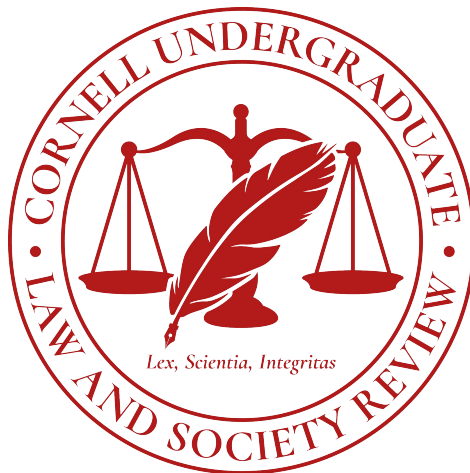


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Torture and Execution by CIA: Tort Claims

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I. Introduction

A tort is an act that gives rise to injury or harm and amounts to a civil wrong to another.¹ Every year, thousands of tort claims are filed that allege federal employees of wrongdoing and seek to recover money damages. Among the three types of personal liability claims which sound in tort, one is a liability claim premised upon an alleged violation of the U.S. Constitution.²

In 1971, federal employees violated the Fourth Amendment rights of an individual. In the ensuing legal case, *Bivens v. Six Unknown Fed. Narcotics Agents*, the Supreme Court (hereinafter “Court”) ruled that district courts may infer personal liability remedies for monetary damages. However, the Court clarified that such a remedy—referred to as the *Bivens* remedy—is subject to “special factors counsel[ing] hesitation.”³ One factor, the Court observed, that makes it inappropriate to infer a *Bivens* remedy is when Congress has “provided an equally effective alternative remedy and declared it to be a substitute for recovery under the Constitution.”⁴

Owing to such factors, the Court has shown great reticence to award a *Bivens* remedy in the post-*Bivens* era. In a particular case from 2002, *Christopher v. Harbury*, the Court refused to award *Bivens* damages to the plaintiff on the grounds that a remedy could not be used to provide an otherwise nonexistent cause of action against officers alleged to have acted unconstitutionally.

First, my paper will recount the decision-making frameworks developed in *Bivens* and in

¹ <https://www.law.cornell.edu/wex/tort>

² <https://www.justice.gov/sites/default/files/usao/legacy/2010/12/06/usab5806.pdf>

³ *Ibid.*

⁴ *Ibid.*

Harbury. Next, it will analyze how the framework used in *Bivens* applies to the decision reached in *Harbury*. This paper coincides in the historic decisions reached by the Court in both cases, viz. I affirm the reversal of the dismissal of the suit in *Bivens* and the reversal of intentional infliction of emotional distress used as an underlying cause of action in a tort claim in *Harbury*.

II. Bivens v. Six Unknown Federal Narcotics Agents

In 1965, six agents of the Federal Bureau of Narcotics confronted Webster Bivens at his home. Without a warrant, they forced their way into and searched his premises. Bivens was then handcuffed by agents in front of his wife and children and arrested on narcotics charges. Later, the agents interrogated him and subjected him to a visual strip search. Bivens, who endured humiliation and experienced mental suffering, sued each agent for \$15,000 in damages.⁵ He alleged that the agents, in addition to their actions described above, acted without probable cause and had used unreasonable force in effecting the arrest.⁶

Bivens' complaint, however, was dismissed by the U.S. District Court for the Eastern District of New York (hereinafter "NY District Court") on grounds that he failed to state a cause of action, i.e., a set of predefined factual elements that allow for a legal remedy.⁷ He appealed the decision, but the U.S. Court of Appeals for the Second Circuit (hereinafter "Second Circuit") affirmed the ruling of the NY District Court on the same basis.⁸ Believing that the agents conducted an unlawful search and arrest that violated the 4th amendment, Bivens thus appealed the Second Circuit's decision to affirm the dismissal of his suit for damages against the

