No. _____

[02-M76]

IN THE
SUPREME COURT OF THE UNITED STATES

In re Patricia J. Herring (formerly Patricia J. Reynolds), Susan Brauner, Catherine Brauner, Judith Palya Loether, William Palya, and Robert Palya, as living heirs of the deceased Robert Reynolds, William H. Brauner and Phyllis Brauner, and Albert H. Palya and Elizabeth Palya, and as the Respondents or heirs of Respondents in *United States v. Reynolds*, 345 U.S. 1 (1953),

Petitioners.

PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION TO FILE PETITION FOR A WRIT OF ERROR *CORAM NOBIS*

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The United States stakes out two remarkable positions in its response to petitioners' Motion to File their Petition. First, it argues that *coram nobis* or other equitable relief from fraud is simply unavailable in this Court. What's done is done, the government says, and even if it did deliberately deceive this Court fifty years ago to secure a favorable precedent and deprive petitioners of their judgment, the Court is powerless to do anything about that today. Second, the government moves beyond procedure to substance to argue that "petitioners' central allegation of fraud is without merit." Here, the United States suggests that the Air Force's affidavits in support of the government's privilege claims were legitimate – even though it *admits*, as it must, that the specific accident report and witness statements that the government refused to produce under penalty of a default judgment of liability and which were the subject matter of this Court's 1953 opinion actually *contained no state secrets whatsoever.*

Petitioners here reply to the government's arguments. Moreover, inasmuch as the United States has elected to answer the Petition on the merits, petitioners respectfully suggest that the matter is ripe not only for docketing, but also for decision in petitioners' favor.

I.

The Government Did Indeed Defraud This Court.

The core of the government's defense on the merits is that the Air Force's "claim of privilege did not state that the particular accident reports or witness statements in this case in fact contained military secrets." Response at 21. The government observes that in his Claim of Privilege, Secretary Finletter objected to disclosure of the accident report and to "any other ancillary report or statement pertaining to the investigation." This

concern with "ancillary" materials was well-founded, the government says, because the Air Force's accident investigation file contained an exchange of correspondence between the Air Force and an RCA employee that mentioned "Project Banshee" (the code name of the classified project on which Reynolds, Palya and Brauner were working the day they were killed), and "th[is] file ... would have been at risk of disclosure in discovery." *Id.* at 22-23. Thus, "[t]he Secretary's claim of privilege over the accident and ancillary reports responsibly and accurately sought to protect highly classified information about the Banshee project." *Id.* at 23. Indeed, the government proclaims, "[t]he Secretary's and the Judge Advocate General's statements were true." *Id.* at 24.

The problem is that none of this can withstand any reasonably diligent scrutiny of the record of this case.

1. The "accident investigation file," and "ancillary" materials in that file, were never the object of discovery practice or court orders in this case. The widows' motion to compel sought the production of "the report and findings of the crash of defendant's B-29 type aircraft." R. 14.[1] The district court's opinion rejecting the government's claim of a self-evaluative privilege identified the materials the widows sought as "the report and findings of the official investigation made by defendants," together with statements of witnesses secured by defendants. *Brauner v. United States,* 10 F.R.D. 468, 469 (E.D. Pa. 1950). Consequently, *before* Secretary Finletter and Major General Harmon advanced their claims of "state secret" privilege, the only documents at issue in discovery were the Air Force's official accident report and witness statements.

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[1] "R. ___" references the original Transcript of Record in *United States v. Reynolds*, October Term, 1952, No. 21 (U.S. Supreme Court.)

Furthermore, the district court's September 21, 1950 order directing an *in camera* review of assertedly privileged materials was squarely confined to "[t]he report and findings of the official investigation of the defendant's B-29 type aircraft near Waycross, Georgia on October 6, 1948," and statements by witnesses Moore, Peny and Murhee. R. 28. It cannot be argued, therefore, that the Air Force ever had a legitimate concern about disclosure of its complete accident investigation file or the ancillary RCA correspondence in that file. These materials were *never* "at risk of disclosure in discovery" for the simple reason that the widows had never sought them and the trial court had never directed their production.[2]

2. Secretary Finletter and Major General Harmon *did* state that the accident report and witness statements in this case in fact contained military or state secrets. Yes, they lied. It is not possible to read their affidavits and the record otherwise.

