

2018

Federal Accident Investigations: Civil Litigation Viewpoint

Jill Dahlmann Rosa
United States Department of Justice

Recommended Citation

Jill Dahlmann Rosa, *Federal Accident Investigations: Civil Litigation Viewpoint*, 83 J. AIR L. & COM. 561 (2018)

<https://scholar.smu.edu/jalc/vol83/iss3/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FEDERAL ACCIDENT INVESTIGATIONS: CIVIL LITIGATION VIEWPOINT

JILL DAHLMANN ROSA*

I. INTRODUCTION

WHILE AVIATION ACCIDENT INVESTIGATIONS have come a long way from the days when they were completely shrouded in secrecy, friction still remains between investigation and litigation. Investigations are key for identifying facts, witnesses, and areas of focus. The investigation reports, however, might be excluded from trial, and litigation experts can be excluded from trial as well if they rely solely on investigation findings without conducting their own analysis. Although the federal government spends money and effort investigating accidents, the reports are not completed with evidentiary admissibility in mind. Courts are increasingly concerned by double hearsay and other evidentiary problems that arise when using investigation reports in litigation. In the biggest civil tort lawsuit in recent years, arising from the *Deepwater Horizon* explosion and BP oil spill, the U.S. District Judge excluded *all* investigation materials from both depositions and the trial, completely separating the litigation from the high-profile investigations.

This article addresses some of the nuances of the role of federal accident investigations in civil tort litigation, primarily investigations by the National Transportation Safety Board (NTSB). The article will look at the history behind the statute forbidding the use of the NTSB probable cause determination in litigation, the current state of the law on the use of NTSB reports, some privileges that apply to federal accident investigations, and hearsay topics. A recurring issue in aviation tort litigation is the NTSB's backlog, which can cause lengthy delays in lawsuits as

* Senior Trial Counsel, United States Department of Justice, Civil Division, Torts Branch, Aviation, Space & Admiralty Litigation. The views expressed in this article are those of the author and do not necessarily reflect the views of the Department of Justice or the United States.

the parties wait for the investigators to release data or wreckage. The article concludes that early access to factual material, as well as clear, early rulings from courts on the use of investigation materials, would save money and increase efficiency for litigants and courts.

II. NTSB REPORTS

A. HISTORY: “SECRECY, INCOMPETENCE, AND CONSPIRACY”

For civil aviation accidents, Congress has tasked the NTSB with investigating and determining the facts, circumstances, and probable causes of accidents.¹ The NTSB is an independent agency that holds hearings, public forums, and otherwise maintains a robust public presence, including direct communication with the public through social media and other venues.² The agency’s accident reports and docket are publicly available from its website,³ but such transparency was not always the case with federal aviation investigations.

The earliest predecessor to the NTSB was created in 1926, when the Air Commerce Act charged the Department of Commerce with investigating the cause of aircraft accidents.⁴ As detailed in Nick Komons’s seminal Federal Aviation Administration (FAA) history book, *Bonfires to Beacons*, the fledgling agency struggled with how to investigate aviation accidents while also satisfying its mandate to promote the growth of the aviation industry.⁵ The Air Commerce Act left it to the Secretary of Commerce to determine whether to issue an investigation report and what to make public. The Aeronautics Branch at first published “a few full-scale reports on major air disasters” in 1926 and 1927.⁶ These reports included the identities of the air carriers and the probable cause of the accidents.

¹ 49 U.S.C. §§ 1131, 1132 (2018).

² See, e.g., NTSB SAFETY COMPASS, <https://safetycompass.wordpress.com> [<https://perma.cc/NQE7-MQ92>]. With respect to independence, see Paul Stephen Dempsey, *Independence of Aviation Safety Investigation Authorities: Keeping the Foxes from the Henhouse*, 75 J. AIR L. & COM. 223, 277 (2010).

³ NAT’L TRANSP. SAFETY BD., <https://www.nts.gov/pages/default.aspx> [<https://perma.cc/XP2Z-3SZK>]. Both the reports and the docket are available under the “Investigations” menu.

⁴ NICK A. KOMONS, *BONFIRES TO BEACONS: FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926–1938* 178 (Fed. Aviation Comm’n 1978).

⁵ *Id.*

⁶ *Id.*

The publicity of these reports did not go over well with the aviation industry. Komons explained: “The industry’s reaction was pained. In consequence, the Department discontinued the practice.”⁷ The agency instead opted to publish a table of statistics on accidents but kept “[a] tight lid of secrecy” on the details of accident investigations.⁸ Over the next few years, the agency clashed with members of Congress who requested accident investigation reports but were denied.⁹ Members of the public and the press protested the secrecy and argued that public confidence in aviation safety could only be inspired by giving the reasons for accidents “and putting the blame where it should be.”¹⁰ The Secretary of Commerce, however, would not “admit that the public had a right to know the facts” of aviation accidents and argued that, because the Department lacked subpoena power and relied upon voluntary witnesses, it would not be able to get pilots to talk to investigators if such information were to be publicly divulged.¹¹

One of the agency’s primary concerns about allowing the public to see its work was the potential use of investigative findings in personal injury and wrongful death lawsuits. Indeed, a headline in the *New York Times* in early 1930 read that the Assistant Secretary of Commerce in charge of the Aeronautics Branch “Defends Silence on Air Crash Data: Col. Young Says Publication of Federal Inquiry Records Would Aid Dishonest Lawyers.”¹² Historian Komons explained that, because the Air Commerce Act did not prohibit the use of accident reports in legal proceedings, “making reports public would permit their use in civil suits; the reports, therefore, would become instruments for collecting damages from airline companies and aircraft manufacturers. These suits could so injure some companies that they would be forced out of business.”¹³

The first edition of the *Journal of Air Law and Commerce*, published in 1930, contains a transcript of the First National Legislative Air Conference, held in Chicago that year. Following one presentation, the conference attendees engaged in a lengthy

⁷ *Id.* at 179.

⁸ *Id.*

⁹ *Id.* at 179–80.

¹⁰ *Id.* at 180.

¹¹ *Id.* at 181.

¹² *Defends Silence on Air Crash Data: Col. Young Says Publication of Federal Inquiry Records Would Aid Dishonest Lawyers*, N.Y. TIMES, Feb. 14, 1930, at 12.

¹³ KOMONS, *supra* note 4, at 181.

back-and-forth discussion about accident investigations and damages litigation, and whether the evidence discovered by federal investigators should be available to plaintiffs' lawyers.¹⁴ Elmer Kintz, the Chief of the Legal Section of the Aeronautics Branch, pointed out that his office was "continuously called upon" by lawyers to furnish the cause of aviation accidents, and that "[i]f we were to furnish to all who request it that information, the Department could do nothing but appear in civil actions from now until doomsday."¹⁵ Kintz also objected to furnishing investigative opinions because the opinions were sometimes based on hearsay. He was further concerned that pilots would not voluntarily talk to investigators out of fear of being fired.¹⁶ In response, conference attendees pointed out that other investigative entities, such as coroners' offices, had no problem divulging facts, even in cases involving airplane accident deaths.¹⁷ The lawyers at the conference also inquired about obtaining the names of eyewitnesses, because it was hard to find witnesses months after an accident.¹⁸ But Attorney Kintz was not swayed, instead responding that plaintiffs' lawyers would need to talk to "airport officials or the people in the locality of the crash" to find eyewitnesses.¹⁹

But the ever-present dangers of aviation continued to challenge this investigatory status quo. The investigation into the airline crash that killed Notre Dame football coach Knute Rockne in 1931 revealed the shortcomings of aviation accident investigations at that time. This accident "was the most sensational air accident that the Aeronautics Branch dealt with in its brief history."²⁰ As the public clamored for an explanation, the investigators could no longer maintain secrecy. They issued a series of conflicting statements on the cause of the accident, which had to be retracted after they discovered a mechanical defect that was present in all Fokker F-10A airplanes.²¹ Although the planes were taken out of passenger service, the agency still did not publicly reveal why the F-10s were grounded.²² This investigation,

¹⁴ John M. Vorys, *What State Body Should Regulate Aeronautics?*, 1 J. AIR L. & COM. 494, 503-08 (1930).

¹⁵ *Id.* at 504.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 505.

¹⁹ *Id.*

²⁰ KOMONS, *supra* note 4, at 183.

²¹ *Id.* at 185.

²² *Id.* at 188.

which the NTSB now says “was overshadowed by public perception of secrecy, incompetence and conspiracy,”²³ singlehandedly led to changes in the way the government investigates civil aviation accidents.

In 1934, Congress amended the Air Commerce Act to require the Secretary of Commerce to “make public a report on the probable cause of each fatal aircraft accident” and “gave the Secretary the power to subpoena witnesses and evidence.”²⁴ As a compromise, the amendment “prohibited the Government’s accident report or other evidence gathered by Federal investigators from being admitted as evidence in court.”²⁵ Thus was born the statutory bar on the use of civil aviation accident investigation reports in litigation, which has remained in place since 1934. The statute, 49 U.S.C. § 1154(b), currently reads: “No 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.”²⁶

B. WHAT’S UP WITH THE NEW FORMATTING OF NTSB REPORTS ONLINE?

Courts have long held that, despite the precise wording of the NTSB exclusionary statute, 49 U.S.C. § 1154(b), factual reports may be used in aviation litigation and even admitted into evidence, whereas the probable cause conclusions of the Board may not.²⁷ In *Berguido v. Eastern Air Lines, Inc.* and *American Airlines, Inc. v. United States*, two federal appellate decisions from the 1960s, the courts ruled that the best way to enforce the policy underlying the statute (despite its clear language) was to ex-

²³ Robert L. Sumwalt, *The Importance of an Independent Safety Board*, UAA Aviation Policy Seminar, at 3, <https://www.nts.gov/news/speeches/RSumwalt/Documents/UAAprese.pdf> [<https://perma.cc/VSJ5-6E45>].

²⁴ KOMONS, *supra* note 4, at 278.

²⁵ *Id.* (citing Air Commerce Act of 1926, Pub. L. 73-418, 48 Stat. 1113 (1934) (“Neither any such statement nor any report of such investigation or hearing, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action growing out of any matter referred to in any such statement, investigation, hearing, or report thereof.”)).

²⁶ 49 U.S.C. § 1154(b) (2018).

²⁷ *See, e.g.,* *Lidle v. Cirrus Design Corp.*, No. 08 Civ. 1253(BSJ) (HBP), 2010 WL 1644958, at *2 (S.D.N.Y. Apr. 22, 2010).

clude only the agency's views on the probable cause of the accident.²⁸

For most aviation cases, this has been easy to understand because the NTSB issued multiple reports—a factual report (or multiple factual reports) and a probable cause report. The NTSB appears to have introduced new formatting for its reports, however. Whether the new formatting will impact admissibility remains to be seen.

In its regulations, the NTSB states that a “Board accident report” is the “report containing the Board’s determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format.”²⁹ A “factual accident report,” on the other hand, is defined as a “report containing the results of the investigator’s investigation of the accident.”³⁰ The regulations also provide that “no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.”³¹ By contrast, “there is no statutory bar to[] admission in litigation of factual accident reports.”³²

The agency’s regulatory attempt to bring clarity to litigants may now be disturbed by its new report formatting, however. In the last year or so, many NTSB aviation reports available online have been consolidated into just one “final report,” instead of the traditional factual report and probable cause report. In the new “final report” format, the probable cause is embedded into the same document as the factual findings. For example, in the report arising out of the tragic impact of a hot air balloon with power lines in Texas in 2016, which resulted in sixteen fatalities, the NTSB issued a single “Accident Report.”³³ The first part of the report contains factual information, and the second part contains conclusions and analysis.³⁴ Within the report’s conclusions, at page 49, is the probable cause finding.³⁵ Page 50 contains recommendations to the FAA and the signatures of four

²⁸ *Berguido v. E. Air Lines, Inc.*, 317 F.2d 628, 631–32 (3d Cir. 1963); *Am. Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969).

²⁹ 49 C.F.R. § 835.2 (2018).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *See generally* NAT’L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REP. AAR-17/03 (adopted Oct. 17, 2017).

³⁴ *Id.* at 1, 34.

³⁵ *Id.* at 49.

board members.³⁶ Page 51 contains a concurring statement by Chairman Sumwalt.³⁷ Based on the case law interpreting 49 U.S.C. § 1154(b), this report appears to be an inadmissible report because the probable cause is embedded in the single, signed report of the board.

In an admiralty case addressing a similarly formatted NTSB marine report, the court struck opinions of an expert who relied upon the report.³⁸ The case, *Credle v. Smith & Smith, Inc.*, arose after the sinking of a fishing boat off the coast of Cape May, New Jersey, resulting in the deaths of six fishermen.³⁹ The families of the decedents sued the vessel owners.⁴⁰

The accident was investigated by the U.S. Coast Guard and the NTSB. As can happen in maritime cases, the NTSB issued its report a couple of years before the Coast Guard concluded its own investigation.⁴¹ The NTSB's brief was a single, fourteen-page document.⁴² It included a description of the investigation, the history of the vessel, the conditions on the day of the sinking, the probable cause determination, and a safety recommendation based on the results of the investigation.⁴³ The five members of the board adopted the report, signing the final page.⁴⁴

In the lawsuit, the plaintiffs' expert based a number of his findings and opinions on information contained in the NTSB report.⁴⁵ The defendants filed a motion *in limine* seeking to preclude the introduction of any evidence that the NTSB issued in its report, including any of the opinions and conclusions of the board.⁴⁶ The New Jersey District Court noted that expert witnesses may, in certain circumstances, base their opinions on

³⁶ *Id.* at 50.