⁵ <https://www.oyez.org/cases/1970/301>

⁶ <https://plus.lexis.com/api/permalink/2f7ca16e-938e-459a-a169-89a207be1947/?context=1530671>

⁷ https://www.law.cornell.edu/wex/cause_of_action

⁸ <https://plus.lexis.com/api/permalink/2f7ca16e-938e-459a-a169->

respondents.⁹

On January 12, 1971, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (hereinafter “*Bivens*”) was brought to the Supreme Court (hereinafter “Court”). The Court reversed and remanded on writ of certiorari: an order by a higher court for a lower court to deliver its record in a case for review.¹⁰ The agents argued that Bivens’ right to damages for an invasion of state-created right to privacy was available only in a state court applying state law. In the event that a constitutional violation be found, they asserted that they would stand before state law as private citizens. However, the Court disagreed, positing that the relationship between unconstitutionally acting federal agents and a private citizen differs from that between exclusively private citizens. In fact, the Court ruled that the Fourth Amendment “did not proscribe only the acts engaged in by private citizens that were condemned by state law.”¹¹ Since the agents had a greater capacity for harm, the Court also reasoned that the Fourth Amendment (hereinafter “Fourth”) limited that exercise of federal power. Furthermore, the Court considered that the Fourth’s guarantee against unreasonable searches might be inconsistent with the interests of state laws that regulate invasion of privacy. Finally, the Court put forth that the awarding of damages to the petitioner, Bivens, following a violation of the Fourth by federal agents was a remedy normally available in federal courts.¹²

Around six months later, the Court decided 5-4 to reverse the judgement that affirmed the dismissal of the petitioner’s suit for damages against federal agents. In the majority opinion

⁹ <https://www.justice.gov/osg/brief/christopher-v-harbury-amicus-merits>

¹⁰ https://www.law.cornell.edu/wex/writ_of_certiorari

¹¹ <https://plus.lexis.com/api/permalink/2f7ea16e-938e-459a-a169-89a207be1947/?context=1530671>

¹² *Ibid.*

written by William Brennan Jr., the unconstitutional conduct of the federal agent who acted under the guise of federal authority was a violation of the Fourth and subsequently gave rise to a federal cause of action for damages.¹³ The Court also held that a federal remedy for an unlawful search and arrest in violation of the Fourth is not limited to conduct condemned by state law.

III. Christopher v. Harbury

In March 1992, Efraim Bamaca-Velasquez disappeared in Guatemala. Bamaca – the leader of rebel Guatemalan National Revolutionary Union [a] – was detained by Guatemalan army forces, which included Central Intelligence Agency (hereinafter “CIA”) informants.¹⁴ To obtain information of interest, the CIA detained and tortured Bamaca for more than a year. Then, sometime before September 1993, he was executed by the very Guatemalan officers affiliated with the CIA.

During the time that Bamaca was in captivity and alive, Jennifer Harbury, U.S. citizen and his then-wife, learned according to an eyewitness that her husband was being tortured. In March 1993, she contacted several unnamed State Department (hereinafter “SD”) officials to express concerns about Bamaca. While officials “promised to look into the matter and to assist her,” they did not share information about Bamaca with her or the public despite CIA reports from May 1993 confirming that he was still alive. In August 1993, Harbury was advised by Marilyn McAfee – Ambassador to Guatemala – to “submit a written report that the remains found in a grave purported to be Bamaca’s were not his,” as Harbury promptly did. McAfee also promised to “investigate the matter immediately[,] report her findings,” and keep Harbury

¹³ *Ibid.*

¹⁴ <https://supreme.justia.com/cases/federal/us/536/403/>

“properly informed regarding her husband’s situation.”¹⁵ However, she did not give Harbury any information.

