenberg Grand Jury Records. 14

A. General Historical Interest of the Rosenberg Case. 16

 1. *The Widespread Contemporaneous Interest in the Case.*..... 16

 2. *The Continuing Historical Interest in the Case.* 18

 3. *The Many Aspects of the Current Interest in the Case.* 23

 4. *The Broad-Ranging Historical Interest of Petitioners.*..... 25

B. Specific Historical Interest of the Grand Jury Records...... 28

 1. *Bases for the Allegations Against the Rosenbergs.*..... 28

 2. *Alleged Improprieties of the Prosecution Team.* 31

 3. *The Prosecution’s Strategy.* 32

 4. *Abuse of the Grand Jury Process.*..... 33

 5. *Soviet Espionage in the United States.* 34

 6. *Unanticipated Issues Arising from Grand Jury Records.*..... 36

III. The Need to Maintain Secrecy of the Rosenberg Grand Jury Records is Minimal.....38

A. The Forward-Looking Interest in Maintaining Secrecy Will Not Be Inhibited by Disclosure.....39

B. Release of the Rosenberg Grand Jury Records Will Not Impair the Privacy Interests of the Grand Jury Subjects or Witnesses.42

Conclusion47

TABLE OF AUTHORITIES

Cases:

<i>Butterworth v. Smith</i> , 494 U.S. 624 (1990).....	12, 38
<i>Douglas Oil Co. v. Petrol Stops Northwest</i> , 441 U.S. 221 (1979).....	12
<i>In re Biaggi</i> , 478 F.2d 489 (2d Cir. 1973)	12, 45
<i>In re Craig</i> , 131 F.3d 99 (2d Cir. 1997).....	2, 3, 12, 15, 25, 42
<i>In re Hastings</i> , 735 F.2d 1261 (11th Cir. 1984).....	12
<i>In re Am. Hist. Ass’n</i> , 49 F. Supp. 2d 274 (S.D.N.Y. 1999).....	2, 5, 12-16, 21, 25, 27, 38, 39, 40, 42
<i>In re Am. Hist. Ass’n</i> , 62 F. Supp. 2d 1100 (S.D.N.Y. 1999).....	5
<i>In re May</i> , 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987).....	14, 39
<i>Meeropol v. Meese</i> , 790 F.2d 942 (D.C. Cir. 1986)	19

Miscellaneous:

28 U.S.C. § 1651.....	3
50 U.S.C. § 34.....	6
Rule 6(e), Fed. R. Crim. P.	12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----)
IN RE PETITION OF NATIONAL SECURITY)
ARCHIVE, AMERICAN HISTORICAL)
ASSOCIATION, AMERICAN SOCIETY FOR LEGAL) Miscellaneous Action
HISTORY, ORGANIZATION OF AMERICAN)
HISTORIANS, SOCIETY OF AMERICAN)
ARCHIVISTS, AND SAM ROBERTS)
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 1950-1951 THAT PERTAIN TO THE INDICTMENT AND
CONVICTION OF JULIUS AND ETHEL ROSENBERG**

Petitioners, the National Security Archive, the American Historical Association, the American Society for Legal History, the Organization of American Historians, the Society of American Archivists, and Sam Roberts, petition this Court for an order directing the release of fifty-six-year-old grand jury records relating to the early Cold War-era indictment of Julius and Ethel Rosenberg. On January 31, 1951, the Rosenbergs were indicted and later tried, convicted and executed for conspiracy to commit espionage by providing the Soviet Union with the secret of the atomic bomb.

The conviction and execution of Julius and Ethel Rosenberg was arguably the defining event in the early Cold War. The conviction convinced many Americans that Soviet infiltration of American society was pervasive. The conviction convinced many other Americans that the United States government was overreacting to the Soviet threat and was becoming increasingly oppressive. The friction between these two sectors of society defined political conflict in this era, and set the stage for McCarthyism, the “red scare,” and the culture of Cold War America in general.

In the half-century since the Rosenbergs' indictment and conviction, the case has continued to stir passions and inspire scholarly works. The public's appetite for new scholarship on the Rosenbergs remains insatiable, and the academic community and the popular media continue to produce new material on the trial and its aftermath.¹ Despite the vast numbers of academic works that have been published on the Rosenbergs, the grand jury records relating to the couple's indictment continue to be a source of speculation for historians and others because those records are the sole government documents regarding the Rosenberg case to remain secret.

As the detailed declarations submitted with this petition demonstrate, and as this petition shows, the historical interest in the Rosenberg case in general and in the grand jury records in particular justifies the release of the records. *See In re Craig*, 131 F.3d 99, 105 (2d Cir. 1997) (historical interest alone may justify release of grand jury records); *In re Am. Hist. Ass'n*, 49 F. Supp. 2d 274, 287-88 (S.D.N.Y. 1999) (same). The overwhelming historical interest outweighs any secrecy interests that may have survived the fifty-six years since the grand jury handed down its indictment.

While the Rosenbergs had no opportunity to seek the records regarding their indictment, their children, Michael and Robert Meeropol, have consistently sought all available information regarding their parents' conviction, and pursued lengthy Freedom of Information Act litigation against numerous government agencies. The Meeropols

¹ For a sample of the works that have been published since 2001, *see, e.g.*, Alexander Feklisov & Sergei Kostin, *The Man Behind the Rosenbergs* (2001) (memoirs of Julius Rosenberg's Soviet "handler"); 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); Ivy Meeropol, *Heir to an Execution* (2004) (DVD) (Rosenbergs' granddaughter reflects on the lives of her grandparents); Robert Meeropol, *An Execution in the Family: One Son's Journey* (2003); Kenneth R. Kahn, *Secret Judgment: How the*

support the disclosure of the grand jury records as well. The Rosenbergs' co-defendant, Morton Sobell, also supports disclosure in this case. Numerous sources, such as FBI records, interviews with the witnesses, and testimony presented at McCarthy Senate hearings, have already provided information on the grand jury proceedings, significantly reducing any privacy interests that may have otherwise remained with respect to the grand jury records. *See In re Craig*, 131 F.3d at 107.

Despite what is known about the grand jury proceedings, many questions—questions about changed testimony, alleged prosecutorial improprieties, the extent of information the Rosenbergs provided to the Soviets, the reasons behind the government's insistence on the death penalty, and others—remain unanswered. As the accompanying declarations of historians and scholars attest, there is an overwhelming public and scholarly interest in disclosure of the grand jury records. In this extraordinary set of circumstances, resulting from what historians have deemed “the trial of the century,” 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 transcripts of all grand jury testimony related to the Rosenbergs' indictment.

FACTUAL BACKGROUND

The following summary of the background of the grand jury proceedings that led to the indictment of Julius and Ethel Rosenberg, the ensuing trial, and the controversy that still spurs debate, is drawn from the detailed declaration of Professor Bruce Craig, a historian who recently completed an extensive research project into what is known about the proceedings. Not only are the facts reminiscent of spy fiction, but the Rosenberg case

U.S. Government Illegally Executed Julius and Ethel Rosenberg (2004).

is of central importance to understanding domestic anti-Communism during the Cold War Period. Professor Craig's declaration chronicles the Rosenberg case; outlines what is known about the grand jury and the witnesses who appeared before it; canvasses the publicly available sources of information about the grand jury; summarizes allegations of possible improprieties by the grand jury; and describes the current location and accessibility of the grand jury records.

Augmenting Professor Craig's declaration are declarations from Cold War scholars who, although they take quite diverse views on the Rosenberg case and its implications, strongly support release of the grand jury records. These scholars include historian John W. Berresford, Yale University Professor John Lewis Gaddis, Library of Congress Manuscript Historian John Earl Haynes, historian Allen M. Hornblum, Professor Ronald Radosh, New York Times reporter and historian Sam Roberts, Yeshiva University Professor Ellen W. Schrecker, George Mason University Professor Martin J. Sherwin, St. Joseph's University Professor Katherine A. Sibley, Marquette University Professor Emeritus Athan G. Theoharis, and historian Steven Usdin.

I. The Government's Case Against the Rosenbergs.

A. Cracking the Atomic Spy Ring.

In 1945, Igor Gouzenko, a Soviet cipher-clerk defecting from an increasingly oppressive Soviet state, stunned Western authorities with the revelation that the Soviets were engaged in extensive espionage and were spying on their wartime allies. Gouzenko provided Canadian intelligence officers with documentary proof that British physicist Allan Nunn May had used his position on the National Research Council of Canada to gather information for the Soviets. After May confessed to espionage, Canadian, British,

and American intelligence officers began following various leads only to discover that a host of others involved in the top-secret American atom bomb development project (the “Manhattan Project”) also were passing information to the Soviets. One such individual was Klaus Fuchs. In January 1950, Fuchs confessed to espionage and admitted that he had provided the Soviets with highly sensitive information about the atom bomb. In his confession Fuchs told authorities that there were others involved, including a young American soldier who had served as Fuchs’ espionage courier. Fuchs did not know the young man’s name, only that he had been referred to by his Soviet control (handler) as “Raymond.”

The FBI’s frantic efforts to track down “Raymond” led them to three suspects: Joseph Arnold Robbins, Abraham Brothman, and Harry Gold. Brothman and Gold had previously appeared in 1947 before a grand jury charged with investigating the wide-ranging allegations of the “Red Spy Queen” Elizabeth Bentley, a former Soviet spy and courier, who claimed that the government had been infiltrated by Soviet spies. Bentley’s charges resulted in the investigation and prosecution of several Americans, including State Department official Alger Hiss. Gold and Brothman’s testimony before the 1947 grand jury was released in 1999 as a result of this Court’s order unsealing the Alger Hiss grand jury records. *See In re Am. Hist. Ass’n*, 49 F. Supp. 2d 274 (S.D.N.Y.), *subsequent opinion*, 62 F. Supp. 2d 1100 (S.D.N.Y. 1999).

When Robbins and Brothman were ruled out as suspects, the FBI focused its attention on Gold. After the FBI’s search of his home, Gold confessed to providing Fuchs with secret atomic information and recounted other spy contacts he had established through his espionage work.