³⁷ *Id.* at 51.

³⁸ *Credle v. Smith & Smith, Inc.*, 42 F. Supp. 3d 596, 599 (D.N.J. 2013).

³⁹ *Id.* at 597.

⁴⁰ *Id.*

⁴¹ Amy Ellis Nutt, *Coast Guard: Deadly Lady Mary Sinking in 2009 the Result of Open Hatch and Unstable Boat*, N.J. STAR-LEDGER (Aug. 30, 2013), www.nj.com/news/index.ssf/2013/08/coast_guard_deadly_lady_mary_sinking_in_2009_the_result_of_open_hatch_and_unstable_boat.html [https://perma.cc/HG2J-DYXD].

⁴² See NAT'L TRANSP. SAFETY BD., MARINE ACCIDENT BRIEF, Accident No. DCA-09-LM-010 (adopted May 2, 2011).

⁴³ *Id.* at 3, 7, 10, 13–14.

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* at 599.

⁴⁶ *Id.* at 598.

inadmissible evidence under the Federal Rules of Evidence.⁴⁷ The court held, however, that the clear language of 49 U.S.C. § 1154(b) required the exclusion of expert opinions based on the NTSB report.⁴⁸ The court thus prohibited the plaintiffs' expert from mentioning, referring to, attempting to offer into evidence, or conveying to the jury any facts or conclusions based on the NTSB Marine Accident Brief.⁴⁹ The case was settled shortly after this ruling.⁵⁰

Similarly, in the first aviation case to address the admissibility of the new format, the U.S. District Court for the Eastern District of Louisiana granted a motion to strike the NTSB final report.⁵¹ In the case, *LeBlanc v. Panther Helicopters, Inc.*, one of the defendants, Rolls Royce, brought a discovery motion to compel another defendant, Panther Helicopters, to produce cell phone records.⁵² Rolls Royce e-filed the NTSB final report as an attachment to its motion.⁵³ The report, titled "Aviation Accident Final Report," was twelve pages long with the probable cause determination on page two of twelve, followed by ten pages of what formerly would have been the factual report.⁵⁴ Panther Helicopters moved to strike the attachment, arguing that the report was impermissible in the civil action pursuant to 49 U.S.C. § 1154(b) and the NTSB's regulations, 49 C.F.R. § 835.2.⁵⁵ The court agreed with Panther Helicopters and ordered the NTSB report

⁴⁷ *Id.*

⁴⁸ *Id.* at 599.

⁴⁹ *Id.*

⁵⁰ On a tangent, in a case where a party's expert was hired with barely enough time to peruse the NTSB docket before issuing his Rule 26 expert report, the court struck the expert for failing to prepare his own expert report. *Rodgers v. Beechcraft Corp.*, No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *7 (N.D. Okla. Mar. 14, 2017). The court did not cite § 1154(b) in its decision or discuss whether the expert improperly relied upon the probable cause determination. *Id.* at *5. Rather, the expert was excluded because he was retained just days before the expert report deadline, apparently did no work other than look at the NTSB docket and talk to counsel, and counsel wrote his report for him. *Id.* at *7. "Considering the totality of the circumstances, the Court finds that Haider did not 'prepare' an expert report in compliance with Rule 26, and he should not be permitted to testify." *Id.*

⁵¹ *LeBlanc v. Panther Helicopters, Inc.*, No. 14-1617 c/w, 2018 WL 1392897 (E.D. La. Mar. 19, 2018).

⁵² *Id.* at *3.

⁵³ *Id.* at *1.

⁵⁴ Motion to Compel Cell Phone Records by Rolls-Royce Corp., Ex. B at 2-3, *LeBlanc v. Panther Helicopters, Inc.*, No. 14-1617, (E.D. La. Feb. 27, 2018), ECF No. 580-3.

⁵⁵ *LeBlanc*, 2018 WL 1392897, at *2.

be stricken from the record.⁵⁶ The court specifically discussed the format, including its title as a final report, the probable cause section, and the “Factual Information” section, and ruled that “the plain language of the statute and case law indicate[] that both the report and quotations from it should be stricken from the record.”⁵⁷

As more cases enter litigation following the NTSB’s formatting change, we will see if courts are going to interpret the new format strictly, in compliance with § 1154(b), or if they are going to permit redaction of the probable cause determination from the new report format, despite the language of the statute.

C. MOST COURTS CONTINUE TO ENFORCE § 1154(B)

In terms of recent trends, federal courts continue to enforce § 1154(b) by striking the various ways parties seek to introduce NTSB probable cause findings into litigation. This includes situations arising at the pleading stage, through experts, and even at trial.

For example, at the pleading stage, a federal district court in Georgia recently struck portions of the complaint in *Knous v. United States* because the plaintiffs made allegations based on the NTSB’s probable cause determination.⁵⁸ In that case, following the crash of a Beech Bonanza in Mississippi that killed the pilot and his wife, the NTSB determined the probable cause to be the pilot’s continued flight into known adverse weather conditions, with a contributing cause being the air traffic controller’s failure to provide precipitation information to the pilot.⁵⁹ In their complaint, the plaintiffs explicitly alleged that “[t]he NTSB investigation found, in part, that the air traffic controllers’ failure to report precipitation information was a cause of the accident.”⁶⁰ The plaintiffs further alleged that “[a]lternative causes” of the accident “were ruled out by the NTSB.”⁶¹ For good measure, the complaint contained a hyperlink to the NTSB report in a footnote.⁶² The plaintiffs agreed to strike the allegation about the probable cause determination and the footnote, but sought

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Knous v. United States*, 981 F. Supp. 2d 1365, 1367 (N.D. Ga. 2013).

⁵⁹ NAT’L TRANSP. SAFETY BD., AVIATION ACCIDENT FINAL REP., Accident No. ERA11FA036 (Dec. 19, 2011).

⁶⁰ *Knous*, 981 F. Supp. 2d at 1366.

⁶¹ *Id.*

⁶² *Id.*

leave to reword the rest of the challenged allegations to avoid mentioning the NTSB by name.⁶³ The court denied their request, ruling that “[p]assive voice may obscure who made the determination but does not change the fact that the allegation impermissibly draws from the NTSB’s Board accident report.”⁶⁴ The court concluded that allegations that an “unknown entity” determined the cause of the action were not in compliance with the statute.⁶⁵

To take a recent example of the application of 49 U.S.C. § 1154(b) at the motions stage, the plaintiffs in *Seegar v. Anticola* attached NTSB materials to their response to a motion to dismiss for lack of personal jurisdiction.⁶⁶ The U.S. District Court for the District of Delaware struck the probable cause report and the “Brief of the Accident” but allowed the “Pilot Accident Report” and factual report to be considered with the motion.⁶⁷

Likewise, at the trial phase, Judge Joyner of the federal district court in Philadelphia continued this trend of careful enforcement of § 1154(b) in *Snider v. Sterling Airways, Inc.*⁶⁸ The case arose from a Cessna crash near Lock Haven, Pennsylvania, that resulted in the deaths of the pilot and two U.S. Forest Service employees.⁶⁹ The accident was caused by a total engine failure as the plane was preparing to land.⁷⁰ Following a jury verdict in favor of the plaintiffs, the defendant, engine manufacturer Continental Motors, Inc., moved for a new trial.⁷¹ Continental Motors complained that the court had refused to admit into evidence the NTSB Factual Report in its entirety while permitting some portions of the NTSB factual docket, including an engine analysis report, to be admitted.⁷² In denying the motion for a new trial, the court noted that it had admitted the portions of the NTSB docket that were “exclusively factual in nature” and

⁶³ *Id.* at 1367.

⁶⁴ *Id.*

⁶⁵ *Id.* Later, following a bench trial, the court ruled that the air traffic controller acted reasonably in providing three pilot reports of the weather, and that the United States was not at fault. *Knous v. United States*, 183 F. Supp. 3d 1279, 1289 (N.D. Ga. 2016). The decision was affirmed by the appellate court. *Knous v. United States*, 683 F. App’x 859, 866 (11th Cir. 2017).

⁶⁶ *Seegar v. Anticola*, No. 13-2030-LPS, 2015 WL 1149537, at *3 (D. Del. Mar. 12, 2015).

⁶⁷ *Id.* at *3–4.

⁶⁸ No. 13-CV-2949, 2017 WL 3873540, at *1 (E.D. Pa. Sept. 5, 2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at *12.

“those which were largely undisputed such as the flight path of the accident aircraft.”⁷³ The court excluded the portions of the report and investigation docket that “contained opinions and/or conclusions of the NTSB investigators and/or otherwise inadmissible hearsay.”⁷⁴ Also at issue was the experts’ use of the NTSB materials.⁷⁵ The court concluded that the experts’ use was not inappropriate: “While [Continental Motors] makes much of the fact that a number of Plaintiffs’ experts allegedly relied upon the reports in reaching their conclusions, the record reflects that in reality, the experts merely acknowledged that they had reviewed the materials as part of their preparation of the case.”⁷⁶

The *Snider* case also involved a second accident investigation report—the U.S. Forest Service had conducted its own internal investigation into the accident that caused the deaths of its employees, as the airplane operation was under contract to the Forest Service.⁷⁷ The use of the Forest Service’s report at trial was a subject of contention. Certain parties moved to exclude it, while Continental Motors sought to have it admitted into evidence.⁷⁸ The moving parties argued for exclusion on several grounds: that the Forest Service report incorporated NTSB conclusions, that it was inappropriate to embroil the Forest Service investigators in the litigation, that no expert relied on the report, and that it was unfairly prejudicial because the jury would be likely to give it too much weight because it was a government report.⁷⁹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at *7, *12.

⁷⁸ *Id.* at *13; *see generally* Plaintiff’s Supplemental Pretrial Memorandum, Jan. 18, 2017, ECF No. 323; Brief Concerning Admission of NTSB Factual Report & Forest Service Report by Defendants Cont’l Motors, Inc., TDY Indus., LLC, & Teledyne Techs. Inc., Jan. 25, 2017, ECF No. 338; Motion to Exclude USPS Report & Reply to Cont’l Motors, Inc.’s, TDY Indus., LLC’s, & Teledyne Techs. Inc.’s Brief Concerning Admission of NTSB Factual Report & Forest Service Report, Jan. 29, 2017, ECF No. 345; Opposition to Sterling’s Motion by Cont’l Motors, Inc., TDY Indus., LLC, & Teledyne Techs. Inc., Jan. 29, 2017, ECF No. 347; *see also* Trial Transcript at 10–17, Feb. 22, 2017, ECF No. 415 (containing argument about U.S. Forest Service report); Trial Transcript at 205–07, Feb. 22, 2017, ECF No. 421 (granting motion to exclude U.S. Forest Service report and NTSB factual report); Trial Transcript at 111, Feb. 22, 2017, ECF No. 426 (instructing jury not to consider any factual findings and conclusions from either the U.S. Forest Service report or the NTSB report).

⁷⁹ *Snider*, 2017 WL 3873540, at *14; *see* Plaintiff’s Supplemental Pretrial Memorandum, Jan. 18, 2017, ECF No. 323; Brief Concerning Admission of NTSB Fac-

The court allowed experts to testify about the report but then granted the motion to exclude it from evidence.⁸⁰ The jury instructions covered both the NTSB and the U.S. Forest Service reports:

[D]uring this trial you may have heard references to the United States Forest Service Aircraft Investigation Report, and the National Transportation Safety Board report.

I hereby instruct you, members of the jury, that you cannot consider any factual findings and conclusions of these reports in your deliberations. These reports have not been admitted into evidence and are not evidence in this case and cannot be considered by you.⁸¹

Thus, although the U.S. Forest Service lacked a protective statute like the NTSB's statute, its report was excluded from evidence just as the NTSB report was excluded. The *Snider* case is currently on appeal.⁸²

D. WHERE THE PARTIES FAIL TO ALERT THE COURT ABOUT § 1154(b), THE PROBABLE CAUSE DETERMINATION IS SOMETIMES USED IN COURT

Anomalies to the application of § 1154(b) exist, however. In two recent federal cases and two state court cases, courts have allowed the NTSB's probable cause determination to be used

tual Report & Forest Service Report by Defendants Cont'l Motors, Inc., TDY Indus., LLC, & Teledyne Techs. Inc., Jan. 25, 2017, ECF No. 338; Motion to Exclude U.S. Parks Service Report & Reply to Cont'l Motors, Inc.'s, TDY Indus., LLC's, & Teledyne Techs. Inc.'s Brief Concerning Admission of NTSB Factual Report & U.S. Forest Service Report, Jan. 29, 2017, ECF No. 345; Opposition to Sterling's Motion by Cont'l Motors, Inc., TDY Indus., LLC, & Teledyne Techs. Inc., Jan. 29, 2017, ECF No. 347; *see also* Trial Transcript at 10–17, Feb. 22, 2017, ECF No. 415 (containing argument about U.S. Forest Service report); Trial Transcript at 205–07, Feb. 22, 2017, ECF No. 421 (granting motion to exclude U.S. Forest Service report and NTSB factual report); Trial Transcript at 111, Feb. 22, 2017, ECF No. 426 (instructing jury not to consider any factual findings and conclusions from either the U.S. Forest Service report or the NTSB report).

