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## Aircraft Accident Reports and Other Government Documents: Evidentiary Use in International Air Crash Litigation in the United States

William D. Janicki

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# AIRCRAFT ACCIDENT REPORTS AND OTHER GOVERNMENT DOCUMENTS: EVIDENTIARY USE IN INTERNATIONAL AIR CRASH LITIGATION IN THE UNITED STATES

WILLIAM D. JANICKI\*

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\* B.S., United States Air Force Academy, 1989; M.S., Massachusetts Institute of Technology, 1991; J.D., McGeorge School of Law, 2001. He is a former U.S. Air Force KC-10 pilot. He is a senior associate in the San Diego office of Morrison & Foerster LLP. He is a member of the firm's Aviation Practice with a focus on major aviation accidents, mass tort litigation, and liability of air carriers under international treaties.

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I. INTRODUCTION

**I**NTERNATIONAL AVIATION accidents are often litigated in the United States for a variety of reasons. Plaintiffs may seek higher damages awards offered by U.S. juries. Defendants may seek the protections offered by the Federal Rules of Evidence and Civil Procedure. Both may feel more comfortable in a domestic rather than an international forum. Examples abound where plaintiffs chose to file suit in the United States following an international aviation accident, and defendants elected to defend these suits in the United States rather than seek dismissal for forum non conveniens. Even if defendants seek such a dismissal, the motion may be denied for a variety of reasons, leaving the action to be tried in the United States.

This article examines the evidentiary use of civil and military accident reports and other government documents that involve international air crash litigation in the United States. The article begins with a brief overview of the international standards for investigating and preparing an accident report under the provisions of the International Civil Aviation Organization (ICAO). It then discusses the evidentiary use of civil accident reports prepared by both the National Transportation Safety Board (NTSB) and by foreign governments under ICAO provisions. The article considers the implications of the statutory bar to the use of NTSB reports, ICAO policy statements regarding the purpose and use of accident reports, and the hearsay exceptions found in the Federal Rules of Evidence.

The global War on Terror, with combat operations in both Iraq and Afghanistan, provides a backdrop where U.S. military air crashes in foreign countries have resulted in civil litigation in the United States. This article continues with an examination of aviation accident reports prepared by the armed services. A military investigation will often result in the preparation of two acci-

dent reports: a safety investigation report and a collateral investigation report. The distinctions between these reports, their evidentiary use, and their discoverability will be discussed.

The article concludes with an examination of the evidentiary use of other government documents that may be offered in international air crash litigation in the United States, such as NTSB safety recommendations, Federal Aviation Administration Airworthiness Directives, and criminal investigation reports prepared by law enforcement agencies.

## II. USE OF CIVIL AVIATION ACCIDENT REPORTS IN U.S. LITIGATION

An international aviation accident is often litigated in a U.S. rather than a foreign forum. Several recent examples of complaints filed in a U.S. federal district court based on an international aviation accident are listed below:

- One-Two-Go Flight 269: MD-82 crash on September 16, 2007, Phuket, Thailand, killing eighty-nine of its 123 passengers.<sup>1</sup> Complaint filed in the U.S. District Court of the Northern District of Illinois, September 13, 2008.<sup>2</sup>
- Mandala Airlines Flight 91: Boeing 737 crash on September 5, 2005, Sumatra, Indonesia, killing all ninety-six of its passengers, five crew, and forty-four persons on the ground.<sup>3</sup> Complaint filed in the U.S. District Court for the District of Connecticut, September 2, 2008.<sup>4</sup>
- Tam Airlines Flight JJ3054: Airbus A320 crash on July 17, 2007, São Paulo, Brazil, killing six crew, 162 passengers, and eighteen persons on the ground.<sup>5</sup> Complaint filed in the U.S. District Court for the Southern District of Florida, June 11, 2008.<sup>6</sup>

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<sup>1</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA07RA063, at 1 (2007), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA07RA063&rpt=fa>. The accident is being investigated by the government of Thailand. *Id.*

<sup>2</sup> Complaint, Chudley v. McDonnell Douglas Corp., No. 1:08CV05245 (N.D. Ill. Sept. 13, 2008).

<sup>3</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA05RA096, at 1 (2005), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA05RA096&rpt=fa>. The accident is being investigated by the government of Indonesia. *Id.*

<sup>4</sup> Complaint, Brown v. Boeing Co., No. 3:08CV01325 (D. Conn. Sept. 2, 2008).

<sup>5</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA07RA059, at 1 (2007), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA07RA059&rpt=fa>. The accident is being investigated by the government of Brazil. *Id.*

<sup>6</sup> Complaint, Ura v. Tam Linhas Aereas, S.A., No. 1:08CV21980 (S.D. Fla. July 11, 2008).

- Helisca Helicopter Crash: Sikorsky S-61N helicopter crash on July 8, 2006, Canary Islands, Spain, killing three crew members and three passengers.<sup>7</sup> Complaint filed in the U.S. District Court for the District of Connecticut on July 3, 2008.<sup>8</sup>

Other notable examples of international air crash litigation in the United States include the following cases:

- Gol Airlines Flight 1907: Boeing 737 crash on September 29, 2006, Amazon Rainforest, Brazil, killing all 154 on board.<sup>9</sup> Complaints filed in several U.S. district courts and consolidated for multidistrict proceedings in the Eastern District of New York.<sup>10</sup>
- Helios Airways Flight 522: Boeing 737 crash on August 14, 2005, near Athens, Greece.<sup>11</sup> Complaints filed in several U.S. district courts and consolidated for multidistrict proceedings in the Northern District of Illinois.<sup>12</sup>
- Cessna Caravan 208B: Cessna Caravan 208B crash on November 19, 2005, Moscow, Russia.<sup>13</sup> Complaint filed in the Southern District of New York and consolidated for multidistrict litigation proceedings in the District of Kansas with other lawsuits involving the same model aircraft.<sup>14</sup>
- Blackwater 61: CASA 212 crash on November 27, 2004, near Bamiyan, Afghanistan, killing three civilian crew

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<sup>7</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA06RA053, at 1 (2006), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA06RA053&rpt=fa>. The accident is being investigated by the government of Brazil. *Id.*

<sup>8</sup> Complaint, Banco Vitalico de Espana Cia Anonima de Seguros y Reaseguros v. Sikorsky Aircraft Corp., No. 3:08CV01002 (D. Conn. July 3, 2008).

<sup>9</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA06RA076, at 1 (2006), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA06RA076&rpt=fa>. The investigation of this accident is under the jurisdiction of the government of Brazil. *Id.*

<sup>10</sup> *In re Air Crash Near Peixoto de Azeveda, Brazil* on Sept. 29, 2006, 493 F. Supp. 2d 1374 (J.P.M.L. 2007).

<sup>11</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION DCA05RA092, at 1 (2005), <http://www.nts.gov/ntsb/GenPDF.asp?id=DCA05RA092&rpt=fa>. The investigation of this accident is under the jurisdiction of the government of Greece. *Id.*

<sup>12</sup> *In re Air Crash Near Athens, Greece*, on Aug. 14, 2005, 435 F. Supp. 2d 1340 (J.P.M.L. 2006).

<sup>13</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION NYC06RA032, at 1 (2006), <http://www.nts.gov/ntsb/GenPDF.asp?id=NYC06RA032&rpt=fa>. The investigation of this accident is under the jurisdiction of the government of Russia. *Id.*

<sup>14</sup> *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 560 F. Supp. 2d 1380 (J.P.M.L. 2008).

members and three military passengers.<sup>15</sup> Complaint filed in Florida state court and removed to the U.S. District Court for the Middle District of Florida.<sup>16</sup>

The investigation of an international civil air crash is conducted under the provisions of the International Civil Aviation Organization.<sup>17</sup> All but one of the accidents listed above are being investigated by countries other than the United States under the ICAO.<sup>18</sup> The standard procedures governing these investigations are contained in a document known as ICAO Annex 13 (Annex 13).<sup>19</sup> This document specifies the country primarily responsible for conducting the investigation and the countries entitled to participate through a representative, and generally provides guidance on the purpose of the investigation, how the investigation is to be conducted, and what the final report should contain.<sup>20</sup> The ICAO accident investigation process and the evidentiary use of civil aviation accident reports are discussed below.

## A. CIVIL AVIATION ACCIDENT INVESTIGATIONS

### 1. *The International Civil Aviation Organization*

The ICAO is a specialized agency of the United Nations responsible for the safety and security of international air transport.<sup>21</sup> The ICAO was established in 1944 with the signing of the Chicago Convention on International Civil Aviation (Chi-

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<sup>15</sup> NAT'L TRANSP. SAFETY BD., FACTUAL REPORT AVIATION IAD05FA023, at 1 (2005), <http://www.nts.gov/ntsb/GenPDF.asp?id=IAD05FA023&rpt=fa>. The National Transportation Safety Board accepted delegation of the accident investigation at the request of the government of Afghanistan according to the provisions of ICAO Annex 13. *Id.*; see also COLLATERAL INVESTIGATIONS BD., EXECUTIVE SUMMARY CASA 212, N96BW ii (2004), <http://oversight.house.gov/documents/20071012205257.pdf>.

<sup>16</sup> Complaint, *McMahon v. Presidential Airways, Inc.*, No. 6:05CV01002 (M.D. Fla. July 6, 2005).

<sup>17</sup> The Convention on International Civil Aviation: Annex 13, Aircraft Accident and Incident Investigation, Forward: Applicability (9th ed. 2001), available at <http://www.airsafety.com.au/trinvbil/C619icao.pdf>, amended by Adoption of Amendment 11 to Annex 13 (Council – 177th Session, Working Paper No. C-WP/12619, 2006), available at <http://www.icao.int/Hyperdocs/display.cfm?v=2&name=CWP%2F12619&Lang=E> [hereinafter Annex 13].

<sup>18</sup> *Supra* notes 1–15 and accompanying text.

<sup>19</sup> Annex 13, *supra* note 17, Forward: Historical background.

<sup>20</sup> See generally Annex 13, *supra* note 17.

<sup>21</sup> Memorandum on ICAO 3, 6, <http://www.icao.int/icao/en/pub/memo.pdf> (last visited Oct. 1, 2009).

chago Convention) by fifty-two states.<sup>22</sup> The ICAO became a specialized agency of the United Nations in 1947 and is currently headquartered in Montreal, Canada,<sup>23</sup> with 190 contracting states.<sup>24</sup> The ICAO is responsible for the development of Standards and Recommended Practices (SARPS) that cover various operational and technical aspects of civil aviation, including accident investigations.<sup>25</sup> These are detailed in the eighteen Annexes to the Chicago Convention.<sup>26</sup> Annex 13 to the Chicago Convention (Annex 13) sets forth the primary objective and the international standards for conducting an aircraft accident investigation.<sup>27</sup> Annex 13 was first adopted in 1951 pursuant to Article 37 of the Chicago Convention.<sup>28</sup>

## 2. *Responsible and Participating Countries in an ICAO Aircraft Accident Investigation*

Following an aircraft accident, Annex 13 specifies that the country where the accident occurred is responsible for conducting an investigation into the facts, circumstances, and probable cause of the accident.<sup>29</sup> If the accident is not in the territory of any country, then the country where the aircraft is registered is responsible for the investigation.<sup>30</sup> The investigating authority is responsible for preparing a final report, including safety recommendations, and the determination of the causes of the accident, if possible.<sup>31</sup> This responsibility may be delegated to any other country by mutual agreement.<sup>32</sup> Annex 13 expressly provides that “[t]he sole objective of [an ICAO accident investigation] shall be the prevention of [future] accidents

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<sup>22</sup> Foundation of the International Civil Aviation Organization, [http://www.icao.int/cgi/goto\\_m.pl?icao/en/hist/history02.htm/](http://www.icao.int/cgi/goto_m.pl?icao/en/hist/history02.htm/) (last visited Oct. 1, 2009); Convention on International Civil Aviation, Dec. 7, 1944, ch. VII, 61 Stat. 1180, 1192, 15 U.N.T.S. 295, 324.

