No. ________
October Term, 2005

IN THE

Supreme Court of the United States

PATRICIA J. HERRING, INDIVIDUALLY; JUDITH PALYA LOETHER, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); WILLIAM PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); ROBERT PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); SUSAN BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED); CATHERINE BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED),

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where government officials submitted intentionally false and misleading claims of "state secrets" privilege to obtain this Court's decision in *United States v. Reynolds,* 345 U.S. 1 (1953), are petitioners bound to plead and prove that the officials committed the crime of perjury in order to bring an independent action for fraud upon the court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patricia J. Herring (formerly Patricia J. Reynolds), Judith Palya Loether, William Palya, Robert Palya, Susan Brauner and Catherine Brauner respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The decision of the United States Court of Appeals for the Third Circuit has been reported at 424 F.3d 384 and is reproduced as Appendix A. The decision of the United States District Court for the Eastern District of Pennsylvania, dated September 10, 2004, is unreported. It is reproduced as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on September 22, 2005. This petition for a writ of certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes Involved

Federal Rule of Civil Procedure 60(b) provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been

> reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Statement of the Case

A. Background.

Three widows stood before this Court in 1952. Their husbands had died in the crash of an Air Force plane. The lower courts had awarded each of them compensation. But the United States was bent on overturning their judgments, and – to accomplish this – it committed a fraud not only upon the widows but upon this Court. The government swore that a set of reports the Air Force had prepared on the accident contained "state secrets" about the plane's mission and the experimental equipment it carried. This Court took the government at its word and vacated the widows' awards. Yet *United States v. Reynolds,* 345 U.S. 1 (1953), rests on a lie. It turns out that the Air Force reports made no mention of the plane's mission or any secret equipment on board. They described only a flight gone tragically awry due to the

Air Force's negligence. The government's "state secrets" claim was false and misleading when made and knowingly or recklessly so.

Petitioners are one of the widows and the children of the other two. After discovering the government's deceit, petitioners moved in March 2003 for leave to file in this Court a petition for a writ of error *coram nobis,* a common law writ by which an appellate court may correct its own error. The government opposed that motion, arguing that petitioners' claims should instead be pursued through an independent action for fraud upon the court under Federal Rule of Civil Procedure 60(b). This Court denied petitioners' motion for leave to file a *coram nobis* petition without comment. *In re Herring,* 539 U.S. 940 (2003).

Accordingly, on October 1, 2003, petitioners returned to the United States District Court for the Eastern District of Pennsylvania and commenced an Independent Action for Relief from Judgment to Remedy Fraud upon the Court. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and also ancillary to its original jurisdiction in *Reynolds.* 28 U.S.C. § 1367; *United States v. Beggerly,* 524 U.S. 38, 46 (1998). The government moved to dismiss petitioners' complaint pursuant to Rule 12(b)(6). Following briefing and argument, the district court granted the government's motion. *Herring v. United States,* Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004) (reproduced as Appendix B). Petitioners appealed and the Court of Appeals affirmed on grounds different from the district court. 424 F.3d 384 (3d Cir. 2005) (reproduced as Appendix A).

B. The Complaint.

The complaint the lower courts dismissed is reproduced as Appendix C. It alleges:[1]

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1. The complaint's factual allegations must be taken as true in the present posture of this case. *Davis v. Monroe County Bd. of Education,* 526 U.S. 629, 633 (1999).

On October 6, 1948, a United States B-29 Superfortress bomber crashed near Waycross, Georgia. Nine of the thirteen men on board were killed. Three of the deceased, Robert Reynolds, Albert H. Palya and William H. Brauner, were civilian engineers assisting military personnel in testing certain electronic equipment aboard the plane. C4-5 (Complaint, ¶¶ 8-9).

In 1949, the widows of Reynolds, Palya and Brauner filed negligence suits against the United States under the Federal Tort Claims Act. The widows' cases stalled when the Air Force refused to turn over its accident investigation reports, as well as several statements of surviving witnesses, which the Air Force asserted were "privileged." C5 (¶¶ 10-11).

When first called upon to defend this assertion, the United States made no claim that the accident reports and statements contained any "state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security." *Brauner v. United States,* 10 F.R.D. 468, 472 (E.D. Pa. 1950). Rather, the government insisted only that "proceedings of boards of investigation of the armed services should be privileged in order to allow ... free and unhampered self-criticism within the service." *Id.* The district court held no such privilege existed and ordered the Air Force to produce the materials. *Id.* at 471-72. *See also* C5-6 (¶¶ 11-12).

It was only after production had been ordered that the United States first invoked "state secrets" protection.[2] The government supported this claim with a sworn, formal "Claim of Privilege" signed by the Secretary of the Air Force, Thomas F. Finletter, and an affidavit signed by the Judge Advocate General of the Air Force, Major General Reginald K. Harmon. C6, C29-34, C36-37 (¶¶ 13-15 & Exs. C and D).

Secretary Finletter's "Claim of Privilege" first renewed the Air Force's claim for a self-evaluative privilege, urging again that "disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety." C30. But the Secretary then advanced a second, separate ground for withholding the documents:

> The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to the Department and would not be in the public interest.

2. The Air Force requested rehearing of the motion to compel in a July 24, 1950 letter from the Secretary of the Air Force to the district court. This letter stated that "it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel." The letter, however, pointed solely to Air Force regulations regarding air accident investigations and the need for "optimum promotion of flying safety," and did not mention the possibility of "state secrets." The Air Force first raised "state secrets" at a hearing before the court on August 9, 1950. *See Reynolds v. United States,* 192 F.2d 987, 990 (3d Cir. 1951).

In making this new claim, the Secretary specifically described the documents as "reports of Boards of Investigation and statements of witnesses *which are concerned with confidential missions and equipment of the Air Force.*" C31 (emphasis added).

In his affidavit Major General Harmon also renewed the Air Force's claim for a general self-evaluative privilege. But then he too, like Secretary Finletter, swore that

> such information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.

C37. Major General Harmon stated that in lieu of production of the documents, the Air Force would allow the three surviving crew members "to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature." C37.

Upon rehearing, the district judge directed that the accident reports and witness statements be produced for his *in camera* inspection. C39-40 (Ex. E). The United States refused to comply with this order. On October 12, 1950, after the district court was satisfied that the government would not produce the documents even to the court, it held the Air Force in default and deemed its liability to the widows established. C7, C42-43 (¶ 17 & Ex F). The district court then held a hearing on damages and entered judgments in the widows' favor totaling $225,000. C7 (¶ 18).

On appeal, the Court of Appeals accepted the Air Force's affidavits at face value, understanding them to assert, in addition to a self-evaluative privilege, that "the documents sought to be produced contain state secrets of a military character." *Reynolds v. United States,* 192 F.2d 987, 996 (3d Cir. 1951). The Court of Appeals agreed with the district court, however, that it was within the competence of

the federal courts to review such claims of privilege *in camera* to evaluate their validity and proper scope, and therefore affirmed. *Id.* at 996-98. *See also* C8 (¶ 19).

The United States successfully petitioned for certiorari and urged the Supreme Court to reverse the widows' judgments. C8 (¶¶ 20-21). In its petition and its briefs, the government advanced an even more expansive claim of privilege, insisting that the executive branch might lawfully withhold any document from judicial scrutiny if it deemed secrecy in the public interest. *United States v. Reynolds,* 345 U.S. 1, 6 (1953).

A majority of this Court, however, declined to rule so broadly, choosing instead to rely on Secretary Finletter's and Major General Harmon's affidavits:

> Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. *Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.*

345 U.S. at 10 (emphasis added). Indeed, the Secretary had attested that the aircraft and crew "were engaged in a highly secret mission" and the documents were "concerned with confidential missions and equipment of the Air Force." Similarly, the Judge Advocate General had sworn that furnishing the reports and witness statements would compromise "national security ... and the development of

highly technical and secret military equipment." *Id.* at 4-5, 10. In the majority's view, these representations that the documents contained "military secrets" were sufficient to forestall disclosure even to the district judge, absent a more compelling necessity. *Id.* at 10-11. The balance between the government's need for secrecy and the widows' need for the documents weighed in favor of the government:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

Id. at 11. The Court, accordingly, reversed.[3]

After remand, without the benefit of the accident report and witness statements, the widows settled their cases with the government for $170,000.[4] The cases were discontinued on August 5, 1953. C9 (¶ 22).

In early 2000, Palya's daughter, Judith, learned through internet research that previously-classified Air Force documents regarding military aircraft accidents had been declassified and were publicly available. Curious about the "secret mission" that had occupied her father on the day of his death, she ordered a copy of materials relating to her

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3. Chief Justice Vinson wrote for the majority. Justices Black, Frankfurter and Jackson dissented "substantially for the reasons set forth in the opinion of Judge Maris [of the Court of Appeals] below." 345 U.S. at 12.

4. The widows noticed depositions of several survivors of the crash and it appears that those depositions were taken prior to settlement. Petitioners do not have copies of any transcripts of such depositions. It is possible they were never ordered transcribed.

father's accident. She soon saw what the government had fought so hard to keep her mother and a federal district judge from seeing. C9-10, C104-162 (¶¶ 23-25 & Ex. J).[5]

The accident report and witness statements contained none of the military or national security secrets the government had claimed. The materials nowhere described any part of the "secret mission" in which Reynolds, Palya and Brauner were involved. They did not refer to any "newly developing electronic devices" or "secret electronic equipment" aboard the plane or elsewhere. They made no mention of anything that was or should have been "confidential." Indeed, they recorded nothing beyond the events surrounding the crash and the likely reasons for its occurrence, none of which had anything to do with the mission of the flight or the confidential equipment on board. C10, C11-12 (¶¶ 26, 32-34).[6]

Thus, petitioners' complaint alleges:

- The affidavits offered by Secretary Finletter and Major General Harmon in support of the Air Force's claim of privilege were intentionally false and

5. The documents Judith Palya Loether obtained included all of the materials identified in the district court's September 21, 1950 order. C9-10 (¶ 25). Copies of these documents were attached to the Complaint in their original form as Exhibit I and in printed form as Exhibit J. Because this Court's rules forbid the attachment of originals, only Exhibit J, the printed form, is included in Appendix C.

6. The accident report identifies the main cause of the accident as the Air Force's failure to comply with certain technical orders which mandated "changes in the exhaust manifold assemblies for the purposes of eliminating a definite fire hazard." C11, C110 (¶ 33 & Ex. J). As a result, "[t]he aircraft is not considered to have been safe for flight," and when the No. 1 engine on the plane caught fire, the fire could not be contained and the plane plummeted to the ground. C116 (Ex. J). The declassified documents also reveal that one of the government's key interrogatory responses was false. C169-170, C175 (Ex. K) (Interrogatory 31(a): "Have any modifications been prescribed by defendant for the engine in its B-29 type aircraft to prevent overheating of engines and/or reduce the fire hazard in the engine?" Answer: "No.").

misleading. They were proffered to cover up and suppress conclusive evidence that the Air Force's negligence had caused the deaths of Reynolds, Palya and Brauner, and with a view toward fabricating a "test case" for a favorable judicial ruling on claims of an executive or "state secrets" privilege – a case built on a fraudulent premise. C11-13 (¶¶ 32-35).

- The affidavits were made with knowledge of their falsity or in reckless disregard for whether the statements they contained were true or false. Indeed, the affidavits' falsity is apparent upon reading the accident report and witness statements themselves. They provide no confidential information of any kind concerning the plane's secret mission or equipment – the "secret" topics the Air Force claimed and the courts at the time understood them to address. C13 (¶¶ 36-38). And,

- The Air Force intended that the federal courts rely upon the affiants' testimony to deny the widows evidence to which they were entitled and, later, to reverse the judgments rendered in the widows' favor. And, ultimately this Court *did* rely on the Air Force's falsehoods. The government thereby practiced a fraud on this Court and worked a grave miscarriage of justice. C13-15 (¶¶ 39-45).

C. The Decisions Below.

In dismissing petitioners' complaint, the district court agreed that Secretary Finletter and Major General Harmon were acting as officers of the court in asserting a "state secrets" privilege. B12. The court went on to hold, however, that courts generally should "defer on some level to governmental claims of privilege" for military secrets and it was therefore obliged to give the Finletter and Harmon affidavits "a broader reading" than the federal judges and justices who considered them fifty years before. B9-11.

> From [the affidavits], Plaintiffs deduce that only the mission and electronic equipment were confidential, but a broader reading of the affidavits suggests that beyond the mission itself, disclosure of technical details of the B-29 bomber, its operation, or performance would also compromise national security.

B10-11. The district court then pointed to references in the report to technical aspects of the plane's operation and performance that it believed "in the hands of the wrong party could surely compromise national security," B11-12, and – based on its reading of the affidavits – ruled as a matter of law that appellants could not show that "the Air Force sought to defraud the Courts." B12.

To buttress this ruling, the district court also undertook to identify a purported "public record" on the development of a Soviet copycat bomber. Based on its own independent research (which petitioners had no opportunity to address or contest), the district court posited that the Soviet Union's Tu-4 "copied the B-29 almost exactly, including the fire-prone engines." B16. On this mistaken premise,[7] the district judge speculated that "it seems that the accident investigation report may have reasonably contained sufficient intelligence, if not about the secret equipment or mission, then about ongoing developments in Air Force technical engineering, to warrant an assertion of the military secrets privilege." B18. Thus, the district court held that petitioners

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7. The Tu-4 did *not* copy the B-29's engine, but instead used the Shestov Ash-73TK, a Soviet variant of a different U.S. engine that the Soviets had licensed years before. Von Hardesty, *Made in the U.S.S.R.,* Air & Space/Smithsonian, Feb./Mar. 2001 (available at http://www.airandspacemagazine.com/ASM/Mag/Index/2001/FM/TU-4.html). The existence of the Tu-4 was, moreover, public knowledge a year before the crash. It was disclosed in a 1947 hearing chaired by Secretary Finletter. See "Russian Air Gain Noted by Spaatz," New York Times, Nov. 18, 1947, at 33.

could not challenge the government's privilege claim as fraudulent.

The Court of Appeals took a different approach. Its keynote was that "[t]he presumption against the reopening of a case ... must be not just a high hurdle to climb but a steep cliff-face to scale." A3. This "steep cliff-face" meant that, where sworn affidavits were involved, it was not enough to show that officers of the court had engaged in fraud.[8] Rather, petitioners had to allege and prove that these officers had committed perjury. Therefore, petitioners needed to plead and prove that Finletter's and Harmon's affidavits were "not subject to a literal, truthful interpretation" as "a necessary element" of their claim. A12.

Petitioners, however, could not make out this "necessary element." In the Court of Appeals' view, if read literally – and without regard for the circumstances in which they were made or how the courts had understood them at the time – the Air Force's affidavits might be construed to claim "state secrets" protection not just for the mission and secret equipment aboard the ill-fated plane, but generally for anything to do with the "workings" of the B-29. A13-14. Because this was "an obviously reasonable truthful interpretation of the statements made by the Air Force," petitioners were "unable to make out a claim for the perjury which ... forms the basis for their fraud upon the court claim," and their complaint was properly dismissed. A14.[9]

Reasons for Granting the Writ

The Court of Appeals has held that government officials may intentionally defraud the federal courts by false and misleading affidavits and the government may escape answering for their misconduct, so long as the affiants are

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8. The Court of Appeals agreed that Finletter and Harmon were acting as "officers of the court" in *Reynolds*. A11.

9. In light of this conclusion, the Court of Appeals did not reach the district court's additional "independent research"-based ground for dismissal.

careful to avoid committing the crime of perjury. This unprecedented holding conflicts with prior decisions of this Court and other circuit courts governing independent actions for fraud upon the court and establishes a standard that promises only to bring shame on the federal judiciary. A fraud directed squarely at the integrity of this Court's decision-making, as happened in the *Reynolds* case, should be confronted, not excused. In the exercise of its supervisory powers, this Court should issue a writ of certiorari to review the Court of Appeals' ruling.

I. The Court of Appeals' Decision Conflicts with Rule 60(b) and Prior Decisions of this Court and Other Courts of Appeals.

The Court of Appeals' decision in this case makes pleading and proof of criminal perjury the *sine qua non* of an independent action under Rule 60(b) of the Federal Rules of Civil Procedure, at least where allegedly false and misleading statements appear in sworn affidavits or declarations:

> To allege that false statements were made in these documents is to allege perjury .... In such a case, proof of perjury, though not sufficient to prove fraud upon the court, becomes a necessary element which must be met before going on to meet the additional rigors of proving fraud upon the court.

A12. On this basis, the Court of Appeals flipped the rules that generally govern motions to dismiss; read the Finletter and Harmon affidavits entirely outside the context in which they were presented and previously understood; and held that because those affidavits were arguably susceptible to a "literal, truthful interpretation" petitioners could not prove perjury and hence could not make out a claim for fraud upon the court. A12-14.

The Court of Appeals cites no authority for its holding that "proof of perjury" is a necessary element of a fraud upon the court in this or any other context. None

exists. The court's decision conflicts with the plain language of Rule 60(b) and with *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1944), and *United States v. Beggerly,* 524 U.S. 38 (1998), this Court's leading recent discussions of fraud upon the court. It is also at odds with the standards for Rule 60(b) independent actions established by other federal appeals courts.

Rule 60(b), as amended in 1946, abolished almost all common law avenues for post-judgment relief in the district courts. *Beggerly,* 524 U.S. at 45. The amended rule, however, specifically preserved "the power of the court to entertain an independent action ... to set aside a judgment for fraud upon the court." Such an independent action sounds in equity and, as *Beggerly* notes, appears "more broadly available than the more narrow writs that the 1946 Amendment abolished." *Id.*

The rule allows an action for *fraud* upon the court, not perjury upon the court. Perjury and fraud are different. Perjury is a crime. It requires proof of a willfully false statement made under oath or expressly under penalty of perjury, on a material matter which the defendant does not believe to be true. 18 U.S.C. § 1621. These criminal standards are exacting. Only an affirmative false statement will sustain a charge of perjury; a literally true statement is not perjury, even if it is intentionally evasive, misleading and deceitful. *Bronston v. United States,* 409 U.S. 352, 360-62 (1973). Further, a conviction lies only if the prosecution proves that the defendant knew his testimony was false at the time he gave it. *United States v. Sweig,* 441 F.2d 114, 117 (2d Cir.), *cert. denied,* 403 U.S. 932 (1971); *La Placa v. United States,* 354 F.2d 56, 59 (1st Cir. 1965).

Fraud, by contrast, is the intentional misstatement or omission of a material fact made with knowledge of its falsity or in reckless disregard for whether it is true or false. *E.g., SEC v. Infinity Group Co.,* 212 F.3d 180, 191-92 (3d Cir. 2000), *cert. denied,* 532 U.S. 905 (2001) (actionable securities fraud consists of knowing or reckless misstatements or

omissions); *McLean v. Alexander,* 599 F.2d 1190, 1197 & n. 12 (3d Cir. 1979) (same, collecting cases). Fraud is both a criminal and civil law concept. Unlike perjury, fraud does not depend upon an affirmative false statement; it may rest upon an omission to state a material fact that the actor is under a duty to disclose or that is necessary to make the facts stated not misleading. *Bronston,* 409 U.S. at 358 n.4 (criminal fraud, unlike perjury, "goes 'rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations'") (citation omitted); *Kline v. First Western Gov't Sec.,* 24 F.3d 480, 491 (3d Cir. 1994); *SEC v. Coffey,* 493 F.2d 1304, 1314 (6th Cir. 1974). Fraud also does not require that the actor know his statements and omissions to be false; the actor may answer for fraud if he acts in reckless disregard for whether his statements and omissions are true or not. *Infinity Group Co.,* 212 F.3d at 191-92; *First Commodity Corp. v. Commodity Futures Trading Comm.,* 676 F.2d 1, 6-7 (1st Cir. 1982).

Fraud thus is not perjury, and in preserving an "independent action ... for fraud upon the court" Rule 60(b) is not preserving an action confined by the elements of the crime of perjury. It is preserving a broader remedy for *deceit* directed at the court itself.

This Court's leading decision on "fraud upon the court," *Hazel-Atlas,* makes this clear.[10] In 1941, Hazel-Atlas commenced an action to set aside a judgment entered against it in 1932 on a claim of patent infringement. It

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10. *Hazel-Atlas* is a prime example of a situation for which the independent action was preserved under amended Rule 60(b). 28 U.S.C. App., Fed R. Civ. P. 60, Advisory Committee's Notes on 1946 Amendment, at p. 795 ("the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1944)."). *See also Beggerly,* 524 U.S. at 46.

alleged that Hartford-Empire had procured the judgment by a fraud upon the court. Its evidence showed that in 1926 an attorney for Hartford had written an article extolling Hartford's glass-making machine as a "remarkable advance" and arranged to have that article published in a trade journal under the name of William Clarke, a leader in the field. 322 U.S. at 240. Hartford and its attorney submitted the article to the Patent Office in support of Hartford's patent application and later cited it to the Third Circuit in a brief, directing the court's attention to "[t]he article by Mr. William Clarke, former President of the Glass Workers' Union." *Id.* at 240-41. The truth came fully to light in the course of testimony in a later government prosecution of Hartford for antitrust violations. *Id.* at 243.

The Court of Appeals denied Hazel-Atlas relief, but this Court reversed. The Court found that "[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." *Id.* at 245.[11] Hartford's sin was not the crime of perjury: Hartford was not under oath when it misrepresented the authorship of the article in its Patent Office filings and appeal brief. Hartford's sin was deception and fraud – "a deliberately planned and carefully executed scheme to defraud ... the Circuit Court of Appeals" – and deception and fraud was enough to support an independent action:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud

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11. The Court observed that the federal courts' equitable power to set aside a final judgment obtained by fraud was well established and that, notwithstanding the "deep-rooted policy" of finality, "where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' they have wielded the power without hesitation." 322 U.S. at 244-45 (citations and footnote omitted).

> cannot complacently be tolerated consistently with the good order of society. ... The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 246. It was, moreover, no answer to Hazel-Atlas' claim that the article was not basic to the 1932 judgment or that the statements it contained were true. Hartford was in no position to dispute that the article was material and effective or to argue its accuracy having misrepresented its true origin. *Id.* at 246-47.

Similarly, in *Beggerly,* this Court reviewed amended Rule 60(b) and the independent action it allows and concluded that such an action "should be available only to prevent a grave miscarriage of justice." 524 U.S. at 47. As support for this proposition the Court pointed not only to *Hazel-Atlas,* but also to *Pacific R. Co. v. Missouri Pacific R. Co.,* 111 U.S. 505 (1884), and *Marshall v. Holmes,* 141 U.S. 589 (1891). The *Pacific* case involved an action to set aside a foreclosure decree as the product of conspiracy among certain parties fraudulently to expand the deed and decree to embrace more property than had originally been mortgaged. *Marshall v. Holmes* was an effort to vacate a series of judgments that had been entered based on an allegedly forged letter. Like *Hazel-Atlas,* both of these cases were *fraud* cases; neither involved false statements under oath.

These cases make it clear that the availability of the independent action has never depended on proof of the crime of perjury. Nor have any other Courts of Appeals held that proof of perjury is a "necessary element" of such a claim. The standard the Sixth Circuit has announced for independent actions, for example, requires conduct:

> 1. On the part of an officer of the court; 2. That is directed to the "judicial machinery" itself; 3. That is intentionally false, willfully blind to the truth, or is

> in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993). This standard recognizes that fraud upon the court, unlike perjury, need not be based on affirmative misstatements, but may be based on nondisclosures, and need not be based on proof of subjective knowledge of falsity, but may be founded on a showing of willful blindness or reckless disregard for the truth.

Other circuits have adopted more general standards. *See, e.g., Aoude v. Mobil Oil Corp.,* 892 F.2d 1115, 1118 (1st Cir. 1989) (fraud upon the court is an "unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense"); *Gleason v. Jandrucko,* 860 F.2d 556, 559 (2d Cir. 1989) ("fraud which seriously affects the integrity of the normal process of adjudication"); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1338 (5th Cir. 1978) ("only the most egregious conduct, such as bribery of a judge or members of the jury, or the fabrication of evidence by a party in which an attorney is implicated"); *Oxxford Clothes XX, Inc. v. Expeditors Int'l, Inc.,* 127 F.3d 574, 578 (7th Cir. 1997) ("conduct that might be thought to corrupt the judicial process itself, as where a party bribes a judge or inserts bogus documents into the record"); *Greiner v. City of Champlin,* 152 F.3d 787, 789 (8th Cir. 1998) ("egregious misconduct directed to the court itself"); *Dixon v. Commissioner,* No. 00-70858, 2003 U.S. App. LEXIS 4831, at *11-12 (9th Cir. Mar. 18, 2003), *amending* 316 F.3d 1041 (9th Cir. 2003) ("unconscionable plan or scheme which is designed to improperly influence the court in its decision").

Not one of these formulations, however, demands proof of perjury to establish fraud upon the court. Nor do any other decided cases petitioners have been able to locate. In

announcing and enforcing such a standard, the Court of Appeals for the Third Circuit stands alone.

II. The Court of Appeals' "Perjury" Standard for Independent Actions So Far Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of this Court's Supervisory Powers.

Independent actions for fraud upon the court – especially fraud upon this Court – are admittedly rare. But they are important. The standards courts apply to independent actions establish when, notwithstanding the doctrine of finality, courts will act to defend the integrity of their own processes to assure that justice is done. Where a court, in the name of finality or expediency, announces a standard that turns a blind eye to potential corruption of its processes, it demeans itself and the public confidence that is the court's most vital resource.

This is what the Court of Appeals has done here. Its decision begins with a vow to erect "not just a high hurdle to climb but a steep cliff-face to scale" in pleading and proving fraud upon the court. A3. It concludes with an extraordinary holding that, at least where the fraud is perpetrated by sworn statements, a showing that the statements were intentionally misleading and deceptive is not enough. The affidavits must be perjurious, and must be viewed with all of the facts in the light most favorable to their proponents to see if they might bear any literal, truthful interpretation. This standard is result-driven in its reasoning and outcome and, at bottom, shameful. A court should expect more of government officials who solicit judicial action than that they not be guilty of perjury.

Petitioners duly pleaded that Secretary Finletter and Major General Harmon defrauded the federal courts, including this Court, in claiming "state secrets" protection for the accident report and witness statements at issue in *Reynolds*. When these officials' affidavits are read in the

context of the underlying litigation, it is plain that they intended to lead the trial court and later the Court of Appeals and this Court to believe that the documents in question contained secret information regarding the plane's mission and the confidential equipment it carried. Moreover, the record establishes beyond question that this is precisely how they were understood by the trial court, the Court of Appeals, and this Court. And, it is *because they were so understood* that the government secured in this Court a broad privilege for "state secrets" that led to the reversal of the widows' judgments. *Reynolds,* 345 U.S. at 10 ("On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.")

It turns out that the accident report and witness statements contain no "state secrets" of the sort this Court understood the Air Force to claim. The documents contain nothing secret about the plane's mission or its confidential equipment.[12] On this score, which is the score that matters, the affiants perpetrated fraud. That their affidavits might be

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12. The district court suggested, *sua sponte,* that references in the accident report that the plane was involved in an "electronics project," an "authorized research and development mission" and "projects ... requir[ing] aircraft capable of dropping bombs at altitudes of 20,000 feet and above" might reveal secret information. B11. This speculation, even if it were appropriate on a motion to dismiss (which it is not), is easily answered. Contemporaneous news reports at the time publicly reported these facts. Indeed, many of them appear in this Court's opinion in *Reynolds*. 345 U.S. at 2-3. On appeal, the government also pointed to a reference in a witness statement to the fact that the plane had an auto-pilot, hinting that this fact might be confidential. But this speculation, even less appropriate on appeal, is also baseless. The Air Force had publicized that its bombers had auto-pilot technology in 1943. "Army Tells Secret of its Robot Pilot: Electronically Controlled, It Is Said to Keep Plane Rigidly On Course In Bombing," New York Times, Sept. 21, 1943, p. 25.

read literally to claim a privilege for *other* information about the B-29, as the Court of Appeals suggests, might help the affiants avoid a perjury prosecution.[13] But it does not render their affidavits any less false, misleading and fraudulent, for the affidavits were intended to deceive – and did deceive – the courts on key facts that drove this Court's decision. *See Hazel-Atlas,* 322 U.S. at 247 (misrepresentation of key fact of authorship upon which court relied constituted fraud upon the court, even if other facts presented were truthful); *Lucia v. Prospect St. High Income Portfolio, Inc.* 36 F.3d 170, 175 (1st Cir. 1994) (literally accurate statements may, in context and manner of presentation, be misleading and fraudulent under securities laws); *McMahan v. Wherehouse Entertainment, Inc.,* 900 F.2d 576, 579 (2d Cir. 1990) (same); *SEC v. First American Bank & Trust Co.,* 481 F.2d 673, 678-79 (8th Cir. 1973).[14]

The standard adopted below leads to the absurd result that a fraud upon the court practiced by means of sworn affidavits will be harder to make out than one founded on unsworn statements. Let us imagine that Congress had not required the Secretary of the Air Force to take an oath when claiming "state secrets" protection and the Secretary and

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13. Petitioners do not agree with the Court of Appeals' reading of the affidavits. Secretary Finletter, for instance, specifically represented that the documents in question were "concerned with confidential missions and equipment of the Air Force." C31. This statement, which the Court of Appeals does not even mention, has no "literal, truthful interpretation." It is false. Petitioners also do not agree that the affiants sought to claim any privilege for the "workings" of the B-29. The affiants were offering to produce witnesses to testify to precisely these matters. 345 U.S. at 11. Nor is there any evidence that what the accident reports or witness statements disclosed about the "workings" of the B-29 was, in fact, secret.

14. *See also* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 182 (November, 2001) ("Under modern criminal law, literally true but misleading assertions, misleading statements expressing mere beliefs and opinions, and various forms of misleading nonverbal conduct can all provide a predicate to prosecution for fraud and related offenses").

Judge Advocate General had simply presented their claims by letter to the trial court. The fraud upon the court would be the same. Yet the crime of perjury would not be implicated and hence there would be no quest for a "literal, truthful interpretation" of the claims. The letters would be evaluated under the standards for fraud and considered as a whole and in context to ascertain whether, by commission or omission, they were intentionally false, misleading or deceptive.

Surely a government official who defrauds the court under oath is no less contemptible than one who fabricates evidence or offers unsworn factual misrepresentations. After all, the oath-taker has made a solemn vow to be truthful. There is no logic or justice in according him the heightened protection of a "perjury" standard. The rule the Court of Appeals adopted licenses the worst sort of fraud upon the court: the clever, sworn series of "literally truthful statements" that will beat off a perjury prosecution but nonetheless deceive the court on facts fundamental to its decision-making.

History reveals another example of fraud directed at the integrity of this Court's decision-making and accomplished through "literally truthful statements" by high government officials. It arose in a context no less charged than *Reynolds*. It was discovered only decades after the event. But, it was rightly condemned as a fraud upon this Court because these "literally truthful statements" were intentionally dishonest and deceptive.

In *Korematsu v. United States,* 323 U.S. 214 (1944), the Court affirmed the conviction and internment of Fred Korematsu, an American of Japanese ancestry. In 1983, Korematsu filed a petition for a writ of *coram nobis* to vacate this conviction based on government misconduct. That misconduct included evidence that the government's brief in this Court had been deliberately misleading in setting out the facts upon which the government had relied in ordering

the evacuation and internment of Japanese-Americans as a "military necessity."

