

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE PETITION OF NATIONAL SECURITY)	
ARCHIVE, AMERICAN HISTORICAL)	
ASSOCIATION, AMERICAN SOCIETY OF LEGAL)	Misc. No. 11-189
HISTORY, ORGANIZATION OF AMERICAN)	
HISTORIANS, SOCIETY OF AMERICAN)	
ARCHIVISTS, AND SAM ROBERTS)	
FOR ORDER DIRECTING RELEASE OF)	
GRAND JURY MINUTES)	
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SUPPLEMENTAL DECLARATION OF BRUCE CRAIG

1. I, Bruce Craig, provide this Supplemental Declaration to augment the initial declaration I filed in this case on behalf of the National Security Archive and others for an Order Directing Release of Grand Jury Minutes that Pertain to the Indictment and Conviction of Julius and Ethel Rosenberg.

2. This declaration addresses contentions set forth in Part C of the government’s Memorandum of Law in Partial Opposition to the aforementioned petition.

3. Among other things, the government’s memorandum argues that the Court should not order the unsealing of any of the Brothman/Moskowitz grand jury materials because petitioners have failed to establish that the case is one of significant historical importance. The government also takes issue with the petitioners’ characterization of the Brothman/Moskowitz prosecution as a “dress rehearsal” for the Rosenberg-Sobell prosecution, and it contends that this view is not supported by any authority other than “the petitioners’ own conjecture.” Government Memorandum of Law at 32 n.17, hereinafter “Gov. Mem.” Of course, as I explain in detail below, in making this claim, the government does not rely on the expert opinion of a single Cold War historian — even though the government has access to such individuals who are employed by the records’ custodian, the National Archives and Records Administration (NARA); it should

be noted that NARA's director, Archivist of the United States Allen Weinstein, is himself a noted Cold War historian. Nor does the government address the fact that petitioners' historians have not simply engaged in "conjecture" about the importance of the Brothman/Moskowitz case as a "dress rehearsal" for the Rosenberg prosecution, but have instead explained in detail the basis for their conclusion. *See, e.g.,* Radosh and Milton, *The Rosenberg File* at 152-54 (2d ed.) (Using the term "tune-up" to describe the Brothman/Moskowitz prosecution and explaining in detail the basis for the claim).

4. The government does not dispute that the Rosenberg atomic spy trial is a "case of significant historical importance within the meaning of the "special circumstances" exception. Gov. Mem. at 2. The government does, however, incorrectly assert that the Brothman/Moskowitz prosecution "is *but an afterthought*" (emphasis added) to the Rosenberg case — an odd claim to make since the Brothman/Moskowitz prosecution preceded the Rosenberg-Sobell prosecution — and that it "is alleged to be significant only insofar as it may possibly inform aspects of the Rosenberg prosecution." Gov. Mem. at 3. None of the government's contentions can be squared with the historical record.

5. There are two main flaws in the government's argument regarding the Brothman/Moskowitz case. One is the government's failure to appreciate the "interlocking" nature of the allegation of atomic subversion and the prosecutions that resulted from these allegations. Here, it is important to understand, as I explain below, that "interlocking" is not my characterization; it is the Senate Judiciary Committee's characterization. The Committee's authoritative 30-part investigation of Soviet espionage, including atomic espionage takes note of the Gold, Brothman/Moskowitz and Rosenberg/Sobell prosecutions, is entitled "Interlocking Subversion in Government Departments." Recognizing this relationship is essential to obtain a

full understanding of the Harry Gold, Brothman/Moskowitz, and Rosenberg/Sobell cases. The second flaw is that the government supposes that grand juries are hermetically sealed off; so that one grand jury heard the evidence against the Rosenberg's and Sobell, and that a second, completely different grand jury heard evidence targeted solely at Brothman and Moskowitz. That is not the case. As I also explain below, grand juries often hear evidence from many sources and the evidence heard by an individual grand jury is used in more than one prosecution. Consider a key example here. Elizabeth Bentley, the "Red Spy Queen," delivered what some consider the knock out blow against the Rosenbergs. But she did not testify before the "Rosenberg" grand jury at all though she did testify in the Harry Gold matter and specifically before the Brothman/Moskowitz grand jury. It is crucial to determine what she said before this grand jury, to assess whether, as some have claimed, her damning testimony against Julius Rosenberg was a last-minute contrivance encouraged by prosecutors. Let me turn to these points in greater depth.