⁸⁰ Trial Transcript at 205–06, *Snider v. Sterling Airways, Inc.*, No. 13-CV-2949, 2017 WL 3873540 (E.D. Pa. Sept. 5, 2017), ECF No. 421.

⁸¹ Trial Transcript at 111, *Snider v. Sterling Airways, Inc.*, No. 13-CV-2949, 2017 WL 3873540, (E.D. Pa. Sept. 5, 2017), ECF No. 426. Continental Motors has appealed the court's order denying a new trial for these, and other, reasons. *See generally* Notice of Appeal, *Snider v. Sterling Airways, Inc.*, No. 13-CV-2949, 2017 WL 3873540 (3d Cir. Oct. 2, 2017), ECF No. 457.

⁸² *See* Notice of Appeal, *Snider v. Sterling Airways, Inc.*, No. 13-CV-2949, 2017 WL 3873540 (3d Cir. Oct. 2, 2017), ECF No. 457.

without objection by any party. It thus remains the responsibility of counsel to alert the courts to the statute.

In *Edens v. Sensenich Propeller Service*, the widow of a commercial pilot sued the company that had recently maintained and overhauled the Lancair IV-P aircraft, including the propeller, before an accident that led to the pilot's death.⁸³ The defendant filed the NTSB probable cause report as an exhibit to its motion to dismiss for lack of personal jurisdiction.⁸⁴ The plaintiff did not object to this use of the NTSB report. In another federal court case, a maritime action in Texas, a party filed the probable cause report in opposition to a motion to strike an expert, and the opposing party did not object.⁸⁵

Also in state court, the NTSB report appeared in a pipeline case in Mississippi, *Elmore v. Dixie Pipeline Co.*⁸⁶ Strangely, the court excluded an expert because the expert's conclusions differed from the NTSB probable cause determination. The appellate court explained:

The National Transportation Safety Board (NTSB) investigated the pipeline rupture. The NTSB noted that the pipeline segment at issue was hydrostatically pressure tested in 1961, and again in 1984. . . . Based on the inspections, the NTSB determined that no defects or anomalies in the subject pipe joint could be correlated with the 2007 rupture.⁸⁷

The court then quoted with approbation the entire probable cause statement, which should have been barred from use under 49 U.S.C. § 1154(b): "The NTSB ultimately concluded that 'the probable cause' of the subject pipeline rupture 'was the failure of a weld' Importantly, the NTSB concluded that the following were not factors in the rupture: corrosion, excava-

⁸³ See Motion to Dismiss by Defendant Lancair Int'l, Inc. Under Fed. Rule of Civil Proc. 12(b)(2), or, Alternatively, for More Definite Statement Under Fed. Rule of Civil Proc. 12(e) & Incorporated Memorandum in Support Thereof, *Edens v. Sensenich Propeller Service, Inc.*, No. 15-cv-00272 (E.D. Tenn. May 13, 2016), ECF No. 49.

⁸⁴ Motion to Dismiss by Defendant Lancair Int'l, Inc. Under Fed. Rule of Civil Proc. 12(b)(2), or, Alternatively, for More Definite Statement Under Fed. Rule of Civil Proc. 12(e) & Incorporated Memorandum in Support Thereof, Exhibit 2, *Edens v. Sensenich Propeller Service, Inc.*, No. 15-cv-00272 (E.D. Tenn. May 13, 2016), ECF No. 49-2.

⁸⁵ See Pinkerton Claimants' Response to Motion of Petitioners Conti 168 & BBG to Exclude the Expert Opinion Testimony of Shahid Syed, MD, *In re Maersk Tankers*, No. 15-cv-00106 (S.D. Tex. Apr. 30, 2017), ECF No. 323.

⁸⁶ *Elmore v. Dixie Pipeline Co.*, No. 2015-CA-01499-COA, 2017 WL 4386686, at *1 (Miss. Ct. App. Oct. 3, 2017).

⁸⁷ *Id.*

tion damage, the controller's actions, or the operating conditions of the pipeline."⁸⁸ There is no indication that the plaintiff objected to this use of the NTSB probable cause or invoked 49 U.S.C. § 1154(b); indeed, both sides quoted the NTSB probable cause in their briefs and neither mentioned the statutory exclusion.⁸⁹

Similarly, in Arizona state court, it appears the NTSB probable cause conclusion was read to the jury in an aviation accident trial. The case, *Wetherilt v. Moore*, arose following the crash of an experimental kit aircraft.⁹⁰ The NTSB concluded that the cause of the accident was a malfunction in the elevator control system.⁹¹ The pilot and the owner sued the mechanic who had inspected the airplane the day before.⁹² The NTSB found that the system malfunctioned "due to incorrect installation or maintenance, which was due to the retaining nut backing off the bolt and allowing the bolt to fall out," raising the question whether the nut fell out because the plaintiff improperly installed it or because the defendant improperly inspected it.⁹³

The defendant's expert in *Wetherilt* testified that he agreed with the NTSB's probable cause determination.⁹⁴ The probable cause was used throughout the litigation. In an earlier ruling in the case, the court wrote, "There has been no motion to strike the NTSB report and no serious argument that the information contained in the NTSB will be inadmissible at trial."⁹⁵ Before trial, the defendant had moved to exclude the NTSB report on the grounds that it was hearsay and not reliable.⁹⁶ The plaintiff opposed the motion, arguing that the report was a relevant public record, and the court allowed the expert to testify about the probable cause.⁹⁷ Apparently no party alerted the court to 49

⁸⁸ *Id.*

⁸⁹ *Id.*; Brief of Appellant 6, *Elmore v. Dixie Pipeline Co.*, No. 2015-CA-01499-COA (Miss. Ct. App. Sept. 26, 2016); Brief of Appellee 8, *Elmore*, No. 2015-CA-01499-COA (Miss. Ct. App. Nov. 22, 2016).

⁹⁰ *Wetherilt v. Moore*, No. 1 CA-CV 15-0143, 2017 WL 1278842, at *1 (Ariz. Ct. App. Apr. 6, 2017).

⁹¹ *Id.*

⁹² *Id.* at *2.

⁹³ *Id.* at *1-2.

⁹⁴ *Id.* at *9.

⁹⁵ *Wetherilt v. Moore*, No. CV 2011-014464, 2013 WL 9817032, at *1 (Ariz. Sup. Ct. Feb. 20, 2013).

⁹⁶ Motion in Limine NTSB Report-Inadmissible Hearsay, *Wetherilt v. Moore*, 2014 WL 6774337 (Ariz. Sup. Ct. Apr. 23, 2014).

⁹⁷ Response to Defendants' Motion in Limine-NTSB Report, *Wetherilt v. Moore*, 2014 WL 6774328 (Ariz. Sup. Ct. May 5, 2014).

U.S.C. § 1154(b), so the court allowed the expert to testify about the NTSB's conclusions.

Another investigation aspect of the *Wetherilt* case was the testimony of the FAA inspector. Following the accident that led to *Wetherilt*, the NTSB did not travel to the accident site or conduct a field investigation—as is the case with many general aviation non-fatal accidents. Rather, a local FAA aviation safety inspector appeared on the scene within hours, inspected the wreckage, gathered facts, and took the pilot's statement.⁹⁸ The FAA is not responsible for determining the probable cause of an accident but generally conducts its own investigations for regulatory compliance and enforcement purposes.⁹⁹ The FAA inspector gave deposition testimony about his investigation, which was admitted into evidence.¹⁰⁰ The inspector testified that the “NTSB did not get too involved with this one,” and that, although he did not remember even talking to the NTSB, it appeared the NTSB report was based on his own investigation.¹⁰¹ In opposing the motion to strike the NTSB report for being unreliable, the plaintiff argued that the NTSB did not actually investigate the accident (the FAA did), and the FAA investigator's testimony was available to establish reliability.¹⁰² The court permitted the jury to hear testimony about both the NTSB and the FAA investigations.¹⁰³

Finally, in *Pool v. Matco Manufacturing*, a case in federal court in Colorado, a probable cause determination was submitted as an exhibit—although the determination was from an accident that was different from the subject accident but arguably related.¹⁰⁴ The plaintiff submitted the probable cause of the related accident as an exhibit opposing the defendant's motion

⁹⁸ *Wetherilt v. Moore*, No. 1 CA-CV 15-0143, 2017 WL 1278842, at *3–4 (Ariz. Ct. App. Apr. 6, 2017); Transcript of Deposition of Jeffrey A. Miller, *Wetherilt*, No. 1 CA-CV 15-0143, 2017 WL 1278842 (on file with author).

⁹⁹ See generally FED. AVIATION ADMIN., FAA ORDER 8020.11D, AIRCRAFT ACCIDENT AND INCIDENT NOTIFICATION, INVESTIGATION, AND REPORTING (2018).

¹⁰⁰ *Wetherilt*, 2017 WL 1278842, at *4.

¹⁰¹ Transcript of Deposition of Jeffrey A. Miller at 65-68, *Wetherilt*, No. 1 CA-CV 15-0143, 2017 WL 1278842 (on file with author).

¹⁰² Response to Defendants' Motion in Limine—NTSB Report at 3, *Wetherilt v. Moore*, No. CV2011-014464, 2014 WL 6774328 (Ariz. Sup. Ct. May 5, 2014).

¹⁰³ See *Wetherilt*, 2017 WL 1278842, at *2–4.

¹⁰⁴ *Pool v. Matco Mfg.*, No. 14-cv-01563-WYD-MJW, 2015 WL 6153312, at *3 (D. Colo. Oct. 20, 2015).

for summary judgment.¹⁰⁵ In that case, the pilot was flying an experimental airplane that crashed, then the pilot sued the manufacturer.¹⁰⁶ The plaintiff was sanctioned for disassembling and reassembling the parking brake valve after the accident, without permission of the NTSB and without properly documenting it.¹⁰⁷ The probable cause determination from the related accident was excluded from the plaintiff's case in chief because the plaintiff failed to disclose it in time, but the court ruled that the plaintiff might be able to use it for impeachment purposes.¹⁰⁸ There was no discussion of whether it was barred under 49 U.S.C. § 1154(b).¹⁰⁹

III. PRIVILEGES

Regardless of the intricacies of the case law interpreting the NTSB's exclusionary statute, accident investigation reports and other materials may be subject to various litigation privileges. Investigations conducted by other federal agencies may be excluded by their own statutes or by privileges specific to the United States. Each federal agency is different and has its own statutes, regulations, and guidelines concerning investigations and their availability to the public, which may differ depending on whether the United States is a party to the lawsuit. Some commonly seen privileges are the deliberative process privilege and the military safety privilege. Recent cases have affirmed the continuing applicability of both.

Of note, recent decisions have tended to support the sanctity of investigators' deliberations. Before an investigation is final, materials are likely to be protected from discovery under either the deliberative process privilege or federal regulations. Even after investigations are concluded and made public, internal deliberations are likely to be protected from discovery.

¹⁰⁵ See Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Exhibit 9, *Pool v. Matco Mfg.*, No. 14-cv-01563-WYD-MJW (D. Colo. Aug. 6, 2015), ECF No. 65-9.

¹⁰⁶ *Pool*, 2015 WL 6153312, at *2.

¹⁰⁷ Order at 1-2, *Pool v. Matco Mfg.*, 2015 WL 6153312 (D. Colo. July 29, 2015), ECF No. 64.

¹⁰⁸ *Pool v. Matco Mfg.*, No. 14-cv-01563-WYD-MJW, 2015 WL 6153312, at *3 (D. Colo. Oct. 20, 2015). *Contra Wojciechowicz v. United States*, No. 04-cv-01846 (D.P.R. Feb. 26, 2008), ECF No. 145 (granting motion to exclude NTSB reports of allegedly similar accidents following motion to exclude them under 49 U.S.C. § 1154(b), and because the other accidents had no probative value in the case).

¹⁰⁹ See Order at 3.

A. THE DELIBERATE PROCESS PRIVILEGE

A recent admiralty case in federal court in Chicago applied the deliberative process privilege to an internal Army investigation.¹¹⁰ In *Ingram Barge*, an accident on the Illinois River resulted in a number of barges striking a federal dam during flood conditions, breaking the dam and flooding the nearby town.¹¹¹ Hundreds of suits were filed against the barge operators and the United States, which also sued the barge operators for the damage to the dam.¹¹² The Coast Guard and the NTSB investigated the accident.¹¹³ In the days following the accident, the U.S. Army Corps of Engineers, which operated the dam, also decided to conduct its own investigation into various questions the local Army Colonel had about the facilities and the incident.¹¹⁴ This “Commander’s Inquiry” became a contentious subject in discovery because the lawsuits started just weeks after the accident, so the inquiry was being conducted at the same time discovery was proceeding.

The United States invoked the deliberative process privilege to protect the drafts of the unfinished inquiry from discovery.¹¹⁵ The deliberative process privilege safeguards against the impairment of the federal government’s decision-making functions. Courts have long recognized that “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.”¹¹⁶ One purpose of the privilege is to enhance the quality of agency decisions by protecting open discussion.¹¹⁷ The privilege also serves to protect against premature disclosure of proposed policies before they have been finally formulated or adopted, as well as against con-

¹¹⁰ See *In re Ingram Barge Co.*, No. 13-C-3453, 2016 WL 3763450 (N.D. Ill. July 14, 2016).

¹¹¹ *Id.* at *1.

