IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE PETITION OF LUKE NICHTER	)	Misc. No. 12-74 (RCL)

DEPARTMENT OF JUSTICE'S RESPONSE TO PETITION TO UNSEAL

PRELIMINARY STATEMENT

Forty years after the break-in at the Democratic National Committee that began the chapter of U.S. history known as Watergate**,** no good reason exists to keep sealed many of the judicial records created during the trial of the Watergate burglars. Some of the sealed proceedings concern evidentiary discussions that needed to occur outside the hearing of the jury. Other proceedings involved pretrial discussions between defendants' lawyers and the court. With respect to these documents, the passage of time, the completion of the criminal proceedings, and the non-invasive nature of the content, weigh in favor of some unsealing**.** Other documents, however, are not appropriate for unsealing. These fall into three categories: (1) presentence reports and other personal documents implicating the privacy of living individuals; (2) documents reflecting the content of illegally obtained wiretaps; and (3) grand jury information.

No documents within these categories should be disclosed. First, presentence reports are inherently personal documents prepared by the probation office to aid the district court in sentencing. Disclosure of the very intimate details collected in these documents would be an undue invasion of privacy with no articulated countervailing public interest. Second, the federal wiretap statute prohibits the disclosure of material reflecting the contents of illegally obtained wiretaps. The wiretap statute comprehensively regulates the collection and disclosure of such

material, and makes no provision for discretionary disclosures based on historical or scholarly interest. Moreover, the majority of the victims to the illegal wiretap are living individuals who have consistently objected to the disclosure of the wiretap content. Finally, courts lack inherent authority to disclose grand jury information outside the confines of Criminal Rule 6(e). Recognizing that this Court has ruled otherwise, however, the grand jury information should remain protected under the balancing test adopted by the Second Circuit. Under that test, the privacy interests of living individuals should prevail.

I. Background

Petitioner in this case seeks disclosure of all the currently sealed material from the 1972 criminal case of *United States v. Liddy* (D.D.C.). In particular, petitioner focuses on what Alfred C. Baldwin, III, heard while he monitored illegally placed wiretaps at the Democratic National Committee ("DNC") from a room in the Howard Johnson hotel. Baldwin, a retired FBI agent living in Connecticut, was hired by James McCord, head of security for the Committee to Re-Elect the President ("CRP"), first as a bodyguard for Martha Mitchell, and then to work on special surveillance activity. That activity included others breaking into the DNC and planting electronic telephone bugs, including on the phone of R. Spencer Oliver, the Chairman of the Association of State Democratic Chairmen. Baldwin monitored the phone line, kept logs on what he heard, and delivered them to James McCord. Baldwin was at his post in the Howard Johnson hotel when the Watergate burglars were caught inside the DNC. The FBI quickly identified Baldwin, who cooperated with prosecutors. The logs that Baldwin had given to McCord were destroyed as part of the ensuing cover-up. G. Gordon Liddy, Counsel for the Finance Committee of the CRP, E. Howard Hunt, a former CIA agent employed as a consultant

to the White House, McCord, Bernard Baker, Eugenio Martinez, Frank Sturgis and Virgilio Gonzalez, were all convicted or pled guilty to various counts of conspiracy, wiretapping, and burglary. *See generally United States v. Liddy*, 509 F.2d 428, 433-434 (D.C. Cir. 1974) (describing the evidence presented in district court); *see also United States v. Barker, et al.*, 514 F.2d 208, 211-18 (D.C. Cir. 1975) (en banc) (affirming decision below not to allow some defendants to withdraw guilty pleas and describing evidence presented at trial). Including the *Liddy* trial, the content of the illegal wiretap has been the subject of legal proceedings on at least three separate occasions.

A. The *Liddy* Trial

On September 15, 1972, Hunt, Liddy, McCord, and the four other burglars were indicted for the Watergate burglary, a case over which Chief Judge Sirica presided. Prior to the commencement of the trial, Alfred Baldwin gave an interview about his role to the *Los Angeles Times*, which published four stories on October 5, 1972. A subpoena was issued to the newspaper for a copy of the interview tapes. *See generally United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972). After initial resistance, including a civil contempt citation, *The LA Times* complied with the demand for the interview tapes. The tapes were turned over to Judge Sirica, transcribed, and placed under seal. During the trial, five interveners[1] – "aggrieved parties" under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 (11) – sought to prevent Baldwin from testifying to the contents the conversations he overheard. Judge Sirica denied the interveners' motion, ruling that the content was relevant to the burglars' motive

[1]The interveners were Spencer Oliver, his secretary Ida Maxwell Wells, Robert E.B. Allen, Severin M. Beliveau, and Robert S. Vance.