In January 1995, Harbury suspected that information was being improperly withheld from her; thus, she filed Freedom of Information Act requests with the SD, the National Security Council (hereinafter “NSC”), the CIA, and other federal agencies. Her requests were expedited, but she claimed that she received no documents “in the following months.”¹⁶ In fact, three months later, officials told Harbury that “they believed Bamaca was dead because so many years had passed without evidence that he was alive.”¹⁷ In order to focus public attention on her husband’s plight, Harbury engaged in a week-long hunger strike in Guatemala in September 1993, the same month that the U.S. Government (hereinafter “Government”) received confirmation that Bamaca died.¹⁸ Despite her efforts, the SD told her nothing.

The Government’s deceptions and omissions continued and intensified following Bamaca’s death.¹⁹ From October 1993 to March 1995, officials repeatedly met and communicated with Harbury to convey that they knew nothing concrete, but that they were seeking concrete information and would keep her informed. In fact, National Security Adviser Anthony Lake told Harbury in November 1994 that the Government had “scraped the bottom of the barrel to no avail.”²⁰ Only in March 1995 did Harbury learn the truth: in a public announcement, then-Congressman Robert Torricelli shared that Bamaca had been killed by order

¹⁵ *Ibid.*

¹⁶ <https://www.justice.gov/osg/brief/christopher-v-harbury-amicus-merits>

¹⁷ *Ibid.*

¹⁸ <https://supreme.justia.com/cases/federal/us/536/403/>

¹⁹ *Ibid.*

²⁰ *Ibid.*

of a Guatemalan army colonel who was a paid agent of the CIA.

One year after Torricelli's announcement, Harbury filed suit in the District Court for District of Columbia (hereinafter "DC") against the CIA, SD, and NSC and members of each in their official and individual capacities. Seeking punitive and compensatory damages, Harbury listed in her complaint 28 causes of action under federal, state, and international law to broadly accuse officials of

1. Failing to provide her with all the information in their possession, or accessible to them
2. Violating her "Right to Meaningful Access to the Courts."

In particular, SD officials made "fraudulent statements and intentional omissions" about Bamaca's exact whereabouts and status that prevented her from "effectively seeking adequate legal redress."²¹ Officials, Harbury believed, "did not want to threaten their ability to obtain information from Mr. Bamaca" and feared "public embarrassment, censure, and/or legal liability."²²

In all, Harbury's complaint sought relief in four categories other than access-to-courts:

1. On behalf of Bamaca's estate, she raised claims on the theory of *Bivens* against CIA defendants under the Due Process Clause of the Fifth Amendment for his imprisonment, torture, and execution.

²¹ <https://www.justice.gov/osg/brief/christopher-v-harbury-amicus-merits>

²² *Ibid.*

2. On her own behalf, she sued all Government defendants for violating her “right to familial integrity” under the First, Fifth, and Ninth Amendments.
3. She alleged common-law torts, invoking the Federal Tort Claims Act
 - a. On behalf of both herself and her husband’s estate against CIA defendants
 - b. On behalf of her husband’s estate against CIA defendants
 - c. On her own behalf against SD
4. On her own behalf and husband’s estate, she brought a tort claim said to arise under international law against CIA defendants.

In addition to these counts for direct harm, Harbury raised claims based on the First and Fifth Amendments that the deception of SD and NSC defendants unconstitutionally impeded her rights to speak freely and to petition the Government and impeded her access to courts. The theory of access to courts, which Harbury herself did not allege, states that if officials shared what they knew or simply said “no comment” rather than affirmatively misleading Harbury into thinking they were doing something, then she might have been able “to take appropriate actions to save her husband’s life” In such a manner, the agents foreclosed Harbury from “effectively seeking adequate legal redress.”²³

However, the DC dismissed all accounts for declaratory and injunctive relief and all *Bivens* counts on the grounds that Harbury failed to state a claim. Regarding Harbury’s access to-courts claims, the DC acknowledged that although conspiracies circulated that agents may

