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IN THE SUPREME COURT OF THE UNITED STATES

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WARREN CHRISTOPHER, FORMER :  
SECRETARY OF STATE, ET AL., :  
Petitioners :  
v. : No. 01-394  
JENNIFER K. HARBURY. :

- - - - -X  
Washington, D.C.  
Monday, March 18, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:00 a.m.

APPEARANCES:  
RICHARD A. CORDRAY, ESQ., Grove City, Ohio; on behalf  
of the Petitioners.  
THEODORE B. OLSON, ESQ., Solicitor General, Department of  
Justice, Washington, D.C.; for the United States, as  
amicus curiae, supporting the Petitioners.  
JENNIFER K. HARBURY, ESQ., Weslaco, Texas; on behalf of  
the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
RICHARD A. CORDRAY, ESQ.	
On behalf of the Petitioners	3
THEODORE B. OLSON, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Petitioners	18
JENNIFER K. HARBURY, ESQ.	
On behalf of the Respondent	27
REBUTTAL ARGUMENT OF	
RICHARD A. CORDRAY, ESQ.	
On behalf of the Petitioners	50

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 01-394, Warren Christopher v. Jennifer K.  
Harbury.

Mr. Cordray.

ORAL ARGUMENT OF RICHARD A. CORDRAY

ON BEHALF OF THE PETITIONERS

MR. CORDRAY: Thank you, Mr. Chief Justice. May  
it please the Court:

I represent current and former Government  
officials who have been sued in their individual capacity  
based on a claim for denial of access to the courts and  
the further claim that they violated clearly established  
law as of 1993, thus negating their defense of qualified  
immunity.

The substantive due process right of access  
claim urged here is extremely expansive and unsupported by  
the Court's precedents. Our position boils down to this.  
The right of access is not violated unless an individual  
is, in fact, barred from filing claims in the courts. In  
limited circumstances, far different from those at issue  
here, the Court has recognized that an actual bar to  
access in the courts implicates the Due Process Clause.  
Here there is no denial of access to the courts under this

1 Court's precedents.

2 The claim asserted here, moreover, would  
3 constitutionalize the handling of informal channels of  
4 communication between Government officials and private  
5 citizens. It's entirely foreseeable that recognizing this  
6 claim would cause the flow of information to the public to  
7 be reduced to stultifying forms of pretrial discovery. We  
8 know no holding of this Court that would lead to such a  
9 result.

10 QUESTION: To begin with right of access, the  
11 Bell case, Bell v. Milwaukee, is discussed in -- in the  
12 briefs. That's 1983. This is Bivens. I recognize the  
13 distinction. That's, of course, a circuit court case.  
14 It's not -- but suppose that case were here. Suppose we  
15 had the Bell case. Would you say the Bell case is  
16 correct?

17 MR. CORDRAY: Your Honor, we feel that the  
18 conduct at issue in the Bell case, very serious misconduct  
19 -- there were actual criminal violations. The  
20 perpetrators were prosecuted. There would be many ways to  
21 address the misconduct at issue in that case. We do not  
22 believe that it would state a claim for denial of access  
23 to the courts.

24 We also believe -- and in fact, it's -- the  
25 district court held here the facts of that case are quite

1 distant from this case where here we're in the sensitive  
2 context of foreign policy and the oversight of covert  
3 operations in a foreign country, and that would result --

4 QUESTION: But your basic position is -- is that  
5 there's a police coverup and the police destroy the  
6 evidence and they lie, et cetera, no -- no cause of action  
7 for denial of access to courts.

8 MR. CORDRAY: That's correct. There would be  
9 many remedies that could and should be imposed in such a  
10 case.

11 QUESTION: Even where the purpose of the action  
12 of the official is to conceal facts that would have  
13 provided the basis for a legal recovery in court.

14 MR. CORDRAY: We believe so, Your Honor, and for  
15 this reason. In this case, the court of appeals devised a  
16 mixed motive test if one of the purposes was to prevent or  
17 impede a lawsuit.

18 QUESTION: Well, yes, but we're speaking  
19 hypothetically.

20 MR. CORDRAY: Yes.

21 QUESTION: And there's some circuit court  
22 support for where that's the alleged motive, that that  
23 could provide a basis for a suit for denial of access to  
24 the court.

25 MR. CORDRAY: Alleged that that is the sole

1 motive, no other motive. I mean, it's -- what I'm trying  
2 to communicate is it's very difficult in these cases to --  
3 to suggest this.

4           It's very easy to allege that this is one of the  
5 motives or even the sole motive at a motion to dismiss  
6 stage where the -- where the allegations are treated  
7 generously and, all of a sudden, all of these claims  
8 become constitutional claims. If there's some failure to  
9 timely disclose information and some irreparable harm  
10 results, this could apply, for example, in undercover  
11 Government investigations of criminal conduct, sting  
12 operations. If the allegation is made that maybe my  
13 attorney inquired, there was some intentionally misleading  
14 statement made, and therefore, as a result, some  
15 irreparable harm occurred, someone was killed during the  
16 implementation of the operation, something of that sort,  
17 all of these would become denial of access to court --

18           QUESTION: Suppose that it is an ordinary case,  
19 civil case, criminal system, and they're holding -- a  
20 group of rogue policemen are unlawfully somebody in a jail  
21 cell and his wife comes in and says, I -- I want to get a  
22 -- go to court and get a writ of habeas corpus on his  
23 behalf. Now, will you tell me please, is that -- is this  
24 going on? And they lie so that she cannot go to court and  
25 get the writ of habeas corpus. Now, in that circumstance,

1 would that be a -- a denial of access to the courts?

2 MR. CORDRAY: In a situation where the  
3 Government was holding an individual in custody, therefore  
4 physically barring that person from accessing the courts,  
5 that person --

6 QUESTION: No, no. The person -- the wife --

7 MR. CORDRAY: That -- that person --

8 QUESTION: -- wants to go.

9 MR. CORDRAY: That person would have a claim for  
10 denial of access to the courts.

11 The wife or an attorney inquiring on their  
12 behalf, et cetera, do not have a right to Government  
13 information. The mere fact that someone is incarcerated  
14 doesn't mean that their attorney inquiring of the  
15 prosecutor's office or the police have some right of  
16 access to information.

17 QUESTION: Suppose -- suppose the Government  
18 imprisons the key witness in my suit in order to deprive  
19 me of the ability to win the suit. Is there denial of  
20 access to courts there? Again, we'll have 1980 -- let's  
21 assume 1983 because Bivens has an extra problem.

22 MR. CORDRAY: Are we talking about a criminal  
23 case, a criminal proceeding?

24 QUESTION: Either --

25 MR. CORDRAY: A witness -- it would matter if it

1 were a criminal proceeding because there are special fair  
2 trial guarantees that the Constitution imposes such as  
3 Brady v. Maryland and the like in a -- an ongoing criminal  
4 proceeding. If we're talking about a civil case or here  
5 prior to any civil case even being filed when we're in the  
6 realm of potentially pretrial investigation, discovery of  
7 information, people seeking information, that would not  
8 constitute a substantive due process right of access to  
9 courts claim, we do not believe. Again, those facts,  
10 again, are far afield from what's at issue in this case,  
11 but we don't believe that -- that that would file a claim,  
12 would be our position. You wouldn't need to go that far  
13 in this case.