and necessary to proving the alleged crimes of wiretapping and conspiracy to wiretap. *See U.S. v. Liddy*, 354 F. Supp. 217 (D.D.C. 1973). The interveners took an interlocutory appeal, and the D.C. Circuit reversed. In an unpublished order, the panel found that the content of the wiretaps was not necessary to proving the charges, and that the "[d]isclosure of such contents would frustrate the purpose of Congress making wiretapping a crime." *See* Order, Jan. 22, 1973, attached at Exhibit A. Accordingly, pursuant to 18 U.S.C. § 2515, the court suppressed the contents of the wiretap. *See also U.S. v. Liddy*, 509 F.2d at 446 (affirming convictions). Baldwin testified at trial, but was not permitted to testify as to what he overheard, other than to say that he monitored conversations that were political or personal in nature, and to identify the voices of Spencer Oliver and Ida Mae Wells. *U.S. v. Liddy*, 509 F.2d at 433, 446. The *LA Times* interview remained sealed, as did several district court exhibits, all of which contained some reference to what Baldwin overheard on the calls. Similarly, the transcript of an *in camera* proffer of what Baldwin would say on the witness stand was ordered sealed.

B. Petition to Unseal Baldwin Interview

In 1980, writer Robert Fink petitioned Chief Judge Bryant of the District Court for the District of Columbia to unseal Baldwin's *LA Times* interview. Judge Bryant determined that, except for "certain passages ... alluding to the contents of illegally intercepted conversations," the interview could be unsealed. *See U.S. v. Liddy, et al.*, Order, Oct. 3, 1980, attached at Exhibit B. The *LA Times* transcript, therefore, with the redactions ordered by Judge Bryant, is currently open and available to researchers at the National Archives.

C. The Wells Defamation Suit

In 1997, Ida Maxwell Wells sued Liddy for defamation based on Liddy's public remarks

suggesting that she "acted as a procurer of prostitutes for men who visited the DNC." *Wells v. Liddy*, 37 Fed. Appx 53, 58, 2002 WL 331123 (4th Cir. 2002). In connection with that lawsuit, Wells petitioned the D.C. Circuit to revisit and clarify its Jan. 22, 1973 Order so that Baldwin could testify in deposition as to what he overheard about her. Wells posited that Baldwin's testimony would prove the falsity of Liddy's statements. Liddy also sought to have the 1973 Order vacated, but for a different reason. Liddy argued that "privacy must give way to the greater public interest in the truth and an accurate historical record." *U.S v. Liddy, and Wells*, Brief of G. Gordon Liddy, 1997 WL 34646712. The aggrieved parties to the original suppression motion, however, including Oliver, objected to any disclosure of the wiretap contents. They argued that, as victims of the illegal wiretap, they would be victimized again from the public disclosure of the fruits of the illegal conduct. The D.C. Circuit ultimately dismissed the petition, ruling that "there is no question before it suitable for adjudication." The D.C. Circuit held that the 1973 Order "clearly indicates that it was a suppression order, the scope of which was co-terminus with the scope of the evidence-barring provision of the wiretapping statute, 18 U.S.C. § 2515." *U.S. v. Liddy*, 136 F.3d 828 (D.C. Cir. 1998). The D.C. Circuit made clear, however, that its order "in no way suggest[s] that disclosure of the matters in question here would be permissible in any context under the terms of 18 U.S.C. §§ 2511 and 2515...." *Id.*[2]

[2]Attorneys for Wells did succeed in deposing Baldwin during the course of the libel suit. According to the briefs in the case, Baldwin testified that he did not overhear anything about a prostitution ring being run out of the DNC. *See U.S. v. Liddy*, Brief of Ida Maxwell Wells, 1997 WL 34643605. Baldwin was similarly deposed in another defamation suit brought by John and Maureen Dean. *See Dean v. St. Martin's Press, et al.*, Civil Action No. 92-1807 (D.D.C.), ECF # 494 (lodging deposition of Alfred Baldwin).

II. Proceedings To Date

This Court's Order of February 7, 2012, details the correspondence between the petitioner and the Court that precipitated this action. On May 1, 2009, petitioner wrote to the Court suggesting a possible mechanism for gaining access to wiretap materials sealed in the case of *U.S. v. Liddy* (D.D.C. 1973). Professor Nichter noted that the motivation for the Watergate break-in remains "mysterious": " While the traditional understanding of the break-in was the need to acquire 'political intelligence,' the sealed wiretapped materials purportedly will demonstrate that exposing a prostitution ring was the real motivation for the break-in." Letter from Luke A. Nichter to the Hon. Chief Judge Lamberth, dated May 1, 2009.[3]

The Court responded in a letter dated August 24, 2010. The Court suggested that petitioner's letter be treated as a request to unseal any Watergate court records that could be located at the National Archives, and proposed a continuing dialogue on the matter once the relevant materials were identified. Petitioner wrote back to the Court on September 6, 2010, and again on August 7, 2011. Petitioner's August 2011 letter sought to narrow the scope of his original request to a list of specific documents and date ranges. In an email to chambers dated November 22, 2011, petitioner explained that, after further study of files from the National Archives, he was further refining his request to the following: "a request to unseal all District court materials sealed in the course of U.S. v. Liddy et al. (1827-72 and 73-1020)." Email to Jeremy Baron from Luke A. Nichter, Nov. 22, 2011.

