

John H. Clarke (DC Bar 388599)  
1629 K Street, NW  
Suite 300  
Washington, DC 20006  
Tel/Fax: (202) 332-3030  
Attorney for Petitioner

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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H. RAY LAHR,	)	
	)	
Plaintiff Cross-Appellant/Appellee,	)	
	)	U.S.C.A. Nos. 06-56717,
	)	06-56732, 07-55709
v.	)	
	)	
NATIONAL TRANSPORTATION	)	
SAFETY BOARD, ET AL.,	)	D.C. No. CV-03-08023-AHM
	)	
Defendants-Appellants/Appellees.	)	

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Appeal From  
The United States District Court  
For The Central District Of California

**PLAINTIFF'S PETITION FOR REHEARING EN BANC**

Petitioner H. Ray Lahr ("Lahr"), the FOIA plaintiff in this action against the National Transportation Safety Board (NTSB), Central Intelligence Agency (CIA), and the National Security Agency (NSA), respectfully requests the Court to rehear his cause *en banc*, under Fed. R. App. P. 35 and 9th Cir. R. 35-1.

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**I. INTRODUCTION AND GROUNDS FOR *EN BANC* HEARING**

**A. RULE 35 STATEMENT**

Lahr seeks review of the following questions:

- As a matter of law, under 5 U.S.C. § 552(b)(7)(C), a FOIA exemption protecting privacy, does the balancing test mandate disclosure of names of crime scene witnesses, where the allegations of the government's having misrepresented witnesses' accounts are uncontroverted, under Fed. R. Civ. P. 56?
- Under 5 U.S.C. § 552(b)(5), should the Court apply the rule that "extreme government misconduct" vitiates the deliberative process privilege?

The panel's opinion leads to an unprecedented result: It allows the government to withhold the identities of eyewitnesses whose accounts the government has indisputably falsified. The panel's reversal of the district court's ruling directly conflicts with the Supreme Court's holding in *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (U.S. 2004), and overlooks the mandates of Fed.R. Civ. P. 56, SUMMARY JUDGMENT.

Additionally, this *de novo* review raises a privilege issue of first impression under the FOIA, and, therefore, could substantially affect a rule of national application. Accordingly, consideration by the full court is necessary to secure or maintain uniformity of the court's decisions.

Additionally, the proceeding involves questions of exceptional importance,

and the opinion directly conflicts with an existing opinion by the Supreme Court.

**B. STATEMENT OF THE CASE**

The genesis of this suit lies in the tragic crash of Trans World Airline ("TWA") Flight 800 ("Flight 800"). On July 17, 1996, Flight 800 departed from John F. Kennedy International Airport in New York City, en route to Charles de Gaulle International Airport in Paris, France. The aircraft crashed into the Atlantic Ocean twelve minutes after departure. There were no survivors of the accident and the aircraft, a Boeing 747-131, was destroyed.

*Lahr v. Nat'l Transp. Safety Bd.*, 453 F. Supp. 2d 1153, 1162 (C.D. Cal. 2006).

Seventeen months later, on November 17, 1997, the three major networks broadcasted excerpts of the CIA-produced animation entitled, *What Did The Eyewitnesses See?*<sup>1</sup> and CNN broadcasted the 14-minute animation in its entirety. The animation depicts the government's finding that at 13,800 feet a spontaneous explosion blew the front third of the aircraft from the fuselage and, while the nose descended, two thirds of the aircraft ascended 3,200 feet to an altitude of 17,000 feet before beginning its

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<sup>1</sup> See Lodging DVD No. 2, CIA Animation.

descent.<sup>2</sup> See the attached screen shot of the CIA animation's depiction of the "zoom-climb."

Like tens of millions of other Americans, Lahr saw the CIA animation. "Lahr is a former Navy pilot and retired United Airlines Captain who has served as the Air Line Pilots Association's [ALPA] Southern California safety representative for over fifteen years." *Lahr* at 1167.