¹¹² *Id.*

¹¹³ See generally NAT’L TRANSP. SAFETY BD., MARINE ACCIDENT BRIEF, Accident No. DCA15LMO34.

¹¹⁴ *In re Ingram Barge Co.*, 219 F. Supp. 3d 749, 756-57, 777-78 (N.D. Ill. 2016).

¹¹⁵ U.S. Response to Ingram’s Motion to Compel at 1, No. 1:13-cv-4292 (N.D. Ill. June 9, 2014), ECF No. 409.

¹¹⁶ *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc); see also *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) (“[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decisionmaking process.”).

¹¹⁷ *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001); *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, 239 F.R.D. 508, 514–15 (N.D. Ill. 2006).

fusing the issues and misleading the public by disseminating documents suggesting reasons and rationales for a course of action that may not be the ultimate reason for the agency's action.¹¹⁸ In addition, the privilege protects the executive branch from judicial interference.¹¹⁹

In *Ingram Barge*, the court reviewed the declaration of the Colonel invoking the privilege over a sampling of draft portions of the Commander's Inquiry.¹²⁰ The court concluded that the privilege applied to various documents at issue, including the government's computer-generated analysis of raw data.¹²¹ Because the United States had produced the underlying raw data, the litigation parties were free to conduct their own analysis of the data.¹²² The court ruled that the privilege did not apply to the purely factual portions of a particular document from which the United States could redact the author's conclusions and analysis.¹²³ The Inquiry was final and the resulting report was produced about a year and a half after the accident, well into the discovery period.¹²⁴

In the aviation context, the Ninth Circuit reached a similar conclusion about data analysis in a Freedom of Information Act (FOIA) lawsuit against the NTSB related to its investigation of the TWA Flight 800 crash.¹²⁵ In *Lahr v. NTSB*, an individual sent more than 200 FOIA requests to federal agencies to pursue his belief that the government engaged in a vast cover-up of the cause of the crash off the coast of Long Island in 1996.¹²⁶ The NTSB asserted the deliberative process privilege and refused to turn over certain documents.¹²⁷ The Ninth Circuit affirmed the withholding of an early analysis of the radar tracking because it contained conclusions and thoughts of analysts concerning the viability and accuracy of certain radar data and the application

¹¹⁸ See, e.g., *King v. Internal Revenue Serv.*, 684 F.2d 517, 519 (7th Cir. 1982).

¹¹⁹ See *Judicial Watch of Fla. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 n.8 (D.D.C. 2000).

¹²⁰ *In re Ingram Barge Co.*, No. 13 C 3453, 2014 WL 12748533, at *2 (N.D. Ill. July 17, 2014).

¹²¹ *Id.* at *5.

¹²² *Id.* at *4.

¹²³ *Id.* at *5.

¹²⁴ *Id.* at *1.

¹²⁵ *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 969 (9th Cir. 2009).

¹²⁶ *Id.*

¹²⁷ *Id.* at 979.

of such data in determining the flight path.¹²⁸ The court ordered the raw data, but not the data analysis, to be produced.¹²⁹

B. NTSB PENDING INVESTIGATION PRIVILEGE:
49 C.F.R. § 831.13

A regulatory privilege over NTSB material arose in a recent case in Oklahoma against Beechcraft Corporation following the crash of a twin engine Premier 390A.¹³⁰ The United States was not a party to the lawsuit; rather, the plaintiff sought to discover NTSB materials through Beechcraft, which was both a defendant to the lawsuit and a party representative to the investigation.¹³¹ In *Caves v. Beechcraft Corp.*, Beechcraft included certain investigation documents on a privilege log during discovery. In refusing to produce its communications with the NTSB, including draft reports and comments, Beechcraft invoked the attorney client privilege, attorney work product privilege, and an NTSB regulation.¹³² That regulation, 49 C.F.R. § 831.13, restricts the release of investigative materials before the report is public, except to a party representative to the investigation.¹³³ Because the NTSB had not yet issued its final report, the court ruled that Beechcraft had raised a valid privilege and thus denied the motion to compel.¹³⁴

¹²⁸ *Id.* at 983.

¹²⁹ *Id.*

¹³⁰ See *Caves v. Beechcraft Corp.*, No. 15-CV-125-CVE-PJC, 2016 WL 355491 (N.D. Okla. Jan. 29, 2016).

¹³¹ *Id.* at *1. “The [NTSB investigator] may designate one or more entities to serve as parties in an investigation.” 49 C.F.R. § 831.11(a)(1) (2018). Party status is limited to entities that “were involved in the accident and that can provide suitable qualified technical personnel to actively assist in an investigation.” *Id.* Various persons have questioned the potential unfairness in allowing manufacturers to be parties to the investigation because that status may require the manufacturers to test wreckage and components without giving any access or information to the representatives of crash victims. See generally CYNTHIA C. LEBOW ET AL., SAFETY IN THE SKIES: PERSONNEL AND PARTIES IN NTSB AVIATION ACCIDENT INVESTIGATIONS 7, 30 (2000), available at www.rand.org/pubs/monograph_reports/MR1122.html [<https://perma.cc/G7P4-6VT2>] (analyzing the “inherent conflicts” of the NTSB party process as it relates to future litigation: “The NTSB must work with parties involved in a crash; there is insufficient in-house expertise within the agency itself. However, this presents a clear and present danger to the integrity of the investigative process—parties that face potentially enormous economic losses if they are found to be the cause of an accident could attempt to disrupt or bias an investigation.”).

¹³² *Caves*, 2016 WL 355491, at *3.

¹³³ 49 C.F.R. § 831.13(c) (2018).

¹³⁴ *Caves*, 2016 WL 355491, at *5.

The plaintiffs in *Caves v. Beechcraft* complained that the regulation did not create a privilege and was unfair to the plaintiffs, arguing that the NTSB and Beechcraft were “in cahoots.”¹³⁵ The plaintiffs even implied that Beechcraft was manipulating the evidence to influence the investigation, arguing “garbage in, garbage out.”¹³⁶ Both the court and Beechcraft took exception to this characterization of the NTSB’s mission and reputation, noting that “dedicated investigators” are not compromised when a manufacturer is a party.¹³⁷ The court further cited a string of cases for the proposition that the NTSB is “litigation neutral” and “not a show for ‘silent note[-]takers looking for someone to sue.’”¹³⁸ The court further noted that the plaintiffs could make their own request for materials to the NTSB under the agency’s regulations or would obtain additional information when the investigation was concluded.¹³⁹ Thus, the NTSB’s regulations served as a privilege for the party representatives.

The NTSB regulation § 831.13 also arose in the litigation following the sinking of a U.S.-flagged cargo vessel, S.S. *El Faro*, near the Bahamas during Hurricane Joaquin in October 2015.¹⁴⁰ This maritime disaster caused the deaths of all thirty-three crewmembers aboard.¹⁴¹ Both the NTSB and the Coast Guard investigated the accident.¹⁴² Early in the civil lawsuit, the parties were unable to reach agreement on a case management plan due to 49 C.F.R. § 831.13.¹⁴³ The plaintiffs requested production of the materials that the vessel operator had provided to the NTSB and the Coast Guard in the accident investigation.¹⁴⁴ The vessel operator explained that it could not make such a production without the agreement of the NTSB because the production would be barred by § 831.13.¹⁴⁵ The vessel operator provided the court with a letter from NTSB counsel stating that

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at *4.

¹³⁹ *Id.* at *5.

¹⁴⁰ *In re Sea Star Line, LLC*, No. 15-CV-01297, 2017 A.M.C. 377, 378 (M.D. Fla. 2016).

¹⁴¹ *Id.*

¹⁴² Order at 2, *In re Sea Star Line, LLC*, No. 3:15-cv-1297-HES-MCR, 2015 WL 9257084 (M.D. Fla. Oct. 30, 2015).

¹⁴³ *Id.* at 1.

¹⁴⁴ Case Management Report at 5, *In re Sea Star Line, LLC*, No. 3:15-cv-1297-J-20-MCR, (M.D. Fla. June 1, 2016), ECF No. 382.

¹⁴⁵ *Id.* at 4.

the investigation was ongoing and the investigation materials could not be released for use in the civil litigation.¹⁴⁶ The NTSB's letter stated that materials submitted to the investigators constituted investigative material that could not be released.¹⁴⁷ The court scheduled a hearing on the issue, at which the court expressed concern about the NTSB's position: "[T]here's a separation of powers in this country. And how do you people in the executive branch think you're going to tell the judicial branch: This is how you handle your cases?"¹⁴⁸ The problem was quickly averted, however, because one of the plaintiffs' attorneys had recently explained the problem directly to the chairman of the NTSB. After hearing how the NTSB's position had stalled the case and was frustrating the parties, the NTSB revised its position and permitted the production of investigation materials in the parties' possession under a protective order.¹⁴⁹ The lawsuits were then able to proceed. All the wrongful death suits of the families were settled within the next year, well before the issuance of the final reports of the Coast Guard or the NTSB, which were released months later, in October 2017 and December 2017, respectively.¹⁵⁰

C. MILITARY SAFETY PRIVILEGE

When the military is involved in an aviation accident that is the subject of a civil tort lawsuit, the military safety privilege may arise. The military safety privilege was first recognized in *Machin v. Zuckert*.¹⁵¹ In *Machin*, the D.C. Circuit affirmed the district court's decision to quash a subpoena to the U.S. Air Force seeking a copy of the Air Force's accident investigation report following the crash of an Air Force B-25 bomber at Lowry Air Force Base in Denver.¹⁵² The plaintiff, who survived the accident, sued the manufacturer of the propeller assemblies.¹⁵³ To support his lawsuit, he subpoenaed the investigation report.¹⁵⁴ The Air Force refused to produce it but did provide a summary and a list

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Scheduling Conference Transcript at 9–10, *In re Sea Star Line, LLC*, No. 3:15-cv-1297-J-20MCR (M.D. Fla. July 28, 2016), ECF No. 439.

¹⁴⁹ *Id.* at 11–12.

¹⁵⁰ Petitioners' Notice of Settlement at 1, *In re Sea Star Line, LLC*, No. 3:15-cv-1297-HES-MCR (M.D. Fla. Apr. 13, 2017), ECF No. 676.

¹⁵¹ 316 F.2d 336, 339 (D.C. Cir. 1963).

¹⁵² *Id.* at 337.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

of witnesses.¹⁵⁵ The appellate court affirmed that the deliberations and recommendations in the report were privileged: “[A] recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued.”¹⁵⁶ The court ruled that “factual findings,” however, were not privileged.¹⁵⁷

The military safety privilege has been affirmed in aviation cases over the years, including recently in the Northern District of Florida.¹⁵⁸ In *Miles v. United States*, two people were killed in a civil aircraft accident at Eglin Air Force Base in 2011.¹⁵⁹ Both the Air Force and the NTSB investigated the accident.¹⁶⁰ During discovery, the United States produced a redacted version of the Air Force’s safety investigation report, asserting the military safety privilege to withhold portions of the report containing confidential analysis, conclusions, findings, and recommendations of the investigator.¹⁶¹ Factual matters were unredacted and released to the parties.¹⁶² The district court upheld the United States’ assertion of the privilege.¹⁶³ The court noted that military accident investigations were not meant for use in civil litigation; they are done quickly and could include speculation and opinion:

[T]he purpose of the privilege is to allow safety investigators to speculate, opine, analyze, and make recommendations in a hasty fashion, knowing they may not be fully supported by facts, so that all possible causes of an accident can be identified and all corrective action can be taken in as timely a fashion as possible.¹⁶⁴

The court concurred with the “obvious” position that the military must be able to conduct these investigations “in what might be considered an expedited fashion, as opposed to the prolonged and overly deliberative process that might characterize investigation of a purely civil occurrence. The legitimate pur-

¹⁵⁵ *Id.* at 338.

¹⁵⁶ *Id.* at 339.

¹⁵⁷ *Id.* at 340.

¹⁵⁸ *Miles v. United States*, No. 3:14cv360/MCR/CJK, 2015 WL 11109793, at *7 (N.D. Fla. Oct. 19, 2015).

¹⁵⁹ *Id.* at *1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *4.

¹⁶² *Id.* at *5.

¹⁶³ *Id.* at *7.

¹⁶⁴ *Id.*

pose of the military safety privilege would be undermined if that privilege were to be applied on a case-by-case basis.”¹⁶⁵

This privilege was also recently reaffirmed in *D.F. v. Sikorsky Aircraft Corp.*¹⁶⁶ In that case, filed in the Southern District of California, the plaintiffs sued Sikorsky and other manufacturers following a Navy helicopter crash at Miramar Marine Corps Air Station, alleging the helicopter’s landing gear was defective.¹⁶⁷ The defendants served the Navy with a subpoena, seeking documents relating to the accident.¹⁶⁸ The Navy provided witness statements, some redacted and some not, and a redacted copy of the safety investigation report.¹⁶⁹ The defendants sought unredacted copies of all of the investigative material.¹⁷⁰ The district court, citing the *Machin* case, ruled that the privilege applied.¹⁷¹ The court further ruled that the Navy did not need to submit a formal privilege log because the parties were still attempting to work out what documents would be produced: “Given the law that clearly supports the Navy’s privilege claim, as well as the large volume of documents and information already made available to the parties by the Navy from various sources,” the court questioned the need for the Navy “to incur the additional time and expense that will undoubtedly be necessary to present the parties and the Court with a formal, detailed privilege claim addressing all disputed documents.”¹⁷²

The *Machin* privilege has been incorporated in FOIA, as seen in the cases of *United States v. Weber Aircraft Corp.* and *Badhwar v. U.S. Department of the Air Force*.¹⁷³ This means that if a report or investigation materials are privileged under *Machin*, a party also cannot obtain the privileged material through a FOIA request.