<sup>23</sup> Memorandum on ICAO, *supra* note 21, at 2, 9.

<sup>24</sup> ICAO, Contracting States, [http://www.icao.int/cgi/goto\\_m.pl?cgi/statesDB4.pl?en/](http://www.icao.int/cgi/goto_m.pl?cgi/statesDB4.pl?en/) (last visited Nov. 12, 1008).

<sup>25</sup> Making an ICAO Standard, <http://www.icao.int/icao/en/anb/mais/index.html/> (last visited Oct. 1, 2009).

<sup>26</sup> *Id.*

<sup>27</sup> Annex 13, *supra* note 17, Forward: Historical background.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶ 5.1.

<sup>30</sup> *Id.* ¶ 5.3.

<sup>31</sup> *Id.* ¶ 5.4.

<sup>32</sup> *Id.* ¶ 5.1, 5.3.



and incidents . . . [and] not . . . to apportion blame or liability.”<sup>33</sup>

Annex 13 also provides that the following countries are entitled to participate in an accident investigation through an accredited representative:

- (1) the country where the aircraft is registered;
- (2) the country in which the operator’s principle place of business is located;
- (3) the country where the aircraft was designed; and
- (4) the country where the aircraft was manufactured.<sup>34</sup>

Each country participating in the investigation is entitled to review a draft of the final report and provide comments.<sup>35</sup> Comments are to be addressed by either amending the draft report to include the comments or appending the comments to the final report.<sup>36</sup>

The U.S. National Transportation Safety Board (NTSB or Board) is typically not the responsible entity in the investigation of an international aviation accident, but there are some exceptions.<sup>37</sup> The crash of Blackwater 61 is one notable exception.<sup>38</sup> This accident involved the crash of a Presidential Airways CASA 212 aircraft in the Bamiyan Valley of Afghanistan. Responsibility for this investigation was delegated to the NTSB by the Afghan government.<sup>39</sup> The NTSB prepared a factual report and on December 4, 2006, adopted a probable cause for this accident.<sup>40</sup> There is ongoing litigation for this international air crash in the U.S. District Court for the Middle District of Florida,<sup>41</sup> and the evidentiary use of the NTSB report may become an issue. Therefore, a brief review of the use of NTSB accident reports in civil litigation is presented below.

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<sup>33</sup> *Id.* ¶ 3.1.

<sup>34</sup> *Id.* ¶ 5.18.

<sup>35</sup> *Id.* ¶ 6.3.

<sup>36</sup> *Id.*

<sup>37</sup> See NTSB, Aviation-Foreign Investigations, <http://www.nts.gov/ntsb/foreign.asp> (last visited Oct. 1, 2009) (explaining that when a civil aviation accident occurs in a foreign state, that state is responsible for investigation).

<sup>38</sup> NAT’L TRANSP. SAFETY BD., *supra* note 15.

<sup>39</sup> *Id.*

<sup>40</sup> Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-06-77 (Dec. 4, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_77.pdf](http://www.nts.gov/Recs/letters/2006/A06_77.pdf); Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-06-78 through -81 (Dec. 4, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_78\\_81.pdf](http://www.nts.gov/Recs/letters/2006/A06_78_81.pdf).

<sup>41</sup> Complaint, *McMahon v. Presidential Airways, Inc.*, No. 6:05CV01002 (M.D. Fla. July 6, 2005).

## B. USE OF NTSB ACCIDENT REPORTS IN CIVIL LITIGATION

### 1. *Role of the NTSB*

The NTSB is “an independent federal agency charged with investigating airplane accidents.”<sup>42</sup> “The agency does not function as a traditional regulatory or adjudicatory body; rather, its principal missions are to determine the probable cause of accidents and make [safety] recommendations that will help prevent future accidents.”<sup>43</sup> “[The] NTSB neither promulgates nor enforces any air safety regulations.”<sup>44</sup> An NTSB investigation “does not include an adjudication of individual claims.”<sup>45</sup> As such, Congress has placed strict limits on the use of NTSB materials in civil litigation to reflect its “‘strong . . . desire to keep the Board free of the entanglement of such suits’ and serve to ensure that the Board does not exert an undue influence on litigation.”<sup>46</sup> These limits are currently codified in 49 U.S.C. § 1154(b).<sup>47</sup>

### 2. *49 U.S.C. § 1154(b)—Statutory Bar to the Use of NTSB Accident Reports in Civil Litigation*

The use of NTSB accident reports in civil litigation is governed by 49 U.S.C. § 1154(b), which states that “[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.”<sup>48</sup> “The legislative history of the statute demonstrates [that the] purpose [of this exclusionary rule is] to prevent usurpation of the jury’s role” as fact finder.<sup>49</sup> This purpose is served by the exclusion of opinions, conclusory statements, or determinations of the probable cause of an accident.<sup>50</sup>

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<sup>42</sup> See 49 U.S.C. §§ 1111(a), 1132(a) (2006).

<sup>43</sup> *Chiron Corp. v. NTSB*, 198 F.3d 935, 963 (D.C. Cir. 1999).

<sup>44</sup> *Id.* at 937.

<sup>45</sup> *Id.* at 936.

<sup>46</sup> 49 C.F.R. § 835.3(a) (2008) (internal citation omitted).

<sup>47</sup> 49 U.S.C. § 1154(b) (2006) (preceded by 49 U.S.C. § 1903(c) (1976) and 49 U.S.C. § 1441(e) (1958)).

<sup>48</sup> 49 U.S.C. § 1154(b).

<sup>49</sup> *Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990), *rev’d on other grounds*, 963 F.2d 188 (8th Cir. 1992) (quoting, *In re Air Crash at Stapleton Int’l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1493, 1496 (D. Colo. 1989)).

<sup>50</sup> *Id.*

Federal regulations distinguish between (1) Board accident reports that contain the Board's determinations and (2) factual accident reports that contain the results of an investigator's investigation.<sup>51</sup> The regulations explain that Board accident reports "containing the Board's determinations, including the probable cause of an accident" are statutorily barred from use in civil litigation, whereas factual accident reports are not.<sup>52</sup> The Board's regulations provide that a further purpose of this rule is to avoid embroiling the Board in civil litigation.<sup>53</sup> These federal regulations have the force and effect of law.<sup>54</sup> Federal courts have consistently barred the use of NTSB accident reports in civil litigation under 49 U.S.C. § 1154(b) and its predecessor statutes.<sup>55</sup> However, courts have found that this statute does not apply to factual accident reports prepared by an investigator, and these may be admitted into evidence under certain circumstances.<sup>56</sup>

In addition, federal courts often prohibit experts from relying on NTSB materials barred by 49 U.S.C. § 1154(b) as the basis for their opinions. In *Mullan v. Quickie Aircraft Corp.*, the Tenth Circuit explained that an expert may properly rely only upon the admissible factual portions of an NTSB report but may not use the NTSB's inadmissible conclusions.<sup>57</sup> Numerous other courts have held that experts may not rely on NTSB materials

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<sup>51</sup> 49 C.F.R. § 835.2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 835.1; *see also* *Chiron Corp. v. NTSB*, 198 F.3d 935, 941 (D.C. Cir. 1999).

<sup>54</sup> *Swell v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986).

<sup>55</sup> Numerous courts bar NTSB accident reports under federal law. *Chiron*, 198 F.3d at 937; *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 639 (10th Cir. 1990); *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1001 (5th Cir. 1998); *Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 271 (9th Cir. 1978); *Moorhead v. Mitsubishi Aircraft Int'l, Inc.*, 828 F.2d 278 (5th Cir. 1987); *Curry v. Chevron, USA*, 779 F.2d 272, 274 (5th Cir. 1985); *Protectus Alpha Navigation Co., v. North Pac Grain Growers, Inc.*, 767 F.2d 1379, 1384-85 (9th Cir. 1985); *In re Jacoby Airplane Crash Litig.*, No. 99-6073(HAA), 2007 WL 2746833, at \*10 (D.N.J. Sept. 19, 2007); *Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185-KES, 2006 WL 1084103, at \*37 (D.S.D. April 20, 2006); *Correll v. Consol. Rail Corp.*, 266 F. Supp. 2d 711, 714 (N.D. Ohio 2003); *Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 485 (D. Kan. 2001); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 780 F. Supp. 1207 (N.D. Ill. 1991).

<sup>56</sup> *Chiron*, 198 F.3d at 940; *Sheesley*, 2006 WL 1084103, at \*37.

<sup>57</sup> *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10th Cir. 1986) (construing predecessor to 49 U.S.C. § 1154(b)).

excluded under the statute as the basis for their opinions.<sup>58</sup> The fact that experts may generally rely on inadmissible evidence under Federal Rule of Evidence 703 is immaterial because Congress has imposed limitations beyond those in the Federal Rules of Evidence by prohibiting all use of NTSB reports in civil litigation.<sup>59</sup>

### 3. *Fed. R. Evid. 803(8)(C)—Government Records Exception to Hearsay Rule and Its Limitations*

The distinction between NTSB factual accident reports, which may be admitted under Federal Rule of Evidence Rule 803(8)(C) (Rule 803(8)(C)) as an exception to hearsay, and NTSB Board accident reports, precluded by 49 U.S.C. § 1154(b), has been considered by many courts. NTSB factual accident reports prepared by an investigator have long been held admissible under the hearsay exception for government records found in Rule 803(8)(C).<sup>60</sup> This exception applies whether or not the declarant is available to testify. Rule 803(8), entitled “Public records and reports,” provides: “Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions . . . , factual findings resulting from an investigation made pursuant

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<sup>58</sup> *Curry*, 779 F.2d at 274 (forbidding expert’s “use of any conclusory statements in the NTSB reports”); *Petroleum Helicopters, Inc. v. Rolls-Royce Corp.*, No. 1:05-cv-0410-LJM-WTL, 2007 WL 2249118, at \*8 (S.D. Ind. Aug. 2, 2007) (holding that expert report may not quote materials contained in NTSB safety recommendation because “admission of the NTSB’s opinion in the guise [of an expert report] is improper”); *Major v. CTX Transp.*, 278 F. Supp. 2d 597, 604 (D. Md. 2003) (“References to NTSB opinions and conclusions rendered inadmissible by [49 U.S.C. § 1154(b)] must be stricken . . . regardless of whether they are used to address issues of probable cause and negligence or to bolster the credibility of experts and their opinions”); *McLeod Era Aviation, Inc.*, No. 93-294, 1996 WL 109302, at \*2 (E.D. La. Mar. 12, 1996) (“The factual portions of the NTSB report may be admissible and relied upon by experts but any opinions, conclusory statements, or conclusions on the probable cause of the accident contained in these reports shall be excluded from trial nor used by an expert.”).

<sup>59</sup> *Huber v. United States*, 838 F.2d 398, 403 (9th Cir. 1988) (holding that the Federal Rules of Evidence cannot provide an exception for evidence barred by Congress).

<sup>60</sup> *Sheesley*, 2006 WL 1084103, at \*38; *Major*, 278 F. Supp. 2d at 605; *Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990), *rev’d on other grounds*, 963 F.2d 188 (8th Cir. 1992); *In re Air Crash at Stapleton Int’l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1493, 1497 (D. Colo. 1989); *Complaint of, Am. Export Lines, Inc.*, 73 F.R.D. 454, 460 (S.D.N.Y. 1977).

to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."<sup>61</sup>

Four criteria must be satisfied for Rule 803(8)(C) to apply to a government accident report.<sup>62</sup> First, the report "must constitute a factual finding. Second, the factual finding must have resulted from an investigation authorized by law. Third, the declarant must have had first-hand knowledge of the matter asserted."<sup>63</sup> Fourth, the document must be trustworthy.<sup>64</sup>

Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly."<sup>65</sup> Admissibility of public reports is presumed "because of the reliability of the public agencies usually conducting the investigation, and 'their lack of any motive for conducting the studies other than to inform the public fairly and adequately.'"<sup>66</sup> When the opponent of such evidence, however, proves that "sufficient negative factors are present" to bring into doubt the report's trustworthiness, it should not be admitted.<sup>67</sup>

NTSB reports are therefore not only subject to 49 U.S.C. § 1154(b), but also to the limitations contained in the public records exception to the hearsay rule.<sup>68</sup> A public document that satisfies the criteria stated in Rule 803(8)(C) may still be inadmissible.<sup>69</sup> "If the factual findings in the public document themselves are based upon hearsay, then the underlying hearsay must also fit within an exception to the general hearsay rule" or be excluded.<sup>70</sup> The limitations in the hearsay exception for government records are discussed below.