The Justice Department's original draft brief before this Court admitted that:

> The Final Report of General DeWitt [supporting the military necessity justification] ... is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. *The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects,* particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, *in conflict with the information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not asks* [sic] *the Court to take judicial notice of the recital of those facts contained in the Report.*

Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (emphasis in original). However, by the time the brief was filed with this Court, this passage had been revised to:

> The Final Report of General DeWitt ... is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. *We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the Final Report only to the extent that it relates to such facts.*

Id. at 1418 (emphasis in original) (citing Brief for the United States, *Korematsu v. United States,* October Term, 1944, No. 22, at 11). The final brief made no mention of the contradictory reports, nor of the "willful historical inaccuracies and intentional falsehoods" that Justice Department officials believed the DeWitt Report contained. 585 F.

Supp. at 1418. The United States' brief was literally true, but deliberately misleading.

As the district court recognized, the government's deceitful omissions were critical. *Id.* The government had relied heavily in the district court on the entire range of factual findings in the DeWitt Report to justify the evacuation. And, this Court assumed the integrity of the executive branch's factual determinations in that report in adopting a deferential standard of review in *Hirabayashi v. United States,* 320 U.S. 81, 95 (1943), and in applying that deferential standard to sustain Korematsu's conviction a year later. *See* 323 U.S. at 218-24. "Whether a fuller, more accurate record would have prompted a different decision cannot be determined. *Nor need it be determined."* 584 F. Supp. at 1419 (emphasis added). The record had been falsely depicted and relevant evidence had been knowingly withheld from the Court. This was sufficient to issue the writ and vacate Korematsu's conviction. *Id.*

Korematsu and, petitioners believe, this case show that where the stakes warrant and the opportunity exists, fraud upon the court will occur. If the Court of Appeals' decision should stand – if "perjury" standards can defeat claims of fraud – officials intent on fraud will find ways to practice their deceit within the bounds of that decision and equity will turn its back on the consequences. That will be a sad day for the victims and for our courts. The Court should issue a writ of certiorari to set the standards right.

III. This Court Should Provide Petitioners a Remedy for the Government's Fraud.

Petitioners sought a writ of error *coram nobis* from this Court in March, 2003. The government opposed the petition, pointing to the availability of an independent action under Rule 60(b). This Court declined to accept the petition for filing, remitting the petitioners to their district court remedy.

The fraud in this case succeeded only in this Court. Petitioners therefore believed this Court was the appropriate forum in which to seek redress in the first instance. Subsequent proceedings have confirmed that petitioners were correct. The lower courts have gone to extraordinary lengths to dismiss this case. The district court conducted its own "independent" factual research, made demonstrably erroneous findings to which petitioners had no opportunity to respond, then dismissed the case with prejudice on a theory the government itself had never advanced. The Court of Appeals vowed to put a "cliff-face" before petitioners, and it did.

The lower courts have no sufficient stake in this case. This Court does. It is this Court's processes that were subverted. The Court should issue a writ of certiorari to assure that petitioners have a remedy for the fraud upon this Court the government perpetrated.

Conclusion

This is a case about a fraud upon the Court. Some may find in the petitioners' complaint reason to doubt the wisdom of this Court's holding in *United States v. Reynolds*. Others will see this "back-story" as merely a sad footnote that takes nothing away from the logic of the Court's 1953 decision. The merits of the *Reynolds* holding – and its impact on present day controversies – pose interesting and no doubt important questions. But petitioners do not raise any of them. Whether the legal principles established in *Reynolds* are right or wrong is for another day and another case.

For petitioners, the only issue this Court must today address is whether it will tolerate a fraud – a fraud that struck at the integrity of the Court's decision-making process and that cheated three struggling widows and their children out of that which was rightly theirs. Petitioners pray that it will not.

For all of these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4270

PATRICIA J. HERRING, INDIVIDUALLY; JUDITH PALYA LOETHER, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); WILLIAM PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); ROBERT PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); SUSAN BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED); CATHERINE BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED), Appellants

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 03-CV-5500)
District Court Judge: Honorable Legrome D. Davis

Argued: July 15, 2005

Before: ALITO, VAN ANTWERPEN and ALDISERT,
Circuit Judges

(Filed: September 22, 2005)

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OPINION OF THE COURT

ALDISERT, Circuit Judge.

In this case we decide whether the Government's assertion of military secrets privilege for an accident report discussing the October 6, 1948 crash of a B-29 bomber which killed three civilian engineers along with six military personnel, at Waycross, Georgia, was fraud upon the court.

I.

Actions for fraud upon the court are so rare that this Court has not previously had the occasion to articulate a legal definition of the concept. The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment. The presumption against the reopening of a case that has gone through the appellate process all the way to the United States Supreme Court and reached final judgment must be not just a high hurdle to climb but a steep cliff-face to scale.

In order to meet the necessarily demanding standard for proof of fraud upon the court we conclude that there must be: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court.[1]

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1. The United States Court of Appeals for the Sixth Circuit has set forth five elements of fraud upon the court which consist of conduct: "1. On the part of an officer of the court; 2. That is directed to the 'judicial machinery' itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court." Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993).

Although other United States Courts of Appeals have not articulated express elements of fraud upon the court as the Sixth Circuit did, the doctrine has been characterized "as a scheme to interfere with the judicial

We further conclude that a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself," and that it "must be supported by clear, unequivocal and convincing evidence." In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976) (citations omitted). The claim of privilege by the United States Air Force in this case can reasonably be interpreted to include within its scope information about the workings of the B-29, and therefore does not meet the demanding standard for fraud upon the court.

II.

Early in 2000, Judith Palya Loether learned through internet research that the government had declassified Air Force documents regarding military aircraft accidents. She ordered documents related to the crash of a B-29 bomber at Waycross, Georgia, on October 6, 1948. Her father, Albert

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machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense." In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976) (citations omitted); see also Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) (holding "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court"). Additionally, fraud upon the court differs from fraud on an adverse party in that it "is limited to fraud which seriously affects the integrity of the normal process of adjudication." Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1998).

Other United States Courts of Appeals expressly require that fraud upon the court must involve an officer of the court. See Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 (1st Cir. 1995); Demjanjuk, 10 F.3d at 348. The Ninth Circuit noted that "one species of fraud upon the court occurs when an 'officer of the court' perpetrates fraud affecting the ability of the court or jury to impartially judge a case." Pumphrey v. Thompson Tool Co., 62 F.3d 1128, 1130 (9th Cir. 1995); see also Weese v. Schukman, 98 F.3d 542, 553 (10th Cir. 1996) (noting that "fraud on the court should embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court") (citation omitted); Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (11th Cir. 1980) (same).

Palya, along with two other civilian engineers, had been killed in that crash. Her mother and the other two widows had sued the Government under the Tort Claims Act, but had not been able to gain access to the, now declassified, Air Force documents because of the Government's claim that the documents were protected by privilege. The case was heard by the Supreme Court in United States v. Reynolds, 345 U.S. 1(1953), which explained the legal framework we must use in analyzing claims in which the Government asserts a privilege against revealing military secrets. Id. at 7-12. The Supreme Court reversed the decision of this Court and remanded the case to District Court for determination of whether the facts of that particular case, applied to the legal standard articulated, merited a determination that the privilege sought by the Government should be granted. Id. at 12. Before the District Court was able to consider the case on remand, the parties settled for 75% of the District Court's original verdict and the case was then dismissed with prejudice.

The Supreme Court explained the facts and procedural history leading up to its determination of the case as follows:

> These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft at Waycross, Georgia, on October 6, 1948. Because an important question of the Government's privilege to resist discovery is involved, we granted certiorari.
>
> The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observers were killed in the crash.
>
> The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved,

under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant to Air Force regulations promulgated under R.S. § 161. The District Judge sustained plaintiffs' motion, holding that good cause for production had been shown. The claim of privilege under R.S. § 161 was rejected on the premise that the Tort Claims Act, in making the Government liable "in the same manner" as a private individual had waived any privilege based upon executive control over governmental documents.

Shortly after this decision, the District Court received a letter from the Secretary of the Air Force, stating that "it has been determined that it would not be in the public interest to furnish this report. . . ." The court allowed a rehearing on its earlier order, and at the rehearing the Secretary of the Air Force filed a formal "Claim of Privilege." This document repeated the prior claim based generally on R.S. § 161, and then stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for

> examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a "classified nature."
>
> The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(2)(i), that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed, both as to the showing of good cause for production of the documents, and as to the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents.

Id. at 2-5 (citations and internal quotations omitted).

In the present action, Palya Loether is joined by Patricia Herring, William Palya, Robert Palya, Susan Brauner and Catherine Brauner. Patricia Herring is one of the widows who was a party in the original action. The others are heirs of the two other, now deceased, widows in the original action. The substance of their complaint is that the purportedly top secret documents for which the Government claimed a military secrets privilege did not actually reveal anything of a sensitive nature. They claim, therefore, that Government officers fraudulently misrepresented the nature of the report in a way that caused the widows to settle their case for less than its full value.

Appellants first pursued this current claim in the Supreme Court by a motion seeking leave to file a petition for a writ of error coram nobis. The Court denied this motion on June 23, 2003. In re Herring, 539 U.S. 940 (2003). Then, on October 1, 2003, Appellants filed this action in the District Court for the Eastern District of Pennsylvania,

preserved by the savings clause of Rule 60(b) of the Federal Rules of Civil Procedure, to set aside the 50-year-old settlement agreement on the grounds that the settlement was procured by fraud upon the court. The Appellants sought the difference between the settlement amount and judgment originally entered by the District Court (which was later set aside by the Supreme Court). The Government then filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). The District Court granted the Government's 12(b)(6) motion. It determined that there was no fraud because the documents, read in their historical context, could have revealed secret information about the equipment being tested on the plane and, on a broader reading, the claim of privilege referred to both the mission and the workings of the B-29. We affirm.

III.

The District Court had jurisdiction supplemental to its exercise of jurisdiction over the original claim in Reynolds v. United States, No. 10142 (E.D. Pa.) (filed September 27, 1949), and Brauner v. United States, No. 9793 (E.D. Pa.) (filed June 21, 1949). See 28 U.S.C. § 1367 (2000). We have jurisdiction pursuant to 28 U.S.C. § 1291.

IV.

The Government urges us to apply an abuse of discretion standard of review to our review of the District Court's grant of its Rule 12(b)(6) motion and provides several arguments in favor of departure from the normally applicable standard.

Initially, we must be clear that we are not here reviewing a Rule 60(b) motion. The provision of Rule 60(b) commonly known as the "savings clause" states: **"This rule does not limit the power of a court to entertain an independent action** to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court."

Rule 60(b), Federal Rules of Civil Procedure (emphasis added). It follows that an independent action alleging fraud upon the court is completely distinct from a motion under Rule 60(b). See Geo. P. Reintjes Co., 71 F.3d at 48.

The Government contends that because Appellants seek an equitable remedy ancillary to the prior suit of relief from a prior judgment of the District Court we should treat this action as if it were a review of denial of a Rule 60(b) motion and therefore review for abuse of discretion. We will not treat as a Rule 60(b) motion something that is explicitly preserved without being included by the text of Rule 60(b).

We are similarly unpersuaded by the Government's argument that because Rule 60(b) allows relief more broad than an independent action for fraud upon the court, and determinations based on Rule 60(b) are reviewed only for abuse of discretion, see Pridgen v. Shannon, 380 F.3d 721, 725 (3d Cir. 2004), an independent action for fraud upon the court should be reviewed at least as deferentially. Fundamentally, this argument confuses standard of review with burden of proof. We are quite capable of taking full account of the narrow criteria for relief present in an independent action for fraud upon the court without altering the Federal Rules of Civil Procedure. Under the normal de novo, review that applies to a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, we can determine whether the Appellants have alleged facts which, if true, provide a basis for relief under the very demanding legal standard for fraud upon the court.

Finally, the Government cites United States v. Buck, 281 F.3d 1336, 1342-1343 (10th Cir. 2002), for the proposition that independent actions to reopen a judgment based on fraud upon the court are reviewed for abuse of discretion. We note initially that Buck is not binding on this Court. Even if it were, it does not support the Government's proposition because it reviewed a case in a much different procedural posture than the one at bar. In Buck, the court

converted a motion brought under Rule 60(b)(6) alleging fraud upon the court into an independent action and then reviewed for abuse of discretion. Instead, we are faced with the simple review of a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim to which de novo review clearly applies. See In re Adams Golf, Inc. Sec. Litig., 381 F.3d 267, 273 (3d Cir. 2004).

V.

As noted above, we will employ a demanding standard for independent actions alleging fraud upon the court requiring: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court. We agree with the Court of Appeals of the Eighth Circuit that the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d at 195 (citations omitted). We must decide whether the United States Air Force's assertion of military secrets privilege over the accident report describing the cause of the B-29's crash at Waycross, Georgia, was fraud upon the court. In order to do this we look carefully at two documents central to the original litigation: the formal affidavit and claim of privilege filed by then-Secretary of the Air Force, Thomas K. Finletter and an affidavit of then-Judge Advocate General of the Air Force, Reginald Harmon.

Before engaging in a detailed inquiry into the substance contained in these documents it is important to note the form and authorship of the documents. Both are formal documents making assertions to the court under oath authored by lawyers who were participating in the litigation though not directly representing the United States.

Authorship is important because, as noted above, we agree with the courts analyzing fraud upon the court which

have required the fraud to be perpetrated by an "officer of the court." See Geo. P. Reintjes, 71 F.3d at 49; Demjanjuk, 10 F.3d at 348; Lockwood v. Bowles, 46 F.R.D. 625, 632 (D.C. Cir. 1969). These cases have noted, and we agree, that perjury by a witness is not enough to constitute fraud upon the court. See e.g., Geo. P. Reintjes Co., 71 F.3d at 49 ("The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court. Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud has expired, it would upend [Rule 60's] careful balance.") (citations omitted).

The Government seeks to define officer of the court narrowly to exclude Secretary Finletter and Judge Advocate Harmon because, though lawyers, they did not represent the United States in the litigation sought to be reopened. Although it is true that Finletter and Harmon did not represent the United States in the litigation, they did represent the United States Air Force's claim of privilege over a document central to that litigation. They were attorneys making a formal claim of privilege on behalf of the Government. We agree with the District Court's conclusion that the Supreme Court depended upon Finletter and Harmon's "experience, expertise and truthfulness" in its decision to reverse and remand. Herring v. United States, No. Civ. A.03-CV-5500-LDD, 2004 WL 2040272, *6 n.3 (E.D. Pa. Sept. 10, 2004). Given these unique facts, we find it inappropriate to decide the case on the basis that Secretary Finletter and Judge Advocate General Harmon were not officers of the court.[2]

2. In this view that we take, we extend to Appellants the full reach of case law that prescribed required elements of "fraud upon the court." Were we to proceed otherwise, the following discussion would not have been necessary to affirm the judgment of the District Court.

The stature of the documents in which the allegedly fraudulent representations were made is also important. The representations were made in an affidavit of Judge Advocate General Harmon and an affidavit and formal claim of privilege of Secretary Finletter both made under oath. To allege that false statements were made in these documents is to allege perjury; a particularly serious type of perjury because of the high degree of faith the Court placed in the truth of Finletter and Harmon's representations. In a perjury case, the plaintiff must prove that the allegedly perjurious statement is not subject to a literal, truthful interpretation. United States v. Tonelli, 577 F.2d 194, 198 (3d Cir. 1978). As explained above, proof of perjury is not enough to establish fraud upon the court. See e.g., Geo. P. Reintjes Co., 71 F.3d at 49. In this case, however, an accusation of perjury forms the basis of the fraud upon the court claim. In such a case, proof of perjury, though not sufficient to prove fraud upon the court, becomes a necessary element which must be met before going on to meet the additional rigors of proving fraud upon the court.

Moving to our examination of the substance of the two documents relied on by the Appellants, it is apparent that we must determine whether they are susceptible to a truthful interpretation. More specifically, can they be reasonably read to include within their scope an assertion of privilege over the workings of the B-29? If they can, the Appellants' assertion that the Air Force claim of military secrets privilege misrepresented the nature of the information contained in the accident report over which the privilege was asserted falls apart.[3]

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3. Even if we concluded that the Air Force's claim of privilege could not be read to include concern about revealing the workings of the B-29, we would be obligated to consider whether certain information contained in the accident report actually revealed sensitive information about the mission and the electronic equipment involved. The accident report revealed, for example, that the project was being carried out by "the 3150th Electronics Squadron," that the mission required an "aircraft capable of dropping bombs" and that the mission required an airplane

We conclude that the statements of Finletter and Harmon can be reasonably read to assert privilege over technical information about the B-29. The formal claim of privilege made by Secretary Finletter states:

> The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of **its** mission or information concerning **its** operation or performance would be prejudicial to this department and would not be in the public interest.

(Claim of Privilege by the Secretary of the Air Force (emphasis added).)

Appellants and the Government disagree on whether the pronoun "its" refers only to the electronic equipment on board or the B-29 airplane itself. While both readings are

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capable of "operating at altitudes of 20,000 feet and above." (Report of Special Investigation of Aircraft Accident Involving TB-29-100BS No. 45-21866.) Our conclusion that information about the workings of the B-29 was included within the claim of privilege makes it unnecessary to engage in this analysis. If such an analysis were necessary, it would require a certain amount of deference to the Government's position because of the near impossibility of determining with any level of certainty what seemingly insignificant pieces of information would have been of keen interest to a Soviet spy fifty years ago. See e.g., Knight v. C.I.A., 872 F.2d 660, 663 (5th Cir. 1989) ("[E]ven the most apparently innocuous [information] can yield valuable intelligence."); C.I.A. v. Sims, 471 U.S. 159, 178 (1985) ("Foreign intelligence services have both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details. In this context, the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.' " (citation omitted).

conceivable, the Government's is more logical. It is more natural to refer to an airplane's mission than to refer to the confidential equipment's mission. At the very least, the statement is readily susceptible to the reading preferred by the Government.

Appellants' contention about the meaning of "its" in the claim of privilege is also completely undercut by the statement in their original Supreme Court brief that "the Secretary for Air [sic] in his claim of privilege states (R. 22) that 'any disclosure of **its (the airplane's)** mission or information concerning its operation or performance would be prejudicial'" and that it was "obvious that the Air Force considers that all details concerning the operation of the airplane are 'classified.'" (Brief for Respondents submitted to the Supreme Court at 35 n.4 (emphasis added) (parenthetical alteration in the original).)

Nothing in Judge Advocate General Harmon's affidavit contradicts the Government's contention that the claim of privilege referred to the B-29 itself rather than solely the secret mission and equipment.

* * * * *

Because there is an obviously reasonable truthful interpretation of the statements made by the Air Force, Appellants are unable to make out a claim for the perjury which, as explained above, forms the basis for their fraud upon the court claim. We, therefore, conclude that Appellants failed to state a claim upon which relief can be granted.

We will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-4270

PATRICIA J. HERRING, INDIVIDUALLY; JUDITH PALYA LOETHER, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); WILLIAM PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); ROBERT PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); SUSAN BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED); CATHERINE BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED)

Appellants

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 03-CV-5500)
District Judge: The Honorable Legrome D. Davis

Argued: July 15, 2005
Before: ALITO, VAN ANTWERPEN and ALDISERT, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on July 15, 2005.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered September 10, 2004, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against Appellants.

ATTEST:

/s/ Marcia M. Waldron

Marcia M. Waldron, Clerk

Dated: September 22, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, et al., Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 03-CV-5500-LDD
	:	
UNITED STATES OF AMERICA, Defendant.	:	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J. SEPTEMBER 10th, 2004

I. INTRODUCTION

Presently before this Court is the Motion to Dismiss filed by the United States of America ("Government") on January 23, 2004 (Doc. No. 6, "D's Mot."), the Memorandum in Opposition to Defendant's Motion to Dismiss filed by Plaintiffs on February 24, 2004 (Doc. No. 9, "P1's Opp."), and the Reply Brief in Support of Defendant's Motion to Dismiss filed by the Government on March 19, 2004 (Doc. No. 10, "Reply"). This Court heard argument on this matter on May 11, 2004. (Doc. No. 15, "Hrg. Tr.").

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case revisits three consolidated actions originally brought in 1949 under the Federal Tort Claims Act by widows of civilians killed in a crash of an Air Force plane, that culminated in the Supreme Court decision United States v. Reynolds, 345 U.S. 1 (1953). In Reynolds, the Court recognized the military secrets privilege that, upon adequate showing, allows the government to withhold evidence the disclosure of which would compromise national security.

Reynolds, 345 U.S. at 11. This Court adopts, in pertinent part, the factual background set out in Reynolds:

"These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft at Waycross, Georgia, on October 6, 1948. Because an important question of the Government's privilege to resist discovery is involved, [the Supreme Court] granted certiorari.

The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observes were killed in the crash. The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant to Air Force regulations promulgated under R.S. § 161. The District Judge sustained plaintiffs' motion, holding that good cause for production had been shown. The claim of privilege under R.S. § 161 was rejected on the premise that the Tort Claims Act, in making the Government liable 'in the same manner' as a private individual had waived any privilege based upon executive control over governmental documents.

Shortly after this decision, the District Court received a letter from the Secretary of the Air Force, stating that 'it has been determined that it would not be in the public interest to furnish this report.' The court allowed a rehearing on its earlier

> order, and at the rehearing the Secretary of the Air Force filed a formal 'Claim of Privilege.' This document repeated the prior claim based generally on R.S. § 161, and then stated that the Government further objected to production of the documents 'for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force.' An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.' The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a 'classified nature.'
>
> The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(2)(i), that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed, both as to the showing of good cause for production of the documents, and as to the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents."

Reynolds, 345 U.S. at 2-5. The Supreme Court formally recognized a military secrets privilege and held that:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Id. at 7-8 (citations omitted). The Court reversed the decision of the Court of Appeals and remanded the case to the District Court for proceedings consistent with its opinion. On remand from the Reynolds decision, the parties conducted limited discovery, settled their claims for approximately seventy-five percent of the original judgment. The District Court dismissed the case with prejudice in August of 1953.

In 2000, the daughter of one of the deceased civil engineers obtained the newly declassified accident report from an internet service provider. Pl's Opp. at 9. Because the report lacked a detailed description of the "secret mission," "newly developing electronic devices," or "secret electronic equipment," Plaintiffs sought leave to file a petition for a writ of *error coram nobis* before the Supreme Court; the Court denied the motion in a one line order on June 23, 2003. In re Herring, 539 U.S. 940 (2003). On October 1, 2003, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the parties and their living heirs filed this action seeking to set aside the settlement agreement reached fifty years earlier on the grounds that the settlement was procured by the Air Force's claim of privilege, through which it committed a fraud on the Court actionable under Rule 60(b)'s savings clause. Fed. R. Civ. P. 60(b)(6). Plaintiffs request the difference between the amount for which they settled the claims and the default

judgment originally entered by the District Judge. Compl. at ¶ 45. On January 23, 2004, the Government filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court heard argument on the Motion on May 11, 2004.

III. STANDARD OF REVIEW

A. Legal Standard for Motion to Dismiss Under Rule 12(b)(6)

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (ED. Pa. 1994), affd, 72 F.3d 318 (3d Cir. 1995). A court may consider only the pleadings, exhibits thereto, any document appended to and referenced in the complaint on which plaintiffs claim is predicated, and matters of public record. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1426 (3d Cir. 1997); In re Westinghouse Sec. Litig., 90 F.3d 696, 707 (3d Cir. 1996). A court, however, need not credit conclusory allegations or legal conclusions in deciding a motion to dismiss. See Gen. Motors Corp. v. New A.C. Chevrolet. Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); L.S.T., Inc. v. Crow, 49 F.3d 679, 683-84 (11th Cir. 1995). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

B. Legal Standard for "Fraud Upon the Court" Under Rule 60(b)

Rule 60(b) reads as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any

> relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b). Though the Third Circuit has not expressly addressed the standard for fraud upon the court, other courts have characterized it as an unconscionable plan or scheme to improperly influence the court or interfere with the judicial machinery performing a task of impartial adjudication, as by preventing an opposing party from fairly presenting his case or defense. See e.g., In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (8th Cir. 1976); Hrg. Tr. at 27, 37. A finding of fraud upon the court is justified only by the most egregious misconduct directed to the court itself such as bribery of a judge or jury or fabrication of evidence by counsel. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180; see also Gleason v. Jandrucko, 860 F.2d 556, 558-59 (2d Cir.1988) ("[T]he type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion' under Rule 60(b)(3) for fraud on an adverse party . . . '[F]raud upon the court as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication.'). It must be supported by clear, unequivocal, and convincing evidence. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180; see also England v. Doyle, 281 F.2d 304 (9th Cir. 1960) (holding that a motion to set aside the action of the court on this ground is addressed to the sound discretion of the trial court and the burden is on the moving party to establish fraud by clear and convincing evidence).

Though Rule 60(b) generally imposes a one year limitation, a court's power to set aside a prior judgment, fraud upon the court, as alleged here, is not subject to that limitation. King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002) (citing Hadges v. Yonkers Racing Corp.,

48 F.3d 1320, 1325 (2d Cir.1995) ("Fraud upon the court should embrace 'only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.'")). In order to sustain an independent action pursuant to Rule 60(b), however, a claimant must adequately allege a grave miscarriage of justice. United States v. Beggerly, 524 U.S. 38, 46-47 (1998) ("Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata.") (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)). Under Rule 60(b), the propriety of granting relief from judgment is committed to the district court's broad discretion. Fed. R. Civ. P. 60(b); see e.g., Schultz v. Commerce First Financial, 24 F.3d 1023 (8th Cir. 1994) (noting that while the determination is within the court's discretion, Rule 60(b) does "not give courts unlimited authority to fashion relief as they deem appropriate" (citing Doe v. Zimmerman, 869 F.2d 1126, 1128 (8th Cir.1989)), but that the rule "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances" (citing United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986) (per curiam), cert. denied, 484 U.S. 836 (1987))).

IV. DISCUSSION

A. Plaintiffs Have Not Adequately Pled Fraud on the Court Under Rule 60(b)(3)'s Savings Clause

1. Complaint, Exhibits, and Declassified Documents, Do Not Suggest Air Force Intent to Deliberately Misrepresent Truth or Commit Fraud

Despite Plaintiffs' allegations, a review of the complaint and the exhibits attached thereto, including the declassified documents, does not suggest that the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court. Because a determination of what information should be kept confidential in the interest of national security involves predictive judgments about the potential future harm of premature disclosure, informed expertise and even intuition "must often control in the absence of hard evidence." Kaluse v. Blake, 428 F. Supp. 37, 38 (D.D.C. 1976). In all likelihood, fifty years ago the government had a more accurate understanding "on the prospect of danger to [national security] from the disclosure of secret or sensitive information" than lay persons could appreciate or than hindsight now allows. Halperin v. NSC, 452 F. Supp. 47 (D.D.C. 1978), aff'd 612 F.2d 586 (D.C. Cir. 1980). Plaintiffs take aim at the factual foundation of the military secret privilege, suggesting that concealing this accident investigation report constituted an unconscionable plan or scheme to improperly influence the Court such that the privilege resulted from an undeserving test case. But, because "each individual piece of intelligence information, like a piece of [a] jigsaw puzzle, may aid in piecing together bits of information even when the individual piece is not of obvious importance itself," Fitzgibbons v. CIA, 911 F.2d 755, 763 (D.C. Cir. 1990), it is proper to defer on some level to governmental claims of privilege even for "information that standing alone may seem harmless, but that together with other information poses a reasonable danger of divulging too much to a 'sophisticated intelligence analyst.' In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989) (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978). "Even the most apparently innocuous [information] can yield valuable intelligence." Knight v. CIA, 872 F.2d 660, 663 (5th Cir. 1989).

Plaintiffs argue that nothing in the accident investigation report constitutes a military secret such that

the claim of privilege was proper.[1] Instead, Plaintiffs surmise that the Air Force engaged in conscious-shocking fraud on the courts by misrepresenting the contents of the accident investigation report with the intent to deliberately trade on the trust with which the Court imbued the military in order to obtain a broad-sweeping military secrets privilege at the dawn of the Cold War and insulate all manner of documents from judicial and public scrutiny. Hrg. Tr. at 26. In response, the Government submits that the apparent dearth of sensitive information in the accident investigation report and witness statements is not probative of whether its disclosure may have been "of great moment" to sophisticated intelligence analyst[s] having a "broad view of the scene" in 1950, CIA v. Sims, 471 U.S.159, 178 (1985), or whether the Air Force, operating on the basis of information and expertise that Plaintiffs and the Court lack, could have correctly reached that conclusion. D's Mot. at 20.

Specifically, the affidavit and claim of privilege by Secretary of the Air Force, Thomas K. Finletter, states that:

> the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.

Compl. at ¶ 14, Ex. C. From this, Plaintiffs deduce that only the mission and electronic equipment were confidential, but a broader reading of the affidavit suggests that beyond the

1. Plaintiffs, convinced that nothing in the accident investigation report would compromise the public interest, conjectured that this Court would be hard-pressed to find national security secrets lurking somewhere in the accident investigation report. Hrg. Tr. at 29.

mission itself, disclosure of technical details of the B-29 bomber, its operation, or performance would also compromise national security. The Secretary's claim of privilege also indicates that the purpose of such accident investigation reports is to ensure continued efforts at flying safety.[2] Similarly, the affidavit taken by Judge General of the Air Force, Major General Reginald C. Harmon, characterizes the confidential nature of the accident investigation report more expansively. Major General Harmon's affidavit indicates that furnishing the requested documents would seriously hamper "national security, flying safety and the development of highly technical and secret military equipment." Compl. at ¶ 15, Ex. D.

Review of the accident investigation report indicates that though it offers no thorough exploration of the secret mission, it does describe the mission in question as an "electronics project" and an "authorized research and development mission." Compl. at Ex. I. Specifically, the report states that "[t]he projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above." Id. It also provides a detailed account of the technical requirements imposed by the Air

2. "The report of investigation, together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety. These statements are obtained in confidence, and these reports are prepared for intra-departmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate the accident. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety." Compl. at Ex. C.

Force to remedy engine and mechanical difficulties. *Id.* The accident investigation report makes specific reference to Air Force technical orders geared to improving the functionality of the B-29 bombers, implementing "changes to the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard" including installation of heat deflector shields "to prevent excessive heat from entering the accessory section," and making the aircraft safe for flight. Compl. at ¶ 33, Ex. I and J. These affidavits, reports, and orders implicate far more than the particulars of the secret equipment aboard that flight; they also suggest the need to preserve engineering technology, mechanical and operational data, and equipment usage for the safety and development of the Air Force fleet. Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security. For all these reasons, that the accident investigation report itself does not make plain the substance of those intelligence concerns does not suffice to support a conclusion that disclosure at that time would not have harmed national security or that in so asserting the privilege, the Air Force sought to defraud the Courts.[3]

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3. The Government argues that the Secretary of the Air Force and the Judge Advocate General of the Air Force were not officers of the Court, and did not owe integrity and impartiality to the Court as fiduciaries, but rather were mere affiants. D's Mot. at 5-6; Hrg. Tr. at 11. In response, Plaintiffs contend that the affiants were high-ranking officials, not merely witnesses, who owed an obligation to the Court to speak with veracity. Pl's Opp at 17; Hrg. Tr. at 18, 19. Adopting the Government's position would directly contravene the role contemplated in United States v. Reynolds for military officers; the military secrets privilege standard demands that only the head of the department with control over the matter lodge the formal claim of privilege following her/his personal consideration. Reynolds, 345 U.S. at 8. The Court depends on the experience, expertise, and truthfulness of the official lodging the military secrets privilege claim, such that the official must speak truthfully. In the instant case, the Court finds the affiants satisfy this burden.