On February 3, 2012, the Court issued an order docketing the foregoing correspondence

[3] The Fourth Circuit detailed the origins of the prostitution ring theory of the Watergate burglary in *Wells v. Liddy*, 186 F.3d 505, 515-516 (4th Cir. 1999) and *Wells v. Liddy*, 37 Fed. Appx 53, 58, 2002 WL 331123 (4th Cir. 2002).

as a miscellaneous matter to unseal the specified documents, and ordering a response from the Department of Justice. After several enlargements of time, the Department hereby addresses the merits of Professor Nichter's petition.[4]

ARGUMENT

I. APART FROM THE CATEGORIES OF DOCUMENTS DESCRIBED BELOW, THE DEPARTMENT DOES NOT OPPOSE THE REQUEST TO UNSEAL

In determining whether to unseal judicial records, the D.C. Circuit employs a multi-part test that balances the public interest in access against the privacy interest in nondisclosure. *See United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir.1980). The relevant factors include:

> (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of the party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Johnson v. Greater Se. Cmty. Hosp., 951 F.2d 1268, 1277 (D.C. Cir. 1991) (citing *Hubbard*, 650 F.2d at 317-322); *In re Petition of Geoffrey Shepard*, 800 F. Supp. 2d 37, 41 (D.D.C. 2011).

Many of sealed records in the Libby trial concern matters typical of those that arise during the course of a criminal trial, but which, at the time, must be sealed in order to ensure a fair trial. These include bench conferences about evidentiary matters that could not be discussed in the presence of the jury. They also include pre-trial meetings between lawyers and the court in chambers that concern the investigation or other trial matters, where public disclosure could

[4]The government addresses in this response those documents that Professor Nichter has specifically targeted in his correspondence, as articulated in his last communication to the Court. To the extent the Court on its own initiative is evaluating whether additional records can be unsealed, government counsel is prepared to assist the Court in any way that would be helpful.

adversely influence the potential jury pool. With the passage of forty years, these kinds of documents add to the historical record of the trial without negatively impacting on the administration of justice. There is, accordingly, a public interest in their disclosure. On the privacy side of the scale, many of these documents no longer implicate the privacy of living individuals. Where portions of these documents do implicate personal privacy**,** the National Archives and Records Administration ("NARA") is charged with making the appropriate redactions, and would commit to doing so by order of this Court before the opening of any record that the Court unseals. *See* 36 C.F.R. § 1256.56.

Some documents and portions of documents, however, are particularly sensitive and invasive of personal privacy. These documents, including presentence reports and certain personal correspondence, should remain sealed. So, too, should documents reflecting the content of illegally obtained wiretaps, which, in the *Liddy* case were the fruits of the very activity for which defendants were convicted. Finally, non-public grand jury information should remain sealed. These categories are addressed in turn.

II. PRESENTENCE REPORTS AND OTHER SENSITIVE RECORDS IMPLICATING PERSONAL PRIVACY SHOULD REMAIN SEALED

A presentence report is a document prepared by the Probation Office for the district court prior to the court's imposition of sentence**.** *See* Fed. Crim. R. 32(c)(1)(A)**.** In preparing the presentence report, the Probation Office acts as an arm of the court. It gathers highly personal information from the defendant, family members, cooperating public and private welfare agencies, law enforcement agencies, employers, and others who know the defendant. Presentence reports routinely contain information about the defendant's health, family ties,

education, financial status, mental and emotional condition, prior criminal history and uncharged crimes. And, while these reports are written with care, they are not subject to the rules of evidence, and could contain errors. *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995). (describing policy reasons behind confidentiality of presentence reports).

In addition, the information in presentence reports is often provided with an assurance of confidentiality. For this reason as well, courts have held that disclosing a presentence report "is contrary to the public interest as it may adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused, and from sources independent of the accused, for use in the sentencing process." *United States v. Charmer Industries, Inc., et al*, 711 F.2d 1164, 1171 (2d Cir. 1983); *Huckaby*, 43 F.3d 135 at 138. Accordingly, the prevailing rule is that district courts should not authorize disclosure of presentence reports to third parties in the absence of a "compelling demonstration" that the report is "required to meet the ends of justice." *Charmer Industries,* 711 F.2d at 1171; *see also, U.S. v. McKnight*, 771 F.2d 388, 390 (8th Cir. 1985) (presentence reports are not public documents); *U.S. v. Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977) (same); Fed. Crim. R. 32(e) (providing for disclosure of presentence report to defendant, defendants' attorney, and attorney for the government).[5]

In this case, the sealed records from the *Liddy* trial contain at least one presentence report.

[5]This Circuit holds that, when held by the Executive Branch (as opposed to the Judicial Branch), presentence reports are subject to the Freedom of Information Act as agency records. *White v. DOJ*, 606 F. Supp. 880 (D.D.C. 1985) (citing cases). They are, however, subject to withholding and redaction under a variety of FOIA's exemptions, including for reasons of personal privacy *Id*.