14 QUESTION: Was a FOIA claim open to the  
15 respondent here? Could -- could such information have  
16 been sought and obtained theoretically under FOIA?

17 MR. CORDRAY: At any time. At any time. And in  
18 fact, respondent did file FOIA claims later. Her  
19 contention here is that she was lulled into inaction, but  
20 of course, it remained open to her at any time to file a  
21 FOIA claim. It remained open to her at any time to file a  
22 lawsuit in the courts. And in fact, she did so. She  
23 later pursued litigation to -- under FOIA to get  
24 documents. She received thousands of pages of documents.

25 Part of the complaint here is that the



1 information was not timely disclosed. And again, that's  
2 unfortunate. It's regrettable. There may even be  
3 individuals who should be called to account for it, but it  
4 doesn't constitute a substantive right of access to courts  
5 claim under the substantive due process line of cases or,  
6 you know, all such communications between Government  
7 officials and private citizens --

8 QUESTION: Mr. Cordray, may -- may I go back to  
9 your answer about this being like a sting operation?  
10 Those are designed to uncover crimes, and the object of  
11 the sting is a suspect. But here, we're not dealing with  
12 someone who was suspected of a crime. We're dealing with  
13 someone who was seeking information from her Government  
14 for perfectly understandable, appropriate purposes.

15 MR. CORDRAY: That -- that's true, nor do we  
16 contend otherwise. But even a suspect, a criminal  
17 suspect, is innocent till proven guilty, and the purpose  
18 of those operations is to try to ferret out crime. It's  
19 true. But it --

20 QUESTION: But couldn't one make a distinction?  
21 I mean, you say if this case, then the sting operation,  
22 and I think that however you come out in this case, you're  
23 not touching the sting case.

24 MR. CORDRAY: I don't believe that's correct,  
25 Your Honor, because a constitutional line can't be founded

1       there. It can't be maintained there. It has no moorings  
2       at that point. We're not talking about guilty suspects  
3       who have already been adjudicated. We're talking about  
4       individuals --

5                QUESTION: People suspected of crimes.

6                MR. CORDRAY: Sure. And -- and here, the  
7       Government's purposes involved overseeing covert military  
8       operations in a foreign country. There may be innocents  
9       involved. There may be people who are impeding our  
10      foreign policy and the like. The Government is trying to  
11      carry out its functions, carry out its duties and  
12      responsibilities, and the same is true of police trying to  
13      uncover crime. And the mere fact that someone is  
14      suspected or they may not be suspected -- they may be on a  
15      list --

16              QUESTION: The person who's being deceived -- I  
17      just don't see where there's any spill-over that you can  
18      -- you can disassociate the suspect who was being deceived  
19      in order to be caught by the Government and someone who  
20      was under no suspicion of any involvement in any  
21      wrongdoing.

22              MR. CORDRAY: We don't think a constitutional  
23      line could be -- could be founded there and maintained.

24              I will say in the case of affirmative  
25      misrepresentations by Government officials or

1 affirmatively misleading statements, there -- there are  
2 some circumstances where they perhaps are justified.  
3 There are many circumstances where they would not be  
4 justified, and if they violate a legal duty, there would  
5 be legal redress for the violation of the duty. If it's  
6 criminal in nature, there would be -- criminal sanctions  
7 could be imposed upon the perpetrators. There's a free  
8 press and there are political checks. People can lose  
9 their job. They'd be subject to censure. People could  
10 vote them out of office. But it doesn't in our view  
11 constitute a substantive due process right of access to  
12 the courts or an actual denial of access.

13 QUESTION: Mr. Cordray, one of your -- one of  
14 your arguments here is essentially a lack of standing  
15 argument that -- that there's no remediable harm that's  
16 been suffered. Why -- why is that? You say the  
17 injunction -- it's -- it's too speculative whether the  
18 injunction would ever have issued. But what about a delay  
19 in -- in getting damages? Why -- why doesn't that  
20 constitute harm?

21 MR. CORDRAY: A delay in what constitute harm?

22 QUESTION: In obtaining -- in obtaining damages;  
23 that is, had she known this information sooner, she could  
24 have brought suit sooner and would have obtained justice  
25 sooner.

1 MR. CORDRAY: Again, I don't think that that  
2 founds -- that that meets the standing requirements.  
3 We're -- we're concerned here about the traceability and  
4 redressability requirements. And at the end of all of  
5 this long skein of hypotheticals here is a notion that an  
6 American court order would have somehow have prevented the  
7 Guatemalan military from executing her husband.

8 QUESTION: Yes, I am not talking about -- I am  
9 not talking about that. I'm talking about the -- I'm just  
10 talking about her ability to get monetary compensation for  
11 what the Government did. Hasn't that been at least  
12 delayed? You say she can still get it. But the answer to  
13 that is, yes, well, you know -- but meanwhile, she hasn't  
14 gotten it.

15 MR. CORDRAY: It may have been delayed. She  
16 does have tort claims that are now pending in district  
17 court, intentional infliction of emotional distress,  
18 negligent supervision. Those are proceeding under the  
19 Federal Tort Claims Act. And so, again, we -- we would  
20 say that she's not been denied access to the courts.  
21 She's pursued that access. She is vigorously pursuing it.  
22 She's pursued political relief and the like.

23 QUESTION: Is -- are the claims that are now  
24 pending against the individuals or the -- the United  
25 States has substituted itself?

1           MR. CORDRAY: The United States has substituted  
2     itself under the Federal Tort Claims Act for the purposes  
3     of those claims. They're in discovery in the trial court.

4           QUESTION: And what -- they're in discovery  
5     right now?

6           MR. CORDRAY: Yes, they are. That's correct.

7           QUESTION: Would she have had standing if she  
8     had clearly brought or clearly adduced the theory that she  
9     wanted an injunction against the officials to prevent the  
10    officials from continuing to pay money to the agents of a  
11    foreign government who were torturing her husband, who in  
12    fact was a -- a foreign national? Would she have had  
13    standing if she had made that allegation?

14          MR. CORDRAY: I'm not certain, to be honest,  
15    Your Honor. It would be very close to the line.

16          QUESTION: Why wouldn't she have had? Let's put  
17    it that way.

18          MR. CORDRAY: Well, because -- because there  
19    would be, again, a traceability, redressability problem.  
20    If she's simply seeking -- her standing is somehow to save  
21    her husband's life. That's always been the claim asserted  
22    to this case --

23          QUESTION: Right, and her -- her allegation is  
24    that they are torturing her husband because the United  
25    States is paying them to do it. And she says, on my

1 hypothetical, I want you to enjoin them from paying more  
2 money. That -- that -- the -- the causal connection, at  
3 least in the allegation, would have been very clear,  
4 wouldn't it?

5 MR. CORDRAY: It would be close to the line. It  
6 would still depend on third party responses to a court  
7 order, which this Court has had some --

8 QUESTION: Well, she might or might not have  
9 been able to prove ultimately, had it gone to trial, that  
10 stopping the money would stop the action of the foreign  
11 government. But as a matter of standing to get to trial,  
12 she would have had it, wouldn't she?