2. The Accident Investigation Report Need Not Reveal Details of Secret Mission or Equipment to Constitute Military Secret

Even if, as Plaintiffs suggest, the accident investigation report contained no concrete data that would expose Air Force intelligence, hamper national security, or affect the public interest, sufficient cause for the Air Force's assertion of the military secrets privilege may have existed. To better amplify the contention that the Air Force sought to disguise its negligence, Plaintiffs cite a number of secondary sources that speak to the chronic mechanical and technical deficiencies of the B-29 bomber, catalog its role in World War II, and place the Air Force's developing technology within a historical framework.[4] In so doing, Plaintiffs place these matters of public record squarely at issue. To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and *matters of public record*. Churchill v. Star Enterprises, 183 F.3d 184, 190 (3d Cir. 1999) (emphasis added) (citing Pension Benefit Guar. Corp. v. White Consol. Indus. Inc., 998 F.2d 1192, 1196 (3d Cir.1993)); Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir.1989). See also 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.").

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4. In addition to the accident investigation report, the affidavits, the District Court's orders, witness statements, and attorney-client correspondence, Plaintiffs also cite to Geoffrey Perret, Winged Victory: The Army Air Forces in World War II, 448 (1993) ("Winged Victory"); Wilbur H. Morrison, Point of No Return: The Story of the 20th Air Force 19 (1979) ("Point of No Return"); and Curtis E. LeMay and Bill Yenne, Superfortress: The B-29 and American Air Power 61-64, 70-71, 78 (1988) ("Superfortress").

Despite the plain language of Rule 12(b), which requires conversion of a Rule 12(b) motion to a Rule 56 motion whenever a district court considers materials outside the pleadings, the Third Circuit and other appellate courts have held that certain narrowly defined types of material may be considered by the trial court without converting the motion to dismiss. See In re Rockefeller Ctr. Prop., Inc. Secs. Litig., 184 F.3d 280, 287 (3d Cir. 1999) (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) (A court can consider a "'document integral to or explicitly relied upon in the complaint." (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996))). See also, PBGC v. White Consol. Indus. 998 F.2d 1192, 1196 (3d Cir. 1993) (A district court may examine an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiffs claims are based on the document."). As the Third Circuit stated in In re Rockefeller, "the rationale for these exceptions is that 'the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated '[w]here plaintiff has actual notice ... and has relied upon these documents in framing the complaint.'" 184 F.3d at 287. (citations omitted). Many other courts have considered matters of public record in ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) without converting the motion to one for summary judgment. See, e.g., In re Colonial Mortgage Bankers Corp., 324 F.3d 12 (1st Cir. 2003) (stating that while court generally may not consider material beyond the four corners of complaint when ruling on motion to dismiss without thereby converting the motion into one for summary judgment, narrow exception exists for documents whose authenticity is not disputed by parties, for official public records, for documents central to plaintiffs claim, and for documents sufficiently referred to in the complaint); Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (concluding that the court may consider, in addition to the pleadings, materials "embraced by the

pleadings" and materials that are part of the public record); Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221 (D.C. Cir. 1993) (stating that matters of public record are fair game in adjudicating motions to dismiss for failure to state a claim, and that the court's reference to such matters does not convert motion to dismiss into motion for summary judgment).[5] Naturally, Plaintiffs' challenge to the veracity of fifty-year-old military privilege claims requires some reliance on contemporary intelligence. Because Plaintiffs turn to numerous documents outside the four corners of the complaint in order to bring matters of public record to this Court's attention, the Court may consider those public documents and the factual considerations they bring to bear on the motion before it. To determine whether the Plaintiffs in this case have established fraud on the court, this Court will examine those facts that, in addition to averments in the complaint, exhibits, and the accident investigation report, the public record now unearths.

Among the facts now widely known about the Boeing B-29 bomber are the many mechanical and technical problems that plagued the propeller-driven plane, specifically its notoriously unreliable engines, which were famed for catching fire. See, supra, n.4. The accident investigation report concludes that engine failure caused the crash on October 6, 1948; the report also indicates that had the plane complied with the technical orders dated May 1, 1947, the accident might have been avoided. Compl. at Ex. I. It does not, as Plaintiffs point out, refer to any newly developed electronic devices or secret electronic equipment. Compl. ¶¶ 26, 32-34 & Exs. I & J. Yet, Plaintiffs exclude from their historical recitation that four

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5. For a more complete analysis of those materials courts have considered on 12(b)(6) motions, see Kurtis A. Kemper, Annotation, *What Matters Not Contained in the Pleadings May Be Considered in Ruling on a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or Motion for Judgment on the Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment*, 138 A.L.R. Fed. 393, 1997 WL 475158 (1997).

years before the accident, in 1944, after bombing missions against Japanese targets, three American B-29 bombers were forced to land in Vladivostok, Russia, a town in the then Soviet Union. See Superfortress, supra at 166-168 (outlining the details of the emergency landing, detention of Air Force personnel, and confiscation of the planes); see also Point of No Return, supra at 85 (summarizing that in addition to these lost planes, three B-29's were shot down over Yawata, 10 others were lost, 95 airmen were dead or missing, and one crew bailed out near Khabarovsk); Von Hardesty, Made in the U.S.S.R., Air & Space Magazine, February/March 2001, available at http://www.airspacemag.com/ASM/Mag/Index/2001/FM/TU-4.html. (summarizing events in Vladivastok); Associated Press, How Soviets Copied America's Best Bomber During WWII (Jan. 25, 2001), available at http://www.cnn.com/2001/US/01/25/smithsonian.cold.war/ (same). The Soviet government released the crews but kept the planes and, between 1945 and 1947, used reverse engineering to build a copy of the B-29-the Tu-4 designed by Andrei Tupolev.[6] Point of No Return, supra, at 85-86. See also Made in the U.S.S.R, supra, at 2 (noting that this technology transfer gave the Soviets "an intercontinental bomber capable of striking New York City and the industrial heartland of the United States" in a fraction of the time needed to develop their own design). The replicas copied the B-29 almost exactly, including the fire-prone engines. Superfortress, supra, at 167 ("The Tu-4 was outwardly identical to the B-29 . . . so faithful to the originals that the Soviets had many of the same technical problems."); Made in U.S.S.R., supra, at 12 ("Operational deployment of the Tu-4 brought a series of breakdowns and near disasters as the airplane encountered teething problems such as engine overheating, a glitch that

6. The Smithsonian's accounts of the Tu-4 development are based largely on the writings of Leonid Kerber, who worked with Tupolev and specialized in radios and navigation instruments. His unofficial biography about Tupolev, Tupolev's Prison Workshop, is reprinted by the Smithsonian Institution Press as Stalin's Aviation Gulag (1996).

mirrored the U.S. experience with the first generation of B-29's."). As a result, though "World War II began with the catastrophic failure of U.S. air defenses over Pearl Harbor and in the Philippines," the atomic attacks on Hiroshima and Nagasaki contributed to the war's end and were supposed to "usher in a time when a U.S. nuclear monopoly would restore America's strategic invulnerability;" that dominance was short-lived. Lester W. Grau & Jacob W. Kipp, Maintaining Friendly Skies: Rediscovering Theater Aerospace Defense, AEROSPACE POWER J. 3448 (July 1, 2002). Following the construction if its nuclear capable Tu-4, the U.S.S.R. used the B-29 reproduction to detonate its first atomic bomb in 1949. Id.

These facts might seem harmless decades after the Cold War began, but in Reynolds, the Supreme Court determined that as a matter of law, "[t]he occasion for the privilege is appropriate" if the court is satisfied, "from all circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Reynolds, 345 U.S. 1, 10 (1953). The Court in Reynolds also took "judicial notice that this [was] a time of vigorous preparation for national defense." Id. at 11. In 1948, amid Communist paranoia, it is hardly shocking to contemplate an Air Force eager to protect from public view the accident investigation report that mentions modifications needed for the B-29, and by extension the Tu-4. By no means, will this Court draw firm conclusions as to military intelligence concerns in existence some fifty years ago. Rather, we will examine the events contemporaneous to the accident only in order to shed light on factors surrounding the Air Force's assertion of military privilege. It is at least conceivable that were the accident investigation report released, it might have alerted the otherwise unaware Soviets to a technical problem in the Tu-4 that the May 1, 1947 technical order sought to remedy

in the B-29.[7] Though the Plaintiffs argue that the Air Force deliberately hid its obvious negligence behind fraudulent affidavits, disclosure of this now seemingly innocuous report would reveal far more than the negligence Plaintiffs read; it may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike.[8] Pl's Opp. at 12. Viewed against this political and technical backdrop, it seems that the accident investigation report may have reasonably contained sufficient intelligence, if not about the secret equipment or mission, then about ongoing developments in Air Force technical engineering, to warrant an assertion of the military secrets privilege.

B. Plaintiffs Have Not Sufficiently Established a Claim Under Rule 60(b)(6)

Rule 60(b)(6) authorizes courts to grant post-judgment remedies for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Both the Supreme Court and the Third Circuit have recognized that Rule 60(b)(6) permits an independent action for fraud perpetrated by one party upon another where necessary "to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 46-47 (1998) (holding that in an action to set aside a settlement between the claimants and the government, the alleged failure by the government to make full disclosures failed to satisfy the requirements of an independent action for relief from the judgment). "If relief may be obtained through an independent action . . . where

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7. Coincidentally, though the accident investigation report mentions little detail of the secret mission and electronic equipment on that flight, the Court notes that the B-29 also saw military service two years later. From 1950 to 1953 in Korea, electronic weapons, or radio controlled bombs known as Razons, were dropped against bridges. Boeing World Headquarters, Post-War Developments: 1946-1956, at http://www.boeing.com/history/boeing/postwar.html.

8. The War Department also asked returning airmen interned in the Soviet Union to keep silent about their time there due to the emerging friction between the Soviets and the Allies. Made in the U.S.S.R., supra, at 3.

the most that may be charged against the Government is failure to furnish relevant information that would *at best* form the basis for a Rule 60(b)(3) motion, the strict 1-year time limit on such motions would be set at naught." Id. at 46 (emphasis added). In the complaint, Plaintiffs do not assert an independent action on the basis of fraud by one party upon another under Rule 60(b)(6). Pl's Opp. at 19-21; Reply at 6. Not until the Memorandum in Opposition to the Government's Motion to Dismiss do Plaintiffs submit that the government sought to defraud the widows by claiming the military secrets privilege. Plaintiffs fail to set forth allegations in the complaint amounting to gross injustice to warrant relief. Reply at 7 (citing, for example Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 663 (2d Cir. 1997) (holding that plaintiff who neither adequately established fraud nor escaped responsibility for a voluntary agreement could not obtain relief from the judgment); George P. Reintjes Co. v. Riley Soker Corp., 71 F.3d 44, 48-49 (1st Cir. 1995) ("[W]hile the notion that it would be 'against conscience' to let a particular judgment stand may in some instances serve to tip what would otherwise be ordinary fraud into the special category that can invoke a court's inherent powers to breach finality, [the plaintiff] has failed to so move us here (citing Marshall v. Holmes, 141 U.S. 589, 595 (1891), Hazel-Atlas Glass, 322 U.S. at 244-45, 64)). But, because the independent action under Rule 60(b)(3) fails, leaving Plaintiffs with no viable claim against the Government, the Court will entertain a discussion of the merits of Plaintiffs' Rule 60(b)(6) arguments out of an abundance of caution.

1. Settlement Agreement Did Not Constitute a Grave Miscarriage of Justice In Support of A Claim for Relief Under Rule 60(b)(6)

The Government correctly argues that the Plaintiffs cannot undo the careful and prudent decision to settle their claims and relitigate issues they voluntarily put to rest more than fifty years ago. In Bandai Am. Inc. v. Bally Midway

Mfg. Co., 775 F.2d 70 (3d Cir 1985), the Third Circuit recognized that under Rule 60(b)(3), an attorney's deliberate attempt to mislead the court may suffice to reopen the judgment. Bandai, 775 F.2d at 73 (citing Hazel-Atlas Glass Co. v., Hartford Empire Co., 322 U.S. 238, 245-46 (1944), questioned on other grounds, Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976)). But, the Court of Appeals also noted that alleged misconduct or perjury does not prevent the moving party from "fully and fairly presenting [its] case" unless the "misrepresentations relied up on were clearly material to the outcome of the litigation." Id. (citing Publicker v. Shallcross, 106 F.2d 949 (3d Cir 1939), cert. denied, 308 U.S. 624, Schum v. Bailey, 578 F.2d 493, 499 (3d Cir. 1978); Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983). "The judicial system's interest in finality and in efficient administration dictates that, absent extraordinary circumstances, litigants should not be permitted to relitigate issues that they have already had a fair opportunity to contest." Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 204 (3d Cir.) (citations omitted). Settlement, as the Government rightly concludes, is a pragmatic decision made daily by civil litigants after a measured evaluation of the merits of their claims notwithstanding foreseeable obstacles. Hrg. Tr. at 14. See United States v. Bank of N.Y., 14 F.3d 756 (2nd Cir. 1994) (noting that when party makes the deliberate, strategic choice to settle, she cannot be relieved of such choice merely because of her own incorrect assessment); Schultz, 24 F.3d at 1024 ("When a party voluntarily accepted the earlier decision, its burden 'is perhaps even more formidable than if it had litigated the claim and lost.' " (citing United States v. Fort Smith, 760 F.2d 231, 234 (8th Cir. 1985)). Altogether absent from the pleadings in this case is a sufficient showing of egregious conduct by any Air Force representatives. As such, this Court cannot, in good conscience, find a gross miscarriage of justice or grant Plaintiffs the relief from judgment they seek.

2. The Supreme Court Contemplated Other Discovery Options For Plaintiffs

It is undisputed that in Reynolds, the Supreme Court left other avenues of discovery open to Plaintiffs, including examination of the surviving crew members and the right to challenge the claim of military privilege by an adequate showing of necessity. Reynolds, 345 U.S. 1, 12 (1953). More generally, the Federal Rules of Civil Procedure provide, in pertinent part, that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). It is widely recognized that the federal rules allow broad and liberal discovery. Pacitti v. Macy's, 193 F.3d 766, 777-78 (3d Cir. 1999) (citations omitted). In his affidavit, the Judge Advocate General offered the testimony of Air Force military personnel who survived the crash, provided at the Government's expense. Compl. at Ex. D. Those witnesses could "testify regarding all matters pertaining to the cause of the accident, except as to facts and matters of a classified nature." Id. In order to refresh their memories, the witnesses were free to rely on those confidential Air Force records, including the statements witnesses made to the Aircraft Accident Investigating Board. Id. And, though Plaintiffs argue that they should not have been required to conduct discovery independent of the accident report, this argument is contingent upon a finding of fraud which is absent here. Moreover, as Plaintiffs concede, they only partially followed the Supreme Court's guidance by deposing the surviving witnesses. Reynolds, 345 U.S. at 11-12; Hrg. Tr. at 21. They

did not, as suggested, revisit the question of military secrets privilege by offering the requisite showing of necessity, but instead, made the calculated choice to settle their claims. Id. The litigation reached its close by virtue of a strategic decision by Plaintiffs that should not now be revisited.

V. CONCLUSION

For all these reasons, it is hereby ORDERED that the Motion to Dismiss (Doc. No. 6) is GRANTED. The Clerk of Court is instructed to statistically close this matter.

BY THE COURT:

/s/ Legrome Davis

Legrome D. Davis, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. HERRING, individually, JUDITH PALYA LOETHER, WILLIAM PALYA, ROBERT PALYA, individually and as living heirs of Elizabeth Palya (deceased), SUSAN BRAUNER and CATHERINE BRAUNER, individually and as living heirs of Phyllis Brauner (deceased),	:	Civil Action No. __________
Plaintiffs,	:	
-v.-	:	
UNITED STATES OF AMERICA,	:	**JURY TRIAL DEMANDED**
Defendant.	:	

INDEPENDENT ACTION FOR RELIEF FROM JUDGMENT TO REMEDY FRAUD ON THE COURT

Plaintiffs Patricia J. Herring ("Herring"), individually, Judith Palya Loether, William Palya, Robert Palya, individually and as living heirs of Elizabeth Palya (collectively, the "Palyas"), and Susan Brauner and Catherine Brauner, individually and as living heirs of Phyllis Brauner (collectively, the "Brauners"), by and through their undersigned attorneys, file this independent action for relief from judgment to remedy fraud on the court pursuant to Federal Rule of Civil Procedure 60(b).

I. PRELIMINARY STATEMENT

Three widows came before this Court in 1949 asserting claims against the United States under the Federal Tort Claims Act. Their husbands had died in the crash of an Air Force plane. This Court awarded each of them full compensation. But the United States was bent on overturning their judgments, and – to accomplish this – it committed a fraud not only upon the widows, but upon this Court, the Third Circuit Court of Appeals, and the Supreme Court. As a result, what the widows had won was lost. One of the widows and the children of the other two ask this Court to right this wrong.

At the heart of the case is a report the Air Force prepared on the accident that had resulted in the deaths of the widows' husbands, who were civilian engineers assisting the Air Force with the development and testing of sophisticated electronic guidance systems when the tragedy occurred. The Air Force refused to produce this report, even to Judge Kirkpatrick, for *in camera* review. Judge Kirkpatrick, therefore, ruled for the widows on liability, determined damages, and entered judgment. The Third Circuit affirmed. Undeterred, the United States took the case to the Supreme Court and advanced a sweeping claim of executive privilege, contending that the report contained "military secrets" so sensitive not even the district court should see them. It pointed to affidavits of two of the highest-ranking men in the Air Force in support of this plea. The Supreme Court took the government at its word, and reversed. Without these documents, the widows settled with the government for less than the value of their judgments.

Fifty years later, one of the plaintiffs, Judith Palya Loether, came across an internet website offering access to recently-declassified military aircraft accident reports. She obtained the report that the Air Force fought so hard to prevent her mother and the federal courts from seeing and was astonished to find that the report contains nothing approaching a "military secret." There is not one mention of

the secret mission or the secret equipment that had occupied these men on the day of the crash. The accident report is no more than an accounts of a flight that, due to the Air Force's negligence, went tragically awry. In telling three federal courts otherwise by way of sworn affidavits, the Air Force lied. And, in reliance upon the Air Force's lie, the Supreme Court deprived the widows of their judgments. Plaintiffs urge that it is now for this Court, in exercise of its authority under Rule 60(b) and its inherent power to remedy a fraud on the court, to see that justice is done.

II. PARTIES

1. Plaintiff Herring (formerly, Patricia J. Reynolds) is an individual resident of the State of Indiana. She is the widow of the deceased, Robert Reynolds, and was an original party to Reynolds v. United States, Civil Action No. 10142 (E.D. Pa, filed Sept. 27, 1949). (A true and correct copy of the docket entries in the Reynolds case is attached as Exhibit A.)

2. Plaintiffs the Brauners are the children and living heirs of the deceased, William H. Brauner. They reside in the Commonwealth of Massachusetts. Their mother, Phyllis Brauner (now deceased), was an original party to Brauner, et al. v. United States, Civil Action No. 9793 (E.D. Pa., filed June 21, 1949). (A true and correct copy of the docket entries in the Brauner case is attached as Exhibit B.) The Brauners bring this suit individually and as living heirs of Phyllis Brauner.

3. Plaintiffs the Palyas are the children and living heirs of the deceased, Albert H. Palya. They reside in New Jersey, Massachusetts and Alabama. Their mother, Elizabeth Palya (now deceased), was an original party to Brauner, et al. v. United States, Civil Action No. 9793 (E.D. Pa., filed June 21, 1949). They bring this suit individually and as the living heirs of Elizabeth Palya.

4. Defendant United States of America was an original party defendant to Reynolds v. United States, Civil Action No. 10142 (E.D. Pa.), and Brauner, et al. v. United States, Civil Action No. 9793 (E.D. Pa.).

5. The Reynolds and Brauner actions were consolidated for trial by stipulation and order dated December 8, 1949. Published decisions and orders in the consolidated Reynolds and Brauner cases are reported at Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), United States v. Reynolds, 192 F.2d 987 (3d Cir. 1951), and United States v. Reynolds, 345 U.S. 1 (1953).

III. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the acts complained of raise federal questions under the Constitution and laws of the United States. This Court also has jurisdiction ancillary to its original exercise of jurisdiction in Reynolds v. United States, Civil Action No. 10142 (E.D. Pa.), and Brauner, et al. v. United States, Civil Action No. 9793 (E.D. Pa.). See Standard Oil Co. of California v. United States, 429 U.S. 17 (1976).

7. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the fraud committed by the United States was practiced in this district and the injuries occasioned by the fraud were suffered in this district by named plaintiffs.

IV. FACTS

The 1949 Litigation

8. On October 6, 1948, a United States Air Force B-29 Superfortress Bomber crashed outside of Waycross, Georgia, while on a mission for the purposes of testing newly-developed electronic equipment. The crash killed nine of the thirteen men on board.

9. Three of the deceased, Robert Reynolds, William H. Brauner, and Albert H. Palya, were civilian research and development engineers working in the private sector for the Radio Corporation of America in Camden, New Jersey, and the Franklin Institute of Technology in Philadelphia, Pennsylvania. These men were hired to assist Air Force personnel with the development and testing of the electronic equipment.

10. In 1949, the three widows of the civilian deceased brought suits against the United States in this Court seeking damages under the Federal Torts Claims Act for wrongful death. The suits were captioned Reynolds v. United States, Civil Action No. 10142 (E.D. Pa.), and Brauner, et al. v. United States, Civil Action No. 9793 (E.D. Pa.). They were assigned to Judge William H. Kirkpatrick.

11. In discovery, the widows sought production of the Air Force's official accident investigation report ("the Accident Report") and several statements of surviving witnesses. The Air Force refused to produce these specified documents and the widows moved for an order compelling their production. See Brauner v. United States., 10 F.R.D. 468,469 (E.D. Pa. 1950).

12. In response to the widows' motion to compel, the government originally did not claim that the requested documents should be protected as "state secrets or facts which might harm the [g]overnment in its diplomatic relations, military operations or measures for national security." 10 F.R.D. at 471-72. Rather, the government claimed a different kind of privilege:

> Its position is that the proceedings of boards of investigation of the armed services should be privileged in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline.

Id. at 472. After full briefing, this Court concluded that no such privilege existed and ordered the United States to produce the Accident Report and witness statements to the widows. Id.

13. The United States moved for a rehearing in August 1950. In support of this motion, the government submitted an affidavit and a formal claim of privilege taken by the Secretary of the Air Force, Thomas K. Finletter, as well an affidavit taken by the Judge Advocate General of the Air Force, Major General Reginald C. Harmon. These affidavits (hereinafter, "the Affidavits") amended and greatly expanded the claims of privilege urged before this Court.

14. Secretary Finletter stated in his Affidavit and claim of privilege that

> [T]he [United States] further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.

(A true and correct copy of the Claim of Privilege of Thomas K. Finletter is attached hereto as Exhibit C.)

15. Major General Harmon's Affidavit swore that the materials could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." (A true and correct copy of the Affidavit of Reginald C. Harmon is attached hereto as Exhibit D.)

16. On September 21, 1950, in light of these submissions, Judge Kirkpatrick amended his prior order and directed the United States to produce the following

documents to the Court for *in camera* inspection by October 4, 1950:

"(a) the report and findings of the official investigation of the crash of defendant's B-29 type of aircraft near Waycross, Georgia on October 6, 1948.

(b) the statement with reference to such crash of Captain Herbert W. Moore, 1279A.

(c) the statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025.

(d) the statement with reference to such crash of Technical Sergeant Earl W. Murrhee."

(A true and correct copy of the Amended Order for Production and Inspection of Documents, dated September 21, 1950, is attached hereto as Exhibit E.)

17. Notwithstanding this order, the United States refused to produce the specified documents to the Court for *in camera* review. Accordingly, on October 12, 1950, this Court held the government in default and entered a finding of liability in favor of the widows. (A true and correct copy of the unpublished October 12, 1950 decision of Judge Kirkpatrick is attached hereto as Exhibit F.)

18. The Court thereafter conducted a hearing on damages. Following this hearing, the Court determined that the United States should pay damages to the widows totaling $225,000 ($80,000 each to Mrs. Brauner and Mrs. Payla, plus $65,000 to Mrs. Reynolds (now Ms. Herring)). Judge Kirkpatrick specifically found that these sums represented the full value of the working lives of the deceased, reduced to present value. (A true and correct copy of the November 27, 1950 Hearing Transcript and the February 20, 1951 unpublished decision on the issue of damages are attached hereto as Exhibits G and H, respectively.) Judgments were entered in favor of the widows on February 27, 1951.

The Government Appeals

19. The United States appealed. In United States v. Reynolds, 192 F.2d 987 (3d Cir. 1951), the Court of Appeals upheld the decisions of this Court and affirmed the judgments entered in favor of the widows. It agreed that it was within the competence of the district court to review the requested documents *in camera* in an effort to assess the validity and proper scope of the government's claim of privilege. Id. at 997.

20. The United States petitioned the United States Supreme Court for certiorari, advancing a sweeping claim of executive privilege. The Supreme Court granted certiorari on the question posed by the government, 343 U.S. 918 (1952), and thereafter reversed the decisions of this Court and the Third Circuit, vacating the widows' judgments. United States v. Reynolds, 345 U.S. 1 (1953).

21. In so ruling the Supreme Court found that the claim of "state secrets" protection that the government had made out through the Air Force's Affidavits was sufficient to justify withholding the Accident Report and witness statements, even from the federal courts:

> [I]t is apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests ... [and that] there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.

United States v. Reynolds, 345 U.S. at 10. The Supreme Court therefore concluded that "when the formal claim of privilege was filed by the Secretary of the Air Force, there was certainly a sufficient showing of privilege to cut off further demand for the documents...." Id. at 11.

The Settlements

22. After remand, without the benefit of the Accident Report and witness statements, the widows settled their cases with the government. Their settlements totaled $170,000, $55,000 less than the judgments the widows had originally obtained. Pursuant to the settlements, the Reynolds and Brauner cases were dismissed on August 5, 1953.

The Fraud Is Discovered

23. The government classified the Accident Report and witness statements, ostensibly to maintain their secrecy. These documents remained classified for nearly 50 years.

24. In early 2000, one of the daughters of the deceased, Ms. Palya Loether, learned through internet research that previously-classified documents regarding military aircraft accidents had been made available to the public by the United States government. Curious about the secret mission her father had undertaken with the Air Force on the day of his death, Ms. Palya Loether ordered and received a copy of the declassified documents relating to her father's accident in or about February or March of 2000.

25. The documents that were the subject of Judge Kirkpatrick's September 21, 1950 Order providing for an *in camera* review of the government's claim of privilege, and of the ensuing district court and appellate proceedings, were included in the materials Ms. Palya Loether received. Ms. Palya Loether thus saw for the first time (a) the official "Report of Special Investigation of Aircraft Accident, Involving TB-29-100BH No 45-21866" (b) a "Memorandum for the Chief of Staff, United States Airforce, Re: Aircraft Accident TB-29-100BH No 45-21866," (c) a "Summary of B-29 Aircraft Accident," (d) the statement with reference to such crash of Captain Herbert W. Moore, 1279A, (e) the statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025, and (f) the statement with reference to such crash of Technical Sergeant Earl W.

Murrhee. (True and correct copies of these declassified documents are collectively attached hereto as Exhibit I; a typeset copy of these documents has been prepared and is attached as Exhibit J.)

26. These newly-uncovered documents revealed that the decision of the Supreme Court in United States v. Reynolds, 345 U.S. 1 (1953), the settlement, and the dismissal of the Reynolds and Brauner cases were procured by a fraud on the courts. Contrary to the statements in the Affidavits, on which the Supreme Court expressly relied, not one of the documents that were the subject of the trial court proceedings and orders contain any secret or privileged information. The documents consist, instead, of admissions of negligence on the part of the Air Force.

The Families Attempt to File a Petition for Writ of Error *Coram Nobis* to Remedy Fraud On The Court

27. Ms. Palya Loether attempted over the course of the next year to locate the other families who were affected by the government's misconduct. Ultimately, she succeeded. The families then sought out the law firm of Charles J. Biddle, who had represented the widows in the original proceedings, in an effort to see if the injustice done the families could be remedied.

28. On or about February 26, 2003, the plaintiffs in this action filed a "Petition for a Writ of Error *Coram Nobis* to Remedy Fraud Upon the Court" with the United States Supreme Court, pursuant to Supreme Court Rule 20 and the All Writs Act, 28 U.S.C. § 1651.

29. The Supreme Court Clerk's Office refused to docket the case and required the petitioners to file a "motion for leave to file" along with their petition. Petitioners complied. The government opposed petitioners' motion to file: Its opening argument was that the petitioners should first seek relief in the district court by way of an "independent action" under Rule 60(b).

30. In a one line order dated June 23, 2003, the Supreme Court denied petitioners' motion for leave to file their petition for a writ of error *coram nobis*, thereby remitting the plaintiffs to such other remedies as the law provides.

V. CLAIM FOR RELIEF FOR FRAUD ON THE COURTS

31. The allegations in paragraphs 1 through 30, above, are incorporated herein by reference as if set forth in full.

32. Contrary to the claim of privilege and sworn Affidavits submitted by Secretary Finletter and Judge Advocate General Harmon, the Accident Report and witness statements that Judge Kirkpatrick had ordered the government to produce contain no military secrets or other information implicating national security interests.

33. Instead, the Accident Report consists of nothing more than an account of the accident and a series of admissions that it was the Air Force's negligence that caused the deaths of the civilian engineers. Thus, the Accident Report reveals that:

(a) The main cause of the accident as the failure of Air Force personnel to comply with Technical Orders 01-20EJ-177 and 01-20EJ-178, which provided for necessary "changes to the exhaust manifold assemblies for the purposes of eliminating a definite fire hazard."

(b) These mandatory changes involved the installation of heat deflector shields "to prevent excessive heat from entering the accessory section [of the engine]."

(c) Without these changes to the engine manifold, "[t]he aircraft is not considered to have been safe for flight."

(d) The mandatory heat deflector shields were not installed in the B-29 type aircraft prior to flight, as required, and that the No. 1 engine of the plane caught fire as a result.

(e) The fire had begun in the accessory section of the No. 1 engine, exactly where it would have started without the required heat deflectors.

(f) None of civilian engineers were briefed prior to the flight on emergency and aircraft evacuation procedures, as required by Air Force regulations.

(g) The aircraft commander, copilot and engineer had never flown together as a crew prior to this flight. And,

(h) When the fire first broke out in the No. 1 engine, the pilot inadvertently "feathered" the No. 4 engine, accidentally leaving a second working engine disabled. See Exhibits I and J. There is not one mention of anything remotely approaching a military secret.

34. Likewise, the surviving witnesses' statements that were ordered produced by this Court in 1950 consist of nothing more than the witnesses' accounts of the flight. They make no mention whatsoever of "secret" equipment, the aircraft's mission or any other information implicating military secrets or national security concerns. Id.

