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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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1 P R O C E E D I N G S

2 (11:00 a.m.)

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

6 Mr. Cordray.

7 ORAL ARGUMENT OF RICHARD A. CORDRAY

8 ON BEHALF OF THE PETITIONERS

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

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

17 The substantive due process right of access
18 claim urged here is extremely expansive and unsupported by
19 the Court's precedents. Our position boils down to this.
20 The right of access is not violated unless an individual
21 is, in fact, barred from filing claims in the courts. In
22 limited circumstances, far different from those at issue
23 here, the Court has recognized that an actual bar to
24 access in the courts implicates the Due Process Clause.
25 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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