See Docket, page 45 (Oct. 19, 1973) (Exhibit C).[6] Petitioner has not demonstrated why disclosure of this presentence report is required to meet the ends of justice, or provided any other reason why the public interest requires unsealing. To the contrary, the only substance that petitioner addresses in his correspondence is the content of the illegal wiretap, which petitioner seeks for reasons of historical interest. No reason is given as to why disclosure of a presentence report would add to the historical record, or why the potent policy reasons supporting the presumption of confidentiality should give way. Accordingly, the presentence report should remain sealed.

For similar reasons, certain correspondence and information relating to the health and family circumstances of one or more defendants should remain sealed. The information pertains to living individuals who have a strong privacy interest in the information remaining sealed. Petitioner has offered no reason why information of this nature should be unsealed, why it would be in the public interest to do so, or why any such public interest would outweigh the strong privacy interests at stake. Accordingly, this material -- which includes at least the documents at Exhibit C, pages 59 (May 5, 1975), 19 (Jan. 8, 1973), and 14 (Dec. 15, 1972) – should remain sealed.

III. TITLE III DOES NOT PROVIDE FOR THE DISCLOSURE OF THE CONTENTS OF ILLEGAL WIRETAPS FOR NON-LAW ENFORCEMENT PURPOSES

Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") in the wake of *Katz v. United States*, 389 U.S. 347, 353, 355-56 (1967), which held

[6]To assist the Court in identifying the sealed records, we have attached the Docket Sheet from the *Liddy* trial at Exhibit C The Docket Sheet is held at the National Archives with other court records from the *Liddy* trial, and is publicly open to researchers.

that electronic surveillance was a search under the Fourth Amendment and thus required a court-approved search warrant. Through Title III, Congress sought to achieve two primary goals: (1) protecting the privacy of wire and oral communications, and (2) delineating the circumstances under which interception of wire and oral communications could occur. *Gelbard v. Untied States*, 408 U.S. 41, 48 (1972), citing S. Rep. No. 1097, 90th Cong., 2d Sess., 89 (1968); U.S. Code Cong. & Admin. News, p. 2177.

Pursuant to Title III, it is a crime to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. §2511(c). Wiretap "contents" are defined broadly as, "any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. §2510(8). The statute codifies an exclusionary rule, such that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter." 18 U.S.C. §2515. The statute provides exceptions to the no disclosure rule set forth in section 2511 for enumerated investigative and law enforcement purposes, so long as the content was obtained by means authorized under the statute. 18 U.S.C. §2517. Finally, the statute provides a civil damages remedy (including punitive damages) to "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of Title III. 18 U.S.C. §2520. An "aggrieved person" under the statute "means a person who was a party to any intercepted wire, oral, or

electronic communication or a person against whom the interception was directed." 18 U.S.C. §2510(11).

From the statutory scheme, it is clear that Congress sought not only to regulate comprehensively the use of electronic surveillance as an investigative tool, but also to limit the disclosure of materials obtained through such surveillance. *Lam Lek Chong v. DEA*, 929 F.2d 729, 732 (D.C. Cir. 1991), citing *Gelbard* , 408 U.S. at 46 (1972).[7] Given the restrictions imposed by Title III, therefore, together with its core concern for the protection of privacy, the Court should maintain the seal over the records that petitioner seeks reflecting the contents of illegally intercepted communications.

A. Title III Does Not Provide For Disclosure of Wiretap Content Based on Public or Historical Interest

As described above, 18 U.S.C. §2511(c) makes it a crime knowingly to disclose the contents of illegally obtained wiretaps. For legally obtained wiretap content, Title III makes express provision for limited use of the content for certain enumerated law enforcement purposes. *See* 18 U.S.C. §2517. No such provisions exist for the disclosure or use of illegally obtained wiretap content.[8] When considering the disclosure of wiretap content, "the question is whether Title III specifically *authorizes* such disclosure, not whether Title III specifically

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[7]Title III applies even to evidence obtained by entirely private misconduct. *Chandler v. U.S. Army*, 125 F.3d 1296, 1298 (9th Cir. 1997).

[8]Courts have determined that the government may use suppressed wiretap content for purposes of impeachment in a criminal trial. *See, e.g. United States v. Simel*, 654 F.3d 161, 169-70 (2d Cir. 2011) (collecting cases). Title III's legislative history cited specifically to *Walder v. United States* (1954) in explaining that §2515 was intended to codify the exclusionary rule as it existed at the time. *Walder* held that, even under the Fourth Amendment's exclusionary rule, suppressed evidence could be used for impeachment. *Id.*

prohibits the disclosure, for Title III prohibits all disclosures not authorized therein." *Smith v. Lipton*, 990 F.2d 1015, 1018 (8th Cir. 1993) (emphasis in original). As the Seventh Circuit has explained, "by permitting disclosure of lawfully obtained wiretap evidence only under the specific circumstances listed in 18 U.S.C. §2517, Title III implies that what is not permitted is forbidden." *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir. 1982); *see also United Kingdom v. United States*, 238 F.3d 1312, 1323 (11th Cir. 2001); *United States v. Underhill*, 813 F.2d 105, 110 (6th Cir. 1987); *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015, 1018 (8th cir. 1993 (en banc); *In re Grand Jury*, 111 F.3d 1066, 1078 (3d Cir. 1997); Op. Off. Legal Counsel, Sharing Title III Electronic Surveillance Materials with the Intelligence Community, 2000 WL 33716983 at *8 (Oct. 17, 2000);[9] *but see SEC v. Rajaratnam, et al*, 622 F.3d 159, 176-77 (2d Cir. 2010) (rejecting that proposition as leading to absurd results).[10]