Military investigation reports may also be subject to statutes prohibiting their use, such as 10 U.S.C. § 2254, which prohibits

¹⁶⁵ *Id.*

¹⁶⁶ No. 13cv331, 2016 WL 3360515, at *3 (S.D. Cal. June 13, 2016).

¹⁶⁷ *Id.* at *1.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *3.

¹⁷² *Id.* at *7.

¹⁷³ *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984) (holding that confidential portions of Air Force accident investigation materials were properly withheld from FOIA production under FOIA Exemption 5, which is analogous to the *Machin* privilege); *Badhwar v. U.S. Dep’t of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987) (affirming that *Machin* privilege applied to withhold confidential portions of Air Force investigation in a FOIA case).

the use of certain aircraft investigation opinions in civil or criminal proceedings.¹⁷⁴ In the case of *Ferguson v. Bombardier Services Corp.*, the district court excluded a redacted Army accident investigation report from evidence, and the Eleventh Circuit affirmed.¹⁷⁵ The court ruled that the redacted report offered “no indication” of the underlying calculations, so it was limited in both “usefulness and reliability.”¹⁷⁶ The court further affirmed the exclusion of opinions written by the Adjutant General, ruling that his opinions were inadmissible under § 2254(d).¹⁷⁷

IV. HEARSAY

Once a party has overcome any exclusionary statutes, litigation privileges, or both, the Rules of Evidence may still create an obstacle for use of accident investigation reports or docket materials at trial. Accident investigation materials often lead to hearsay challenges. Although the Supreme Court ruled in *Beech Aircraft Corp. v. Rainey* that conclusory portions of reports might be admissible, it remains the court’s job to determine if accident investigation reports or materials, such as witness statements, contain otherwise inadmissible evidence.¹⁷⁸ Courts generally appear to exercise one of two options: (1) exclude investigation materials as a whole to avoid the “arduous weeding process” of culling inadmissible evidence from the reports; or (2) engage in the arduous weeding process, redacting the inadmissible and admitting the rest.

A. OPTION 1: EXCLUDE EVERYTHING TO AVOID THE ARDUOUS WEEDING PROCESS

Some courts are opting to exclude from litigation all accident investigation reports and statements, particularly in the more complex cases where expert witnesses are certain to testify about the technical aspects of an accident. In the litigation arising out

¹⁷⁴ 10 U.S.C. § 2254(d) (2018).

¹⁷⁵ *Ferguson v. Bombardier Servs. Corp.*, 244 F. App’x 944, 950 (11th Cir. 2007) (unpublished).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* For a thorough discussion of the various types of military aircraft investigations and the statutes and regulations applying to them, see generally William D. Janicki, *Aircraft Accident Reports and Other Government Documents: Evidentiary Use in International Air Crash Litigation in the United States*, 74 J. AIR L. & COM. 801 (2009).

¹⁷⁸ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (“[P]ortions of investigatory reports otherwise admissible under [the public records exception] are not inadmissible merely because they state a conclusion or opinion.”).

of the *Deepwater Horizon* explosion and the BP Oil Spill, Judge Barbier in the U.S. District Court for the Eastern District of Louisiana resolved evidentiary issues concerning the multiple investigations that followed the explosion and spill.¹⁷⁹ In the end, the various investigations played practically no role whatsoever in “the case of the century.”¹⁸⁰

This massive multidistrict litigation, which went to trial in several phases beginning in 2012, has been called “the greatest legal show on earth” and “the largest and most complex lawsuit for more than a decade in the world’s most litigious country.”¹⁸¹ The case involved thousands of claimants, including the United States,

over 500 days of deposition, more than 100 expert reports, three trials, several appeals to the Fifth Circuit, multiple petitions to the Supreme Court, the management of terabytes of information, numerous case management orders, document management decisions, the application of the Manual for Complex Litigation, and the highly effective use of magistrate judges and special masters.¹⁸²

Among the various investigations were those conducted by the U.S. Coast Guard, the Department of the Interior (which joined with the Coast Guard to investigate), and a Commission established by the President of the United States.¹⁸³ With respect to the Coast Guard, the parties agreed early on that, to ensure statutory compliance,¹⁸⁴ the report and any materials generated in the investigation would not be used in the civil litigation, and the court entered an order so ruling.¹⁸⁵ Shortly before the Phase

¹⁷⁹ Ed Crooks, *BP: The Case of the Century*, FIN. TIMES MAG. (Feb. 24, 2012) <https://www.ft.com/content/8bf50a04-5dc1-11e1-869d-00144feabdc0> (last visited Aug. 27, 2018).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² John C. Cruden et al., *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 MICH. J. ENVTL. & ADMIN. L. 65, 68 (2016).

¹⁸³ So many investigations were undertaken that they have their own Wikipedia entry, “Deepwater Horizon investigation,” listing at least six investigations. *Deepwater Horizon Investigation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Deepwater_Horizon_investigation#cite_note-upstream220410-2 (last visited Aug. 27, 2018).

¹⁸⁴ 46 U.S.C. § 6308 (2018) (“[N]o part of a report of a marine casualty investigation . . . shall be admissible as evidence . . .”).

¹⁸⁵ Order Regarding Transocean Motion for Protective Order Regarding Report of U.S. Coast Guard at 2, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. May 6, 2011), ECF No. 2281.

I trial, the issue came up again, as certain parties moved to clarify whether Interior's volume of the report was considered part of the excluded Coast Guard report. The court ruled that the entire report, including Interior's volume, fell under the Coast Guard's statute because the investigation had been conducted jointly.¹⁸⁶ With respect to trial evidence, the court ruled that neither the reports nor any expert's reliance on such reports was admissible: "(1) expert reports (or portions thereof) solely or substantially relying on marine casualty investigation reports will be stricken; and (2) references or citations to such reports within otherwise admissible expert reports will be stricken."¹⁸⁷

These rulings meant that, even though the investigators held seven sessions of public hearings and heard testimony from more than eighty witnesses and experts,¹⁸⁸ neither the video of the investigation testimony nor the transcripts were used at depositions or at trial.

Before trial, the *Deepwater Horizon* court considered additional investigation reports in various motions *in limine*.¹⁸⁹ In considering the report prepared by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, the court first ruled that it was indeed a public record under Federal Rule of Evidence 803(8).¹⁹⁰ The court then turned to the problematic nature of the "inner hearsay" of entities that provided information to the Commission, ruling that hearsay "does not become admissible just because it is within a public record."¹⁹¹ The court opted against conducting an in-depth examination to sift out the inner hearsay: "Considering the volume of evidence and testimony which the parties plan to seek to introduce, much of which will likely be cumulative of that contained in the report, the Court does not intend to spend a great deal of time attempting to sort the wheat from the chaff."¹⁹² In striking the

¹⁸⁶ Order at 1, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (E.D. La. Jan. 26, 2012), ECF No. 5448.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ Press Release, Bureau of Ocean Energy Mgmt., Reg. & Enft, Deepwater Horizon Joint Investigation Team Releases Final Report (Sept. 14, 2011), <https://web.archive.org/web/20110924075744/http://www.boemre.gov/ooc/press/2011/press0914.htm> (last visited Aug. 27, 2018).

¹⁸⁹ *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, 2012 WL 425164, at *1 (E.D. La. Feb. 9, 2012).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at *2.

exhibit from trial, the court cited judicial economy and the likely cumulative nature of the investigation report.

Numerous other cases have addressed the hearsay-within-hearsay problem of accident investigation reports, including frequently-cited aviation cases *John McShain, Inc. v. Cessna Aircraft Co.* and *Sheesley v. Cessna Aircraft Co.*¹⁹³ In *McShain*, the district judge refused to admit into evidence thirty NTSB accident reports proffered to show other accidents in which the Cessna landing gear gave way.¹⁹⁴ The Third Circuit affirmed this decision, ruling that the reports each included witness statements and other hearsay and that the district court acted well within its discretion in declining a “lengthy attempt to sift out admissible hearsay.”¹⁹⁵

The federal district court in Puerto Rico reached the same decision in *Echevarria v. Caribbean Aviation Maintenance Corp.*, a case arising out of the crash of a Robinson helicopter.¹⁹⁶ The court cited *McShain* in ruling that sifting through NTSB reports for prior Robinson accidents would be “arduous”:

[T]he court notes the amount of time it would necessarily take to weed out the factual statements from these reports. . . . The time it would take the court to make these determinations, combined with the potential prejudice to the Defendants regarding the existence of past accidents, makes the prejudicial [effect] outweigh the probative value to the Plaintiffs.¹⁹⁷

Similarly decisive, and affirmed on appeal, was the state trial court in Nebraska in *O’Brien v. Cessna Aircraft Co.*¹⁹⁸ The Supreme Court of Nebraska affirmed the trial court’s hearsay rulings on the inadmissibility of FAA airworthiness directives and

¹⁹³ *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977) (affirming district court’s striking portions of the accident investigation report for double hearsay); *Sheesley v. Cessna Aircraft Co.*, No. 02-4185-KES, 2006 WL 1084103, at *38–39 (D.S.D. Apr. 20, 2006) (finding portions of the NTSB report to be inadmissible hearsay-within-hearsay under Rule 803(8)). See generally *United States v. Pendas-Martinez*, 845 F.2d 938, 942–43 (11th Cir. 1988) (holding that, where statements in a Coast Guard report constituted double hearsay and one level of hearsay did not fit within an exception, it was error to admit the report without redacting the hearsay); *Johnson v. Scotty’s, Inc.*, 119 F. Supp. 2d 1276, 1282 (M.D. Fla. 2000) (stating that there must be an exception for each level of hearsay).

¹⁹⁴ *John McShain, Inc.*, 563 F.2d at 636–37.

¹⁹⁵ *Id.* at 636.

¹⁹⁶ *Echevarria v. Caribbean Aviation Maint. Corp.*, 839 F. Supp. 2d 464, 465 (D.P.R. 2012).

¹⁹⁷ *Id.* at 467.

¹⁹⁸ 903 N.W.2d 432, 454 (Neb. 2017).

NTSB materials, including the NTSB's "Most Wanted Transportation Safety Improvements" list.¹⁹⁹ The case arose following the crash of a Cessna 208B Caravan in 2007, seriously injuring the pilot.²⁰⁰ The pilot sued Cessna and Goodrich in a product liability action, alleging that the accident was the result of an ice-contaminated tail stall.²⁰¹ The judge ruled on numerous evidentiary issues during the four-week jury trial which concluded in a verdict for the defendants.²⁰² The plaintiff sought to introduce into evidence various FAA and NTSB documents relating to icing issues with Cessna Caravan models.²⁰³ For example, the FAA issued an Airworthiness Directive (AD) in 2006 for the Caravan, prohibiting flight into moderate or greater icing conditions.²⁰⁴ Although the court allowed testimony about the AD, it ruled that the AD itself contained inadmissible hearsay and was more prejudicial than probative.²⁰⁵ The jury requested a copy of the AD during deliberation, but the court did not provide it because it had not been admitted into evidence.²⁰⁶ The court further ruled that NTSB exhibits such as directives, bulletins, briefing papers, letters, and the Most Wanted list, all discussing Caravan icing issues, were inadmissible hearsay, irrelevant, or overly prejudicial.²⁰⁷ The Supreme Court of Nebraska affirmed these rulings.²⁰⁸

B. OPTION 2: ENGAGE IN ARDUOUS WEEDING

In *Sheesley v. Cessna Aircraft Co.*, on the other hand, the court did undertake a lengthy attempt to sort "the wheat from the chaff." The *Sheesley* case arose following the crash of a Cessna 340A in South Dakota in 2000, resulting in the deaths of all three people in the airplane.²⁰⁹ The crash happened shortly after take-off.²¹⁰ As part of the NTSB investigation, the "engines and turbochargers were sent to their respective manufacturers

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 444.

²⁰¹ *Id.*

²⁰² *Id.* at 446.

²⁰³ *Id.* at 454.

²⁰⁴ *Id.* at 452.

²⁰⁵ *Id.* at 454.

²⁰⁶ *Id.* at 453–54.

²⁰⁷ *Id.* at 454.

²⁰⁸ *Id.*

²⁰⁹ *Sheesley v. Cessna Aircraft Co.*, No. 02-4185-KES, 2006 WL 1084103, at *2 (D.S.D. Apr. 20, 2006).