²³ <https://supreme.justia.com/cases/federal/us/536/403/>

“destroy or cover-up evidence of a crime that render a plaintiff’s judicial remedies inadequate or ineffective” which violate the right of access, Harbury had not stated a valid cause of action. For one, Harbury had filed no prior suit, so she had “nothing more than a guess” as to how the alleged cover-up might “have prejudiced her rights to bring a separate action.” Second, the defendants would be entitled to qualified immunity. The alleged officers, the DC reasoned, did not act contrary to “clearly established constitutional norms that a reasonable official would understand” in being less than “forthcoming in discussing the intelligence that they received.”²⁴

With respect to the DC ruling, Harbury did not pursue her claims for declaratory and injunctive relief but appealed only the dismissal of the *Bivens* causes of action. The Court of Appeals for the District of Columbia Circuit (hereinafter “Court of Appeals”) affirmed the dismissal of those *Bivens* claims that concerned violations of Bamaca’s due process rights, Harbury’s rights of familial association, and her free speech and petition rights. However, it reversed the dismissal of *Bivens* claims against SD and NSC defendants for denial of access to courts.

The Court of Appeals reasoned that a plaintiff, such as Harbury, who merely alleges without factual basis generally falls short of raising a claim for denial of access to courts. In the conduct of an ongoing lawsuit, “key witnesses . . . may now be dead or missing, . . . crucial evidence may have been destroyed, and . . . memories may have faded.”²⁵ However, it held that Harbury’s allegations stated a valid access claim insofar as she proclaimed that the Government’s conduct “effectively prevented her from seeking emergency injunctive relief in time to save her

²⁴ *Ibid.*

²⁵ *Ibid.*

husband's life." The Court of Appeals went on to conclude that "because [Bamaca's] death completely foreclosed this avenue of relief, nothing would be gained by requiring Harbury to postpone this aspect of her access to courts cause of action until she finishes prosecuting her tort claims."²⁶ Furthermore, it asserted that qualified immunity – protection against lawsuits other than those suits in which an official violates a "clearly established" statutory or constitutional right – would not bar suit.²⁷

IV. Harbury in the United States Supreme Court

On June 20, 2002, the Court reversed in *Christopher v. Harbury*, 536 U.S. 403 (hereinafter "*Harbury*") the judgment of the Court of Appeals that dismissed Harbury's claim. The Court was granted certiorari because of the importance of the particular issue to the Government in its conduct of foreign affairs. The Court generally deals with two categories of denial of access to courts claims. The first category involves claims that systemic official action discourages a plaintiff in preparing and filing suits at the present time. The second surrounds claims that cannot be tried or which have been tried with all available evidence.

The official acts alleged by Harbury to have denied her access may have also caused the loss or inadequate settlement of a case likely to succeed on its merits. Additionally, Harbury alleged that she may have lost an opportunity to seek some particular order of relief. The Court identified *Harbury* as a case which fits the second category: it does not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable.²⁸ Thus, the Court

²⁶ *Ibid.*

²⁷ https://www.law.cornell.edu/wex/qualified_immunity

²⁸ <https://supreme.justia.com/cases/federal/us/536/403/>

established that Harbury was seeking judgment in the access claim itself, rather than in a future lawsuit, to provide herself relief obtainable at the present time

The framework employed to recognize any kind of access claim is to see if the claim stands such that the Government must provide some effective vindication for the plaintiff's separate right to seek judicial relief for some wrong. The Court recognized that its framework rests on the recognition that the right to seek relief is additional to the underlying claim; without an underlying claim, a plaintiff could not have suffered injury by being shut out of court. It held that the plaintiff must identify a "nonfrivolous and arguable" underlying cause of action in their complaint, and the allegations about the official acts that frustrate the litigation. Because Harbury's access claim looked backward, she was called to identify a remedy that may be awarded (but not otherwise available in some suit that may yet to be brought, because "there is no point in establishing facts constituting denial of access case when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element").²⁹ Allegations, in addition, must adequately inform the defendant. In other words, the Court warned Harbury to take care in identifying the claim for relief underlying the access-to-courts plea.