- Secretary Finletter was responding to a court order that compelled the production of the official accident report and witness statements. His Claim of Privilege thus at the outset objects to the "Report of Investigation (Report of Major Aircraft Accident, AF Form 14)," which is the official accident report, and

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[2] Indeed, had the widows obtained the discovery they were entitled to, they would have had no reason to look further for "secret" documents. The widows' aim in discovery, as the district court recognized, was to learn the causes of the accident. 10 F.R.D. at 470-71. The causes of the accident are set forth in the Air Force's official accident report – which contained no military secrets. Once the widows secured that report, they would have had no need of other documents in the government's files, "secret" or otherwise. The Air Force asserted a "state secrets" privilege for the accident report and witness statements not out of concern to protect the RCA documents, but to deny the widows the proof they sought and, it appears, to fabricate a "test case" for military secrets protection in the federal courts. *See* Petition at 8-9, 16-19.

to "any other ancillary report or statement pertaining to the investigation," which embraces the witness statements (which were not part of the official report). R. 22. Thereafter, in claiming state secret protection, the Secretary specifies the documents at issue as "*this report,* together with statements of witnesses," and he characterizes these documents as "*reports of Boards of Investigation* and statements of witnesses that are concerned with secret and confidential missions and equipment of the Air Force." R. 23 (emphasis supplied). His assertion is unmistakable: the documents at issue – the official accident report and statements the district court had ordered produced – contain military secrets.

- Major General Harmon (whose affidavit is barely mentioned in the government's response to the Petition) is even more direct. He, too, is responding to the district court's order compelling production. And, he tells the court that the "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." R. 27. The Judge Advocate General is not advancing a "one-size-fits-all" claim of protection for Air Force crash investigations: He is swearing that these particular documents, demanded by these plaintiffs, cannot be produced without compromising national security.

- The district court certainly understood the Air Force's affidavits to claim that the official accident report and witness statements contained military secrets. After all, the district court had already written an opinion in which it refused to recognize an entirely different "self-evaluative privilege" that the government had

claimed for these items. In that opinion, the district court had noted that the government had not claimed that these materials contained military secrets. 10 F.R.D. at 472. By ordering an *in camera* review of the report and testimony so that it might assure the legitimacy of the government's subsequent state secrets claim, R. 28, and by later deeming the government liable to the widows when it refused to allow such an assessment, R. 29, the district court necessarily accepted the proposition that the claim that the Secretary and Judge Advocate General were making was specific to the report and testimony the government was refusing to produce.

- Similarly, the Court of Appeals understood the Air Force affidavits to claim that "the documents sought to be produced contain state secrets of a military character." *Reynolds v. United States*, 192 F.2d. 987, 996-97 (3d Cir. 1951). It affirmed the district court because it believed this was not an adequate excuse for refusing to produce the documents for *in camera* judicial scrutiny.

- Finally, this Court also plainly understood the Air Force's affidavits to claim 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.'" 345 U.S. at 5. Indeed, it was Secretary Finletter's and Major General Harmon's sworn statements that established to the majority's satisfaction "a reasonable danger that *the accident investigation report* would contain references to the secret military equipment which was the primary concern of the mission," *id.* at 10 (emphasis supplied), and hence "a reasonable

possibility that military secrets were involved" sufficient to cut off further inquiry, even by a federal district judge. *Id.* at 10-11.[3]

The fact is that the accident report and witness statements that were the subject of the proceedings before the lower courts and this Court *contained no military secrets.* The government does not pretend otherwise. *See* Response at 21. Indeed, to defend its actions fifty years ago, the government must look to a file that plaintiffs and the courts did not seek, for an exchange of correspondence with RCA that plaintiffs and the courts did not request, and then suggest that these materials, with their passing references to "Project Banshee," somehow justify the Air Force's conduct.

It is, perhaps, debatable whether even the RCA correspondence contains a military secret.[4] But the RCA correspondence was never at issue: As the government

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[3] The government seems to read *Reynolds* as allowing it to claim state secrets protection where circumstances suggest a "possibility" that a document may contain state secrets, *even if the document in fact contains no such secrets*. *See* Response at 23-24. Needless to say, nothing in *Reynolds* authorizes the military to advance a bogus claim to state secrets protection. The majority framed its test in terms of a "reasonable possibility that military secrets were involved" because it was requiring only circumstantial evidence to support the claim, and was denying courts the power, in most cases, to inquire of the government further. Thus, in ruling on a such claim of privilege, a court could not have "certainty" that a military secret was involved; it would have to rest content with a "reasonable possibility." But, it would not have to rest content with a lie. *Cf. Hirabayashi v. United States,* 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States,* 584 F. Supp. 1406 (N.D. Cal. 1984).

The government also claims that "no court was misled" by its misrepresentations concerning the accident report and witness statements. Response at 24. This is frivolous: Had the government not falsely sworn that the accident report and witness statements in question contained state secrets, *none* of the ensuing proceedings in the district court, the Court of Appeals, and this Court would make any sense.