35. The Accident Report and the witness statements also show that the Air Force lied in earlier discovery in the cases. This includes a lie told in the Air Force's sworn responses to interrogatories about the main cause of the accident:

Q: 31. (a) Have any modifications been prescribed by defendants for the engines in its B-29 type aircraft to prevent overheating of the engines and/or to reduce the fire hazard in the engines?

(b) If so, when were such modifications prescribed?

(c) If so, has any such modifications been carried out on the engines of the particular B-29 type aircraft involved in the instant case? Give details.

A: 31. No.

(A true and correct copy of the Interrogatories and Responses to Interrogatories are attached hereto as Exhibit K.)

36. The Affidavits advanced in support of the government's claims of privilege, as well as the government's sworn discovery responses, were intended to, and ultimately did, cover-up and suppress conclusive evidence that the Air Force's negligence caused the deaths of the three civilian engineers.

37. Moreover, the Affidavits advanced in support of the government's claims of privilege were intended to, and ultimately did, set up for the government a "test case" for a favorable judicial ruling on claims of an executive or "state secrets" privilege – a test case built on the fraudulent premise that the documents in question contained "secret" military or national security information.

38. The Affidavits advanced in support of the government's claims of privilege, as well as the government's sworn discovery responses, were intentionally and knowingly false when made or were made in reckless disregard of whether the statements contained therein were true or false. Government officials, including Secretary Finletter and Judge Advocate General Harmon, acted with knowledge of the falsity of the statements in the Affidavits or with reckless disregard for the truth or falsity of such statements; indeed, the falsity of such statements is apparent upon reading the documents that were the subject of this Court's orders and the claims of privilege.

39. The government intended that the federal courts would rely upon its false statements and honor its false

claim of privilege to deny the widows discoverable evidence to which they were lawfully entitled. The government further intended, after this Court entered judgments in favor of the widows, that the federal appellate courts would rely upon its false statements to reverse such judgments. In fact, the United States Supreme Court did rely on those statements to reverse the widows' judgments. And, this Court ultimately relied on them to enforce the Supreme Court's mandate, to approve the parties' subsequent settlement, and to dismiss the Reynolds and Brauner actions.

40. The widows were without knowledge that the government's claims of privilege were false and fraudulent. They settled with the government and agreed to a dismissal of their lawsuits in ignorance of the government's misconduct. It was only some 50 years later, after the government declassified the purportedly "secret" documents that were the subject of the Reynolds and Brauner actions, that Ms. Herring and the other widows' families came to learn the truth.

41. By the foregoing conduct, the government practiced a fraud on this Court and other federal courts.

42. The government's fraud on the courts is manifestly unjust and shocks the conscience. The government's fraud directly harmed three widows and their five young children, who were forced to march through a series of appeals to defend their judgments, ultimately lost those judgments, and then settled for less than they were entitled. Moreover, the government's fraud was intended to and did subvert the processes of this Court, the Court of Appeals, and the United States Supreme Court.

43. As a result of the government's fraud on the courts, the widows were deprived of judgments to which they were lawfully entitled and they and their heirs suffered substantial loss for which they should be compensated in damages. The settlements that the widows made with the

government and the dismissals this Court entered, after the widows' judgments were wrongly vacated, are all tainted by the government's fraud, and are no bar to according plaintiffs relief pursuant to the Court's authority under the Federal Rules and the Court's inherent powers.

44. The proper measure of the plaintiffs' damages for the government's fraud on the courts is the difference between the amounts the widows were entitled to pursuant to the judgments less amounts paid to the widows pursuant to the settlements, increased to present value at a market interest rate in order fully and fairly to compensate the plaintiffs for their loss. Such damages are in excess of $1 million.

45. By reason of the government's fraud on the courts, the plaintiffs are also entitled to an award of their attorneys' fees and costs of litigation.

WHEREFORE, plaintiffs pray that this Court enter a judgment in their favor and against the United States:

A. Ruling that the United States perpetrated a fraud on the federal courts in the Reynolds and Brauner actions; and,

B. Awarding plaintiffs (1) damages as aforesaid, including interest at a market rate since February 27, 1951, (2) their attorneys' fees and costs of litigation, and (3) such other and further relief as this Court deems just and proper.

DATE: October 1, 2003

/s/ Wilson M. Brown, III
Wilson M. Brown, III
Jeff A. Almeida
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(215) 988-2700
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Attorneys for Plaintiffs
Patricia J. Herring, Judith Palya Loether,
William Palya, Robert Palya,
Susan Brauner and Catherine Brauner

Demand for Jury Trial

Plaintiffs demand a trial by jury of all issues so triable in this cause.

DATE: October 1, 2003

/s/ Wilson M. Brown, III
Wilson M. Brown, III
Jeff A. Almeida
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Attorneys for Plaintiffs
Patricia J. Herring, Judith Palya Loether,
William Palya, Robert Palya,
Susan Brauner and Catherine Brauner

EXHIBIT A

C18

DOCKET

DOCKET 10142

PATRICIA J. REYNOLDS

vs.

THE UNITED STATES OF AMERICA

Basis of Action Death

ATTORNEYS

For Plaintiff:

Charles J. Biddle

For Defendant:

G.A. Gleeson

DATE					
MONTH	**DAY**	**YEAR**	**PLAINTIFF'S ACCOUNT**	**RECEIVED**	**DISBURSED**
Sept.	27	1949	C.J.B.	$15.00	
Dec.	14	1949	TO U.S. TREAS.		$15.00

UNITED STATES DISTRICT COURT

September 27, 1949	Complaint filed.
September 27, 1949	Summons exit.
November 9, 1949	Summons returned "on September 28 - 1949 served on Gerald A. Gleeson, Esq." and "on October 10 - 1949 served on the Attorney General by registered mail" and filed.
November 22, 1949	Answer filed.
November 22, 1949	Order to place case on trial list filed.
December 8, 1949	Motion for stipulation of counsel and Order of Court consolidating this case with civil action #9793 for trial filed (#9793). Notes 12/9/49.
June 30, 1950	Opinion Kirkpatrick J. denying defendant's motion to quash and granting plaintiff's motion to produce filed (#9793).
July 20, 1950	Order of Court permitting plaintiff to inspect certain documents etc. and staying all other proceedings until order is complied with or vacated filed (#9793). Noted 7/21/50.
August 30, 1950	Transcript of hearing on Aug. 9, 1950 before Kirkpatrick J. at Washington D.C. filed (see c.a. #9793)
September 21, 1950	Amended order re inspection of documents, filed. (see #9793)
October 10, 1950	Petition for rehearing on motion to quash order and motion for production of documents, filed.
October 10, 1950	Claim of Privilege by Secretary of Air Force, filed.

October 10, 1950	Affidavit of Judge Advocate General, U.S. Air Force, filed.
October 12, 1950	Order of Court that certain facts be taken as established, filed 10/13/50. Notes and Notice mailed.
November 27, 1950	Trial (Kirkpatrick J.). Witnesses sworn.
December 11, 1950	Transcript of testimony filed (#9793).
December 18, 1950	Plaintiff's Requests for findings of fact filed.
December 18, 1950	Plaintiff's Requests for conclusions of law, filed.
February 20, 1951	Opinion, Kirkpatrick J. finding in favor of plaintiff, affirming certain plaintiff's requests for findings of fact and conclusions of law filed.
February 27, 1951	Decree granting judgment in favor of plaintiff in the sum of $65,000.00, filed. Noted and notice mailed 2/28/51.
March 2, 1951	Transcript of hearing of November 21, 1950 (In Chambers, K., J.) filed.
April 20, 1951	Notice of Appeal of defendant filed (4/23/51 Copy to Charles J. Biddle).
April 20, 1951	Copy of Clerk's notice to U.S. Court of Appeals filed.
May 29, 1951	Record transmitted to U.S. Court of Appeals.
November 8, 1951	Letter of U.S. Attorney together with letter of Dept. of the Air Force filed (C.A. #9793).
January 15, 1952	Mandate of U.S. Court of Appeals affirming judgment of this Court filed.

March 27, 1953	Notice of taking depositions of Capt. Herbert W. Moore, et al. filed.
April 13, 1953	Certified Copy of Order of U.S. Court of Appeals recalling mandate, filed. (4/14/53 Mandate returned to U.S. Court of Appeals.)
April 13, 1953	Mandate of U.S. Supreme Court reversing judgment of U.S. Court of Appeals and remanding case to U.S. District Court for further proceedings, filed (#9793).
June 22, 1953	Stipulation of Counsel for compromise settlement and Order of Court approving same, filed. (See #9793.) 6/23/53 Noted.
August 5, 1953	Order to Dismiss filed.
August 5, 1953	In accordance with Order filed, this action is marked dismissed with prejudice.

Attest: /s/ J.A. Comey, Dep. Clerk

EXHIBIT B

C23

DOCKET

DOCKET 9793

PHYLLIS BRAUNER and ELIZABETH PALYA

vs.

THE UNITED STATES OF AMERICA

Basis of Action Wrongful Death

ATTORNEYS

For Plaintiff:

Charles J. Biddle

For Defendant:

G.A. Gleeson

DATE					
MONTH	DAY	YEAR	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED
June	21	1949	C.J.B.	$15.00	
July	15	1949	TO U.S. TREAS.		$15.00

UNITED STATES DISTRICT COURT

June 21, 1949	Complaint filed.
June 21, 1949	Summons exit.
July 5, 1949	Appearance of Gerald A. Gleeson Esq. for defendant filed.
July 14, 1949	Summons returned June 30 - 1949 and served on Attorney General of the United States by registered mail and on June 22, 1949 served Gerald A. Gleeson, Esq., United States District Atty., and filed.
August 17, 1949	Stipulation of counsel extending time within which to file Answer to October 19, 1949 and Order of Court approving same filed. Noted 8/18/1949.
October 20, 1949	Stipulation of counsel extending time for filing Answer to December 18 - 1949 and Order of Court approving same filed. 10/21/49 Noted.
November 22, 1949	Answer filed.
November 22, 1949	Order to place case on trial list filed.
November 28, 1949	Plaintiff's interrogatories filed.
December 5, 1949	Stipulation of counsel extending time for filing answers to plaintiffs' interrogatories to December 28 - 1949 and Order of Court approving same filed. Noted 12/6/49.
December 8, 1949	Motion for, stipulation of counsel and Order of Court consolidating Civil Action #10142 with this case for trial filed. Noted 12/9/49.

December 28, 1949	Stipulation of counsel extending time for filing answers to interrogatories to Jan. 17, 1950 and Order of Court approving same, filed. 12/29/49 noted.
January 5, 1950	Defendant's answer to interrogatories filed.
January 18, 1950	Plaintiffs' motion for production of documents, filed.
January 18, 1950	Order to place case on Argument List, filed.
January 25, 1950	Motion to quash order and motion for production of documents filed.
February 15, 1950	Hearing sur plaintiff's motion for production of documents and sur defendant's motion to quash etc. C.A.V.
June 30, 1950	Opinion Kirkpatrick J. denying defendant's motion to quash and granting plaintiff's motion to produce filed.
July 20, 1950	Order of Court permitting plaintiff to inspect certain documents, etc. and staying all proceedings until order is complied with or vacated. Noted and notice mailed 7/21/50.
August 30, 1950	Transcript of hearing on August 9, 1950 before Kirkpatrick, J. at Washington, D.C. filed.
September 21, 1950	Amended Order re production and inspection of documents, filed.
October 10, 1950	Defendant's Petition for rehearing on motion to quash Order and motion for production of documents, filed.

October 10, 1950	Claim of privilege by Secretary of the Air Force, filed.
October 10, 1950	Affidavit of Judge Advocate General, U.S. Air Force, filed.
October 12, 1950	Order of Court that facts be taken as established, filed. 10/15/50 Noted and Notice Mailed (#10142).
November 27, 1950	Trial (Kirkpatrick J.) Witnesses sworn. C.A.V.
December 11, 1950	Transcript of testimony filed.
December 18, 1950	Plaintiff's Requests for findings of fact, filed.
December 18, 1950	Plaintiff's Requests for conclusions of law, filed.
February 20, 1951	Opinion, Kirkpatrick J. granting judgment for plaintiff and affirming certain of plaintiff's requests for Findings of Fact and Conclusions of Law filed.
February 27, 1951	Decree granting judgment in favor of plaintiffs in the sum of $80,000 each filed. Noted and notice mailed 2/28/51.
March 2, 1951	Transcript of hearing of November 21, 1951 (In Chambers, K., J.) filed (See #10142).
April 20, 1951	Notice of appeal of defendant filed (4/23/51 Copies to Charles J. Biddle).
April 20, 1951	Copy of Clerk's notice to U.S. Court of Appeals filed.
May 29, 1951	Record transmitted to U.S. Court of Appeals.

November 8, 1951	Letter of U.S. Attorney together with letter of Dept. of the Air Force, filed.
November 8, 1951	Supplemental record transmitted to Court of Appeals.
January 15, 1952	Mandate affirming judgment of this Court filed.
January 23, 1953	Certificate and the disposition of exhibits, filed.
March 27, 1953	Notice of taking depositions of Capt. Herbert W. Moore, et al. filed.
April 13, 1953	Certified Copy of Order of U.S. Court of Appeals recalling mandate, filed. (4-14-53 Mandate returned to U.S. Court of Appeals).
April 13, 1953	Mandate of U.S. Supreme Court reversing judgment of U.S. Court of Appeals and remanding case to U.S. District Court for further proceedings, filed.
June 22, 1953	Stipulation of Counsel as to compromise settlement and Order of Court approving same, filed. 6/22/53 Noted.
August 5, 1953	Order to Dismiss filed.
August 5, 1953	In accordance with Order filed, this action is marked dismissed with prejudice.

Attest: /s/ J.A. Comey, Dep. Clerk

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. REYNOLDS	}	
	}	
v.	}	CIVIL ACTION NO. 10142
	}	
UNITED STATES OF AMERICA	}	

CLAIM OF PRIVILEGE BY THE SECRETARY
OF THE AIR FORCE

The plaintiff has filed suit against the United States for the wrongful death of her husband, who was killed in a military aircraft while on a confidential mission, near Waycross, Georgia, on 6 October 1948. Counsel for the plaintiff has applied to this court pursuant to Rule 34 of the Federal Rules of Civil Procedure for copies of the findings of the Board of Officers appointed to investigate the accident pursuant to Air Force Regulation No. 62-14 and statements of Air Force personnel witnesses.

With respect to the production of statements of witnesses interrogated by the Board sought by the plaintiff's counsel, there has been no affidavit showing good cause; nor any showing of necessity for the production of this information. The defendant, in fact, as the affidavit of The Judge Advocate General, United States Air Force, filed herein, more particularly shows, has provided the plaintiff with certain records and with the names and known addresses of its witnesses and now undertakes to produce all witnesses in its employ and under its control for pretrial examination by the plaintiff. The names and addresses of defendant's witnesses were furnished in answer to the plaintiff's interrogatories.

With regard to the demand for the production of the Report of Investigation (Report of Major Aircraft Accident, AF Form 14) and any other ancillary report or statement

pertaining to this investigation, the respondent-defendant, the United States, has objected and still objects to the production of this report on the grounds that it is privileged. The report of investigation (Report of Major Aircraft Accident, AF Form 14), together with all the statements of the witnesses, was prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so that precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety. These statements are obtained in confidence, and these reports are prepared for intra-departmental use only, with the view of correcting deficiencies found to have existed and with the view of taking necessary corrective measures or additional precautions based on the opinions and conclusions of the Board of Officers convened to investigate such accidents. The disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety.

The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest. The furnishing of such information to claimants or litigants against the Government is not contemplated under the provisions of Air Force Regulation No. 62-14, and if such information is to be released it must be released as prescribed in Air Force Regulation No. 112-2, paragraph 6; Air Force Regulation No. 112-2, paragraph 20;

Army Regulation No. 410-5; and Army Regulation No. 420-5, 32 CFR 836.7 (by Joint Army-Air Force Regulation No. 1-1-60, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations).

The issue presented is solely whether reports of Boards of Investigation and statements of witnesses which are concerned with confidential missions and equipment of the Air Force, declared confidential and privileged by law and Department regulations, and which are the work-product of the Department of the Air Force, are privileged and their production is beyond judicial authority in this litigation.

It has been the historic position of the executive branch of the Government, as the Attorney General of the United States has informed this Honorable Court by statement filed by him in Nathan Alltmont, et al, v. United States, Civil Action No. 10019, 177 F.(2d) 971, that executive files and investigative reports are confidential and privileged and that their disclosure would not be in the public interest. In that statement the Attorney General said:

> "President Washington in 1796 refused to furnish the instructions to the U.S. Minister concerning the Jay Treaty.
>
> President Jefferson in 1807 refused to furnish confidential letters relative to the Burr conspiracy.
>
> President Monroe in 1825 refused to furnish documents relating to the conduct of naval officers in the Pacific.
>
> President Jackson in 1833 refused to furnish a paper read by him to the heads of departments relating to the removal of bank deposits.
>
> President Tyler in 1842 refused to furnish the names of the Congressmen who applied for office, and in 1843 refused to furnish a War Department report on alleged Indian frauds.

President Polk in 1846 refused to furnish evidence of payments made by the State Department on President's certificates.

President Fillmore in 1852 refused to furnish information on a proposal by the King of the Sandwich Islands to transfer the islands to the United States.

President Lincoln in 1861 refused to furnish Major Anderson's dispatches relative to the defense of Fort Sumter.

President Grant in 1876 refused to furnish information concerning executive acts performed away from the Capitol.

President Hayes in 1877 refused to permit the Secretary of the Treasury to produce papers concerning the nomination of Theodore Roosevelt as Collector of the Port of New York.

President Cleveland in 1886 refused to produce documents relating to suspension and removal of Federal Officials.

President Theodore Roosevelt in 1909 refused to produce documents relating to the Bureau of Corporations.

President Coolidge in 1924 refused to produce a list of companies in which Secretary of the Treasury Mellon was interested.

President Hoover in 1930 refused to produce the letters leading up to the London Naval Treaty; and in 1932 refused to produce documents concerning a Treasury Department investigation.

President Franklin D. Roosevelt in 1941 refused to permit the Director, F.B.I., to produce F.B.I. reports; in 1943 he refused to permit the Director, Bureau of the Budget, to produce the files and correspondence of that Bureau relative to the transfer of the F; C. C.'s

> functions; also refused to permit the Chairman of the Board of War Communications and the Secretary of War to produce their files in the matter; and in 1944 refused to permit the Director, F. B. I., to produce reports of that agency.
>
> President Truman in 1947 refused to permit the Civil Service Commission to produce records concerning applicants for positions; and in 1948 refused to permit disclosure of F. B. I. reports used in the Employees Loyalty Investigation."

The position of the executive branch of the Government and of this Department is restated in the opinion of Attorney General Jackson of April 30, 1941, 40 Op. Atty. Gen. No. 8. That opinion pointed to the following injurious results: (1) disclosure would seriously prejudice law enforcement; (2) disclosure would prejudice the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation for keeping of faith with confidential informants is an indispensable condition of future efficiency; and (4) disclosure might also result in the grossest kind of injustice to innocent individuals because the reports include leads and suspicions and sometimes even the statements of malicious or misinformed people.

This position is historically approved and authorized by authority of R.S. 161, 5 U.S.C. 22, and Air Force Regulations issued pursuant thereto, including Air Force Regulations Nos. 205-1, 112-2, 62-14, and Army Regulations Nos. 410-5 (Sections III and IV) and 420-5 (by Joint Army-Air Force Regulation No. 1-11-60 and Air Force Regulation No. 5-9, dated 11 May 1949, the Air Force has adopted all pertinent Army Regulations that have not been superseded by Air Force Regulations). It may therefore be seen, the position taken by the Air Force in respect to the production of the documents in question has been affirmed time and time again by the courts: Boske v. Comingore, 177 U.S. 459 (1900); Totten v. United States, 92 U.S. 105 (1875); Ex parte

Sackett, 74 F.(2d) 922 (C.C.A. 9th, 1935); United States v. Potts, 57 F.Supp. 204 (M.D. Pa., 1944); United States v. Haugen, 58 F.Supp. 436 (E.D. Wash., 1944); U.S. ex rel Bayarsky v. Brooks, 51 F.Supp. 974 (D.N.J., 1943); Harwood v. McMurtry, 22 F.Supp. 572 (W.D. Ky., 1938); Federal Life Ins. Co. v. Tolod, 30 F.Supp. 713 (M.D. Pa., 1940); Walling as W. & H. Adm. v. Comet Carriers, 3 F.R.D. 442 (S.D.N.Y., 1944); Young v. Terminal Ry., 70 F.Supp. 106 (E.D. Mo., 1947); see In re Lamberton, 124 F. 446 (W.D. Ark., 1903); Stegall v. Thurman, 175 F. 813 (N.D. Ga., 1910); Brent v. Hagner, 5 Cranch. C.C. 71, Fed. Cas. No. 1,839 (C.C.D.C., 1836); (1853) 6 Op. Atty. Gen. 7; (1877) 15 Op. Atty. Gen. 342; (1905) 25 Op. Atty. Gen. 326; (1941) 40 Op. Atty. Gen. No. 8.

For the reasons stated above, I consider that the compulsory production of the Reports of Investigation conducted by the Board of Officers convened under the provisions of Air Force Regulation No. 62-14 and other pertinent regulations in connection with aircraft accidents is prejudicial to the efficient operation of the Department of the Air Force, is not in the public interest, and is inconsistent with national security. Accordingly, pursuant to the authority vested in me as the head of the Department of the Air Force, I assert the privileged status of reports here involved and must respectfully decline to permit their production.

/s/ THOMAS K. FINLETTER

THOMAS K. FINLETTER,
Secretary of the Air Force

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. REYNOLDS)

v.) Civil Action No. 10142

UNITED STATES OF AMERICA)

AFFIDAVIT OF THE JUDGE ADVOCATE GENERAL, UNITED STATES AIR FORCE

REGINALD C. HARMON, Major General, USAF, Serial Number 721A, The Judge Advocate General, United States Air Force, who being first duly sworn, deposes and says:

THAT as The Judge Advocate General, United States Air Force, he is responsible for the furnishing of material and the appearance of witnesses from among the military personnel of the United States Air Force in all matters where the United States Air Force is interested and in particular the above-styled suit,

THAT the following personnel of the Air Force are the only surviving military witnesses to the aircraft accident that occurred on October 6, 1948, approximately two miles south of Waycross, Georgia, in which aircraft type TB-29 (Serial Number 45-21866) was completely destroyed, and in which plaintiffs' decedents were killed:

Captain Herbert W. Moore, 1279A,
Tyndall Air Force Base, Florida,
Staff Sergeant Walter J. Peny, AF 6980255,
Chatham Air Force Base, Florida,
Technical Sergeant Earl W. Murrhee, AF 14171471,
MacDill Air Force Base, Florida,

THAT the aforementioned three witnesses will be made available at the expense of the United States for

interrogation by the plaintiffs at a place and time to be designated by the plaintiffs,

THAT these witnesses will be authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature,

THAT these witnesses will be authorized to refresh their memories by reference to any statements made by them before Aircraft Accident Investigating Boards or Investigating Officers, as well as other pertinent and material records that are in the possession of the United States Air Force,

THAT upon demand by the plaintiffs all records, other than those which have been classified or determined to be privileged, have already been made available by the Air Force,

THAT such information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment,

AND THAT the disclosure of statements made by witnesses before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety.

/s/ REGINALD C. HARMON

REGINALD C. HARMON,
Major General, USAF

Subscribed and sworn to before me this seventh day of August, 1950.

/s/ J. xxxxxx Will

J. xxxxxx Will
Notary Public Arlington County, Virginia
My Commission Expires December 3, 1950

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and ELIZABETH PALYA	: :	
v.	:	Civil Action No. 9793
UNITED STATES OF AMERICA	:	
PATRICIA J. REYNOLDS	:	
v.	:	Civil Action No. 10142
UNITED STATES OF AMERICA	:	

AMENDED ORDER

A re-hearing on plaintiffs' Motion for Production of Documents under Rule 34 was held on August 9, 1950, at the request of defendant, the United States of America. Pursuant to claim of privilege advanced by defendant at said re-hearing, the ORDER for production of documents entered on July 20, 1950, is hereby amended to read as follows:

> ORDERED that defendant, the United States of America, its agents and attorneys, produce for examination by this court the below-listed documents, so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest.

(a) The report and findings of the official investigation of the crash of defendant's B-29 type aircraft near Waycross, Georgia, on October 6, 1948.

(b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A.

(c) the statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025.

(d) the statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF14171471.

AND it is further ordered that the said examination be held at United States Courthouse, Room 2096, in the City of Philadelphia, Commonwealth of Pennsylvania, on the 4th day of October, 1950, at 2 o'clock p.m.

AND it is further ordered that defendant, the United States of America, its agents and attorneys, thereafter permit plaintiffs and their attorneys to inspect the said documents and make copies of the same, with the exception of any part or parts of the said documents which may have been determined by this court to be privileged from discovery.

/s/ Kirkpatrick

J.

September 21, 1950

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and	:	
ELIZABETH PALYA	:	
v.	:	Civil Action No. 9793
UNITED STATES OF AMERICA	:	
PATRICIA J. REYNOLDS	:	
v.	:	Civil Action No. 10142
UNITED STATES OF AMERICA	:	

ORDER THAT FACTS BE TAKEN AS ESTABLISHED

Defendant having failed to comply with the order of this court dated September 21, 1950 requiring defendant to produce certain documents at Room 2096, United States Courthouse, Philadelphia, Pennsylvania, on October 4, 1950, for discovery purposes; and it appearing that the said documents are in the possession and control of defendant, that there was no sufficient excuse for defendant's failure to produce the same,

IT IS ORDERED that the following facts be taken as established for the purposes of this action, that plaintiffs need produce no further proof with respect to said facts, and that defendant will not be permitted to introduce evidence controverting said facts:

1. The deaths of William H. Brauner, Albert Palya and Robert E. Reynolds occurred as the result of the crash near Waycross, Georgia, on October 6, 1948, of a B-29 airplane

owned and operated by defendant, United States of America.

2. The said crash and the resulting deaths of the aforesaid persons were caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment.

10/12/50 /s/ Kirkpatrick

Ch. J.

EXHIBIT G

C45

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and
ELIZABETH PALYA,
Plaintiffs :

v. : Civil Action No. 9793

UNITED STATES OF AMERICA,
Defendant :

PATRICIA J. REYNOLDS,
Plaintiff :

v. : Civil Action No. 10142

UNITED STATES OF AMERICA,
Defendant :

Philadelphia, Pa., November 27, 1950

SHORTHAND SERVICE BUREAU
EVERETT G. RODEBAUBH
COURT REPORTERS
U N I T E D S T A T E S C O U R T H O U S E
PHILADELPHIA 7, PA.

C46

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and
ELIZABETH PALYA, Plaintiffs :

v. : Civil Action No. 9793

UNITED STATES OF AMERICA,
Defendant :

PATRICIA J. REYNOLDS,
Plaintiff :

v. : Civil Action No. 10142

UNITED STATES OF AMERICA,
Defendant :

Before HON. WILLIAM H. KIRKPATRICK, J.

Philadelphia, Pa., November 27, 1950

PRESENT: CHARLES J. BIDDLE, ESQ. and
FRANCIS HOPKINSON, ESQ.,
for Plaintiffs.

THOMAS J. CURTIN, ESQ.,
Assistant. United States Attorney,
for Defendant.

TRANSCRIPT OF THE TRIAL RECORD

PLAINTIFFS' EVIDENCE

MR. BIDDLE: If Your Honor please, I will begin by offering in evidence for the record –

MR. LILLY: Will you tell me which cases are being tried?

(Discussion off the record.)

MR. BIDDLE: In the Brauner and Palya cases I would offer in evidence the admitted paragraphs of the complaint, which are paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 17 and 18; that is, in Brauner and Palya.

(Paragraph 1 of the Brauner and Palya complaint reads as follows:

"1. The defendant herein is the United States of America. On or about October 6, 1948, defendant was the owner, operator and possessor of a certain B–29 airplane."

Paragraph 1 of the answer reads as follows:

"1. Admitted."

Paragraph 2 of the Brauner and Palya complaint reads as follows:

"2. On and prior to said date, and at all times material hereto, the maintenance, supervision, control and operation of the said airplane was carried on by the officers and employees of defendant, while acting within the scope of their office and employment."

Paragraph 2 of the answer reads as follows:

"2. Admitted."

Paragraph 3 of the Brauner and Palya complaint reads as follows:

"3. On and prior to said date, and at all times material hereto, William H. Brauner was a civilian research and development engineer employed by the Franklin Institute, Philadelphia, Pennsylvania."

Paragraph 3 of the answer reads as follows:

"3. Admitted."

Paragraph 4 of the Brauner and Palya complaint reads as follows:

"4. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and employees, the said William H. Brauner boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane."

Paragraph 4 of the answer reads as follows:

"4. Admitted."

Paragraph 5 of the Brauner and Palya complaint reads as follows:

"5. On said date, and while being operated by defendant's officers and employees, the said airplane took off from Macon, Georgia; shortly thereafter developed engine trouble; caught on fire; and crashed in the vicinity of Waycross, Georgia."

Paragraph 5 of the answer reads as follows:

"5. Admitted."

Paragraph 6 of the Brauner and Palya complaint reads as follows:

"6. The said William H. Brauner, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident."

Paragraph 6 of the answer reads as follows:

"6. Admitted."

Paragraph 8 of the Brauner and Palya complaint reads as follows:

"8. The said William H. Brauner did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency."

Paragraph 8 of the answer reads as follows:

"8. Admitted."

Paragraph 9 of the Brauner and Palya. complaint reads as follows:

"9. The said William H. Brauner left surviving him the following persons: his wife, Phyllis Brauner, who is a plaintiff herein; a daughter Susan, aged four; and an after-born daughter Catherine, born February 12, 1949."

Paragraph 9 of the answer reads:

"9. Admitted."

Paragraph 11 of the Brauner and Palya complaint reads as follows:

"11. The allegations of paragraphs 1 and 2 are repeated."

Paragraph 11 of the answer reads:

"11. Admitted."

Paragraph 12 of the Brauner and Palya complaint reads as follows:

"12. On and prior to said date, and at all times material hereto, Albert Palya was a civilian research and development engineer employed by Radio Corporation of America, Camden, New Jersey."

Paragraph 12 of the answer reads:

"12. Admitted."

Paragraph 13 of the Brauner and Palya complaint reads as follows:

“13. In the course of his said employment, on said date, and under the supervision and control of defendant’s officers and employees, the said Albert Palya boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane.”

Paragraph 13 of the answer reads:

“13. Admitted.”

Paragraph 14 of the Brauner and Palya complaint reads as follows:

“14. The allegations of paragraph are repeated.”

Paragraph 14 of the answer reads:

“14. Admitted.”

Paragraph 15 of the Brauner and Palya complaint reads as follows:

“15. The said Albert Palya, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident.”

Paragraph 15 of the answer reads:

“15. Admitted.”

Paragraph 17 of the Brauner and Palya complaint reads as follows:

“17. The said Albert Palya did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency.”

Paragraph 17 of the answer reads:

“17. Admitted.”