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<sup>61</sup> FED. R. EVID. 803(8).

<sup>62</sup> *Fraleigh v. Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1266 (S.D. Ohio 1979).

<sup>63</sup> *Id.* Rule 803(8) is silent about a requirement of personal knowledge, although the introductory notes to Rule 803 state that "neither this rule nor Rule 804 dispenses with the requirement of first-hand knowledge." FED. R. EVID. 803 advisory committee's note; see *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1273 (7th Cir.1988) ("In the case of Rule 803(8) this requirement must be interpreted flexibly, bearing in mind that the primary object of the hearsay rule is to bar untrustworthy evidence"); see also *Walker v. Fairchild Indus.*, 554 F. Supp. 650, 652 (D. Nev. 1982).

<sup>64</sup> *Fraleigh*, 470 F. Supp. at 1266.

<sup>65</sup> FED. R. EVID. 803(8) advisory committee's note.

<sup>66</sup> *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984).

<sup>67</sup> FED. R. EVID. 803(8)(C) advisory committee's note.

<sup>68</sup> *Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990), *rev'd on other grounds*, 963 F.2d 188 (8th Cir. 1992); *In re Air Crash at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1493, 1497 (D. Colo. 1989).

<sup>69</sup> *Fraleigh*, 470 F. Supp. at 1267.

<sup>70</sup> *Id.*

a. Opinions and Conclusions Are Admissible

The United States Supreme Court in *Beech Aircraft Corp. v. Rainey* broadly construed the term “factual findings,” as stated in Rule 803(8)(C), to permit the admission of opinions and conclusions drawn from a factual investigation into evidence so long as they satisfy the Rule’s trustworthiness requirement.<sup>71</sup> In *Rainey*, the Supreme Court held the opinions and conclusions contained in a Navy aircraft accident report were properly admitted into evidence because they were based on a factual investigation.<sup>72</sup> The Rule’s requirements for both “factual findings” and trustworthiness prohibit statements and conclusions not based on a factual investigation.<sup>73</sup> *Rainey* involved the application of Rule 803(8) to a U.S. Navy accident report and did not address the application of 49 U.S.C. § 1154(b) or its predecessor statutes regarding reports prepared by the NTSB.<sup>74</sup> Although factually based opinions and conclusions are admissible under *Rainey*, a government report may not contain legal conclusions.<sup>75</sup> Finally, the inability to cross-examine the author of the report on its conclusions does not make the report inadmissible.<sup>76</sup>

b. Double Hearsay Statements Are Not Admissible

Although a government report is presumptively admissible under Rule 803(8)(C), it may present independent hearsay problems requiring exclusion.<sup>77</sup> “Evidence reported in a government document is only admissible to the extent that the maker of the document could testify to that evidence were he or she present in court.”<sup>78</sup> Reports otherwise admissible under Rule 803(8) may not contain double hearsay.<sup>79</sup> Recordation of

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<sup>71</sup> *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 154.

<sup>74</sup> *Petition of, Cleveland Tankers, Inc.*, 821 F. Supp. 463, 466 (E.D. Mich. 1992); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 780 F. Supp. 1207, 1212 n.8 (N.D. Ill. 1991).

<sup>75</sup> *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 302 (11th Cir. 1989).

<sup>76</sup> *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 112 (4th Cir. 1993).

<sup>77</sup> *Budden v. United States*, 748 F. Supp. 1374, 1377 (D. Neb. 1990), *rev’d on other grounds*, 963 F.2d 188 (9th Cir. 1992).

<sup>78</sup> *Id.*; *In re Air Crash at Stapleton Int’l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1493, 1497 (D. Colo. 1989).

<sup>79</sup> *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, 144 (6th Cir. 1983) (excluding report because relied upon hearsay statements of witnesses interviewed by

otherwise inadmissible hearsay evidence in a government document does not make that evidence admissible.<sup>80</sup> Witness statements, contractor reports, and other hearsay statements for which there is no exception are routinely excluded from NTSB factual reports.<sup>81</sup>

c. The Report Must Be Trustworthy

The Supreme Court in *Rainey* recognized that a court is obligated to exclude an entire government report, or portions thereof, that are determined to be untrustworthy.<sup>82</sup> “[T]he opponent to admissibility [of a government report] has the burden of showing that a public record is untrustworthy.”<sup>83</sup> *Rainey* recognized the Advisory Committee list of four factors helpful in evaluating the trustworthiness of a government report: “(1) the timeliness of the investigation; (2) the investigator’s skill or experience; (3) whether a hearing was held; and (4) possible bias.”<sup>84</sup> “Other factors [that] may indicate a lack of trustworthiness [are] unreliability, inadequate investigation, and inadequate foundation for conclusions.”<sup>85</sup>

Several courts have applied the above criteria to find a government accident report to be untrustworthy and inadmissible as hearsay. The inexperience of an investigator is one example. The Southern District of Ohio found a Navy report on the cause of an airplane accident to be untrustworthy because it “was prepared by an inexperienced investigator in a highly complex field of investigation.”<sup>86</sup> The Ninth Circuit found a Judge Advocate General (JAG) aircraft accident report untrustworthy because the investigator “was not qualified to render expert opinions.”<sup>87</sup> The Ninth Circuit noted: “(1) [the investigator] did not attend

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investigator); *McKinnon v. Skil Corp.*, 638 F.2d 270, 278 (1st Cir. 1981) (concluding Consumer Product Safety Commission Reports properly excluded as untrustworthy where they contained double hearsay).

<sup>80</sup> *Budden*, 748 F. Supp. at 1378; *In re Air Crash at Stapleton Int’l Airport*, 720 F. Supp. at 1498.

<sup>81</sup> See, e.g., *Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185-DES, 2006 WL 1084103, at \*38 (D.S.D. Apr. 20, 2006); *Budden*, 748 F. Supp. at 1378; *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635–36 (3d Cir. 1977).

<sup>82</sup> *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988).

<sup>83</sup> *In re Air Crash at Stapleton Int’l Airport*, 720 F. Supp. at 1497.

<sup>84</sup> *Beech Aircraft Corp.*, 488 U.S. at 168 n.11.

<sup>85</sup> *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993).

<sup>86</sup> *Fraleigh v. Ruckwell Int’l Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979).

<sup>87</sup> *Desrosiers v. Flight Int’l of Fla. Inc.*, 156 F.3d 952, 962 (9th Cir. 1998).

aviation accident reconstruction school until *after* completing the JAG report; (2) he had no formal training in aircraft accident investigation; (3) this was the first JAG aircraft accident report [he had] ever prepared; and (4) [he had] never reviewed the avionics maintenance records before issuing the report.”<sup>88</sup>

Further, the inclusion of hearsay, unauthenticated documents, and reliance on hearsay in a government document are indicia that the document lacks trustworthiness.<sup>89</sup> A lack of trustworthiness may also be shown “‘if the report appears to have been made subject to a suspect motivation[, such as] if the public official or body who prepared the report has an institutional or political bias.’”<sup>90</sup> A report may be untrustworthy if made in contemplation of litigation.<sup>91</sup> The fact that a government report is not final, but interim or preliminary in nature, also casts doubt upon its trustworthiness.<sup>92</sup> “Rule 803(8)(C) was meant to cover only final reports, not to ‘piggyback the whole administrative proceeding into the trial.’”<sup>93</sup>

### C. USE OF ICAO ACCIDENT REPORTS IN CIVIL LITIGATION

There is no statutory bar to the use of ICAO accident reports in civil litigation as there is for NTSB accident reports. However, the general limitations found in Rule 803(8)(C) for the admission of a government report applies equally to an ICAO accident report.

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<sup>88</sup> *Id.*

<sup>89</sup> *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, 144 (6th Cir. 1983) (excluding report because relied upon hearsay statements of witnesses interviewed by investigator); *McKinnon v. Skil Corp.*, 638 F.2d 270, 278 (1st Cir. 1981) (concluding Consumer Product Safety Commission Reports properly excluded as untrustworthy where they contained double hearsay); *In re Air Crash at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1493, 1498 (D. Colo. 1989).

<sup>90</sup> *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002) (quoting STEPHEN A. SALTZBURG, *FEDERAL RULES OF EVIDENCE MANUAL* 1688–89 (7th ed. 1998)).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* n.4; *Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 861 (5th Cir. 1998); *Figures v. Bd. of Pub. Util.* 967 F.2d 357, 360 (10th Cir. 1992); *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 743 (2d Cir. 1989); *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983); *City of New York v. Pullman, Inc.*, 662 F.2d 910, 914–15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164; *Barlow v. Connecticut*, 319 F. Supp. 2d 250, 258 (D. Conn. 2004); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1147 (E.D. Pa. 1980).

<sup>93</sup> *Brown v. Sierra Nev. Mem'l Miners Hosp.*, 849 F.2d 1186, 1189 (9th Cir. 1988).



1. *Fed. R. Evid. 803(8)(C) Applies to ICAO Accident Reports*

"Nothing in the language of [Fed. R. Evid. 803 or the Advisory Committee Note] indicates that [the statute's] application to foreign documents was explicitly considered."<sup>94</sup> "Nonetheless, courts regularly admit foreign documents pursuant to [the] exceptions" in this statute.<sup>95</sup> As stated recently by the Southern District of New York, "Rule 803(8) is available to reports of foreign public offices and agencies that otherwise come within its terms."<sup>96</sup> The admissibility of a foreign accident report therefore turns on the limitations of Rule 803(8)(C) and the issue of trustworthiness as described above. Several cases that have evaluated the admissibility of ICAO accident reports under Rule 803(8)(C) are discussed below.

2. *Examples of ICAO Accident Reports Evaluated Under the Limitations of Rule 803(8)(C)*

a. *In re Korean Air Lines Disaster of Sept. 1, 1983*

Representatives of passengers on board Korean Airlines (KAL) Flight 007 brought suit against the airline after the aircraft was shot down by the Soviet military and crashed into the Sea of Japan.<sup>97</sup> An accident investigation was conducted by the Secretary General of the ICAO, and he submitted a report (ICAO Report) to the ICAO Council.<sup>98</sup> Appended to the ICAO Report was a Soviet report concerning the probable flight path of the aircraft.<sup>99</sup> The Council chose not to endorse the ICAO Report.<sup>100</sup>

KAL objected to both the ICAO Report and the Soviet report as hearsay not within the public records exception of Rule

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<sup>94</sup> *United States v. Regner*, 677 F.2d 754, 761 (9th Cir. 1982).

<sup>95</sup> *Id.* For the admission of foreign documents under Rule 803(8) see *United States v. Garland*, 991 F.2d 328, 334-35 (6th Cir. 1993) (records of Ghana); *United States v. Grady*, 544 F.2d 598, 604 (2nd Cir. 1976) (records of Ireland); *United States v. Rodriguez Serrate*, 534 F.2d 7 (1st Cir. 1976) (records of Dominican Republic); *United States v. PachecoLovio*, 463 F.2d 232 (9th Cir. 1972) (records of Mexico).

<sup>96</sup> *In re Parmalat Sec. Litig.*, 477 F. Supp. 2d 637, 640 (S.D.N.Y. 2007); see also *FAA v. Landy*, 705 F.2d 624, 633 (2d Cir. 1983) (Rule 803(8) applies to foreign documents).