[4] The RCA correspondence does reference the name "Project Banshee" and describes the project as classified. But, it does not disclose any particulars of the work or the technology involved. In fact, in 1947, over a year before the accident that took the widows' husbands and three years before the district court ordered production of the (continued...)

concedes, it was not a part of the Air Force's official accident report or any witness statement. What was at issue, as Secretary Finletter and Major General Harmon knew, was the official report and the statements. In their affidavits, these two officials swore to the courts that *those* documents contained state secrets – and this was a lie.[5]

II.

This Court Has The Power To Remedy the Government's Fraud.

Petitioners argue two independent bases on which the Court might act in this case: (1) through issuance of a writ of error *coram nobis* pursuant to the All Writs Act, 28 U.S.C. § 1651(a), or (2) in the exercise of its inherent equitable power to remedy a fraud upon the Court. The government responds by denying that this Court has any power to correct its judgments when it finds them tainted by fraud. This cannot be the law.

(..continued)
accident report and witness statements in their lawsuit, the Army Air Force was publicly championing the pilotless guidance technology that was "Project Banshee." *See* "'*Drone' Plane on Way Here From Florida To Circle Capital*," Washington Star, Jan. 13, 1947 (noting that "[n]ewspaper reporters and radio network representatives are traveling in both planes"); *"Flying Fort Drone Again Slated to Try Florida Trip Today*," Washington Star, Jan. 14, 1947 (reporting successful test of pilotless remote controlled drone B-17 over Washington, DC).

[5] The government states that petitioners err in viewing the Secretary's and Judge Advocate General's affidavits "through a contemporary lens." Rather, the Air Force's claim of a state secrets privilege in this case should be evaluated "from the standpoint of the day and the context in which it was asserted." Response at 19, 24. The early days of the Cold War were surely trying times for our country and its military. But, petitioners cannot believe that this Court would be more tolerant of a lie told by high government officials to the federal judiciary on a pivotal issue in 1950 than today. Times of national peril may warrant significant deference to the executive branch on matters of national security. But, they do not – indeed, cannot – excuse the fraud on the Court that the government practiced here.

The government dismisses this Court's inherent equitable power to remedy fraud in a footnote, asserting that petitioners "do not identify the statutory basis for jurisdiction to exercise such authority in this case." Response at 2 n.1. Of course, petitioners do indeed point to a statutory basis for jurisdiction: This Court's exercise of certiorari jurisdiction in *United States v. Reynolds* pursuant to 28 U.S.C. § 1254(1). Having granted review and rendered a judgment within its statutory jurisdiction, this Court retains the inherent power to correct that judgment. Petition at 13-15. If the Court believes the Petition is not rightly styled as a request for an extraordinary writ, the Court should treat it as a motion in equity in the *Reynolds* case itself to vacate the Court's decision. *Id.* at 13 n.7.

The government's answer to this is that "the Court was divested of ... jurisdiction [in *Reynolds*] when it issued the mandate in that case some 50 years ago." Response at 2. But here the government simply ignores the Court's precedent. This Court undoubtedly relinquished jurisdiction when it issued its mandate in *Reynolds*. But the Court did not thereby forfeit all power as a court of equity later to correct its mandate, for that power, as this Court has squarely held, is *inherent* in the Court's original exercise of appellate jurisdiction. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944). In *Hazel-Atlas*, this Court affirmed a federal appellate court's power to correct a judgment for fraud years after the appellate court's mandate had issued. It rejected precisely the argument the government makes here. This Court thus has the power to remedy the fraud the government practiced in *Reynolds*, even if it believes *coram nobis* relief is not appropriate.

As it happens, however, a writ of error *coram nobis* is entirely appropriate here. Most of the government's arguments opposing such a writ are anticipated in the Petition and the Motion to File. *See* Petition at 10-13; Motion to File at ¶¶ 4-6, 8. Four, however, bear reply.

