No. 02-M76

IN THE SUPREME COURT OF THE UNITED STATES

IN RE PATRICIA J. HERRING, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF ERROR CORAM NOBIS

**RESPONSE OF THE UNITED STATES TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF ERROR CORAM NOBIS**

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## QUESTION PRESENTED

Whether the Court should grant petitioners leave to file a petition for a writ of error coram nobis to challenge in this Court, in the first instance, an alleged fraud concerning the Air Force's claim of privilege with respect to certain internal military documents sought in connection with the Federal Tort Claims Act suit in United States v. Reynolds, 345 U.S. 1 (1953).

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**JURISDICTION**

The motion for leave to file a petition for a writ of error coram nobis was filed on March 4, 2003. The jurisdiction of this Court is asserted under 28 U.S.C. 1254(1), 28 U.S.C. 1651(a), and the United States Constitution. Pet. 2. The All Writs Act, 28 U.S.C. 1651(a), is the only possible statutory basis for jurisdiction. As explained below, however, petitioners have not shown that an extraordinary writ should be issued under that Act.

Section 1254(1) of title 28 of the United States Code grants jurisdiction to "review[]" cases in the court of appeals "by writ of certiorari." But petitioners do not seek review of any case in the court of appeals, nor have they filed any petition for a writ of certiorari. This Court exercised certiorari jurisdiction in

United States v. Reynolds, 345 U.S. 1 (1953), but the Court was divested of that jurisdiction when it issued the mandate in that case some 50 years ago. Petitioners' generalized reference to the Constitution also does not provide a basis for jurisdiction over the petition filed in this case and there is no ground for the exercise of the Court's original jurisdiction in this case. See U.S. Const. Art. III; 28 U.S.C. 1251.[1]

**STATEMENT OF THE CASE**

Petitioners seek leave to file a petition for a writ of error coram nobis -- a device specifically abolished by the Federal Rules of Civil Procedure -- in the first instance in this Court, in connection with a suit in which a final settlement judgment was entered by the district court 50 years ago. They allege that the United States committed a fraud upon the courts in connection with the Federal Tort Claims Act suit in United States v. Reynolds, 345 U.S. 1 (1953), when it defended the Secretary of the Air Force's assertion of privilege in that case with respect to an accident investigation report and ancillary reports and witness statements. They ask this Court to vacate its 1953 decision in Reynolds and to award them damages as well as attorney's fees. That extraordinary

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[1] Petitioners also state that "[w]here a litigant defrauds a federal court, the court has 'inherent' power to act," Pet. 10, but do not identify a statutory basis for jurisdiction to exercise such authority in this case. In any event, any inherent authority of this Court to act to remedy a fraud in this case may be exercised, if at all, consistent with the statutory basis for jurisdiction established by the All Writs Act.

reques: for relief should be denied.

1. On October 6, 1948, a United States Air Force B-29 airpla:ıe with nine Air Force crew members and four civilian contra:tor employees, including petitioners' decedents, took off from W:rner Robins Air Force Base in Georgia on a mission to test secret electronics equipment. The plane crashed over Waycross, Georgi:. Three crew members and one civilian survived. Pursuant to Army Air Forces Regulation No. 62-14, Part Four, Section II (1944) and Army Air Forces Regulation No. 62-14A (1947), the Air Force investigated the cause of the accident, interviewed survivors and other witnesses, and prepared a report and recommendations for improv:.ng flying safety. Reynolds, 345 U.S. at 3.

2 a. In 1949, the widows of each of the civilians who died in the crash, one of whom is a petitioner in this case, Pet. ii, filed consolidated suits against the United States under the Federa:. Tort Claims Act (FTCA). During discovery, the United States acknowledged that an investigation into the accident had been u:dertaken but declined to produce a copy of the accident invest:gation report and accompanying witness statements. The governm:ent asserted that those documents were privileged on the basis of Army Air Forces Regulation No. 62-14 (1944), and an amendm:nt to that regulation, AAF Reg. No. 62-14A (1947). The regulat:ions were promulgated pursuant to a statute that authorized the he:.d of each department to establish the rules governing the

control of the department's records. 5 U.S.C. 22 (Supp. 1950).