<sup>97</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1482 (D.C. Cir. 1991).

<sup>98</sup> *Id.* at 1478-79.

<sup>99</sup> *Id.* at 1482.

<sup>100</sup> *Id.*

803(8)(C).<sup>101</sup> KAL argued the ICAO Report lacked sufficient evidence from which to draw conclusions, was not final, and was based upon an untrustworthy Soviet report.<sup>102</sup> The Soviet report was claimed to lack trustworthiness because it was politically motivated, seeking to exonerate the Soviet Union's actions.<sup>103</sup>

The D.C. Circuit found the district court did not abuse its discretion by admitting the reports under Rule 803(8)(C).<sup>104</sup> The Secretary General was found to be acting in the capacity of a public official when he conducted the investigation and submitted the report.<sup>105</sup> The ICAO Report was a final report when submitted to the Council, even though they chose not to endorse it.<sup>106</sup> The Soviet report presented a separate problem. The D.C. Circuit noted the Soviet report, standing alone, would probably be inadmissible under Rule 803(8)(C), but there was no abuse of discretion in admitting the report because it was attached to the ICAO Report.<sup>107</sup> It was noted that the district court understood its duty to evaluate the trustworthiness of the Soviet report and recognized its authority to exclude untrustworthy portions.<sup>108</sup> The judgment call by the trial judge is entitled to deference, and plaintiffs did not rely on the objectionable material contained in the report to establish the probable flight path of the aircraft.<sup>109</sup>

b. *Graiver v. Walkers Cay Air Terminal*

This case arises out of a chartered airplane crash in Mexico.<sup>110</sup> The accident was investigated by the Mexican government.<sup>111</sup> Defendants objected to the admissibility at trial of the Mexican accident report as hearsay outside the scope of Rule 803.<sup>112</sup> The *Graiver* court found Rule 803 to apply to foreign government documents and considered the admissibility of the Mexican accident report in the same manner as a report of the United

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<sup>101</sup> *Id.* at 1481.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1482.

<sup>104</sup> *Id.* at 1483.

<sup>105</sup> *Id.* at 1482.

<sup>106</sup> *Id.* at 1481-82.

<sup>107</sup> *Id.* at 1482-83.

<sup>108</sup> *Id.* at 1483.

<sup>109</sup> *Id.*

<sup>110</sup> *Graiver v. Walkers Cay Air Terminal*, 1980 U.S. Dist. LEXIS 15199, at \*1 (S.D.N.Y. Oct. 6, 1980).

<sup>111</sup> *Id.* at \*2.

<sup>112</sup> *Id.*

States.<sup>113</sup> The court stated the Mexican accident report was hearsay unless it fell into one of the exceptions in Rule 803.<sup>114</sup>

Defendants argued against the trustworthiness of the report based on the possible bias of the Mexican government "to cover-up wrongdoing by the Mexican [air] traffic controller," technical errors in the report, and a "failure to quote radio transmissions on which some findings were based."<sup>115</sup> The district court, however, found the Mexican accident report admissible under the public records exception to the hearsay rule. In the court's brief discussion regarding the admissibility of the report, it mentioned the Mexican accident report (1) was made under legal authority, (2) was timely, and (3) was prepared by the agency of the Mexican government with the "expertise to study civil air disasters."<sup>116</sup> Defendants did not come forward with any facts to overcome the presumption of trustworthiness attached to government reports and therefore the report was admissible.<sup>117</sup>

c. *Drummond v. Alia-The Royal Jordanian Airline Corp.*

In *Drummond*, the district court considered the trustworthiness of an airline accident report authored by the government of Qatar and found it inadmissible under Rule 803(8)(C).<sup>118</sup> The airplane crash occurred on March 13, 1979, and the investigation began "immediately thereafter."<sup>119</sup> The court noted that "no problem" appeared in the timeliness of the report or the authority of the investigation.<sup>120</sup> The court, however, ultimately found the report untrustworthy based on several factors. Specifically, the court found: (1) there was no information regarding the special skill or expertise of the officials conducting the investigation; (2) there was no hearing conducted for purposes of preparing the report and, as a result, there "were very few procedural safeguards to protect against the inclusion of hearsay and

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<sup>113</sup> *Id.* at \*2 n.1.

<sup>114</sup> *Id.* at \*2.

<sup>115</sup> *Id.* at \*4.

<sup>116</sup> *Id.* at \*5.

<sup>117</sup> The *Graiver* court excised statements regarding the cause of the accident as improper opinion not covered by Rule 803(8). *Id.* at \*5-6. This decision was made prior to the Supreme Court's holding in *Rainey* expressly allowing factually based opinions and conclusions in government documents. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988).

<sup>118</sup> *Drummond v. Alia-The Royal Jordanian Airline Corp.*, 11 Fed. R. Evid. Serv. 1904, 1905 (W.D. Pa. 1982).

<sup>119</sup> *Id.* at 1908.

<sup>120</sup> *Id.*

irrelevant evidence”; (3) there was the possibility “that the government of Qatar may have required that the report be prepared in such a way as to protect itself from any liability”; and (4) there was “no way of knowing . . . whether the [expert] opinions [contained in the report] were based upon data and facts reasonably relied upon by experts in the field.”<sup>121</sup>

d. *In re Air Crash Near Roselawn, Indiana, on October 31, 1994*

This case involved the crash of an ATR-72 on October 31, 1994, near Roselawn, Indiana.<sup>122</sup> The NTSB investigated this accident and produced a final accident report.<sup>123</sup> Pursuant to Annex 13, the French Bureau Enquetes-Accidents (BEA) participated in the investigation, as France was the country of manufacture for the ATR-72 aircraft.<sup>124</sup> The BEA strongly disagreed with substantial portions of the NTSB report and submitted its own 274-page response.<sup>125</sup> The BEA report was appended to the NTSB accident report in accordance with section 6.3 of Annex 13.<sup>126</sup>

The defendants moved to admit the BEA report at trial.<sup>127</sup> Without a detailed analysis, the district court held the BEA report itself, and its conclusions, would not be introduced into evidence based on Federal Rule of Evidence 403, as more prejudicial than probative.<sup>128</sup> The court did allow, however, for qualified expert witnesses to rely on non-conclusory facts contained in the BEA report.<sup>129</sup>

### III. USE OF MILITARY AVIATION ACCIDENT REPORTS IN U.S. LITIGATION

U.S. combat operations in Iraq and Afghanistan have provided occasions where U.S. military air crashes in foreign countries resulted in civil litigation back in the United States. Annex 13 and NTSB accident investigation procedures, however, do

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<sup>121</sup> *Id.* at 1909–11.

<sup>122</sup> NTSB, Aircraft Accident Report DCA95MA001, <http://www.nts.gov/Publictn/1996/aar9602.pdf> (last visited Oct. 31, 2009).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 5–6.

<sup>125</sup> *Id.* at 7.

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *In re Air Crash Near Roselawn, Ind., on Oct. 31, 1994*, No. 95 C 4593, MDL 1070, 1997 WL 572896, at \*1 (N. D. Ill. Sept. 10, 1997).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

not apply to military accident investigations.<sup>130</sup> Following the crash of a military aircraft, the service involved conducts the accident investigation and prepares one or more accident reports. This section discusses the admissibility and discoverability of aviation accident reports prepared by the armed services.

There are several recent examples of military air crashes in Iraq and Afghanistan that resulted in civil litigation in the United States where a branch of the armed services conducted the accident investigation.

- MH-47E Chinook Helicopter Crash: U.S. Army MH-47E Chinook crash on February 17, 2007, in the Zabul Province of Afghanistan. Complaint filed against the helicopter manufacturers in California state court and removed to the United States District Court for the Northern District of California.<sup>131</sup>
- F/A 18 Shot Down by Patriot Missile: U.S. Navy F/A 18 shot down by Patriot missile on April 2, 2003, near Karbala, Iraq. Complaint filed in the United States District Court for the District of Massachusetts against the manufacturer of the Patriot Missile system.<sup>132</sup>
- Sikorsky MH-53 Pave Low Helicopter Crash: U.S. Air Force Sikorsky MH-53 Pave Low helicopter crash on November 23, 2003, near Bagram Airbase, Afghanistan. Complaint filed in the United States District Court for the Southern District of Florida against the helicopter manufacturer.<sup>133</sup>
- Apache AH-64D Longbow Helicopter Crash: U.S. Army Apache AH-64 Longbow helicopter crash on August 14, 2003, near Tikrit, Iraq. Complaint filed in California state court against the helicopter manufacturers and subsequently removed to the United States District Court for the Central District of California.<sup>134</sup>

In each of these examples, the litigants may seek to either offer or exclude one or more military accident reports, or have experts rely on those reports.

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<sup>130</sup> 49 U.S.C. § 1132(a), (d) (1994); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 780 F. Supp. 1207, 1212 n.8.

<sup>131</sup> *Getz v. Boeing Co.*, No. CV 07-6396 CW, 2008 WL 2705099, at \*1 (N.D. Cal. July 8, 2008). The accident was investigated by the United States Army. *Id.*

<sup>132</sup> Pl.'s Am. Compl. and Demand for Jury Trial, *White v. Raytheon Co.*, No. 07-CV-10222-R65, 2008 WL 5273290 (D. Mass. Dec. 17, 2008).

<sup>133</sup> Complaint, *Kerwood v. Lear Siegler Servs., Inc.*, No. 0:05CV61790 (S.D. Fla. Nov. 23, 2005).

<sup>134</sup> Complaint, *Carns v. Honeywell*, No. 2:05CV6344 (C.D. Cal. July 26, 2005).

## A. MILITARY AVIATION ACCIDENT INVESTIGATIONS

"Following every accident involving a military aircraft, the service involved initiates two parallel investigations," each with different procedures and different aims.<sup>135</sup> The first is a confidential safety or mishap investigation.<sup>136</sup> The second is a legal or collateral investigation.<sup>137</sup> Separate safety and legal investigations are specified in Department of Defense (DoD) Instruction 6055.7, which establishes the basic accident investigation procedures and requirements for each type of investigation.<sup>138</sup> The military departments are required to implement DoD Instruction 6055.7 through their respective regulations and instructions.<sup>139</sup>

*1. Safety or Mishap Investigation Board Reports*

The military safety or mishap board report is prepared to enable the service to secure the quality of information and candid opinions required in order to identify the specific causes of the accident and prevent its repetition.<sup>140</sup> The safety investigation is conducted by a specially appointed board which "prepares a report that is intended for 'the sole purpose of taking corrective action in the interest of accident prevention.'"<sup>141</sup> To encourage witnesses to speak freely, they are not sworn in and receive assurance that their statements will not be used for any purpose other than accident prevention.<sup>142</sup> As military investigation boards "do not have the power to compel testimony, they must rely on the willingness of military personnel to be absolutely candid about their own performance and the performance of others, and on the willingness of manufacturer's representatives to highlight possible shortcomings in their own products."<sup>143</sup>

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<sup>135</sup> *Badhwar v. U. S. Dep't of the Air Force*, 829 F.2d 182, 183 (D.C. Cir. 1987); *Cooper v. Dep't of the Navy of the U.S.*, 558 F.2d 274, 275 (5th Cir. 1977); *Brockway v. Dep't of the Air Force*, 518 F.2d 1184, 1185 (8th Cir. 1975).

<sup>136</sup> *Badhwar*, 829 F.2d at 183; *Cooper*, 558 F.2d at 275; *Brockway*, 518 F.2d at 1185; Dep't of Defense Instruction (DoDI) 6055.7 § E4.4 (2000).

<sup>137</sup> *Badhwar*, 829 F.2d at 183; *Cooper*, 558 F.2d at 275; *Brockway*, 518 F.2d at 1185; DoDI No. 6055.7 § E4.6 (2000).

<sup>138</sup> DoDI No. 6055.7 §§ E4.4, E4.6; *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 973 (10th Cir. 1994).

<sup>139</sup> DoDI No. 6055.7 § 2.1 (2000).

