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## When Can the Government's Misrepresentations Give Rise to a Constitutional Tort?

by Antonio F. Perez

PREVIEW of United States Supreme Court Cases, pages 307-311. © 2002 American Bar Association.

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### ISSUES

Can allegations that senior State Department and National Security Council officials failed to inform a U.S. citizen that her foreign citizen husband was in foreign custody suffice to allege a denial of access to the courts in violation of the Fifth Amendment so as to give rise to a constitutional tort even absent any allegation that the plaintiff tried to file a lawsuit or was actually hindered in doing so?

If so, was that right clearly established as of the time of the government officials' conduct so as to defeat a defense of qualified immunity?

### FACTS

Jennifer Harbury, the respondent in this case, is an American citizen and the widow of Efrain Bamaca-Velazquez, a Guatemalan citizen and high-ranking commander of a Guatemalan rebel group. After Bamaca-Velazquez vanished on March 12, 1992, and despite Guatemalan army claims that he

had committed suicide during an armed skirmish, Harbury allegedly learned in early 1993 from an escaped prisoner that her husband was alive, in Guatemalan army custody, and being tortured.

She alleges that she contacted State Department officials in March 1993 and sought their assistance, and that they in turn promised to look into the matter. The State Department never supplied any information, she alleges, although it is now clear that it was aware that Bamaca-Velazquez was in the custody of members of the Guatemalan military, which included paid CIA informants. Indeed, she alleges that in August of that year she obtained permission to exhume a body from a grave erroneously thought to be that of her husband, which she then reported to the State Department, which again indicated it would investigate and keep her informed.

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CHRISTOPHER ET AL. V. HARBURY  
DOCKET NO. 01-394

ARGUMENT DATE:  
MARCH 18, 2002  
FROM: THE DISTRICT  
OF COLUMBIA CIRCUIT

# Case at a Glance

Jennifer Harbury says that State Department and National Security Council officials knowingly failed to alert her to the circumstances surrounding her husband's detention by the Guatemalan military in time for her to prevent his death. The nature of the constitutional right to access to the courts is now at issue in this case in which Harbury seeks to hold the former U.S. secretary of state and other senior officials personally liable.



It is alleged that Bamaca-Velazquez was executed sometime between March and September of 1993.

Between October 1993 and October 1994, Harbury met repeatedly with State Department officials, who she says assured her that they were looking into the matter and that the Guatemalan military had assured them that they did not have and had never had custody of Bamaca-Velazquez. Prompted in part by Harbury's 32-day hunger strike in Guatemala City, the CBS news program *60 Minutes* investigated and in October 1994 reported that the U.S. embassy in Guatemala had received an intelligence report indicating that Bamaca-Velazquez had been captured alive. Only then did the State Department publicly confirm his capture while still indicating that it had no independent evidence concerning whether he was alive.

Shortly thereafter, Harbury met with National Security Adviser Anthony Lake, who told her the government had "scraped the bottom of the barrel" for further information about her husband, but to no avail. Nonetheless, in January 1995, Harbury filed a Freedom of Information Act (FOIA) request. She did not, however, receive any documents until after she filed two lawsuits in federal court to press those FOIA requests. See *Harbury v. CIA*, No. 95-CV-1431 (D.D.C. filed July 31, 1995; stipulation of dismissal filed Jan. 28, 1999); *Harbury v. Department of State, et al.*, No. 97-CV-305 (D.D.C., filed Feb. 14, 1997; stipulation of dismissal filed Jan. 28, 1999). The government now appears to concede that many of those documents could have been declassified and made available at the time of the initial FOIA requests. In March 1995, after being told by State Department and NSC officials that her husband was probably dead because so much time

had passed, Harbury began another hunger strike. At this point, Congressman Bob Torricelli announced publicly that Bamaca-Velazquez had been murdered at the direction of a Guatemalan army officer who had also been a paid CIA informant.

Harbury filed suit in 1996, claiming that the State Department and National Security Council (NSC) officials knowingly failed to alert her to the true state of affairs for the purpose and with the effect of delaying her from filing suit and thereby abridging her constitutional right of access to the courts. She asserts that the misrepresentations by the individuals named in her complaint, including the secretary of state and national security adviser, in effect prevented her from seeking judicial relief that might have prevented her husband's execution or continued torture. She also asserts that if the government had not misled her, she might have been able to obtain documents earlier by commencing an action under the Freedom of Information Act and might have been able to seek the assistance of Congress.

Relying on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a constitutional tort remedy of money damages for violation of Fourth Amendment rights), Harbury asserted that the officials named in her complaint had committed a constitutional tort entitling her to an award of damages.

Judge Kollar-Kotelly of the D.C. Circuit dismissed Harbury's *Bivens* claim that sought damages for the alleged violations of her constitutional rights but allowed Harbury's additional claims against the federal government under the Federal Tort Claims Act (FTCA) to proceed. (To the extent those claims proceed on

the basis of a misrepresentation theory, however, they may well fail under the FTCA's "misrepresentation exception," which provides that the United States's waiver of sovereign immunity does not apply to "any claim arising out of ... misrepresentation." 28 USC § 2860(h).)