Investigations conducted pursuant to the Army Air Forces regulations were intended solely to improve flying safety and were not permitted to be used in court-martial proceedings or for disciplinary purposes or determining pecuniary liability. Army Air Forces Regulation No. 62-14A (¶¶ 43 & 46(b)) mandated that the report be classified as "Restricted," or a higher-security level if required, and specified that investigations for liability or disciplinary purposes were to be "entirely separate and apart from the investigation required by this Regulation."

b. The district court rejected the claim of privilege and ordered production of the documents. Tr. 17-21.[2] The court observed that the government was not asserting the "well recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security." Id. at 20. Instead, the court stated, the government's position was that under the regulations discussed above "the proceedings of boards of the armed services should be privileged, in order to allow free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline." Id. at 20-21. The court rejected that privilege,

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[2] Tr. refers to the Transcript of Proceedings in this Court in United States v. Reynolds, No. 21, October Term 1952.

stating that existing law did not recognize it. Id. at 21.

c The government filed a request for rehearing and, in support of that request, a Claim of Privilege by the Secretary of the Air Force. Tr. 21-28. The Secretary explained that petitioners had not shown good cause for production of the witness statements, because the government had provided petitioners with the names and addresses of the witnesses. Id. at 22. In addition, the Secretary emphasized that the investigation report and accompanying statements were prepared "for interdepartmental use only" under regulations designed to insure full and frank disclosure of any events that may have contributed to an aircraft accident in order to prevent future accidents. Ibid.

The Secretary also explained that production of the requested documents would not be in the public interest:

> 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 highly secret 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.

Tr. 22-23.

The Secretary's claim of privilege was supported by a declaration of the Judge Advocate General of the Air Force, Major General Reginald Harmon, which identified the three surviving crew members and offered to make them available for questioning at the

expense of United States. Tr. 27. Major General Harmon stated that the witnesses would be permitted to testify as to all matters not classified and to refresh their memories by reference to any statements they made before the accident investigation board and other pertinent material. Ibid. He also stated that the information and findings of the accident investigation board and statements of survivors cannot be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment," and that the disclosure of such information would undermine the "much desired objective of encouraging uninhibited admissions in future inquiry proceedings" conducted by the Air Force. Id. at 27-28.

d. The district court ordered the government to submit the documents to the court for in camera review so that the court could determine whether production of the documents would violate the "Government's privilege against disclosure of matters involving the national or public interest." Tr. 28. The government declined to produce the documents on the ground that doing so would vitiate the asserted privilege. The district court entered a finding adverse to the government on liability and barred the government from introducing evidence on that issue. Id. at 29. After a trial on damages, the court entered judgment against the United States in the amount of $65,000 for Mrs. Reynolds, $80,000 each for Mrs. Brauner and Mrs. Palya. Id. at 32-33.

3. The court of appeals affirmed. Tr. 44-58. With respect to the government's claim of privilege, the court held that the government was not entitled to an "absolute 'housekeeping' privilege" against disclosing internal accident reports. Id. at 52. Focusing on the second ground for the Secretary's claim of privilege based on the national security interest in preventing disclosure, the court further stated:

> The claim of privilege thus made is of a wholly different character from the one previously discussed. It asserts in effect that the documents sought to be produced contain state secrets of a military character. State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding and unquestionably come within the class of privileged matters referred to in Rule 34. Moreover, this privilege, as well as the privilege previously mentioned against disclosure of official information which would be harmful to the interests of the United States, was fully recognized by the district judge in these cases in his final order. For * * * he directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the 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."

Id. at 55. The court also concluded that the government had improperly refused to submit the documents at issue for in camera review. Id. at 55-56.