Title III does not provide for disclosure of historically interesting information derived from the content of an illegal wiretap. To the contrary, it makes such knowing disclosure a crime, and we are unaware of any court that has unsealed previously undisclosed illegal wiretap content for reasons of historical interest. Accordingly, the plain language and intent of Title III

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[9] When held by the Executive Branch, this Circuit has found that wiretap content is exempt from disclosure under the Freedom of Information Act's Exemption 3, finding that such information is specifically exempted from disclosure under Title III. *Lam Lek Chong v. DEA*, 929 F.2d 729 (1991).

[10] The Second Circuit in *Rajaratnam* held that the fruits of a legal wiretap could be disclosed to the Securities and Exchange Commission for purposes of conducting its own investigation of criminal defendants alleged to have engaged in insider trading. Relying on its earlier decision in *In re Application of Newsday, Inc*., 895 F.2d 74, 78 (2d Cir. 1990), the Second Circuit held that the district court did not abuse its discretion in permitting the disclosure of legally obtained wiretap evidence "where the government has previously disclosed the contents of wiretaps to a party, and a civil enforcement agency seeks access to those contents *from that party*, not from the government." *Rajaratnam*, 622 F.2d at176.

should control, and there is no need to engage in any balancing of interests. Indeed, Congress, in passing Title III, has already balanced the relevant interests – "Congress has decided that the risk to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance." *See. Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979). Accordingly, the sealed documents that contain reference to the contents of the illegal wiretap should remain sealed.

B. The Privacy Interests of the Aggrieved Parties to the Illegal Wiretap Are Dispositive

Even if the Court were to look beyond the plain language of the statute, it is clear that the wiretap content should remain sealed. As the Supreme Court has emphasized, safeguarding the privacy of innocent persons who have not consented to the interception of their communications was a motivating factor behind the passage of Title III. *See Gelbard*, 408 U.S. at 48-52. In this case, the majority of the victims to the illegal wiretap at issue have expressed their continued objection to any disclosure of the wiretap contents. As the very class of individuals that Title III seeks to protect, their objection should be dispositive.

As explained above, the individuals who used the wiretapped telephone at the DNC and whose conversations were intercepted intervened in the *Liddy* case to suppress the fruits of the illegal wiretap. R. Spencer Oliver, the aggrieved party whose telephone was being illegally monitored, went further, suing Nixon campaign officials and organizations under Title III for civil damages. *See* Exhibit D. He ultimately settled the suit for an undisclosed amount of damages. In 1997, as part of the Wells petition to modify the suppression order to obtain discovery from Alfred Baldwin, Oliver submitted a brief arguing against disclosure of the

wiretap content. In his brief, Oliver argued that disclosure would invade his privacy and the privacy of the others whose conversations were intercepted, and noted that the suppression order served to keep "the insult of 'disclosure' from adding to the injury of 'illegal interception'" *See United States v. Liddy, et al.*, Brief of the United States at p. 9 (quoting brief of Spencer Oliver) (attached as Exhibit E). Aggrieved parties Robert E.B. Allen and Severin M. Beliveau both filed affidavits opposing disclosure and the petition to vacate the 1973 Order. Exhibit E at 7.[11] All of these individuals are alive, and have demonstrated their objection to the release of the wiretap content. Their objection, together with Congress' clear policy choice in Title III favoring personal privacy, is by itself sufficient reason to maintain the seal.

C. There is No First Amendment or Public Right of Access to Sealed Wiretap Content

In his May 1, 2009, and September 6, 2010, correspondence to the Court, Professor Nichter suggests that the Court consider the approach taken by Judge Rakoff in *In the Matter of Application of the New York Times Company to Unseal Wiretap & Search Warrant Materials*, 600 F. Supp. 2d 504 (S.D.N.Y. 2009), *rev'd* 577 F.3d 401 (2009) ("*Spitzer*"). In that case, *The New York Times* intervened in a criminal prosecution to seek access to sealed wiretap applications from the FBI's "Emperor's Club" investigation, a prostitution ring once patronized by former New York governor Eliot Spitzer. Judge Rakoff recognized that Title III governed access to wiretap applications, but found that the right of access to judicial records outweighed other competing interests, particularly since the names of those whose communications were intercepted would be redacted by agreement of the parties. *Id.* at 507.

[11]Wells ultimately withdrew her petition to the D.C. Circuit. *See generally*, Exh. E.

