

Tuesday, August 19, 2008

**Plame and Wilson lose on appeal against Libby and company.**

Â Bill of Rights.Â (From the public domain.)Â Â For awhile, the Valerie Plame/Joe Wilson/Scooter Libby story went on the backburner. Then, in late July 2008, Robert Novak -- whose column blowing Plame's CIA cover led to the prosecution and conviction of Libby -- hit a pedestrian and kept driving, followed by an announcement shortly thereafter of his malignant brain cancer and retirement. Â Not long thereafter, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit voted 2-1 (JudgesÂ Sentelle and Henderson affirming and Judge Rogers concurring in part and dissenting in part)Â to uphold the dismissal of Plame's and Wilson's lawsuit against Libby and company over damages allegedly caused by the revelation of Plame's covert CIA status. *Wilson, et al., v. Libby, et al.*, \_\_\_ F.3d \_ (D.C. Cir., Aug. 12, 2008). Â Plame and Wilson's suit seeksÂ damages for Constitutional violations under *Webster Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which is a case governing private party lawsuits against federal officials for Constitutional violations. In affirming the dismissal of Plame's and Wilson's lawsuit, the Court of Appeals stated: "We have discretion in some circumstances to create a remedy against federal officials for constitutional violations, but we must decline to exercise that discretion where 'special factors counsel[] hesitation' in doing so. See *Bivens*, 403 U.S. at 396; *Spagnola v. Mathis*, 859 F.2d 223, 226 (D.C. Cir. 1988) (en banc). In *Bivens*, the Court implied a remedy where there were no "â€"special factors counselling hesitation in the absence of affirmative action by Congressâ€" that required 'the judiciary [to] decline to exercise its discretion in favor of creating damages remedies against federal officials.'" *Spagnola*, 859 F.2d at 226 (quoting *Bivens*, 403 U.S. at 396)." Here, the Court of Appeals found that the Privacy Act provided a remedial scheme for Plame and Wilson that precluded a *Bivens* action. Â The D.C. Circuit further declared: "Litigation of the Wilsonsâ€™ allegations would inevitably require an inquiry into 'classified information that may undermine ongoing covert operations.' See *Tenet*, 544 U.S. at 11. The amended complaint alleges that the disclosure of Valerie Plame Wilsonâ€™s identity 'impaired . . . her ability to carry out her duties at the CIA,' Am. Compl. Â¶ 43, increased the risk of violence to her and her family, id. at Â¶ 42, and subjected her to treatment different from that given other similarly situated agents, id. at Â¶ 51â€“52. We certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents. In cases involving covert espionage agreements, '[t]he state secrets privilege and the more frequent use of in camera judicial proceedings simply cannot provide the absolute protection [the Court] found necessary in enunciating the Totten rule.' *Tenet*, 544 U.S. at 11. Here, although *Totten* does not bar the suit, the concerns justifying the *Totten* doctrine provide further support for our decision that a *Bivens* cause of action is not warranted."Â Responding to the majority, Judge Rogers wrapped it up as follows: "In conclusion, the courtâ€™s decision is not the product of the application of the *Bivens* doctrine to appellantsâ€™ claims as *Wilkie* directs, 127 S. Ct. at 2598. It is rather the result of the refusal to acknowledge precedent that *Bivens* is a remedial doctrine and absent special factors applies where Congress created statutory protection for some persons in some circumstances but did not address the type of constitutional claims alleged by Mr. Wilson and in part by Ms. Wilson. The disclosure concerns identified by the court as counselling hesitation are either unfounded or premature because there has been no discovery or presentation by the Wilsons to the district court of how they will attempt toÂ prove their claims. Contrary to separation of powers, then, the court effectively cedes to Congress the judiciaryâ€™s defined role to decide issues arising under the Constitution, despite the fact that the Privacy Act neither is nor purports to be a universal bar to all constitutional relief related to the release of agency records. Accordingly, I concur in Parts II and III.B of the courtâ€™s opinion, and in the judgment regarding Ms. Wilsonâ€™s equal protection and due process property claims, but I respectfully dissent from the affirmance of the dismissal of Mr. Wilsonâ€™s First and Fifth Amendment claims against each appellee and Ms. Wilsonâ€™s due process state-endangerment claims (except against appellee Armitage), and would leave to the district court to address in the first instance appelleesâ€™ defenses of immunity, see, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Davis*, 442 U.S. at 249; *Butera*, 235 F.3d at 646."Â Judge Rogers' partial dissent/partial concurrence provides very strong arguments to increase the chances ofÂ en banc review by the entire District of Columbia Circuit over the very critical issue of when to permit and not permit a *Bivens* action to proceed forward. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00