<sup>140</sup> *Badhwar*, 829 F.2d at 183.

<sup>141</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 795 (1984); *see also* DoDI No. 6055.7 § E4.4.

<sup>142</sup> *Weber*, 465 U.S. at 795; *Brockway*, 518 F.2d at 1185-86.

<sup>143</sup> *Badhwar*, 829 F.2d at 183.

"The operating theory behind [a safety] investigation is that only a credible promise of confidentiality will enable the services to secure the kind of information needed to properly analyze accidents and prevent recurrences."<sup>144</sup> Military regulations treat safety investigation reports as privileged and generally prohibit their release, subject to an exception for factual information and nonpersonal evidence.<sup>145</sup> As discussed more fully below, safety investigation reports are subject to an executive privilege shielding them from disclosure in civil litigation or from disclosure under the Freedom of Information Act.<sup>146</sup>

## 2. *Legal or Collateral Investigation Board Reports*

The legal or collateral investigation<sup>147</sup> is carried out by personnel not involved with the mishap investigation, and this report is prepared to collect evidence used in claims, disciplinary proceedings, civil litigation, administrative actions, and for all purposes other than accident prevention and aviation safety.<sup>148</sup> Witnesses in a collateral investigation testify under oath and are generally protected by procedural safeguards.<sup>149</sup> The record of a collateral investigation board report is public and not subject to an executive privilege shielding it from disclosure.<sup>150</sup> However, DoD Instruction 6055.7 § E4.6.6 specifies that legal investigation reports are subject to a federal statute prohibiting the use

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<sup>144</sup> *Id.*

<sup>145</sup> *Weber*, 465 U.S. at 795; *see also* DoDI No. 6055.7 § E4.5.3 (2000) and Army Regulation (AR) 385-40 §§ 1-10, 1-11 (1994).

<sup>146</sup> DoDI No. 6055.7 §§ E4.5.3.1, E4.5.3.2 (2000); Air Force Instruction (AFI) 91-204 § 2.1.2 (1991).

<sup>147</sup> The Navy conducts a legal accident investigation pursuant to JAG Instruction 5800.7D, Manual of The Judge Advocate General, § 241 (Aircraft Accidents). These investigations are often known as "Jag Manual Reports." *See Cooper v. Dep't of the Navy of the United States*, 558 F.2d 274, 274 (5th Cir. 1977); *Hill Tower, Inc. v. Dep't of the Navy*, 718 F. Supp. 562, 565 (N.D. Tex. 1988). The Army conducts a legal accident investigation pursuant to AR 385-40 (Accident Reporting and Records), and these investigations are known as Collateral Investigation Board reports or CIB reports. *See Ferguson v. Bombardier Servs. Corp.*, 244 Fed. App'x 944, 947 (11th Cir. 2007). The Air Force conducts a legal accident investigation pursuant to AFI 51-503 (Aircraft, Missile, Nuclear, and Space Accident Investigations), and its reports are known as Accident Investigation Board Reports. *See* AFI 91-204 § 2.3.4 (Safety Investigations and Reports).

<sup>148</sup> *Weber*, 465 U.S. at 795; *Brockway v. Dep't of the Air Force*, 518 F.2d 1184, 1185 (8th Cir. 1975); *Badhwar*, 829 F.2d at 183.

<sup>149</sup> *Weber*, 465 U.S. at 795.

<sup>150</sup> *Id.*; *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 206 (D.D.C. 1984).

of opinions, contributing factors, or conclusions contained in the reports in civil litigation.<sup>151</sup>

B. 10 U.S.C. § 2254(D)—STATUTORY BAR TO THE USE OF  
OPINIONS OR CONCLUSIONS IN MILITARY AVIATION  
ACCIDENT REPORTS IN CIVIL LITIGATION

The use of military aviation accident reports in civil litigation is governed by 10 U.S.C. § 2254(d), which provides that “any opinion of the accident investigators as to the cause of, or the factors contributing to, the accident set forth in the accident investigation report may not be considered as evidence in [a civil] proceeding.”<sup>152</sup> The statute applies to “any form of investigation of an aircraft accident other than an investigation (known as a ‘safety investigation’) that is conducted solely to determine the cause of the accident and to obtain information that may prevent the occurrence of similar accidents.”<sup>153</sup>

This federal statute was enacted in 1992, and only a few courts have had an opportunity to rule on its application. One court expressly ruled the statute applies to military collateral investigation reports.<sup>154</sup> While no court has ruled on the applicability of 10 U.S.C. § 2254(d) to safety or mishap investigation reports, the plain language of the statute indicates these reports do not fall under its provisions pursuant to 10 U.S.C. § 2254(a)(2).<sup>155</sup> The application of this statute by the few courts to have considered it is discussed below.

I. Richardson v. Bombardier Services Corp.

This case arises out of the crash of a military Sherpa C-23B, which crashed while transporting Virginia Air National Guard personnel, killing eighteen passengers and three crew members.<sup>156</sup> The Army conducted two official investigations of the crash.

The United States Army Safety Center issued a Safety Center Report, which was [prepared] for the purpose of increasing aviation safety and preventing mishaps. The Army redacted all of the

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<sup>151</sup> DoDI No. 6055.7 § E4.6.6 (2000).

<sup>152</sup> 10 U.S.C. § 2254(d) (2000).

<sup>153</sup> 10 U.S.C. § 2254(a)(2).

<sup>154</sup> *Lopez v. Three Rivers Elec. Coop., Inc.*, 92 S.W.3d 165, 172 (Mo. Ct. App. 2002), *overruled by* *Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008).

<sup>155</sup> 10 U.S.C. § 2254(a)(2).

<sup>156</sup> *Ferguson v. Bombardier Servs. Corp.*, 244 Fed. App'x 944, 947 (11th Cir. 2007).



findings and recommendations of the investigation board and reviewing officials before releasing the Safety Center Report. The Army also convened a Collateral Investigation Board [(CIB)], which issued [a separate] report. Unlike the Safety Center Report, the CIB report was [prepared] for the purpose of studying the events leading up to the crash, identifying contributing factors, and determining the cause.<sup>157</sup>

The district court considered the admissibility of each of these reports.

The district court heard extensive arguments concerning the admissibility of the CIB report and ruled that its conclusions were inadmissible pursuant to 10 U.S.C. § 2254(d) but that the balance of the report would be admitted with the conclusions redacted.<sup>158</sup> Attached to the CIB report was a memo from Major General Harrison entitled "Convening Authority Comments on the Collateral Investigation Report." Although General Harrison was the convening authority for the CIB, he was not a member of the board, took no part in the investigation of the crash, and was not qualified to render opinions.<sup>159</sup> The district court found that General Harrison's memo was not part of the CIB report and was therefore inadmissible hearsay.<sup>160</sup> The court further reasoned that to the extent the memo was properly part of the CIB report, 10 U.S.C. § 2254(d) rendered his opinions and conclusions inadmissible.<sup>161</sup>

The district court also considered the Army Safety Center Report, which was substantially redacted and transmitted with a cover letter noting the report was for "safety purposes only."<sup>162</sup> The district court excluded the Safety Center Report because of authenticity problems, due to the substantial redactions, and because it was hearsay.<sup>163</sup> The court noted the cover letter transmitted with the report indicated a lack of trustworthiness obviating the public records exception under Federal Rule of Evidence 803(8)(C).<sup>164</sup> Plaintiffs appealed the trial court's evidentiary rulings to the Eleventh Circuit.

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<sup>157</sup> *Id.*

<sup>158</sup> *Richardson v. Bombardier, Inc.*, No. 8:03CV544T31MSS, 2005 WL 3087864, at \*10 (M.D. Fla. Nov. 16, 2005).

<sup>159</sup> *Id.* at \*10 n.38.

<sup>160</sup> *Id.* at \*10.

<sup>161</sup> *Id.* at \*10 n.39.

<sup>162</sup> *Id.* at \*11.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

On appeal, plaintiffs argued both the CIB and the Safety Center Reports were admissible hearsay under the government report exception in Rule 803(8)(C).<sup>165</sup> First, the Eleventh Circuit affirmed the district court's exclusion of the CIB's conclusions and opinions pursuant to 10 U.S.C. § 2254(d).<sup>166</sup> The Eleventh Circuit also found that General Harrison's memo was not part of the CIB report and was therefore outside the scope of Rule 803(8)(C) because it was not a finding of the military.<sup>167</sup> The circuit court cited *City of New York v. Pullman Inc.* for the proposition that interim staff reports do not "embody the findings of an agency" and are therefore outside the scope of Rule 803(8)(C).<sup>168</sup> The circuit court also agreed that the memo would be inadmissible under 10 U.S.C. § 2254(d).<sup>169</sup>

Second, the Eleventh Circuit found the district court committed no error in excluding the Army Safety Center Report.<sup>170</sup> The circuit court noted:

The portion of the Report that appellants contend should have been admitted, the conclusion regarding the aircraft's weight and center of gravity, offers no indication of how the Army Safety Center arrived at its calculation. Because the Report was issued for aviation safety and not for the purposes of litigation, extensive portions were redacted, limiting its usefulness and reliability. Given the lack of any indicia of reliability regarding the report's estimation of the weight of the aircraft or what role the weight may have played in the crash, the district court did not abuse its discretion in excluding the report.<sup>171</sup>

Thus the Eleventh Circuit upheld the district court's exclusion of the CIB's conclusions pursuant to 10 U.S.C. § 2254(d) and upheld the exclusion of the Safety Center Report's conclusions as outside the scope of Rule 803(8)(C).<sup>172</sup>

## 2. *Lopez v. Three Rivers Electric Cooperative, Inc.*

This case was brought in a Missouri state court following the crash of an Army CH-47 Chinook helicopter when it struck

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<sup>165</sup> *Ferguson v. Bombardier Servs. Corp.*, 244 Fed. Appx. 944, 949 (11th Cir. 2007).

<sup>166</sup> *Id.* at 950.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citing *City of New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 949–50.

power lines hanging over a river.<sup>173</sup> The Army conducted a safety investigation and a collateral investigation into the accident. Only the collateral investigation report was offered into evidence. The trial court ruled that the opinions and conclusions contained in the collateral investigation report prepared by the Army would be excluded pursuant to 10 U.S.C. § 2254(d), but that other portions of the report could be introduced into evidence.<sup>174</sup>

On appeal, Three Rivers argued the collateral report was not an accident report that fell under 10 U.S.C. § 2254(d) but that it should have been admitted into evidence in full under Missouri state law.<sup>175</sup> However, the state appeals court held that “[b]y its terms, 10 U.S.C. § 2254[(a)(2)] applies to ‘any form of investigation of an aircraft accident’ other than a safety investigation” conducted solely to determine the cause of the accident and to prevent similar occurrences.<sup>176</sup> The state appeals court noted that Army regulations require the Army to conduct two investigations when a military accident results in a fatality: (1) a safety investigation and (2) a collateral investigation.<sup>177</sup> The purpose of the collateral investigation is “to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative actions.”<sup>178</sup> Thus, a collateral report is not a safety report conducted solely to determine the cause of an accident or to prevent similar occurrences and consequently, 10 U.S.C. § 2254(d) would apply.<sup>179</sup> The opinions and conclusions expressed in the collateral report were properly excluded by the trial court under the statute.<sup>180</sup>

### C. DISCLOSURE OF MILITARY SAFETY INVESTIGATION REPORTS

The plain language of 10 U.S.C. § 2254(a)(2) excludes military safety investigation reports from the statutory bar to the

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<sup>173</sup> *Lopez v. Three Rivers Elec. Coop., Inc.*, 92 S.W.3d 165, 165 (Mo. Ct. App. 2002), *overruled by* *Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008).

<sup>174</sup> *Id.* at 170.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 172 (emphasis in original); 10 U.S.C. § 2254(a)(2) (2000).