One of these contacts was a young soldier stationed at the Los Alamos atomic bomb development facility in New Mexico. Gold did not recall the soldier's name. But he provided the FBI with enough information to pinpoint David Greenglass as the soldier-turned-spy. When apprehended by authorities, Greenglass quickly confessed to his contact with Gold. He also admitted he had passed information to his brother-in-law, Julius Rosenberg.

When Greenglass was interrogated by the FBI, he agreed to cooperate fully on the condition that the government promise not to prosecute his wife. Greenglass claimed that he had been "sucked into" the espionage work by his brother-in-law. When questioned, Ruth Greenglass also identified Julius Rosenberg as a spy and claimed that Julius had asked Ruth, in the presence of Ethel Rosenberg, to persuade David Greenglass to supply the Soviets with information from Los Alamos. When the FBI located and interrogated Julius, he denied all allegations of Soviet involvement.

Julius was arrested on July 17, 1950, charged with conspiracy to commit espionage, and arraigned in the United States District Court for the Southern District of New York. Unable to post the \$100,000 bail, he remained in custody. Ethel was arrested on August 7, 1950, immediately following her second grand jury appearance. She also remained in custody.

On August 17, 1950, the grand jury indicted both Julius and Ethel Rosenberg, and charged them both with eleven overt acts that violated the Espionage Act, 50 U.S.C. § 34. The couple entered not guilty pleas on August 23. On October 10, 1950, the same grand jury handed down a superseding indictment charging the Rosenbergs with conspiracy to violate the Espionage Act beginning in November 1944. The couple pled not guilty on

October 17. The grand jury issued yet another superseding indictment on January 31, 1951, this time charging the Rosenbergs, along with Morton Sobell and Soviet Vice-Consul Anatoli Yakovlev, with conspiracy to commit espionage beginning in June 1944.² The Rosenbergs again pled not guilty on February 2, 1951. Through this period of numerous indictments, and stretching into mid-March 1951, the prosecution built its case against the Rosenbergs, and the grand jury heard from dozens of additional witnesses. For a complete list of witnesses, see Craig Decl. Appx. 1.

Morton Sobell, an engineer, had fled to Mexico after David Greenglass' arrest. Max Elitcher, an acquaintance of Sobell and Rosenberg, informed the authorities that Rosenberg had tried to recruit Sobell and Elitcher into Soviet espionage, and that Sobell was passing information to the Soviets. The FBI located Sobell in Mexico and, with the help of Mexican security police, had him abducted and returned to the United States. Sobell was arrested, but he never confessed to any wrongdoing. Despite the fact that Sobell's alleged espionage was related to conventional military technology and not the atom bomb, he was tried alongside the Rosenbergs.

B. Prosecuting the Rosenbergs.

The Rosenbergs' trial began on March 6, 1951. A complete transcript of the trial is available online at <http://www.law.umkc.edu/faculty/projects/FTrials/Rosenberg/RosenbergTrial.pdf>. After the jury was impaneled and provided with the charges, the attorneys made opening statements on March 7, and the prosecution began its case the following day.

² For a description of the initial indictments and the text of the final indictment, see Federal Bureau of Investigation, *The Rosenberg Espionage Conspiracy* at 16-21, available at <http://foia.fbi.gov/rosen/rosen1.pdf>.

The prosecution's first witness was Max Elitcher. The sole accuser of Morton Sobell, Elitcher testified to his relationship with Sobell and Julius Rosenberg. The veracity of Elitcher's testimony was questioned by the defendants' attorneys, and Judge Irving Kaufman provided the defendants with the minutes of Elitcher's grand jury testimony.

From March 9 through March 14, David Greenglass was the primary witness. Walter S. Koski, a physical chemist, and William Denson, Chief of Litigation for the Atomic Energy Commission, also were called to testify about scientific issues relating to the atomic bomb. Ruth Greenglass's testimony on March 14 was particularly helpful for the prosecution because she substantiated her husband's testimony and emphasized Ethel Rosenberg's involvement in the atomic spy ring.

Harry Gold testified next. During his two days on the stand, Gold asserted that his Soviet control, Yakovlev, told him the recognition signal from his contact at Los Alamos would be, "I come from Julius." This testimony seriously harmed efforts to cast doubt on the defendants' guilt, even though Gold never claimed to have known the Rosenbergs by name.

Several minor witnesses testified on March 16, in support of the prosecution's theory that the defendants had been preparing to flee the country after the spy ring had been cracked. Finally, on March 21, the prosecution produced its "celebrity" witness, Elizabeth Bentley, the "Red Spy Queen." Bentley testified to telephone conversations with a Soviet contact named "Julius." While the defense raised questions regarding the truthfulness of her testimony, Bentley's appearance was a high note on which the prosecution rested.

Julius Rosenberg then testified for two days, denying all allegations of espionage. Ethel's following testimony also presented steadfast denials of wrongdoing, but the prosecution questioned her truthfulness by reading verbatim portions of her grand jury testimony, in which she refused to answer many questions on Fifth Amendment grounds. Sobell did not testify, and none of the defendants presented any corroborating witnesses.

After several rebuttal witnesses, the prosecution rested. Summation arguments were presented on March 28, 1951, and Judge Kaufman instructed the jurors on the charges. The following day, the jury returned guilty verdicts against all defendants. On April 5, 1951, Julius and Ethel Rosenberg were sentenced to death, and Sobell was given a 30-year sentence. After numerous appeals, presidential denials of clemency, and the Supreme Court's unprecedented vacatur of the stay of execution issued by Justice William O. Douglas, the Rosenbergs were executed on June 19, 1953.³

II. The Rosenberg Grand Jury Records.

A. Existing Information on the Grand Jury Proceedings.

While the official grand jury records have remained sealed for over fifty years, much is known about the Rosenberg grand jury proceedings. Every grand jury witness has been identified and is listed in the Craig Declaration. (*See* Craig Decl. Appx. 1.)

A number of sources have provided information about the proceedings. Ethel Rosenberg's grand jury testimony was quoted verbatim and summarized at the trial,

³ *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952) (affirming lower court decision); *Rosenberg v. United States*, 344 U.S. 838 (1952) (denying certiorari); *Rosenberg v. United States*, 344 U.S. 889 (1952) (denying motion for leave to file *amici* brief and denying petitions for rehearing); *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952) (affirming lower court's denial of motion for new trial); *Rosenberg v. United States*, 346 U.S. 273 (1953) (vacating Justice Douglas's stay of execution); *Rosenberg v. United States*, 346 U.S. 324 (1953) (denying motion for reconsideration on vacatur of

where she was compelled to testify about her grand jury statements. FBI records released through Freedom of Information Act requests have produced information on the grand jury proceedings as well, including the testimony of Vivian Glassman, a friend of Ethel Rosenberg who had been suspected of involvement in the spy ring. The grand jury testimony of Ann Sidorovich was also revealed through an FBI summary memorandum.

Subsequent prosecution of grand jury witnesses also led to revelations about the proceedings. William Perl, also suspected of involvement in espionage, was indicted and convicted of perjury on the basis of testimony given at the Rosenberg grand jury. The content of his grand jury testimony was revealed at his perjury trial and was widely reported by the media.

Several grand jury witnesses were also subpoenaed in 1953 by the Senate Permanent Subcommittee on Investigations, run by Senator McCarthy and assisted by Roy Cohn, one of the main prosecutors in the Rosenberg case. These witnesses often testified to their grand jury statements. For example, when Perry Alexander Seay was questioned by the committee about a dinner that he attended at Morton Sobell's house, he indicated that he was asked about that dinner by the grand jury.⁴

B. The Grand Jury Records.

The transcripts of the grand juries that investigated the Rosenberg controversy are located at the National Archives and Records Administration, Northeast Region, in New York, as part of Record Group 118, Series II (Grand Jury Files), Records of the United States Attorneys and Marshals, United States Attorney for the Southern District of New

Justice Douglas's stay).

⁴ For a more complete recitation of the witnesses who appeared before the Senate, see *infra* p. 42-44.

York, *United States v. Rosenberg et al.*, File No. 114868. In addition to these records, also relevant are Series I (U.S. Attorney Files) and Series III (Court Files), both of which contain miscellaneous information including lists of witnesses and interview schedules, the names and occupations of the individuals sitting on the grand jury panel (closed record), copies of pre-trial testimony of key witnesses, grand jury charges, subpoenas of witnesses, telegrams, U.S. Attorney conference notes, and general correspondence. The contents of Series I and III are described in detail by the typed “finding aide” for the U.S. Attorney Files and by a separate hand-written box locator.

ARGUMENT

If any grand jury records ever merited release because of their historical importance, the Rosenberg records surely qualify. The Rosenberg case was perhaps the defining moment of the early Cold War. The indictment, prosecution, conviction and execution of the Rosenbergs proved to the American people that the threat of domestic Soviet espionage was real, and the Rosenberg case was used to justify arguably repressive measures in response to the Soviet threat. This petition demonstrates that, despite the passage of more than fifty years, interest in the Rosenberg case remains unabated.

None of the conventional justifications for grand jury secrecy applies to the Rosenberg records. The grand jury investigation was completed fifty-six years ago. Most of the grand jury participants are deceased, and any secrecy interests that may have attached to the grand jury records have eroded or evaporated completely. The Rosenberg children, Robert and Michael Meeropol, and their families, support this petition, as does Morton Sobell, the Rosenbergs’ co-defendant.

Disclosure of these records is of vital importance to scholars. As the declarations of eminent Cold War scholars explain, many critical questions still hound those who study the Rosenberg case, and the grand jury records are the last government documents still undisclosed. The release of the records will open the final door in the wall of secrecy that once surrounded the Rosenberg prosecution.

I. The Court Has Discretion to Unseal Historically Significant Jury Records in Special Circumstances.

The presumption that grand jury records remain secret in perpetuity has a number of exceptions. Several exceptions are enumerated in Rule 6(e) of the Federal Rules of Criminal Procedure; for example, a grand jury witness may disclose the content of his testimony. Fed. R. Crim. P. 6(e)(2); *see Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990); *In re Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *In re Hastings*, 735 F.2d 1261, 1268–69 (11th Cir. 1984). Under Rule 6(e), district courts are empowered, as part of their supervisory authority over grand juries, to determine whether disclosure of records is appropriate when one or more of the enumerated exceptions to grand jury secrecy applies. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 221, 223 (1979); *In re Craig*, 131 F.3d at 102.