13 MR. CORDRAY: I frankly think it's like the  
14 Simon case where the issue was availability of tax credit  
15 or tax relief, and it was thought that that was not  
16 significant enough to influence clearly the third party's  
17 contract --

18 QUESTION: Well, then your -- well, was it that  
19 or was it there was no cause of action? It was --

20 MR. CORDRAY: Well, we think -- we think both.

21 QUESTION: But it seems to me you have to take  
22 her complaint the way -- the way Justice Souter wrote it.  
23 I mean, her complaint --

24 (Laughter.)

25 QUESTION: Her complaint is that the only reason

1     they're -- they're torturing is because we're paying them  
2     to do that. And if that is the allegation, I -- I think  
3     the redressability/causality element is certainly there.

4             MR. CORDRAY: It would be close to the line  
5     because we're talking about independent decisions by third  
6     parties in response to a court order would be the issue.  
7     That would be the issue.

8             QUESTION: What do you mean third parties?

9             MR. CORDRAY: The third party is the Guatemalan  
10    military who, in the end, have to change their conduct.

11            QUESTION: No, no, no. But the injunction is  
12    against the payment which she says is the only reason the  
13    Guatemalan military are doing this. She wants to enjoin  
14    the American officials from paying the money which she  
15    asserts is the sole reason they're going through with  
16    this. Why -- why --

17            MR. CORDRAY: But the only claim to standing on  
18    her part to enjoin the CIA from doing something would be  
19    somehow because it affects her husband's well-being and  
20    the like. So, you have to make that further step that the  
21    third parties are going to be influenced in a positive way  
22    and a decisive way by an American court order, and that's  
23    where we think it breaks down. But -- but that's a close-  
24    to-the-line case in terms of standing.

25            QUESTION: How can you be so cavalier? It's

1 close to the line. You -- you win anyway even if it's on  
2 the other side of the line?

3 MR. CORDRAY: We think that there's not standing  
4 under Simon and Linda R.S., and we think it's even clearer  
5 in a foreign military context where we're talking about  
6 foreign nationals not subject to U.S. jurisdiction, who at  
7 the end of the chain of reasoning, have to alter their  
8 conduct. That's correct.

9 I'd also like to address --

10 QUESTION: May I just ask you another question  
11 before you leave the subject?

12 MR. CORDRAY: Sure.

13 QUESTION: Assume, for the sake of argument,  
14 that there is standing in that case. Would there have  
15 been a cause of action alleged?

16 MR. CORDRAY: Here for denial of access to --

17 QUESTION: On my hypothesis.

18 MR. CORDRAY: For denial of access to the  
19 courts?

20 QUESTION: Any cause of action.

21 MR. CORDRAY: By Ms. Harbury for denial of  
22 access to the courts. That's the only claim we have  
23 before this Court --

24 QUESTION: Yes, yes, yes.

25 MR. CORDRAY: Again, it's distant from any



1     allegations of torture or mistreatment of someone. We're  
2     only talking about denial of access to the courts based on  
3     the alleged --

4             QUESTION: And -- and she said I -- I want to go  
5     into court because I want to press this cause of action.  
6     One of your arguments is, well, you've got to get into  
7     court first, or -- or at least try to get into court. But  
8     another line of argument is whether you're yet at the  
9     courthouse door or not, you've at least got to have a  
10    cause of action that you could press if you got there.

11            And my question here is, assume standing, assume  
12    your second line of argument on access to courts so that  
13    the issue comes down to whether there would have been an  
14    allegation of a cause of action on that hypothesis. Would  
15    there have been a cause of action alleged?

16            MR. CORDRAY: We still allege there are many  
17    steps on the standing argument in terms of what kind of  
18    claims she would have brought. There's -- in the court of  
19    appeals --

20            QUESTION: Okay, but I'm -- I'm saying assume  
21    for the sake of argument that there is standing. Would  
22    there have been a cause of action sufficient to support  
23    the access to courts claim?

24            MR. CORDRAY: Again, in a situation where the  
25    claim is that she did not have timely disclosure of

1 information that would have helped her formulate her cause  
2 of action, we do not think that falls within the  
3 Constitution. But my --

4 QUESTION: Do you -- do you concede that at  
5 least the claim that there was something unconstitutional  
6 or illegal about paying the -- about our Government paying  
7 the money to a foreign government for this purpose would  
8 state a cause of action?

9 MR. CORDRAY: We don't concede that. We don't  
10 think that that's the case. And again, what we're talking  
11 about here is disclosure of information necessary to  
12 formulate a claim. We don't think that's  
13 constitutionalized under the substantive due process.

14 If I might reserve the remainder of my time.

15 QUESTION: Very well, Mr. Cordray.

16 General Olson, we'll hear from you.

17 ORAL ARGUMENT OF THEODORE B. OLSON

18 ON BEHALF OF THE UNITED STATES,

19 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

20 MR. OLSON: Mr. Chief Justice, and may it please  
21 the Court:

22 5 years ago in its Glucksberg decision, the  
23 Court urged utmost care in creating new substantive due  
24 process rights because doing so removes the matter from  
25 the arena of public debate and legislative action. That

1 admonition is acutely compelling in the field of  
2 Government-to-citizen communication. Respondent's theory  
3 would not only constitutionalize the Freedom of  
4 Information Act and create a constitutional pre-litigation  
5 discovery right against the Government, but would also  
6 affirmatively discourage an unquantifiable, but immense  
7 volume of valuable informal Government communications that  
8 take place thousands of times every day. As the Court  
9 held in OPM v. Richmond in 1990, the natural consequence  
10 of a rule imposing liability for Government statements  
11 would be a decision to cut back and impose strict controls  
12 upon Government provision of information.

13 Government officials respond to informal  
14 requests for information every day in -- in an infinite  
15 variety of contexts with infinite -- with an infinite  
16 array of answers, candor, off-the-record disclosures, and  
17 occasional polite evasions. One of the most commonplace  
18 of those governmental responses to requests for  
19 information is the equivocal and innocuous I will get back  
20 to you that forms the core of respondent's constitutional  
21 theory.

22 Today, the respondent urges that that I will get  
23 back to you, when accompanied by an easy to allege and  
24 hard to disprove, in the words of this Court, allegation  
25 that such responses were intentionally false for the

1 purpose of discouraging a potentially productive  
2 litigation will become the trigger for expensive,  
3 burdensome, and distracting personal suits for damages  
4 against the offending officials. The -- the consequence  
5 will be a drying up of informal Government-to-citizen  
6 exchanges and a regime of no comment or brush-offs or  
7 brusque refusals to discuss, the precise antithesis of the  
8 open Government the Framers of the First Amendment  
9 intended.

10 So, to constitutionalize the responses in an  
11 informal context where the response was not required by  
12 any provision of law, no response was required at all, the  
13 response violated no law or affirmative duty to respond,  
14 it promised no specific action or any specific time table  
15 -- I will get back to you didn't promise any --

16 QUESTION: Well, the allegation, though, is that  
17 the response was given in -- with the intent and in order  
18 to prevent a potential lawsuit. At least that's the  
19 allegation.

20 MR. OLSON: That is the allegation, and that's a  
21 conclusionary information and belief, easy to allege, hard  
22 to disprove allegation that can be made in every one of  
23 these cases. It's easy to imagine an infinite number of  
24 situations. I think it was Justice Ginsburg that was  
25 asking about the sting operation. The sting is a

1     falsehood that's created by government to accomplish some  
2     law enforcement objective, but if it's a false storefront  
3     or something like that, it's a falsehood to a lot of  
4     different people.