<sup>177</sup> *Lopez*, 92 S.W.3d at 172.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* DoDI No. 6055.7 § E4.6, AFI 91-204 § 2.3.5.2, and the Manual of the Judge Advocate General § 241(c)(1) all include military legal accident investigations within the scope of 10 U.S.C. § 2254 while making no mention of the statute with respect to safety investigations.

<sup>180</sup> *Lopez*, 92 S.W.3d at 172.

opinions and conclusions in a military accident report.<sup>181</sup> However, military regulations require these reports to be privileged from disclosure.<sup>182</sup> The service that prepares a safety investigation report is required to redact confidential witness statements, conclusions, recommendations, and future policy proposals before disclosure.<sup>183</sup> The armed forces are generally successful in preventing disclosure of this information in civil discovery or under the Freedom of Information Act (FOIA) by claim of executive privilege.<sup>184</sup> The scope of this privilege is discussed below.

1. *The Machin Privilege – Obtaining Military Safety Investigation Reports in Civil Discovery*

Military accident investigation reports can be withheld from disclosure in litigation under an executive privilege known as the *Machin* privilege when information is obtained by the military under assurances of confidentiality.<sup>185</sup> Confidential witness statements made to military air crash safety investigators were held to be privileged with respect to pretrial discovery more than forty years ago in *Machin v. Zukert*.<sup>186</sup> However, this privilege must be properly asserted by the armed forces in order to withhold information in accident safety reports from discovery.<sup>187</sup>

a. *Machin v. Zukert*

*Machin* involved a civil lawsuit against an aircraft company brought by the sole surviving crewmember of an Air Force B-25 bomber that crashed shortly after one of its pilots reported an over-speeding propeller. The plaintiff sought production of accident reports in the files of the Department of the Air Force, including certain witness statements made by employees of aviation corporations and the factual findings of Air Force mechan-

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<sup>181</sup> 10 U.S.C. § 2254(a)(2).

<sup>182</sup> *Id.* § 2254(d).

<sup>183</sup> OP NAVIST 5102.1D (Navy & Marine Corps. Mishap and Safety Investigation, Reporting, and Record Keeping Manual) §§ 7002, 7003(1) (2005); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987); *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963).

<sup>184</sup> See *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>185</sup> *Weber*, 465 U.S. at 798–99.

<sup>186</sup> *Machin*, 316 F.2d 336, *cert. denied*, 375 U.S. 896 (1963).

<sup>187</sup> See *Bray v. United States*, No. Civ.A. 03-5150, 2005 WL 589754, at \*2 (E.D. Pa. Mar. 14, 2005).

ics who inspected the wreckage.<sup>188</sup> The Secretary of the Air Force asserted a claim of executive privilege over the Air Force accident reports.<sup>189</sup>

The Court of Appeals for the D.C. Circuit held that confidential statements made to military air crash safety investigators were privileged and exempt from disclosure, while the factual findings of the Air Force mechanics were to be disclosed.<sup>190</sup> The executive privilege extends to any conclusions that might be based on confidential information or otherwise reflects official deliberations or recommendations as to policies that should be pursued.<sup>191</sup>

b. *United States v. Weber Aircraft Corp.*

Twenty years after *Machin*, the Supreme Court, in *United States v. Weber Aircraft Corp.*, acknowledged that “the *Machin* privilege is well recognized in the case law as precluding routine disclosure” of confidential witness statements made to military air crash investigators.<sup>192</sup> The *Machin* and *Weber* holdings effectively prevent litigants from obtaining material contained in military safety board reports in pretrial discovery or from discovering safety board conclusions, deliberations, or recommendations.<sup>193</sup>

c. *Bray v. United States*

This case concerns the proper assertion of the *Machin* privilege over a military safety board report. The case arises out of the death of a police diver conducting an underwater search for a sunken U.S. Coast Guard buoy.<sup>194</sup> The Coast Guard convened a Mishap Board to review the incident and to make recommendations to improve the safety of future operations. The Mishap Board drafted a report, the Coast Guard Mishap Board Investigation Report, and plaintiff sought production of the report

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<sup>188</sup> *Machin*, 316 F.2d at 337.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 339–40.

<sup>191</sup> *Id.*

<sup>192</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984).

<sup>193</sup> *See Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 205 (D.D.C. 1984) (recognizing that the *Machin* privilege generally exempts military safety reports prepared to prevent future accidents from discovery in litigation).

<sup>194</sup> *Bray v. United States*, No. Civ.A. 03-5150, 2005 WL 589754, at \*1 (E.D. Pa. Mar. 14, 2005).

through discovery. The United States withheld the mishap report as protected by the *Machin* privilege.

The district court held that the *Machin* privilege was a form of the executive, or deliberative process, privilege. There are three requirements for this privilege to apply:

- (1) the head of the agency who has control over the document must assert the privilege after personal consideration;
- (2) the head of the agency must state with particularity what information is subject to the privilege; and
- (3) the agency must supply the court with precise and certain reasons for maintaining the confidentiality of the document.<sup>195</sup>

The district court noted that the claim of privilege in *Machin* was made by the Secretary of the Air Force himself, and thus the Court did not need to consider whether the “head of agency” requirement was met before the privilege was applied to the accident report.<sup>196</sup>

In *Bray*, the district court ordered the United States to produce the Coast Guard Mishap Board Report because there was no assertion that the Commandant of the Coast Guard personally considered the report and asserted the privilege.<sup>197</sup> Therefore, the United States did not properly invoke the executive privilege to protect the mishap report from discovery under the *Machin* privilege.

## 2. *Obtaining Military Safety Investigation Reports Through the FOIA*

In addition to civil discovery, government records such as military accident reports may be obtained through the Freedom of Information Act codified at 5 U.S.C. § 552. The FOIA requires government agencies to make their records and information public upon request unless specifically exempt from disclo-

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<sup>195</sup> *Walsky Constr. Co. v. United States*, 20 Cl. Ct. 317, 320 (1990) (citing *Mobil Oil Corp. v. Dep’t of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983)); *see also* *Scott Paper Co. v. United States*, 943 F. Supp. 501, 502 (E.D. Pa. 1996) (“the deliberative process, or executive, privilege may only be invoked by the head of the agency or department”); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 714 (E.D. Pa. 1968) (“a claim of executive privilege is validly made only by the head of the executive department or administrative agency involved, after actual personal consideration by that officer”).

<sup>196</sup> *Bray*, 2005 WL 589754, at \*2.

<sup>197</sup> *Id.*

sure.<sup>198</sup> Documents are presumed to be subject to disclosure unless the agency proves that one of the nine statutory exemptions listed in 5 U.S.C. § 552(b) applies.<sup>199</sup> The fifth listed exemption provides that the FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency."<sup>200</sup> The sixth listed exemption applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>201</sup> The fifth exemption (Exemption 5) and the sixth exemption (Exemption 6) have been held to apply to military air crash safety reports shielding them from disclosure pursuant to a FOIA request.<sup>202</sup> Certain cases applying these FOIA exemptions are discussed below.

a. *United States v. Weber Aircraft Corp.*

In *Weber*, the Supreme Court expressly held that FOIA Exemption 5 incorporates the *Machin* privilege protecting military air crash safety reports containing confidential statements from disclosure.<sup>203</sup> The case in *Weber* involved the crash of an Air Force F-106B that severely injured the pilot. The Air Force conducted two separate investigations: a safety investigation and a collateral investigation. During pretrial discovery, the Air Force released the entire record of the unprivileged collateral investigation. The Air Force also released certain factual portions of the safety investigation pursuant to its internal regulations but refused to disclose confidential portions of the report under a claim of executive privilege.<sup>204</sup>

Because the *Machin* holding effectively prevented Weber Aircraft from obtaining the confidential information through discovery, it commenced an action to obtain the information under the FOIA. The material withheld by the Air Force contained conclusions, speculations, findings, and recommendations made by the investigators as well as witness testimony given

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<sup>198</sup> 5 U.S.C. § 552(b) (2008).

<sup>199</sup> Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 984–85 (9th Cir. 1985).

<sup>200</sup> 5 U.S.C. § 552(b)(5).

<sup>201</sup> *Id.* § 552(b)(6).

<sup>202</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 792 (1984).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 796.

under a pledge of confidentiality.<sup>205</sup> The circuit court held the undisclosed materials were privileged and FOIA Exemption 5 applied, but not to the factual portions of the witness statements.<sup>206</sup> The Supreme Court reversed, holding that Exemption 5 simply incorporates all civil discovery privileges and would apply to the entire witness statements, including the factual materials contained therein.<sup>207</sup>

b. *Badhwar v. U.S. Dep't of Air Force*

*Badhwar* was decided after the Supreme Court's decision in *Weber* and involved "access to information contained in confidential aircraft safety investigation reports compiled by the armed services."<sup>208</sup> The district court held that certain portions of the safety reports could be disclosed under the FOIA while others were privileged.<sup>209</sup> It held that the findings, conclusions, recommendations, and confidential witness statements of government employees were privileged from disclosure under Exemption 5.<sup>210</sup> It further held that factual portions of contractors' reports and autopsy reports, both part of the safety investigation reports at issue, could be disclosed.<sup>211</sup>

The D.C. Circuit found the privilege from disclosure applies to three categories of information:

- (1) material obtained in large part through promises of confidentiality;
- (2) material that reflects official deliberations; and
- (3) material that reflects recommendations or policies that should be pursued.<sup>212</sup>

The D.C. Circuit upheld the district court's nondisclosure of findings, conclusions, recommendations, and confidential witness statements of government employees.<sup>213</sup> The D.C. Circuit, however, found that the *Machin* privilege applies even to factual findings in the contractors' reports when provided under a promise of confidentiality.<sup>214</sup> The distinction between dis-

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<sup>205</sup> *Id.* at 796–97.

<sup>206</sup> *Id.* at 798.

<sup>207</sup> *Id.* at 799.

<sup>208</sup> *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 182 (D.C. Cir. 1987).

<sup>209</sup> *Id.* at 183.

<sup>210</sup> *Id.* at 184.

<sup>211</sup> *Id.* at 185.

<sup>212</sup> *Id.* at 184.

<sup>213</sup> *Id.* at 186.

<sup>214</sup> *Id.* at 185.



closable and nondisclosable parts of a safety investigation report is whether the information is obtained through the assurance of confidentiality.<sup>215</sup> The D.C. Circuit further found that the autopsy report could be withheld under Exemption 6 if the information constituted a “clearly unwarranted invasion of privacy.”<sup>216</sup> The case was remanded to the district court for reconsideration of whether the contractors were given assurances of confidentiality and whether the autopsy report constituted a “clearly unwarranted invasion of personal privacy.”<sup>217</sup>

#### IV. USE OF OTHER GOVERNMENT PREPARED DOCUMENTS IN U.S. LITIGATION

In addition to civil and military aviation accident reports, there are a number of other government documents that may be introduced in U.S. litigation involving an international air crash. The evidentiary use of NTSB safety recommendations, FAA Airworthiness Directives, and criminal investigation reports are discussed below.

##### A. USE OF NTSB SAFETY RECOMMENDATIONS

Although an NTSB investigation into an international aviation accident may not be common, the NTSB often issues safety recommendations relating to accidents or aircraft models involved in foreign accidents. Several examples of recent aviation accidents outside the United States where the NTSB issued safety recommendations are listed below:

- Gol Airlines Flight 1907: Boeing 737 crash on September 29, 2006, Amazon rainforest, Brazil. The NTSB issued Safety Recommendation A-07-35 through -37 on May 2, 2007 relating to this accident.<sup>218</sup>
- Blackwater 61: CASA 212 crash on November 27, 2004, near Bamiyan, Afghanistan. The NTSB issued Safety Recommendation A-06-77, A-06-78 though -81, and A-06-82 on December 4, 2006 relating to this accident.<sup>219</sup>

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<sup>215</sup> *Id.* at 184.

<sup>216</sup> *Id.* at 186.

<sup>217</sup> *Id.* at 185–86.