In addition to the exceptions explicitly discussed in Rule 6(e), courts have recognized a “special circumstances” exception to the general rule of grand jury secrecy. *In re Craig*, 131 F.3d at 102; *In re Biaggi*, 478 F.2d 489, 492–93 (2d Cir. 1973). Under the district courts’ inherent supervisory authority over grand jury proceedings, a court may order the release of grand jury records when warranted by “special circumstances” outside the enumerated exceptions in Rule 6(e). *In re Am. Hist. Ass’n*, 49 F. Supp. 2d 274, 287 (S.D.N.Y. 1999) (“the ‘special circumstances’ exception is well-grounded in the

federal courts' supervisory authority").

Historical interest is a "special circumstance" that, in appropriate cases, justifies the release of grand jury records. As the Second Circuit emphasized in *In Re Craig*, "there is nothing . . . that prohibits historical interest, on its own, from justifying release of grand jury material in an appropriate case." 131 F.3d at 105 (quotations omitted); see *In re Am. Hist. Ass'n*, 49 F. Supp. 2d at 287–88 (rejecting argument that historical interest is not a "special circumstance" permitting disclosure of grand jury records). *In re Craig* addressed historian Bruce Craig's petition for the release of grand jury records related to Harry Dexter White, a Cold War-era government official accused of Soviet espionage. The Second Circuit declined to overturn the district court's decision not to release the Harry Dexter White records. The court did, however, hold that when historical interest is sufficiently substantial, historical interest alone will justify the release of grand jury records.

Historical interest alone has been used in this Circuit to justify the release of grand jury records. In a case strikingly similar to this one, *In re American Historical Association*, this Court released the grand jury records pertaining to indictment of Alger Hiss, a prominent, high-ranking State Department official accused of perjury for denying before the grand jury that he served as a Soviet spy. 49 F. Supp. 2d at 274. This Court found that the Hiss records presented sufficient historical interest to warrant their release. *Id.* There is an even stronger argument for release of the Rosenberg records. The Hiss and Rosenberg cases both involved allegations of Soviet espionage. However, while Hiss's alleged espionage involved unclassified diplomatic cables, the Rosenbergs' espionage allegedly revealed atomic military secrets that enabled the rapid production of

the Soviets' nuclear bomb, thereby triggering the arms race and escalating the Cold War. And while Hiss faced a perjury charge and was sentenced to several years in jail, the Rosenbergs were tried for conspiracy to commit espionage, convicted, sentenced to death, and ultimately executed. Finally, though the Hiss case has remained a subject of interest among historians and other students of the Cold War era, the Rosenberg case was the defining moment of the early Cold War in America and continues to inspire not only a volume of scholarly research but also intense interest among the general public that far exceeds the interest in any other case from the Cold War era.

The Hiss case was not the first in which a court in this Circuit ordered release of grand jury records for historical purposes. A decade earlier, historian Gary May sought the release of grand jury records pertaining to indictments of William Remington, a prominent public official Elizabeth Bentley accused of being a Communist spy. In *In re May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987), this Court found that the “undisputed historical interest” in the Remington case, combined with past allegations of abuses by the grand jury, gave the public “a strong interest in having its understanding of the administration of justice in this case based on complete and accurate historical evidence.” *Id.* at 2199. This Court ordered the records released, and the government did not appeal.

II. The Special Circumstances Surrounding the Rosenberg Controversy Warrant Release of the Rosenberg Grand Jury Records.

The “special circumstances” test articulated by the Second Circuit is a fact-intensive inquiry in which the court weighs numerous factors to balance the historical importance of the grand jury records against the need to maintain secrecy. *See In re Craig*, 131 F.3d at 105; *In re Am. Hist. Ass’n*, 49 F. Supp. 2d at 297. The Second Circuit

has set forth a non-exhaustive list of nine factors that a district court may consider. *In re Craig*, 131 F.3d at 106. The factors identified by the court in *In re Craig* are: (i) the identity of the parties seeking disclosure; (ii) whether the government or the defendant in the grand jury proceeding opposes disclosure; (iii) why the disclosure is sought; (iv) what specific information is sought; (v) the age of the grand jury records; (vi) the current status—living or dead—of the grand jury principals and of their families; (vii) the extent to which the grand jury records sought have been previously made public, either permissibly or impermissibly; (viii) the current status—living or dead—of witnesses who might be affected by disclosure; (ix) any additional need for maintaining secrecy. *Id.*

This Court in *In re American Historical Association* applied those factors and concluded that the historical interest in the Hiss case greatly outweighed the need to maintain secrecy. 49 F. Supp. 2d at 297. In so ruling, the Court analyzed both the general historical importance of the Alger Hiss case and the specific historical importance of the grand jury records. *Id.* at 293. The Alger Hiss case was one of the most influential trials involving Soviet espionage in the United States. Hiss was a high-ranking State Department official, and his perjury conviction convinced many people that the Soviets had infiltrated high levels of the United States government. This Court ruled that the historical importance of the Hiss case and of the grand jury records in particular was more than sufficient to justify the release of the records. *Id.* at 297.

While the Hiss case was highly controversial and inspired great debate, the Rosenberg case was “the most infamous atomic espionage trial of the early Cold War era.” (Craig Decl. ¶ 24.) It has had an even greater impact on the American consciousness, and has taken on a more lasting and well-documented general historical

importance. (*Id.* ¶ 25-30.) This point is driven home in the declarations of numerous historians who explain that the Rosenberg grand jury records are of specific historical significance. (*See, e.g.*, Gaddis Decl. ¶ 4 (“The trial of Julius and Ethel Rosenberg was one of the key events of the early Cold War.”); Schrecker Decl. ¶ 2 (“In many respects, [the Rosenberg] case was the most notorious of the political trials of the McCarthy era.”); Sibley Decl. ¶ 3 (“Not even the Alger Hiss case, for which the grand jury proceedings were recently opened, can match the Rosenberg case for its historical resonance and continued scholarly interest.”)).

A. General Historical Interest of the Rosenberg Case.

The general historical interest of the Rosenberg case is proven by its lasting influence in the American academic world and in popular culture. The case continues to present questions concerning the merits of the prosecution. It also provokes serious debate over the extent of Soviet espionage during the Cold War era. As this Court stated in *In re American Historical Association*, “Alleged Soviet espionage against the United States was a controversial, highly-visible, and significant issue in domestic politics during the 1940s and 1950s.” 49 F. Supp. 2d at 293. The trial, conviction, and execution of Julius and Ethel Rosenberg were key events shaping early Cold War-era fear of Soviet espionage in the United States.

1. *The Widespread Contemporaneous Interest in the Case.*

The Rosenberg trial captured wide publicity in its own time. Sensational newspaper headlines continually broadcasted the latest updates on the Rosenberg case, and the nation was riveted by the “atomic spy trial.” *See, e.g.*, Meyer Berger, *3 Go to Trial Here as Atom Spies; War Crime Guilt Can Mean Death*, N.Y. Times, Mar. 7, 1951,

at 1; Meyer Berger, *Theft of Atom Bomb Secrets in War Stressed at Spy Trial*, N.Y. Times, Mar. 8, 1951, at 1; Meyer Berger, *Ex-Sergeant Calls Sister a Member of Bomb Spy Ring: Testifies She and Her Husband Got Secrets of Los Alamos Project from Him in '44*, N.Y. Times, Mar. 10, 1951, at 1; William R. Conklin, *Atom Bomb Secret Described in Court*, N.Y. Times, Mar. 13, 1951, at 1; William R. Conklin, *Atom Bomb Spying Described as Easy*, N.Y. Times, Mar. 14, 1951, at 1.⁵ For an analysis of the U.S. press coverage, see generally John F. Neville, *The Press, the Rosenbergs, and the Cold War* (1995).

In addition to the pervasive domestic coverage, the trial and conviction attracted international interest. The French press had extensive coverage of the case, and the execution garnered media attention in many nations, including England, Italy, Poland,

⁵ For additional articles published during the trial proceedings, in the *New York Times* alone, see also Meyer Berger, *Former College Classmate Accuses 2 on Trial as Spies*, N.Y. Times, Mar. 9, 1951, at 1; William R. Conklin, *Greenglass' Wife Backs His Testimony on Theft of Atom Bomb Secrets*, N.Y. Times, Mar. 15, 1951, at 1; William R. Conklin, *Admitted Spy, Gold, Is Star US Witness*, N.Y. Times, Mar. 16, 1951, at 1; William R. Conklin, *Spy Jury May Get Case by March 27*, N.Y. Times, Mar. 17, 1951, at 6; William R. Conklin, *Spy Trial Speeded Toward Early End: Jury Likely to Get Case Monday—Mexican Witnesses Tell of Sobell's Flight to U.S.*, N.Y. Times, Mar. 21, 1951, at 14; William R. Conklin, *3 on Trial as Spies Open Defense, Rosenberg Denying All Charges*, N.Y. Times, Mar. 22, 1951, at 1; William R. Conklin, *Rosenberg Says He Is True to U.S. But Won't Tell Spy Jury if He Is Red*, N.Y. Times, Mar. 23, 1951, at 1; William R. Conklin, *Rosenberg's Wife Shies at Red Query*, N.Y. Times, Mar. 27, 1951, at 21; William R. Conklin, *Spy Case Against 3 Goes to Jury Today*, N.Y. Times, Mar. 28, at 18; William R. Conklin, *Spy Jury Locked up After Deciding on 2 in Atom Conspiracy*, N.Y. Times, Mar. 29, 1951, at 1; William R. Conklin, *3 in Atom Spy Case Are Found Guilty; Maximum is Death*, N.Y. Times, Mar. 30, 1951, at 1; Ira Henry Freeman, *How the Russians Got the World's Biggest Secret*, N.Y. Times, Apr. 1, 1951, at 154 (labeling Yakovlev “Chief Agent,” Julius Rosenberg “Coordinator,” Ethel Rosenberg “Accomplice,” Klaus Fuchs and David Greenglass “Sources,” and Harry Gold “Courier”); William R. Conklin, *Atom Spy Couple Sentenced to Death; Aide Gets 30 Years*, N.Y. Times, Apr. 6, 1951, at 1; *Text of Judge Kaufman's Statement on Sentencing Bomb Spies*, N.Y. Times, Apr. 6, 1951, at 10 (printing Judge Kaufman's sentencing statement).

and Romania. *See id.* at 77–89, 136. According to John F. Neville, a scholar of the Rosenberg media coverage, “the Rosenberg case became more than a legal case. It became a *cause celebre* that dwarfed other American social and political movements and causes. . . . The [case led] to an international confrontation that played out on the front pages of newspapers throughout the world.” *Id.* at 141–42.