5             There are lots of different situations where the  
6     Government quite legitimately may have reasons to give  
7     false information out. We're not defending all the  
8     circumstances in which that might occur because there are  
9     duties and responsibilities and statutes that are imposed  
10    for that sort of thing. But to constitutionalize this  
11    subject would just put this broad blanket of inhibition  
12    over the whole disclosure of -- this was an informal oral  
13    communication. It wasn't a written communication. It  
14    wasn't where writing was occurred.

15            She had at any time -- the respondent had at any  
16    time the opportunity and right to bring an action under --  
17    to -- to bring a request and then an action under the  
18    Freedom of Information Act, which is Congress' carefully  
19    structured regime for receiving information from the  
20    Government. If she had received an evasive or  
21    nonresponsive answer in connection with the Freedom of  
22    Information Act, that would have been remedied or remedial  
23    in a court under the strictures that Congress carefully  
24    developed and this Court has implemented over the years.  
25    There's --

1 QUESTION: General --

2 QUESTION: Well, do you say there should be an  
3 exhaustion requirement? You have to at least go with a  
4 FOIA request?

5 MR. OLSON: Well, Justice O'Connor, even if she  
6 had gone -- well, she -- if she -- I wouldn't put it as  
7 exhaustion. What I'm suggesting is that because there is  
8 this regime in place already, there are other ways to get  
9 information from the Government. There -- there could  
10 have been a lawsuit brought at any time, although this  
11 would have been very, very remote, this lawsuit. And --  
12 and the answers to questions could have been policed by a  
13 court.

14 We're not suggesting that there's necessary an  
15 exhaustion requirement, but that to constitutionalize  
16 these exchanges and to create remedies for damages under  
17 these circumstances, when the legislature has developed an  
18 infinite -- I mean, not an infinite, but a substantial  
19 array of opportunities to both obtain information and to  
20 police the type of information that's obtained, if a  
21 Government official lies, there may be certain  
22 circumstances where they are subject to discipline.

23 There -- there may be -- and we're talking about  
24 all levels of government, State, local, and the National  
25 Government. There may be remedies that are available.

1 Many of the cases cited by the plaintiff were violations  
2 of underlying provisions of law. There was manufacturing  
3 of evidence in some of those cases.

4 What we're saying is that there are ways to deal  
5 with Government-to-citizen communications that don't have  
6 the --

7 QUESTION: What -- what do you do, Mr. Olson,  
8 with the circuit court cases which have held under 1983 a  
9 violation of the right of access to courts when there's a  
10 coverup of a -- of a police murderer or something of that  
11 sort?

12 MR. OLSON: Well, precisely.

13 QUESTION: Is there a right of access to courts  
14 in your view in those cases?

15 MR. OLSON: We believe that there is not. We  
16 believe that in each of those cases, there were  
17 circumstances where there were other rights that were  
18 violated, and that to take the step that those courts  
19 took, to the extent that they go beyond the violation of  
20 other underlying rights, would create this very problem  
21 that the Court urged caution about. The consequence could  
22 be the drying up of information.

23 The creation of an additional right in those  
24 areas is problematical in the first place in terms of what  
25 it would accomplish beyond the rights that are already in

1       existence. And the down side consequence to the  
2       Constitution, to the regular exchange of information, and  
3       the limitation, as this Court said in Glucksberg --

4               QUESTION: I suppose -- I suppose that they  
5       could allege that the drying up of information was also  
6       done in order to prevent them from bringing a lawsuit,  
7       that is, if you say no comment.

8               MR. OLSON: Well, they --

9               QUESTION: They could allege the only reason you  
10      said no comment was you didn't want to give the  
11      information.

12              MR. OLSON: Of course. As a matter of -- as a  
13      matter of fact, Justice Scalia, what they did say is that  
14      -- and this is on page 20 of the transcript in the oral  
15      argument, and there is something similar in the -- in the  
16      brief, that they had -- that they -- we can't get back to  
17      you or we're not able to respond to you -- they suggested  
18      that that would be a perfectly constitutional response, or  
19      as you say, a no comment would be a perfectly  
20      constitutional response. That could have been a lie too.  
21      We can't -- I'm sorry we can't get back to you. Well, in  
22      fact, they could get back under the theory pleaded in the  
23      complaint. So, that would have been a lie too.

24              It illustrates the slipperiness of the slope  
25      that the respondent's theory would ask the Court to embark



1       upon. Any of those infinite varieties of exchanges  
2       under --

3               QUESTION: I don't see how no comment could be a  
4       lie.

5               MR. OLSON: Pardon me?

6               QUESTION: I don't see how no comment could be a  
7       lie.

8               MR. OLSON: No comment might not be a lie,  
9       Justice Stevens, but -- but the -- the respondent  
10       specifically says it would have been constitutional to say  
11       I cannot get back to you, or if there is information,  
12       we're not in a position to give it to you. There are --  
13       that's -- those specific things that are in the brief  
14       itself and in the transcript of the oral argument could  
15       easily be lies as well, and they could easily be  
16       characterized as lies.

17              QUESTION: Is it your position, just to be sure,  
18       that the refusal to give information can never be a denial  
19       of access to the courts?

20              MR. OLSON: I -- I hesitate ever to say anything  
21       of that sort. There are circumstances when it conceivably  
22       could. There could be legal duties triggering a  
23       requirement. In the habeas situation that one of the  
24       Justices asked about, there are rights of the individual  
25       which may be asserted by -- under appropriate next-friend

1 standing, but it's the rights of the individual in  
2 custody.

3 QUESTION: Well, withholding could give rise to  
4 tolling of the statute of limitations.

5 MR. OLSON: Absolutely, and that's another  
6 situation, Justice -- Chief Justice Rehnquist, in which if  
7 something is delayed -- and I think Justice Scalia asked  
8 that question. There's a tolling remedy. There's  
9 additional damages because of the delay. There are  
10 remedies in virtually all of these circumstances.

11 One last point, if I still have time, is that  
12 the causation, the actual harm element of this so-called  
13 cause of action, is extraordinarily remote. The  
14 respondent is taking the position that if the Government  
15 had just answered constitutionally by saying no comment,  
16 somehow she might have filed a Freedom of Information  
17 case. It might have been in time. It might have been in  
18 time then for her to file some sort of justiciable,  
19 nonfrivolous cause of action, which she doesn't really  
20 ever fully identify except calling it some sort of  
21 injunction, and that that sort of injunction would have  
22 caused a court somehow to provide the opportunity to save  
23 the individual's life that she was attempting to save.  
24 That all is extraordinarily remote when -- when compounded  
25 with the various aspects of the elusive nature of the

1 right being articulated here, the elusive nature of the  
2 remedy that could be -- possibly be given and the damage  
3 that constitutionalizing this right would create. We  
4 submit that this a course that this Court should not and  
5 would not under its precedents want to go.