The district court's decision, however, was reversed by the Second Circuit. The Circuit court, citing to *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981),[12] first held that Title III supercedes any arguable common law right of access. Pursuant to Title III, the statutory presumption was against disclosure, and *The New York Times* had not met the statutorily defined meaning of "good cause" for the unsealing of wiretap applications.[13] The Second Circuit then analyzed whether there was a First Amendment right of access. Applying the test articulated in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986), the court found that wiretap applications were not historically available to the public, but were instead a modern invention consistently governed by Title III. In addition, there was no question that the public and press were not permitted to attend the *ex parte, in camera* proceedings where wiretap applications are presented to a district judge. The court therefore concluded that under all of the relevant tests, there was no First Amendment right of access to wiretap applications. *Spitzer*, 577 F.3d 401, 409 (2d Cir. 2009).

The same analysis applies here. There is no common law right of access to the fruits of illegal wiretap because Title III, which creates a strong presumption against disclosure, displaces any arguable common law right. *Milwaukee v. Illinois*, 451 U.S. at 313-314; *Spitzer*, 577 F.3d at 407-08. Specifically, by making the disclosure of such information a criminal offense, 18 U.S.C.

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[12] "[F]ederal common law . . . is resorted to [only] in the absence of an applicable Act of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (internal quotation marks and punctuation omitted).

[13]The Second Circuit distinguished its decision in *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir. 1990), which dealt with a different section of Title III. There, the court found that 18 U.S.C. § 2517 did not prohibit a right of access to information obtained with a wiretap that was then placed in a search warrant application that subsequently was made public. *Newsday*, 895 F.2d at 75.

§ 2511(c), Congress clearly intended to prevent disclosure, and therefore "there is no occasion for us to consider or apply the common law." *Spitzer*. 577 F.3d at 407.

Nor is there a First Amendment right of access to the fruits of an illegal wiretap. Under the *Press-Enterprise* test, a qualified First Amendment right of public access attaches to criminal proceedings and related materials where (1) "the place and process have historically been open to the press and general public" and (2) "public access plays a significant positive role in the function of the particular process in question." *Press-Enterprise*, 478 U.S. at 8. As the Second Circuit explained, electronic wiretapping is a relatively modern invention which, from its outset, has been comprehensively governed by Title III. Title III creates a presumption against disclosure, and for the fruits of an illegal wiretap, imposes criminal penalties for a knowing disclosure. In no sense has the content of illegally intercepted communications been historically available to the press or public. Similarly, the "logic" prong of the *Press-Enterprise* test cannot be met. Public access plays no role in the collection or governing of illegal wiretap content. To the contrary, one of Title III's objectives was to prevent public access to such material in order to protect against the invasion of privacy that would befall the victims of the illegal surveillance were the information disclosed. Where the wiretap content is never presented at trial and no law enforcement interest is at stake, there is simply no "significant positive role" for the public to play. As the Seventh Circuit wrote,

> There is public curiosity about it, but curiosity is just the opposing force to privacy; one of them has to yield; both have constitutional dignity. Congress in Title III struck a balance between these interests that seems reasonable to us.

United States v. Dorfman, 690 F.2d 1230, 1234 (7th Cir. 1982).

Because there is no common law or First Amendment right of access to these materials, the documents from the *Liddy* trial that reflect the content of illegally obtained wiretaps should remain sealed. These documents include at least those listed on Exhibit C, at pages 15 (Dec. 21, 1972), 17 (Jan. 2, 1973), and 22 (Jan 17-18, 1973)**.**

IV. GRAND JURY MATERIAL NOT DISCLOSED AT TRIAL SHOULD REMAIN SEALED

Grand jury material not used at trial should remain sealed, because no statute or rule provides for disclosure of grand jury information for reasons of historical interest. Alternatively, the transcript should remain sealed because personal privacy outweighs any need for the disclosure.

A. No Statute or Rule Provides for the Release of Grand Jury Information Due to Historical Interest

In its earlier decision regarding President's Nixon grand jury testimony, this Court held, over the Department's objection, that courts' "authority regarding grand jury records reaches beyond Rule 6(e)'s literal wording," adopting the Second Circuit's "exceptional circumstances" test. *In re Petition of Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011); *see also In re Petition of Shepard*, 800 F. Supp. 2d 37 (D.C.C. 2011). With respect, the Department continues to disagree that courts possess inherent authority to reach outside the plain language of Federal Rule of Criminal Procedure 6(e). For all the reasons set forth in its opposition to the *Kutler* petition, and briefly summarized below, the Court should reject the current petition with respect to non-public grand jury information because historical interest is not a basis on which the Rules permit the

release of grand jury information.[14]

The Supreme Court has made clear that it views grand jury secrecy to be of paramount importance in protecting the integrity of law enforcement investigations as well as the rights of witnesses and innocent third parties. *See generally U.S. v. Sells Engineering*, 463 U.S. 418, 423-24 (1983); *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 219 (1979) (footnotes and citation omitted); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399-400. "In the absence of a clear indication in a statute or Rule, therefore, we must always be reluctant to conclude that a breach of this secrecy has been authorized**.**" *Sells Engineering*, 463 U.S. at 425 (internal quotations omitted).