Judge Kollar-Kotelly held that Harbury's denial of access-to-courts claim foundered on her failure to allege any actual attempt on her part to file suit, and, in the alternative, that this *Bivens* action was defeated by the qualified immunity accorded government officials when, as here, the asserted constitutional right was not clearly established law at the time of the alleged constitutional violation.

The Court of Appeals for the D.C. Circuit (Judges Edwards, Ginsburg, and Tatel) reversed the dismissal of the *Bivens* claim. The panel asserted that government misrepresentation could have impaired Harbury's ability to pursue effective injunctive relief along the lines described in her complaint, and it specifically rejected the so-called exhaustion requirement—that is, the argument that she should have made an effort to actually file suit—because the potential for irreparable harm from the government's conduct rendered the exhaustion requirement inapplicable. The panel also rejected the government's qualified immunity defense, reasoning from prior cases that qualified immunity is unavailable in cases in which the plaintiff was "affirmatively misled" by government officials.

The court of appeals recognized that its holding may be in conflict with the decisions of the Sixth and Ninth Circuits, which have imposed an exhaustion requirement on constitutional torts grounded on denial of access to courts. See *Swetel v. City of River Rouge*, 119 F.3d 1259 (6th



Cir. 1997); and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). Nonetheless, the D.C. Circuit denied the defendants' petition for rehearing *en banc*. See *Harbury v. Deutch*, 244 F.3d 960 (D.C. Cir. 2001). The Supreme Court granted the defendants' petition for a writ of certiorari on December 10, 2001, and scheduled oral argument for March 25, 2002.

Harbury has chosen to appear before the Court as her own counsel, while her former counsel, Jenner & Block, LLC, has filed an *amicus* brief on behalf of the Brennan Institute for Justice in support of her position.

### CASE ANALYSIS

This case comes to the Supreme Court in the wake of a series of recent cases signaling a majority of the Court's intention to narrow *Bivens* cases to their particular facts. Last term's *Correctional Servs. Corp. v. Malesko*, for example, refused to extend the doctrine so as to permit an action against an independent contractor's performing correctional services, largely because the contractors would not benefit from qualified immunity and, therefore, state law remedies would still be available. See 122 S. Ct. 515, 521 (2001). Indeed, in *Davis v. Passman*, 442 U.S. 228 (1979), the only case in which the Court has found a constitutional tort arising from the violation of the Fifth Amendment's due process clause, the Supreme Court made clear that the critical element of the plaintiff's argument was the absence of any other remedy for the plaintiff's claim against a sitting congressman for violation of her rights under the equal protection component of the Fifth Amendment's due process clause.

Thus, the precise nature of the constitutional right of access to the

courts will be an issue in this case. If the right to access that Harbury seeks to vindicate is premised on the assertion of claims for monetary relief against government officials in their individual capacity, then the qualified immunity of these officials may well bring her claim within the central rationale of *Bivens*: that there is an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights. However, Harbury's central claim is that deception by government officials prevented (or, perhaps better, dissuaded) her from seeking other kinds of judicial relief, such as an order enjoining Bamaca-Velazquez's execution or continued torture, and that it prevented her from bringing her FOIA action at an earlier date and exercising her First Amendment right to petition the Congress either directly or through the media.

The petitioners (former Secretary of State Warren Christopher and other government officials) argue that Harbury's right of access to the courts is grounded primarily on the possibility that injunctive relief might have saved her husband's life. They further argue, as does the U.S. government as *amicus curiae*, that Harbury lacks standing to advance such a claim. First, even affirmative misrepresentation by defendants would not have caused her husband's torture and death. Second, because a U.S. court would lack jurisdiction to order the Guatemalan army not to murder one of its prisoners, no threatened harm to Harbury would be redressable through injunctive relief. The petitioners therefore argue that since Harbury failed to satisfy the core constitutional requirements for standing, any possible "denial of access" to courts through government misrepresentation is in reality a "blithe skein of conjecture." Brief for Petitioners, at 30.

To the extent Harbury grounds her access to courts claim on the right to seek information alone, the petitioners note that the Court has previously been reticent to imply constitutional torts to protect interests when "Congress has provided what it considers to be adequate remedial mechanism for constitutional violations." *Zschweiker v. Chilichy*, 487 U.S. 412, 423 (1983). The petitioners thus reason that the existence of FOIA counsels against the implication of a *Bivens* remedy in this case. In response, Harbury argues that the due process clause requires fair notice and an opportunity to be heard. Thus, even if causation and redressability are unclear, she was nevertheless entitled to a hearing on her claims and not to be misled into not pursuing her rights.

