

Appeals Court Affirms Censorship of Valerie Plame Wilson Memoir

Concurring Judge Faults Majority for "Blinking Reality"

A Second Circuit panel held that because former covert intelligence officer Valerie Plame's "possible" pre-2002 federal service dates negligently released by CIA in a post-employment retirement annuity letter (subsequently reprinted in the Congressional Record) remain "properly classified" and Plame was obligated by a secrecy agreement with the CIA not to disclose classified information, Plame and her publisher, Simon & Schuster, could not demonstrate a First Amendment violation when the Bush administration censored Plame's references in her memoir *FAIR GAME* to that public domain information. [Wilson v. CIA](#), No. 07-4244-cv, 2009 WL 3763830 (2d Cir. Nov. 12, 2009) (Raggi, CJ, Keenan, DJ) (Katzmann, CJ, concurring in the judgment).

The court affirmed an award of summary judgment by the district court in favor of the government defendants. *Wilson v. McConnell*, 501 F.Supp.2d 545 (S.D.N.Y. 2007). The majority also held that the Agency, then under the direction of Gen. Michael V. Hayden, was not the proximate cause of Congressional release of CIA's annuity planning letter to Plame, and therefore CIA's negligence did not constitute an "official disclosure" of Wilson's pre-2002 dates of service. The majority reasoned that Plame – who received the letter from CIA's Chief of Retirement & Insurance Services via First-Class mail and which the record shows was for her retirement "planning purposes" – broke the chain of negligent causation by CIA when she "did not object to any otherwise permissible inclusion or [her] personal financial information as contained in [the February 10, 2006 letter]" in connection with proposed Congressional legislation.



Valerie Plame Wilson

Plame had previously been 'outed' improperly by former Bush administration senior officials. Consequently, Representative Jay Inslee (D-Wash.) had requested the information from Plame to establish the necessary basis for a proposed private bill in Congress. The proposed private bill, which has not been enacted, would have permitted Plame to receive full

retirement benefits available by federal statute to intelligence officers with 20 years of service despite the fact that she had not reached the requisite age.

The majority opinion did not refer to the sentence in CIA's letter stating it was provided by CIA to Plame for her "planning purposes." The court also did not address Plaintiffs-Appellants' argument that the letter from CIA's Chief of Retirement & Insurance Services constituted a vicarious admission by CIA of the information it contained, binding upon the Agency itself pursuant to Fed. R. Evid. 801(d)(2)(D) and therefore an "official acknowledgment" for First Amendment purposes.

Judge Katzmann, writing separately, observed that "the CIA's position in this litigation blinks reality in light of the unique facts of this case and the policies behind the doctrines at issue here. Indeed, the CIA's litigation posture may very well be counterproductive to its purpose." Judge Katzmann further observed:

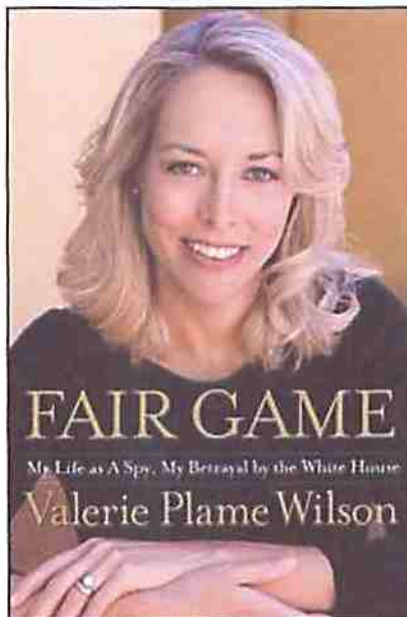
[T]he CIA's position in this litigation, set forth in unclassified, publicly filed court documents, has served only to give credence to the perception that the February 10 Letter accurately set

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forth Ms. Wilson's dates of service. Senator Daniel Patrick Moynihan, a student of secrecy, believed that the obvious need to protect legitimate secrets is undermined when agencies proceed reflexively without a fully reasoned assessment of the likely consequences of positions contemplated. See Daniel Patrick Moynihan, *Secrecy*, with a new preface by the author (1998). This may have been such a case. (Katzmann, CJ., concurring in the judgment.)

FAIR GAME was published by Simon & Schuster in redacted form in October 2007 with an afterward by reporter Laura Rozen. A film version of FAIR GAME, with Sean Penn appearing as Joseph Wilson and Naomi Watts appearing as Valerie Plame



Wilson, is currently in post-production and scheduled for release in 2010. Plaintiff-Appellant Valerie Plame Wilson plans to file in December 2009 a petition for panel rehearing and/or rehearing en banc. A fuller report on the case and the petition for rehearing will appear in a future MLRC MediaLaw Letter.

Plaintiffs-Appellants Valerie Plame Wilson and Simon & Schuster, Inc. were represented by David B. Smallman, Smallman Law PLLC, New York, NY. R. Bruce Rich and Jonathan Bloom, Weil, Gotschal & Manges LLP, New York, NY, represented Amici Curiae Association of American Publishers, Inc., et al. in support of Plaintiffs-Appellants. Defendants-Appellees were represented by Benjamin H. Torrance, Assistant United States Attorney, Southern District of New York. Elizabeth McNamara, Davis Wright Tremaine LLP, New York, NY, also represented Simon & Schuster, Inc. as co-counsel in the district court proceeding.

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