²¹⁰ *Id.*

for tear down and analysis.”²¹¹ The court ruled that, although the NTSB factual report was a public record under Federal Rule of Evidence 803(8), specific portions of the report were inadmissible, including Teledyne’s engine teardown report.²¹² Teledyne’s analysis, in which it concluded that its engines were operating properly, was not a public record and, in fact, was “simply a prior, self-serving statement by a party,” as Teledyne was a defendant in the lawsuit.²¹³ The court ordered the parties to redact the portions of the NTSB factual report that quoted the teardown analysis.²¹⁴ The court reached the same decision regarding Honeywell’s turbocharger teardown analysis.²¹⁵ The court did permit into evidence the NTSB’s own wreckage analysis, performed by the NTSB Materials Laboratory Division, under the public records exception to the hearsay rule.²¹⁶ Finally, the court excluded the witness statements provided to the NTSB and any witness interview summaries or quotes in the factual report.²¹⁷

The *Paulsboro Derailment* case is another example of a court attempting the difficult business of separating the admissible portions from the inadmissible portions of NTSB reports.²¹⁸ Many cases were filed in New Jersey following a 2012 train derailment that resulted in a toxic chemical spill. The first ruling came during the summary judgment stage, when the plaintiffs attached the NTSB report to their opposition brief.²¹⁹ The report that the plaintiffs attached was the seventy-eight-page final report, containing the probable cause determination on page 58, along with the signatures and concurring statements of board members.²²⁰ The defendants moved to strike the report

²¹¹ *Id.*

²¹² *Id.* at *38.

²¹³ *Id.*

²¹⁴ *Id.* at *39.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *In re Paulsboro Derailment Cases*, No. 13-784 (RBK/KMW), 2015 WL 4138950 (D.N.J. July 9, 2015).

²¹⁹ See Plaintiffs’ Brief in Opposition to Defendants’ Motion for Partial Summary Judgment, *In re Paulsboro Derailment Cases*, No. 13-cv-00784-RBK-KMW (D.N.J. Apr. 6, 2015), ECF No. 660; Plaintiffs’ Brief in Opposition to Defendants’ Motion for Partial Summary Judgment, Exhibit 2, *In re Paulsboro Derailment Cases*, No. 13-cv-00784-RBK-KMW (D.N.J. Apr. 6, 2015), ECF No. 660-6.

²²⁰ Exhibit 2, ECF No. 660-6, *supra* note 219, at 58. See *Paulsboro Derailment Cases*, 2015 WL 4138950, at *1 (“Plaintiffs rely on portions of the NTSB Report in support of various factual and legal positions in their opposition papers to De-

from the record under 49 U.S.C. § 1154(b).²²¹ The court granted the motion:²²² “Despite the plain language of the statute and regulations that ‘no part’ of an accident report may be admitted into evidence, Plaintiffs argue that the factual portions of the NTSB Report should nevertheless be admissible. The Court disagrees.”²²³

The court’s later rulings on the factual material were not so easy. The voluminous, seventy-seven-item NTSB docket contained seven factual reports, such as an Operations Factual Report, a Mechanical Factual Report, and a Hazardous Materials Group Factual Report. As one of the individual cases headed to trial, the plaintiff sought to admit into evidence the seven factual reports, which the defendant opposed.²²⁴ The defendant argued that the reports contained inadmissible hearsay and irrelevant material.²²⁵ For example, the reports allegedly contained “extensive quotations, all of which are inadmissible double hearsay, from persons who are not the Defendant’s employees, many of whom subsequently filed suit.”²²⁶ The defendant further contended that some of the material in the reports, such as post-accident inspections, was overly prejudicial.²²⁷ Finally, the defendant argued that the report contained highly technical subjects, such as “descriptions of the event recorder and GPS data,” that could not be understood without an expert witness, which the plaintiffs lacked.²²⁸ At the pretrial conference, the court denied the motion without prejudice, believing that the reports had little to do with the issues that would be tried.²²⁹ The court reserved ruling in the event that the defendant raised some issue that could be rebutted with the factual reports.²³⁰

fendants’ motion for summary judgment [], and also attach the entire NTSB Report as an exhibit.”)

²²¹ *Paulsboro Derailment Cases*, 2015 WL 4138950, at *1.

²²² *Id.* at *1-2.

²²³ *Id.* at *1.

²²⁴ Defendant’s Opposition to Plaintiffs’ Motion in Limine to Admit the NTSB Factual Reports into Evidence at 4, *In re Paulsboro Derailment Cases*, No. 1:13-cv-03244-RBK-KMW (Morris) (D.N.J. Jan. 15, 2016), ECF No. 204.

²²⁵ *Id.*

²²⁶ *Id.* at 5.

²²⁷ *Id.* at 5-6.

²²⁸ *Id.* at 9.

²²⁹ Order at 2, *In re Paulsboro Derailment Cases*, No. 13-0784 (Morris) (D.N.J. Jan. 21, 2016), ECF No. 217.

²³⁰ *Id.*; Transcript at 30-31, *In re Paulsboro Derailment Cases*, No. 13-3244 (Morris) (D.N.J. Mar. 7, 2016), ECF No. 251.

The factual reports did come up at trial. Perhaps due to the lack of a pretrial ruling, counsel for both sides jointly created a consolidated, redacted exhibit consisting of agreed portions of the various NTSB factual reports.²³¹ Even with this attempt to reach agreement, however, portions of the factual reports were still contested, requiring the court, near the end of the jury trial, to go over the reports line by line to rule on the defendant's objections.²³² During this painstaking exercise in redaction, the court entered rulings on relevance, hearsay, and whether certain technical details could come in without expert testimony.²³³ The combined, redacted factual reports were then admitted into evidence and sent to the jury room for use during deliberations.²³⁴

The plaintiff's counsel relied on the NTSB factual findings in his closing argument and indeed appeared to use the NTSB factual findings in place of expert testimony.²³⁵ He told the jury:

[In] evidence in this case, which you haven't seen yet, but it's going to be back with you, is the NTSB factual findings. The NTSB is the entity that investigates the occurrences. We don't have to bring an expert in, as they suggest. The NTSB did an investigation, and using logical connections, there's only one cause to this accident.²³⁶

The plaintiff's counsel repeatedly quoted and referenced the NTSB factual reports throughout his closing.²³⁷ The jury returned a verdict in the plaintiff's favor, albeit only in the amount of \$500 for the alleged injuries caused by driving through a cloud of chemicals released into the air after the train

²³¹ *In re* Paulsboro Derailment Cases (Morris), exhibit 381 (on file with author).

²³² Transcript at 27–52, *In re* Paulsboro Derailment Cases, No. 13-3244 (D.N.J. Feb. 2, 2016), ECF No. 237.

²³³ *Id.*

²³⁴ Transcript at 34–35, *In re* Paulsboro Derailment Cases, No. 13-3244 (Morris) (D.N.J. Feb. 3, 2016), ECF No. 244; Transcript at 83–84, *In re* Paulsboro Derailment Cases, No. 13-3244 (Morris) (D.N.J. Feb. 2, 2016), ECF No. 238.

²³⁵ Transcript at 34–35, *In re* Paulsboro Derailment Cases, No. 13-3244 (Morris) (D.N.J. Feb. 3, 2016), ECF No. 244.

²³⁶ *Id.* at 34.

²³⁷ *Id.* at 34–57.

derailment.²³⁸ The case was affirmed in a non-precedential decision, without discussion of the NTSB issue.²³⁹

From the viewpoint of a practitioner, this case shows why early, decisive rulings or stipulations on the use of factual reports are advantageous to all parties, rather than hashing it out line by line during trial, while the jury waits. To the extent a party may attempt to use a factual report in lieu of retaining an expert, an early ruling on the issue would allow that party to know if an expert is necessary before the expert disclosure deadline. Judge Barbier's early and decisive ruling on the use of the *Deepwater Horizon* investigations provided clear guidelines that were easy for the lawyers to use in discovery and at trial, sparing the parties the need to haggle over the admissibility of various portions of the many investigations. Of note, neither the "total exclusion" option nor the "painstaking redaction" option allows for the wholesale admission into evidence of complete factual reports as one can assume that any factual report is likely to contain at least some hearsay. Litigation expense and judicial efficiency should be considered for either option as the need to retain experts is expensive—but so are the motions and disputes over the admissibility of various portions of lengthy reports. The relative speed and efficiency of the *Deepwater Horizon* litigation may tip the balance in favor of "total exclusion" for the most complex tort cases.

V. REMEDIES FOR PROBLEMS WITH ACCIDENT INVESTIGATIONS

Case law reveals few remedies for persons claiming to have been aggrieved by acts conducted during the accident investigation itself. Plaintiffs may argue that a poor investigation caused evidence to be destroyed or that the investigation itself otherwise harmed them. Although spoliation of evidence may now be a tort in some states, the author is not aware of any successful case against the United States for spoliation in the context of an aviation accident investigation.²⁴⁰

²³⁸ Jim Walsh, *Conrail Suit Ends with \$500 Award*, COURIER POST (Feb. 5, 2016, 5:31 PM), <https://www.courierpostonline.com/story/news/2016/02/05/conrail-paulsboro-morris-cuker/79891218/> [<https://perma.cc/4B2D-QVP2>].

²³⁹ See Opinion, *In re Paulsboro Derailment Cases*, Nos. 16-3172 & 16-3263, 2018 WL 39914702 (3d Cir. Aug. 15, 2018).

²⁴⁰ For a thorough discussion of the state of the third-party spoliation cause of action, see Steven A. Kirsch, Dep't of Justice, *Beyond the Adverse Inference: In-*

The United States was sued for spoliation in *Carter v. Bell Helicopter Textron, Inc.* and *Black Hills Aviation, Inc. v. United States*.²⁴¹ In both cases, the federal government allegedly damaged or lost wreckage from aviation accidents, and in both cases, the courts ruled that the United States could not be held liable for the alleged negligence because the discretionary function exception to the Federal Tort Claims Act²⁴² prohibited the suits. In *Smith v. United States*, in the Southern District of Ohio, the court denied the plaintiffs' request for a negative inference against the United States as a result of "the missing portion of the exhaust stack," which was lost in the investigation of the Aero Club airplane accident.²⁴³

In *Miles v. United States*, discussed above, the plaintiff brought a motion for sanctions against the United States for alleged spoliation of evidence.²⁴⁴ The case was filed following a civil aircraft accident on an Air Force base in which the plaintiff's husband and another pilot were killed.²⁴⁵ When the NTSB concluded its investigation, the Air Force stored the wreckage at the Air Force base on the plaintiff's request.²⁴⁶ By the time the plaintiff inspected the wreckage, certain engine parts were missing, and in discovery, the plaintiff further found that the aircraft's discrepancy logs were also missing.²⁴⁷ The plaintiff sought an order imposing sanctions for the alleged loss or destruction of the discrepancy logs.²⁴⁸ The court denied the motion, ruling that the plaintiff failed to prove that the discrepancy logs were crucial to her case, among other things.²⁴⁹

dependent Tort Actions for Spoliation of Evidence Against Third Parties, SMU Air Law Symposium (Mar. 30, 2017).

²⁴¹ *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 976 (10th Cir. 1994) (holding that the discretionary function exception to the Federal Tort Claims Act barred a lawsuit challenging the Army's decision to limit the scope of an airplane accident investigation into an accident on a missile base); *Carter v. Bell Helicopter Textron, Inc.*, 52 F. Supp. 2d 1108, 1114, 1117 (D. Ariz. 1999) (holding that the discretionary function exception barred suit for alleged failure to preserve the helicopter wreckage and spoliation of evidence caused by the U.S. Forest Service in an accident investigation).

²⁴² 28 U.S.C. § 2680(a) (2018).

²⁴³ *Smith v. United States*, No. 3:95cv445, 2012 WL 1453570, at *35 (S.D. Ohio Apr. 26, 2012).

²⁴⁴ *Miles v. United States*, No. 3:14cv360-MCR/CJK, 2016 WL 3556845, at *1 (N.D. Fla. Mar. 30, 2016).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *2.

²⁴⁹ *Id.* at *3.

The court in *Bearden v. United States* also denied a motion for default judgment or an adverse inference for spoliation of evidence against the United States.²⁵⁰ In *Bearden*, a Piper Arrow IV crashed into the Cascade Mountains in Oregon, killing the pilot and five passengers. Because the airplane was owned by an Air Force Aero Club, the Air Force took possession of the wreckage from the NTSB following the investigation. In their motion for sanctions, the plaintiffs argued that the Air Force lost parts of the wreckage, some photographs, and an audio tape of air traffic control communications.²⁵¹ The court denied the motion in its entirety. The court first ruled that dismissal was not an appropriate remedy because the plaintiffs failed to establish willfulness or flagrant disregard for the court and the discovery process.²⁵² The court then ruled against any lesser sanctions, again because the plaintiffs failed to proffer evidence that the loss “was the result of bad faith or willfulness of the government.”²⁵³ The court noted that the government had no continuing duty to preserve the wreckage, which was located in a remote area of the Cascade Mountains. As the Air Force denied possessing the lost wreckage, it was possible that the accident site had been vandalized or looted. The court also declined to sanction the government for the lost photographs and transmission tape because the plaintiffs failed to show bad faith. The court further found that the plaintiffs failed to establish the relevance of the lost photographs and audio tape and that sufficient other evidence was available, including other photographs and other copies of the air traffic control transmissions.²⁵⁴

Lawsuits have also proven unsuccessful in attempting to obtain judicial review of an allegedly incorrect NTSB finding or probable cause determination. In *Joshi v. NTSB*, an airplane crashed in Indiana in 2006, killing the pilot and all four passengers.²⁵⁵ The NTSB investigated, eventually issuing a factual report and a probable cause report blaming pilot Georgina Joshi for the accident.²⁵⁶ The pilot’s father petitioned the NTSB for

²⁵⁰ *Bearden v. United States*, 21 Av. Cas. (CCH) ¶ 17,533 (N.D. Ala. 1988).

²⁵¹ *Id.* at 17,535.

²⁵² *Id.*

²⁵³ *Id.* at 17,536.