Captain Lahr served as Air Line Pilots Association (ALPA) representative in seven major NTSB probes, and "has an abiding interest in flight safety and aerodynamics."<sup>3</sup>

The government filed no opposition to Lahr's three *Statement of Genuine Issues*, and the district court entered Summary Judgment accordingly. *Lahr* at 1164-67:

PLAINTIFF'S ALLEGATIONS OF IMPROPRIETY

\*\*\* The following summary of the evidence Plaintiff presented to meet the threshold requirement described in *Favish* is based on Plaintiff's "Statement of Genuine Issues in Opposition to [the Second] CIA Motion for Partial Summary Judgment," especially the portion beginning at page 13. **Defendants did not file any response to that statement, so on this motion, at least, Plaintiff's assertions have not been repudiated.** Nor did Defendants file objections to that evidence. The ensuing

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<sup>2</sup> In August of 2000, the NTSB issued its final report, agreeing with the CIA's initiating event conclusion as well as the "zoom-climb" conclusion, albeit to an altitude of 14,800 feet, cutting the CIA's 3,200-foot climb conclusion by half.

<sup>3</sup> Fee order, Def's Excerpts in 07-55709 at 4.

summary characterizes the **evidence in the light most favorable to Plaintiff**...

According to Plaintiff then, the government withheld evidence from the Flight 800 probe.<sup>FN 7</sup> The government altered evidence during the investigation.<sup>FN 8</sup> Evidence was removed from the reconstruction hangar.<sup>FN 9</sup> The government misrepresented radar data, which does not correspond to the "zoom-climb" conclusion.<sup>FN 10</sup> Radar data<sup>FN 11</sup> and flight recorder data<sup>FN 12</sup> are missing. It appears that underwater videotapes of the debris from the plane have been altered.<sup>FN 13</sup> The government concealed the existence of missile debris field and debris recovery locations.<sup>FN 14</sup> At its first public hearing, the NTSB did not permit eyewitness testimony.<sup>15</sup> Many eyewitnesses vehemently disagree with the conclusions the CIA expressed in the video animation.<sup>FN 16</sup> The CIA falsely reported that only twenty-one eyewitnesses saw anything prior to the beginning of the fuselage's descent into the water.<sup>FN 17</sup> The FBI took over much of the investigation from the NTSB, which should have been in charge,<sup>FN 18</sup> and the CIA never shared its data and calculations of the trajectory study with others for peer review, which would have been appropriate.<sup>FN 19</sup>

Plaintiff also submits evidence that the government's conclusion that there was a center-wing fuel tank explosion and the government's "zoom-climb" theory were physically impossible under the circumstances. For example, evidence suggested there was no spark in the center-wing fuel tank.<sup>FN 20</sup> Once an explosion occurred, engine thrust would have been cut off with the loss of the nose of the plane.<sup>FN 21</sup> Furthermore, the aviation fuel used in Flight 800 is incapable of an internal fire or explosion.<sup>FN 22</sup> The zoom-climb theory is impossible because at least one wing separated early in the crash sequence.<sup>FN 23</sup> Additionally, a steeper climb would likely result in a reduction in ground speed, which contradicts radar evidence.<sup>FN 24</sup> In fact, Plaintiffs evidence suggests the "zoom-climb" theory is aerodynamically impossible.<sup>FN 25</sup>

Finally, Plaintiff also claims that there were "military assets" conducting classified maneuvers in the area at the time of the crash, and several vessels in the area remain unaccounted for.<sup>FN 26</sup>

For the purpose of determining whether Exemption 7(C) (and other FOIA provisions) are applicable, and only for that purpose, the Court finds that, taken together, this evidence is sufficient to permit Plaintiff to proceed based on his claim that the government acted improperly in its investigation of Flight 800, or at least performed in a grossly negligent fashion. Accordingly, the public interest in ferreting out the truth would be compelling indeed.

The district court ruled in favor of Lahr and against the government in holding that the FOIA's two privacy Exemptions, 6 and 7(C), do not shield from disclosure the names of 233 eyewitnesses and one supervisory FBI agent, which had been redacted from 10 documents. The government appealed only this narrow holding by the district court. The panel wrote that it is "compelled by precedent—especially by a recent case of this court, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008), not available to the district court, to reverse this holding." Slip op. at 7363.