4. This Court reversed and remanded. 345 U.S. 1. The United States' brief in this Court argued that the lower courts had improperly compelled production of the documents at issue based on general separation-of-powers principles, the statute and regulations governing accident investigation reports, and

historical practice. The government did not focus in its brief on the public interest in withholding production of the particular documents at issue in this case. See Reynolds, 345 U.S. at 6 (discussing "broad propositions" advanced by parties with "constitutional overtones"); id. at 6 n.9.

The Court identified "a narrower ground for decision" than then broader positions advanced by the parties. Reynolds, 345 U.S. at 6. The Court noted that the Secretary of the Air Force had "attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence." Id. at 6-7. Drawing from "judicial experience in dealing with * * * the privilege against self-incrimination," the Court held that the judiciary, and not the executive officer asserting the privilege, "must determine whether the circumstances are appropriate for the claim of the privilege." Id. at 8.

The Court did not decide whether the privilege was available with respect to the documents at issue, but offered several observations that were pertinent to the resolution of the privilege claim. The Court observed that it could not "escape judicial notice that this is a time of vigorous preparation for national defense." 345 U.S. at 10. In addition, the Court stated that:

> Experience in the past war has made it common knowledge that air power is one of 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 that was the primary concern of the mission.

Ibid.

The Court also stated that, "[i]n each case," the court must evaluate "the showing of necessity" made by the party requesting the documents. 345 U.S. at 11. In this case, the Court observed, the need for the documents at issue "was greatly minimized by an available alternative, which might have given [plaintiffs] the evidence to make out their case without forcing a showdown on the claim of privilege." Ibid. As the Court noted, the government "formally offered to make the surviving crew members available for examination." Ibid. In light of that offer, the Court observed that "it should be possible for [plaintiffs] to adduce the essential facts as to causation without resort to material touching upon military secrets." Ibid. But the Court did not hold that the offer itself negated any claim of necessity. Instead, the Court "remanded [the case] to the District Court for further proceedings consistent with the views expressed in th[e] opinion." Ibid.

5. On remand, plaintiffs did not avail themselves of the government's offer to interview the surviving crew members. Instead, they elected to settle their claims for a total of $170,000, $55,000 less than the total of the default judgments

previously entered by the district court. Pet. App. 2a-9a.

**ARGUMENT**

Petitioners seek leave to file a petition for a writ of error coram nobis to challenge, in the first instance in this Court, a fraud that they allege was committed by the United States more than 50 years ago in connection with the underlying litigation in United States v. Reynolds, 345 U.S. 1 (1953). Rule 20 of the Rules of this Court governs petitions for extraordinary writs authorized by the All Writs Act, 28 U.S.C. 1651(a). Under that rule, "[i]ssuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised." S. Ct. R. 20.1. In addition, "[t]o justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Ibid. Petitioners have failed to show that any of those criteria is satisfied here and, in any event, their central allegation of fraud lacks merit.

**I. NEITHER THE ALL WRITS ACT NOR RULE 20 OF THIS COURT PROVIDES A BASIS FOR ISSUING ANY EXTRAORDINARY WRIT IN THIS CASE**

The Federal Rules of Civil Procedure abolished the writ of error coram nobis and established a different mechanism for setting aside a judgment for alleged fraud under Rule 60(b). See United States v. Beggerly, 524 U.S. 38, 45 (1998). Those rules, however,

are applicable only to proceedings in the district court, Fed. R. Civ. P. 1, and petitioners have purposely avoided the lower courts and instead filed their claim of fraud in the first instance in this Court. In this Court, petitioners' request for a writ of error coram nobis is properly construed as a request for an extraordinary writ pursuant to Rule 20 of this Court's rules. Such an extraordinary writ may be issued by this Court not as "a matter of right, but of discretion sparingly exercised." S. Ct. R. 20.1. There is no basis for taking the exceedingly unusual step of granting the extraordinary writ requested by petitioners here.

1 Although petitioners have requested relief from this Court in the first instance, they have not shown "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. R. 20.1. Rule 60(b)(3) of the Federal Rules of Civil Procedure expressly provides that a motion for relief from a judgment based on fraud must be filed within one year of the date the judgment is entered. That date passed long ago in the original Reynolds case. But Rule 60(b) also states that "[t]his rule does not limit the power of a court to entertain an independent action * * * to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b).