²⁵⁴ *Id.* at 17,537.

²⁵⁵ *Joshi v. Nat’l Transp. Safety Bd.*, 791 F.3d 8, 10 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 994 (2016).

²⁵⁶ *Id.*

reconsideration based on evidence he gathered.²⁵⁷ The NTSB denied the petitions, so he sued the agency, seeking review of both reports.²⁵⁸ Joshi had hired an engineering firm to reconstruct the accident by analyzing radar data, air traffic control transmissions, and other evidence.²⁵⁹ He argued that a second aircraft was operating in the area and contributed to the accident.²⁶⁰ He also asserted that the civil litigation against the FAA, which had been settled, showed that alleged FAA failures contributed to the accident.²⁶¹ The court ruled, however, that there was no final agency action for it to review, so it lacked jurisdiction.²⁶² Because NTSB reports are “only used within the government in making decisions regarding the need for further safety regulations,” no legal consequence attached to the reports.²⁶³

VI. IMPACT ON LAWSUITS FROM NTSB’S POSSESSION OF KEY EVIDENCE

Litigation issues may arise in aviation cases following the NTSB’s taking custody of all accident evidence. Sometimes it may be difficult for litigation parties to obtain necessary factual information in time to meet obligations in court. Because the statute of limitations is not tolled while waiting for the accident report,²⁶⁴ parties must make decisions about whom to sue, often without all the necessary facts. Eager to keep their dockets mov-

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 11.

²⁵⁹ *Id.* at 10.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 11.

²⁶² *Id.* at 13 (“We conclude that we may not review either the Reports or the denial of Joshi’s petition for reconsideration.”).

²⁶³ *Id.* at 12. *Accord* *Helicopters, Inc. v. Nat’l Transp. Safety Bd.*, 803 F.3d 844, 846 (7th Cir. 2015) (“Neither the Factual Report nor the Probable Cause Report are reviewable final orders under § 1153(a) because the reports do not create any legal repercussions for Helicopters.”); *Gibson v. Nat’l Transp. Safety Bd.*, 118 F.3d 1312, 1315 (9th Cir. 1997).

²⁶⁴ In a case against the United States under the Federal Tort Claims Act, the Ninth Circuit rejected an argument that the statute of limitations should be tolled during the investigation period. *Green v. United States*, 172 F.3d 56, 56 (9th Cir. 1998) (unpublished). The court ruled:

Green also contends that her investigative efforts were hampered by the National Transportation Safety Board’s (NTSB) investigation of the crash. Even assuming that this argument is relevant to the accrual issue, it has scant force in light of the facts of this case. The NTSB released the wreckage after only a few days, and released its report eight months later, affording Green ample opportunity to investigate prior to the expiration of the limitations period. Moreo-

ing, courts may order discovery to proceed as much as possible, often reaching a roadblock when expert reports are due if factual records and data have not been received from the NTSB by that time.

One aviation law firm has sued the NTSB twice over its delay in responding to FOIA requests for factual data.²⁶⁵ In *Agostini v. NTSB*, the plaintiffs alleged that, in December 2011, they submitted a FOIA request to the NTSB for records concerning the crash of a Piper PA-44-180 at West Palm Beach, Florida on November 11, 2010.²⁶⁶ The plaintiffs alleged that, despite the normal twenty-day period for a FOIA request having long since passed,²⁶⁷ the NTSB had not produced any records or indicated any unusual circumstances for the delay. The plaintiffs sought an order directing the NTSB to process the request immediately and release the documents, “including but not limited to the Galaxy Aviation surveillance video.”²⁶⁸ In subsequent filings, the plaintiffs provided the court with a letter dated September 27, 2013, sent by the NTSB to the law firm, stating that the NTSB was providing certain video files, audio files, and documents pursuant to the FOIA request.²⁶⁹ The agency withheld an internal email under the deliberative process privilege, photographs of the deceased pilot or passenger, and pages that it deemed invasive to the privacy of the pilot and passengers.²⁷⁰ The agency further sent a number of documents to the FAA to determine if the FAA would assert any privilege over their release.²⁷¹ In the

ver, many independent avenues of investigation were available to Green, avenues that apparently went unexplored.

Id.; see also *Hammons v. Navarre*, No. 2015-CA-00243-COA, 2017 WL 1392835, at *7 (Miss. Ct. App. Apr. 18, 2017), *reh'g denied* (Aug. 29, 2017), *cert. granted*, 233 So. 3d 823 (Miss. 2018), and *aff'd*, No. 2015-CT-00243-SCT, 2018 WL 2731329 (Miss. June 7, 2018) (ruling that the NTSB report, issued six months before the statute of limitations expired, gave the plaintiff all the information he needed to sue necessary parties).

²⁶⁵ See generally *Law Firm Turns to Court After NTSB Delays Acting on FOIA Requests*, 32 WESTLAW J. AVIATION 7 (2014).

²⁶⁶ Complaint, *Agostini v. Nat'l Transp. Safety Bd.*, No. 2:13-cv-05099-AB, at 3 (E.D. Pa. Aug. 29, 2013), ECF No. 1.

²⁶⁷ 5 U.S.C. § 552(a)(6)(A)(i) (2018).

²⁶⁸ Complaint, *Agostini v. Nat'l Transp. Safety Bd.*, No. 2:13-cv-05099-AB, at 4 (E.D. Pa. Aug. 29, 2013), ECF No. 1.

²⁶⁹ Letter from Melba D. Moyer, FOIA Officer, Nat'l Transp. Safety Bd., to Cynthia M. Devers, The Wolk Law Firm (Sept. 27, 2013) at 2, Exhibit A, *Agostini v. Nat'l Transp. Safety Bd.*, No. 2:13-cv-05099-AB (E.D. Pa. Oct. 9, 2013), ECF No. 5-2.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 3.

papers it filed with the court, the NTSB stated that “Plaintiffs’ FOIA request came to the top of the waiting list on or about June 26, 2013, and was being processed prior to the filing of the Complaint.”²⁷² Following additional litigation over the withheld documents, the law firm eventually dismissed the FOIA lawsuit. The underlying action against Piper and others, filed in state court in Pennsylvania, was settled before trial.²⁷³

The same law firm filed another lawsuit against the NTSB for delayed FOIA requests in *Wolk Law Firm v. NTSB* in 2014, alleging FOIA violations related to five separate airplane crashes.²⁷⁴ In that case, the law firm alleged that it was retained to investigate the circumstances of the April 21, 2012 crash of a Cirrus SR22 aircraft.²⁷⁵ Other plaintiffs to the FOIA lawsuit included a widow seeking information about the January 13, 2013 crash of a Pilatus PC-12, a person who was injured in a Robinson helicopter crash on April 30, 2011, a number of representatives of persons killed in the July 27, 2013 crash of a Robinson helicopter, and a person injured in a Piper PA-28R-200 crash on December 23, 2012.²⁷⁶ The law firm alleged that, in all cases, the NTSB had failed to release requested data.²⁷⁷ In one case, the law firm had specifically requested a video that was taken on board the accident helicopter, which was then excluded from the materials the NTSB provided.²⁷⁸ In another case, the law firm sought raw data from the Engine Monitoring Unit from the accident helicopter, which was not released.²⁷⁹

The law firm’s complaint further alleged a “conflict of interest” when the NTSB relies upon manufacturers to provide technical expertise to the NTSB during the investigation.²⁸⁰ The plaintiffs complained: “The NTSB’s reliance upon manufacturers of civil aircraft and aircraft components creates a situation where manufacturers are afforded early and exclusive access to

²⁷² Memorandum of Law in Support of Defendant’s Motion to Dismiss Plaintiffs’ Complaint at 3, *Agostini v. Nat’l Transp. Safety Bd.*, No. 2:13-cv-05099-AB (E.D. Pa. Nov. 5, 2013), ECF No. 9.

²⁷³ *Agostini v. Piper Aircraft Corp.*, Case ID No. 111100726 (Pa. Ct. Common Pleas Nov. 10, 2011, closed May 7, 2015).

²⁷⁴ Complaint, *Wolk Law Firm v. Nat’l Transp. Safety Bd.*, No. 2:14-cv-05184-CMR (E.D. Pa. Sept. 9, 2014), ECF No. 1.

²⁷⁵ *Id.* at 2.

²⁷⁶ *Id.* at 2-3.

²⁷⁷ *Id.* at 4.

²⁷⁸ *Id.* at 6.

²⁷⁹ *Id.* at 7.

²⁸⁰ *Id.* at 8.

crash evidence while victims of aviation crashes are wholly excluded from the investigation process as well as evidentiary collection and preservation efforts.”²⁸¹ The plaintiffs protested that the NTSB allowed crash victims access only to “its ‘Public Docket’ which contains only those photographs, notes, manuals, and other evidence selected by the NTSB with the sole input of the manufacturer party participants who are putative defendants in lawsuits arising from the crash,” and obstructed, withheld, or destroyed other evidence.²⁸² That lawsuit also was resolved by stipulation of dismissal when the NTSB produced requested materials.

In a case in New Mexico, it appears the parties became so frustrated by their inability to obtain records and data from the NTSB that they asked the district court to compel the NTSB to produce information either through long-pending FOIA requests or via subpoena.²⁸³ The accident at issue happened in October 2013 in Brownwood, Texas.²⁸⁴ Although the report was final in June 2015, the parties had difficulty obtaining necessary data, such as the data of tests conducted on an engine blockage, from the NTSB.²⁸⁵ The official docket contained only sixteen pages and two photos. In a letter requesting additional data from the NTSB, the plaintiff’s counsel wrote, “Data related to those tests are not otherwise available. The parties to the above-captioned matter all agree that the NTSB’s complete investigation file is necessary for their experts to proceed with the analysis.”²⁸⁶ In an affidavit, the plaintiff’s counsel further explained:

The NTSB took possession of certain portions of the engine and conducted testing of the fuel system resulting in a finding of an unidentified foreign substance that blocked the flow of fuel causing the engine to lose all power. The NTSB tested the substance with a Fourier Transform Infrared spectrometer.²⁸⁷

²⁸¹ *Id.*

²⁸² *Id.* at 10.

²⁸³ Hall v. High Mountain Aviation, Inc., No. 16-1080 MV/GJF, 2017 WL 4356185, at *1 (D.N.M. Sept. 29, 2017).

²⁸⁴ Agreed Motion to Compel the Nat’l Transp. Safety Bd. to Produce Subpoenaed Documents & Motion to Vacate Scheduling Order & Stay Proceedings Pending Production of Documents at 2, Hall v. High Mountain Aviation, Inc., No. 2:16-cv-01080-MV-GJF (D.N.M. Sept. 9, 2017), ECF No. 55.

²⁸⁵ *Id.*

²⁸⁶ Letter from Kent C. Krause, Craddock Davis & Krause LLP, to Nat’l Transp. Safety Bd. (Sept. 13, 2017) at 2, Exhibit A, Hall v. High Mountain Aviation, Inc., No. 2:16-cv-01080-MV-GJF (D.N.M. Sept. 20, 2017), ECF No. 55-1.

²⁸⁷ *Id.* at 8.

Counsel sent his first FOIA request to the NTSB in the fall of 2015.²⁸⁸ In the spring of 2017, the NTSB FOIA office informed him that the department was just starting to respond to requests from the previous year.²⁸⁹ Two years after the original FOIA request was filed, the NTSB told the plaintiff's counsel that there were still 200 requests in the queue before the plaintiff's request, and it would take another eight months to a year to fulfill.²⁹⁰

Although the court denied the motion to compel the NTSB to produce documents under FOIA, it took under advisement the plaintiff's motion to compel production from the NTSB under Federal Rules of Civil Procedure 37 and 45.²⁹¹ Even after that motion, the parties informed the court that deadlines needed to be moved because the NTSB still had not released information, and as such, their experts could not prepare reports.²⁹² The parties explained that the case “has been significantly hampered by the failure of the National Transportation Safety Board (‘NTSB’) to produce its records and data relating to the crash investigation. Much of the Aircraft and other evidence relating

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 8–9.

²⁹⁰ *Id.* at 9. Based on the information in this affidavit, it appears the NTSB takes two to three years to respond to some FOIA requests. *See id.* The NTSB's Freedom of Information Act Annual Report for Fiscal Year 2016 states that the agency had 690 requests pending at the start of the fiscal year, added 471, processed 272, and ended the fiscal year with 889 pending FOIA requests. *National Transportation Safety Board Freedom of Information Act Annual Report Fiscal Year 2016*, NAT'L TRANSP. SAFETY Bd. 9–10, 36–37 (Jan. 26, 2016), www.nts.gov/about/foia/Documents/NTSBFY16FOIA.pdf [<https://perma.cc/97WG-SUKC>]. The report further states that, for “complex” requests, the agency grants information in an average of 490 days, with the highest number of days to fulfill a request being 983 days. *Id.* at 21. The agency has nine full-time FOIA staff members. *Id.* at 29. The report contains this discussion of the backlog: “The recently hired NTSB Chief FOIA Officer has evaluated the FOIA program and is actively taking steps to address the backlog. He has the full support of the NTSB Leadership and plans include process improvements and staff augmentation.” *Id.* at 40. In a report filed in March 2017, the NTSB FOIA Officer stated that the agency “currently has a pending request to hire FOIA contract support and has reassigned OCIO staff to assist” with the backlog. *Chief FOIA Officer Report Questions: Medium-Volume Agencies*, NAT'L TRANSP. SAFETY Bd. 10 (Mar. 20, 2017), https://www.nts.gov/about/foia/Documents/2017ChiefFOIA_OfficerReportDOJ.pdf [<https://perma.cc/TU6D-PWQF>].