6 QUESTION: Thank you, General Olson.

7 Mr. Harbury, we'll hear from you.

8 ORAL ARGUMENT OF JENNIFER K. HARBURY

9 ON BEHALF OF THE RESPONDENT

10 MS. HARBURY: Mr. Chief Justice, and may it  
11 please the Court:

12 This case turns upon a very narrow question of  
13 law, specifically the United States officials take  
14 affirmative and wrongful action to deceive a citizen,  
15 number one, with the intention of obstructing her or  
16 preventing her from proceeding to the courts of law for  
17 emergency injunctive relief, and where such affirmative  
18 and wrongful conduct and actions of deceit not only delay  
19 the filing of that case, but in fact extinguish the cause  
20 of action, and when it is known at the time that her  
21 husband is in a secret cell being severely tortured and  
22 that he is in danger of imminent extrajudicial execution.  
23 Ironically I note that today this case is in the highest  
24 Court of the land, but it is exactly 10 years and 6 days  
25 too late.

1           Given the importance of a number of the points  
2     that have been made today, I would like to start with a  
3     few clarifications.

4           Number one, I'm not arguing here that the  
5     petitioners simply were negligent or did not get back to  
6     me on time or that they had some duty, when 6 days after  
7     my husband's capture, they learned that he was being  
8     tortured and secretly detained. I'm not say that they had  
9     a duty to locate me, to knock on my door, and inform --  
10    and inform me of his situation.

11          I'm saying that they could not take wrongful and  
12    affirmative steps, once I went to them, to deceive me, to  
13    tell me that there was no information when, in fact, they  
14    had numerous bulletins from the CIA telling them that he  
15    was captured alive, that he was undergoing torture, that  
16    they were falsifying his death, and when I was speaking  
17    with them, that he was still alive and could, in fact,  
18    have been saved.

19          Number two, I am not alleging here that the --  
20    that the Government officials should have given me  
21    sensitive national security information. I'm alleging  
22    that they covered up information that was not sensitive,  
23    that our own Government has since decided did not  
24    constitute state secrets and could have been given to me  
25    initially, and that that nonsensitive information had all

1 the details I needed in 1993 to approach the courts of law  
2 for an emergency injunctive to -- injunction to --

3 QUESTION: Ms. Harbury, may I ask you --

4 QUESTION: If -- if this were a -- if this were  
5 a private cause of -- of action without governmental  
6 actors, it would be just a tort of deceit, I -- I take it.

7 MS. HARBURY: The tort of --

8 QUESTION: Like a tortious action for deceit if  
9 these were all private actors. We'll leave the Government  
10 out of it. And it seems to me that what you're trying to  
11 do is to make up for the absence of a tort of deceit under  
12 the Federal Tort Claims Act by creating a constitutional  
13 right. Is that what's -- is that what's happening here  
14 structurally so far as your argument is concerned?

15 MS. HARBURY: No, Your Honor. I'm alleging that  
16 any kind of affirmative and wrongful conduct by a state  
17 official, when the objective and, in fact, the result is  
18 to prevent the filing of a lawsuit, access to courts, then  
19 -- then a constitutional right has been violated.

20 QUESTION: I'm suggesting to you that the only  
21 reason you -- you must say that is because if you followed  
22 the usual course of the law and file an action for deceit,  
23 you'd be barred under the Federal Tort Claims Act. That  
24 is correct, is it not?

25 MS. HARBURY: I believe the Federal Tort Claims

1 Act could not have been triggered in the case when one was  
2 only asking for injunctive relief, Your Honor.

3 QUESTION: In -- in the context of a private  
4 person, under the law of torts, there is an action for  
5 deceit based on the facts that you've -- that you've  
6 discussed, is there not?

7 MS. HARBURY: Yes, there is.

8 QUESTION: All right. And the reason that you  
9 have to show an access -- right of access to court is  
10 because, under the Federal Tort Claims Act, you can't sue  
11 for deceit. I mean, that's -- that's where we -- that's  
12 the beginning point here. Isn't that right?

13 MS. HARBURY: I could not sued for deceit under  
14 the Federal Tort Claims Act. That is correct, Your Honor,  
15 but that action, even if I could file it under the Federal  
16 Tort Claims Act, would not be focused on the wrong and the  
17 injury that I am alleging here. I'm saying that my day in  
18 court, when I could have saved my husband's life, has been  
19 extinguished wrongfully on the basis of a violation of  
20 standard -- of standard duties of conduct.

21 QUESTION: Ms. Harbury, on that central  
22 question, an issue kept coming up repeatedly in the D.C.  
23 Circuit during your argument there, and the court asked,  
24 access to court, access to do what?

25 Now, the -- they rejected your claim that there

1 was a Fifth Amendment right, a substantive right,  
2 involving the Government's participation in -- in the  
3 torture abroad. They rejected your argument about a  
4 familial relationship. So, what I don't understand at  
5 this point is rejecting your claims, your substantive  
6 claims, of a wrong to yourself, wrongful conduct engaged  
7 in by the United States, access to court for what? If you  
8 have no Fifth Amendment claim, what is there? What claim  
9 could you state?

10 MS. HARBURY: All of the claims that I would  
11 have stated, Your Honor, would have been rooted in the  
12 context that in the absence of extraordinary  
13 circumstances, as in Guatemala in 1992 and '93, the use of  
14 torture, the causation and participation in torture by  
15 United States officials, was completely outside of the  
16 scope of their delegated authorities and, in the  
17 alternative, in violation of their own regulations and  
18 subject to review under the APA for emergency injunctive  
19 relief. That core concept would, in turn, have allowed me  
20 to sue for conspiracy to end aiding and abetting, assault  
21 and battery in his case, emotional distress in my case,  
22 intentional refusal to supervise independent contractors.

23 And I would still assert that although my  
24 familial rights have not been recognized in the Bivens  
25 context for a number of good reasons, because there's no

1 easy way to draw the line in damages in that context, but  
2 had I gone to a court of law and said, this is my family,  
3 I have the right to choose our medical care, I have the  
4 right to choose whether or not together we will have  
5 children and how we will raise them and which church we  
6 shall worship at and what professions we shall exercise,  
7 the most fundamental right of all that I would have  
8 presented seeking injunctive relief is that I have a right  
9 to defend my family from wrongful outside actions,  
10 especially when they're taken by the state. I would have  
11 brought all of those issues before the courts of law and  
12 asked for emergency assistance.

13 QUESTION: At bottom, in this case you're  
14 claiming damages now. Is that not correct?

15 MS. HARBURY: There are some tort claims issues  
16 still in the district court, yes, Your Honor, but those  
17 cannot make good the lost day in court to save a human  
18 life.

19 QUESTION: No, but -- but what's running through  
20 my mind is the -- there's a long chain of causation here,  
21 and if -- if one were persuaded -- and I'm not saying I  
22 am, but if one were persuaded that even if you had all the  
23 help that you sought at the time you did, there still  
24 would not have been time to save your husband's life. And  
25 therefore, the ultimate damage would -- would have been



1 suffered anyway. Would you be entitled to prevail?

2 MS. HARBURY: If the question where there was no  
3 time to save my husband's life?

4 QUESTION: Correct.

5 MS. HARBURY: I would certainly want to bring my  
6 witnesses and my evidence to a factual hearing on exactly  
7 that subject, Your Honor, because I believe there was at  
8 least 6 months if not, under more recent information, a  
9 year or a year-and-a-half during which I could have saved  
10 my husband's life. But under the allegations in the  
11 complaint, 6 months. And that any court faced with  
12 torture and the possibility that someone tomorrow may be  
13 literally thrown from a helicopter, I do not believe that  
14 any court in this country could not have acted swiftly to  
15 redress that situation.

