ONCE AGAIN, THE FEDERAL GOVERNMENT USES VALERIE TO SCREW JOE

I'm not so much surprised that Judges Sentelle and Henderson dismissed the Wilsons' appeal yesterday—I'm more surprised by the false ignorance through which they dismiss the Wilsons' Bivens complaint (a Bivens claim allows a person to sue federal agents when they violate that person's constitutional rights).

At the rhetorical foundation of Sentelle's opinion lies the repetition of one of the biggest myths about the Plame leak—that Rove (and for that matter, Libby and his secret July 9 conversation with Novak) had nothing to do with Robert Novak's article outing Plame, that Armitage acted alone.

> In July, Libby talked to Judith Miller of The New York Times and to Matthew Cooper of Time magazine; **Karl Rove talked to Matthew Cooper of Time magazine and to Chris Matthews, host of MSNBC's "Hardball;"** and Deputy Secretary of State Richard **Armitage met with reporter Robert Novak.** Armitage, who had learned of Valerie Wilson's CIA employment from a State Department memo, told Novak that Valerie Wilson worked at the CIA on issues relating to weapons of mass destruction. Novak then wrote an article that was published in several newspapers, including The Washington Post and the Chicago Sun Times, on July 14, 2003.
>
> [snip]
>
> The publication was the result of a disclosure by Deputy Secretary of State Armitage of information about an individual contained in State Department

> records.

Um, sure, the publication was the result of a disclosure by Blabby Armitage. But then, that State Department memo was written as a direct result of Libby's own oppo research, so it was also the result of Libby's attempt to gather dirt on Joe Wilson. And of course, Novak wouldn't have written his column without the "confirmation" from Rove, who got his information from some other source; he has always denied seeing the INR memo. So it is likely that that letter also was the result of Dick Cheney's own efforts to collect information with which to embarrass Wilson. (Novak's column was also the result of the Off the Record club brokering the leak, too—private citizens who could have much more easily been sued, but that's a weakness in the Wilsons' suit, not the Court's opinion.)

I suspect there's a reason for the Court's feigned ignorance here. It's that they want to dismiss any Bivens claim based on the availability of an alternate remedy—the Privacy Act. Sentelle argues that Dick and Scooter and Karl are immune from the Privacy Act because they were in the Vice President's and President's offices, and therefore not in an agency subject to the Privacy Act. (Yes, that does mean that if Dick Cheney or his sidekick Mr. Germ leaked all the information about Hatfill, they would have been immune from suit there too.) But the State Department does qualify as an agency, and therefore Armitage could have been sued under the Privacy Act. By focusing on Armitage, then, the Court gets to point to the Privacy Act as a legitimate means of recourse, and therefore ignore the Bivens claim.

> The first problem with this argument is that the Wilsons, unlike the plaintiffs in Davis and Bivens, can seek at least some remedy under the Privacy Act. At the least, as they concede, Valerie Wilson has a possible claim based on the

> disclosure by Deputy Secretary of State Armitage because the information disclosed about her and the agency involved in the disclosure are subject to the Privacy Act's restrictions.

Which brings us to the other problem—one ~~Janice Rogers Brown~~ Judith Rogers points out in a dissent. Rogers points out that her colleagues have dismissed **Joe** Wilson's claims based on the logic they use to dismiss **Valerie**'s claims, even though Joe does not have recourse to the Privacy Act here.

> Because Mr. Wilson is a person for whom Congress has "inadvertently omitted damages remedies" … the Privacy Act is not a comprehensive remedial scheme as to him and implying a Bivens action for his claims would comport with precedent. **… To avoid this result, the court lumps the Wilsons' claims together, describing Mr. Wilson's claims as seeking damages for unconstitutional action taken in regard to information that once was covered by the Privacy Act. … But the Constitution protects individual rights, not information, and whether Ms. Wilson might have a Privacy Act remedy is irrelevant to Mr. Wilson's independent claims based on public disclosures** that were steps removed from internal government transfers. … **The days when husband and wife were considered as one at law are long past.** [my emphasis, citations removed]

Ironically, following Roger's logic, Sentelle has replicated almost the same kind of sexist bullshit that Cheney and friends were using when they tried to suggest Wilson was some kind of wuss who needed his wife to score him key boondoggles to Africa. They're arguing that a husband must sacrifice any recourse for the violation of his constitutional rights if his wife has lost any recourse based on a different

claim. So not only can Cheney and friends leak information from government records with impunity, but their "not an Agency" line exempts them, therefore, from respecting the First and Fifth Amendment rights of affected spouses, too.

Update: bmaz makes an important point below, which is that,

> the court must take the facts as alleged in the complaint. I'm afraid that part of the factual problem we face here is due to the way the facts were pled in the complaint. You could have seen this coming a mile away. The plaintiffs should have pled a much more aggressive interpretation of the facts and made the defendants controvert them.

I just reread the Wilsons' appeal, and boy oh boy is bmaz right, particularly with respect to Rove's role as confirming source for Novak. By the time this appeal was written, Novak's trial testimony was available, naming Rove, not to mention the September 2004 Fitzgerald affadavit, which states,

> Karl Rove later confirmed that information in a July 9 phone call.
>
> [snip]
>
> Novak expressed to Rove his surprise that somebody like Wilson (whom he viewed as a partisan Democrat) had been sent on the mission. Novak then brought up to Rove the fact that Novak had heard that Wilson's wife had worked at the CIA, and had suggested her husband for the mission.
>
> [snip]
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> In response to Novak's statement about Wilson's wife, NOvak recalls Rove saying "oh, you know about that too." Novak too that comment as a confirmation of the information, and so Rove became his second source.

So why not include the evidence tying Rove directly to the Novak leak?

That doesn’t excuse Sentelle for ignoring a whole bunch of other facts in the appeal (such as the numerous times Libby leaked this), not to mention his use of "talked to" rather than laying out that Rove and Libby both shared Valerie’s identity before Novak’s column came out. But bmaz is absolutely right that this appeal sets up just what happened, an undue focus on Armitage, away from Cheney and Libby and Rove.

Update: Fixed my reference to the wrong judge.