<sup>218</sup> Letter from Nat'l Transp. Safety Bd., Safety Recommendation A-07-35 through -37 (May 2, 2007), [http://www.nts.gov/Recs/letters/2007/A07\\_35\\_37.pdf](http://www.nts.gov/Recs/letters/2007/A07_35_37.pdf).

<sup>219</sup> Letter from Nat'l Transp. Safety Bd., Safety Recommendation A-06-77 (Dec. 4, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_77.pdf](http://www.nts.gov/Recs/letters/2006/A06_77.pdf); Letter from Nat'l

- Cessna Caravan 208B: Cessna Caravan 208B crash on November 19, 2005, Moscow, Russia. The NTSB issued Safety Recommendation A-06-01 through -03 on January 17, 2006 relating to the Cessna Caravan 208B and specifically mentioned the investigation of the Moscow accident.<sup>220</sup>
- Copterline Sikorski S-76 Helicopter: Copterline Sikorski S-76 Helicopter crash on August 10, 2005, into the Baltic Sea near Estonia. The NTSB issued Safety Recommendation A-05-33 through -35 on November 17, 2005,<sup>221</sup> and A-06-17 and A-06-18 on March 7, 2006 relating to this accident.<sup>222</sup>

The central issue with NTSB safety recommendations is the extent to which they are governed by 49 U.S.C. § 1154(b). This issue was recently considered by the Eastern District of New York in the context of a motion to dismiss for forum non conveniens.<sup>223</sup> Plaintiffs, in their opposition to the motion, relied upon the NTSB safety recommendations issued following the crash of Gol Flight 1907 in Brazil.<sup>224</sup> One defendant brought a motion to strike their use. The district court, without extensive analysis, applied the plain language of 49 U.S.C. § 1154(b) and refused to admit the safety recommendations or use the substance or conclusions in the recommendations in any way.<sup>225</sup> The court concluded “no substance from the report will be considered in these cases, and the report itself will not be used, but in considering defendants’ forum non conveniens motions, the Court will note that the NTSB issued a report on the accident.”<sup>226</sup>

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Transp. Safety Bd., Safety Recommendation A-06-78 through -81 (Dec. 4, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_78\\_81.pdf](http://www.nts.gov/Recs/letters/2006/A06_78_81.pdf).

<sup>220</sup> Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-06-01 through -03 (Jan. 17, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_01\\_03.pdf](http://www.nts.gov/Recs/letters/2006/A06_01_03.pdf).

<sup>221</sup> Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-05-33 through -35 (Nov. 17, 2005), [http://www.nts.gov/Recs/letters/2005/A05\\_33\\_35.pdf](http://www.nts.gov/Recs/letters/2005/A05_33_35.pdf).

<sup>222</sup> Letter from Nat’l Transp. Safety Bd., Safety Recommendation A-06-17 through -18 (Mar. 7, 2006), [http://www.nts.gov/Recs/letters/2006/A06\\_17\\_18.pdf](http://www.nts.gov/Recs/letters/2006/A06_17_18.pdf).

<sup>223</sup> *In re Air Crash Near Peixoto de Azeveda*, Braz. on Sept. 29, 2006, 574 F. Supp. 2d 272, 275–78 (E.D.N.Y. 2008).

<sup>224</sup> Pl.’s Supplemental Opp’n to Mot. to Dismiss for Forum Non Conveniens, *In re Air Crash Near Peixoto de Azeveda*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) (No. 07-md-1844), 2008 WL 6409803.

<sup>225</sup> *In re Air Crash Near Peixoto de Azeveda*, 574 F. Supp. 2d at 278.

<sup>226</sup> *Id.*

The admissibility of NTSB safety recommendations was more thoroughly discussed in another recent decision by the Eastern District of Kentucky in a case arising out of the crash of Comair Flight 5191 in Lexington, Kentucky.<sup>227</sup> The district court recognized that “[b]y regulation, the NTSB divides its reports into two groups: (1) ‘factual’ reports from its investigators and (2) analytical reports containing the Board’s determinations, which may include the probable cause of an accident.”<sup>228</sup> The latter may not be used as evidence, but the NTSB “does not object to . . . admission in litigation of factual accident reports.”<sup>229</sup> The court noted this distinction was explored in *Chiron Corp. v. NTSB*, where the D.C. Circuit considered “earlier cases holding that ‘factual findings’ of a Board report were admissible, [but found that] closer scrutiny showed that those cases focused only on admissible ‘investigators’ reports’ which were mislabeled as ‘reports of the Board.’”<sup>230</sup> The D.C. Circuit further noted that the response of the Board to this confusion was to amend its regulations to expressly exclude investigators’ factual accident reports from the statutory bar in 49 U.S.C. § 1154(b).<sup>231</sup>

The district court further considered a letter from the NTSB General Counsel stating the “NTSB’s long-standing position that [NTSB] safety recommendations are covered by the statutory prohibition against the use or admission of NTSB reports.”<sup>232</sup> The district court found the NTSB’s interpretation of 49 U.S.C. § 1154(b) to be entitled to some deference and persuasive.<sup>233</sup> The safety recommendations “were issued on Board stationery, concurred in by all members of the Board, and signed by the Board Chairman.”<sup>234</sup> They further “arose out of and are related to the investigation of one or more accidents.”<sup>235</sup> Accordingly, the safety recommendations of the NTSB are “encompassed within the meaning of a report of the Board, related to an accident or an investigation of an accident that is inadmissible” in litigation pursuant to 49 U.S.C. § 1154(b).<sup>236</sup>

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<sup>227</sup> *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, No. 5:06-CV-316, 2008 WL 2796875, at \*5 (E.D. Ky. July 18, 2008).

<sup>228</sup> *Id.* at \*1.

<sup>229</sup> 49 C.F.R. § 835.2 (2009).

<sup>230</sup> *In re Air Crash at Lexington, Ky.*, 2008 WL 2796875, at \*2.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at \*4.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at \*5.

Two other courts to have considered this issue found NTSB safety recommendations inadmissible under the statute.<sup>237</sup> The *Jacoby* court relied upon the D.C. Circuit's holding in *Chiron* and the legislative history of the statute to exclude NTSB safety recommendations in their entirety, even purely factual information.<sup>238</sup> The *Jacoby* court went on to state "the statute means what it says: No part of the Board's actual report is admissible as evidence in a civil suit."<sup>239</sup> "It takes no twisting of Congress's words to ascertain its intent to exclude Board reports like the 2001 Safety Recommendation from being admitted into evidence in this case."<sup>240</sup>

## B. USE OF FAA AIRWORTHINESS DIRECTIVES

Airworthiness Directives (AD) are mandatory regulations promulgated by the FAA when it determines that an "unsafe condition exists in" an aircraft or component and that that "condition is likely to exist or develop in other [aircraft or components] of the same type [or] design."<sup>241</sup> ADs specify inspections, conditions, and limitations the operator must comply with to maintain the continued airworthiness of an aircraft and to be in compliance with federal law.<sup>242</sup>

ADs are frequently offered as evidence in air crash litigation. Courts have admitted them as government records pursuant to Rule 803(8)(C).<sup>243</sup> They have also been excluded when circumstances indicate a lack of trustworthiness.<sup>244</sup> Courts have also evaluated ADs under Federal Rule of Evidence 407 to determine

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<sup>237</sup> *In re Jacoby Airplane Crash Litigation*, No. 99-6073(HAA), 2007 WL 2746833, at \*9-10 (D.N.J. Sept. 19, 2007); *Petroleum Helicopters, Inc. v. Rolls-Royce Corp.*, No. 1:05-cv-0410-LJM-WTL, 2007 WL 2249118, at \*8 (S.D. Ind. Aug. 2, 2007).

<sup>238</sup> *In re Jacoby*, 2007 WL 2746833, at \*9-10.

<sup>239</sup> *Id.* at \*9.

<sup>240</sup> *Id.* at \*10.

<sup>241</sup> 14 C.F.R. §§ 39.3, 39.5 (2002).

<sup>242</sup> *Id.* §§ 39.3, 39.11; *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1171 (9th Cir. 2002).

<sup>243</sup> *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1315 (3d Cir. 1978).

<sup>244</sup> *In re Air Crash Near Roselawn, Ind.*, No. 95-c-4593, MDL 1070, 1997 WL 572896, at \*1 (N.D. Ill. Sept. 10, 1997) ("all post-accident government actions in this case, including the FAA Airworthiness Directives . . . , are reports which lack trustworthiness because each government agency involved in the post-accident investigation was subject to different agendas and fact-finding methodology"); *Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1115 n.75 (E.D. Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978).

whether they are inadmissible as a subsequent remedial measure.<sup>245</sup>

Rule 407 precludes the introduction of subsequent remedial measures to prove a party's negligence or a product defect.<sup>246</sup> The rule provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.<sup>247</sup>

The rule is based upon three policy reasons: (1) encouraging the implementation of remedial measures; (2) assuring the exclusion of unreliable evidence; and (3) ensuring cooperation with government agencies.<sup>248</sup> Some courts consider government mandated measures to be outside of Rule 407 as a "superior authority" exception to the rule.<sup>249</sup> Other courts consider the superior authority exception to be inapplicable when a manufacturer voluntarily cooperates with the government agency and the purpose behind Rule 407 would be advanced by exclud-

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<sup>245</sup> *In re Airport Disaster at Metro. Airport, Detroit, Mich.* on Jan. 19, 1979, 782 F.2d 1041 (Table), 1985 WL 14069, at \*5-6 (6th Cir. Dec. 3, 1985).

<sup>246</sup> FED. R. EVID. 407.

<sup>247</sup> *Id.*

<sup>248</sup> *In re Air Crash Disaster*, 86 F.3d 498, 530 (6th Cir. 1996) (stating Rule 407 serves the "purpose of excluding inherently unreliable evidence"); *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1344 n.14 (5th Cir. 1987) ("Relevancy and policy considerations provide the rationale for the exclusion of evidence of subsequent remedial measures."); *Werner v. Upjohn Co.*, 628 F.2d 848, 859-60 (4th Cir. 1980) (explaining that Rule 407's exclusionary rule applied to encourage voluntary cooperation with regulatory agency regarding drug warnings), *cert. denied*, 449 U.S. 1080 (1981).

<sup>249</sup> *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990) (explaining that superior authority and third party exception to Rule 407 recognized "because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence"); *In re Air Crash in Bali, Indon.*, 871 F.2d 812, 816-17 (9th Cir. 1989); *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322, 1331 (10th Cir. 1983) ("Where a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tortfeasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case."); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978) (explaining that superior authority exception applies where remedial measure, required without voluntary participation by defendant, does not advance the rule's underlying policy).

ing the evidence.<sup>250</sup> Several courts to have considered the admissibility of FAA ADs are discussed below.

1. In re Air Crash near Palembang, Indonesia on December 19, 1997

The crash of SilkAir Flight 185 is one example where FAA ADs were offered as evidence in an international air crash being litigated in the United States. This case involved the crash of a 737 near Palembang, Indonesia. Plaintiffs sought to admit FAA ADs regarding the Boeing 737 rudder system as evidence that the aircraft design was defective and dangerous. Defendants moved to exclude the ADs on a number of grounds: (1) the danger of unfair prejudice under Rule 403; (2) as post-accident remedial measures under Rule 407; and (3) as hearsay under Rule 802.<sup>251</sup>

A Special Master, appointed to assist with the parties' motions in limine, recommended that defendants' motion be denied.<sup>252</sup> The Special Master concluded that ADs satisfy the criteria for public reports or records under Rule 803, and as such are not excludable as hearsay.<sup>253</sup> The Special Master also recommended the ADs should not be excluded as subsequent remedial measures under Rule 407 because they were promulgated by the FAA without the voluntary participation of Boeing.<sup>254</sup> The Special Master cited the Ninth Circuit's holding in *In re Aircrash in Bali, Indonesia* for this position.<sup>255</sup>

2. Melville v. American Home Assurance Co.

This case involved a suit on an insurance policy covering accidental death following the crash of a Piper Cherokee Arrow.<sup>256</sup> Defendants objected to the introduction of several FAA ADs at

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<sup>250</sup> *Werner*, 628 F.2d at 859 (explaining that subsequent drug warning mandated by government properly was excluded because of "cooperative aspect" of defendants' interaction with regulatory agency); *In re Airport Disaster at Metro. Airport*, 782 F.2d 1041 (Table), 1985 WL 14069, at \*5-6 (explaining that FAA AD was excluded under Rule 407 under the rationale of *Werner*).