Such independent actions have been initiated in the lower courts in connection with similar allegations of fraud upon the court. See Beggerly, 524 U.S. at 45; see also Weldon v. United States, 70 F.3d 1, 4 (2d Cir. 1995) ("[W]e conclude that the FTCA

also permits equitable relief in an independent action based on assertions of fraud on the court that are committed in the course of a suit against the government for money damages."); Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1022-1023 (3d Cir.) (Rule 60(b) permits an independent action for relief from a judgment due to fraud), cert. denied, 482 U.S. 915 (1987); Bulloch v. United States, 721 F.2d 713 (10th Cir. 1983) (independent action to set aside 1956 judgment in FTCA action based on alleged fraud). To be sure, as this Court has recognized, it is very difficult to establish a "meritorious independent action" for an alleged fraud upon the court. Beggerly, 524 U.S. at 46. The difficulty in prevailing in such an action, however, does not excuse petitioners from first attempting to bring an independent action in the lower courts to remedy the alleged fraud before coming to this Court.

There is nothing unique about the particular allegations of fraud in this case that should excuse petitioners from presenting their allegations to a lower court first by way of an independent action. Although it is true that only this Court can set aside its own judgment, it is not uncommon for a plaintiff alleging fraud to initiate an independent action in the district court seeking relief on the ground of fraud from a judgment entered or affirmed by a higher court. In addition, the fraud alleged by petitioners concerning the foundation for the Air Force's claim of privilege in Reynolds was committed, if at all, in the trial court, court of

appeals, as well as the Supreme Court in Reynolds, because the claim of privilege was asserted on the same foundation in each of those courts. The fact that petitioners have taken the unusual step of seeking relief for an alleged fraud from this Court in the first instance is reason alone to deny the petition.

2. Petitioners have not shown "exceptional circumstances" that would warrant the issuance of an extraordinary writ. S. Ct. R. 20.1. The United States takes seriously any allegation of fraud and explains in Part II, infra, why the allegations of fraud in this case are without merit. But the typical remedy for an alleged fraud is to file a motion pursuant to Rule 60(b)(3) to reopen a case within a year of the fraud. As this Court recognized in Beggerly, 524 U.S. at 46-47, after that time period has lapsed, the interest in repose strongly disfavors revisiting or reopening a case, even in the context of a proper independent action contemplated by Rule 60(b). See id. at 47 ("If relief may be obtained through an independent action in a case such as this, where the most that may be charged against the Government is a 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.").

Moreover, although, as explained below, the allegations of fraud lack merit, even accepting the allegations, there would be no exceptional circumstances warranting the issuance of an

extraordinary writ by this Court. In Reynolds, this Court did not decide that the documents at issue were protected by the Air Force's claim of privilege, but rather remanded the case for further proceedings. 345 U.S. at 12. The parties then settled for $55,000 less than the damages awarded in the default judgment for all the plaintiffs. Petitioners state that on remand the plaintiffs "had little choice but to settle their cases with the government" (Pet. 7), and that "the widows' choices were to proceed with discovery and trial without the 'privileged' documents or to accept a settlement" (Pet. 18, n.12). That is incorrect.

As this Court emphasized in Reynolds, 345 U.S. at 11, plaintiffs' need for the documents in Reynolds was greatly diminished by the fact that the government had offered to make the surviving crew members from the crash available for examination. If plaintiffs had availed themselves of that offer, it is possible that they could have successfully made a case for negligence based on the testimony of those witnesses. There is no indication of which we are aware that one key premise of their tort action -- that B-29 engines had caught fire and caused other B-29 crashes -- was a classified fact at the time of the trial.[3]

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[3] Moreover, if, after examining the surviving crew members, petitioners had been unable to elicit the information that they believed was necessary to make their case, they could have attempted to make a stronger showing of necessity for the privileged information before the district court. That court might then have reviewed the privileged information, consistent with this Court's decision in Reynolds, and determined whether the showing of