16 QUESTION: In -- in this case, Ms. Harbury, you  
17 are seeking money damages, are you not?

18 MS. HARBURY: I am, Your Honor. Money damages  
19 related to other harm which was incurred, not the  
20 equivalent of the day in court to save my husband's life,  
21 which has been extinguished. There is no -- there is no  
22 way that I can now recover that day. So, the damages  
23 claims in the lower court are on peripheral injuries.

24 QUESTION: You began by telling us that this is  
25 a very narrow remedy that you seek. I have trouble with

1     that. The Solicitor General tells us that the  
2     consequences of your theory are that for innumerable small  
3     matters, which involve access to courts, the Government is  
4     going to be sued all of the time. And as you know, when  
5     the law evolves and we decide cases, we -- we, of course,  
6     look to the egregious nature of the conduct in a  
7     particular case, but we also have to look at what we're  
8     creating as a general rule. And the Government says as a  
9     general rule what you're asking for is a sweeping,  
10    revolutionary cause of action.

11               MS. HARBURY: Yes, Your Honor. I think that in  
12    this case that is not a true concern. If I may elaborate  
13    on that.

14               Number one, the circuit courts that have dealt  
15    with the issue of access to the courts in the context of a  
16    Government coverup have created a solution that would so  
17    filter out most cases that there would not be a flood gate  
18    effect. Specifically, just delaying a case, as opposed to  
19    extinguishing that actual cause of action, as in this  
20    case, will not be a harm that in itself, without further  
21    damage, is going to be actionable as a constitutional  
22    violation for denial of access. So, in the vast majority  
23    of cases, where an official makes a neutral statement,  
24    there's not going to be any damage done that the fact  
25    finder or the judge in the district court is not going to

1 be able to remedy with his panoply of equitable tools.

2 The second filter, though, is that there must  
3 have been harmful and affirmative and wrongful conduct  
4 aimed at obstructing the access to the courts, blocking  
5 that person from going to the courts of law. That means  
6 that in the context of deceit, which is presented here,  
7 that the statements have to have been intentionally  
8 deceptive, not just words of courtesy which would be --

9 QUESTION: When -- when you say wrongful, Ms.  
10 Harbury, you don't mean in violation of any particular  
11 statute. You mean something broader than that, don't you?

12 MS. HARBURY: In this case it would be a common  
13 law -- common law tort, Your Honor, to commit intentional  
14 deceit where the person making the deceptive statements is  
15 fully aware and intends that a reasonable person will rely  
16 on that statement to their detriment.

17 QUESTION: The Secretary of State is liable for  
18 the common law tort of deceit under those circumstances is  
19 what you're saying.

20 MS. HARBURY: I'm saying that where the common  
21 law tort of deceit is the wrongful act which was taken in  
22 order to block access to the courts of law, then it  
23 becomes a constitutional tort. The simple act of  
24 deception I doubt would be actionable in most cases,  
25 especially when the words were simply courtesy words and a

1 reasonable person, hearing some -- one statement, for  
2 example, that oh, we're very concerned, a reasonable  
3 person would probably not rely on that statement to mean  
4 more than we'll write a letter of inquiry for you.

5 But what is set out in this case, what is  
6 alleged in this case is that there was an array of  
7 statements made by numerous persons in the State  
8 Department and other agencies which were intended and  
9 which did give a number of false impressions and false  
10 understandings, specifically that the United States had no  
11 information at all about what was happening with my  
12 husband. In fact, they knew that the CIA was deeply  
13 involved. They knew within 6 days of his capture that  
14 they were falsifying his death and planned to torture him  
15 for his information.

16 QUESTION: Ms. Harbury, from the time you did --  
17 you did get information from the Government ultimately  
18 when you brought your Freedom of Information Act suit.  
19 From the time you made your request under FOIA until you  
20 received that information, how much time elapsed?

21 MS. HARBURY: I made the FOIA request in January  
22 of '95. A number of disclosures were made by Government  
23 officials in March, and in the ensuing uproar, I then  
24 began to get some preliminary documentation later that  
25 fall.

1           The reason that I filed my FOIA, for purposes of  
2 clarification here, in January is that the 60 Minutes  
3 broadcast, for the first time ever, had indicated to me  
4 that the U.S. officials were deceiving me, that they  
5 weren't --

6           QUESTION: My -- my point is your -- your theory  
7 is, if I hadn't been lulled into the sense that the  
8 Government was my friend, I would have immediately filed a  
9 FOIA request and I would have gotten this information in  
10 time to seek this injunction. But in fact, if it takes --  
11 there was a 6-month interval from March until September,  
12 assuming that September was the date of execution. If the  
13 FOIA lawsuit would have taken more than 6 months to  
14 process, then you would not have found out anything in  
15 time to bring this injunction action.

16          MS. HARBURY: Under those conditions, Your  
17 Honor, knowing or believing that my husband could still  
18 well be alive and being subjected to torture, I would have  
19 been in court immediately for a TRO for expedited handling  
20 of that case. The reason I didn't do so in '95 is because  
21 I learned that my husband was dead. There was no longer  
22 any reason to go for an emergency injunctive relief.

23          QUESTION: Do you know of FOIA cases that have  
24 been handled that way with a TRO? Or you're saying that  
25 this is a unique situation?

1 MS. HARBURY: Your Honor, I believe the FOIA  
2 itself makes provisions for expedited handling where  
3 necessary, and I believe that any Federal district court,  
4 using their rights and their equitable remedies for  
5 emergency situations, could have ordered the emergency  
6 processing. And in fact, those documents were not sealed  
7 away in remote files. They were being reviewed, actively  
8 reviewed, by many of the petitioners as those events were  
9 unfurling.

10 QUESTION: Well, would they? That's -- I mean,  
11 obviously reading your story, one is immediately  
12 sympathetic, and it's a very sad and difficult. I  
13 understand that.

14 And suppose you were in court and the court  
15 might think there are other people with similar stories,  
16 and indeed, foreign nationals are quite often perhaps,  
17 from what one reads in the paper, subject to very bad  
18 treatment at the hands of other foreign nationals. And  
19 our Government supports some of those and because we must,  
20 according to what they say.

21 Well, how is a court supposed to know whether,  
22 when you have the CIA, when you have one group of foreign  
23 nationals hurting another group of foreign nationals, when  
24 there's egregious behavior throughout the world and we  
25 have to support some -- how in your view can we

1 distinguish this case from the general problem of foreign  
2 relations, from the general problem of the CIA, from  
3 things that courts by and large don't go into?

4 MS. HARBURY: If I may. I'm not sure if I'm  
5 understanding your question, Your Honor.

6 QUESTION: Well, I'm really trying to work  
7 getting you to address what I would see as a major  
8 implication, which is not at all casting doubt on -- on  
9 the sympathy with which an individual might have, but  
10 rather the problem of conducting foreign affairs, which  
11 we're told by the Government requires courts to stay out  
12 of certain things and your thing is in that category that  
13 they say stay out of. And I'd like you to say what you  
14 want about that.