The panel opinion, submitted with this Petition, describes Lahr's proffer on the issue of government impropriety as "general allegations" under its discussion, *Deliberative Process Documents* (slip op. at 7373):



Lahr did, of course, make general allegations of government misconduct in the district court, as his entire request is an attempt to prove a massive government conspiracy. But disproving the general, substantive allegations of misconduct is not the government's obligation in FOIA litigation.

And the panel declined to entertain the issue of whether the evidence proved "extreme government misconduct," vitiating the deliberative process privilege under Exemption 5, because Lahr had not advanced that argument in the district court.

**C. WHETHER TO ORDER DISCLOSURE OF INVESTIGATIVE RECORDS OF THE TWA FLIGHT 800 TRAGEDY IS A QUESTION OF EXCEPTIONAL IMPORTANCE**

The controversy is the CIA's "zoom-climb" conclusion, and the government's alleged misconduct.

**1. THE MOST CONTROVERSIAL DISASTER IN AVIATION HISTORY**

The Long Island coast is a popular summer resort. Wednesday evening, 8:00, July 17, 1996, saw the sunset of another warm, sunny day.

Explosions were seen from "over 40 miles away,"<sup>4</sup> culminating in the aircraft's descent 12 miles from the coast, tragically killing 230 people, thirty-eight of whom were under the age of 18. Flight 800 is the most controversial, and one of the most witnessed, disasters in aviation history.

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<sup>4</sup> See Lodging DVD No. 2 CIA animation at 10:40.

The district court observed that Flight 800 raises "much-debated questions" (*Lahr* at 1161) and "finds (because a balancing test is in order) that the crash of Flight 800 and the government's investigation and findings are matters of great public interest." *Id.* at 1183. In its fee order (Def. Excerpts in 07-55709 at 3), the district court highlighted *Lahr's* demonstration of the ongoing public interest:

Plaintiff provides ample evidence of the public's interest in the information obtained in this case. According to Plaintiff, TWA Flight 800 has already been the subject of nine books and over 2,000 newspaper articles. A Google search yields over 147,000 webpage hits. Plaintiff adds that well-qualified experts will analyze the disclosures and several will publish reports of their findings on the websites of Flight 800 Independent Researcher's Organization (at [flight800.org](http://flight800.org)) and the Association of Retired Airline Professionals (at [www.twa800.com](http://www.twa800.com)). At least two magazines have already published articles about this Court's ruling.

At least 673 eyewitnesses contacted authorities and gave statements.<sup>5</sup>

NTSB Exhibit 4A, "the NTSB's WITNESS GROUP FACTUAL REPORT states that, of 183<sup>6</sup> witnesses who observed a streak of light, 96 said it originated from the surface)." *Lahr* at 1165 n. 17.

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<sup>5</sup> Cf. Lodging DVD No. 2 CIA Animation at 12:40, reportedly analyzing 244 eyewitness accounts.

<sup>6</sup> The NTSB was given access to 458 FBI 302 "sanitized" Reports, selected from the 673 available 302's.

**2. THE SOURCE OF CONTROVERSY IS THE GOVERNMENT'S CONCLUSION, AND ITS CONDUCT DURING THE PROBE**

Conspicuously absent from the NTSB's public docket, containing "over 3,000 [case] documents," is NTSB Exhibit 4A, its October 1996 WITNESS GROUP FACTUAL REPORT,<sup>7</sup> discussed above.

Unquestionably, the government's hypothesis was *knowingly* false, as Lahr persuasively reiterated in his *Reply Brief of Cross-Appellant H. Ray Lahr*. That Brief's Table of Contents, in part:

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B. THE GOVERNMENT'S TRAJECTORY THEORY IS IMPOSSIBLE . . . . . 7

1. The aircraft immediately stalled — aerodynamics . . . . . 7

2. The aircraft did not slow and so did not climb — physics . . . . . 8

3. Eyewitnesses saw supersonic speed — trigonometry . . . . . 8

4. Loss of center-fuel-tank spar would result in loss of wings — engineering . . . . . 8

5. Engine thrust was cut with the loss of the nose — engineering . . . . . 9

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<sup>7</sup> See also NTSB Ex 4A, Excerpts Vol. I at 102-113, at 104: "United States Attorney Valerie Caproni... reiterated that no interviews were to be conducted by the NTSB, but the NTSB could review FBI-supplied documents provided no notes were taken and no copies made." Caproni is General Counsel, FBI. See Lahr's *Reply Brief* n. 9 at 11.

3. The FBI, CIA, and NTSB fraudulently misrepresented eyewitness accounts . . . . . 15  
 (a) Captain David MacLaine — contemporaneous ATC transmission . 16  
 (b) Mike Wire . . . . . 17  
 (c) Dwight Brumley . . . . . 17  
 (d) Major Meyer . . . . . 19  
 4. All aspects of the probe evidence cover-up. 20

**D. THE HOLDING CONFLICTS WITH THE PRECEDENT SET BY THE SUPREME COURT IN *FAVISH***

In *Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570, 1581 (U.S. 2004), the Supreme Court defined the burden of a FOIA plaintiff to prove governmental bad faith in order to overcome the privacy interest sought to be protected under Exemption (b)(7)(C) (quoted in *Lahr* at 1164 and by the panel at 7363): The burden is defined as evidence which "would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred..."

**E. THE PRIVILEGE ISSUE<sup>8</sup> IS ONE OF FIRST IMPRESSION UNDER THE FOIA**

"[T]his [misconduct] exception to the (b)(5) exemption has never been applied in a holding at the Circuit level, nor has the scope of 'misconduct'

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<sup>8</sup> "Lahr [also] contests the district court's conclusion that the [final] simulation inputs" are deliberative under Exemption 5. Slip op. at 7383 n. 19.

been clearly defined." *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 130, 133 (DCDC 2008).

**II. THE COURT'S REVERSAL OF SUMMARY JUDGMENT ON THE ISSUE OF GOVERNMENT IMPROPRIETY, WITH THE ABSENCE OF ANY TRANSVERSE AFFIDAVITS, DEFIES ELEMENTAL SUMMARY JUDGMENT LAW UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

The Supreme Court in *Favish (id.)* adopted a "less stringent standard... more faithful to the statutory scheme" for a FOIA plaintiff to meet his burden of proof to demonstrate governmental bad faith under Exemption (b)(7)(C), quoted in *Lahr* at 1164 and by the panel at 7363:

We hold that where... the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred....

The district court recognized that Fed.R.Civ.P.56(e), FORM OF AFFIDAVITS, mandates the conclusion it reached:

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P.56(e). Summary judgment will be entered against the non-moving party if that party does not present such facts.

*Lahr* at 1168, citing *Celotex Corp. v. Catrett*, 477 U.S. at 322, 106 S.Ct. 2548.

The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).... The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex*....

*Id.*

In support of his claim of government impropriety under Exemptions 6 and 7(C) under Rule 56, Lahr filed affidavits from 29 people. Lahr's affiants included seven eyewitnesses, four of whom saw the event from the air, and two of whom are featured in the CIA's animation. His witnesses also included six air crash investigators, three of whom were parties in the government's TWA Flight 800 probe. Six of Lahr's experts hold Ph.D.s. Lahr's specific "assertions have not been repudiated." *Lahr* at 1166.

The panel relied on *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008) in reversing the district court's holding. That case adjudicated the disclosure of the names of 23 employees that the Forest Service had redacted from its Report on a controversial fire that killed two of its own employees, and which led to OSHA citations and criminal charges. The panel's conclusion that *Lahr* "is for all relevant purposes identical to that in *Forest Service Employees*" (slip op. at 7371) raises the central issue herein:

- As a matter of law, under 5 U.S.C. § 552(b)(7)(C), a FOIA exemption protecting privacy, does the balancing test mandate disclosure of names of crime scene witnesses, where the allegations of the government's having misrepresented witnesses' accounts are uncontroverted, under Fed. R. Civ. P. 56?

Disclosure in *Forest Service Employees* could have caused "embarrassment, shame, [and] stigma" (524 F.3d at 1026) associated with a criminal probe, whereas here, there is no stigma associated with simply having seen an event, along with hundreds of other people, which the government claims was an innocent accident. Under these circumstances, the balancing test under *Favish* mandates disclosure, as "disclosure of these persons' identities could contribute significantly to the public understanding of the operations or activities of the government." *Lahr* at 1184.

The panel opined that here, "inquiries by media representatives [are] substantially more likely than in *Forest Service Employees*." Slip op. at 7366. Curiously, the record belies this conclusion. Of the 183 known eyewitnesses to missile fire, only a scattering of the accounts from these witnesses appeared in print in lesser publications, and not a single account in the *New York Times*. The sad fact is that any eyewitness who desires to share his observations with the public was compelled to purchase advertising space. See, e.g., Aug. 15, 2000, *Washington Times*' full-page advertisement, "WE SAW TWA FLIGHT 800 SHOT DOWN BY MISSILES AND WE WON'T BE

SILENCED ANY LONGER," subtitled "HERE ARE A FEW OF THE HUNDREDS OF OUR STATEMENTS THE FBI CONCEALED," followed by six eyewitness accounts, and ending with, "AMERICA MUST KNOW THE TRUTH." Excerpts Vol. II at 361. The advertisement generated no media attention. Eyewitnesses to the tragedy are safe from media intrusion.

The panel's conclusion that eyewitnesses who are not among Lahr's affiants "have not come forward" (slip op. at 7366) does not consider the eyewitnesses who have contacted the news media, but whose accounts went unreported. Nor does the panel recognize that nongovernmental investigators smuggled evidence out of the Flight 800 probe to give to the news media,<sup>9</sup> to no avail.

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<sup>9</sup> Excerpts Vol. I Ex D at 82-83: Two pages of debris field data smuggled out in 1996 by TWA Captain Terrell Stacey to investigative reporter James Sanders. *See also Holtsclaw Aff. id.* at 180 ¶¶ 1-4: "[In] 1996, I provided to Captain Richard Russell the Radar tape... recorded at the New York Terminal Radar... authentic.... The tape shows a primary target at the speed of approximately 1200 knots converging with TWA-800, during the climb out phase of TWA 800. It also shows a U.S. Navy P-3 pass over TWA-800 seconds after the missile has hit TWA-800." *And see Sanders Aff. id.* Ex 1 at 187: Photograph of smuggled out seat padding of two reddish residue samples of missile exhaust, one of which *60 Minutes* gave to the FBI.



If unchallenged allegations of the government's concealment<sup>10</sup> of a crime<sup>11</sup> would not tip the balance in favor of disclosure of the eyewitness' names, nothing would. In this case, *Favish* dictates disclosure.

Additionally, after disclosure of names corresponding to the CIA's "versions of the accounts these individuals allegedly provided to investigators" (*Lahr* at 1184), another Flight 800 FOIA plaintiff will obtain disclosure of eyewitness identities redacted from the corresponding FBI 302 Reports, enabling researchers to learn exactly what the CIA failed to include from the FBI 302's. (The CIA interviewed no witnesses, and generated its records of eyewitnesses' accounts using only 233 of the 673 FBI 302's.)

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<sup>10</sup> See Lodging DVD No. 1 under EXPERTS, ALPA's James Speer, Excerpts Vol. I at 194 ¶¶ 32-33: [I]t's been successfully covered up, the truth is not known, and there are many people fortunately still working on it trying to discover the truth... [I]t was never declared a crime scene... So here we are in limbo, a dedicated group of people with a mission to seek the truth, obstructed by the government.

<sup>11</sup> See Lodging DVD No. 1 under EXPERT EYEWITNESSES, Blackhawk pilot Major Fred Meyer; *Meyer Aff.*, Excerpts Vol. I # 23 at 213 ¶¶ 56-59: This was not an accident... If you're conducting a missile shoot under the main traffic control routes into New York City, you have exhibited in my mind, depraved indifference to human life. That's not an accident – under any statute – any codes anywhere. That's murder. Now, if it was a foreign force – that's murder....

**III. THE COURT SHOULD ADJUDICATE WHETHER PLAINTIFF'S EVIDENCE PROVES "EXTREME GOVERNMENT MISCONDUCT" VITIATING THE DELIBERATIVE PROCESS PRIVILEGE**

"The so-called misconduct exception to the deliberative process privilege... has never been applied in a holding at the Circuit level [under the FOIA], nor has the scope of 'misconduct' been clearly defined." *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 130, 133 (DC Cir. 2008). The panel recognized the applicability of the exception in the FOIA context, holding that "Lahr contends that evidence of government misconduct, crime, and fraud bars the application of Exemption 5...." But, wrote the panel, "Lahr did not so argue in the district court, and so waived the issue." Slip op. at 7373.

Notwithstanding that the "issue is purely a question of law," the panel declined to exercise its discretion and apply the exception. The panel reasoned that "considering the issue for the first time on appeal would unfairly prejudice the government" because it was unaware that its failure "to submit evidence in response to those allegations would vitiate its deliberative process privilege." *Id.* at 7374. However, the government had every incentive to repudiate Lahr's very serious allegations of government impropriety.

The panel also declined to apply the "to prevent a miscarriage of justice" exception to the waiver rule, "most especially because he has not made any allegation of a connection between these particular documents and government misconduct" (*id.* n. 14), an assertion the district court rejected as "plainly incorrect." Fee order, Def. Excerpts at 3 in 07-55709. "[T]he records Plaintiff succeeded in establishing a right to obtain do indisputably shed light on th[e] question" of whether a "missile strike" took Flight 800 down. *Id.* Here, the uncontested material facts include the absence of a single "witness produced by FBI, CIA or NTSB that corroborated 'zoom-climb' theory." *Lahr* at 1165 n. 16.

The panel wrote, "Lahr's misconduct allegations [do not] specifically relate to the documents at issue under Exemption 5" (slip op. at 7373-74). But Lahr shows a nexus between his misconduct allegations and the three Records at issue here, Nos. 27, 28, and 43. Like most of the CIA records at issue in the case,<sup>12</sup> these three were generated after the animation's broadcast.

From the released headings of the CIA's *Dynamic Flight Simulation*, Record 27 purports to explain Flight 800's aerodynamics. The aerodynamic

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<sup>12</sup> See, e.g., *Clarke Decl.*, IV # 90 at 1034-49, listing 23 contested CIA records, only 11 of which predate the broadcast of the CIA animation; *Schulze Decl.*, II # 69 at 558 ¶ 13: "[N]o supporting aerodynamic calculations were begun until almost a year later."

impossibility of the zoom-climb conclusion is among numerous facts that defendants admitted. *Lahr* at 1166: "In fact, Plaintiff's evidence suggests the 'zoom climb' theory is aerodynamically impossible.<sup>FN 25</sup>" "On this motion... Plaintiff's assertions have not been repudiated." *Id.* at 1164. As this Record purports to explain the impossible, Lahr has made a clear "allegation of a connection between these particular documents and government misconduct." Slip op. at 7373 n. 14.

Similarly with the CIA's Record 28, *Analysis of Radar Tracking*: "The government misrepresented radar data, which does not correspond to the 'zoom-climb' conclusion." *Lahr* at 1165.

Record 43, withheld in its entirety, cannot reflect a good faith "analysis of eyewitness reports about the crash..." (slip op. at 7379), but, rather, based on the record herein "taken together" (*Lahr* at 1167), reflects efforts to cover them up.

## CONCLUSION

For the reasons cited above, Lahr moves the Court for a rehearing *en banc*. The question of whether the CIA zoom-climb animation is "the

boldest and most flagrant lie ever visited on the American people in peacetime"<sup>13</sup> is an extremely important one. Fortuitously for those who seek the truth of the Flight 800 tragedy, the issues of the government's impropriety under Exemption 7(C), and extreme government misconduct under Exemption 5, are before this Court.

The truth incriminates the Executive Branch, the news media, and the functionality of our system of checks and balances in serving as an auxiliary precaution against corruption. "[T]he exercise of jurisdiction [is] warranted" "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

Date: July 20, 2009.

Respectfully Submitted,

/s/

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John H. Clarke (DC Bar 388599)  
1629 K Street, NW  
Suite 300  
Washington, DC 20006  
Tel/Fax: (202) 332-3030  
Attorney for Petitioner

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<sup>13</sup> *First Strike*, J. Cashill & J. Sanders, WND Books 2003, Chap. 9, *The Big Lie*, at 155.