Immediately following the conviction and execution of Julius and Ethel Rosenberg, numerous books on the case were published. These works, many of which struck a partisan position for or against the Rosenbergs, included S. Andhill Fineberg, *The Rosenberg Case: Fact and Fiction* (1953) (advocating the case against Rosenbergs); Virginia Gardner, *The Rosenberg Story* (1954) (arguing for Rosenberg innocence); William A. Reuben, *The Atom Spy Hoax* (1955); John Wexley, *The Judgment of Julius and Ethel Rosenberg* (1955, rev’d ed. 1977) (making the case that the government framed the Rosenbergs); *see also* Ethel Rosenberg & Julius Rosenberg, *Death House Letters* (1953) (presenting the Rosenbergs’ letters written in prison). (*See also* Craig Decl. ¶ 26.)

2. *The Continuing Historical Interest in the Case.*

The Rosenberg case remained a hot topic of debate and speculation among historians and the general public throughout the 1960’s and 1970’s, as evidenced by the large numbers of publications on the controversy. *See, e.g.*, Jonathan Root, *The Betrayers: The Rosenberg Case—A Reappraisal of an American Crisis* (1963); Walter and Miriam Schneir, *Invitation to an Inquest* (1965, rev’d ed. 1983); Louis Nizer, *The Implosion Conspiracy* (1973) (best-seller, discussing legal aspects of the Rosenberg case and trial); Morton Sobell, *On Doing Time* (1974) (autobiography of co-defendant, Morton Sobell); Alvin H. Goldstein, *The Unquiet Death of Julius and Ethel Rosenberg*

(1975). The case became a symbol of the Cold War mentality of fear and inspired serious literary works. *See, e.g.*, Donald Freed, *Inquest* (1969) (play about the Rosenberg case by award-winning playwright); E.L. Doctorow, *The Book of Daniel* (1971) (best-selling semi-historical novel discussing aftermath of Rosenberg execution; nominated for National Book Award); Robert Coover, *The Public Burning* (1977, new release 1998) (fictionalized narrative of Rosenberg execution).

Over twenty years after the Rosenbergs were put to death, interest in the case extended beyond the popular press and into the courts. In the mid-1970's, the Rosenbergs' two sons, Michael and Robert Meeropol, and their attorney, Marshall Perlin, filed Freedom of Information Act (FOIA) requests to obtain government records on the Rosenberg case and investigation. *See generally* 5 U.S.C. § 552. These requests engendered lengthy litigation and ultimately resulted in the release of hundreds of thousands of pages of documents from the files of the FBI, the CIA, the Department of Justice, and other agencies. *See Meeropol v. Meese*, 790 F.2d 942, 945–50 (D.C. Cir. 1986) (providing timeline of FOIA litigation and describing agencies' production of documents).⁶ The documents uncovered by the Meeropols' FOIA litigation provided new information for the vigorous debate over the Rosenberg case, and the information sparked a renewed interest in the case. *See, e.g.*, Susan F. Rasky, *Yet Another Rosenberg Chapter*, *N.Y. Times*, Sept. 14, 1985, at 8. The documents, now called the "Perlin Papers," are housed at Columbia University Law School. The Perlin Papers are currently

⁶ The government recognized the importance of public disclosure of the Rosenberg records. Deputy Attorney General Harold Tyler Jr. directed the Justice Department "to follow a policy of 'maximum possible disclosure of information' in response to FOIA requests concerning the Rosenberg case. The statement also indicated that requests would be expedited, and that statutory exemptions would be invoked only when there

being digitized and made accessible on the internet, to encourage the widespread use of these valuable records. See Columbia University Law School, *Perlin Papers Online*, <http://www.columbia.edu/acis/cria/rosenberg/>. The CIA has also posted at the CIA Electronic Reading Room its documents made available through the FOIA request. *Atomic Spies: Ethel and Julius Rosenberg*, <http://www.foia.cia.gov/rosenberg.asp>.

By the 1980's, the case had gained such significance in the academic world that a historian's opinion on the Rosenberg case was the stuff on which his or her reputation could rise or fall. For example, Professor Ronald Radosh, a self-described "red diaper baby" and historian, was shunned by much of the academic community when he published *The Rosenberg File*, an inquiry into the Rosenberg case that argues for Julius Rosenberg's guilt, based on documents obtained through the Meeropols' FOIA requests. (See Sibley Decl. ¶ 4 ("Ronald Radosh, a liberal historian, became an academic pariah overnight when he published The Rosenberg File.")); see also Ronald Radosh, *Commies: A Journey Through the Old Left, the New Left, and the Leftover Left* (2002) (including chapters entitled "Red Diapers," "Commie Camp," and "The Little Red Schoolhouse"); Ronald Radosh & Joyce Milton, *The Rosenberg File* (1983, 2d ed. 1997).

The Rosenberg File, with its assertion that Julius was a spy and that Ethel was aware of his Soviet activities, created a serious rift in the academic community, and the ensuing debates were played out in the media. See, e.g., Alan M. Dershowitz, Book Review, *Spies and Scapegoats*, N.Y. Times, Aug. 14, 1983, at BR1 (favorable review of *The Rosenberg File*); Walter Schneir & Miriam Schneir, Letter to the Editor, N.Y. Times, Sept. 18, 1983, at BR18 (criticizing Dershowitz's review); Sam Roberts, *The*

was a 'compelling reason to do so.'" 790 F.2d at 946 n.2.

Rosenbergs: New Evidence, Old Passions, N.Y. Times, Sept. 23, 1983, at B1 (discussing the findings of *The Rosenberg File*); Michael Meeropol & Robert Meeropol, Letter to the editor, *Some Evidence Left out of Recent Rosenberg Case Accounts*, N.Y. Times, Oct. 14, 1983, at A30 (criticizing fact-checking in Roberts' article); Walter Goodman, *For a Spirited Audience at Town Hall, 'The Rosenberg File' Remains Open*, N.Y. Times, Oct. 22, 1983, at 25 (describing the October 20 Town Hall debate between the Schneirs and Radosh and Milton; stating, "[M]ore is involved in this dispute than one couple's guilt or innocence. The case reflects a deep and continuing division on the left about the character of American society."). This passionate response to a decades-old prosecution reveals the continued cultural and historical importance of the Rosenberg case.

The Rosenberg case is not solely about the guilt or innocence of the couple; instead, the trial, conviction, and execution have long been irrevocably entangled with the long-lasting and ongoing dispute over the existence and extent of Soviet espionage during the Cold War. The Rosenberg case was the touchstone event that ignited extensive debate over the reasonableness of the Cold War fear of Soviet espionage and of the government's response to that threat. *Cf. In re Am. Hist. Ass'n*, 49 F. Supp. 2d at 294 ("The [Hiss] case was, and is, also an important facet of the broader historical debate over the extent of wartime Soviet espionage in the United States and the propriety of investigations thereof.").

The broad historical significance of the Rosenberg trial has been made even more apparent by recent revelations regarding Cold War-era espionage. In 1995, the National Security Agency released the files of the VENONA intelligence project, a United States effort to intercept and decipher Soviet consular messages primarily during World War II.

See Tim Weiner, *US Tells How It Cracked Code of A-Bomb Spy Ring*, N.Y. Times, July 11, 1995, at A10. The VENONA decrypts included Soviet messages referencing the espionage work of Julius Rosenberg (code-named “LIBERAL”), David Greenglass (“CALIBER”) and Ruth Greenglass (“OSA”). See, e.g., John Earl Haynes & Harvey Klehr, *Venona: Decoding Soviet Espionage in America* 308 (1999). The messages are less clear about the role of Ethel Rosenberg, who did not receive a code name, which led students of the case to varying opinions on the extent of her involvement. Compare, e.g., *id.* at 16 (characterizing Ethel as “a participant in her husband’s espionage”) with Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* 178 (1998) (characterizing Ethel as a “lever” used by the government against Julius; “[s]he probably was [aware of Julius’s activities]; but her real crime was to stand by her man”).

The VENONA revelations, combined with the late-1990s release of intelligence material from former Soviet bloc countries, have fueled further scholarship and debate on the Rosenberg case—especially on the role, if any, that Ethel played in the theft of atomic secrets—and on the extent of Cold War-era Soviet espionage in the United States generally. See, e.g., Radosh (2d ed. 1997); Haynes & Klehr; Allen Weinstein & Alexander Vassiliev, *The Haunted Wood: Soviet Espionage in America—The Stalin Era* (1999) (arguing based on VENONA information that Julius Rosenberg was a Soviet spy).

Other works on the Rosenberg case, ranging from biographies to documentaries to novels, have been published in the past twenty years as well, thereby demonstrating that the public’s fascination with the case continues despite the fifty-six years that have passed since the Rosenbergs’ indictment. See, e.g., Robert Meeropol & Michael Meeropol, *We Are Your Sons: The Legacy of Ethel and Julius Rosenberg* (1986); Ilene J.

Philipson, *Ethel Rosenberg: Beyond the Myths* (1988); Joseph H. Sharlitt, *Fatal Error: The Miscarriage of Justice That Sealed the Rosenbergs' Fate* (1989) (describing legal maneuvering of the case and arguing that Rosenbergs' conviction was based on the wrong statute); Rob Okun, ed., *The Rosenbergs: Collected Visions of Artists and Writers* (1993); Marjorie Garber and Rebecca L. Walkowitz, eds., *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties America* (1995) (social history and social commentary on Rosenberg case).

