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Historian Wins Release of Grand Jury Records of Espionage Investigation of Chicago Tribune

WW II Investigation Was First and Only Effort to Prosecute Major Newspaper for Espionage

By Brendan Healey

President Roosevelt was livid.

The United States had broken the top-secret code of the Imperial Japanese Navy—one of the more closely guarded United States secrets of World War II—and President Roosevelt believed the *Chicago Tribune* had just disclosed the classified information in a front-page story about the Battle of Midway.

The *Tribune* story stated that the U.S. Navy knew days in advance of the attack on Midway exactly which Japanese ships would be involved and where they would be. Armed with this "definite" "advance information," the Navy earned a decisive victory, one that many believe marked a turning point in the Pacific theater.

Nonetheless, many in Washington were angry with the *Tribune* for allegedly exposing the intelligence coup. Frank Knox, Secretary of the Navy, recommended that "immediate action be taken" against the *Tribune*, and, in the summer of 1942, a federal grand jury convened in Chicago to investigate whether the *Tribune* and its reporter had violated the Espionage Act.

It was the first and only time in United States history that the United States government has attempted to prosecute a major newspaper for violation of the Espionage Act.

It was the first and only time in United States history that the United States government has attempted to prosecute a major newspaper for violation of the Espionage Act. The grand jury heard testimony from the *Tribune* reporter as well as editors and Navy personnel but ultimately decided not to issue an indictment.

The story received press coverage over the years—particularly in light of recent high profile disclosures involving Chelsea (formerly Bradley) Manning and Edward Snowden—but, for nearly 73 years, the grand jury records were closed.

On November 18, 2014, historian Elliot Carlson filed a petition in the Northern District of Illinois seeking release of the grand jury transcripts from August of 1942. Carlson, an award-winning author and former newspaper reporter, is writing a book for the Naval Institute Press about the incident and the subsequent action against the *Tribune*. Carlson has spent years researching and writing his book and has collected thousands of pages of historical records, but he was denied access to the grand jury transcripts.

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The National Security Archive, The George Washington University, Gelman Library, 2130 H Street, NW, Suite 701, Washington, DC, 20037
www.nsarchive.org

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NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA

Knew Dutch Harbor Was a Feint.

Washington, D. C., June 7.—The strength of the Japanese forces with which the American navy is battling somewhere west of Midway Island in what is believed to be the greatest naval battle of the war, was well known in American naval circles several days before the battle began, reliable sources in the naval intelligence disclosed here tonight.

The navy learned of the gathering of the powerful Japanese units soon after they put forth from their bases, it was said. Altho their purpose was not specifically known, the information in the hands of the navy department was so definite that a feint at some American base, to be accompanied by a serious effort to invade and occupy another base, was predicted. Guesses were even made that Dutch Harbor and Midway Island might be targets.

The advance information enabled the American navy to make full use of air attacks on the approaching Japanese ships, turning the struggle into an air battle along the modern lines of naval warfare so often predicted in Tribune editorials.

It was known that the Japanese fleet—the most powerful yet used in this war—was broken into three sections: First, a striking force; next a support force, and finally an occupation fleet.

Pearl Harbor Was to Be Next.

It was apparent to Adm. Chester W. Nimitz's strategists in Hawaii that the feint would probably be made by the supporting force, the real blow struck by the striking fleet, with the occupation force standing by, ready to land troops as soon as defenses were broken down.

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Carlson was joined on the petition by the Reporters Committee for Freedom of the Press, which also prepared the petition and supporting memorandum in conjunction with outside counsel, as well as the American Historical Association, the National Security Archive, the Naval Historical Foundation, the Naval Institute Press, the Organization of American Historians, and the Society for Military History.

Petitioners argued, among other things, that the court has the inherent authority to order the disclosure of grand jury records and that, given the age of the records, the death of all the witnesses, and the historical significance of the records, they should be disclosed.

The government opposed the petition and argued that the court did not have inherent authority to order disclosure.

On June 10, 2015, Ruben Castillo, Chief Judge of the Northern District of Illinois, ruled in petitioners' favor and ordered release of the transcripts. *Carlson v. United States*.

Chief Judge Castillo noted the "long-standing tradition" of grand jury secrecy but emphasized that "the rule of grand jury secrecy is not absolute." Federal Rule of Criminal Procedure 6 (e) lists several circumstances under which a court can release grand jury materials. Petitioners' situation did not fall under any of the enumerated exceptions in 6(e), though, so the court addressed the question of whether it could order release under its inherent authority.

The court noted that, by its terms, Rule 6(e) is not limited to the enumerated exceptions. Moreover, the court discussed how "numerous other federal courts" have determined that courts have inherent discretion to disclose grand jury proceedings. Accordingly, the court determined that it would "join[]those courts in concluding that in appropriate circumstances, federal courts possess inherent authority to release grand jury materials for reasons other than those contained in Rule 6(e)."

Having determined that it could release the transcripts, the court then turned to whether it should do so. The court adopted the Second Circuit's nine-factor test for whether to release grand jury transcripts based on their historical significance: (1)

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identity of the party seeking disclosure; (2) whether the government or defendant objects; (3) why disclosure is sought; (4) what information is sought; (5) how long ago the grand jury proceeding occurred; (6) current status of the principals and their families; (7) the extent to which the information is already public; (8) whether the witnesses are still alive; and (9) any additional need for maintaining secrecy. *See In re Craig*, 131 F.3d 99 (2dCir.1997).

The court found that six of the nine factors (numbers 1, 2, 3, 4, 5, and 7) favored petitioners. With regard to the third and fourth factors (why disclosure is sought and what information is sought), the court noted that "the *Tribune* investigation implicates broader principles, namely, the relationship between the government and press in a democratic society, particularly as to matter impacting national security."

The court found that disclosure would have minimal impact on the witnesses and their families, noting that the last known grand jury witness died in 1997. There were unidentified witnesses, but any survivors would almost certainly be over 100 years old. Finally, the court found no other reasons for maintaining secrecy—the government had not identified any national security concerns and no one other than the government objected to disclosure.

Accordingly, the court ordered disclosure of these long-ago yet still timely grand jury records.

A few other footnotes of historical interest in the case:

- Frank Knox, the Navy Secretary who vigorously advocated for the prosecution of the *Tribune*, was the former publisher of the Chicago *Daily News* and a long-time rival of Colonel Robert McCormick, the *Tribune* publisher. Moreover, as the *Tribune* pointed out at the time, Knox continued to be paid by the *Daily News* while he was working for the government.
- Notwithstanding the *Tribune* and other papers' putative disclosure of the code-breaking, the Japanese Navy continued to use the same basic code (with some tweaking) through the end of the war.
- Earlier in the war, the Navy failed to ask *Tribune* correspondent Stanley Johnston, who provided the reporting for the story and later testified before the grand jury, to sign accreditation papers. Although he was given oral instructions to submit his materials for censorship, he was not asked to sign a formal, written commitment.

The Petitioners were represented by Brendan Healey of Mandell Menkes LLC. The government was represented by Elizabeth Shapiro from the U.S. Department of Justice and Daniel Gillogly and Mark Schneider from the Northern District of Illinois U.S. Attorney's Office.