Paragraph 18 of the Brauner and Palya complaint reads as follows:

"18. The said Albert Palya left surviving him the following persons: his wife, Elizabeth A. Palya, who is a plaintiff herein; a son Robert, aged nine; a son William, aged six; and a daughter Judith, seven weeks old."

Paragraph 18 of the answer reads:

"18. Admitted.")

MR. BIDDLE: Now, in Reynolds I would offer in evidence the admitted paragraphs, which are 1, 2, 3, 4, 5, 6, 8 and 9.

(Paragraph 1 of the Reynolds complaint reads as follows:

"1. The defendant herein is the United States of America. On or about October 6, 1948, defendant was the owner, operator and possessor of a certain B-29 airplane."

Paragraph 1 of the answer reads:

"1. Admitted."

Paragraph 2 of the Reynolds complaint reads as follows:

"2. On and prior to said date, and at all times material hereto, the maintenance, supervision, control and operation of the said airplane was carried on by the officers and employees of defendant, while acting within the scope of their office and employment."

Paragraph 2 of the answer reads as follows:

"2. Admitted."

Paragraph 3 of the Reynolds complaint reads as follows:

"3. On and prior to said date, and at all times material hereto, Robert E. Reynolds was a civilian electrical engineer employed by Radio Corporation of America, Camden, New Jersey."

Paragraph 3 of the answer reads as follows:

"3. Admitted."

Paragraph 4 of the Reynolds complaint reads as follows:

"4. In the course of his said employment, on said date, and under the supervision and control of defendant's officers and employees, the said Robert E, Reynolds boarded and became a passenger on the said airplane, as a civilian observer, for the purpose of observing and testing the operation of certain confidential electronic equipment which was installed in the said airplane."

Paragraph 4 of the answer reads as follows:

"4. Admitted."

Paragraph 5 of the Reynolds complaint reads as follows:

"5. On said date, and while being operated by defendant's officers, and employees, the said airplane took off from Macon, Georgia; shortly thereafter developed engine trouble; caught on fire; and crashed in the vicinity of Waycross, Georgia."

Paragraph 5 of the answer reads as follows:

"5. Admitted."

Paragraph 6 of the Reynolds complaint reads as follows:

"6. The said Robert E. Reynolds, as aforesaid, was a passenger on the said airplane and was killed as a result of the said accident."

Paragraph 6 of the answer reads as follows:

"6. Admitted."

Paragraph 8 of the Reynolds complaint reads as follows:

"8. The said Robert 3. Reynolds did not bring an action during his lifetime and no other action for his death has been commenced against the defendant, nor has any claim therefor been presented to any Federal agency."

Paragraph 8 of the answer reads as follows:

"8. Admitted."

Paragraph 9 of the Reynolds complaint reads as follows:

"9. The said Robert R. Reynolds left surviving him the following person: his wife, Patricia J. Reynolds, who is the plaintiff herein. He was not survived by any children."

Paragraph 9 of the answer reads as follows:

"9. Admitted.")

MR.BIDDLE: I further offer the sheets, one on William Brauner, one on Albert Palya, and one on Robert Reynolds, which were marked respectively at the pretrial hearing A, B and C, which have been agreed to by the Government, and which give the ages, life expectancy, education, previous employment, et cetera, of the respective decedents.

THE COURT: That is in all three cases?

MR. BIDDLE: Yes, there is one in each.

THE COURT: Yes.

MR. BIDDLE: One for each of them.

At this point, Your Honor, I might hand you a plaintiffs' trial brief on the law of Georgia, where this accident happened, and which applies under the Erie case to the damages.

THE COURT: Do I understand the facts in A, B and C exhibits are admitted, or is it simply agreed that the Court shall consider those exhibits as competent evidence of the facts?

MR. CURTIN: Didn't we see them on Tuesday?

THE COURT: Yes, I just wondered, it is immaterial, I mean, it isn't an important question, but I would like to have it understood whether you admit those facts as correct

or whether you simply agree that I shall consider the exhibits as competent evidence of the facts which they state.

MR. BIDDLE: I think this is correct, here is the reading from the record of the pretrial hearing, and it says this, by the Court:

"It is agreed that the plaintiffs may offer in evidence the three statements marked A, B and C ..." – those are those three statements I just handed up.

THE COURT: Yes.

MR. BIDDLE: "... marked A, B and C by the Court, as evidence of the facts contained therein."

THE COURT:
Oh, well, then, that is all right. Then I understand that it is agreed that I am to consider those as competent evidence of the facts –

MR. CURTIN: Yes.

THE COURT: – contained therein.

MR. CURTIN: I think that it might be, it might be better if Your Honor would state that the memorandums of the A, B and C – in other words, my thought was we would eliminate the necessity of my friend representing the plaintiffs bringing in –

THE COURT: That is right.

MR. CURTIN: That is right.

THE COURT: That is right, I understand it.

MR. CURTIN: All right, I have no objection.

(A copy of Exhibit A follows:

"WILLIAM BRAUNER

Born – June 13, 1914, in Vienna, Austria; naturalized U.S. citizen at Lafayette, Indiana, in April, 1944,

#6100054; age in October, 1948 – 34; life expectancy (Am. Exp.) – 32.50 years.

Education	– University of Vienna, 1938 – B. S., E. E. Loyola University, 1942 – B. S., Physics Purdue University, 1944 – M. S., Physics
Employment	– Jan., 1939 - June, 1942 – New Orleans Public Service Inc. – draftsman – $1,440 a year.
Aug. 1942 – June, 1944	– Naval Training School, Purdue University – instructor – $2,000 a year
July, 1944 – Nov., 1946	– General Electric Co., West Lynn, Mass. – development engineer, $3,300 a year
Nov., 1946 – Oct., 1948	– Franklin Institute, Phila., Pa. – research engineer – starting salary – $4,400 a year merit increase in Jan., 1947 – $4,750 a year merit increase in Jan., 1948 – $5,000 a year.”

A copy of Exhibit B follows:

ALBERT PALYA

Born	– March 2, 1907; age in October, 1948 – 4l; U.S. born American citizen; life expectancy (Am. Exp.) – 27.45 years
Education	– University of Minnesota
Employment	– Graduation to 1941 – self-employed photographic engineer; earnings – about $3,000 a year

1941 to Aug. 1945	– Minneapolis Honeywell -$4,200 a year
Aug. 1945	– Radio Corp. of America – start – $4,992 a year
Dec. 1, 1946	– merit increase to $5,520 a year
1947	– two general increases to $5,792 a year
May 1, 1948	– merit increase to $6,720 a year”

A copy of Exhibit C follows:

ROBERT REYNOLDS

Born	– Feb. 9, 1924; age in October, 1948 – 24; U. S. born American citizen; life expectancy (Am. Exp.) – 39.49 years
Education	– University of Purdue – B. S. 1946
Employment	– Radio Corp. of America
July 1, 1946	– starting rate – $2,280 a year
Dec. 16, 1946	– general increase – $2,395 a year
March 3, 1947	– merit increase – $2,620 a year
April 28, 1947	– general increase – $2,787 a year
Oct. 13, 1947	– general increase – $2,891 a year
Dec. 1, 1947	– merit increase – $3,120 a year
June 14, 1948	– general increase – $3,203 a year.
Aug. 9, 1948	– general increase – $3,307 a year”)

MR. BIDDLE: Your Honor will recall so far as the liability is concerned we have had the motions made for the production of certain records by the Government, which they have refused to produce, and it is already a part of the record, the order which Your Honor made. I take it –

THE COURT: Yes.

MR. BIDDLE: there is nothing further needed on that.

THE COURT: Yes.

MR. BIDDLE: I shall therefore proceed to the proof of the damages.

Dr. Ewing, will you take the stand, please.

DOUGLAS HANCOCK EWING, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BIDDLE:

Q Dr. Ewing, what is your present position?

A I am Director of Development, Air Navigation Development Board, Department of Commerce.

Q And your office is in Washington?

A Yes, sir.

Q Now, you were previously with RCA over in Camden?

A Yes, from 1945 to January of 1949.

BY THE COURT:

Q With what?

A The RCA.

MR. BIDDLE: Radio Corporation of America in Camden.

BY MR. BIDDLE:

Q And while you were there did you know Albert Palya?

A Yes. Albert Palya worked under my direct supervision at the time of his death.

Q You knew him for how long?

A For about two and a half years.

Q And what did he do?

A He was supervisor of an engineering group which was working on the development of quite highly classified electronic equipment for the Government – for the United States Air Force in particular.

BY THE COURT:

Q The word "classified" means secret, does it?

A Yes, sir. There are three classifications of which secret is one.

BY MR. BIDDLE:

Q And what was his profession? He was an engineer, of course, but what kind of an engineer was he?

A He was a mechanical engineer although the group of which he had charge contained both electrical and mechanical engineers.

Q I see. Now, what kind of an engineer was he, as to his abilities?

A In my estimation he was a very competent engineer. He, by background and by previous experience, had worked with the kind of equipment which we were developing for the Government. He had quite good capabilities, quite unusual capabilities, I would say, for organizing his own work and organizing the work of the people who worked for him.

If the Court please, I would like to refer to some notes in my own handwriting that were wade prior to this.

THE COURT: Yes.

BY MR. BIDDLE:

Q Just go ahead and tell us why –

MR. CURTIN: Just a minute. Doctor, from what notes? May I see them?

THE WITNESS: Yes, sir.

(The paper produced by the witness was examined by Mr. Curtin and returned to the witness.)

A (Continuing) I mentioned previously that he was a mechanical engineer. He was responsible for suggesting a number of quite ingenious ideas which were incorporated in the equipment which he and his group built. He was quite a hard worker, most regular in his habits. To the best of my knowledge – I haven't checked the attendance records with the company, but to the best of my knowledge he missed very little time on account of health. He was always regular in meeting the schedules of the equipment which was developed under his guidance.

BY MR. BIDDLE:

Q Now, what were his future prospects?

A At the time of his death his salary was about $6700 per year, which in my estimation was quite commensurate with his contributions to the company at that time.

He was about forty-one, his last raise in pay had been given in May of '48, just a few months prior to his death. In my judgment he would have normally received raises of about 10 per cent at intervals of two years or thereabouts, and I should say from experience with people of his type in business of the sort in which he was engaged, his salary would have increased at about that rate of 10 per cent per two years, leveling off at about $10,000 around the age of fifty to fifty-two.

I might state that at the time of his employment, in August of '45, he was hired at $5,000 per year and between August of '45 and May of '48 was raised from five thousand to sixty-seven hundred.

It is possible that his specialized knowledge might have brought substantially higher salaries in a smaller company which had demand for the kind of knowledge he had, but I am sure that that kind of supposition is not permissible as evidence here.

Q Doctor, you said that in your judgment, in the normal course Mr. Palya would have received increases leveling off at around $10,000. Now, I take it that that leaves out of the consideration any out of the ordinary compensation that he might have received for inventions or if he had shown extraordinary ability and became an officer of the company or anything of that kind?

A Oh, yes, indeed. Certainly that would count only on his continuing in the occupation in which he was engaged.

Q In other words, we can't guess that he might have gotten to be president of the company or he might have made some invention?

A I don't think we –

Q What he would have done based on the regular employment in the company of a man of his capacity, what his normal future would be –

A That is exactly the basis.

Q – that is what you have testified to?

A Yes.

MR. BIDDLE: Cross-examine.

CROSS–EXAMINATION

BY MR. CURTIN:

Q Doctor, that memorandum that you have there –

MR. BIDDLE: Just a minute, I beg your pardon. I should ask whether you would prefer to cross-examine as to Mr. Palya because Dr. Ewing is also going to testify as to Mr. Reynolds.

MR. CURTIN: I think you ought to keep them separate.

THE COURT: Yes.

MR. BIDDLE: We will do it anyway you want.

THE COURT: Well, go ahead as to Palya, then.

MR. BIDDLE: All right.

BY MR. CURTIN:

Q The memorandum that you have before you, you say, you prepared yourself, is that correct?

A Yes, that is correct.

Q From what did you prepare it?

A I prepared it from a letter which I wrote about a year ago to the firm of Drinker, Biddle and Reath, as a request of Mr. Biddle, when he stated that this case was being tried.

Q In other words, you prepared this memorandum from another memorandum that you had prepared?

A From a letter which I had.

Q A letter?

A Yes.

Q Now, what did you prepare the letter from?

A I prepared the letter from my own knowledge of the performance – the letter, incidentally, referred to both Mr. Palya and Mr. Reynolds – I prepared that from my own knowledge of their performance at the time they worked for me and from some notes which the Radio Corporation had sent regarding the salaries which they were making at the time they were killed; their salary increases since the time they had been employed by the company, and the summaries of performance – I forget the exact term – semi-annual performance ratings which were made by

myself and by others on these two people when employed by the company.

Q In other words, it doesn't represent just your past recollection alone, does it, this memorandum?

A No, it does not.

MR. BIDDLE: If the Court please, I have here the –

MR. CURTIN: If Your Honor please, I am cross-examining.

MR. BIDDLE: Go ahead.

BY THE COURT:

Q Let me ask you, the facts that you testified today, do you remember independently of any memorandum – have you got an independent recollection of those facts?

A Yes, I have.

Q It hasn't faded out of your mind?

A No, sir.

THE COURT: All right.

BY MR. CURTIN:

Q But the recollection is also predicated upon records, is it not, from the RCA Company?

A Partially.

Q To what extent are they based upon records from the RCA Company?

A I think only to the extent of the exact amount of money the two men were earning at the time they were killed and the exact ratings on their semi-annual rating sheets.

Q The ratings and their money, is that all?

A I believe that is correct.

Q You say everything else is based upon your own personal recollection and yet you only knew the man two and a half years?

A Yes.

Q Is that correct?

A That is correct.

MR. CURTIN: That is all.

MR. BIDDLE: If Your Honor please, I have the original letter that Dr. Ewing wrote to me right here in the file.

MR. CURTIN: That letter is not admissible, if Your Honor please.

THE COURT: It isn't necessary anyhow.

MR. BIDDLE: And the personnel officer from RCA will be here with the original personnel records.

THE COURT: All right, go ahead.

DIRECT EXAMINATION (Continued) BY MR. BIDDLE:

Q Now, Doctor, I believe Robert E. Reynolds, who was also killed in this accident in October 1948 along with Mr. Palya and Mr. Brauner, also worked at RCA under your supervision, did he not?

A That is correct. To be specific, Mr. Reynolds worked directly for Mr. Palya who worked for me.

Q In other words, Mr. Reynolds worked under Mr. Palya and you were Mr. Palya's superior?

A That is correct.

Q What can you tell us about Mr. Reynolds along the same line?

A Mr. Reynolds was hired by the company just after leaving college as a student engineer in accordance with the company's normal practice.

He was assigned shortly after coming to the company to field assignments in connection with the classified equipment which the group of which he was a part was making for the Government. Because of the fact that he was in field assignments rather than in the home laboratory he wasn't in a position to learn as rapidly from the older members of the profession as would have been desirable. As a consequence, his first year of service showed performance which was somewhat less than satisfactory. It was of some concern to Mr. Palya and myself that his progress didn't seem to be as rapid as his general capacities and capabilities promised, so that we thought for some time of the possibility of bringing him back to the home office to train him under more experienced engineers. This turned out to be not very practicable because there was no replacement for him in the field and instead of that we suggested to him that he undertake a course of reading and general private self instruction, which he did apply himself, to which he did apply himself quite diligently. As a consequence of this his performance increased to somewhat better than satisfactory at the time of his death. This I think can be brought out by the fact that the review made a few months before his death – the review of his performance – showed a marked improvement over those made previously.

At the time of his death he was due for consideration for a merit increase and I think on the basis of his performance to that time a raise of about 10 per cent would have been justified.

Q Now, at the time of his death he was getting –

A I believe the exact figure is $63.60 per week.

Q Which works out to – well, the Court has it on that –

THE COURT: Oh, yes, that is all right, whatever it is.

MR. BIDDLE: About thirty-one hundred and something, isn't it, Your Honor?

THE COURT: His last increase brought him up to $3,307.00 a year.

MR. BIDDLE: All right.

BY MR. BIDDLE:

Q Now, will you go ahead? What were his future prospects?

A I would venture to say in his connection – I would first say that I would only predict his future gross on the basis of his continuing as a working engineer and not as a supervisor.

Q Not as a what?

A Not as a supervisor of other engineers, and it seems to me reasonable that on the basis of his performance at the time of his death he would have proved about an average engineer in which case he would have received fairly steady increases and have leveled out, in my estimation, to about five or six thousand dollars per year at about age forty-five.

Q Well, can you say whether it is five or six? How old was he?

A He was twenty-four at the time of his death.

Q Twenty-four?

A Twenty-four.

Q And at what age group have you got him leveling out?

A At about forty-five.

Q At about forty-five. Well then, you said five or six. Which is which?

A I –

MR. CURTIN: Couldn't it be between?

THE COURT: Let it stand at five or six. That is what he says.

THE WITNESS: I would hate to make it more precise.

MR. BIDDLE: I see.

BY MR. BIDDLE:

Q And that again, as in the case of Mr. Palya, that estimate of yours is based upon his work as a working engineer?

A That is correct.

Q And it is not based on such speculative things as possible inventions or becoming an officer of the company or anything of that kind?

A That is correct, nor even assuming that he might have turned out to be a supervisor of other engineers in the smaller operations.

It is possible that he could have proven much more valuable than I have assumed here, but he was so young and had so little experience that his latent capacities hadn't had a chance to develop.

Q One other question: According to your recollection he was regular in his attendance at work?

A Yes, he was.

BY THE COURT:

Q Did you see anything wrong with his health?

A No, sir, he was very healthy indeed.

MR. BIDDLE: Cross-examine.

CROSS-EXAMINATION (Continued)

BY MR. CURTIN:

Q How long had you known Reynolds?

A Just over a year.

Q Just over a year. That memorandum you have before you is prepared from what?

A It was prepared from my own recollection of Mr. Reynolds' performance, from a resume of his salary, and semi-annual review.

Q What record did you use?

A In preparing this I used the letter referred to previously which I addressed to Mr. Biddle about a year ago.

Q Any other records?

A No. Oh, excuse me. In preparing this I used only the letter which was sent to Mr. Biddle a year ago.

Q But the letter from which this memorandum is derived, what did you use in preparing that?

A In the preparation of that I used some notes from RCA on his salary increases since he had been with the company, and the summary of semi-annual performance that I also got from the company.

Q So that the memorandum is a combination of your recollection and records of the company, is that correct?

A That is correct.

MR. CURTIN: That is all.

Now, if Your Honor please, for the record I ask that the testimony of this witness be stricken because it is not based upon past recollection or present recollection.

THE COURT: One minute, Doctor.

BY THE COURT:

Q I want to ask you the same question as to Reynolds as I did as to Palya; that is to say, independent of the records that you have, do I understand that your recollection is to the same effect as your present recollection?

A Yes.

Q You remember the man, of course?

A Yes.

Q He hasn't faded out of your memory?

A Not at all.

Q Do you remember what sort of work he did?

A Yes, I do.

THE COURT: Very well, I will overrule the objection.

MR. BIDDLE: If Your Honor please, those records I will now produce from RCA.

MR. CURTIN: If Your Honor please, the records it depends upon what records are produced –

THE COURT: Well, it doesn't seem to me necessary in view of your A B and C. Put them in if you want to, but it seems that that is all covered by your A B and C.

JOSEPH ABEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BIDDLE:

Q Mr. Abel, what is your position?

A I am the wage and salary administrator for the RCA Victor Division of the Camden plant.

Q And you have charge of the personnel records?

A Well, there is another section in the department, in the personnel department, which has the supervision of the records, but I do control the wages and the salaries, –

Q I see.

A – administer and control the wages and salaries.

Q Now, starting first with Albert Palya, was he employed by RCA?

A Yes, he was.

Q Did you know him?

A No, I did not.

Q Have you got his record there?

A Yes, I have.

Q He was employed in what capacity?

A He was employed as a working group leader of design research and development engineers.

Q I see. Now, what do your employment records show as to Mr. Palya and his rating as an employee, as an engineer?

A The employee record contains a service review which was made on September 27th of 1948.

The over-all evaluation of the employee's performance was superior beyond the satisfactory fulfilment of job requirements.

Q Now, Mr. Abel, so we may understand, you say you have an over-all rating. How do you make that rating up? Just what does it mean?

A We have a plan that covers all salaried employees in a very formal fashion. We have a review form which is broken down into factors and then there are some comments in addition to that that are made in reference to the employee's performance over a period of about a year.

Q How is that review form made up? Who makes it up?

A The director supervisor does the rating and then it is further reviewed by that supervisor's superior and then becomes a part of the personnel record.

Q Now, do you know Dr. Ewing who was just on the stand?

A Yes, I do.

Q What was his function in there? Was he the supervisor or what was he?

A He was the reviewer in this case. He was the reviewer.

Q Who made up these ratings?

A That is right. The man that made up this rating in this case was S. T. Eaton or T. T. Eaton. And then it was further reviewed by – you see, in our system –

Q I didn't understand what you said. The man who made up the rate was who?

A Eaton, E-a-t-o-n.

Q Eaton?

A That's right.

Q I see. And then what was Dr. Ewing's function in connection with this rating that you have?

A He was Mr. Eaton's supervisor.

Q I see, and he reviewed it?

A That's right.

Q The very record that you have before you?

A That is correct.

Q Now then, what did it show as to Mr. Palya's rating?

A What I gave you is a summary or an over-all evaluation which was superior.

Now, it is broken down into factors. The performance of the unit supervised was extraordinary. The effectiveness in dealing with people was extraordinary, that which the present job can fully utilize. The initiative was extraordinary as was the job attitude.

In the very good review – that is in the very good evaluation of his performance, were the following factors: Cost control, organizing ability, ability to develop subordinates, personal efficiency, job knowledge, judgment and dependability.

Q I see. Now then, with that record what were Mr. Palya's prospects? It has been agreed what his present rate of pay was at the time of his death, how about his future? Have you any standard rates in effect at RCA?

A Yes, we do.

Q Tell us what they are as applied to Mr. Palya.

MR. CURTIN:

That is objected to.

THE COURT:

I will hear it subject to the objection.

BY MR. BIDDLE:

Q Go ahead.

A The category or the classification, occupational classification, for Mr. Palya as working group leader has a maximum rate of $10,800 annually. We actually make our payments on the semi-monthly basis. Projecting within that scale on an average which is current and in accord with our normal operations, it can be said that he would have received about 5 per cent on an average a year, or 10 per cent every two years, which would bring him at about the age fifty-one to the maximum rate of that classification.

Now, that is if he remained within that classification, but obviously there were other opportunities. Engineering services today are at a premium and he may have been able to get into a higher category.

Q Well now, the category that you have put him in and which you say would have brought him to a maximum at age fifty-one of how much?

A $10,800; $450 S.M.

Q That is, do I understand, simply based upon his continuing to work over that period of years in the position which he held at the time of his death?

A That is correct.

Q But increasing, of course, with the years in experience?

A That is correct.

Q It doesn't take into consideration whether he might have branched out into some other field or became an executive or anything of that kind?

A No, it does not, but it is not unusual.

Q Now, have you got a tabulation showing the increases in rates of pay for an engineer of Mr. Palya's capacity in the employ of RCA?

A Well, I had Mr. Palya's record here from his –

Q But you said a moment ago that he would have gotten an increase of 5 per cent a year, something of that kind.

A That is right. That is based on the experience. It is part of my job to review all increases requested by supervisors in the plant. We have something like six thousand salaried employees. They have to be fanned – those requests have to be fanned across our wage schedules. We have a plan for review in this particular bracket and at about his salary the reviews would take place about every fourteen months and the average, as we experience it now, is about every two years, 10 per cent every two years.

In fact, in his particular case he received an adjustment that was 15 per cent in May of 1948, which is very unusual. We normally grant increases to 10 per cent. The average runs around 8.9 per cent, but this does show that there was outstanding performance.

Q What is the reason that he got 15 per cent?

A Based on outstanding performance.

Q Now, you have a tabulation, have you, of the increases to which you have testified?

A Yes, I have the original pay–roll record, but I have excerpted – I have excerpted here in my own hand the amount of increases since the date of his employ. This is a copy of the original personnel pay–roll folder.

Q You made this up yourself?

A Yes, I did.

MR. BIDDLE: I would like to have that marked –

THE COURT: Very well.

MR. BIDDLE: – and I offer that in evidence.

MR. CURTIN: Objected to.

THE COURT: I will note the objection and take it subject to the objection.

(Carbon copy of tabulation entitled “Albert Palya” was marked Exhibit P–l. A copy thereof follows:

“ALBERT PALYA

Age	Rate/Semi-Monthly	Probable Annual Earnings x 24	Year
41	$280	$ 6,720	1948
42	294	7,056	1949
43	308	7,392	1950
44	325	7,800	1951
45	340	8,160	1952
46	360	8,640	1953
47	375	9,000	1954
48	390	9,360	1955
49	410	9,840	1956
50	430	10,320	1957
51	450	10,800	1958
52	450	10,800	1959
53	450	10,800	I960
54	450	10,800	1961
55	450	10,800	1962
56	450	10,800	1963
57	450	10,800	1964
58	450	10,800	1965
59	450	10,800	1966
60	450	10,800	1967
61	450	10,800	1968
62	450	10,800	1969
63	450	10,800	1970
64	450	10,800	1971
65	450	10,800	1972”)

MR. BIDDLE: Cross-examine.

CROSS-EXAMINATION

BY MR. CURTIN:

Q Who is Mr. Eaton?

A Mr. Eaton was a supervisor, as indicated on this particular form.

Q What kind of a supervisor?

A I don't know definitely. Based on experience I would say he would have been a group supervisor.

Q He was an engineer also?

A Yes, he was.

Q An engineer also?

A Yes.

Q And this report that you have read from is his –

A His evaluation.

Q His evaluation of the work records of Mr. Palya?

A That is right.

MR. CURTIN: I ask, with Your Honor's permission, that the evidence testified by this witness be stricken from the record.

THE COURT: I will deny it. I will consider your motion at the close of the case.

MR. CURTIN: That is all.

THE COURT: All right.

DIRECT EXAMINATION (Continued)

BY MR. BIDDLE:

Q Mr. Abel, these records which you have produced are, I take it, the regular employment records of the company?

A Yes, they are. We have a folder like this for every employee.

Q I may have asked you this question before but I am not sure: The tabulation which you have made up and a copy of which has been offered in evidence shows the regular rates of increases in effect in the company for a man of Mr. Palya's capacity?

A That is correct.

Q Now will you turn to your records on Mr. Robert Reynolds, please?

Mr. Reynolds was also employed at RCA?

A Yes, he was.

Q And do you have his record there?

A I do.

Q What does that show?

MR. CURTIN: Just for the purpose of the record I want my objection noted again.

THE COURT: Same ruling.

A The service review made in April of 1948 and rated by Mr. Palya and reviewed by his superior, Mr. Schraeder, indicates an over-all evaluation of the employee's performance as good, performance fully competent.

In the factors of quantity of work, quality, dependability and job attitude, he was rated as very good and this meant that the employee's performance with respect to a factor is beyond the requirements for satisfactory performance of the job.

He was rated as satisfactory on the factors of adaptability, job knowledge, judgment and the factor of satisfactory is the employee's performance with respect to a factor meets the full job requirement as the job is defined at

the time of rating. A satisfactory rating means good performance.

I don't recall, did I indicate initiative, organizing ability and effectiveness in dealing with people? They are in the very good – rated as very good.

Q All right. Now, will you also tell us, Mr. Abel, what Mr. Reynolds future prospects were, based upon his record? And when I say "future prospects" I mean his regular prospects under the established rates in effect of the RCA.

A Right.

Q If he had carried on with them in the position which he held at the time of his death with natural improvement for years of experience.

A He was classified occupationally as a class C engineer. We have several other classifications: that of B, A and AA with corresponding rates of pay.

Now, he would have progressed, in my opinion he would have progressed, in accord with some studies that I have made recently on the basis of an average rate for certain ages, he would have progressed from his rate to a maximum of $6484.

BY THE COURT:

Q At what age?

A At the age of sixty-five. Now, that would have been on the basis of the actual rates as they obtained in RCA for engineers. It so happens that I have made a table which indicates that within five year periods the average rate for engineers of that age is equal to so much and I predicated it on that basis. In my opinion this is a very conservative estimate of what would have happened.

BY MR. BIDDLE:

Q What he would have received?

A That is right.

MR. BIDDLE: I would like to offer that tabulation in evidence also.

(Tabulation entitled “Reynolds” was marked Exhibit P-2. A copy thereof follows:

Exhibit P–2

“REYNOLDS

Age	Rate Weekly	Probable Annual Earnings (x 52)	Year	Age	Rate Weekly	Probable Earnings (x 52)	Year
24	71.80	3733.60	1948	46	126.65	6585.80	1970
25	71.80	3733.60	1949	47	126.65	6585.80	1971
26	86.36	4490.72	1950	48	126.65	6585.80	1972
27	86.36	4490.72	1951	49	126.65	6585.80	1973
28	86.36	4490.72	1952	50	126.65	6585.80	1974
29	86.36	4496.72	1953	51	124.70	6484.40	1975
30	86.36	4490.72	1954	52	124.70	6484.40	1976
31	98.31	5112.12	1955	53	124.70	6484.40	1977
32	98.31	5112.12	1956	54	124.70	6484.40	1978
33	98.31	5112.12	1957	55	124.70	6484.40	1979
34	98.31	5112.12	1958	56	124.70	6484.40	1980
35	98.31	5112.12	1959	57	124.70	6484.40	1981
36	114.24	5940.48	1960	58	124.70	6484.40	1982
37	114.24	5940.48	1961	59	124.70	6484.40	1983
38	114.24	5940.48	1962	60	124.70	6484.40	1984
39	114.24	5940.48	1963	61	124.70	6484.40	1985
40	114.24	5940.48	1964				1986
41	118.66	6170.32	1965	62	124.70	6484.40	1987
42	118.66	6170.32	1966	63	124.70	6484.40	1988
43	118.66	6170.32	1967	64	124.70	6484.40	1989
44	118.66	6170.32	1968	65	124.70	6484.40	
45	118.66	6170.32	1969”)				

MR. BIDDLE: Cross-examine.

CROSS-EXAMINATION

BY MR. CURTIN:

Q The evaluation of this record of Mr. Reynolds was made by his superior, I believe you said, Dr. Ewing, was it not?

A No, by Mr. Palya.

Q In other words, Mr. Palya reviewed Mr. Reynolds?

A That is right.

Q Is that correct?

MR. CURTIN: Now, for the record I also –

A (Continuing) No, pardon me, sir, may I correct that? Mr. Palya did the rating but it was further reviewed by Mr. Schraeder.

BY MR. CURTIN:

Q And in the first case the evaluation was made by Eaton and reviewed by Dr. Ewing, who testified, is that correct?

A That was it in the other case.

Q The first case?

A Right.

Q In the second case the evaluation was made by –

A Mr. Palya.

Q – Mr. Palya, and a reviewal by Mr. Schraeder?

A Mr. Schraeder.

MR. CURTIN: Now, for the record I move that the testimony of the witness be stricken from the record.

REDIRECT EXAMINATION

BY MR. BIDDLE:

Q The Mr. Palya you refer to, of course, is the Mr. Palya who was killed in the same accident with Reynolds?

A Yes, it is A. Palya and it looks like the same signature.