3. *The Many Aspects of the Current Interest in the Case.*

Even into the new millennium, the Rosenberg case, by then over fifty years old, continued to inspire historical scholarship and artistic works. *See, e.g.*, Millicent Dillon, *Harry Gold: A Novel* (2000) (fictionalized account of the life of Gold, a trial witness against the Rosenbergs); Alexander Feklisov & Sergei Kostin, *The Man Behind the Rosenbergs* (2001) (memoirs of Julius Rosenberg's Soviet "handler"); 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); Ivy Meeropol, *Heir to an Execution* (2004) (DVD) (Rosenbergs' granddaughter reflects on the lives of her grandparents); Robert Meeropol, *An Execution in the Family: One Son's Journey* (2003); Kenneth R. Kahn, *Secret Judgment: How the U.S. Government Illegally Executed Julius and Ethel Rosenberg* (2004); Steven Usdin, *Engineering Communism: How Two Americans Spied for Stalin and Founded the Soviet Silicon Valley* (2005) (story of Joel Barr and Alfred Sarant, two Americans Julius Rosenberg recruited to act as Soviet spies, who ultimately defected to the Soviet Union).

Over the past fifty-six years, the Rosenberg case has become part of public

consciousness and popular culture in a way that the Alger Hiss case and other espionage trials never did. Numerous films,⁷ television shows,⁸ plays,⁹ and other productions¹⁰ have documented the Rosenbergs' fate and made their story accessible to the masses.

In addition to the historical and popular interest in the case, the legal academy has also found significant value in the Rosenberg trial, and numerous law review articles have been published on the subject. *See, e.g.,* Atossa M. Alavi, Comment: *The Government Against Two: Ethel and Julius Rosenberg's Trial*, 53 Case W. Res. L. Rev. 1057 (2003); Michael E. Parrish, *Essay on the Trials of the Century: Revisited—The Rosenberg "Atom Spy" Case*, 68 UMKC L. Rev. 601 (2000); Sheila M. Brennan, *Popular Images of American Women in the 1950's and Their Impact on Ethel Rosenberg's Trial and Conviction*, 14 Women's Rights. L. Rep. 43 (1992); William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 Cornell L. Rev. 211 (1985); Michael E. Parrish, *Justice Douglas and the Rosenberg Case: A Rejoinder*, 70 Cornell L. Rev. 1048 (1985); Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 Colum. L. Rev. 219 (1954).

⁷ *See, e.g.,* *Heir to an Execution* (Blowback Productions 2004, HBO television broadcast June 14, 2004); *Can The Rosenberg Case Be Reopened?* (Radical Films 2001); *Landmark American Trials: Julius and Ethel Rosenberg* (World Almanac Films 1999); *The Rosenberg File: Case Closed* (Discovery Channel Films 1997); *Daniel* (Paramount Pictures 1983); *End of Innocence* (First Run/Icarus Films 1981); *The Unquiet Death of Julius and Ethel Rosenberg* (Facets Video 1974); *Judgment: The Trial of Julius and Ethel Rosenberg* (television broadcast Jan. 28, 1974).

⁸ *See, e.g.,* *History Undercover: David Greenglass: Twice a Traitor* (History Channel television broadcast 2006); *60 Minutes: The Traitor* (CBS television broadcast Dec. 5, 2001); *Secrets, Lies, and Atomic Spies* (PBS television broadcast Feb. 5, 2002); *American Justice: The Rosenbergs* (A&E television broadcast 1993);

⁹ *See, e.g.,* John Hancock, *The Brother* (2007); Tony Kushner, *Angels in America* (1980, HBO television broadcast Dec. 7, 2003); Lou Shaw, *Worse Than Murder: Ethel and Julius Rosenberg* (2002); Donald Freed, *Inquest* (1970)

¹⁰ *See, e.g.,* Ari Benjamin Meyers, *Defendants Rosenberg* (1996) (opera); Leonard

Highly respected academic institutions have recognized the historical importance of the Rosenberg case by preserving papers and collections regarding the case. These institutions include, for example, Columbia University Law School and Georgetown University. See Columbia University Law School, *Perlin Papers Online*, <http://www.columbia.edu/acis/cria/rosenberg/>; Georgetown University, Special Collections, *Robert J. Lamphere Papers*, <http://library.georgetown.edu/dept/speccoll/cl264.htm> (papers of former FBI agent, including extensive material on Rosenberg case). In decisions concerning the disclosure of grand jury records, maintenance of archives by academic institutions is recognized as an “indication of the historical importance” of the case. *In re Am. Hist. Ass’n*, 49 F. Supp. 2d at 295 n.10.

The Rosenberg case promises to be the subject of future historical and academic inquiry, especially if the grand jury records are released. *In re Craig* cautioned district courts not to grant petitions based on journalistic intrigue or public curiosity. 131 F.3d at 105 n.8. This petition raises no such concern. This petition does not seek records to satisfy mere curiosity, nor to provide information for a single academic’s isolated scholarly interest. Instead, this petition stems from the consensus among a broad range of historians, academics, and archivists who have a professional and academic interest in the Rosenberg case in general and in the grand jury records in particular and who believe that there are no longer legitimate reasons to keep the Rosenberg grand jury records secret.

4. *The Broad-Ranging Historical Interest of Petitioners.*

The parties, National Security Archive, the American Historical Association, the American Society for Legal History, the Organization of American Historians, the

Lehrman, *We Are Innocent* (1987) (cantata).

Society of American Archivists, and Sam Roberts, have long-standing professional interests in the Rosenberg grand jury records. As is explained in the declaration of Thomas Blanton, the National Security Archive is an independent, non-governmental research institute that collects and publishes declassified documents obtained through the Freedom of Information Act, and it also serves as a repository of government records on a wide range of topics pertaining to the national security, foreign, intelligence, and economic policies of the United States. The National Security Archive won the 1999 George Polk Award, one of American journalism's most prestigious prizes, for, in the words of the citation, “piercing the self-serving veils of government secrecy, guiding journalists in the search for the truth and informing us all.”

The American Historical Association is the nation’s largest historical society for professionals, founded in 1884 for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research. The American Society for Legal History is a nonprofit membership organization dedicated to fostering scholarship, teaching, and study concerning the law and institutions of all legal systems. The Organization of American Historians is the largest professional society for the teaching and study of American history. The Society of American Archivists is the oldest and largest national archival professional association in the United States, dedicated to ensuring the identification, preservation, and use of records of historical value. Sam Roberts is a *New York Times* reporter who has reported extensively on the aftermath of the Rosenberg case. Through persistence, Roberts gained unprecedented access to David Greenglass and, based on his interviews, wrote a widely-acclaimed account of the Rosenberg case, *The Brother: The Untold Story of the*

Rosenberg Case (2003).

The historians who provided declarations in support of this petition are preeminent scholars of the Cold War era, and they attest to the ongoing historical interest in the Rosenberg case and the likelihood of valuable historical research that would result from the release of the records. (See, e.g., Gaddis Decl. ¶ 5 (observing that disclosure would be a “boon to historians of Cold War intelligence activities”); Hornblum Decl. ¶ 10 (discussing his intent to use the records, if released, in forthcoming biography of Harry Gold); Schrecker Decl. ¶ 9 (discussing her intent to use the records, if released, in forthcoming book on political repression in the United States); Sibley Decl. ¶ 9 (discussing her intent to use the grand jury records, if released, in future publication on gender assumptions during the Cold War period)).

While this Court in *In re American Historical Association* did not base its release of the grand jury records solely on the general historical interest of the Hiss case, it did note that general historical interest alone may have been an appropriate basis for the release of the grand jury records. Sufficiently old records give the public “a significant, if not compelling, interest in ensuring the pages of history are based upon the fullest possible record.” *In re Am. Hist. Ass’n*, 49 F. Supp. 2d at 295. This interest is especially strong when the “case fosters vigorous and sustained debate not only about the case itself, but also about broader issues concerning fundamental and, at times, countervailing aspects of our democracy,” such as governmental investigative power, freedom of expression, and the role of grand juries, all of which are relevant to the Rosenberg case. *Id.* Disclosure in cases involving such issues is appropriate and positive because it “can only, in the long run, build confidence in our government by affirming that it is open, in

all respects, to scrutiny by the people.” *Id.*

The overwhelming general historical interest of the Rosenberg case may well be sufficient grounds for releasing the grand jury records. However, as this petition demonstrates below, the Rosenberg grand jury records present a significant specific historical interest as well.

B. Specific Historical Interest of the Grand Jury Records.

The Rosenberg grand jury records contain information that is important to numerous historical issues, and, as discussed below, these records will provide information that cannot be found elsewhere. This specific historical interest in the Rosenberg grand jury records supplements the overwhelming general historical interest in the case and provides a more than substantial basis for the release of the records.

1. *Bases for the Allegations Against the Rosenbergs.*

Historical debate continues over the conviction and execution of the Rosenbergs. Historians generally agree that Julius Rosenberg was engaged in espionage for the Soviets, but significant questions remain as to the extent, content, and importance of the information he provided to the Soviets. (Craig Decl. ¶ 243-44; Radosh Decl. ¶ 5.)

While the Rosenbergs were convicted for atomic espionage, some historians believe that industrial espionage was the main focus of Julius Rosenberg’s espionage activities.

These historians believe that the “untold story of the Rosenberg case is the success of the Rosenberg spy ring in engaging in espionage activities relating to non-atomic military technology.” (Usdin Decl. ¶2; *see also* Haynes Decl. ¶ 5; Radosh Decl. ¶ 5.) Some believe that as a recruiter and handler of agents, Julius was able to transmit detailed specifications and manufacturing instructions for critical military technology of the Cold

War. Such technology included the proximity fuse (used to bring down spy-pilot Gary Powers), powerful land-based and airborne radars, automated anti-aircraft weapons, and jet engine and airframe technology that provided far greater assistance to the Soviets than the atomic espionage for which Julius was ultimately executed. (Usdin Decl. ¶ 2; Gaddis Decl. ¶ 5.) Because the Rosenbergs' trial focused on atomic espionage, any information that was revealed at the grand jury about whether Julius Rosenberg was engaged in industrial espionage has remained secret. The release of the grand jury records will likely shed light on this significant but often ignored part of history. (*See* Gaddis Decl. ¶ 5-6; Haynes Decl. ¶ 6; Usdin Decl. ¶ 3.)