<sup>251</sup> Special Master's Report and Recommendations Regarding Motions In Limine at 30-36, *In re Air Crash Disaster near Palembang, Indon.* on Dec. 19, 1997, MDL Docket No. 1276, Master File No. C99-589C (W.D. Wash. 1999).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *In re Aircrash in Bali, Indon.*, 871 F.2d 812, 816 (9th Cir. 1989).

<sup>256</sup> *Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1068-69 (E.D. Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978).

trial, claiming they were hearsay and contained improper opinion evidence.<sup>257</sup> The district court excluded one AD because it relied on hearsay, indicating a lack of trustworthiness, while admitting other ADs as exceptions to the hearsay rule under Rule 803(8)(C).<sup>258</sup> The court reasoned that the safeguards in Rule 803(8)(C) that require a government document to be trustworthy are sufficient to exclude improper opinion.<sup>259</sup> The district court stated that "defendant could point to 'no circumstances indicating [a] lack of trustworthiness' sufficient to rebut 803(8)(C)'s presumption of admissibility."<sup>260</sup> The Third Circuit affirmed the trial court's evidentiary ruling, finding the ADs were admissible under 803(8)(C) even though they contained evaluative material.<sup>261</sup>

### 3. Herndon v. Seven Bar Flying Service, Inc.

In this case, plaintiffs sought to admit ADs and manufacturer's service bulletins regarding the Piper Aztec aircraft.<sup>262</sup> The district court admitted the service bulletins but excluded the ADs, finding the ADs cumulative and unduly prejudicial under Rule 403.<sup>263</sup> The Tenth Circuit, however, concluded the ADs should have been admitted under Rule 407, as mandated by a superior authority, but the service bulletins should have been excluded.<sup>264</sup> Therefore, it was harmless error to exclude the ADs because the same material was admitted in the service bulletins.<sup>265</sup>

### 4. Murray v. Gates Learjet Corp.

This case involved the crash of a Learjet 25D. The aircraft owner and lessee offered into evidence an FAA AD to prove the manufacturer was negligent, which the district court ruled inadmissible as a subsequent remedial measure under Rule 407.<sup>266</sup> The district court held that nothing in Rule 407 limits its appli-

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<sup>257</sup> *Id.* at 1111.

<sup>258</sup> *Id.* at 1112, 1115 n.75.

<sup>259</sup> *Id.* at 1112.

<sup>260</sup> *Id.* at 1115.

<sup>261</sup> *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978).

<sup>262</sup> *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322, 1324-25 (10th Cir. 1983).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1330-31.

<sup>265</sup> *Id.* at 1331.

<sup>266</sup> *In re Airport Disaster at Metro. Airport, Detroit, Mich.* on Jan. 19, 1979, 782 F.2d 1041 (Table), 1985 WL 14069, at \*5 (6th Cir. 1985).

cability to subsequent remedial repairs taken by manufacturers.<sup>267</sup>

The Sixth Circuit, in an unpublished decision, specifically rejected the superior authority exception to Rule 407 for FAA ADs, finding that exclusion would advance the policy of encouraging voluntary remedial measures.<sup>268</sup> The Sixth Circuit quoted *Werner* in its holding.

[I]f subsequent warnings are admitted to prove antecedent negligence simply because [a government agency] required or might have required the change, then [manufacturers] might be discouraged from taking early actions on their own and from participating fully in voluntary compliance procedures.<sup>269</sup>

The Sixth Circuit affirmed the district court's exclusion of the AD under Rule 407.<sup>270</sup>

##### 5. In re Air Crash Near Roselawn, Indiana, 1997

This case involved the crash of an ATR-72 on October 31, 1994, near Roselawn, Indiana. The aircraft manufacturer brought a motion to exclude FAA ADs.<sup>271</sup> The court acknowledged its "authority to admit certain government-ordered remedial measures under the superior authority exception to Fed.R.Evid. 407."<sup>272</sup> However, the court excluded the governmental remedial actions as more prejudicial than probative under Rule 403.<sup>273</sup> The court reasoned in part that government findings such as FAA ADs "could undermine and confuse the jury's distinct function in this case. The functions of the Court and the jury must be preserved uninfluenced by the findings of government investigators."<sup>274</sup> The court also specifically found the ADs "are reports which lack trustworthiness because each government agency involved in the post-accident investigation was subject to different agendas and fact-finding methodol-

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<sup>267</sup> *Murray v. Gates Learjet Corp.*, 782 F.2d 1041 (Table), 1985 WL 14069, at \*5 (6th Cir. Dec. 3, 1985).

<sup>268</sup> *Id.* at \*6.

<sup>269</sup> *Id.* (quoting *Werner v. Upjohn Co.*, 628 F.2d 848, 859 (4th Cir. 1980)).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*



ogy.”<sup>275</sup> “Post crash evidence is inherently subject to the various agendas of the parties who prepared it.”<sup>276</sup>

### C. USE OF POLICE REPORTS FROM PARALLEL CRIMINAL INVESTIGATIONS INTO AN AVIATION ACCIDENT

An aviation accident will often result in parallel investigations into its cause by both civil and criminal authorities. The purpose behind NTSB and ICAO accident investigations is to determine the cause and prevent future accidents.<sup>277</sup> Criminal investigations seek to determine if a crime has been committed. A notable example of a criminal investigation following an air crash in the United States is the 1996 crash of Value Jet Flight 592 where the federal government indicted an aviation repair station.<sup>278</sup> Another example is the TWA 800 accident on July 17, 1996, where the FBI played a major role in the investigation.<sup>279</sup>

International aviation accidents also often involve a parallel criminal investigation. One example is the crash of Gol Flight 1907 in the Amazon Rainforest of Brazil. Following the midair collision between a Boeing 737 and an Embraer Legacy aircraft, the Brazilian Federal Police instituted a criminal investigation into the accident.<sup>280</sup> The Federal Police indicted the pilots of the Embraer Legacy aircraft that collided with the Boeing 737 and produced a report regarding the cause of the accident.<sup>281</sup> Litigation was brought in the United States, and defendants sought dismissal for forum non conveniens. Plaintiffs submitted the Federal Police Report to the Eastern District of New York in opposition to defendants’ motion to dismiss.<sup>282</sup> Plaintiffs’ use of the police report was not challenged. Should the litigation remain in the United States, the admissibility of the Brazilian Federal Police report may become an issue.

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<sup>275</sup> *Id.*

<sup>276</sup> *In re Air Crash Near Roselawn, Ind.*, No. 95 C 4593, MOL 1070, 1997 WL 572896, at \*1 (N.D. Ill. Sept. 10, 1997).

<sup>277</sup> ICAO Annex 13, *supra* para 17, para. 3.1.

<sup>278</sup> *United States v. Sabre Tech Inc.*, 271 F.3d 1018, 1020–21 (11th Cir. 2001).

<sup>279</sup> *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 969 (9th Cir. 2009).

<sup>280</sup> *In re Air Crash Near Peixoto de Azeveda, Braz.* on Sept. 29, 2006, 574 F. Supp. 2d 272, 272 (E.D.N.Y. 2008).

<sup>281</sup> Pl.’s Supplemental Opp’n to Mot. to Dismiss for Forum Non Conveniens, at 5, *In re Air Crash Near Peixoto de Azeveda*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) (No. 07-md-1844), 2008 WL 594708.

<sup>282</sup> *Id.* at 30.

The few courts to have considered the admissibility of a police report in the context of an international air crash being litigated in the United States are discussed below.

1. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*

This case arose out of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988.<sup>283</sup> A Scottish Detective Constable was charged with matching certain bags, located in the container that was determined to have held the bag where the bomb exploded, with passengers on the aircraft.<sup>284</sup> The detective prepared a report and Pan Am objected to its admission at trial.<sup>285</sup> Pan Am moved to exclude the report based on multiple layers of hearsay.<sup>286</sup> The detective compiled his report based upon other officers' reports of interviews conducted during the course of the lengthy investigation.<sup>287</sup>

The Second Circuit found there was no abuse of discretion to admit the detective's report under Rule 803(8)(C), noting the district court carefully examined the report for reliability concerns.<sup>288</sup> Although there was no specific finding of trustworthiness, no finding was required.<sup>289</sup> The investigation was timely, the investigator was experienced, and "no bias could be presumed in the Scottish investigation."<sup>290</sup>

2. *In re Air Crash near Palembang, Indonesia on December 19, 1997*

This case involved the crash of a 737 near Palembang, Indonesia. The investigation of the accident was conducted by the Indonesian National Transportation Safety Committee that issued an interim report implicating the Singaporean pilot. The Singapore police conducted an investigation to ascertain if there was evidence of a criminal offense that might have led to the accident. Plaintiffs sought to introduce the police report at

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<sup>283</sup> *In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988*, 37 F.3d 804, 810 (2d Cir. 1994), *rev'd on other grounds*, *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996).

<sup>284</sup> *Id.* at 827.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 828.

trial. Defendants objected to the report claiming: (1) it was not based on first-hand knowledge by the investigator; (2) it was untimely because it was initiated two years after the crash; (3) the investigator lacked special skill or experience; (4) no hearing was held; (5) the police had a suspect motive in exculpating the crew; and (6) there were inaccuracies in the report.<sup>291</sup>

A Special Master, appointed to assist with the parties' motions in limine, recommended that defendants' motion be denied. The Special Master concluded the police investigation was as timely as it could have been under the circumstances. The police began investigating immediately when they were notified of a concern. The police did not attempt to investigate any technical aspect of the airline crash, but investigated things that police usually investigate. There was no suggestion the investigation was less open than a typical police investigation. There was no direct evidence the police were biased. Rule 803(8)(C) does not require the author of a report to have first-hand knowledge of the facts upon which his findings are based when the source for the factual findings had first-hand knowledge.<sup>292</sup>

## V. CONCLUSION

There are many evidentiary issues unique to an international aviation accident litigated in the United States. Accident reports prepared by the NTSB are subject to the exclusionary rule in 49 U.S.C. § 1154(b) and the limitations contained in the hearsay exception for government reports in Federal Rule of Evidence 803(8)(C). ICAO accident reports, prepared with the sole purpose of preventing future accidents, are also subject to the same limitations in Rule 803(8)(C) for the use of government reports. Military accident investigations typically result in the production of two reports: a safety or mishap report and a collateral investigation report. Safety reports are subject to an executive privilege shielding confidential information from disclosure. Collateral reports are subject to the exclusionary rule in 10 U.S.C. § 2254(d). Both are subject to the trustworthiness concerns of Rule 803(8)(C).

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<sup>291</sup> Def. Boeing Co.'s Mot. in Limine to Exclude Report Issued by the Singapore Police, *In re Air Crash Disaster near Palembang, Indon.* on Dec. 19, 1997, MDL Docket No. 1276 (W.D. Wash. July 10, 2003), 2003 WL 24253988.

<sup>292</sup> Special Master's Report and Recommendations Regarding Motions in Limine at 40-47, *In re Air Crash Disaster near Palembang, Indon.* on Dec. 19, 1997, MDL Docket No. 1276 (W.D. Wash. 1999).

International aviation accident litigation in the United States may also involve NTSB safety recommendations, FAA Airworthiness Directives, or parallel criminal investigation reports. All are evaluated for trustworthiness under Rule 803(8)(C). NTSB safety recommendations also are subject to the exclusionary rule of 49 U.S.C. § 1154(b). Finally, Airworthiness Directives can be excluded under Federal Rule of Evidence 407 as a subsequent remedial measure.