Here, no "statute or Rule," *id*, provides for unsealing the sealed grand jury material from the *Liddy* trial. Rule 6(e) mandates that enumerated categories of individuals maintain grand jury secrecy "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e)(3)'s exceptions to grand jury secrecy apply only to the government, with the exception of two. *See* Fed. R. Crim. P. 6(e)(3)(A)-(E). Those subparts provide as follows:

> (E) The Court may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs - of a grand jury matter:
>
> (I) preliminarily to or in connection with a judicial proceeding;[15]
>
> (ii) at the request of a defendant who shows that a ground may exist to dismiss the

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[14] Rather than repeat its earlier argument in full, the Department incorporates by reference its opposition to the *Kutler* petition as if it were set forth fully below.

[15]The judicial proceeding mentioned in Rule 6(e)(3)(E)(i) does not refer to the proceeding brought for the purpose of obtaining disclosure. Instead, "the focus is on the *actual use* to be made of the material. If the primary purpose of the disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure ... is not permitted." *United States v. Baggot*, 463 U.S. 476, 480 (1983) (emphasis in original).

indictment because of a matter that occurred before the grand jury.

Fed. R. Crim. P. 6(e)(3)(E). Neither of these provisions permits petitioner access to the grand jury information he requests.

Nor should the court look beyond the text of Rule 6(e). *See United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009) (there is no common law right of access to grand jury materials and courts may not fashion a disclosure order in the absence of a recognized exception in Rule 6(e) (internal citations omitted)). Rule 6(e) was enacted by Congress and has all the force and effect of a statute. *See Fund for Constitutional Gov't v. National Archives and Records Services, et al*, 656 F.2d 856, 867 (D.C. Cir. 1981) (reviewing legislative history of Rule 6(e)). There is no ambiguity with respect to Rule 6(e)'s exceptions to secrecy. Rule 6(e)(3) does not contain the word "including" before the list of exceptions, and it contains no language that would indicate that the list of exceptions was illustrative or subject to the court's discretion. *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007); *United States. v. Novak*, 476 F.3d 1041, 1049 n.9 (D.C. Cir. 2007) ("our case law dictates that when Congress provides a list of exceptions in a statute, that list is presumed exclusive.")

Where, as here, the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Accordingly, because there exists no statutory authority for disclosing grand jury material based solely on historical interest, the petitioner's request must be denied.

This Court, citing cases like *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), *In re Hastings*,

735 F.2d 1261 (11th cir. 1984), and *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974), determined that Rule 6(e)'s express terms could give way in exceptional cases. *Kutler*, *supra*. Even assuming the correctness of those decisions at the time they were rendered, however, the Supreme Court subsequently has made clear that neither "inherent supervisory power" nor policy considerations provide a basis to circumvent or contravene the specific language of the Federal Rules of Criminal Procedure. *Carlisle v. United States,* 517 U.S. 416, 426-28 (1996); *United States v. Williams,* 504 U.S. 36, 46-47 (1992); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988); 1 Charles A. Wright and Andrew D. Leipold, Federal Practice and Procedure § 106 (4th ed. 2010) ("The Supreme Court has suggested that there is no authority beyond what is granted by Rule 6, and has made it clear that courts have no sweeping supervisory power over grand juries."). Moreover, while departure from the plain text of Rule 6(e) to exercise inherent authority is unwarranted, a departure for the sake of "historical interest" is particularly so. Historically, the exceptions to grand jury secrecy grew out of a recognition that grand jury secrecy must sometimes yield in order to further the "ends of justice" in a particular case. *See, e.g., United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (prosecutor could use witness's grand jury information to refresh recollection during trial, as court had discretion to breach grand jury secrecy where "the ends of justice" require it); *Pittsburgh Plate Glass Co.*, 360 U.S. at 399 (particularized needs that may overcome grand jury secrecy include the need "to impeach a witness, to refresh his recollection, to test his credibility and the like"); *Douglas Oil*, 441 U.S. at 219-220 (in some situations "justice may demand" that discrete portions of grand jury information be disclosed); Fed. R. Crim. P. 6(e)(3)(E)(i).

Because Rule 6(e)'s exceptions to grand jury secrecy arose out of concerns for protecting

the accused and ensuring justice in particular cases, it is unsurprising that courts relying on inherent authority to disclose grand jury information have generally done so because justice required it in particular and extraordinary situations. In the *Biaggi* case, for example, Judge Friendly permitted limited public release of an elected official's grand jury testimony after the official publicly denied having invoked his Fifth Amendment privilege in the grand jury and publicly stated his non-opposition to the release. In the *Hastings* case, the 10th Circuit permitted release of grand jury testimony to the legislature for purposes of an impeachment proceeding. Indeed, in *Hastings*, the court emphasized that reliance on inherent authority would only be appropriate in "exceptional circumstances consonant with ... [R]ule [6(e)]'s policy and spirit." *Hastings*, 735 F.2d at 1269. The *Hastings* court authorized disclosure only because it was "backed by a congressional mandate" and because the materials were needed in connection with "judge-run" proceedings that were "little removed from the judicial proceedings encompassed with the Rule [6(e)(3)(C)(I)] exception." *Id*. Impeachment proceedings and the close analogue between the grand jury and the functioning of the Judiciary Committee in that unique instance similarly animated the disclosure of the grand jury's report in the *Haldeman* case.