6. Point One: Both the U.S. Attorney's Office and the NARA recognize the collective significance of these records. As stated in my initial declaration, and as the government appears to concede, the U.S. Attorney's Office and NARA have determined to retain the Brothman/Moskowitz trial records as part of the U.S. Attorney Files Series II (Grand Jury Files (1950-1954)) that are currently in the custody of NARA's Varick Street Regional Archives Center (New York, New York). While many records of court cases ultimately are destroyed in accordance with U.S. Attorney-NARA records disposition schedules, both the U.S. Attorney's Office and NARA recognize the collective historical importance of these records and have opted to retain them as "permanent" records. The Brothman/Moskowitz records have been preserved precisely because of their enduring historical significance. This alone attests to their

historical importance and demonstrates that the Borthman/Moskowitz records are important in their own right.

7. Point Two: The Harry Gold-Rosenberg-Sobell-Brothman-Moskowitz records were originally created by the U.S. Attorney's office in a single, integrated record subseries that are chronically and numerically arranged and remain in this form today. One of the ironies in the government's position here is that it contradicts the way the U.S. Attorney's Office historically dealt with these prosecutions; not as walled-off separate cases, as the government now claims, but as related prosecutions that emanate from a single, albeit broad, investigation into Soviet atomic espionage. In my view, this fact alone refutes the government's implicit argument that these prosecutions should be seen as hermetically sealed off from one another. There are many factors that support this conclusion that are beyond legitimate dispute. For one thing, both cases involved the same prosecutors, investigators and trial judge. For another, the sequential nature of the testimony and the fact that grand jury witnesses were repeatedly called as witnesses in separate trials on related interlocking espionage cases confirms the inter-relatedness of these three cases. For example, the record of the Harry Gold case begins on July 14, 1950, with the grand jury testimony of Abraham Brothman (at 8869) and ends with the testimony of Harry Gold on July 29, 1950 (at 9085). The very next business day, the first witness of the Rosenberg investigation is called, or rather re-called, before the same grand jury: Harry Gold testified on August 2, 1950 (at 9086). His testimony on the Rosenberg investigation was followed by a long train of over one-hundred other witnesses who could speak to the allegations of atomic espionage carried out by a number of alleged spies, including Julius Rosenberg, Ruth and David Greenglass and others, all before the same grand jury. This history

cannot be squared with the government's claim that these cases were compartmentalized in any meaningful way.

8. Point Three: Key witness testimony in the Gold and Brothman/Moskowitz cases has direct relevance to the Rosenberg trial. The government does not dispute the historic significance of the Harry Gold atomic espionage case (in which there already has been a partial release of testimony) or the Rosenberg/Sobell case. Nonetheless, the government asserts that the Brothman/Moskowitz case was merely an “afterthought” and lacks sufficient historical interest to justify invocation of the exceptional circumstances required to unseal grand jury records. There are a number of reasons why the government's argument misses the mark.

9. As noted above, all three cases are linked as a matter of history and archival practice, as evidenced by U.S. Attorney's Office's records management decision — ratified by NARA — to compile the evidence in the cases in a single, sequential subseries numbering system. Not only did this decision regarding the record's provenance make sense from an archival point of view, but it would have been impractical, if not impossible for the U.S. Attorney's office to compile and use the case files in any other way. For instance, Harry Gold's testimony — and the witnesses called in the government's investigation into Gold's activities — relate not only to Gold's admissions of guilt and his trial, but to the alleged activities of Brothman, Moskowitz, the Rosenbergs, Klaus Fuchs, and others. After all, Gold served as a Soviet go-between not just with David Greenglass (having visited Greenglass in New Mexico to carry back atomic secrets), but also with Abraham Brothman *and* with Klaus Fuchs. This testimony could not have been as compartmentalized as the government's argument suggests. Take one example. Gold's testimony about his meeting with David Greenglass was like a falling domino that triggered a cascade of the remaining dominos: Gold fingered Abraham Brothman and Max Elitcher (who

was a key witness against the Rosenbergs); then Gold fingered Greenglass (by helping the FBI identify him as the source of information at Los Alamos regarding the atomic bomb); Greenglass, in turn, fingered Julius and Ethel Rosenberg as his Soviet go-betweens, and on and on.