THE COURT: The same ruling. You can raise this question on a motion to strike out.

MR. CURTIN: I just want the record to show it anyway.

THE COURT: Oh, yes, I know.

MR. CURTIN: Because Your Honor knows enough about this case.

THE COURT: Yes, sure, I know a lot about it.

MR. BIDDLE: Is that all?

MR. CURTIN: That is all.

MR. BIDDLE: Mr. Curtin, will you agree that the rating records that Dr. Ewing referred to are the ones that have been produced by Mr. Abel, or do you want me to put him back on the stand?

MR. CURTIN: I don't –

MR. BIDDLE: In his testimony Dr. Ewing referred to certain ratings that he looked at from the records of RCA.

MR. CURTIN: I am not doubting that these are the records of RCA.

THE COURT: No, but they are the ones that Dr. Ewing referred to.

MR. CURTIN: I don't know what all he saw, if Your Honor please.

THE COURT: Well, Dr. Ewing, will you stand up a minute?

MR. BIDDLE: Let us get him back.

THE COURT: Don't put him back.

You heard Mr. Abel testify to certain records?

MR. EWING: Yes, sir.

THE COURT: Are those the records which you referred to in your testimony as your having looked at before you testified?

MR. EWING: They are.

THE COURT: They are. All right.

MR. CURTIN: Doesn't Your Honor think he ought to ask him if they are the only records he saw?

THE COURT: Are they the only records you saw?

MR. EWING: They are the only company records I saw, yes, sir.

THE COURT: All right.

MR. BIDDLE: Now, Mrs. Palya, would you take the stand?

ELIZABETH A. PALYA, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BIDDLE:

Q Mrs. Palya, you are the widow of Albert Palya?

A I am.

Q You are the plaintiff in this case to recover damages?

A Yes, sir.

Q Where do you live?

A I live at 16 Station Avenue, New Haddon Heights, New Jersey.

Q And you teach, I think, at the Haddonfield High School now?

A Yes, that is right.

Q Have you got any children?

A I have three children.

Q How old are they?

A The youngest is two and I have a boy eight and one eleven.

Q The one that is two is a boy or girl?

A A girl.

Q And how long were you and Mr. Palya married before his death?

A We were married a little over eleven years.

Q It is in evidence already here that he worked for RCA. Before that he worked for –

A Minneapolis Honeywell, Minneapolis.

Q And before that he was in business for himself?

A Yes, that is right.

Q Now, what was his working attendance? In other words, was he able to work regularly or –

A Yes, Mr. Palya was in very good health and he missed very few days at work. He seldom missed.

Q In other words, his employment was steady?

A Yes.

MR. BIDDLE: Cross-examine.

MR. CURTIN: I have no questions.

BY THE COURT:

Q What is your age, Mrs. Palya?

A I am thirty-eight.

THE COURT: All right.

RALPH H. MCCLARREN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BIDDLE:

Q Mr. McClarren, you are employed at the Franklin Institute, are you not?

A Yes, sir.

Q In what capacity?

A I am assistant to the executive vice-president.

Q Now, did you have at the Franklin Institute William Brauner who was killed in this accident October 1948?

A At the time Mr. Brauner was killed, I was director of the Electronics and Instruments Division of the laboratories for research and development. Mr. Brauner worked directly under my supervision.

Q He was an engineer?

A He was a research engineer, yes, sir.

Q What kind of an engineer, electrical, mechanical or what?

A He was a combination of electrical and physicist. He had training in both.

Q How long had he been there?

A He had been employed a little over two years at the time of his death.

Q What kind of an engineer was he with respect to his ability?

A Well, Mr. Brauner was an above average engineer. During the period of time with us he accomplished work of an unusual nature having the ability to thoroughly analyze a problem from the fundamental physics and mathematics, see that problem through its experimental stage and to actually devise, design and develop apparatus which conformed to his analysis of the problem to do a successful job.

Q Anything else outstanding about him?

A Well, he also showed tendencies toward invention, new ideas. In fact, prior to his employment with the Institute he worked with the General Electric Company and I know at the time he had made several inventions for the General Electric Company which he had on application filed with them.

Also with one of our projects we filed letters of patent for a particular machine that he developed during one of his projects with the Institute.

Q Who was that for, Simonds Abrasive Company?

A Simonds Abrasive Company, yes, sir.

Q Was he regular in his work?

A Very regular, seldom absent. In fact, he worked extra time most of the time.

BY THE COURT:

Q Did he give any idea as to what physical condition he was in? Was he a man apparently in good health?

A Very good health, yes, sir.

BY MR. BIDDLE:

Q Based upon your knowledge of Brauner that you have testified to and his employment, what can you tell us with regard to his prospects with the Franklin Institute as an engineer?

A Well, during Mr. Brauner's employment with us I made two recommendations for a salary adjustment. Both of those recommendations were granted by the Institute and I brought with me the official personnel department records, the employee record card, and that first recommendation was for a raise in salary effective January 22, 1947. He was granted a raise from $4400 per annum to $4750 per annum.

Again I made a recommendation for a merit increase to be effective January 1st, 1948. This was granted and that raised his salary to $5,050 per annum. And, just about the time of the accident, we were reviewing our personnel again and I know that I would have made a favorable recommendation for him effective the first of January 1949.

BY THE COURT:

Q How many engineers are there employed at the Franklin Institute?

A In our laboratories for research and development there are about 110 engineers.

BY MR. BIDDLE:

Q Now, based upon your standard rates at the Franklin Institute, what was Brauner's future?

A Well, Brauner on the whole and on the average would probably have received recommendations for increases, I would say with certainty he would have received favorable recommendations for increases and those would probably average about $400 a year.

I just made up a table here based on what the increases since have been for engineers doing comparable work and analyzing Brauner's case and what might be expected for his future.

MR. CURTIN: Just a moment until I see that memorandum. Have you an extra copy of that?

MR. BIDDLE: This is the only one I have complete.

THE WITNESS: And I have noted that in 1949 it is quite likely his salary would have been $5,450 and that increased about four hundred per year up until a maximum of $9,000 in 1960 and that is the top salary for the senior research engineer category at the present time. Brauner was a research engineer, the next higher promotion would have been to a senior research engineer.

He, of course, should he show executive ability and so forth, would have the opportunity to go to a section head or associate director of the laboratories.

BY MR. BIDDLE:

Q But your tabulation that you have made up from which you just testified is based upon – it does not take into consideration the possibility of his becoming a section head?

A No, sir. This takes into account the possibility that he would be promoted to a senior research engineer and I am sure he had all the qualifications for such.

Q And it is based again on your standard rate in effect at the Franklin Institute?

A Yes, sir.

Q For everybody in that category, that kind of an engineer?

A That is right.

Q Is that right?

A Yes, sir.

Q It doesn't take into consideration what he might have made out of the invention you were talking about, anything like that?

A Well, any invention that he would have made as a result of his work at the Institute would be assigned to the Institute or to the sponsors.

Q I see.

A But any invention he would make on his own, not pertaining to the work at the Institute, would not necessarily be assigned.

Q Have you got the typewritten ribbon copy of that?

A (The witness produced the original copy.)

MR. BIDDLE: I would like to offer this in evidence as Exhibit P–3.

(Tabulation entitled “William Brauner – Died October 6, 1948 – then age 34, American Experience Table – Life Expectancy 32.50 Years” was marked Exhibit P–3. A copy thereof follows:

“WILLIAM BRAUNER
Died October 6, 1948 – then age 34
American Experience Table – Life Expectancy 32.50 Years

Age	No. of years from date of death	Year	Probable Earnings
35	1	1949	5450
36	2	1950	6000
37	3	1951	6400
38	4	1952	6800
39	5	1953	7200
40	6	1954	7600
41	7	1955	8000
42	8	1956	8300
43	9	1957	8500
44	10	1958	8700
45	11	1959	8900
46	12	1960	9000
47	13	1961	"
48	14	1962	"
49	15	1963	"
50	16	1964	"
51	17	1965	"
52	18	1966	"
53	19	1967	"
54	20	1968	"
55	21	1969	"
56	22	1970	"
57	23	1971	"
58	24	1972	"
59	25	1973	"
60	26	1974	"
61	27	1975	"
62	28	1976	"
63	29	1977	"
64	30	1978	"
65	31	1979	"
66	32	1980	"
	32.50”)		

MR. BIDDLE: Cross-examine.

CROSS-EXAMINATION

BY MR. CURTIN:

Q In this particular case you were the one that evaluated the work of the employee yourself?

A Yes, sir.

MR. CURTIN: I have no further questions.

MR. BIDDLE: I think, Your Honor, that is everything.

THE COURT: All right.

MR. CURTIN: Are you going to rest?

THE COURT: Would you state, Mr. Biddle, for the record – I know you don't think it is material and it may not be, but just so we have it in the record, the ages of the other two widows?

(Discussion off the record.)

MR. BIDDLE: I will find out exactly and put it in.

MR. CURTIN: Put it in as an exhibit.

THE COURT: Put it in later, that will be all right.

MR. BIDDLE: I think that is all.

MR. CURTIN: Are you resting?

MR. BIDDLE: Yes.

PLAINTIFF RESTS.

Counsel for the plaintiffs subsequently supplied the following information:

"Mrs. Brauner was born on October 2, 1916 and now resides at 15 Benton Street, Wellesley 81, Massachusetts.

"Mrs. Reynolds (now Herring) was born on January 20, 1928 and resides at 416 North Bancroft Street Indianapolis, Indiana.")

DEFENDANT'S EVIDENCE

MR. CURTIN: Now, so that the record may be clear, Your Honor has made a ruling on a bar order with respect to the happening of the accident. In view of that Your Honor knows I am therefore not going to put in any testimony respecting the accident.

THE COURT: That is the order, I believe.

MR. CURTIN: So, in conformity with your pretrial conference –

THE COURT: I didn't say any – well, any testimony on the issue of negligence.

MR. CURTIN: That is what I meant.

I am going to offer these income tax returns because there seems to be some discrepancy between the amounts and so for whatever value they may have I am going to offer all these various photostatic copies of the three individuals' income taxes for the years involved, as Government's Exhibit No. 1.

The Government rests.

(Certified copy of withholding statement of wages paid and income tax withheld, Form W-2, filed by Robert E. Reynolds, 4l6 Bancroft Street, Indianapolis, Indiana, for the year 1946, was marked Exhibit D-l.

Certified copy of joint income tax return, with attached schedules, filed by Robert E. Reynolds and Patrician J. Reynolds, 4l6 Bancroft Street, Indianapolis, Indiana, for the year 1947, was marked Exhibit D-1 A.

Certified copy of income tax return, with attached schedules, captioned Robert E. & Patrician J. Reynolds, 4l6 Bancroft St., Indianapolis, Indiana, for the year 1948, was marked Exhibit D-1 B.

Certified copy of income tax return, with attached schedules, of Albert Palya, 1406 North Emerson, Indianapolis, Indiana, for the year 1945, was marked Exhibit D-1 C.

Certified copy of joint income tax return of Albert Palya and Elizabeth A. Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1947 was marked Exhibit D-1 D.

Certified copy of income tax return captioned Albert and Elizabeth Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1948, was marked Exhibit D-1 E.

Certified copy of joint income tax return, with attached schedule, of Albert Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1946, was marked Exhibit D-1 F.

Certified copy of joint income tax return of William Brauner and Phyllis Ambler Brauner, 36 Yale Avenue, Wakefield, Massachusetts, for the year 1945, was marked Exhibit D-1 G.)

(Discussion off the record.)

MR. CURTIN: The Government rests.

DEFENDANT RESTS

THE COURT: Both sides rest, gentlemen?

MR. BIDDLE: Yes.

THE COURT: Now, what do you want to do, do you want to brief this thing or do you want to just leave it in my hands? Do you want to file any requests, what do you gentlemen want to do?

I don't know that it is necessary, all I am going to do is make one finding. I think there are only three findings to be made; namely, the death, finding of negligence and the amount of the damages in each case.

MR. BIDDLE: I would think so.

THE COURT: I won't need any full statement of facts.

MR. CURTIN: That is what I was going to say. In view of Your Honor's bar order I don't think there will be any need for any special findings.

THE COURT: I think three findings will cover the whole thing. Now, if you want anything more –

MR. BIDDLE: I would like to do this, sir, I have already handed you a trial memorandum on the law of damages which is applicable to this case; namely, the law of Georgia, where the accident took place. Now I would like to, when we get the notes of testimony from the stenographer, I would like to file a memorandum with Your Honor giving you our views of what the testimony produced today justifies in the way of an award.

THE COURT: All right.

MR. BIDDLE: I would like to do that and do it very promptly.

MR. CURTIN: I probably might want to do the same thing. It might be of some assistance to Your Honor.

THE COURT: All right.

MR. CURTIN: That is only on the one point.

(Discussion off the record.)

EVIDENCE CLOSED

Reported by

Russell T. Harris, Jr.

I certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

/s/

Court Reporter

I N D E X

Philadelphia, Pa., November 27, 1950

PLAINTIFFS' EVIDENCE (2)	D.	C.	RD.	RC.
Douglas Hancock Ewing	16	20	–	–
	23	28	–	–
Joseph Abel	30	37	–	–
	38	43	44	–
Elizabeth A. Palya	46	–	–	–
Ralph H. McClarren	47	54	–	–

DEFENDANT'S EVIDENCE (56)

EXHIBITS	PAGE
Exhibit P-l, Carbon copy of tabulation entitled "Albert Palya"	36
Exhibit P-2, Tabulation entitled "Reynolds"	41
Exhibit P-3, Tabulation entitled "William Brauner – Died October 6, 1948 – then age 34, American Experience Table – Life Expectancy 32.50 Years".	53
Exhibit D-1, Certified copy of withholding statement of wages paid and income tax withheld, Form W-2, filed by Robert E. Reynolds, 416 Bancroft Street, Indianapolis, Indiana, for the year 1946	56
Exhibit D-1 A, Certified copy of joint income tax return, with attached schedules, filed by Robert E. Reynolds and Patrician J. Reynolds, 416 Bancroft Street, Indianapolis, Indiana, for the year 1947	57
Exhibit D-1 B, Certified copy of income tax return, with attached schedules, captioned Robert E. & Patricia J. Reynolds, 416 Bancroft St., Indianapolis, Indiana, for the year 1948	57

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Exhibit D-1C, Certified copy of income tax return, with attached schedules, of Albert Palya, 1406 North Emerson, Indianapolis, Indiana, for the year 1945	57
Exhibit D-l D, Certified copy of joint income tax return of Albert Palya and Elizabeth A. Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1947	57
Exhibit D-l E, Certified copy of income tax return captioned Albert and Elizabeth Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1948	57
Exhibit D-l F, Certified copy of joint income tax return, with attached schedule, of Albert Palya, 16 Station Avenue, Haddon Heights, New Jersey, for the year 1946	57
Exhibit D-I G, Certified copy of joint income tax return of William Brauner and Phyllis Ambler Brauner, 36 Yale Avenue, Wakefield, Massachusetts, for the year 1945	58

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. REYNOLDS	:	
v.	:	Civil Action No. 10142
UNITED STATES OF AMERICA	:	

SUR PLEADINGS AND PROOF

Before Kirkpatrick Ch.J.

In this case, in which the plaintiff sued under the Federal Tort Claims Act to recover damages for the death of her husband, judgment has been entered for the plaintiff and damages are now to be awarded.

Concededly, the law of Georgia, where the fatal accident occurred, is binding upon the Court in respect of the measure of damages, unless it is in conflict with the Federal Tort Claims Act (28 U.S.C., Sec. 2674). The Georgia statute provides that a widow may recover from one negligently causing the death of her husband "the full value of the life of the decedent, as shown by the evidence" which the statute defines as "the full value of the life of the decedent without deduction where necessary for other personal expenses of the decedent had he lived."

The Federal Tort Claims Act, after making the United States liable in tort claims to the same extent as a private individual under like circumstances, provides that it shall not be liable for punitive damages. The Act then says "If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only

punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." The defendant contends that this supercedes the Georgia statute and that, inasmuch as the plaintiff produced no evidence of what it cost the decedent to live and what part of his salary he customarily kept for his personal expenses, the evidence is insufficient to allow the Court to make a finding of the widow's "pecuniary injuries", with the result that the Court cannot make an award of damages in any amount. Unless the Georgia statute provides or has been construed to provide for damages "only" punitive in nature, the defendant's position cannot be sustained.

The defendant bases its argument upon a discussion of the origin and general nature of legislation providing a remedy for wrongful death, which appears in several opinions of the Supreme Court of Georgia, particularly Savannah Electric Co. v. Bell, 124 Ga. 663, and Pollard v. Kent, 59 Ga. App. 118. These opinions say that the Georgia death statute is "punitive so far as the defendant is concerned", but it is clear that what was meant was that, as in all death statutes, beginning with Lord Campbell's Act, the imposition upon a wrongdoer of civil liability for causing the death of another was to some extent a punitive concept. The Georgia Court makes it quite clear that the damages to be awarded to the plaintiff pursuant to the liability created by the statute, as distinguished from the liability itself, are not punitive damages by any definition. The same opinions declare them to be "compensatory" so far as the plaintiff is concerned.

The fact is that while the theory of the Georgia statute, like that of similar legislation elsewhere, may be described as punitive, the damages which it awards to a widow are entirely compensatory. Admittedly, the widow may, under the statute, recover more than the actual amount of money

which she has lost by reason of her husband's death, but the restitution of expected support from her husband rarely compensates a widow fully for his death. It takes no account of the various intangible items of injury such as emotional distress, loss of consortium, companionship, services, advice and guidance. The measure set up by the Georgia statute for "full" value of the life of the decedent, permitting the widow to recover for all these items as well as her actual out-of-pocket loss, may well be intended as an approximation, arbitrary perhaps, but none the less legitimate.

That the Federal Tort Claims Act, (28 U.S.C., Sec. 2674) was not intended to apply to a statute like that of Georgia becomes quite plain when the legislative history of the Section and the Amendment is considered. At the time of its enactment there were two states, Alabama and Massachusetts, in which the damages were, beyond question "only" punitive. Thus, under the Alabama statute the age and life expectancy of the deceased, his physical and mental condition and earning capacity are all immaterial. Louisville & Nashville R.R. Co. v. Tegner, 125 Ala. 593, 598. In that state as in Massachusetts the recovery for a wrongful death is determined solely by reference to the character of the wrongful act and the degree of the wrongdoer's culpability. The committee report shows that it was this measure of damage: which Congress intended to eliminate in death cases under the Tort Claims Act.

There is ample evidence in the case from which the "full value" of the life of this decedent within the meaning of the Georgia statute can be ascertained. In Pollard v. Kent, supra, the Georgia Court said, " . . . 'The actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss.' "

I have examined and considered the calculations submitted by the plaintiff in support of her claim. They

are relevant, but even though uncontradicted, are not binding upon the Court. In ascertaining damages in a death case the Court's task is not limited to adding together a number of mathematically ascertained elements. The problem is to find a sum which in the judgment of the Court or jury will fairly and justly compensate the widow for her loss. All the elements made relevant by the controlling law should be taken into consideration but the final award must come from an exercise of judgment by the trier of fact.

With these principles in mind, I affirm the first five of the plaintiff's requests for findings of fact. I also find as follows: The full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

I affirm the plaintiff's first two requests for conclusions of law. I affirm the third conclusion of law to the extent that the gross sum the decedent would have earned to the end of his life had he not been killed, reduced to its present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate the plaintiff for her loss.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and
ELIZABETH PALYA :

v. : Civil Action No. 9793

UNITED STATES OF AMERICA :

SUR PLEADINGS AND PROOF

Before Kirkpatrick Ch. J.

I affirm the plaintiffs' requests for findings of fact Nos. 1, 2, 3, 4, 5, 8 and 9. I also find as follows: The full value of the life of William Brauner as of the date of his death is $80,000. The full value of the life of Albert Palya as of the date of his death is $80,000.

I affirm the plaintiffs' first two requests for conclusions of law. I affirm the third conclusion of law to the extent that the gross sum each decedent would have earned to the end of his life had he not been killed, reduced to present cash value, is a proper factor to be considered in arriving at a sum which would fairly and justly compensate each plaintiff for her loss.

See the opinion filed this day in the case of Patricia J. Reynolds v. United States of America, Civil Action No. 10142.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA J. REYNOLDS	:	
v.	:	Civil Action No. 10142
UNITED STATES OF AMERICA	:	

DECREE

An order having been entered by Judge Kirkpatrick on October 12, 1950, in the above-entitled action, establishing as a fact that the death of Robert E. Reynolds was caused solely and exclusively by the negligence and wrongful acts and omissions of the officers and employees of defendant while acting within the scope of their office and employment;

And the issue of damages in the above-entitled action having been duly tried before Judge Kirkpatrick on November 27, 1950, and both sides having been heard by counsel and an opinion having been filed on February 20, 1951, finding that the full value of the life of Robert E. Reynolds as of the date of his death is $65,000.

Now February 27, 1951, on motion of Charles J. Biddle, Esquire, counsel for plaintiff, it is duly ordered that judgment be entered in favor of the plaintiff, Patricia J. Reynolds, and against the defendant, United States of America, in the sum of $65,000.

/s/ Kirkpatrick

Ch. J.

EXHIBIT I

[ORIGINAL ACCIDENT REPORT AND
ACCOMPANYING
DOCUMENTS; TEXT SET FORTH IN EXHIBIT J]

EXHIBIT J

[p.1]*

REPORT OF SPECIAL INVESTIGATION OF AIRCRAFT ACCIDENT INVOLVING TB-29-100XX NO. 45-21866

1. DATE AND TIME OF ACCIDENT: 6 October 1948, approximately 1408 EST
2. LOCATION OF ACCIDENT: Approximately 2 miles south of Waycross, Georgia
3. AIRCRAFT TYPE, MODEL, SERIES AND SERIAL NUMBER: TB-29-100XX No. 45-21866
4. AIRCRAFT HOME STATION AND ORGANIZATION:
   3150th Electronics Squadron
   Robins Air Force Base
   Robins Field, Ca, AMC
5. RESULTS TO AIRCRAFT: Demolished
6. HISTORY OF AIRCRAFT AND ENGINES:
   Aircraft: Date of Manufacture – 19 September **19XX**
   Total Hours - 305:00
   Date of last overhaul – New

[* The following stamps and marginalia are found on page 1 of the original document:]

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TO RESTRICTED

BY AUTHORITY OF AFR 205 -1

BY RTM DATE 14 SEP. 50

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TO ~~SECRET~~

BY AUTHORITY OF CS/USAF

BY [illegible] DATE 3 JAN. 49

0000760-52

ENGINES	1	2	3	4
Model	R-3350-57	R-3350-57	R-3350-57A	R-3350-57A
Number	M-460686	D-310027	D-310035	D-310313
Total hours	112:35	224:45	116:40	255:20
Hours since last major overhaul	112:35	New	New	15:20
Overhauling depot	OCAMA	Not appl.	Not appl.	OCAMA
Propeller model	Curtis K1.	Curtis K1.	Curtis K1.	Curtis K1.
Hours since last major overhaul	113:35	New	New	15:20

The aircraft was accepted with a total of 70 hours at Wright AFB on 25 June 1947. Records of the aircraft's history prior to this time were not available for study by the accident investigators.

7. PILOT, HOME STATION AND ORGANIZATION:
   Ralph W. Irwin, AO-666261
   Captain, USAF
   1st Experimental Air Service Squadron
   1st Experimental Guided Missile Group
   Proving Ground Command
   Eglin AFB, Eglin Field, Florida

8. PILOT HISTORY:

Flying Time	1st Pilot or Solo Student	Other Pilot or Other Student
Total hours	2507:00	616:00
Hours this type	2149:00	505:00
Hours this model	931:00	359:00

[p.2]*

[* The following stamps and marginalia are found on page 2 of the original document:]

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0000760-53

Flying Time	1st Pilot or Solo Student	Other Pilot or Other Student
Hours last 90 days	51:00	45:00
Hours last 30 days	13:00	8:00
Hours last 24 hours	1:00	0:00
Actual combat hours	327:00	109:00

Instrument rating: White, 30 March 1948, Eglin AFB, Florida

9. COPILOT, HOME STATION AND ORGANIZATION:
   Herbert W. Moore, Jr.,
   AO-48322
   Captain, USAF
   3150th Electronics Squadron
   Robins Air Force Base
   Robins Field, Ga., AMC

10. COPILOT HISTORY:

Flying Time	1st Pilot or Sole Student	Other Pilot Other Student
Total hours	2210:00	743:00
Hours this type	1524:00	261:00
Hours this model	0:00	71:00
Hours last 90 days	0:00	20:00
Hours last 30 days	0:00	8:00
Hours last 24 hours	0:00	1:00

Actual combat hours: 340:00

11. OTHER CREW MEMBERS, HOME STATION, ORGANIZATION AND HISTORY: See par. 12.

12. RESULTS TO CREW AND PASSENGERS:

Pilot – Capt. Ralph R. Irwin, AO-666261, Fatal

Copilot – Capt. Herbert W. Moore, Jr., AO-48322, No injury

Engineer – T/Sgt. Earl W. Murrhee, AF-1417471, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., No injury

12. RESULTS TO CREW AND PASSENGERS: (Contd)

Radio operator – T/Sgt. Melvin T. Walker, AF-6921342, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., Fatal

Left scanner – T/Sgt. Walter J. Peny, AF-6900255, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga. Minor injury

Right scanner – M/Sgt. Jack G. York, AF-6968181, 3150th Electronics Sq., Robins Air Force Base, Robins Field, Ga., Fatal

[p.3]*

AP – T/Sgt. Dervin T. Irvin, AF-6953492, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., Fatal

Navigator - 1st Lt., Lawrence W. Pence, Jr., AO-762068, 1st Exp. Air Service Sq. 1st Exp. Guided Missile Group, PGC, Eglin Air Force Base, Eglin Field, Florida, Fatal

Passenger – A. Palya, Civilian, RCA, Camden, N.J. – Fatal

Passenger – R. E. Cox, Civilian, Wright-Patterson Air Force Base – Fatal

Passenger – Robert Reynolds, Civilian, RCA, Camden, N.J. – Fatal

Passenger – E. A. Nechler, Civilian, Franklin Institute of Technology, Philadelphia, Pa. – Minor injury

Passenger – W. H. Brauner, Civilian, Franklin Institute of Technology, Philadelphia, Pa. – Fatal

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[* The following stamps and marginalia are found on page 3 of the original document:]

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BY RTM DATE 14 SEP. 50

0000760-54

13. NARRATION OF EVENTS:

On 6 October 1948 B-29 No. 45-21566, piloted by Capt. Ralph W. Irwin, AO-666261, took off from Robins AFB, on a research and development mission. The flight was to be a 5-hour mission for the purpose of completing an electronics project assigned to the organization. The landing list included the crew of 8 and 5 civilian technical representatives affiliated with the project. Three of the civilians were employed by the Radio Corporation of America and two by the Franklin Institute of Technology. The normal preflight and before takeoff checks were made by the crew and the takeoff and climb to 18,500 feet was without incident. Upon reaching approximately 18,500 feet the manifold pressure on No. 1 engine dropped to about 20 inches. An attempt to bring it back by the use of the manual emergency system and by replacing the turbo amplifier was ineffective so the engine was feathered. The crew was advised by the pilot to put on their parachutes and a descent and depressurization were started. During the process of feathering No. 1 a fire broke out that engulfed the aft half of the engine and the flames extended past the left scanner's window. Attempts to extinguish the fire by use of the engine fire extinguishers were to no avail. The manifold pressure on engine No. 2 then dropped to approximately 20 inches and about this time the main landing gear switch was activated and then the bomb bay doors were opened. Coincidental with the opening of the bomb bay doors the aircraft went into a spin to the left. The aircraft entered the spin violently and the centrifugal forces developed made movements by the personnel difficult. Two occupants in the

13. NARRATION OF EVENTS: (Contd)

forward compartment and two in the waist were able [p.4]* to abandon the aircraft and successfully opened their parachutes. The remaining six in the waist and three in the forward compartment were later found in or near the wreckage which was located approximately 2 miles south of Waycross, Georgia.

14. FACTS:

a. The flight was an authorized research and development mission and all civilian passengers were authorized to participate in aerial flights under the provision of paragraph 1A(6) AR 95-90 dated 26 April 1947.

b. Three of the five civilians on the landing list had previously flown in B-29's assigned to this squadron. (Exhibits I-1, I-2, I-3)

(1) A. Palya

(2) Richard B. Cox

(3) Robert B. Reynolds

c. Two of the civilians that were included on the landing list had never previously flown with the organization and there was no record of previous B-29 flying time. (Exhibit I-4, I-5)

(1) Will Brauner

(2) Eugene A. Meckler

[* The following stamps and marginalia are found on page 4 of the original document:]

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BY RTM DATE 14 SEP. 50

0000760-55

14. FACTS: (Contd)

d. The crew members had not previously flown together as a crew prior to the date of the accident. (Exhibit B-1, 06, B-2 Q37).

e. Weather was not a factor in this accident in that all sequences for the area were above VFR minimum. (Exhibit G).

f. The B-29 had approximately 15 hours flying time since the last 100 hours inspection. The aircraft was last flown six days prior to the date of the accident. No write ups reported by the pilot on Form I-A were considered applicable to the subject accident. (Exhibit H).

g. Technical Orders 01-20EJ-177 and 01-20EJ-178, dated 1 May 1947, were not complied with. These Technical Orders provide for changes in the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard. (Exhibit G-13).

h. Form F, Weight and Balance Clearance, was filed with Operations Section and the aircraft was loaded within the permissible 00 limits. (Exhibit F).

[p.5]*

i. Take-off and climb to altitude was accomplished without incident and all engine instrument readings were normal until an altitude of between 15,000 and 20,000 feet was attained when the manifold pressure on No.1 engine dropped to 20 inches. (Exhibit B-2 Q47).

[* The following stamps and marginalia are found on page 5 of the original document:]

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0000760-56

14. FACTS: (Contd)

j. The engineer attempted to restore the manifold pressure by utilizing the manual amplifier system. This proved unsuccessful and a new amplifier was installed. Then this failed to rectify the situation, the engine was feathered on the direction of the pilot. (Exhibit B-2 Q47).

k. Before the No. 1 engine was in a full feathered position, the left scanner and engineer observed a discoloration of the access doors to the engine accessory section. Fire broke out immediately according to the engineer's and scanner's statements. (Exhibit B-3 Q94).

l. The fire extinguishers were utilized in an attempt to extinguish the fire; however, according to the engineer's statement it helped only momentarily. Fire was next observed to engulf the entire engine and the wing area immediately to the rear of No. 1 engine. (Exhibits B-2 Q45, B-3 Q94).

m. The pilot, when feathering No. 1 engine, inadvertently hit the feather switch on No. 4 engine; however, according to the testimony the copilot immediately pressed the switch to unfeather No. 4 engine. (Exhibit B-1 Q10).

n. The copilot lowered the gear by the normal method after the engineer's attempt to lower the nose gear failed. (Exhibit B-1 Q11).

o. Bomb bay doors were opened by the pilot and according to the engineer and copilot the aircraft went into a spin to the left immediately after the doors were opened. (Exhibits B-1 Q11, B-2 Q48).

p. Several witnesses on the ground reported hearing a definite explosion when the B-29 was at what they estimated to be 15,000 feet and they further reported that the left wing came off at that time. (Exhibits C, 4, 5, 6, 7, 8, 9, 10 and 11).