Despite the opportunity to interview the crew members, however, petitioners made a strategic decision to settle their cases rather than try to establish liability on the part of the government. Having made that strategic decision in the face of other viable options, such as interviewing the crew members and attempting to prove their case, petitioners should not now be permitted to complain about their decision. Nor have petitioners alleged a fundamental miscarriage of justice that necessitates equitable relief. The law favors finality, and nothing petitioners have raised would justify disturbing the strategic choice they made to take a certain portion of the judgment rather than risk receiving none of it. Plaintiffs settled their claims for $170,000; the district court's initial default judgment for them was only $55,000 greater (split among three plaintiffs). Pet. 23.

Petitioners' position challenges the finality of judicial decisions in cases involving classified information. Many cases have been dismissed because classified information has been removed from the case pursuant to the state secrets privilege leaving the parties unable to establish their legal positions.[4] Others have settled because of limits imposed by claims of privilege. The

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necessity warranted disclosure of any privileged information.

[4] See e.g., Bareford v. General Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991); Fitzgerald v. Penthouse Int'l Ltd., 776 F.2d 1236, 1243 (4th Cir. 1985).

logical extension of petitioner's argument is that parties should be permitted to reopen these cases when classified information is later declassified and ask a court to second-guess the classified decision by rearguing the availability of the privilege with respect to declassified documents. That approach would create needless friction between the branches of government, and under such a rule, there would never be finality in cases involving classified information. There is nothing exceptional about the declassification of the documents at issue in this case that would warrant reopening this long-settled case.

3. The petition in this case does not seek relief that would "be in aid of the Court's appellate jurisdiction." S. Ct. R. 20.1. In order to meet that requirement, the Court must "be called upon to act in an appellate capacity," i.e., "[t]he object must be to correct error in a lower court, even though it is sought by instituting an original proceeding in the Supreme Court, rather than by seeking review through the ordinary process of appeal or statutory certiorari." R. Stern et al., Supreme Court Practice 492 (7th ed. 1993); see Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661-662 & n.5 (1978) ("[T]he traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."); Renaissance

Arcade & Bookstore v. Cook County, 473 U.S. 1322, 1322 (1985) (Stevens, J., in chambers) ("[B]ecause the application [for a stay] does not indicate that the appeal will become moot unless a stay is granted, it does not appear that an extraordinary writ may be issued pursuant to 28 U.S.C. § 1651 in aid of this Court's appellate jurisdiction.").[5] The petition in this case does not call upon this Court to correct any error in the lower courts (and to the extent that it could be so construed, petitioners' claim of fraud should have been filed in the lower courts in the first instance, see supra); to take any action necessary to aid, or preserve, this Court's ability to review a lower court decision; or to act in any conventional "appellate capacity."

There is nothing in the fraud allegations in this case that would aid this Court's appellate jurisdiction. The fraud alleged by petitioners in this case was not a basis for this Court's decision in Reynolds. Neither the separation-of-powers argument briefed by the government nor the Court's ruling on that issue turned on the merits of the underlying FTCA case or on the specific

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[5] The requirement that the writ be issued in aid of the Court's appellate jurisdiction is not a mere prudential rule that may be excused if the Court sees fit, but rather a fundamental limitation on the power of this Court to issue writs. See Chandler v. Judicial Council of the Tenth Circuit 398 U.S. 74, 86 (1970) ("The authority of this Court to issue a writ of prohibition or mandamus can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction.") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-180 (1803); Ex parte Republic of Peru, 318 U.S. 578, 582 (1943)).

content of the privilege claim made in the lower courts. As discussed above, to the extent that petitioners allege that the government misrepresented the contents of the military documents subject to the claim of privilege, that alleged misrepresentation was not unique to the proceedings in this Court.