Ethel Rosenberg's role in the atomic espionage for which she was convicted remains a subject of intense debate. (Sibley Decl. ¶ 4, 6.) Ethel was called before the grand jury twice, and her testimony will likely clarify the extent of her involvement with any espionage activities. (*See id.* ¶ 6.) Many historians have suggested that Ethel's indictment and conviction were part of the government's strategy to pressure her husband to plead guilty and reveal Soviet spying secrets, and that the historical evidence on her guilt in espionage activities is at best thin. (*See, e.g.,* Sibley Decl. ¶ 6; Schrecker Decl. ¶ 7; Roberts Decl. ¶ 12-15; *cf.* Usdin Decl. ¶ 8 ("Ethel was not an unwitting innocent bystander . . . [but t]he available evidence suggests [she] played a minor role in Julius's espionage activities, and that . . . David Greenglass, exaggerated the extent of her actual involvement in court.")). An FBI memorandum suggesting questions to ask the Rosenbergs, prepared after their convictions and sentencing and on the eve of their executions, substantiates this claim. The sole question for Julius regarding Ethel was: "Was your wife cognizant of your activities?" (Craig Decl. ¶ 240.) Moreover,

statements made by David and Ruth Greenglass in subsequent interviews suggest that their testimony describing Ethel's role in the espionage ring, the most compelling evidence against her, may have been fabricated. (Roberts Decl. ¶ 5-8.) Given the continuing uncertainty of Ethel's involvement with the spy ring, the grand jury records may provide pivotal information on the extent of Ethel's knowledge of any atomic spy plot and insight into why the government pressed for her execution.

Professor Craig also notes that Sobell's questionable co-indictment and the evidence on which he was indicted also remain a key concern on which the grand jury records may shed some light. (Craig Decl. ¶ 122-24, 151-52, 206(B); *see also* Radosh Decl. ¶ 9.) The testimony of Brothman and Moskowitz, who were believed to be connected with Harry Gold and Elizabeth Bentley, may also reveal other evidence the prosecution used to pursue charges against the Rosenbergs. (Craig Decl. ¶ 128-41, 212-14; Hornblum Decl. ¶ 6-8.)

In their declarations, Ronald Radosh and Steven Usdin both note that while the grand jury records will likely shed light on the activities of the Rosenbergs and other defendants, the records may also reveal information about other possible Soviet espionage agents. For example, Al Sarant and Joel Barr were likely involved in industrial espionage with Julius Rosenberg, but they defected to the Soviet Union before the FBI was able to question them. Their activities may have been discussed at the grand jury. (Radosh Decl. ¶ 7; Usdin Decl. ¶ 1.) Radosh states that other grand jury witnesses, including Vivian Glassman, Max Finestone, and Stanley Robert Rich, may have been involved in espionage as well. The grand jury records may reveal information into their involvement in Soviet espionage. (Radosh Decl. ¶ 8, 10.) By providing deeper insight

into the members of the Rosenberg spy ring or those closely associated with it, the Rosenberg grand jury records may also help historians to understand better the motives of Americans who allegedly spied for the Soviets. (Usdin Decl. ¶ 6.)

2. *Alleged Improprieties of the Prosecution Team.*

The prosecution team has been accused of eliciting inaccurate or untruthful testimony from its witnesses through coercive methods. FBI records suggest that David Greenglass's crucial testimony against the Rosenbergs was coordinated by the government to mesh with Harry Gold's testimony. Greenglass's grand jury testimony may resolve the question of the prosecution's use of untruthful or tainted evidence. (*See, e.g.*, Craig Decl. ¶ 206(F), 209-11; Schrecker Decl. ¶ 8; Roberts Decl. ¶ 8-9.) Soviet courier Harry Gold originally stated that the code phrase was, "I come from Ben"; however, he later testified that the code was, "I come from Julius." (Radosh Decl. ¶ 6.) Gold's later testimony was consistent with David Greenglass's trial testimony. Furthermore, David and Ruth Greenglass's testimony regarding Ethel's typing of the nuclear information was the key to Ethel's conviction, but initially they did not relate this story to the FBI. (Roberts Decl. ¶ 7-8.) Moreover, in a subsequent interview with David Greenglass in preparation for his book, *The Brother*, Sam Roberts states that David Greenglass "acknowledged for the first time that, in effect, he had lied in his testimony, that he had no recollection—then or now—as to whether Ethel typed his notes or not." (*Id.* ¶ 8.) The grand jury records may clarify the ways in which testimony changed throughout the investigation and provide the final piece of the long-standing puzzle of whether the Rosenbergs received a fair trial. (Radosh Decl. ¶ 6; Roberts Decl. ¶ 9.)

Because of the large number of grand jury witnesses, questions also remain

concerning the amount of information the grand jury gathered and whether that information, not brought out at trial, would have weakened the prosecution's case against some or all of the defendants. (Craig Decl. ¶ 161-62, 206(E); Radosh Decl. ¶ 10.)

3. *The Prosecution's Strategy.*

The grand jury records may reveal the government's prosecutorial strategy for this key atomic espionage case. Many historians have suggested that the government prosecuted both Julius and Ethel Rosenberg and sought the death penalty because it hoped to pressure both Rosenbergs to confess and become informants on other Soviet espionage activities. (Sherwin Decl. ¶ 3; Roberts Decl. ¶ 15; Schrecker Decl. ¶ 7.) By refusing to confess and turn state's witness, the Rosenbergs ended the procession of confessions that had begun with Klaus Fuchs. Fuchs's confession had led the authorities to Harry Gold; Gold's confession led to David Greenglass; Greenglass's confession led to the Rosenbergs, but the Rosenbergs remained silent. (Hornblum Decl. ¶ 3-5.) Many historians theorize that the Rosenbergs could have revealed substantial information on the industrial espionage ring in which Julius was involved, and the government may have used the death penalty threat in an attempt to gain access to that information. (*See* Schrecker Decl. ¶ 3; Usdin Decl. ¶ 2-4, 8.)

The government's decision to seek the death penalty to pressure the Rosenbergs to confess may explain why the Rosenbergs received a sentence far harsher than the other Soviet spies apprehended during this period. Unlike Fuchs, Greenglass, and Gold, the Rosenbergs did not cooperate, and the government, desperate for information on Soviet espionage, may have used the death penalty threat to try to persuade them to confess. The Rosenbergs called the government's bluff, and paid the ultimate price. (Roberts

Decl. ¶ 14; Schrecker Decl. ¶ 2-7.) Moreover, Sam Roberts questions whether the prosecution team even had sufficient evidence to indict and arrest Ethel as early as it did, since all of the evidence used against her at trial was discovered after her indictment and arrest. (Roberts Decl. ¶ 12-15.) Roberts suggests that Ethel was originally arrested and indicted primarily to obtain leverage against Julius. (*Id.*) The grand jury records may reveal whether Roberts' theory is borne out by the evidence.

4. *Abuse of the Grand Jury Process.*

The Alger Hiss grand jury records raised new questions about the methods the government used to prosecute those accused of Soviet espionage activities. According to Professor Athan Theoharis, the prosecution in Hiss used information from illegal wiretaps to pressure grand jury witnesses to confess, or to provide information that they might have otherwise sought to conceal. (Theoharis Decl. ¶ 4.) While the illegal wiretap information could not have been introduced at trial, the grand jury confessions could be introduced. This "laundering" of information may have taken place at the Rosenberg grand jury as well. Professor Theoharis suggests that information from wiretaps, as well as from the VENONA decrypts, may have been used in similar ways by the prosecution to ensure the Rosenbergs' indictment. (*Id.*) Only the grand jury records can answer this question.

Professor Theoharis also suggests that Hiss grand jury records demonstrate that the FBI and the Department of Justice politicized the grand jury process during the Cold War. (Theoharis Decl. ¶ 5.) To secure Hiss's indictment, the prosecution appealed to grand jurors' "deeply rooted, Cold War-era fears of the looming Soviet threat," and the prosecution's political maneuvering remained secret until the records were released. (*Id.*)

Similarly, unsealing these grand jury records would allow scholars to see whether the government attempted to politicize the grand jury process in the Rosenberg case.

5. *Soviet Espionage in the United States.*

The contemporary debate over the existence and extent of Soviet espionage in the United States during the early Cold War has been relentless and heated. Recent books on the topic include: John Earl Haynes & Harvey Klehr, *In Denial: Historians, Communism, and Espionage* (2003) (arguing against “revisionist” history downplaying the extent of Soviet espionage among American Cold War-era communists); Herbert Romerstein & Eric Breindel, *The Venona Secrets: Exposing Soviet Espionage and America’s Traitors* (2000) (arguing that Soviet espionage was widespread in the American Communist Party during Cold War; includes chapter on Rosenbergs); John Earl Haynes & Harvey Klehr, *Venona: Decoding Soviet Espionage in America* (1999); Harvey Klehr, et al., *The Soviet World of American Communism* (1998) (discussing the Soviets’ control over American Communists); *Venona: Soviet Espionage and the American Response, 1939-1957* (Robert Louis Benson & Michael Warner, eds., 1996) (reprinting many of the released VENONA decrypts); Harvey Klehr, et al., *The Secret World of American Communism* (1995) (discussing the American Communist Party’s role in Cold War espionage); and Robert J. Lamphere & Tom Shachtman, *The FBI-KGB War: A Special Agent’s Story* (rev’d ed. 1995) (autobiography of Cold War-era FBI agent).

The disclosure of the Rosenberg grand jury records will provide new insight into the realities underlying the espionage debate. Most of the witnesses who testified before the grand jury did not testify at trial, but in 1953 several of them were questioned about their ties to the Communist party by the Senate Permanent Subcommittee on

Investigations of the Committee on Government Operations. *See infra* pp. 42-44. In addition, Elizabeth Bentley, the “Red Spy Queen” famous for revealing the identities of dozens of alleged American Communist spies, was a grand jury witness. The transcript of her testimony will likely add to our knowledge of the extent of Soviet infiltration in the United States. Her testimony is particularly important because the transcripts of her lengthy grand jury testimony in the Alger Hiss case, while ordered released by Judge Leisure, have never been found and have been declared “missing” by the National Archives and Records Administration. Furthermore, Bentley’s Rosenberg trial testimony was shown by the defense attorneys to be inconsistent and elusive, and the records of her grand jury testimony will possibly demonstrate whether the trial testimony of this “celebrity witness” was untruthful or evasive. (Craig Decl. ¶ 163-70, 206(C).)