15 MS. HARBURY: We're -- there are, of course --  
16 there is, of course, here a case within a case. There's  
17 the 1993 claims I would have brought and there's this case  
18 for --

19 QUESTION: No, no. I'm thinking of the case  
20 within the case because, after all, you have to have had a  
21 claim that a judge would have gone and addressed,  
22 otherwise the blocking you from that wouldn't have  
23 mattered.

24 MS. HARBURY: Yes, Your Honor. In 1993, the  
25 claims for emergency injunctive I would have brought,

1     although as in the redistricting cases, it's not that they  
2     don't touch on a political question, or in this case a  
3     foreign affairs question, but they would have not required  
4     the court to interfere with ongoing formation of foreign  
5     affairs. We would not, for example, have been asking that  
6     the courts of law determine whether or not our military or  
7     our CIA should be present in Guatemala or what our  
8     relationships with the Guatemalan military, which was  
9     later deemed by the United Nations to have engaged in  
10    genocide against the Mayan peasants during the war. The  
11    court would not have been required or even asked to deal  
12    with any of those issues.

13               There would have been a very limited question  
14    presented, which is may the CIA, in the absence of any  
15    extraordinary circumstances such as war or imminent  
16    national security crisis, in the absence of any of those  
17    conditions, may they request and pay for information they  
18    know is being contemporaneously extracted through the use  
19    of extreme torture and refuse to, in any way, instruct or  
20    supervise their own contractors and, in addition, shield  
21    those very assets, or informants in this case, from  
22    Congress which was trying at that time to force the  
23    Guatemalan military to better respect human rights.

24               In fact, our foreign affairs policy at that time  
25    was to promote human rights in Guatemala where the army



1 was quickly becoming an international pariah for a number  
2 of very good reasons. And these actions of rogue  
3 operators with respect to the peace process, in respect --  
4 and with respect to promotion of human rights were  
5 undercutting the foreign affairs. This Court, by taking  
6 -- or the court in the United States, by taking action in  
7 1993, would simply have settled whether or not the CIA may  
8 pay for torture in the absence of any extraordinary  
9 circumstances.

10 QUESTION: May I -- your answer raises this  
11 question in my mind. If you say you're the trial judge in  
12 1993 with the complaint coming in and you think you're  
13 right, you should get relief, do you think the relief that  
14 would have been ordered by the -- the proper relief at  
15 that time would have been simply an order not to pay any  
16 more money to the Guatemalan people, or would it have been  
17 broader relief covering all the matters you've discussed?

18 MS. HARBURY: I would have asked in 1993 for  
19 three steps to have been taken by the CIA through --  
20 through an injunctive -- through an injunction by the  
21 courts. Number one, which -- would be the obvious.  
22 Please don't ask for more information and promise to pay  
23 for it, especially when those payments are often 20 to 30  
24 times more than the annual national salary in Guatemala.  
25 And number two --

1           QUESTION: Well, let's get the first one. What  
2 would the first have been? An order -- tell me again.  
3 What -- what would the injunction say on that first point?

4           MS. HARBURY: The first point of the injunction  
5 would have been to prohibit CIA officials from requesting  
6 and promising payment for and making payment for continued  
7 information contemporaneously being extracted through the  
8 use of torture from a living prisoner. That would have  
9 been point one.

10          QUESTION: Okay.

11          MS. HARBURY: Point two would have been these  
12 are your employees. You may not refuse to engage in any  
13 proper supervision of them. You must at least sit down  
14 and talk to them and indicate to them what the parameters  
15 of human rights law are and international law.

16          And number three, you may not shield these  
17 people from the wrath of the United States Congress. You  
18 are supposed to report those matters to Congress.

19          QUESTION: And you say shield those people.  
20 Which people? Shield the members of the CIA or the people  
21 who are doing the -- the interrogating?

22          MS. HARBURY: The CIA was not properly reporting  
23 my husband's situation to Congress at the time, and the  
24 petitioners in this case were repeatedly writing to  
25 Congress saying there is no information about Mr. Bamaca

1 at all. The same statements that were being made to me  
2 were being made to everyone else. We have no information.  
3 There was so much information appropriate for  
4 declassification that I could have been inside of a court  
5 within 24 hours.

6 With regards to torture, I would like to borrow  
7 two sentences from Patrick Henry, which I find very, very  
8 appropriate today. The issue of the times was with recent  
9 memory of war on our territory and the scars and the  
10 trauma that that had left. There was an ongoing debate in  
11 Congress as to whether or not sometimes U.S. officials  
12 should be allowed to commit torture. His statement: what  
13 has distinguished our ancestors was that they would not  
14 permit torture or cruel or barbaric treatment. Congress  
15 may tell you that there is a necessity of strengthening  
16 the arm of the Government, but if we do so, we are then  
17 lost and undone.

18 This is the bright line our Government has  
19 always taken, all branches of this Government. The CIA  
20 was established in aftermath and horror that went with  
21 what happened in World War II, the Holocaust in Europe,  
22 the war crimes that occurred in the South Pacific.  
23 Treatment of prisoners of war came up again and again in  
24 In re Yamashita. It's mentioned again in Johnson --

25 QUESTION: Well, I mean, that's clearly true.

1     What in your opinion should the CIA do if it discovers  
2     that other people not in the CIA are engaged in this?

3             MS. HARBURY: Questions that I would leave to  
4     Congress and that are not raised in this case would be may  
5     -- may a CIA agent purchase information from someone known  
6     to be an unsavory character. That's not presented here.

7             The question in -- that's presented here, the  
8     facts that are presented here is when you have an  
9     extremely close and supervisory relationship with a given  
10    informant for years, you know that they are -- they are  
11    notorious as a torturer and that, in fact, they were  
12    engaged in a liquidation campaign against civilians, and  
13    you say, we want more information from the living prisoner  
14    in that room, you have the cattle prod and the pliers,  
15    here's a check for several times -- maybe 10 or 20 times  
16    your annual income -- would you please get that  
17    information for us, that is crossing the line. That's  
18    crossing a very bright line that our Government has never  
19    permitted. Our Government has allowed under certain  
20    circumstances to take life, never to torture.

21            QUESTION: Well, and I assume that -- that would  
22    have been part of your -- of your lawsuit, that you would  
23    have had to establish that it is either what? A violation  
24    of a Federal statute or of the Constitution to -- to  
25    permit torture.

1 MS. HARBURY: I -- I would be saying that  
2 carrying out torture was outside the scope of any  
3 statutory delegation of power to the CIA or in violation  
4 of its own internal policies and regulations.

5 QUESTION: You're relying on the statutes or  
6 lack of statutory authority to do it.

7 MS. HARBURY: Or in the alternative, violation  
8 of any -- any internal regulations they might have for  
9 extraordinary circumstances.

10 QUESTION: But you couldn't make it in violation  
11 of the Constitution because the D.C. Circuit threw that  
12 out. There's something just unseemly about your saying it  
13 violated a regulation to torture someone abroad, but it --  
14 I have to accept for purposes of this case that it didn't  
15 violate the U.S. Constitution.