²⁹¹ Order at 2, *Hall v. High Mountain Aviation, Inc.*, No. 2:16-cv-01080-MV-GJF (D.N.M. Sept. 29, 2017), ECF No. 60.

²⁹² Agreed Motion to Modify Second Amended Order Setting Pretrial Deadlines & Briefing Scheduling at 2, *Hall v. High Mountain Aviation, Inc.*, No. 2:16-cv-01080-MV-GJF (D.N.M. Nov. 17, 2017), ECF No. 64.

to the cause of the Crash are no longer available to the litigants”²⁹³ Apparently the NTSB explained to the plaintiff’s counsel that the delay was due to an issue in the format of the data, as the FOIA office could not read the data or convert it to a format for production.²⁹⁴ The case remains pending.²⁹⁵

In a case arising out of a taxiway collision at John F. Kennedy International Airport in New York, the court ruled that the airline defendants were required to produce the information they had provided to the NTSB, even though the investigation was still pending, due to “the inordinate delay of the NTSB in issuing a report.”²⁹⁶ *Lang v. United States* stemmed from an Air France Airbus A380’s collision with a stationary Delta/Comair CRJ 701, injuring the plaintiff who was a passenger on the Comair plane.²⁹⁷ The accident happened in 2011, and the plaintiffs sued the airlines and the United States (for alleged air traffic control negligence) in January 2014.²⁹⁸

Because the NTSB had not issued a report yet, the court ordered that damages discovery be conducted first with discovery into the cause of the accident to be done later, presumably after the NTSB investigation was concluded.²⁹⁹ Discovery into other matters proceeded for two years while the parties waited for the NTSB report. In December 2015, because the court questioned what was taking so long and why the airline defendants could not produce certain materials in discovery,³⁰⁰ the airlines submitted a report explaining that NTSB regulations (49 C.F.R. § 831.13(b)) prohibited them from producing any documents they had provided to the NTSB until the investigator-in-charge

²⁹³ *Id.*

²⁹⁴ *Id.* at 4.

²⁹⁵ Amended Agreed Motion to Modify Fifth Amended Order Setting Pretrial Deadlines & Briefing Scheduling & Extending Expert Deadlines at 2, *Hall v. High Mountain Aviation, Inc.*, No. 2:16-cv-01080-MV-GJF (D.N.M. May 16, 2018), ECF No. 75, (moving for another extension of time because of the delay in obtaining materials from the NTSB).

²⁹⁶ Docket Order dated Dec. 30, 2015, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Dec. 30, 2015).

²⁹⁷ *Lang v. United States*, No. CV14 0359, 2014 WL 256623 (E.D.N.Y. Jan. 17, 2014).

²⁹⁸ *Id.*

²⁹⁹ Joint Discovery Order at 1–2, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. June 10, 2014), ECF No. 15.

³⁰⁰ Docket Order dated Dec. 21, 2015, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Dec. 21, 2015).

allowed them to do so.³⁰¹ The investigator had not provided approval for any such release of information.³⁰² In response, the court, *sua sponte*, ruled that the NTSB's four-year delay constituted an "inordinate delay" and ordered the airline defendants to produce the information they had provided to the NTSB, notwithstanding the regulatory prohibition.³⁰³

The airline defendants immediately moved for reconsideration, arguing that although they understood "the Court's frustration regarding delays in the NTSB investigation process and its effect on the subject litigation, the Court's blanket Order unduly directs the Airline Defendants to expressly contravene federal regulations."³⁰⁴ The motion raised further complaints, including that no discovery request had yet been made, the parties had no dispute, and the order could also result in the violation of other regulations, such as those protecting sensitive security information.³⁰⁵ The NTSB's General Counsel then provided the court with a letter from the investigator-in-charge authorizing the parties to produce the NTSB investigative information that was in their possession under a sufficient protective order.³⁰⁶ The NTSB also released the public docket for the investigation, noting that delays in the release of the final report were caused by the need to provide the country of France an opportunity to comment.³⁰⁷ The NTSB acknowledged that, because there were no fatalities in this accident, the investigation "may have been prioritized below fatal accidents."³⁰⁸ The letter requested that NTSB investigative material in the possession of the parties be produced under protective order until the final NTSB report was issued.³⁰⁹ Liability discovery finally started

³⁰¹ Letter from Louis R. Martinez, Martinez & Ritorto, P.C., to Magistrate Judge Reyes (Dec. 23, 2015) at 1, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Dec. 23, 2015), ECF No. 29.

³⁰² *Id.*

³⁰³ Docket Order dated Dec. 30, 2015, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Dec. 30, 2015).

³⁰⁴ Memorandum of Law in Support of the Airline Defendants' Motion for Reconsideration at 2, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Jan. 13, 2016), ECF No. 30-1.

³⁰⁵ *Id.* at 5.

³⁰⁶ Letter from David K. Tochen, NTSB General Counsel, to Louis R. Martinez, Martinez & Ritorto, P.C. (Jan. 21, 2016) at 1, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Jan. 22, 2016), ECF No. 31-1.

³⁰⁷ *Id.* at 1-2.

³⁰⁸ *Id.* at 2.

³⁰⁹ *Id.* Although the letter stated that the NTSB had "completed its investigative activities," no final report on this accident has been issued to this date. *Id.*

in February 2016, over two years after the lawsuit was filed.³¹⁰ The case was settled after the conclusion of discovery.

While the *Lang* court reversed the order of discovery to permit damages discovery to proceed while waiting for the NTSB, other courts may simply stay pending cases until the data held by the NTSB is released, which can take years. In *LeBlanc v. Panther Helicopters, Inc.*, the federal court stayed the action pending the conclusion of the NTSB investigation.³¹¹ The accident happened in October 2013.³¹² The NTSB issued its report over two years later, in January 2016, after which time the court opened discovery.³¹³ The defendants included parties to the NTSB investigation (Rolls-Royce and Panther Helicopters) who argued that they were prohibited from engaging in discovery by the NTSB's regulations: "[N]o information concerning the accident or incident may be released to any person not a party representative to the investigation (including non-party representative employees of the party organization) before initial release by the Safety Board without prior consultation and approval of the [investigator-in-charge]."³¹⁴

Similarly, in *Ladwig v. Honeywell International Inc.*, the accident happened in February 2014.³¹⁵ The lawsuit was filed in June 2014 and later removed to federal court in Arizona, where it was stayed because the NTSB was still investigating.³¹⁶ The court ordered the parties to submit a status report every ninety days until the investigation was concluded.³¹⁷ Eventually, the NTSB allowed the parties to conduct a visual inspection of the wreckage, which permitted some of the litigation to proceed, includ-

³¹⁰ Docket Order dated Feb. 22, 2016, *Lang v. United States*, No. 1:14-cv-00359-JBW-RER (E.D.N.Y. Feb. 22, 2016).

³¹¹ *LeBlanc v. Panther Helicopters, Inc.*, No. 14-1617, 2016 WL 1161274, at *5 (E.D. La. Mar. 23, 2016).

³¹² *Id.* at *1.

³¹³ *Id.*

³¹⁴ Flow and Dissemination of Accident or Incident Information, 53 Fed. Reg. 15,847 (May 4, 1988), as amended at 62 Fed. Reg. 3808 (Jan. 27, 1997), codified at 49 C.F.R. § 831.13 (2003).

³¹⁵ Complaint at 12, *Ladwig v. Honeywell Int'l Inc.*, No. 2:14-cv-01446-GMS (D. Ariz. June 26, 2014), ECF No. 1-1.

³¹⁶ Order at 1, *Ladwig v. Honeywell Int'l Inc.*, No. 2:14-cv-01446-GMS (D. Ariz. Sept. 26, 2014), ECF No. 32.

³¹⁷ *Id.* Accord Order Granting Stipulation of Dismissal with Prejudice at 1, *Wilson v. Sorenson*, No. 6:13-cv-00358-RAW (E.D. Okla. Jan. 21, 2014), ECF No. 32 (accident June 2013; case stayed pending NTSB investigation and inability to examine wreckage, October 28, 2013; case settled January 2014; NTSB report final September 23, 2015).

ing motions and a remand to state court.³¹⁸ The NTSB report was not issued until March 2016, over six months after the remand to state court.³¹⁹

Another long-stayed action is the lawsuit against the public transit authority in Washington, D.C., *In re Yellow Line Cases*. In January 2015, a Metro train in Washington D.C., full of 380 passengers, stopped in a smoke-filled tunnel and could not get out, leading to ninety-one injuries and one fatality.³²⁰ Following the accident, approximately 100 plaintiffs filed civil suits against Metro.³²¹ The court stayed the case “pending the release of a Final Accident Report from the National Transportation Safety Board.”³²² The court partially lifted the stay in December 2016 to permit the plaintiffs to file a single Master Complaint.³²³ In a decision on immunity issued on August 10, 2017, the court noted, “The parties have represented to the court that while the NTSB issued a preliminary report on May 3, 2016, it has not yet issued a final report.”³²⁴

While some of these cases show extreme delay and frustration by courts and litigants, it appears that a stay of discovery can usually be obtained, giving the NTSB time to complete its work.³²⁵ The NTSB is certainly limited by its resources—the agency sends investigators to just a small fraction of the acci-

³¹⁸ Case Docket, *Ladwig v. Honeywell Int’l Inc.*, No. 2:14-cv-01446-GMS (D. Ariz. Aug. 11, 2015), ECF No. 63.

³¹⁹ *Accord* *Crouch v. Honeywell Int’l, Inc.*, No. 3:07CV-638-S, 2009 WL 859600, at *1 (W.D. Ky. Mar. 26, 2009) (holding the action in abeyance due to the “bare bones” nature of the complaint while the NTSB investigation was pending and the parties were unable to examine the wreckage).

³²⁰ *In re Yellow Line Cases*, 273 F. Supp. 3d 168, 170 (D.D.C. 2017).

³²¹ *Id.*

³²² *Id.*

³²³ *See generally* Master Complaint, *In re Yellow Line Cases*, 1:15-mc-00989-TSC-GMH (D.D.C. Dec. 9, 2016), ECF No. 225.

³²⁴ *In re Yellow Line Cases*, 273 F. Supp. 3d at 170 n.3. That said, the NTSB issued a ninety-seven-page “Accident Report,” signed by the board members, on May 3, 2016, including concurring statements by board members filed on May 10 and May 11, 2016. *See generally* *Washington Metropolitan Area Transit Authority L’Enfant Plaza Station Electrical Arcing and Smoke Accident*, ACCIDENT REPORT, NAT’L TRANSP. SAFETY BD., NTSB/RAR-16/01 (adopted May 3, 2016), www.nts.gov/investigations/AccidentReports/Reports/RAR1601.pdf [https://perma.cc/4MFH-J33X]. The NTSB docket on this investigation has not been updated since May 19, 2016.

³²⁵ Should delays and backlogs continue, parties may wish to attempt the less well-known strategy of sending written interrogatories to the NTSB under 49 C.F.R. § 835.5(a). *See* 49 C.F.R. § 835.5(a) (2018).

dents it investigates, for example.³²⁶ As the agency's staffing is predicted to remain constant, courts and litigants will undoubtedly continue experiencing delays and waiting for data. As Congress mulls the next reauthorization of the NTSB, it urges greater transparency and modernization while also proposing a fairly static budget; thus, no great changes are expected in the near future.³²⁷

VII. CONCLUSION

From a practitioner's viewpoint, an ideal world would involve early access to factual material, including raw data, wreckage, photographs, and witness statements, as well as clear, early rulings from the court on the use of factual reports and other investigation materials. The vagueness in applying statutes, regulations, privilege law, and the Rules of Evidence to the circumstances of an individual case can result in protracted and expensive litigation disputes. Delays in obtaining data from investigators are frustrating, hinder progress in court, and drive up expenses. That said, we have come a long way from the days of investigative incompetence and complete secrecy and will continue to promote progress in reducing the friction between investigation and litigation.

³²⁶ As explained in its report on fiscal year 2015:

We are currently investigating over 1,300 domestic aviation accidents and launched to over 215 of these. Board Members launched to seven major accidents investigated by our modal offices. The Board adopted 17 major reports and 42 accident briefs, and held 10 special studies, forums, and events. Additionally, our Office of Research and Engineering laboratories read out more than 660 recorders, wrote over 215 material reports, and produced over 40 vehicle performance products and studies.

National Transportation Safety Board Fiscal Year 2017 Budget Request, NAT'L TRANSP. SAFETY BD. 4 (Feb. 8, 2016), https://www.nts.gov/about/reports/Documents/NTSB_FY2017_Budget.pdf [<https://perma.cc/7TYE-2N93>].

³²⁷ Mark Edward Nero, *Senate Committee Approves NTSB Reauthorization*, AM. SHIPPER (Dec. 14, 2017), <https://www.americanshipper.com/main/news/senate-committee-approves-ntsb-reauthorization-70038.aspx?source=Little4> [<https://perma.cc/PP9J-UH78>]. A four-year reauthorization of the NTSB is included in the FAA Reauthorization Act of 2018, H.R. 302, Division C, §§ 1101–13, which was passed on October 3, 2018.