The district court did not rule on the merits of the privilege asserted by the Air Force but rather entered an order barring the government from litigating the question of liability because the government took the position that it need not show the privileged information to the court for its independent review of the privilege. The court of appeals affirmed on that basis. In reversing that judgment, this Court did not examine any information in camera but rather ruled that the government must submit the privileged information to the district court for its review.

The Court did not itself examine or reach the substance of the Air Force's claim of privilege, nor did it rule on the merits of the underlying case. Instead, it returned the case to the district court for further action not inconsistent with its decision. Therefore, even under an expansive conception of this Court's appellate jurisdiction, issuance of an extraordinary writ would not be in aid of this Court's appellate jurisdiction.[6]

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[6] Petitioners' statement that, but for the Secretary's representation that disclosure of the accident report might compromise information about secret electronic equipment, the majority would have affirmed the plaintiffs' judgment (Pet. 17) is unsupported. The issue presented to the Court was whether the

## II. PETITIONERS' CENTRAL ALLEGATION OF FRAUD IS WITHOUT MERIT

The motion for leave to file a petition a writ of error coram nobis in this case should be denied for the reasons discussed above. But in any event, the central allegation of fraud underlying the petition is without merit.

Petitioners' claim that there was no basis for the assertion of privilege over the accident investigation report and the witness statements rests on a fundamental error of viewing events of 50 years ago through a contemporary lens. In the first place, there was a well-recognized privilege in 1950, as there is today, for accident investigation reports like the one that was at issue in the underlying case.[7] In 1910, for example, Congress amended the Interstate Commerce Act to prevent the use in litigation of

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government was required to show the privileged information to the district court and, if it failed to do so, whether the district court could enter a default judgment against it under the FTCA. In light of the Court's ruling in Reynolds that even claims of state-secrets privilege are subject to judicial review, and that a default judgment is not a term on which the United States waived its sovereign immunity under the FTCA, a remand would still have been necessary for proceedings consistent with the Court's opinion, i.e., for the petitioners to demonstrate a greater need than they had shown to that point before the court should demand to examine the privileged information and rule whether any privileged information need be disclosed.

[7] Ten years after the Court's decision in Reynolds, the D.C. Circuit recognized the specific privilege the Secretary of the Air Force had asserted in Reynolds in Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). In United States v. Weber Aircraft Corp., 465 U.S. 792 (1984), this Court recognized the Machin privilege as a valid civil discovery privilege and therefore held that it was a proper basis for an exemption 5 claim under the Freedom of Information Act.

investigative reports of railroad accidents (then codified as 45 U.S.C. 41), and later it amended the Civil Aeronautics Act to bar the use in litigation of accident reports of the Air Safety Board of the Civil Aeronautics Board of 1938 (then codified at 49 U.S.C. 581). See Gov't Br. in United States v. Reynolds, October Term 1952, No. 21, at 45-46. The Secretary of the Air Force's claim of privilege relied on regulations that embodied the same public policy of encouraging full and frank cooperation with accident investigations in order to promote flying safety.

Furthermore, the promotion of flying safety in the military services was at that time (and still is) particularly important to the interests of national security because of the key role it plays in national defense. Regardless of the presence of secret electronic equipment on this particular aircraft, there was a strong national interest in discovering the cause of military aircraft accidents and continually trying to improve military aircraft from every technological vantage, including safety of operation. Thus, Army Air Forces Regulation No. 62-14A required the appointment of a board to investigate aircraft accidents and provided specific controls on the use and dissemination of the reports of investigation. In addition, Army Air Forces Regulation No. 62-7 limited distribution of the reports within the chain of command and specifically provided that reports were to be classified "Restricted" unless a higher classification was

warranted. Privilege determinations and access restrictions on accident reports, therefore, were based on categorical judgments -- made independent of the particular facts of a specific investigation or contents of a specific report -- that reports of investigations of accidents were vital to improving flying safety and that limitations on the use and dissemination of such reports were necessary to ensure complete and candid cooperation.