In sum, the right of a defendant in a backward-looking access suit to obtain early dismissal of a hopelessly incomplete claim for relief coincides in *Harbury* with the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly.³⁰

²⁹ *Ibid.*

³⁰ *Ibid.*

V. Analysis

Harbury's various requests for relief, however, were described by the District Judge overseeing her as "nearly unintelligible."³¹ The Court of Appeals, while appreciative of the anguish in Harbury's claims (which for that reason are impossible to quote in this paper), was also frustrated in identifying a predicate claim and in identifying a need for relief otherwise unattainable. On the same grounds, the Court argued that Harbury's complaint was insufficient in its claim for denial of access upon which relief could be granted. However, Harbury's counsel was allowed an opportunity to supply the missing allegations, which were that Harbury would have brought an action for intentional infliction of emotional distress as a wrong for which she could have sought the injunctive relief that might have saved Bamaca's life.

The Court of Appeals accepted the theory that the adequate legal compensation for the wrong meant emergency injunctive relief in a now futile lawsuit for intentional infliction of emotional distress. The amendment was therefore accepted by the Court of Appeals as a sufficient statement of an underlying cause of action.

However, the Court thought that this amendment was an error. For even if Harbury could get over the difficulties raised from defining the underlying claim as an intentional infliction of emotional distress, she could not satisfy the requirement that her backward looking denial-of access claim must provide a remedy that cannot be obtained on an existing claim. While the Court argued in *Bivens* that the awarding of damages to a plaintiff who suffered a civil rights

³¹ *Ibid.*

violation is normally available in federal courts, it clarified an additional condition under which remedy may be offered. That condition is that the petitioner provide a sufficient statement of an underlying cause of action, which in *Bivens* was provided.

The Court dismissed the conduct of federal agents without deciding whether Harbury's rights were violated, but instead on the basis that what Harbury intended to claim as an infliction of emotional distress was already set out in the counts in her complaint that names the CIA defendants, including the Guatemalan officer who killed Bamaca. In pursuing a denial of access to courts, Harbury failed to seek any relief that would be otherwise unavailable.³² Harbury, who could only allege, thus failed to identify cause of action upon which redress would have been possible for her. In *Bivens*, the Court employed the same framework as it did in *Harbury* to award damages because the cause of action put forth was used as justification to receive relief only available with that particular cause of action. However, the death of Bamaca had already obviated the need for federal relief to be awarded to Harbury, and other remedies for the officials' alleged misconduct which normally remained available became inaccessible when she pursued a claim for denial of access to the courts.³³

The Court thereby reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with this opinion.

³² <https://plus.lexis.com/api/permalink/5df9b9da-96a4-4bba-88ba3a385e9ac42a/?context=1530671>

³³ *Ibid.*

VI. Conclusion

The framework provided in *Bivens* and applied to *Harbury* shows that the latter defined tighter conditions under which federal relief may be awarded. More precisely, the Court explicated in *Harbury* that the definition of a “nonfrivolous” underlying cause of action must be used in federal complaints. Additionally, the relief sought in an access-to-court claim must be a distinct relief from reliefs sought in other claims.

The decision put forth *Harbury* cautions petitioners who seek compensation for a cause of action to thoughtfully define the unconstitutional conduct at hand and corresponding relief thereof. For it is unconstitutional to ask the Court to review an identical case more than once. Otherwise, inconsistencies may arise from subsequent judgements that cause Court decisions – which would be subject to frequent modifications – to lose their respect and cogency.

The unconstitutional violation of Webster Bivens’ civil liberties and moral misconduct towards Jennifer Harbury were events that made us appreciate the existence of reasoned discourse through which we define condemnable acts, including acts done under the guise of federal orders. The opinion of the District of Columbia Circuit encapsulates this debate: “it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit.”