If the Court chooses not to resolve the case on the basis of the unique features of the kind of relief Harbury sought, it may confront the split between the D.C. Circuit, on the one hand, and the Sixth and Ninth Circuits, on the other, over whether the right of access to the courts is predicated on the litigant's making an initial effort to bring suit. The nub of Harbury's claim, however, is that her failure to satisfy the exhaustion requirement, on the particular facts of her case, is excused by governmental misconduct. In a sense, she argues, the named officials should be barred (that is, "estopped") from pleading the exhaustion requirement. Indeed, the court of appeals opinion could be read as carving out an exception to the exhaustion requirement on the particular facts of this case, rather than posing a direct conflict with the Sixth and Ninth Circuits.

The Court, however, may well sidestep these narrower questions in order to address the fundamental question raised by this case; that is,

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to what degree must the government cooperate in a citizen's exercise of her right to access to the courts? Much of the debate may turn on the meaning of the Court's precedents. In *Boddie v. Connecticut*, 401 U.S. 371 (1977), the Court extended the access to courts right to encompass an inability to pay the required costs for obtaining a divorce. The Court has imposed even more onerous requirements on the government in the prison context, where the government's control over the prisoner would otherwise diminish her ability to exercise her rights vigorously. In *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court stated that prison officials must "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in law." However, the Court later purported to disavow the suggestion that "the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court." See *Lewis v. Casey*, 518 U.S. 343, 354 (1996)(emphasis in original).

It is an open question whether the Court will analogize Harbury's situation, because of her limited ability to seek the truth about her husband's situation and her limited ability to protect her family from foreign oppression, to that of prisoners who are largely dependent on the government. If the Court does make that analogy (or, perhaps, if the Court finds there was a voluntary undertaking by State Department and NSC officials of a duty to investigate, through their oral commitments to Harbury), it may well be more willing to find a greater duty for governmental cooperation in Harbury's efforts to enlist the courts' help in saving her husband's life. If so, then the government's affirmative misrepresentations might have operated as a

denial of the kind of assistance or information that the *Bounds* Court believed was a duty of the state to provide in order to facilitate the exercise of the constitutional right to access to the courts. The petitioners and United States are likely to reiterate the core background proposition, most recently clarified in *Deshaney v. Winnebago County Dep't of Social Servs.* 489 U.S.189 (1989), that individual rights are protected from governmental deprivation only, and that as a general matter the government has no duty to facilitate their exercise.

Moreover, the petitioners and the United States as *amicus curiae* contend, even if the Court finds there was some governmental duty to cooperate in Harbury's exercise of her right to access to the courts, the line between affirmative governmental misrepresentation and a mere failure to disclose would be impossible to draw in this particular factual context. In substance, petitioners and the United States contend that there are circumstances in which U.S. officials might even be required to affirmatively deceive U.S. nationals in order to protect classified information, including matters of the highest national security concern. Moreover, such nonactionable "nondisclosure" would be indistinguishable from affirmative misrepresentation because, in any case in which classified information needed to be protected, the government officials could never in fact choose to be completely silent in their interactions with the person seeking that information and thus any misleading or deceptive communications on their part might cross the line Harbury would have the Court draw. Indeed, a government official's motive in any case in which classified information is involved is precisely to prevent the dissemination of that information, including through judicial discovery. In short,

the Court may well find that Harbury's proposed test is a distinction without a genuine difference.

On the one hand, Harbury argues that recognition of a government official's privilege to lie to American citizens seeking to exercise their right to access to courts opens the door to a parade of horrors. She even offers a hypothetical case in which the United States develops a relationship with groups smuggling undocumented aliens into the United States in order to obtain information about narcotics smuggling, and that network engages in the kidnapping of young American women for a prostitution network. She suggests that, under the government and petitioners' theory of the case, U.S. Customs officials could lie to the children's U.S. parents and deny them information about their daughters. Respondents Brief, at 17. Even if Harbury's own case is distinguishable from the hypothetical she supposes, her larger point will command the Court's attention: When do government officials possessing specific information regarding threats to the health or safety of American citizens or their families have a duty to disclose that information? Conversely, what are the costs of chilling effective government handling of information relating to those kinds of threats?

### SIGNIFICANCE

Harbury, while asserting the violation of her matrimonial rights under the due process clause, does not appear to have relied on the government's duty under the privileges and immunities clause to seek to protect her while she is abroad. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) (establishing a federal citizen's right to federal protection overseas). The right of citizens to the assistance of their government has, in the wake of recent events, become a more pressing



constitutional concern. That said, the Court may well be loath in this time of crisis to do or say anything that appears to hamstring executive energy in the war against terrorism.

Qualified immunity ordinarily protects federal officers from fear that they will be personally liable for actions within the "outer perimeter" of their official responsibilities. One should expect as narrow a holding as possible in this case, doing as little damage as possible to qualified immunity yet leaving the door open to particularly egregious cases. While Harbury rightly asserts that her allegations are to be taken as true for purposes of a motion to dismiss, this is clearly not a case in which government officials directed her husband's torture and execution. A war against terrorism may well require retaining the confidence of some fairly nasty individuals. Betraying their secrets may in the short term protect the rights of some individual Americans; yet the Court may well feel it is in no position in this case to burden the government's ability to pursue the common good.

## **ATTORNEYS FOR THE PARTIES**

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