Finally, some historians take the position that the success of the Rosenberg spy ring highlights a major failure of the FBI’s counterintelligence efforts to deal with early Cold War-era Soviet espionage. Release of grand jury records may provide insight into what prevented the FBI from detecting “a group of amateurs who managed to photograph tens of thousands of pages of classified documents” relating to some of America’s most important and most secret military projects. (Usdin Decl. ¶ 7; Theoharis Decl. ¶ 2-6 (discussing unexpected value of the Hiss records on research about FBI counterintelligence activities and explaining how the Rosenberg records may provide similar value)).

The much-publicized threat of Soviet espionage led to significant changes in American domestic policy. In his declaration, Professor Martin Sherwin notes that the Rosenbergs’ prosecution and their perceived guilt was a key factor in the government’s

increasingly repressive McCarthyist policies. FBI director J. Edgar Hoover's concentration on domestic communism was spurred in part by the Rosenberg prosecution, and the widespread belief in the dangers of nuclear espionage in particular was underscored by the Rosenbergs' execution. (Sherwin Decl. ¶ 4; Schrecker Decl. ¶ 2, 5-7, 10.)

By adding to this evidence on the witnesses' Communist ties, the grand jury records will provide new information on the extent of possible Soviet espionage in the United States and on the United States' reaction to that threat.

6. *Unanticipated Issues Arising from Grand Jury Records.*

The release of the Alger Hiss grand jury records demonstrated that grand jury records can reveal unanticipated information and raise new questions of interest to historians and the general public. (Theoharis Decl. ¶ 3.) In his 2002 book, *Chasing Spies: How the FBI Failed in Counterintelligence but Promoted the Politics of McCarthyism in the Cold War Years*, Professor Theoharis documented two of these new issues, the abuses of the grand jury process and the politicization of justice by government officials. Historian John Berresford has also studied the Alger Hiss records in depth, and his declaration describes the ways in which the Hiss records revealed new information. For example, the grand jury records contain much information not discussed at the Hiss trials, on topics such as the Soviets' methods of recruiting American Communists into espionage, and the ways in which former Communists lost their faith and detached themselves from the Communist network. (Berresford Decl. ¶ 4.) The Hiss records demonstrate that even when historians have access to a large amount of information on a case, grand jury records can still contain new, unanticipated, and

invaluable information.

The Rosenberg grand jury records will likely contain a similar wealth of new information. (Berresford Decl. ¶ 4.) The investigative grand jury process fosters this accumulation of information. There are no limits on the testimony imposed by notions of relevance, or requirements that the prosecutors ask pointed, close-ended questions. Nor is the testimony of grand jury witnesses rehearsed, or filtered through the careful fine-tuning of their lawyers. Grand jury witnesses are often asked broad, open-ended questions which encourage them to tell their stories. (*Id.* ¶ 5.) Grand jury witnesses are also subject to hostile, surprise questions, and they have to answer with little forethought, a process that elicits more honest answers than the sometimes manufactured testimony at trial. (*Id.*)

In addition, a grand jury investigation is wide-ranging and covers broad subject areas, rather than focusing on an indictment against a certain defendant. The evidence brought before a grand jury is not limited by the same legal factors that limit evidence at trial, such as statutes of limitations, rules of evidence, relevance, and the “four corners” of an indictment. (*Id.* ¶ 6.) The absence of these limitations makes the grand jury records a more useful historical tool than the trial transcript. The Rosenberg grand jury investigation was not limited to atomic espionage or to the crimes of the Rosenbergs and Sobell, and the grand jury records are certain to reveal new information that has not yet been uncovered.

As this petition shows, the release of the grand jury records will increase the public’s knowledge and understanding of this case that has played a vital role in shaping the American consciousness for the past fifty-six years. The overwhelming general

historical interest in the Rosenberg case and the specific historical interest in the grand jury records outweigh any remaining secrecy interests in the records.

III. The Need to Maintain Secrecy of the Rosenberg Grand Jury Records is Minimal.

Fifty-six years have elapsed since the grand jury proceedings that led to the Rosenbergs' indictment. With grand jury records, age matters. Age diminishes the secrecy interests that can be legitimately invoked to justify continued sealing of the records. There are several reasons for this diminishing interest in secrecy. First, when the grand jury investigation has ended, several reasons for secrecy are immediately dissolved. *Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990) (noting that when the investigation has ended, the information no longer must be kept from the investigated individual, and there is no need to prevent the importuning of grand jurors after their service is over). In addition, when all appeals from convictions based on the grand jury's indictments have become final, the secrecy interest in protecting the grand jury witnesses from tampering or retaliation has diminished. *In re Am. Hist. Ass'n*, 49 F. Supp. 2d at 292. Any privacy interests served by the Rosenberg grand jury records' secrecy have evaporated over the intervening fifty-six years.

In *In re American Historical Association*, this Court found two potential secrecy interests remaining in the then 49- to 51-year-old Hiss grand jury records: the forward-looking interest in maintaining secrecy of grand jury proceedings and the privacy interest of any subjects of the investigation whose identities had not yet been revealed. 49 F. Supp. 2d at 292. As in that case, the Rosenberg grand jury records present the same two potential secrecy interests. And as in the Hiss case, neither the general interest in secrecy—the general, forward-looking need for witnesses to be able to testify at grand

juries without fear of reprisal—nor the specific interest in the secrecy of the Rosenberg documents is sufficient to overcome the historical interest in this landmark case.

A. The Forward-Looking Interest in Maintaining Secrecy Will Not Be Inhibited by Disclosure.

This Court has found that when a court orders the disclosure of half-century-old grand jury records for historical purposes the forward-looking interest in maintaining secrecy in order to protect the functioning of future grand juries is negligible. The Court stated that “[t]he inhibiting effect of such disclosure is insignificant” when compared with other, more immediate causes of disclosure, such as press attention, statements by witnesses, and disclosures at trial. *In re Hist. Ass’n*, 49 F. Supp. 2d at 292. In addition, in cases of historical importance, the “often extensive contemporaneous attention given to the case is likely to magnify the importance of those more proximate causes of disclosure in the minds of potential jurors and witnesses, and make the possibility of disclosure decades hence based on historical interest seem a trifling concern, or even an inevitability.” *Id.*

Grand jury records compiled far more recently than the 56-year-old Rosenberg records have been released on the basis of historical interest without detriment to the forward-looking interest in grand jury record secrecy. In *In re May*, this Court released the 35-year-old records of William Remington’s grand jury testimony in the Hiss case. 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987). In *In re O’Brien*, the court ordered the disclosure of 45-year-old grand jury records from the 1945 Columbia, Tennessee race riot investigation. No. 3-90-X-95 (M.D. Tenn. 1990) (unpublished opinion). In *In re American Historical Association*, this Court opened the Alger Hiss grand jury records, which were between 49 and 51 years old. 49 F. Supp. 2d at 292. The Rosenberg grand

jury records are now 56 years old, older than all the records released in prior cases. The forward-looking secrecy interest in grand jury records has not been inhibited by the release of these more recent records, and the release of the Rosenberg records will likewise not harm that secrecy interest.

These prior cases are also notable in that all of the grand jury records provoked innovative scholarship. The Remington grand jury records allowed Gary May, professor of history, to write an insightful narrative of the events leading to Remington's perjury conviction and ultimate murder in prison, including a gripping account of the grand jury's relentless examination of Remington's ex-wife. Gary May, *Un-American Activities* (1994). The race riot grand jury records provided information necessary for the publication of the most thorough account of the Columbia, Tennessee race riots and of the federal grand jury proceedings that resulted in no indictments for civil rights violations. The grand jury records provided a substantial amount of the factual information used to develop a clear picture of the events themselves, and the records also allowed the historian to analyze the surprising and, in her view, blatantly unjust outcome of the federal grand jury. Gail Williams O'Brien, *The Color of the Law: Race, Violence, and Justice in the Post-World War II South* (1999).

The Hiss grand jury records have provided new information and insight about a variety of Cold War espionage cases. Historian Craig was able to integrate the testimony of Harry Dexter White in his book *Treasonable Doubt: The Harry Dexter White Espionage Case* to demonstrate that had White lived longer (he died shortly after proclaiming his innocence before the House Un-American Activities Committee) he may well have been indicted for perjury as was Alger Hiss. See Craig, *Treasonable Doubt*

206-11 (2004).

Other testimony from the released Hiss grand jury record has demonstrated the centrality of grand jury proceedings in providing the prosecutorial framework for the Hiss trial that followed. *See* Haynes and Klehr, *Early Cold War Spies: The Espionage Trials That Shaped American Politics* 107-120 (2006). The released Hiss grand jury record also established the existence of a previously unknown second appearance of Congressman Richard Nixon before the grand jury just before it voted to indict Hiss, but not to indict his accuser, Whittaker Chambers. In this appearance, Nixon used strong anti-communist rhetoric and appealed to the jurors' patriotism in urging the indictment of Hiss; he argued as well that the jurors should not indict Chambers because his indictment might cloud the government's case against Hiss. (Theoharis Decl. ¶ 5.)

Other revelations in the Hiss legal strategy have been documented in a forthcoming article by historian John Berresford, who has produced the first detailed assessment of the grand jury record as it applies to the prosecutorial legal strategy. *See* Berresford, *The Grand Jury in the Hiss-Chambers Case*, *American Communist History* (forthcoming). More studies derived from the Hiss grand jury release will certainly be produced, as historians sift through the extensive information grand jury records provide.

As in the above cases, the age of the Rosenberg records mitigates any adverse effect that the release of the records would have on the functioning of future grand jury investigations. Moreover, the release of the Rosenberg records will similarly serve to provoke additional scholarship, but avoid any detriment to the forward-looking secrecy interest. *See In re Am. Hist. Ass'n*, 49 F. Supp. 2d at 292.