First, the government maintains that "there is nothing unique about the particular allegations of fraud in this case that excuse petitioners from presenting their allegations to a lower court first by way of an independent action." Response at 12. But there is one extraordinarily unique thing about this particular fraud: It did not succeed in the courts below. *It only succeeded in this Court.* Even the government concedes that "only this Court can set aside its own judgment." Response at 20. That being so, only this Court can remedy this particular fraud, because it is only this Court's judgment that is tainted by it – and it is this Court's fraudulently-obtained mandate that ties petitioners' hands. *See* Petition at 13 n.7, 17, 21 n.13.[6]

Second, the government contends that "even accepting the allegations [of a fraud on this Court], there would be no exceptional circumstances warranting the issuance of an extraordinary writ by this Court." Response at 13-14. The government's thesis is that any fraud worked on this Court was immaterial because the widows had the opportunity on remand to prove their case by means other than the fraudulently-withheld accident

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[6] Although the government repeatedly cites to Rule 60(b)'s abolition of the writ of *coram nobis* as an element of civil trial practice, it concedes that Rule 60(b) "is applicable only to proceedings in the district court," and has no application to this Court. Response at 10-11. Moreover, all the cases the government cites involving Rule 60(b) and "independent actions" to set aside judgments for fraud, *id.* at 10-12, involve frauds which succeeded in the lower federal courts. None of those cases remotely resembles this one.

report and witness statements, but instead made a "strategic decision" to accept a settlement. *Id.* at 14-15.

This argument simply misapprehends the relief petitioners seek. The fraud the government practiced on this Court was clearly material, because it worked to deprive the widows of valid district court judgments aggregating $225,000. Petitioners seek reinstatement of those judgments. The settlements the widows later made with the government are no bar to such relief; they serve simply as an offset against the judgments the government succeeded fraudulently in vitiating in this Court.

It is also worth noting how thoroughly disingenuous the government's argument really is. On remand, the widows decision to accept less than the judgments they had previously secured could hardly be called "informed" much less "strategic." The widows were entirely ignorant that their judgments had been vitiated through fraud. Moreover, the discovery the Air Force had offered – depositions of the three surviving crew members – could never substitute for the contents of the official accident report. Why? Because, as their now-declassified statements reveal, not a single one of those crewmen knew that the main cause of the accident was the Air Force's failure to comply with Technical Orders mandating changes to the aircraft's exhaust manifold assemblies. *See* Petition at 35a-60a. This primary cause of the crash was determined by investigators post-flight. Indeed, Murhee, the on-board flight engineer, testified that in his pre-flight checks he saw no mechanical defects in the engines whatsoever. *Id.* at 46a-47a. The Air

Force's offer of these individuals as witnesses thus promised no information on the core problem with the plane. Petitioners have no doubt this was intentional.[7]

Third, the government marches a parade of horribles before the Court, stating that if the Court were to issue a writ of *coram nobis* in this case, the doctrine of finality would crumble and settlements would fall in other cases in which "classified information has been removed from the case pursuant to the state secrets privilege leaving the parties unable to establish their legal positions" or "limits [on claims] have been imposed by claims of privilege." Response at 15-16. Again, the government misapprehends the relief petitioners seek. Reinstating the widows' original judgments in this case does no violence to any doctrine of finality; it merely restores to petitioners what the courts lawfully awarded and the government wrongly took from them. Other settlements in other cases will not be vulnerable to attack, unless the government has there engaged in a fraud upon the Court and the plaintiffs can make out a claim for relief.[8] If there is another case anything like this one – where the fraud had the effect of undoing on appeal

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[7] The government states that the widows did not pursue interviews of any of the government's proffered witnesses. Response at 14. But, correspondence from the widows' attorney, Charles Biddle, to his clients indicates that he *did* depose these Air Force crewmen. Unfortunately, any transcripts made of these witnesses' testimony have been lost. It is, however, obvious that whatever the witnesses said did not establish for counsel and the widows a 100% chance of success on liability – which is what the widows had against the government before they lost their district court judgments, and what they would have had if the damning accident report had been produced.

[8] Where the government deceives a litigant by falsely claiming state secrets protection for a document, that does not necessarily translate into a "fraud on the court" subject to extraordinary remedies. *See* Petition at 15. A claim of fraud upon an opposing litigant (as opposed to the court itself) is subject to substantial limitations. *See* Fed. R. Civ. P. 60(b).

to this Court a judgment already fairly adjudicated by courts that were *not* defrauded – petitioners will be very much surprised. But if there is, why should there be no remedy?

Finally, the government contends that the Petition "does not seek relief that would be 'in aid of the Court's appellate jurisdiction'" because it does not call upon the Court to "correct error in a lower court." Response at 16. This argument proves far too much, because it would deny this Court any power to correct its *own* mistakes, whether through *coram nobis* or otherwise. *See* Petition at 12-13, and cases cited therein. This Court is not powerless in the face of fraud. It should now act in this case to set things right.

For all of these reasons, as well as those set forth in their prior submissions, Petitioners pray that their Motion to File and their Petition for a Writ of Error *Coram Nobis* should be granted.

Respectfully submitted,

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