16 MS. HARBURY: Leaving that issue aside, it  
17 certainly violated any authority ever delegated by  
18 Congress to any person, any official in this country to  
19 engage in torture. It has never -- no authority has ever  
20 been delegated at that level to any official, not even  
21 from the time of our Founding Fathers right up through the  
22 present when we've only recently continued to sign on to  
23 international treaties prohibiting torture of a human  
24 being.

25 QUESTION: You make a -- a statement that the

1 United States could have raised a national security  
2 defense, but it didn't choose to do that. What -- what do  
3 you envision to be the nature of that defense?

4 MS. HARBURY: If the petitioners wished to  
5 present to the district court an affirmative defense in  
6 the answer, which has, of course, not yet been filed --  
7 we're still at the motion to dismiss stage -- stating that  
8 somehow there were overriding national security interests  
9 which forced them or justified their actions in this case,  
10 that -- that met the strict scrutiny test of a fundamental  
11 right such as access to the courts, if they wish to make  
12 that statement and try to provide that evidence, then I  
13 would wish to come to the courts of law and provide my  
14 evidence of pretext that that -- those extraordinary  
15 circumstances of national security did not at all exist in  
16 Guatemala during this relevant time period. And it would  
17 be, of course, for the judge to decide that issue.

18 Even giving great deference to the Government  
19 position, I believe that I have evidence that would  
20 clearly establish that any such assertion was pretextual.

21 QUESTION: Well, you're not talking then about a  
22 Reynolds defense on the part of the Government where you  
23 -- where there is no evidence to presented. You're  
24 talking about something else?

25 MS. HARBURY: I'm saying -- I'm trying to

1 conjecture what the petitioners might raise because they  
2 haven't raised it yet. But the court below, the appellate  
3 court, left open that if in their answer they wished to  
4 present a claim of national security as an affirmative  
5 defense, which they have not raised to date, they're free  
6 to do so. And I'm free to answer.

7           Lastly I -- I don't believe that the 1983 -- the  
8 1993 claim would have raised any -- any undue effect or  
9 impact on our Government officials in any way. They can  
10 continue to make courtesy statements. They can continue  
11 to give the Glomar denial, which would have given me fair  
12 notice that documents might exist in their files.  
13 Instead, I was told there's nothing in this file. Maybe  
14 you should look elsewhere. So, I did. I went to  
15 Guatemala and looked in the files of the Guatemalan  
16 military, which was of itself a less than charming  
17 experience.

18           And I do believe that it's very important that  
19 we remember that even in such cases as the conduct of our  
20 military affairs in the Chappell case, for example, or in  
21 U.S. v. Stanley, although enormous latitude is given to  
22 our officials and we have decided not to engage or to  
23 provide Bivens remedies under those contexts, in all of  
24 those contexts, it has been noted that equitable relief  
25 would still be correct and adequate. So, I believe that

1 my right in 1993 to move forward and obtain equitable  
2 relief is without question.

3 Lastly, addressing the issue of -- of qualified  
4 immunity for the petitioners here, the issue of access to  
5 the courts is not a newfangled cause of action. It was  
6 stated long ago in Chambers v. the Baltimore & Ohio  
7 Railway that that right is fundamental. That right is the  
8 alternative of force. In an organized society, it is the  
9 right conservative of all other rights and lies at the  
10 foundation --

11 QUESTION: That was a full faith and credit  
12 case, was it not? The -- it wasn't an express right of  
13 access to courts claimed as a right under the United  
14 States Constitution.

15 MS. HARBURY: I believe in that case the  
16 question was the denial of the right of citizens from  
17 another State, in Ohio, to actually file suit, and similar  
18 to In re Hull, it was interpreted as barring the  
19 courthouse door.

20 QUESTION: But it was decided not under some  
21 substantive constitutional principle, but under the -- the  
22 full faith and credit or Interstate Commerce Clause, was  
23 it not?

24 MS. HARBURY: That's correct. But the Court, in  
25 discussing those issues, noted the fundamental importance



1 of the access to courts and the equal access to courts of  
2 all citizens.

3 I believe that it was clear enough and very  
4 clearly established in all of the other circuit cases and  
5 in the long line of cases, due process and access to  
6 courts that this Court has always given, that the rights  
7 that I had in 1993 as in today were very clearly  
8 established. The Government cannot take wrongful and  
9 affirmative steps, in this case intentional deceit,  
10 knowing that a person will reasonably rely to their  
11 detriment on those statements, in order to prevent them  
12 from going to the courts of law and in order to obstruct  
13 and thwart their ability to investigate their own case and  
14 gather their own information.

15 When those affirmative and wrongful steps are  
16 taken, whether it be locking a packet of evidence in a  
17 desk drawer or locking crucial information in a file  
18 cabinet and telling the person that there is none, when  
19 the Government acts to conceal information and takes  
20 wrongful steps as opposed to simply passively standing by  
21 or stating no comment, and the harm occurs as planned, and  
22 the case is not simply delayed but destroyed, in that case  
23 I think that it has been clear since Baltimore and since  
24 In re Hull and since --

25 QUESTION: Thank you -- thank you, Ms. Harbury.

1 MS. HARBURY: Thank you, Your Honor.

2 QUESTION: Mr. Cordray, you have 4 minutes  
3 remaining.

4 REBUTTAL ARGUMENT OF RICHARD A. CORDRAY

5 ON BEHALF OF THE PETITIONERS

6 MR. CORDRAY: Thank you, Your Honor.

7 At a minimum, the extent of legitimate debate  
8 today should resolve the qualified immunity issue in this  
9 case. There have been allegations made about torture,  
10 about atrocious treatment of individuals in foreign  
11 countries. It has occurred throughout this century.

12 But before the Court today is a one particular  
13 claim, that by saying we'll investigate and keep you  
14 informed, Government officials denied a substantive due  
15 process right of access to courts asserted by respondent  
16 here.

17 There is no allegation in this complaint, if you  
18 look at pages 2 to 3 of our yellow brief, which fairly  
19 restates the -- the pertinent allegations of this  
20 complaint, that these people were told there was nothing  
21 in the file. Instead, the claim was that they said we'll  
22 investigate the matter. We'll keep you informed, and that  
23 perhaps that was intentionally misleading. That's --  
24 that's the allegations here. That's all the allegations  
25 here.

1           I would also say that in terms of this chain of  
2   causation, the allegation is that at the end of the chain,  
3   Guatemalan military, who allegedly were torturing and  
4   holding rebels in the midst of a civil war, were going to  
5   refrain from conduct because payments might have been  
6   withheld by the United States -- that's extremely  
7   speculative. It's as speculative or more so than Simon  
8   and Linda R.S.

9           And finally, I would say that, again, we are  
10   distant here from any allegations of torture. The  
11   allegations are that our clients perhaps mishandled  
12   informal channels of communication about information that  
13   could have been provided that they may or may not have  
14   actually had, and -- and we think that that's just very  
15   distant from the facts that are actually alleged in the  
16   complaint in this case.

17           Maximizing a particular remedy, which is what's  
18   being sought here, does not equal barring a cause of  
19   action, and there is no legitimate constitutional claim we  
20   think that the Court could recognize based on its  
21   precedents.

22           If there are no questions, thank you very much.

23           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
24   Cordray.

25           The case is submitted.

1                   (Whereupon, at 11:59 a.m., the case in the  
2 above-entitled matter was submitted.)  
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