Historical interest does not fit within the traditional "policy and spirit," *Hastings,* 735 F. 2d at 1272, animating the creation of exceptions to grand jury secrecy. There is nothing exceptional about a request to examine grand jury materials based on interest in their contents. Such requests do not generally present a situation where the denial of disclosure will work some unfairness in civil or criminal litigation, or where disclosure is necessary to ensure that justice is done in an important public proceeding or to correct some public misapprehension on a matter of widespread public concern. Instead, requests under the historical interest exception simply seek

to increase the total amount of information about past events that is available to the public. Even if part of a significant project of historical scholarship, such requests could not easily be distinguished from journalistic inquiries into subjects of public interest or requests based simply on individual or public curiosity.

Whether or not historical interest, as a policy matter, *should be* considered as a justification to release grand jury information where the need for secrecy demonstrably has waned, presents a question for legislators and policymakers, not for courts. Indeed, the Department had proposed an amendment to Rule 6(e) to provide authority for courts to entertain requests to release certain historically important archival grand jury information after the passage of thirty years. That proposal, however, was rejected by the Advisory Committee for the Criminal Rules. Accordingly, the plain language of Rule 6(e) is binding in its present form.

B. The Grand Jury Materials Should Remain Sealed Under the Second Circuit's Multi-Part Test

The Second Circuit identified a number of factors that a court should consider in determining whether the request at hand rises above the "garden variety" petition for grand jury information to which Rule 6(e) should be applied*, see Kutler, supra,* quoting *Hastings*, 735 F.2d at 1269, or whether it constitutes an "'exceptional situation' permitting disclosure outside Rule 6(e)." *Id*. Those factors are as follows:

> (I) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceeding and that of their families; (vii) the extent to which the desired material -- either permissibly or impermissibly -- has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and

(ix) the additional need for maintaining secrecy in the particular case in question.

In re Petition of Craig, 131 F.3d at 106. Applying the Second Circuit's test here, it is apparent that the current request should be denied.

The majority of the *Craig* factors weigh against disclosure. First, the requester in this case is a single individual, in contrast to the consortium of historical associations and Watergate scholars that joined to petition for the release of President Nixon's grand jury testimony. *See Kutler, supra.* at 48. Although Professor Nichter is no doubt a learned scholar, the petition is his alone and lacks the sort of broad-based and unified support presented by the *Kutler* petitioners. Indeed, the *Kutler* petition presented sixteen separate affidavits from historians, academics and Watergate insiders attesting to the importance of the requested information, as well as the reasons why secrecy is no longer required. Here, Professor Nichter express great interest in what he describes as a historical mystery, but does not explain why that scholarly interest should overcome the privacy interests at stake.

Second, and relatedly, the reasons Professor Nichter gives for why the grand jury (and all the sealed) information should be disclosed are unexceptional. At bottom, Professor Nichter believes the information will shed additional light on the motivations behind the Watergate burglary. But no consideration is given to the privacy interests of individuals involved. Moreover, to the extent the grand jury material contains information prohibited from disclosure under Title III, it would be doubly protected by that statute as well as Federal Criminal Rule 6(e).

Third, unlike the *Kutler* petition, which focused solely on the testimony of a single, deceased individual (former President Nixon), petitioner here seeks grand jury testimony that

relates to living individuals. Some of these individuals have repeatedly expressed their opposition to the disclosure of information about them, and petitioner provides no reason why that opposition should not be respected.

Fourth, a portion of the grand jury material – the December 4, 1972 transcript – relates to an entirely different subject matter unrelated to the specifics of the Watergate burglary. Petitioner makes no showing as to why that transcript should be unsealed, and, as it is unrelated to the subject matter in which he has expressed an interest, one can assume that it was not intentionally targeted by his petition.

Finally, although not by itself determinative, "the government's position should be paid considerable heed," *In re Craig*, 131 F.3d at 106, and here the government opposes release of the grand jury material under the circumstances presented here.

The *Craig* factors, therefore, weigh heavily against the unsealing of the non-public grand jury information from the *Liddy* trial. The petition fails to make the showing necessary to establish a decreased need for secrecy sufficient to overcome both institutional concerns as well as concerns for the personal privacy of living individuals, privacy interests that in this circumstance are codified in Title III**.** Accordingly, the grand jury materials – reflected on pages 22 (Jan. 17, 1973) and 15 (Dec. 21, 1972 of Exhibit C – should remain sealed.

CONCLUSION

For all the foregoing reasons, the petition should be granted in part and denied in part, as discussed herein.

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Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

/s/ Elizabeth J. Shapiro
ELIZABETH J. SHAPIRO
D.C. Bar #418925
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-5302
Fax: (202) 616-8460
elizabeth.shapiro@usdoj.gov
Attorneys for the United States