10. In this vein, the testimony of Elizabeth Bentley, the so called “Red Spy Queen,” is particularly important. Bentley was a grand jury witness in the Brothman/Moskowitz investigation but not in the Rosenberg/Sobell grand jury investigation. Nevertheless, she was called to testify at the Rosenberg trial as the government’s final and clinching witness against Julius Rosenberg. Historians surmise that the grand jury testimony she gave in the Brothman/Moskowitz investigation *must* have had relevance to the Rosenberg trial, or else she would not have been called to testify in the Rosenberg trial and certainly not as the government’s final witness. To elaborate on this point, historians hotly dispute whether Bentley’s testimony in the Rosenberg trial was tainted. At trial, she testified that in November 1943 she received a series of telephone calls from a man, thought to be a Soviet operative, who identified himself with the words “This is Julius.” She also made reference to an earlier contact by an operative who also identified himself with a “greeting” from “Julius.” This testimony closely dovetailed with the testimony by Harry Gold, who immediately preceded her on the stand and testified that he established his *bona fides* to David Greenglass, whom he had never met, by saying “I come from Julius.” Given the similarity of the wording, Bentley’s testimony had a great emotional impact on the Rosenberg jury — an impact fully anticipated by the prosecution. But whether the prosecution contrived to have Gold and Bentley say virtually identical things on the stand remains a matter of great controversy. Without the release of Bentley’s Brothman/Moskowitz grand jury testimony the answer to this key question will remain a mystery.

11. Point Four: In searching only recent legal and media databases for references to the Brothman/Moskowitz matter, and not consulting standard historical treatises of the Rosenberg case and other atomic espionage cases which are more indicative and representative of historical significance, the government’s “research” proves nothing. The government asserts that “a search of several legal and/or media databases” revealed only “scant recent attention” to the Brothman/Moskowitz case. Astonishingly, in making this claim, the government looked only at general media and legal databases going back to the late 1960s and later and simply ignored the historical literature that refutes its conclusion. Nor does the government’s argument take into account the fact that the databases start *after* the Cold War had ended, when the public interest in Soviet espionage had waned and was no longer front page news. Furthermore, many such databases fail to collect information going back to the 1950s which in many cases has not even digitized. However, had the government consulted the standard and widely-accepted and authoritative historical writings on atomic espionage in general and the Rosenberg case in particular, it would have seen that historians think that the Brothman/Moskowitz case is important in its own right, and exceptionally important because it is fundamentally linked to the Rosenberg case. For example, Ronald Radosh and Joyce Milton’s definitive *The Rosenberg File* (2nd ed) includes 34 citations to Brothman/Moskowitz and/or their trial; Sam Roberts’ *The Brother* contains nine such references; and John Haynes and Harvey Klehr’s *Early Cold War Spies* includes six references including an extended multi-page discussion (Haynes and Klehr at pp154-157) of “The Trials of Brothman, Moskowitz, Smilg and Slack” (the later two had been implicated by the ubiquitous Harry Gold).

12. It is also striking that the government disclaims the historical importance of the Brothman/Moskowitz case without offering the declaration of a single qualified historian who is

willing to take that position publicly. It is not as if the government lacks access to qualified historians knowledgeable about the Cold War. After all, the grand jury records at issue here are not in the possession of the U.S. Attorney's Office or the Department of Justice but by NARA. Decades ago they were accessioned to NARA, which is administered by professional historians and archivists, and headed by a distinguished Cold War historian, Dr. Allen Weinstein. See Dr. Weinstein's biography at: <http://www.archives.gov/about/info/archivist-biography.html>. Were there any force to the government's claim, one would expect that an historian on NARA's staff would be willing to so state and explain his/her rationale. The government's failure to offer such an opinion shows, on its face, that its claims regarding the Brothman/Moskowitz prosecution are not supportable by the weight of historical opinion and frankly, are out of the mainstream.

13. Equally insubstantial is the government's claim that historians like me who have submitted declarations in this case explaining that the Brothman/Moskowitz trial served as the "dress rehearsal" for the Rosenberg case the were engaging in mere "conjecture." Gov. Mem. at 32 n.17. As just noted, historical authorities agree on this point — which was perhaps best expressed by Ronald Radosh, (the unquestioned historical authority on the Rosenberg case) who in his book *The Rosenberg File* states: "In many respects [including those noted in my initial declaration at paragraphs 129-130], the Brothman-Moskowitz trial served as a tune-up for the more important Rosenberg-Sobell trial to come." Radosh/Milton at 153. The fact remains that no serious student of Soviet espionage and the Rosenberg case can gain a full understanding of the significance of Harry Gold's charges or atomic espionage in general without taking into account the centrality of the Brothman/Moskowitz "dress rehearsal" prosecution.