B. Release of the Rosenberg Grand Jury Records Will Not Impair the Privacy Interests of the Grand Jury Subjects or Witnesses.

The grand jury records present little threat to the privacy interests of the subjects of the grand jury investigations or to the grand jury witnesses. Many of the principal subjects and witnesses are dead. Ethel and Julius Rosenberg were executed. The only immediate family of the Rosenbergs, their sons Robert and Michael Meeropol, along with their families, support this petition for release of the grand jury records. (Meeropol Decl. ¶ 2.) Grand jury witnesses Elizabeth Bentley, Harry Gold, Samuel Levine, Joseph Levitsky, Helen Sobell, and James Weinstein are deceased. (Dillard Decl. ¶ 4-9.) Two people who were likely discussed at the grand jury, Al Sarant and Joel Barr, have also died. (*Id.* ¶ 16-17.) In addition, the Rosenberg trial judge, Judge Irving Kaufman, and the main prosecutors, Roy Cohn and Irving H. Saypol, are deceased. (*Id.* ¶ 18-20.)

As best the petitioners can tell, most of the grand jury witnesses have passed away. For a list of the grand jury witnesses, see Craig Decl. Appx. 1. Of the few witnesses who are still living, most have little or no cognizable privacy interest in their grand jury testimony because the substance of their testimonies has been revealed throughout the past fifty-six years. Previous disclosure of testimony greatly diminishes any remaining privacy interest in the records because “even partial previous disclosure often undercuts many of the reasons for secrecy.” *In re Craig*, 131 F.3d at 107. As far as we know, the principal witnesses discussed *infra* may still be alive; however, the privacy interest in their testimony has evaporated over the intervening fifty-six years. *Id.*

Some Rosenberg grand jury witnesses were interrogated at the McCarthy Senate hearings conducted in closed sessions, and they revealed portions of their grand jury testimony to the Senate committee. The Senate records of these hearings were made

public in 2003 by the Permanent Subcommittee on Investigations, following a Senate rule that records of closed Senate investigations are made public after fifty years. Preface, *Army Signal Corps—Subversion and Espionage*, Hearing Before the S. Perm. Subcomm. On Investigations of the Comm. on Gov't Operations, 83rd Cong. xi (1953) (made public Jan. 2003), <http://www.senate.gov/artandhistory/history/resources/pdf/Volume1.pdf>.

This rule demonstrates the understanding that fifty years is a sufficient amount of time to protect privacy interests. In the preface to the released records, Senators Carl Levin and Susan M. Collins note that the records were sealed for fifty years “in part to protect the privacy of many witnesses who testified in closed executive sessions”; their statement underscores that the Senate recognized that the historical value of the records, after fifty years, outweighed any remaining privacy interests of the witnesses. *Id.* at xi-xii.

Perry Alexander Seay discussed his Rosenberg grand jury testimony at McCarthy's *Army Signal Corps — Subversion and Espionage* Senate hearings. When he was questioned by the committee about a dinner he attended at Morton Sobell's house, he stated that he was asked about that dinner by the grand jury as well. *See Army Signal Corps — Subversion and Espionage*, Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Gov't Operations, 83rd Cong. 2772, 2775 (1953, made public Jan. 2003), www.senate.gov/artandhistory/history/resources/pdf/Volume4.pdf.

Before the Rosenberg grand jury, Ann Sidorovich refuted accusations that she was involved in espionage, and denied that she discussed becoming a courier for the Rosenberg spy ring and that she had been present at an alleged meeting with the Rosenbergs and the Greenglasses. (Craig Decl. ¶ 220-25); *see also* Joyce Milton & Ronald Radosh, *The Rosenberg File* 69 (2nd ed. 1997). In her testimony before the

Senate, Sidorovich repeated her denial of involvement in the spy ring. This closed Senate hearing transcript was made public in 2003. *See Army Signal Corps — Subversion and Espionage*, Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Gov't Operations, 83rd Cong. 3172-74 (1953, made public Jan. 2003), www.senate.gov/artandhistory/history/resources/pdf/Volume4.pdf.

Grand jury testimony of several witnesses was also revealed at the Rosenbergs' trial and at other trials stemming from the Rosenberg proceedings. The minutes of Max Elitcher's grand jury testimony were released to the defendants after his testimony at the Rosenberg trial. Transcript of Rosenberg Trial at 509-18, 598-603, 610-11 (discussing release of grand jury minutes). William Perl was indicted and convicted of perjury on the basis of his testimony before the Rosenberg grand jury. The content of his grand jury testimony was discussed at the perjury trial and was widely reported by the media. *See, e.g., Perl Trial Opens in Spy Case Lying: Prosecution Reads Grand Jury Testimony on Secret Orders to Columbia Ex-Teacher*, N.Y. Times, May 19, 1953, at 19 ("Most of the afternoon session was taken up by [the prosecution] reading from Perl's grand jury testimony. The highlight of the testimony was Perl's account of a mysterious visit to him of a woman named Vivian Glassman when he was doing aerodynamics work in Cleveland for a Government agency.");¹¹ (*See also* Craig Decl. ¶¶ 151-53, 232-37).

¹¹ *See also, e.g., Columbia Teacher Arrested, Linked to 2 on Trial as Spies*, N.Y. Times, Mar. 15, 1951, at 1 (reporting indictment on perjury charges that Perl falsely denied knowing Julius Rosenberg, Morton Sobell, Max and Elaine Elitcher, and Ann and Michael Sidorovich); *Perl Denies Lying to U.S. Grand Jury*, N.Y. Times, May 21, 1952, at 14 ("On direct examination he said he had no intention of misleading the grand jury when he testified he did not know Rosenberg and Sobell. He said he thought he was being asked whether he had been intimately acquainted or associated with them, and that he had not been. As for the others mentioned in the indictment, Perl said he did not realize until later that the Helene Elichter [sic] was the wife of a Max Elichter [sic],

The substance of the grand jury testimony of other witnesses has been discovered through historians' analysis of documents obtained through the Freedom of Information Act. For example, based on FBI notes obtained through the Meeropols' FOIA request, historians learned that Vivian Glassman refused to answer any question before the grand jury. Joyce Milton & Ronald Radosh, *The Rosenberg File* 128, 520 (2nd ed. 1997).

Other witnesses, through their own actions, have demonstrated that they do not maintain an expectation of secrecy regarding their grand jury testimony. *Cf. In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973). Morton Sobell's grand jury testimony has not been disclosed; however, he has been a constant advocate of the release of information pertaining to the Rosenberg case, and, in fact, supports this petition for release. (Sobell Decl. ¶ 2.) A 2001 reissue of his 1974 autobiography, *On Doing Time*, includes a CD-ROM containing hundreds of FBI documents relating to FBI's investigation and monitoring of Sobell, that were obtained through Sobell's FOIA requests. Morton Sobell, *On Doing Time* (2001 ed.). David Greenglass, indicted by a separate federal grand jury in Santa Fe, New Mexico, has not discussed any testimony at the Rosenberg grand jury; however, he has been extensively interviewed for a biography by Sam Roberts of the *New York Times*. Sam Roberts, *The Brother: The Untold Story of Atomic*

whom he had met, and that he did not recall ever meeting Ann and Michael Sodorovich [sic]."); *Perl Denies Guilt; His Bail Is \$20,000*, N.Y. Times, Mar. 16, 1961, at 8; *Atom Perjury Data Filed by Government*, N.Y. Times, May 26, 1951, at 22; *Spy Case Suspect Seeks Cut in Bail*, N.Y. Times, May 28, 1952, at 16; *Perl Asks for Early Trial of Perjury Case But Would Accept Delay if Bail Were Cut*, N.Y. Times, June 10, 1952, at 12; *Perl Once an Active Young Red, Witnesses Say at Perjury Trial*, N.Y. Times, May 20, 1953, at 13; *Jury in Perl Trial to Get Case Today*, N.Y. Times, May 22, 1953, at 12; Milton Bracker, *Perl Guilty of Perjury in Spy Case; Link to Rosenbergs Now Charged*, N.Y. Times, May 23, 1953, at 1; Edward Ranzal, *Perl Gets 5 Years for Lying to Jury*, N.Y. Times, June 6, 1953, at 7; *Perl's Conviction Upheld on Appeal*, N.Y. Times, Feb. 12, 1954, at 8.

Spy David Greenglass and How He Sent His Sister, Ethel Rosenberg, to the Electric Chair (2001). As of 2004, Greenglass and his wife, Ruth Greenglass, have been living under an assumed name, so any adverse publicity resulting from the release of the Rosenberg grand jury records would be mitigated by their current anonymity. See Sam Roberts, *Capturing the Rosenbergs*, N.Y. Times, June 13, 2004, § 2 at 31.

In addition, while there are some remaining, minor grand jury witnesses who may still be alive and whose grand jury testimony has not been revealed, the intervening fifty-plus years sufficiently diminish their privacy interest in their grand jury testimony to justify the full release of the grand jury records.

Thus, the release of the Rosenberg grand jury records will not invade the privacy interests of grand jury subjects or witnesses still alive. The overwhelming historical interest in the Rosenberg case in general, and in the grand jury records in particular, is sufficient to merit the release of the grand jury records. The grand jury records are the last secret government documents regarding the Rosenberg case, and the release of these records would allow historians to write the conclusion to this controversial and divisive chapter of United States history.

CONCLUSION

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

Respectfully submitted,

Vladeck, Waldman, Elias & Engelhard, P.C.

By: _____
Debra L. Raskin (DR 5431)
1501 Broadway
New York, New York 10036
(212) 403-7300

Meredith Fuchs
National Security Archive
Gelman Library
2130 H Street, NW
Washington, DC 20037
Of Counsel

David C. Vladeck
Kathryn A. Sabbeth
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540

Attorneys for Petitioners^{*}

^{*} Counsel acknowledge the significant assistance of Jennifer Dillard, Joy Welan, and Stephanie Wagner, third-year students at Georgetown University Law Center, along with other students at Georgetown's Institute for Public Representation, in the preparation of this petition.