

**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
Payla (deceased), SUSAN BRAUNER
and CATHERINE BRAUNER, individually and
as living heirs of Phyllis Brauner (deceased),

Plaintiffs,

-v.-

UNITED STATES OF AMERICA,

Defendant.

Civil Action

No. _____

JURY TRIAL DEMANDED

**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.

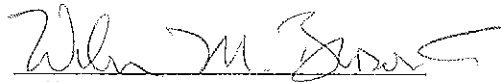
45. By reason of the government's fraud on the courts, the plaintiffs are also entitled to an award of their attorneys' fees and costs of litigation.

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



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DEMAND FOR JURY TRIAL

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

DATE: October 1, 2003



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