14. FACTS: (Contd)

q. Examination of the wreckage revealed that No. 2, 3 and 4 engines showed no evidence of fire. The No. 1 engine showed evidence of fire around the right collector ring and supercharger and considerable melted and burned metal was found throughout the area from the accessory section to the supercharger. The No. 1 propeller was in the full feathered position. The No. 4 propeller blades were also found in the full feathered position. (Exhibit J).

[p.6]*

r. The crew was alerted to prepare to abandon the aircraft and the pilot started to descend and depressurize the aircraft. (Exhibit B.3 Q94).

s. Movement of personnel in the aircraft was greatly restricted by the centrifugal force imparted by the spin and only the left scanner, Sgt. Peny and a civilian technician, Mr. Meckler, were able to successfully abandon the aircraft from the rear compartment through the bomb bay. The copilot, Capt. Moore, and flight engineer, Sgt. Murrhee, were the only persons that successfully parachuted from the forward compartment through the nose wheel escape hatch.

t. The bodies of T/Sgt. Melvin, T. Walker and Lt. Lawrence N. Pence, Jr. were found free of the aircraft, with parachutes partially opened. Mr. Palya's body was also found free of the aircraft with parachute not released.

[* The following stamps and marginalia are found on page 6 of the original document:]

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BY RTM DATE 14 SEP. 50

0000760-57

14. FACTS: (Contd)

Apparently all three persons left the aircraft too late to successfully utilize their parachutes. (Exhibit G-12).

u. Inspection of the wreckage that was scattered over an area of two miles failed to disclose any evidence of fire either before or after the crash, except in the case mentioned in paragraph q above. (Exhibit J.)

v. Nine occupants were fatally injured in the crash. Two persons received minor injuries and two escaped without injury. (Exhibit G-12).

w. Investigation disclosed that the 3150th Electronics Squadron has not established permanent flying crews in the performance of their experimental flights. The organization had six pilots present for duty at the time of the accident. (Exhibit B-4 Q107).

x. The passengers and crew including the civilian passengers were not briefed prior to take-off on emergency procedures in accordance with AF Regulation 60-5. (Exhibits B-3 Q55 and 90, C-2).

y. The Commanding Officer of the 3150th Electronics squadron failed to exercise adequate supervision to insure that his aircraft commanders complied with the briefing requirements for emergency procedures as specified in AF Regulation 60-5. (Exhibit B-4 Q117, 119, 120 and 121).

15. DISCUSSION:

a. The pilot in feathering the No. 1 engine, inadvertently hit the feathering switch on the No. 4 engine. According to testimony, the copilot immediately pressed the switch to unfeather No. 4, however, since the propeller on the No. 4 engine was found in the feathered position,

15. DISCUSSION: (Contd)

it is believed that his attempt to unfeather this engine was unsuccessful.

[p.7]*

b. No. 1 engine showed evidence of fire around the right collector ring and supercharger, and considerable melted and burned metal was found throughout the area from the accessory section to the supercharger. The propeller was in the full feathered position.

c. The burned and damaged state of No.1 engine and examination of the other evidence available did not allow positive establishment of the causes for the fire and drop in manifold pressure. The fire was probably caused, however, by breaks which were found in the right exhaust collector ring. The fire may have been aggravated by non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.

d. The breaks found in the collector ring also lead to two possibilities which singularly or in combination could have caused the drop in the No. 1 engine manifold pressure.

(1) The fire from the collector ring could have burned a hole in the induction system thus permitting a loss in manifold pressure.

[* The following stamps and marginalia are found on page 7 of the original document:]

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BY RTM DATE 14 SEP. 50

0000760-58

15. DISCUSSION: (Contd)

    (2) The loss of exhaust gases through the breaks in the collector ring could have been sufficient to reduce the effectiveness of the turbo superchargers to a point where they could only maintain 20 inches of manifold pressure.

e. A possibility for the loss in manifold pressure on No. 2 engine is that the flight engineer inadvertently shut off the fuel for this engine during the process of feathering No. 1. The flight engineer is very positive, however, in his belief that this mistake was not made.

f. Two possible causes for the aircraft's entering into a spin are:

    (1) The pilot inadvertently caused the aircraft to stall. This possibility is discredited, however, by the pilot's experience and by the fact that the copilot observed the aircraft to be in a descending attitude, just prior to its entry into the spin.

    (2) The large fire in the No. 1 engine may have reduced the lift of the left wing sufficiently to cause the aircraft to fall off into a spin.

g. The disintegration of the aircraft which occurred during the spin was probably contributed to by the fire existing in the No. 1 engine.

h. The opinions of the maintenance personnel were contradictory; however, the Form 41B bears out the opinions of those who believed that the aircraft required more than the normal amount of maintenance. This aircraft was in commission 48.7% of the time since 1 April 1948, as compared to the Air Force average or 57% of B-29 aircraft in commission for a similar 6-month period.

15. DISCUSSION: (Contd)

[p.8]*

i. Vibrations reported in the aircraft's Form 41B in several instances could have been contributed to the maintenance required on the fuel system and other portions of the aircraft. These vibrations may or may not have been caused by loose rivets in the horizontal stabilizer undetected because of non-compliance with Technical Order 01-20EJ-99 which requires inspection of these rivets.

j. Confusion may have existed among the crew during this accident; however, the period of time from the start of the fire until the aircraft entered a spin was very short.

k. The projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above.

16. CONCLUSIONS:

a. The aircraft is not considered to have been safe for flight because of non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.

b. Fire developed in the No. 1 engine as a result of the failure of the right exhaust collector ring.

c. AF Regulation 60-5 was violated in that the passengers and crew were not properly briefed.

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17. RECOMMENDATIONS:

a. That a copy of the memorandum report of this investigation be forwarded to the Commanding General, Air Material Command for information and any action deemed appropriate.

b. That all Air Force agencies wherein civilian personnel participate in aerial flight in military aircraft be required to indoctrinate these civilians in the proper emergency procedures and in the use of emergency equipment appropriate to the types of aircraft in which they will be flying. This indoctrination should be in addition to and not in lieu of the prior to flight briefings required by AF Regulation 60-5.

c. That all agencies place special emphasis on the employment of highly qualified maintenance and flight personnel and the establishment of minimum permanent flight crews consisting of pilot, copilot and flight engineer for projects of this nature.

d. That where ever feasible flight test aircraft be bailed to the commercial concern conducting the test.

[p.9]*

e. That consistent with normal security measures, the civilian agency concerned be given the privilege of satisfying themselves as to the airworthiness of aircraft in which they are flying when bailment is not feasible.

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17. RECOMMENDATIONS: (Contd)

f. That copies of official AF accident reports not be sent to civilian agencies.

18. STATEMENT OF REBUTTAL: Not applicable.

JOHN W. PERSONS
Colonel, USAF
Chief, Flying Safety Division

[p.1]*

AFGAI-40

MEMORANDUM FOR THE CHIEF OF STAFF, UNITED STATES AIR FORCE

THRU: Deputy Chief of Staff, Materiel

SUBJECT: Aircraft Accident Involving TB-29-100**XX** No. 45-21866

1. Narration of Events: On 6 October 1948 B-29 No. 45-21866, piloted by Capt. Ralph W. Irwin, AO-666261, took off from Robins AFB, on a research and development mission. The flight was to be a 5-hour mission for the purpose of completing an electronics project assigned to the organization. The loading list included the crew of 8 and 5 civilian technical representatives affiliated with the project. Three of the civilians were employed by the Radio Corporation of America and two by the Franklin Institute of Technology. The normal preflight and before takeoff checks were made by the crew and the takeoff and climb to 18,500 feet was without incident. Upon reaching approximately 18,500 feet the manifold pressure on No. 1

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BY [illegible] DATE 3 JAN. 49

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engine dropped to about 20 inches. An attempt to bring it back by the use of the manual emergency system and by replacing the turbo amplifier was ineffective so the engine was feathered. The crew was advised by the pilot to put on their parachutes and a descent and depressurization were started. During the process of feathering No. 1 a fire broke out that engulfed the aft half of the engine and the flames extended past the left scanner's window. Attempts to extinguish the fire by use of the engine fire extinguishers were to no avail. The manifold pressure on engine No. 2 then dropped to approximately 20 inches and about this time the main landing gear switch was activated and then the bomb bay doors were opened. Coincidental with the opening of the bomb bay doors the aircraft went into a spin to the left. The aircraft entered the spin violently and the centrifugal forces developed made movements by the personnel difficult. Two occupants in the forward compartment and two in the waist were able to abandon the aircraft and successfully opened their parachutes. The remaining six in the waist compartment and three in the forward compartment were later found in or near the wreckage which was located approximately 2 miles south of Waycross, Georgia.

[p.2]*

2. Discussion and Facts:

a. The two civilians from the Franklin Institute of

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Technology, Mr. Brauner and Mr. Meckler, had never previously flown with the organization and there was no record of previous B-29 flying time.

b. The crew members had not previously flown together as a crew prior to the date of the accident. However, the members of the crew were well qualified individually.

c. The 3150th Electronics squadron does not establish permanent flight crews for their B-29 aircraft flights. The organization had six pilots present for duty at the time of the accident and this was believed insufficient to establish fixed crews and still maintain pilot proficiency.

d. The passengers and crew were not briefed prior to takeoff on emergency procedures in accordance with AF Regulation 60-5.

e. The Commanding Officer of the 3150th Electronics Squadron did not exercise adequate supervision to insure that his aircraft commanders complied with the briefing requirements for emergency procedures as specified in AF Regulation 60-5.

f. The pilot in feathering the No. 1 engine, inadvertently hit the feathering switch on the No. 4 engine. According to testimony, the copilot immediately pressed the switch to unfeather No. 4, however, since the propeller on the No. 4 engine was found in the feathered position, it is believed that his attempt to unfeather this engine was unsuccessful.

g. Technical Orders 01-20EJ-177 and 01-20EJ-178, dated 1 May 1947, were not complied with. These Technical Orders provide for changes in the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard.

h. No. 1 engine showed evidence of fire around the right collector ring and supercharger, and considerable melted and burned metal was found throughout the area

from the accessory section to the supercharger. The propeller was in the full feathered position.

i. The burned and damaged state of No. 1 engine and examination of the other evidence available did not allow positive establishment of the cause for the fire and drop in manifold pressure. The fire was probably caused, however, by breaks which were found in the right exhaust collector ring. The fire may have been aggravated by non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.

[p.3]*

j. The breaks found in the collector ring also lead to two possibilities which singularly or in combination could have caused the drop in the No. 1 engine manifold pressure.

(1) The fire from the collector ring could have burned a hole in the induction system thus permitting a loss in manifold pressure.

(2) The loss of exhaust gases through the breaks in the collector ring could have been sufficient to reduce the effectiveness of the turbo superchargers to a point where they could only maintain 20 inches of manifold pressure.

k. A possibility for the loss in manifold pressure on No. 2 engine is that the flight engineer inadvertently shut off the fuel for this engine during the process of feathering No. 1. The flight engineer is very positive, however, in his belief that this mistake was not made.

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l. Two possible causes for the aircraft's entering into a spin are:

(1) The pilot inadvertently caused the aircraft to stall. This possibility is discredited, however, by the pilot's experience and by the fact that the copilot observed the aircraft to be in a descending attitude, just prior to its entry into the spin.

(2) The large fire in the No. 1 engine may have reduced the lift of the left wing sufficiently to cause the aircraft to fall off into a spin.

m. Testimony indicates that all of the personnel had been alerted to prepare to abandon the aircraft and had donned their parachutes prior to its entry into the spin.

n. Movement of personnel in the aircraft was greatly restricted by the centrifugal force of the spin and only the left scanner, Sgt. Peny, and a civilian technician, Mr. Mecklar, were able to successfully abandon the aircraft from the rear compartment. The copilot, Capt. Moore, and the flight engineer, T/Sgt. Murrhee are the only persons that successfully parachuted from the forward compartment.

[p.4]*

o. The disintegration of the aircraft which occurred during the spin was probably contributed to by the fire existing in the No. 1 engine.

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p. The aircraft had completed a 100 hour inspection 15 hours prior to this flight and was in a satisfactory condition except for technical order non-compliance.

q. The opinions of the maintenance personnel were contradictory; however, the Form 41B bears out the opinions of those who believed that the aircraft required more than the normal amount of maintenance.

r. Vibrations reported in the aircraft's Form 41B in several instances could have contributed to the maintenance required on the fuel system and other portions of the aircraft. These vibrations may or may not have been caused by loose rivets in the horizontal stabilizer undetected because of non-compliance with Technical Order 01-20EU-99 which requires inspection of these rivets.

s. Confusion may have existed among the crew during this accident; however, the period of time from the start of the fire until the aircraft entered a spin was very short.

t. The projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above.

3. Recommendations:

a. That a copy of the memorandum report of this investigation be forwarded to the Commanding General, Air Material Command for information and any action deemed appropriate.

b. That all Air Force agencies wherein civilian personnel participate in serial flight in military aircraft be required to indoctrinate these civilians in the proper emergency procedures and in the use of emergency equipment appropriate to the types of aircraft in which they will be flying. This indoctrination should be in addition to and not in lieu of the prior to flight briefings required by AF Regulation 60-5.

c. That all agencies place special emphasis on the establishment of a minimum permanent flight crew consisting of pilot, copilot and flight engineer for B-29's and larger aircraft when civilian personnel are to be carried.

[p.5]*

d. That where ever feasible flight test aircraft be bailed to the commercial concern conducting the test.

e. That consistent with normal security measures, the civilian agency concerned be given the privilege of satisfying themselves as to the airworthiness of aircraft in which they are flying when bailment is not feasible.

f. That copies of official AF accident reports not be sent to civilian agencies.

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0000760-38

[p.1]*

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON

Flying Safety Division
Office of The Air Inspector
c/o Inspector General, First Region
Langley Air Force Base
Langley Field, Va.

AFCAI-4G

SUBJECT: Summary of B-29 Aircraft Accident

TO: Commanding General
Strategic Air Command
Offutt Air Force Base
Fort Crook, Nebraska

1. A special investigation of a B-29 aircraft accident near a southern Air Force Base revealed that as the aircraft reached 18,500 feet at climbing power, the manifold pressure on No. 1 engine suddenly dropped to 20 inches. Emergency attempts to restore manifold pressure were unsuccessful. Further investigation disclosed that the pilot, in feathering No. 1 engine, inadvertently hit the feathering switch on No. 4 engine. At this time it was observed that the access door on No. 1 engine was

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0000760-61

AFCAI-4G, "Summary of B-29 Aircraft Accident," (Contd)

turning brown from excessive heat. The fire extinguishers were used without effect and then a severe engine fire was observed. While No. 1 engine was being feathered the manifold pressure on No. 2 engine decreased to approximately 20 inches. The main landing gear switch was actuated and the bomb bay doors were opened. The crew was alerted to abandon the aircraft and a short time thereafter the aircraft went into a violent spin to the left. Two occupants in the forward compartment and two in the waist were able to abandon the aircraft and successfully open their parachutes. The remaining nine personnel were killed when the aircraft crashed.

2. Findings:

   a. The aircraft commander, copilot and engineer had not flown together as a crew prior to this flight.

   b. The crew and civilian technicians on board were not briefed by the aircraft commander on emergency procedures prior to takeoff.

   c. The commanding officer of the squadron to which the aircraft was assigned failed to initiate follow-up action to determine whether his aircraft commanders were complying with existing regulations regarding briefing passengers and crew prior to takeoff.

[p.2]

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AFCAI-4G, “Summary of B-29 Aircraft Accident,” (Contd)

d. Technical Orders 01-20EJ-177, 01-20EJ-178 and 01-20EJ-99 were not complied with. The first Technical Order stated provides for changes in the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard.

e. No. 1 engine showed evidence of fire around the right collector ring and supercharger; however, the burned and damaged state of the engine did not allow for positive establishment of the causes for the fire and drop in manifold pressure. The fire was probably caused, however, by breaks which were found in the right exhaust collector ring. The fire may have been aggravated by non-compliance with Technical Order 01-20EJ–177, in that heat shields were not installed at the rear lower cowl assembly to prevent excessive heat from entering the accessory section.

f. Vibrations reported in several instances may or may not have been caused by loose rivets in the horizontal stabilizer because of non-compliance with Technical Order 01-20EJ-99 which requires inspection of these rivets.

3. The Accident Investigation Board concluded that the most probable cause factor for this accident was the failure to comply with Technical Order 01-20EJ-177.

4. The circumstances surrounding this accident are brought to your attention for your information and guidance.

BY COMMAND OF THE CHIEF OF STAFF:

MURL ESTES
Lt. Colonel, USAF
Deputy Chief,
Flying Safety Division

[p.1]*

TESTIMONY OF HERBERT W. MOORE, JR., CAPTAIN, USAF

Given to Robert J. D. Johnson, Major, USAF, Investigating Officer, Inspector General, First Region, Langley Air Force Base, Langley Field, Virginia, at Headquarters, Warner Robins Air Material Area, Robins Air Force Base, Robins Field, Georgia, on 11 October 1948.

Having been duly sworn and advised of his rights under the 24th Article of War, the witness was examined and testified as follows:

1Q Will you state your name, rank, serial number and duty assignment?

A Herbert W. Moore, Jr., Captain, USAF, A048322, Adjutant, 3150th Electronics Squadron.

2Q Captain Moore, will you give your flying experience in B-29 Aircraft?

A Approximately 100 hours. I can only guess that I have made 10 landings, have probably sat through maybe 30 of them.

3Q Are you a qualified B-29 first pilot?

A No, sir.

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4Q Have you previously flown with Captain Erwin?

A Yes, sir.

5Q To your knowledge, has the crew to include Sergeant Murrhee, Sergeant Peny flown with Captain Erwin and yourself on a previous mission? Have you over flown as a crew?

A I don't really know, sir, I really don't.

6Q Have you ever flown with Sergeant Murrhee, Sergeant Peny or Sergeant York before?

A I probably have, but not going as first pilot, some of those names I just know the man, but can think of people I have flown with. Just don't know if I have flown with them before.

7Q Is it a policy or practice of the 3150th Electronics Squadron to have established crews, or according to the needs, do you just pick people who aren't doing anything to go on a particular flight?

A As I understand it, there are established crews but we haven't been able to keep to that because of shortage of primarily officer personnel, There [p.2]* are regularly assigned flight engineers and crew chiefs, but I think even they alternate. On flight engineers, I am sure.

8Q On the 6th of October, who conducted the briefing of the passengers prior to the take-off?

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A I was late getting out there, sir, but Captain Erwin was there. I wasn't there for any briefing. When the flight was originally scheduled to go out in the morning at 8 o'clock and Captain Erwin had started the briefing then and checked the names of those that were there, checked them with the flight clearance, etc. I don't know if any further briefing was conducted because of the trouble they had with number four engine, which caused the flight to be cancelled.

9Q What was the trouble that you experienced with number four engine?

A There was a gasket that had to be replaced. I don't know just what gasket.

10Q Will you give in as much detail as you can recall the complete flight from the time of take-off until you abandoned the aircraft? It is quite important that you get as much detail in the proper sequence as you can remember.

A Well, the normal procedure was accomplished in starting the engines, and prior to taxiing out, the engineer reported that number two was running a little hot, whether that was oil temperature or head temperature, I don't know, but Captain Erwin was aware of it and favored that engine on taxiing out. On the engine run-up, number one checked alright and number two showed a magnetto drop of 100 RPM, then we checked three and four and they appeared alright. The power check, Captain Erwin elected to use number two because it showed the RPM drop , so he went at a full throttle with turbo on for approximately four seconds, which is a little longer than normal, to see if there was any loss of power. There was none, and I didn't think anything of it and neither did Captain Erwin. The take-off was normal and there was no loss of power after take-off, with gear up, flaps up, power was reduced to 43 inches and 2400 RPM. We had to climb through or around some light cumulus and I noticed that Captain Erwin was holding 185 IAS. The engineer reported one, two and four engines as running a little hot. At about that time, we cleared of the

clouds and Captain Erwin either reduced or let the manifold pressure come down to 40 inches during the climb and increased his air speed to 195. As nearly as I can recall, there was no further report of any trouble or malfunction of the engines until we reached about 18,500 or 19,000 feet. At that time either Captain Erwin or the engineer reported that the manifold pressure on number one had dropped to 23 inches. A conversation started between Captain Erwin and the engineer about the engine, and the engineer reported that the fuel consumption on that engine had dropped to, I believe, 125 gallons per hour. Captain Erwin then asked how the other instruments on that engine were reading; the engineer said that all appeared normal. I believe at about this time that Captain Erwin advised [p.3]* everybody to have their chutes on. Captain Erwin didn't think that there was too much cause for alarm, at least I believe he didn't, and I know I didn't, but we did put out our cigarettes then. I can only guess the time lapse between our noticing the trouble with number one engine and the time we reached 20,000 feet. When we reached 20,000 feet, Captain Erwin reduced power to 31 inches on the other three engines and I reduced the RPM to 2100. Then Captain Erwin asked the engineer to try to bring up the manifold pressure on number one manually. It hadn't fluctuated as I recall, held at 23. Then it was 23 on Captain Erwin's and 25 on the engineer's or vice versa. The engineer brought the manifold pressure up manually and I saw the indicator come up to 31 inches

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and then start falling right back to 23. Then Captain Erwin said he would feather number one. Captain Erwin was looking out the window at number one engine as he reached for the feathering button and accidentally pushed the number four feathering switch. I immediately pressed the switch, unfeathering. This was almost simultaneous with his pressing the switch to feather. He then pressed the feathering switch on number one. The engineer reported that fuel shut-off valves were closed, booster pumps were off, the mixture control to idle cut-off.

11Q Did he chop the throttle first?

A That I couldn't see. At the time Captain Erwin elected to feather number one, he put the plane in a descending attitude. I remember feeling the slight vibration that goes with an engine feathering. Captain Erwin ordered the cabin pressure released. Captain Erwin then told the left scanner to keep his eye on that engine and watch for possible outbreak of fire. The scanner immediately reported smoke coming from some part of number one engine. Captain Erwin then told the engineer to pull the fire extinguisher on that engine, which he did, and the scanner reported that the smoke disappeared, but came back almost immediately accompanied by a rapidly spreading fire. About a minute seemed to have gone by and I had not heard any cabin pressure released. I knew that it would be accompanied by either a noise or feel a pressure on the ears. I unbuckled my seat belt and turned around to look at the engineer and see what was going on and asked him if he has released the pressure. He said he had. Somebody then said to open the hatch leading into bomb bay; I realize now that it would be futile to try to get that door open without first releasing the pressure. Still nobody seemed to be doing anything, so I got up, took a step towards the bomb bay hatch. At about the time I took a step toward the hatch, Lieutenant Pence just turned to the door and it blew open. In stepping back across the nose-wheel door, I asked the engineer if he had dropped the nose-wheel. He said yes, so I

reached down to get the door open and somebody, either Lieutenant Pence or Sergeant Walker, came up and hooked the door in the up position, and I saw that the gear was still in the fully retracted position, so I pressed the gear down switch on the pilot's panel, and at the same time, Captain Erwin said what's wrong with number two, so I looked out the nose of the plane and could see that we are in a not too severe dive and about a twenty degree bank to the left and I noticed that Captain Erwin had a little more than half right aileron control, then he opened the bomb bay doors with the switch on the pilot's panel. It must have been at this time that the airplane was thrown into the spin. I was thrown forward against the bombardier's seat, facing to the rear. I can remember seeing someone standing by the nose-wheel escape hatch, holding on to one of the upright posts on the inside of the [p.4]* door. There was no confusion, and as I recall, not a word was being said by anyone at this time. I pulled myself back to the nose-wheel escape hatch and saw someone lying face-up in the well. The nose gear had extended partially but not enough to allow escape. I got a foot down in there and kicked that person on through. The person standing above me said "go", and I didn't hesitate and went on through after the person that I had pushed out.

12Q Was a feathering check made prior to take-off?

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0000760-72

A I don’t believe it was. Along that line, in one of the transition rides I had here, I started to make a feathering check one time and was told that you don’t check the feathering switches with this particular type feathering system because you can only feather, unfeather and feather.

13Q Do you know whether they are electrical?

A This one airplane we were in has the electric, I think. Believe it is Curtis, most of them have the Hamilton.

14Q Did you actually see number one in the feathered position?

A No, sir, I couldn’t from my position

15Q Was there any report received from the scanner up until the time you feathered number one engine?

A As nearly as I can recall, No, although Captain Erwin had been looking out the window at the engine from his position.

16Q Do you recall the position of the cowl flaps?

A No, sir.

17Q Did you personally observe any smoke or fire from number one?

A No sir.

18Q When you were thrown forward by the bombardier’s seat, did Captain Erwin appear to be having difficulty maintaining control?

A He wasn’t fighting the controls. At the time he reached for the bomb bay door switch, there was no grabbing, was looking around the cockpit, etc.

19Q When you were thrown forward by the bombardier’s seat, did you observe him having difficulty maintaining control?

A I don’t recall seeing him make any definite movements.

20Q When the hatch to the bomb bay was opened, were the bomb bay doors open at that time?

[p.5]*

A No, sir.

21Q Did Captain Erwin open the bomb bay doors after you were thrown forward by the bombardier's seat?

A No, sir, it was before I was thrown forward.

22Q Did you actuate the main landing gear switch in the pilot's compartment?

A Yes, sir.

23Q Did you make any observations out to the right toward number three or four engines that were unusual?

A No, sir, I was stooped down right beside co-pilot's seat.

24Q Did Captain Erwin give the order to abandon the aircraft?

A I had been off interphone since going back to the rear and did not hear him give the word to abandon the aircraft.

25Q What prompted you to leave?

A I was sitting there doing absolutely nothing and nobody seemed to be doing a thing. I knew you had to get these doors open and thought well, let's do something.

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26Q In actually abandoning the aircraft, why did you leave, did you see fire?

A When I was thrown forward and the airplane was in the spin, the centrifugal force, first experience I had had expect in training plane, and from the position I was in, I just didn't see what else could be done except to make for it.

27Q Did you observe Captain Erwin attempting to leave the pilot's seat?

A No, sir.

28Q Was there any smoke or fire in the pilot's compartment?

A No, sir.

29Q Can you state for sure which wing it fell off on?

A Was definitely on the left wing and the spin was to the left, too.

30Q Had you retracted the flaps?

A Flaps come up after take-off. Flaps at the time of the emergency were not let down.

[p.6]*

31Q Did you hear any report from the rear of fire, yourself?

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A At this time the scanner at the time pulled fire extinguisher, remember him saying the smoke disappeared and then it came back on.

32Q At the time Captain Erwin remarked what was wrong with number two, did you hear any further conversation with regard to number two engine?

A No, sir, I tried to see the instrument panel, but do not recall what I saw on it. It was all at the same time that I looked through the nose to see the attitude of the plane and the amount of control Captain Erwin had on the aileron.

MOORE

[p.7]*

TESTIMONY OF EARL W. MURRHEE,
Technical Sergeant, USAF

Given to Robert J. D. Johnson, Major, USAF, A037150, Investigating Officer Inspector General, First Region, Langley Air Force Base, Langley Field, Virginia at Headquarters, Warner Robins Air Material Area, Robins Air Force Base, Robins Field, Georgia, on 11 October 1948.

Having been duly sworn and advised of his rights under the 24th Article of War, the witness was examined and testified as follows:

33Q Will you state your name, rank, serial number and duty assignment?

A Technical Sergeant Earl W. Murrhee, serial number 14171471, my duty is flight engineer. Duty when not flying is inspector.

34Q Are you a graduate of an accredited AM school?

A I went through an aircraft sheet metal course while working for Pan-American Air Ferries and at the time of the Army taking the air ferrying over, was November 1, 1942, we enlisted in the Air Force. In fact, most everyone did there, and at the time they had a shortage of mechanics on the line and I went on the line for eight months line duty in order to receive my AM rating.

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35Q Approximately how long have you been working with B-29's?

A Since July 1944.

36Q Approximately how much flying time do you have as a B-29 engineer?

A Somewhere around 500 hours. Not positive, just a rough estimate.

37Q Had you ever flown with Captain Erwin prior to the 6th of October?

A No, sir, first flight.

38Q Were you assigned as flight engineer on the morning flight that was cancelled?

A Yes, sir.

39Q What was the reason that the flight was cancelled?

A The civilian electronic engineers had not arrived on the field, that was my understanding. I was out at the plane until the flight was cancelled, went in to see the operations officer to see when flight was going and he said had been cancelled until 1 o'clock.

40Q Did you make the pre-flight inspection?

[p.8]*

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A Yes, sir we pressure checked all four engines in the morning and found one fuel leak, number four engine, right fuel injection pump at float seal and that was cleared up immediately.

41Q When you say cleared up, what do you mean by that?

A I mean seal was replaced and pressure checked and there was no leak.

42Q Were you aware of any mechanical defect at the time the flight was postponed until later in the afternoon.

A No, sir.

43Q What did your briefing consist of prior to the take-off by Captain Erwin?

A Captain Erwin arrived at the airplane and checked his clearance to make sure that each man was present and had his parachute. That's before boarding the plane and he made his rounds, walked around landing gears and engines before he got into the plane.

44Q Did you as flight engineer brief anyone on escape hatches and emergency exits?

A The Air Force personnel was well-informed in the case of emergency what they were supposed to do. The civilian personnel, I had nothing to do with, do not know what they knew or anything like that.

45Q To your knowledge, did anyone brief the civilian personnel in regard to emergency procedure?

A Some had just come down, whether they had been briefed, I do not know. Some had been briefed, that was the regular men of the Field here that stay in our squadron all the time, Mr. Reynolds and Mr. Paula.

46Q In accomplishing the daily pre-flight, did you check your prop feathering?

A Yes, sir, they are electric and can check those without engines going. They are not pre-flighted. Usually wait until the pilot is present before we make our engine run-ups, that's prior to take-off.

47Q Will you give us a brief discription in detail of everything that occurred from the time you took off until the emergency, keeping in mind the sequence and conversations that you overheard from the others?

A From the ground up, sir, it was perfectly normal, that is the instruments were all normal. We had no indication of trouble of any type until we [p.9]* got up 20,000 feet and the pilot was preparing to level off, and before any power reductions were made, number one engine lost manifold pressure, dropped to 20 inches. I used emergency to bring it back up, that is manually, to 30 inches and it would not hold. By that time, Sergeant York, crew chief, had come up front and he changed the amplifier, that is number one engine, and I asked for report from scanners. Left scanner, Sergeant Peny reported back that number one engine looked ok to him visually. At that time, Captain Erwin decided to feather number one and number one engine was feathered. I noticed the access door of the accessory section was turning a light brown.

[* The following stamps and marginalia are found on page 9 of the original document:]

CLASSIFICATION CANCELLED OR CHANGED

TO RESTRICTED RESTRICTED

BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-77

48Q Would you give me the sequence in feathering?