The claim of privilege did not state that the particular accident reports or witness statements in this case in fact contained military or state secrets. The Secretary's claim of privilege expressed concern that because the particular aircraft was engaged on a secret mission to test highly secret equipment, production of the report might lead to disclosure of information touching on the classified equipment. The case was in the discovery stage, and the bounds of discovery, as defined by Rule 26(b), include all relevant evidence, not privileged, that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26 (b)(1). The Secretary was legitimately concerned that information about the confidential equipment and mission of this aircraft might be disclosed if the report and witness statements were released.

That concern was well-founded. In his claim of privilege, the Secretary objected to 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." Tr. 22 (emphasis added). The accident investigation file relevant to this accident includes a transmittal, portions of which were classified "Secret" and "Restricted," from the Inspector General, USAF, Office of The Air Inspector to the Deputy Chief of Staff, Material dated January 10, 1949, to which the Inspector General attaches a letter from Mr. Frank Folsom of RCA, the employer of decedents Reynolds and Palya. Mr. Folsom's letter refers to RCA's role in project "Banshee," which was a classified project to develop a pilotless aircraft guided missile system. The project used the B-29 because of its capability of flying above 20,000 feet, and every Banshee test flight had civilian engineers aboard. Mr. Folsom expressed concern about the safety of the test flights and the reluctance of RCA and other companies to provide engineers on military test flights if safety could not be insured.

The Air Force's response explained that "[i]n the interest of security all work of a classified nature, such as Banshee must be accomplished under as close supervision as possible. For this reason the aircraft on the Banshee project was not bailed [to the private contractor for pre-flight safety inspection]." Accident Report 760-19.[8] At the time, information about Banshee, the

[8] Additional internal memoranda providing relevant information for preparing the response to Mr. Folsom also refer to the "highly classified" nature of Banshee (e.g., 760-21).

project with which the aircraft in question in this case was involved, was classified and concerned the development of technology for military use. The correspondence that mentioned Banshee predated the discovery request and was part of the file that would have been at risk of disclosure in discovery, and the assertion of privilege was based in part on this information.

In Reynolds, the Court acknowledged the Secretary's concern 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." 345 U.S. at 9; see also id. at 10-11 (noting that the formal claim of privilege was filed "under circumstances indicating a reasonable possibility that military secrets were involved"). In stating that petitioners should have taken advantage of the proffer of the surviving witnesses, the Court observed that there was nothing in the case as it stood before the Court to suggest that the secret electronic equipment had any causal connection to the accident and that petitioners should have been able to establish the essential facts of their case without reference to military secrets.

The Secretary's claim of privilege over the accident and ancillary reports responsibly and accurately sought to protect highly classified information about the Banshee project. This Court understood that the Secretary was referring to a possibility that information about the secret electronic equipment might be

disclosed, a possibility that the Court characterized as reasonable given that the aircraft was engaged in testing secret equipment related to Banshee when it crashed. The Secretary's and the Judge Advocate General's statements were true, and no court was misled or defrauded by those representations.

More generally, in this type of proceeding, it is easy for parties to make hindsight judgments about whether the disclosure of internally restricted military documents such as accident investigation reports could compromise the national interest. The proper focus for the courts is to seek to evaluate the claim of privilege from the standpoint of the day and context in which it was asserted. The claim of privilege in this case was made in 1950, at a time in the Nation's history -- during the twilight of World War II and the dawn of the Cold War -- when the country, and especially the military, was uniquely sensitive to need for "vigorous preparation for national defense." Reynolds, 345 U.S. at 10. The allegations of fraud made by the petition in this case with respect to the military's determination in 1950 that non-disclosure of the accident investigation documents at issue was in the public interest must be viewed in that light.[9]

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[9] Given the insubstantial nature of the petition, petitioners' demand for damages (including interest), attorney's fees and costs, and sanctions must also fail. Moreover, such collateral relief is not available under the writ of coram nobis, which traditionally was made available only to reopen judgments to correct errors of fact. See United States v. Morgan, 346 U.S. 502, 507 (1954); see also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233-234 (1995).

## CONCLUSION

The motion for leave to file a petition for a writ of error coram nobis should be denied.

Respectfully submitted.

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