14. Point Five: The Federal grand jury impaneled to hear evidence was investigating what has come to be known as "interlocking subversion." With respect to the

Gold, Rosenberg/Sobell, and Brothman/Moskowitz prosecutions, the government saw a conspiracy to commit espionage and all of these individuals became targets of single, integrated investigation even though they ultimately were not prosecuted in a single criminal case. As I stated in the section of my initial declaration entitled Espionage Grand Juries, “prior to the convening of the Rosenberg grand jury several other federal grand juries had been investigating violations of espionage laws of the U.S.” *See* Craig Declaration at ¶ 190. In fact, the work of these grand juries extended well beyond the limited term of any one grand jury. The successor grand jury to the Alger Hiss investigation, for example, eventually “concluded” the work of the previous grand jury.” Other grand juries that were subsequently impaneled continued a “broad-based investigation into Soviet espionage” that actually had begun prior to the Hiss investigation. *Id.* at ¶¶ 193-195. Investigations and grand jury proceedings that looked into allegations of espionage, subversion, and theft of atomic secrets were the direct result of the work first undertaken by the House of Representatives so-called Dies Committee which was continued by the House Committee on Un-American Activities when it initiated a series of hearings in 1947-1948 “Regarding Communist Espionage in the United States Government” (see Hearings Before the Committee on Un-American Activities, House of Representatives, 80th Cong; 2nd Sess., July –September 1948 and Parts I, II, and III, published 1948-1950). Not wanting to be outdone by the House, the U.S. Senate Committee on Government Operations soon followed suit with its own independent investigation aptly titled “Interlocking Subversion in Government Departments.” The result of that investigation is a thirty-part hearing record that the Committee began to assemble in 1953 and concluded three years later in 1956 (see Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, “Interlocking Subversion in Government

Departments,” Hearings, 83rd -84th Cong; 1953-1956). The collective goal of these hearings was to expose and thereby force the FBI and Justice Department to bring prosecutions against alleged Soviet operatives. The strategy worked. Congress’s investigation into interlocking subversion resulted triggered the investigation and grand jury proceedings that ensnared Gold, Brothman, Moskowitz, David Greenglass, Morton Sobell, and the Rosenbergs and in time dozens of others.

15. Point Six: In releasing the Harry Dexter White/Alger Hiss Grand Jury testimony, this Court has recognized the inter-related nature of federal grand jury proceedings and has looked broadly at the nature of historical significance. In the case *In re Craig*, I petitioned this Court for the release of the grand jury testimony of Harry Dexter White, a high-ranking Treasury Department official accused of espionage. The government argued successfully that White’s case was not of sufficient historical importance to justify the unsealing of the grand jury records, and the Second Circuit affirmed that ruling. But the Harry Dexter White material has since been fully disclosed as a result of litigation over the Alger Hiss grand jury records, which were set forth in proceedings before two grand juries constituted to investigate allegations of espionage (the John Doe I and John Doe II grand juries). *See In re American Historical Ass’n*, 49 F. Supp 2d 274 (S.D.N.Y. 1999). In that case, the Court ordered the unsealing of virtually all of the Alger Hiss grand jury records, which included all of the witnesses who testified before the grand jury about the activities of Alger Hiss, Harry Dexter White, and others. By authorizing the release of the White materials, the Court recognized the nature of federal prosecutor’s search for interlocking subversion within the confines of the Alger Hiss case. As the Court put it, “Craig’s petition sought only the testimony of White before the Doe I grand jury. The instant petition seeks a much broader range of materials spanning both special grand jury proceedings. In addition, to the extent the petitions overlap, the evidence

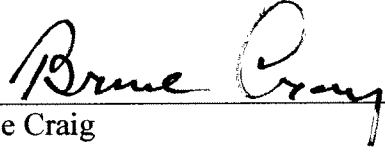
submitted in support of disclosure, and the rationale for disclosure, is different in each case. Craig sought disclosure of White's testimony based on its asserted relevance to the allegations against White. *See Craig*, 131 F.3d at 101. Petitioners, on contrast, seek that testimony based on its alleged relevant to allegations against a different and undisputedly more important historical figure, Hiss, *as well to a number of broader historical issues.*" *In re American Historical Ass'n*, 49 F. Supp. 2d at 290-91 (emphasis added) . Based on those considerations, the Court ordered the White testimony released.

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

17. **Point Seven: There is a Need to Complete the Historical Record.** Failure to release the Brothman/Moscowitz grand jury testimony will permanently hamper the historical community's efforts to complete the historical record of the Rosenberg case; perhaps more importantly, it will hamper the effort to tell the complete story of interlocking atomic espionage in the United States during the Cold War era.

18. With respect to that end, I urge the Court to keep this case open in some way until the remainder of the Rosenberg Grand Jury materials — including the testimony of grand jury witnesses who have opposed disclosure, or have not yet be presumed dead — can be released (in a timely manner) once encumbrances on their release have been lifted. Only with the release of the complete record can the case book be finally closed on the Rosenberg atomic espionage case.

In accordance with 28 U.S.C. 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed this 7th day of July 2008.

A handwritten signature in cursive script that reads "Bruce Craig". The signature is written in black ink and is positioned above a horizontal line.

Bruce Craig