A The pilot pushed the feathering button in and I immediately pushed the fuel shutoff valve to the off position, also turning off tank and engine fuel shutoff valves and pulled fire extinguisher. The fire seemed to stop momentarily. I glanced at number two engine instruments and number two engine was losing manifold pressure same as number one did. Informing Captain Erwin, Captain Erwin suggested to hold feathering of number two. At that time, the fire in number one engine, there was a blaze coming out of number one engine out of the cowling, accessory, and I had a report from the scanner that it was coming out of the oil cooler which is on the bottom. At that time Captain Erwin ordered everyone to stand by to abandon ship. This all happened in a second, sir. Captain Erwin pulled the emergency depressurizing valve, opening bomb bay doors at the same time, which seemed to throw the airplane violently to the right. Captain Erwin or Captain Moore, not positive, but one of them said to abandon ship. At that time the lunge threw me on my back in the engineer's seat. Captain Moore helped to open the lower hatch door and the next movement of the airplane threw me into the hatch and I got out as soon as possible through the lower hatch. Captain Moore told me that he kicked me out. I was stuck in the hatch. On opening my parachute, the airplane was to the rear of me and the next thing I heard was a puff and the airplane went down. It hit the ground before I did. The puff was a mid air explosion. There was pieces around me, I saw landing gears and everything in the air, exactly how it hit the ground, I don't know. I landed in a creek. Captain Moore landed approximately 150 feet in front of me. We both walked over to the plane and Captain Moore left immediately as soon as he looked the plane over, to make a phone call. At that time, I saw Sergeant Peny being carried off by some civilians. He was walking but was being helped by some civilians. I went over to see the extent of his injury. At that time the civilians noticed blood on the back of my head and advised me to let them take me to the hospital also,

but before leaving, a State Trooper and a Marine Sergeant were keeping the people back from the plane and that's just about all I remember about the plane. I stayed in the hospital until I was brought back that night.

49Q Had you cut back to your cruise setting at the time you noticed the loss of manifold pressure in number one?

[p.10]

A No, sir.

50Q Do you recall what your generator's readings were at this time?

A Particularly on number one, No, sir, I don't.

51Q What was your indicated air speed?

A 195, sir. I believe there is a five mile difference between my air speed indicator and the pilot's.

52Q What was the position of the cowl flaps?

A Approximately seven degrees, sir.

53Q Open?

A Yes, sir.

54Q What is the maximum travel of your cowl flaps?

A 6½ inches.

[* The following stamps and marginalia are found on page 10 of the original document:]

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BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-78

55Q In degrees?

A I am sorry, but don't remember off hand, do know, but can't think right now.

56Q What indication did you get from your fuel flow meters?

A They became erratic and we lost manifold pressure. Wouldn't say excessively just number one.

57Q Where the booster pumps on?

A Yes, sir.

58Q Were your cylinder head temperatures higher than normal?

A No, sir, highest was number four which was 205.

59Q What were your oil temperature readings?

A I believe, sir, approximately 80, between 75 and 80.

60Q Was there any abnormal instrument indications on any engines prior to the time you noticed the drop of manifold pressure in number one?

A No, sir, with the exception of number three, believe fuel flow motor showed it was using a little more fuel than the other engines. I mean approximately thirty gallons.

61Q What is the rate of the fuel flow?

[p.11]*

[* The following stamps and marginalia are found on page 11 of the original document:]

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BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-79

A For that power setting, one, two and four was using around 210 per hour and number three approximately 240 per hour. That was 2400 RPM, 39 inches manifold pressure.

62Q Did you handle the throttle?

A Pilot handles the throttle entirely. Only thing I handle is fuel mixture and power shutoff valves in feathering an engine.

63Q Did you observe the throttle being retarded before feathering?

A Yes, sir, he brought the throttle back slightly, not completely off, at one time before pushing the feathering button.

64Q Did he at any time return the throttle to open position?

A No, sir, don't believe he did. The throttle was pulled back because he reduced RPM. Manifold pressure had dropped, but he still had RPM on engine.

65Q You say that the aircraft was turned to the right, did you notice the flight instruments?

A No, sir, unable to because of the way I was thrown.

66Q Where were you thrown?

A I was practically lifted up and laid down in my seat, thrown to the left, looking back. I was facing the rear. The airplane was in a right bank and when it went out of control, still went further to the right, sir, and after that, I really don't know what happened to the instruments.

67Q Did you hear any explosion prior to leaving the aircraft?

A No, sir.

68Q Was there any smoke in the cockpit?

A No, sir.

69Q Could you actually see the flames coming out of the engine?

A Yes, sir.

70Q How long would you estimate it was from the time you feathered until the time that you noticed the discolor on the access door?

A Just a second sir.

71Q But all that time the fuel pressure indicator was holding up?

[p.12]*

A It was either feathered or being feathered. I looked up, and had completed my end of the feathering. Looked out and seen fire, informed the pilot.

72Q Pilot did definitely lead in the feathering procedure?

A Yes, sir.

73Q He reduced the throttle and hit the feathering switch?

A Yes, sir, would say we did it together, sir. The airplane engine itself was feathered in the proper way. If I may say so, I flew transition training flights approximately a year and a half in Birmingham Alabama; we flew practically day and night, checking out crews for ferrying purposes and

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[* The following stamps and marginalia are found on page 12 of the original document:]

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BY RTM DATE 15 SEP. 50

0000760-80

we feathered props during our training course numbers of times and that's why I can state that we did feather the prop. We never had the opportunity to feather number two, sir.

74Q Had you ever had an engine fire before?

A No, sir, first fire. Have lost engines, but no fires.

75Q What manifold pressure can you obtain on the ground without turbo?

A Approximately 40 inches.

76Q Is there only one set of feathering switches?

A One set, sir. One for each engine.

77Q Did you make any observations on, the number three or four engines?

A Visually, sir. Have a thirty minute report from scanner and I can see three and four engines fairly well from my position in the plane.

78Q Did you happen to look over there at the time number one was feathered?

A No, sir.

79Q Previously?

A No, sir.

80Q Was Sergeant York right scanner?

A Yes, sir. Sergeant Irvin, sir, I believe had replaced him. In fact he had been in the rear for some time discussing the auto pilot with the radar men.

81Q Your instruments didn't reveal anything unusual for No. 3 and 4 engines?

[p.13]*

A No, sir, not a thing with the exception of the fuel. We held the same power setting after take-off until we reached 20,000 feet.

82Q Were you aware that Captain Erwin inadvertently hit number four feathering button?

A No, sir.

83Q Did this B-29 have the high pressure bomb bay door opening?

A Yes, sir, 1500 pounds.

MURRHEE

[* The following stamps and marginalia are found on page 13 of the original document:]

CLASSIFICATION CANCELLED OR CHANGED

TO RESTRICTED RESTRICTED

BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-81

[p.14]*

TESTIMONY OF WALTER J. PENY,
STAFF SERGEANT, UASF

Given to Robert J. D. Johnson, Major, USAF, A037150, Investigating Officer, Inspector General, First Region, Langley Air Force Base, Langley Field, Virginia, at Headquarters, Warner Robins Air Materiel Area, Robins Air Force Base, Robins Field, 1, Georgia, on 11 October 1948.

Having been duly sworn and advised of his rights under the 24th Article of War, the witness was examined and testified as follows:

84Q Will you state your name, rank, serial number and duty assignment?

A Walter J. Peny, Staff Sergeant, 6980255, I am 747 at the present time, 747 is mechanic, primary 750.

85Q Are you a graduate from an accredited Air For[ce] AM school?

A No, sir, lacked a month. I was in Panama at the time and our outfit moved.

86Q Approximately how much flying time do you have in the capacity of scanner of B-29?

A Well, I would say approximately 200 hours.

[* The following stamps and marginalia are found on page 14 of the original document:]

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BY AUTHORITY OF AFR 205 -1 — ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-82

87Q Prior to the 6th of October, had you ever flown with Captain Erwin or Sergeant Murrhee?

A I know I have flown with Sergeant Murrhee but do not remember off hand whether I have flown with Captain Erwin but imagine I have.

88Q Prior to the take-off on 6 October, were you briefed by the pilot, Captain Erwin?

A No, sir, not that I recall.

89Q Did you brief the civilian passengers in the rear in regard to escape hatches, use of parachutes or emergency procedures?

A No, sir.

90Q Did you observe or overhear anyone else briefing them?

A No, sir, the only thing that I remember was the civilian who followed me through the escape hatch, the one who got out, claimed that he didn't even know how to get out of a B-29.

[p.15]*

91Q Had you ever flown with any of the civilian passengers before that were on the loading list the 6th of October?

[* The following stamps and marginalia are found on page 15 of the original document:]

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BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-83

A I think two of them are radar personnel, do not remember what their names are.

92Q Was your position that of left scanner on take-off?

A Yes, sir.

93Q Did you make any reports on the take-off or on the climb to the pilot or engineer?

A Prior to take-off, we gave control check and on take-off, gave flight check, landing gear check and engine report. At that time engines were operating properly.

94Q In as much detail as you can will you start from your first observation that was requested by Captain Erwin and give all the conversations and sequence of events that happened until you abandoned the aircraft?

A Well, the first incident I remember the engineer stated that he was losing power, manifold pressure and RPM on number one. The engineer called me for a report in regard to number one engine and at that time everything was normal. Immediately following, the access door to the accessory section turned a brown color. At that time the engineer had begun feathering the prop. At the same time a fire broke out in the oil cooler and I reported that to the engineer. The engineer used up two fire extinguishers, which momentarily extinguished number one fire. In approximately five or six seconds, fire broke out completely over number one engine and pilot reported to me to notify the crew to put on their parachutes and get ready to bail out. At the same time the bomb bay doors were opened. The engineer notified the pilot that number two engine was losing RPM and manifold pressure. At that time it seemed to me that the whole wing was enveloped in a flame and the ship went into a spin. I unfastened my buckle and lunged for the escape hatch to the bomb bay, and it seems while I was trying to open the bomb bay escape hatch that I blacked out momentarily and the next thing I remember is going through the hatch. I pulled the rip cord

and the chute opened, and my right arm was caught in the chute line. I finally managed that loose and landed in the swamp approximately a mile from the airplane. Somebody depressurized the airplane just before the wing was enveloped in a flame.

95Q Did Captain Erwin or anyone give you the order to abandon the aircraft?

A I never received that order, sir.

96Q Did you hear any explosion before you left the airplane?

[p.16]*

A No, sir, seems a few seconds after I left I heard a puff in the skies, that's all. A piece of metal flew by the parachute. Never noticed the ship or the men.

97Q Did you notice the position of any of the other passengers when you were attempting to open the escape hatch?

A No, sir, I could not, but remember on leaving my seat, the right scanner, Sergeant Irwin, was standing. At the time it was on fire, the civilians were getting their chutes on. They were sitting up next to the escape hatch.

98Q What type of chutes did the civilians have?

A Same as we had, back-pack.

[* The following stamps and marginalia are found on page 16 of the original document:]

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BY AUTHORITY OF AFR 205 -1 ~~SECRET~~

BY RTM DATE 15 SEP. 50

0000760-84

99Q Can you remember whether the prop was feather[ed] before you noticed the access door turning brown?

A No, sir, the prop was being feathered at that time, and the prop was finally fully feathered.

100Q The access door turned brown?

A Yes, sir.

101Q You were in the left scanner's position?

A Yes, sir.

PENY

[p.1]*

B/L fr. WRAMA dtd 28 oct 48 subj: "Exhaust Bracket"

1st Ind MCMM/TBMcD/jes

HQ AMC. Wright-Patterson AF Base,
Dayton, Ohio 3 December 1948

TO: Commanding General, Warner Robins Air Materiel Area, Robins Air Force Base, Warner Robins, Georgia

1. The following conclusions have been reached in connection with the basic letter and inclosure:

a. In view of the condition of the exhibit, no conclusive evidence of the cause of the fire was determined. The following are probable conditions which might have caused the fire:

(1) If the crack in the tailpipe clamp progressed enough to permit the tailpipe to part sufficiently to allow exhaust gas to leak into the accessories section, fuel fumes could have been ignited and caused the fire.

(2) If Technical Order 01-20EJA-177 has been complied with, undoubtedly the heat shrouds for cabin hot air have been removed and the exhaust tailpipes are then unprotected in the accessories section. Fuel leakage could have gotten on the hot tailpipes and started the fire. Heat from the fire could have distorted the tailpipes and clamps allowing exhaust tailpipe gases to escape into the accessories section further adding to the fire.

[* The following stamps and marginalia are found on page 1 of the original document:]

RESTRICTED

b. It might also be noted that this is the first report of a failure of this type received by this Unit. There have been other exhaust system failures reported but they have pertained specifically to nipples and collector ring parts.

BY COMMAND OF GENERAL McNARNEY:

/s/ [Illegible] Col. USAF
THOMAS B. McDONALD
Brigadier General, USAF
Chief, Maintenance Division

1 Incl.
n/c

[p.1]*

HEADQUARTERS
WARNER ROBINS AIR MATERIEL AREA
ROBINS AIR FORCE BASE
Office of the Commanding General

ROBINS FIELD, GA
Dec 14 1948

SUBJECT: Supplemental Aircraft Accident Report, TD-29, Serial No. 45-21866.

TO: Commanding General
WRAMA, Robins AFB
Robins Field, Georgia

1. A complete investigation has been made of No. 1 engine of subject aircraft that crashed at Waycross, Georgia, 6 October 1948, as a result of an engine fire in this engine, and subsequent loss of control by the pilot. This report is submitted as a supplemental report to the AAF Form 14 that has already been completed and forwarded for the accident. A brief description of the accident is as follows:

a. Normal climb was made to 18,000 ft. when the manifold pressure on No. 1 engine dropped from 39″ to 20″. The manual supercharger control was used and a momentary surge to 30″ resulted, but immediately returned to 20″. The pilot elected to feather No. 1 engine but pressed No. 4 feathering switch; the co-pilot grabbed the pilot's hand, returned the No. 4 switch to an unfeathered position and then feathered No.1 engine. The engineer reported the fuel shut off, booster pump off, and mixture control in idle cut off. At this time, it was observed that the

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[* The following stamps and marginalia are found on page 1 of the original document:]

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C-10-6-4

access door to the accessory section of No. 1 engine was turning brown from excessive heat. The fire extinguishers were used with little effect, and then a severe engine fire in No. 1 engine was observed. While No. 1 engine was being feathered, the manifold pressure on No. 2 engine decreased to approximately 20″. The airplane went out of control, spun to the left, and crashed. An investigation on the ground, after the crash, revealed that No. 1 and No. 4 propellers were feathered.

2. Findings:

a. T.O. 01-20EJ-177, dated 1 May 47, was partially complied with in that the exhaust manifold has been installed but the heat shields [p.2]* were not installed at the rear lower cowl assembly. (AAF Form No. 60A, Remarks: "19 June '47 – Wright Field – TSFMB – T.O. 01-20EJ-177 partially c/w. Exhaust manifold installed. Shields not installed. /s/ R. H. Melody."

b. Clamp Assy, Part No. CL04005, a part of the exhaust rear manifold assembly, was cracked as indicated in the inclosed photo. This clamp assembly attaches the flexible joint assembly, Part No. CL04003 of the Exhaust Rear Manifold assy to Section Assy, Part No. A12202, on the inboard side of No. 1 engine.

c. A visual inspection of No. 1 engine revealed that the fire had started in the area of the inboard exhaust rear manifold assembly and then entered the accessory section and seriously burned the upper right inboard side of the accessory section. Molten metal was found on supercharger hood of inboard supercharger on No. 1 engine. The screwjack Assembly Coil Flap, Part No. 555A,

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[* The following stamps and marginalia are found on page 2 of the original document:]

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that was located immediately above the rear exhaust manifold showed more indications of fire damage than any other part of the engine.

3. Conclusions:

a. The fire in No. 1 engine started in the vicinity of the inboard rear exhaust manifold assembly. The fire appears to have started in the area surrounding the Flexible Joint Assembly, Part No. CL04003, progressed into the accessory section because of the absence of the heat shields as required by T.O. 01-20EJ-177, and then continued to spread in the upper inboard side of the accessory section.

b. Although Clamp Assy., Part No. CL04005 was found cracked, it was impossible to determine whether this break occurred in flight or as a result of the crash. (Report by Wright Field Lab.) If this break occurred during flight, allowing the flexible joint assy, Part No. CL04005, to become disengaged, exhaust fire could have entered the accessory section because of the absence of the heat shield required by T.O. 01-20EJ-177, and would have been the source of this engine fire.

c. T.O. 01-20EJ-177 was not completely complied with as indicated in the "Findings". Paragraph 2b, subject T.O. states: "a heat shield will be installed at the rear lower cowl assembly prior to installation of the rear exhaust collector ring, to prevent [p.3]* excessive heat from entering the rear of the engine." The failure to comply with T.O. 01-20EJ-177 results in a very serious fire hazard prevailing in all engines. The exhaust stack from the front exhaust collector ring passes underneath and to the side of the accessory section. Without the heat shields installed, there is nothing to protect the accessory section from the intense

[* The following stamps and marginalia are found on page 3 of the original document:]

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heat of this exhaust stack. The fuel injection pump is located in the accessory section over and above this exposed area of the exhaust. Any gasoline leaks from this fuel injection pump would cause fuel or fuel fumes to come in contact with the heat of the exhaust and start an engine fire.

d. No. 4 engine was found feathered when inspected on the ground after the crash. It is believed that this engine feathered as a result of the airplane Commander inadvertently pressing No. 4 feathering switch. The co-pilot disengaged the feathering switch for No. 4 engine, but did not visually check the condition of this engine because his attention was being concentrated on the fire in No. 1 engine.

e. No definite explanation can be made for the drop in manifold pressure in No. 1 engine. Any break in the exhaust system would have resulted in a partial loss of manifold pressure but it is doubted whether any noticeable loss of manifold pressure would have been caused. The condition of the engine, after the crash, precluded any further internal analysis.

f. No definite reason could be determined that would cause the manifold pressure on No. 2 engine to decrease. A possible explanation is that the engineer accidentally shut the fuel off on No. 2 engine when he was going through his procedure for feathering No. 1 engine.

3. Recommendations:

a. Since it appears that the failure to completely comply with T.O. 01-20EJ-177 is the most possible cause factor for this accident, it is recommended that definite

instructions be issued that will require complete compliance with this T.O. and eliminate any possibility of heat shields being omitted when this Technical Order is complied with.

/s/ H. A. MOODY

H. A. MOODY
Colonel, USAF
President, Aircraft Accident
Investigation Board

2 Incls:
Incl. 1. - Photo
Incl. 2. - 1st Ind. with B/L

[p.4]*

B/L fr President, Acft Accident Investigation Board, to CG, WRAMA, RAFB, Robins Fld, Ga. Subj: "Supplemental Acft Accident Report, TB-29 Serial No. 45-21866.

1st Ind Dec. 17, 1948

HEADQUARTERS, WRAMA, RAFB, Robins Field, Georgia

TO: Inspector General, First Region, Flying Safety Division, Langley Air Force Base, Hampton, Virginia.

1. Report has been reviewed and is concurred in as being the best possible explanation for this accident.

2. Action has been taken to insure the complete compliance with T. O. 01-20EJ-177 on all B-29 aircraft assigned to this Station, including Base assigned aircraft and aircraft assigned to be worked by the Maintenance Directorate.

/s/ R. V. IGNICO

R. V. IGNICO
Colonel, USAF
Commanding

2 Incls:
n/o

cc: CG, AMC

3150th Electronics Sq. WRAMA

[* The following stamps and marginalia are found on page 4 of the original document:]

RESTRICTED

6809B

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and	:	
ELIZABETH PALYA	:	
v.	:	Civil Action No. 9793
UNITED STATES OF AMERICA	:	

INTERROGATORIES PROPOUNDED BY PLAINTIFFS
FOR ANSWER UNDER RULE 33

Phyllis Brauner and Elizabeth Palya, plaintiffs in the above action, by their attorney, Charles J. Biddle, Esquire, hereby make demand that defendant or its counsel answer the following interrogatories and submit copies of the records and documents requested, under or pursuant to Rule 33:

1. With reference to the crash of defendant's B-29 type aircraft near Waycross, Georgia, on October 6, 1948:

(a) Was an investigation (or investigations) into said crash made or directed to be made by defendant, its officers, employees, servants or appointees?

(b) If so, attach to your answer a copy of the reports and findings of such investigation (or investigations, if more than one).

2. With reference to the said B-29 type aircraft:

(a) Did defendant require that current aircraft maintenance records (formerly referred to as USAF Forms 1 and 1A) be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

3. With reference to the said B-29 type aircraft:

(a) Did defendant require that current flight engineering records (formerly referred to as USAF Forms 41B) be maintained?

(b) If so, attach complete copies of said records to your answer, covering the entire history of the aircraft.

4. With reference to the said B-29 type aircraft:

(a) Did defendant require that any other records or logs showing mechanical condition, maintenance of equipment, repairs and/or flight records of said aircraft be maintained?

(b) If so, attach complete copies of said records or logs to your answer, covering the entire history of the aircraft.

5. Has defendant obtained a statement or statements, either oral or written:

(a) Concerning the events leading up to the crash of said B-29 type aircraft?

(b) Concerning the mechanical condition of said air craft immediately prior to the crash?

(c) Concerning the cause or probable cause (or causes) of said crash and the resultant loss of lives?

(d) Otherwise concerning the said crash in any way?

6. If the answer to any part of interrogatory number 5 is in the affirmative, attach to your answer a copy of each such statement (or in the case of an oral statement, a write-up of the same), and state:

(a) Name or names and present addresses of the person or persons from whom each of such statements was obtained.

(b) The name of the person taking each such statement, and the date taken.

7. Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1948, prior to the crash?

8. If your answer to the preceding interrogatory is in the affirmative:

(a) At what altitude and at what time was such trouble first experienced?

(b) Describe in detail the trouble experienced.

9. (a) Did said aircraft, or any of its engines, catch on fire prior to the crash? If so, at what altitude, and at what time?

(b) If more than one fire occurred, give details, including altitude and time at which each fire started.

10. What orders, if any, were issued to the civilian personnel in the said aircraft to adjust their parachutes and prepare to bail out? At what altitudes, and at what times?

11. Was the order ever given to the civilian personnel to bail out of said aircraft? If so:

(a) At what altitude, at what time, and how was it given?

(b) Was the aircraft in normal flight at the time? If not, describe any abnormality.

12. Was the said aircraft equipped with an automatic pilot? If so:

(a) Was it functioning properly on October 6, 1948?

(b) When was this equipment first turned on?

(c) Was it operating at the time the order to bail out was given? If not, why not?

13. At what time did the said aircraft crash? At what altitude above sea level?

14. Was the said aircraft equipped with fire fighting equipment? If so:

(a) Was the said fire fighting equipment standard for said type of aircraft? If not, describe any differences.

(b) Did said equipment, if any, include equipment for smothering engine fires?

15. If your answer to the first part of interrogatory number 14 is in the affirmative:

(a) How recently before the crash had said equipment been tested?

(b) Was said equipment functioning properly immediately prior to the crash?

(c) Was said crash due in any way to a failure on the part of said equipment to function properly?

(d) If you have any report or reports as to failure of the fire fighting equipment of said aircraft, either at this time or previously, attach copies of the same.

16. On what date was said aircraft first placed in an operational status?

17. How many hours in flight had been logged on said aircraft (prior to the crash)?

18. Had said aircraft been involved in any accident or accidents prior to October 6, 1948? If so, give details, and attach copies of official reports of investigation.

19. Did defendant have in force on October 6, 1948, any written standard regulations with reference to the operation of army aircraft, and the carrying of civilian personnel therein (sometimes referred to as Airforce

Regulations)? If so, attach a complete copy of all such regulations.

20. (a) What was the name of the pilot of the said B-29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

21. (a) What was the name of the co-pilot of the said B-29 type aircraft, on October 6, 1948?

(b) Did defendant require that a log or record (formerly known as Form 5) of his flying experience be maintained?

(c) If so, attach a complete copy of said record.

22. (a) Was the said B-29 type aircraft fitted with emergency escape hatches?

(b) If so, give the size and location of each escape hatch.

(c) How many doors must be opened to escape from each escape hatch?

23. (a) What was the weight of the said B-29 type aircraft empty?

(b) What was its gross weight loaded, on October 6, 1948?

(c) What is the maximum gross weight allowable for such type of aircraft under normal conditions?

(d) Was there anything unusual about the distribution of weight or personnel in said aircraft, on October 6, 1948?

24. Do the engines in this type of aircraft tend to overheat when run at full power? If so:

(a) For what periods and at what times were the engines of this aircraft run at full power on October 6, 1948?

(b) Did the engines of this aircraft give any evidence of overheating on October 6, 1948? If so, give details, including time and temperatures

25. (a) Was a radio log kept on said aircraft showing communications with other aircraft and with ground stations?

(b) If so, attach a copy of said radio log for October 6, 1948, to your answer.

26. (a) Was a radio log kept at the field at Macon of messages sent to and received from said aircraft on October 6, 1948?

(b) If so, attach to your answer a copy of such radio log.

27. (a) Did the pilot of said aircraft bail out of the air craft with his parachute?

(b) If so, at what altitude above the ground?

28. (a) Did the co-pilot of said aircraft bail out of the aircraft with his parachute?

(b) If so, at what altitude above the ground?

29. Were any pictures taken of the wreckage by defendant after the crash? If so, attach copies.

30. During the three months immediately preceding the crash on October 6, 1948, was it necessary at any time to postpone a scheduled flight of the said B-29 type aircraft because of mechanical or engineering defects? If so, list the date or dates of such postponements, giving the defects causing each such postponement and the steps taken to remedy them.

31. (a) Have any modifications been prescribed by defendant for the engines in its B-29 type aircraft to prevent

overheating of the engines and/or to reduce the fire hazard in the engines?

(b) If so, when were such modifications prescribed?

(c) If so, had any such modifications been carried out on the engines of the particular B-29 type aircraft involved in the instant case? Give details.

/s/ Charles J. Biddle

Charles J. Biddle
Counsel for Plaintiffs

TJC: MR
31069
MR. CURTIN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BRAUNER and ELIZABETH PALYA	:	
vs.	:	Civil Action No. 9793
UNITED STATES OF AMERICA	:	

ANSWER TO INTERROGATORIES PROPOUNDED
BY PLAINTIFFS FOR ANSWER UNDER RULE 33

COMES NOW the United States of America by its attorneys Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and makes answer to the Interrogatories propounded by plaintiffs herein, as follows:

1. (a) Yes.

(b) This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Civil Procedure, as amended.

2. (a) Yes.

(b) Destroyed in crash.

3. Yes, see attached Exhibit "A".

4. Yes, see attached Exhibit "A".

5. (a) Yes.

(b) Yes.

(c) Yes.

(d) Yes.

6. This material is not produced as it is not within the scope of an interrogatory filed pursuant to Rule 33, Federal Rules of Civil Procedure, as amended.

(a) Captain Herbert W. Moore, 1279A, Tyndall Air Force Base, Fla.
S/Sgt Walter J. Peny, AF 698025, Chatam Air Force Base, Fla.
T/Sgt Earl W. Murrhee, AF 14171471, MacDill Field, Fla.
Eugene Mechlir, 52 Wesley Ave., Erlton, N.Y.

(b) Not applicable.

7. Yes, almost immediately before the crash.

8. (a) 18,500 feet altitude at approximately 1400 hours, E.S.T.

(b) At between 18,500 or 19,000 feet mainfold pressure dropped to 23" on No. one engine.

(c) Thereafter engine No. one was feathered. Fire broke out which was extinguished.

9. (a) Yes, number one engine of the aircraft caught fire at approximately 20,000 feet and approximately 1405 hours Eastern time.

(b) One fire occurred.

10. All personnel were instructed by the pilot to put their chutes on immediately after leveling off at 20,000 feet, and prior to the outbreak of the engine fire.

11. (a) (b) At the instant the gear was extended, and the bomb bay doors opened to facilitate parachuting from the aircraft, the aircraft fell into a violent spin, the

centrifugal force probably made it difficult to bail out. Testimony does not indicate whether or not order was given.

12. Yes.

(a) Yes.

(b) On the climb that day.

(c) The auto-pilot was not being used at the time of the accident. The pilot turned it off. The erratic action of the aircraft after the gear was extended and the bomb bay doors opened would have precluded using the auto pilot to hold the aircraft while bailing out.

13. Aircraft crashed at approximately 1408 hours Eastern time at point about 500 feet above sea level.

14. Yes.

(a) Yes.

(b) Yes, was equipped with carbon dioxide fire extinguisher system for smothering engine fire.

15. (a) On June 1948.

(b) Yes.

(c) No.

(d) Not applicable in view of 15 (a) (b) (c).

16. Aircraft was placed on operational status on 19 October 1945.

17. Said aircraft was logged 304 hours and ten minutes prior to the accident.

18. Said aircraft had never been involved in an accident prior to October 6, 1948.

19. Yes. See attached Exhibit “B”.

20 (a) Pilot of said B-29 on October 6, 1948 was Captain Ralph W. Erwin.

(b) Yes.

(c) See Exhibit “C” attached.

21. (a) Name of the co-pilot of said B-29 on October 6, 1948 was Captain Herbert W. Moore, Jr.

(b) Yes.

(c) Form 5 is attached, marked Exhibit “D”.

22. (a) Yes.

(b) See attached exhibit “E”

(c) Two doors must be opened to get from the rear pressurized compartments, one door must be opened to get from front compartment.

23. (a) Weight of said B-29 empty 69,121.

(b) Gross weight, approximately but not exceeding 109,000 lbs. on October 6, 1948.

(c) Under normal conditions gross weight allowable is 102,000 lbs.

(d) There was nothing unusual about the distribution of weight or personnel in said aircraft on 6 October 1948.

24. The engines of all aircraft tend to overheat including the B-29’s, when run at full power.

(a) The engines of this aircraft were never run at full power on October 6, 1948. Only the prescribed take-off, climb and cruise power settings were used which never approached full power.

(b) The engine head temperatures on engine Nos. 1, 2 and 4 were high after take-off and manifold pressure was reduced to 40" hg. The airspeed was kept at 195 and no further high head temperature was experienced. This engine reaction is not unusual for B-29 type of aircraft on climbs after a take-off.

25. (a) If one was kept it was destroyed in the aircraft crash.

(b) Answer as in 25 (a).

26. (a) A radio log was kept by the control tower at Robins Air Force Base of messages sent to and received by the said TB-29 for take-off instruction but the military airways logs are destroyed after one year and if there were any enroute messages to any airways station from said aircraft they are no longer available.

(b) Copy of Air Force Base tower Radio log is attached. See Exhibit "F"

27. (a) Pilot did not appear to have bailed out. Body was found near wreckage, with no parachute attached.

(b) Not applicable, see 27 (a) above.

28. (a) Yes.

(b) Co-pilot of said aircraft bailed out at approximately 15,000 feet.

29. Yes, see attached Exhibit "G".

30. No. Scheduled flight was postponed for mechanical and engineering defects for three months prior to October 6, 1948.

31. No.

/s/ GERALD A. GLEESON
GERALD A. GLEESON
United States Attorney

/s/ THOMAS J. CURTIN
THOMAS J. CURTIN
Assistant United States Attorney
Attorneys for Defendant.

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF PHILADELPHIA :

THOMAS J. CURTIN, being duly sworn according to law, deposes and says that he is Assistant United States Attorney in and for the Eastern District of Pennsylvania; that he has read the foregoing Answer to Interrogatories; and that answers set forth therein are true and correct to the best of his knowledge, being based upon information furnished the deponent by the Department of the Air Force.

/s/ Thomas J. Curtin

Sworn to and subscribed
before me this 5th day
of January, A. D., 1950.

/s/ Gilbert W. Ludwig

DEPUTY CLERK. UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA