No. 05-821

In the Supreme Court of the United States

PATRICIA J. HERRING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly rejected petitioners' claim that the United States committed fraud upon the courts in the litigation that culminated in this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1 (1953).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 424 F.3d 384. The opinion of the district court (Pet. App. B1-B22) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A15-A16) was entered on September 22, 2005. The petition for a writ of certiorari was filed on December 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of petitioners' allegations that the United States committed a fraud upon the courts in connection with the Federal Tort Claims Act suit in *United States* v. *Reynolds*, 345 U.S. 1 (1953), when the

Secretary of the Air Force asserted a privilege in that case with respect to an accident investigation report, ancillary reports, and witness statements.

1. On October 6, 1948, a United States Air Force B-29 aircraft crashed while on a mission to conduct experimental testing of secret electronic equipment. Three civilian engineers on board perished in the crash. The widows of the engineers filed suit under the Federal Tort Claims Act and, in discovery, sought the Air Force's official accident investigation report and statements taken in connection with the report. The government declined to produce the materials because Air Force regulations protected against public disclosure of accident reports. The government subsequently submitted an additional claim of privilege by the Secretary of the Air Force raising national security concerns. Pet. App. A4-A7. The Secretary stated:

> The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.

Id. at C30.

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

the United States. Pet. App. C36-C37. Major General Harmon stated that the witnesses would be permitted to testify as to all matters not classified and to refresh their memories by reference to any statements they made before the accident investigation board and other pertinent material. *Id.* at C37. He also stated that the information and findings of the accident investigation board and statements of survivors could not be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment," and that the disclosure of statements made by witnesses to the board would undermine the "much desired objective of encouraging uninhibited admissions in future inquiry proceedings" conducted by the Air Force "in the interest of flying safety." *Ibid.*

The district court instructed the government to submit the materials in camera, but the government declined to produce them. The court therefore entered an order under Federal Rule of Civil Procedure 37(b)(2)(i) that the facts in the plaintiffs' favor be taken as established, held a trial on damages, and awarded the plaintiffs damages totaling $225,000. Pet. App. A7, C100-C101. The Third Circuit affirmed, and this Court granted a petition for a writ of certiorari. *Id.* at A5, A8.

This Court in *Reynolds* reversed and remanded because the Secretary had "invoke[d] the privilege against revealing military secrets, a privilege which is well established in the law of evidence." 345 U.S. at 6-7. The Court reasoned that because the "record before the trial court" showed that the accident occurred on a plane that "had gone aloft to test secret electronic equipment," there was "a reasonable danger that the accident investigation report would contain references to the secret

electronic equipment." *Id.* at 10. The Court also reasoned that the plaintiffs had not yet established a need for the report because the government had "formally offered to make the surviving crew members available for examination" and that the plaintiffs had "fail[ed] to pursue that alternative," "which might have given [plaintiffs] the evidence to make out their case without forcing a showdown on the claim of privilege." *Id.* at 11. The Court then remanded the matter for "further proceedings consistent with the views expressed in this opinion." *Id.* at 12.

On remand, approximately two months after the Court's mandate, plaintiffs settled their claims for a total of $170,000, approximately 75% of the amount they had been awarded under the judgments previously entered by the district court. Pet. App. C9, C21, C27.

2. Nearly 50 years later, after obtaining the declassified documents at issue in *Reynolds*, petitioners, who are one of the original plaintiffs in *Reynolds* and two heirs of deceased widows in *Reynolds*, made their own determination that the documents contained no information implicating military secrets and that the government had defrauded the courts in the case. Pet. App. C3, C11-C12. The petitioners filed in this Court a motion for leave to file a petition for a writ of error coram nobis to remedy fraud upon the Court. The United States filed an extensive response, and this Court denied petitioners leave to file their petition by order dated June 23, 2003. 539 U.S. 940; Pet. App. C11.

3. Petitioners then filed the instant suit based on Federal Rule of Civil Procedure 60(b), which permits a court "to entertain an independent action to * * * set aside a judgment for fraud upon the court." Petitioners' complaint alleged that, contrary to the government's

privilege claim, "the Accident Report and witness statements * * * contain no military secrets or other information implicating national security interests." Pet. App. C11. Petitioners sought damages in excess of $1 million, reflecting the "difference between the amounts" awarded in the district court's original judgments based on its order deeming liability to have been established and the amounts obtained "pursuant to the settlements, increased to present value at a market interest rate." *Id.* at C15.

The district court dismissed the suit. Pet. App. B1-B22. The district court explained that a finding of "fraud upon the court is justified only by the most egregious misconduct directed to the court itself such as bribery of a judge or jury or fabrication of evidence by counsel." *Id.* at B7. The court found that the "complaint and the exhibits attached thereto, including the declassified documents, do[] not suggest that the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court." *Id.* at B9.

The court also observed that the determination of what "information should be kept confidential in the interest of national security involves predictive judgments," and "fifty years ago the government had a more accurate understanding 'on the prospect of danger to [national security] from the disclosure of secret or sensitive information' than lay persons could appreciate or than hindsight now allows." Pet. App. B9 (quoting *Halperin* v. *National Sec. Council*, 452 F. Supp. 47, 51 (D. D.C. 1978), aff'd, 612 F.2d 586 (D.C. Cir. 1980)). The district court determined that the Secretary's privilege claim was accurate because the accident report included details regarding the secret mission, describing it "as an 'electronics project'" that required an "aircraft capable

of dropping bombs" as well as "operating at altitudes of 20,000 and above." *Id.* at B11; see *id.* at C108, C124. The court also observed that the materials over which the government had claimed a privilege further revealed "a detailed account of the technical requirements imposed by the Air Force to remedy engine and mechanical difficulties." *Id.* at B11-B12. The court found that "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security." *Id.* at B12. The court thus concluded that the fact that the accident report "offers no thorough exploration of the secret mission" of the B-29 "does not suffice to support a conclusion that disclosure at that time would not have harmed national security or that in so asserting the privilege, the Air Force sought to defraud the Courts." *Id.* at B11-B12. The court finally relied on the fact that *Reynolds* had "left other avenues of discovery open to the Plaintiffs, including examination of the surviving crew members and the right to challenge the claim of military privilege by an adequate showing of necessity." *Id.* at B21. In the end, the court explained, the plaintiffs in *Reynolds* made a "calculated choice to settle their claims" that "should not now be revisited." *Id.* at B22.

4. The court of appeals unanimously affirmed. Pet. App. A1-A16. The court stated it would "employ a demanding standard for independent actions alleging fraud upon the court requiring: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court." *Id.* at A10. The court determined that petitioners had not made such a showing in this case.

The court explained that because the case involved "representations * * * made in an affidavit" that peti-

tioners alleged were false, to "allege that false statements were made in these documents is to allege perjury." Pet. App. A12. Accordingly, the court found that "a necessary element which must be met" is "proof of perjury." *Ibid.* The court thus found it dispositive that the affidavit and assertion of privilege were "susceptible to a truthful interpretation" because the Air Force's privilege claim can "be reasonably read to include within [its] scope an assertion of privilege over the workings of the B-29," whether or not the accident report also "actually revealed sensitive information about the mission and the electronic equipment involved." *Id.* at A12 & n.3.[1]

The court explained that the military's claim of privilege stated that the "airplane * * * carried confidential equipment on board and any disclosure of *its* mission or information concerning *its* operation would be prejudicial to * * * the public interest." Pet. App. A13 (quoting claim of privilege by Secretary of Air Force); see *id.* at C30 (emphasis added by court). Focusing on the term "its" in the claim of privilege, the court concluded that the most natural reading of the quoted passage is that the government was referring to the B-29 airplane rather than the secret equipment. *Id.* at A13-A14. The court also observed that petitioners' conten-

[1] The court noted that its "conclusion that information about the workings of the B-29 was included within the claim of privilege makes it unnecessary" to decide whether the report revealed information about the aircraft's mission and the electronic equipment onboard. Pet. App. A13 n.3. The court observed, however, that any such inquiry "would require a certain amount of deference to the Government's position because of the near impossibility of determining with any level of certainty what seemingly insignificant pieces of information would have been of keen interest to a Soviet spy fifty years ago." *Ibid.*

tion that the claim of privilege referred solely to the aircraft's secret equipment was "completely undercut by the statement in their original Supreme Court brief that 'the Secretary * * * in his claim of privilege states (R.22) that 'any disclosure of *its (the airplane's)* mission or information concerning its operation or performance would be prejudicial' and that it was 'obvious that the Air Force considers that all details concerning the operation of the airplane are classified.'" *Id.* at A14 (quoting Brief for Respondents in *Reynolds* at 35 n.4) (parenthetical alteration in original brief) (emphasis added by court). The court therefore concluded that petitioners "are unable to make out a claim for * * * perjury which * * * forms the basis for their fraud upon the court claim." *Ibid.*

ARGUMENT

1. Rule 60(b) of the Federal Rules of Civil Procedure provides that "not more than one year after the judgment * * * was entered," a court may, on motion in the original action, "relieve a party" "from a final judgment * * * for * * * fraud * * *, misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). The Rule further specifies that it "does not limit the power of a court to entertain an independent action * * * to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). Because reopening of a judgment is already permitted for fraud under Rule 60(b)(3), an independent action under Rule 60(b) is "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States* v. *Beggerly*, 524 U.S. 38, 46 (1998) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-*

Empire Co., 322 U.S. 238, 244 (1944)). Thus, an "independent action should be available only to prevent a grave miscarriage of justice." *Id.* at 47.

Petitioners argue that this Court's review is warranted because the court of appeals held that "government officials may intentionally defraud the federal courts by false and misleading affidavits and the government may escape answering for their misconduct, so long as the affiants are careful to avoid committing the crime of perjury." Pet. 12-13. Thus, in petitioners' view, the court of appeals held that perjury is a requisite element for actions under Rule 60(b), contrary to the decisions of this Court and other courts of appeals. Pet. 13-19. Those contentions lack merit.

As the court of appeals explained, because petitioners here had alleged as the basis of their fraud claim that the government had made false statements *under oath* in their claim of privilege, "[t]o allege that false statements were made in these documents is to allege perjury." Pet. App. A12. Thus, the Third Circuit's reliance on standards for establishing perjury was not a holding that fraud on the court must always include an element of perjury. The court concluded only that such a showing was appropriate in this particular case because petitioners alleged that an affidavit submitted to the court was affirmatively false. Indeed, petitioners repeatedly alleged in their complaint that officials intentionally made false statements to subvert the tort claims made in *Reynolds*. *Id.* at C11-C14; Pet. 20 (the "documents contain nothing secret about the plane's mission or its confidential equipment"). The court thus looked to the perjury standard because "*[i]n this case* * * *, an accusation of perjury forms the basis of the fraud upon the court claim." Pet. App. A12 (emphasis added).

Particularly given that the events in question arose more than half a century ago, there was nothing improper about the court of appeals' examination of the officials' specific representations to determine whether they were truthful.

This Court and the courts of appeals have reasoned that in cases like this one, a perjury standard is one appropriate guidepost for determining whether an official orchestrated a fraud upon the court. In *Hazel-Atlas*, this Court observed that a "judgment obtained with the aid of a witness who * * * is * * * guilty of perjury" does not rise to the level of fraud upon the court. 322 U.S. at 245. That reasoning suggests that when, as here, a submission made under oath is at issue, at least a showing of perjury is required before a court can conclude that a grave miscarriage of injustice has occurred.[2] Similarly, other courts of appeals have also looked to perjury standards in evaluating the conduct of officers of the court. See, *e.g.*, *Baltia Air Lines, Inc.* v. *Transaction Mgmt., Inc.*, 98 F.3d 640, 643 (D.C. Cir. 1996) ("knowing participation of an attorney in the presentation of perjured testimony"); *Cleveland Demolition Co.*

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[2] Contrary to petitioners' suggestion (Pet. 15-17), the decision below does not conflict with *Hazel-Atlas*, which did not involve allegations of fraud on the court based on the submission of a false claim of privilege and supporting affidavit. That case involved an attorney for a patent applicant who drafted an article in support of the patent and then "determined to have [the article] published * * * [and] signed by an ostensibly disinterested expert." 322 U.S. at 240. The Court found that the attorney engaged in "a deliberately planned and carefully executed scheme to defraud * * * the Circuit Court of Appeals" by publishing the fake article. *Id.* at 245-246. The Court also found that the attorney's tampering with the patent approval process "does not concern only private parties" because there "are issues of great moment to the public in a patent suit." *Id.* at 246.

v. *Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987) (involvement of an attorney, as an officer of the court, in a scheme to suborn perjury); *Simon* v. *Navon*, 116 F.3d 1, 6 (1st Cir. 1997) ("perjury alone, absent allegation of involvement by an officer of the court, . . . has never been sufficient") (quoting *Geo. P. Reintjes Co.* v. *Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995).

2. Petitioner argues that this Court should exercise its supervisory powers because the courts below "excused" a fraud directed at this Court. Pet. 13. That claim, too, lacks merit. Petitioners' complaint alleges that the Air Force, 55 years ago, falsely represented in a claim of privilege and in an affidavit that the B-29 accident report and related materials would reveal sensitive information about electronic equipment onboard the aircraft. Because the materials do not give details about the specific secret equipment on board the aircraft, petitioners have drawn the conclusion that the officials intentionally lied about the contents of the materials in an effort to hide the Air Force's negligence and to bring about a test case to establish a privilege for military secrets. Pet. 9-10, 19-25. Those assertions are belied by facts leading up to the decision in *Reynolds* and the decision itself.

a. As an initial matter, the government had offered to make the surviving crew members from the crash available for examination "regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature." Pet. App. C37; *Reynolds*, 345 U.S. at 11. There is no indication of which we are aware that one key premise of the plaintiffs' tort action—that B-29 engines had caught fire and caused other B-29 crashes—was a classified fact at the time of the trial. After this Court's decision in *Reynolds,* the

plaintiffs apparently availed themselves of the opportunity to depose the surviving witnesses. See Pet. App. C21; Pet. 8 n.4. But the plaintiffs then made a strategic decision to settle their cases rather than try to establish liability on the part of the government. In light of that strategic decision made in the face of other viable options, such as attempting to prove the plaintiffs' case in court, there is no cause for this Court to reopen the case more than 50 years later.

Nor have petitioners shown a fundamental miscarriage of justice that necessitates equitable relief at this late date. The law favors finality, and nothing petitioners have raised would justify disturbing the strategic choice the plaintiffs in *Reynolds* made to accept an amount in excess of 75% of the amount that the district court had previously awarded, rather than risk receiving none of it after a trial. Plaintiffs settled their claims for $170,000; the district court's initial judgment for them was only $55,000 greater (split among three plaintiffs). Pet. App. A7, C9, C21, C27.

b. The government also did not assert a military secrets privilege to bring a "test" case in order to "secure[] * * * a broad privilege for 'state secrets,'" as petitioners contend. Pet. 10, 20. The government's primary submission in *Reynolds* was that the Executive Branch could withhold whatever documents it deemed necessary to withhold in the public interest. U.S. *Reynolds* Br. at 19-52. The government's brief in *Reynolds* relied in particular on the public policy of encouraging frank discussions in Air Force investigations of accidents. *Id.* at 43-47. As set forth in the government's response to the petition for a writ of error coram nobis (at 19-21), this Court has since recognized a privilege for such accident

reports. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984).

This Court found the government's broad contention "unnecessary to pass upon, there being a narrower ground for decision," *i.e.*, "the privilege against revealing military secrets, *a privilege which is well established in the law of evidence*." *Reynolds*, 345 U.S. at 6-7 (emphasis added). The government had devoted only several pages of its brief to that more specific claim. See U.S. *Reynolds* Br. at 42-43, 45. There is accordingly no basis for concluding that United States officials intentionally lied about the contents of the accident report and related material to deceive the Court into recognizing some novel privilege.

c. There also is no reason for this Court to disturb the fact-bound conclusion of both courts below that petitioners failed to establish fraud upon the court based on the government's representations in the 1950s that the documents in question implicated military secrets. As the court of appeals correctly held, the government's claim of privilege extended not only to the secret equipment on board the B-29 but also to the B-29 itself, *i.e.*, its operations and failures that led to the crash at issue. Thus, the Secretary of the Air Force stated that the disclosure of "*its* mission or *information concerning its operation of performance* would be prejudicial to this department and would not be in the public interest." Pet. App. A13 (emphasis added). As the court of appeals concluded, the Secretary's reference in his claim of privilege to "its operation" can "reasonably read to assert privilege over technical information about the B-29." *Ibid.* (emphasis omitted). That reading is not only the "more logical" reading of the privilege claim (*id.* at A14), it was also the reading reflected in the government's

brief in *Reynolds*, which specifically stated that the state secrets privilege claim was being made with reference to the B-29 generally. In the government's brief to this Court, the government explained that "to the extent that the report reveals military secrets concerning the *structure or performance of the plane* that crashed or *deals with these factors in relation to projected or suggested secret improvements* it falls within the judicially recognized 'state secrets' privilege." U.S. *Reynolds* Br. at 45 (emphasis added).

That construction is also precisely how counsel for the plaintiffs in *Reynolds* interpreted the government's claim of privilege. Pet. App. A14. They thus stated in their brief filed in this Court that "[i]n light of [the] all-inclusive claim of privilege [made by the Secretary in that sentence], *it is obvious that the Air Force considers that all details concerning the operation of the airplane are 'classified*.'" C.A. App. 112 n.4 (emphasis added). Counsel quoted the precise portion of the Secretary's privilege claim that petitioners now allege to be fraudulent, explaining that the pronoun "its" referred to the *airplane* itself: "The Secretary for Air in his claim of privilege states * * * that 'any disclosure of its *(the airplane's)* mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.'" *Ibid.* (parenthetical alteration in original) (emphasis added). As the court of appeals explained, petitioners' current "contention about the meaning of 'its' in the claim of privilege is * * * completely undercut by [this] state-

ment in their original Supreme Court brief." Pet. App. A14.[3]

This Court's review also is not warranted because the government truthfully represented that disclosure of either the aircraft's mission on the day in question or the electronic equipment being tested could compromise national security. As this Court in *Reynolds* explained, there was a "reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." 345 U.S. at 10. Although petitioners are correct that the materials did not thoroughly detail the nature of that equipment, the materials nonetheless "revealed" various details concerning the B-29's confidential mission, including "that the project was being carried out by 'the 3150th Electronics Squadron'; that the mission required an 'aircraft capable of dropping bombs'; and that the mission required an airplane capable of 'operating at altitudes of 20,000 feet and above.'" Pet. App. A12-A13 n.3 (quoting accident report).[4] More

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[3] In a footnote, petitioners briefly challenge the notion that revelation of operational workings of a military aircraft could reveal national security information because the government had offered to produce the surviving crew members for examination. Pet. 21 n.13. Those witnesses, however, would have been "authorized to testify regarding all matters pertaining to the cause of the accident *except as to facts and matters of a classified nature*." Pet. App. C37 (Harmon affidavit); see *Reynolds*, 345 U.S. at 5. As the district court correctly found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security." Pet. App. B12.

[4] Petitioners state that some of the details were "publicly reported" in "[c]ontemporaneous news reports." Pet. 20 n.12. But a news report on suspected classified information does not serve as official confirmation of the underlying classified information or render it declassified.

over, as the government set forth in its response to the petition for a writ of error coram nobis (at 21-24), the Air Force was legitimately concerned that, because the B-29 was on a secret mission to test sensitive military equipment, disclosure of the accident report and related materials could lead to the further disclosure of information leading to the military's Banshee project to develop a pilot-less guided missile weapon system. See Pet. App. C109 ("The flight was an authorized research and development *mission*.") (emphasis added); *id.* at C124 ("The *projects* which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above.") (emphasis added).

Finally, this Court in *Reynolds* did not purport to conclusively resolve what was in the accident report—it declined to review the material *in camera* and instead stated at most that there was a "reasonable danger" the information to which it referred would be present. 345 U.S. at 10. The Court further cautioned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Because the Court chose not to determine what was in the report, it set forth a methodology whereby a court could evaluate a claim of state secrets privilege by deciding how deeply to probe into the claim based upon the plaintiffs' need for the information at issue. *Id.* at 11 ("In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."). Because no showing of necessity had yet

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Cf. Exec. Order No. 13,292, § 1.1(b), 3 C.F.R. 196 (2004) ("[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information").

been made by the plaintiffs, however, no such probing was yet required. *Ibid.* If, on remand, the plaintiffs had made the showing of necessity outlined by this Court—for example, if the depositions the government had offered failed to shed light on the accident's cause—the trial court might have had the occasion to determine whether disclosure of the materials implicated state secrets. But the litigation did not get that far; the plaintiffs instead chose to enter into a generous settlement for 75% of the full value of their claims. Because the plaintiffs declined to explore further the claim of privilege at the time, an especially high threshold was appropriate in evaluating their claim of fraud upon the court. See *Beggerly*, 524 U.S. at 47 ("independent action should be available only to prevent a grave miscarriage of justice").

d. Petitioners' position challenges the finality of judicial decisions from the 1950s. Many cases have been dismissed because classified information has been removed from the case pursuant to the state secrets privilege, leaving the parties unable to establish their legal positions.[5] Others have settled because of limits imposed by claims of privilege. The logical extension of petitioner's argument is that parties should be permitted to reopen those cases when classified information is later declassified and ask a court to second-guess the classification decision by rearguing the availability of the privilege with respect to declassified documents. That approach would create needless friction between

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

the branches of government, and under such a rule, there would never be finality in cases involving classified information. There is nothing exceptional about the declassification of the documents at issue here that would warrant reopening this long-settled case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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