**Certificate of Compliance  
(Circuit Rules 35-4 and 40-1)**

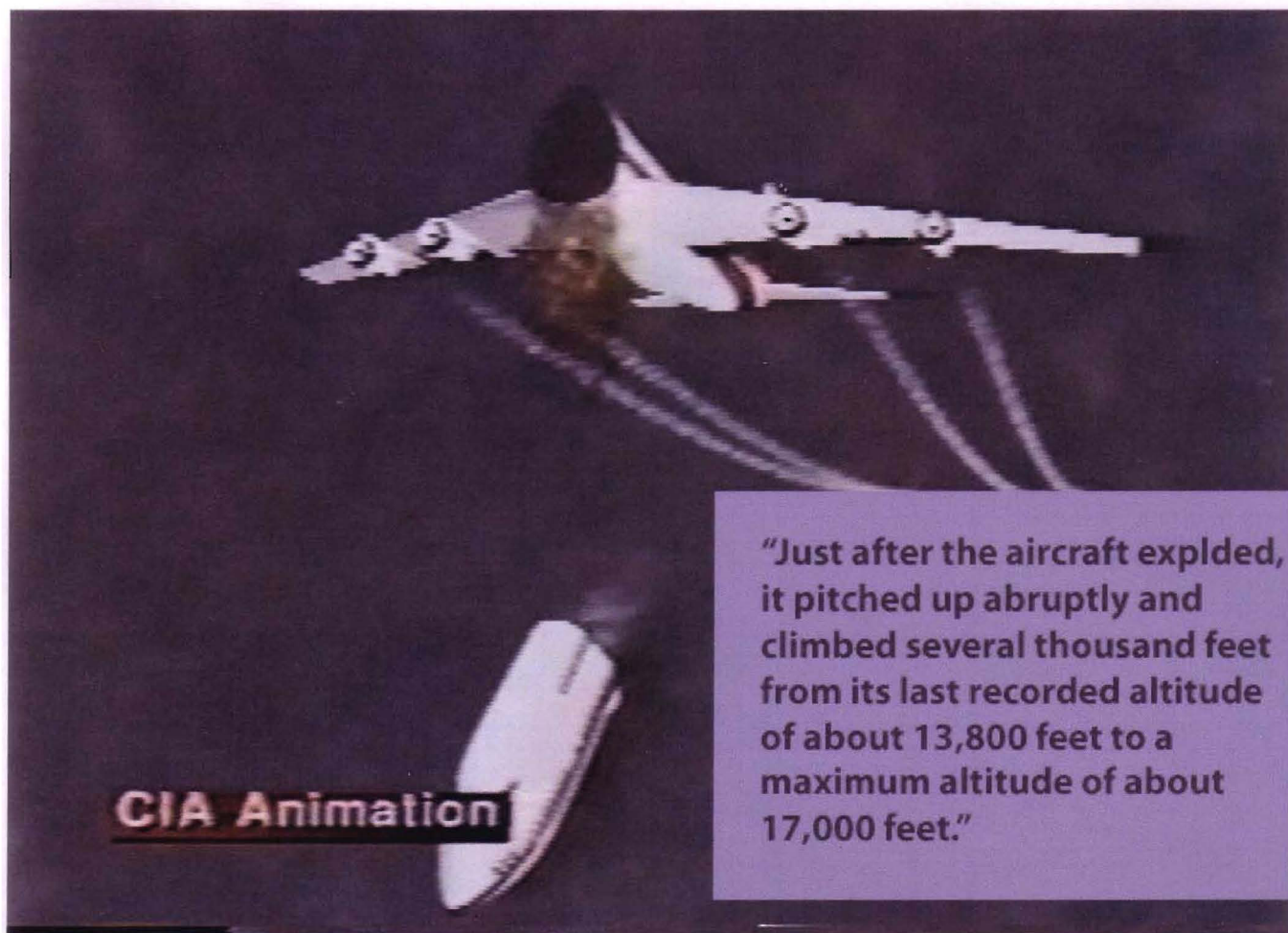
I certify that the attached Petition For Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more, and contains 4,151 words.

\_\_\_\_\_/s/  
John H. Clarke

**Certificate of Service**

I hereby certify that on July 20, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

\_\_\_\_\_/s/  
John H. Clarke



"Just after the aircraft exploded, it pitched up abruptly and climbed several thousand feet from its last recorded altitude of about 13,800 feet to a maximum altitude of about 17,000 feet."