
ORAL ARGUMENT SCHEDULED FOR MAY 9, 2008
(Before Chief Judge Sentelle and Circuit Judge Henderson and Circuit Judge Rogers)

In The
United States Court of Appeals
For The District of Columbia Circuit

**VALERIE PLAME WILSON;
JOSEPH C. WILSON, IV,**

Plaintiffs - Appellants,

v.

**I. LEWIS LIBBY, JR.; KARL C. ROVE;
RICHARD B. CHENEY; RICHARD L. ARMITAGE;
JOHN DOES 1-9; UNITED STATES OF AMERICA,**

Defendants - Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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GLOSSARY

Appellees' Br.

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Appellee Cheney's Br.

Brief for Appellee Vice President Richard B. Cheney

SUMMARY OF ARGUMENT

1. The district court dismissed plaintiffs' constitutional claims based on the Privacy Act, 5 U.S.C. § 552a, and its conclusion that this statute provided a comprehensive enforcement mechanism that precluded suits against the defendants pursuant to *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971). The parties agree that the Privacy Act, does not apply to the offices of the President and Vice President and that there is not another federal statute that would provide plaintiffs any remedy at all. They disagree, however, as to whether the complete absence of any statutory remedy precludes the *Bivens* claims presented here.

The existence of the Privacy Act does not preclude plaintiffs' *Bivens* claims for three key reasons. First, it has no relevance to plaintiffs' claims for violations of freedom of speech, denial of equal protection and deprivation of property without due process, as these claims are brought to redress actions by defendants independent of invasions of plaintiffs' privacy.

Second, there is nothing in Congress' decision to exclude the President and Vice President from the burdens of record-keeping and disclosure imposed by the Privacy Act to suggest that Congress also intended to immunize the President and Vice President from suits for constitutional violations. Whether Congress even could preclude a remedy for constitutional violations where no other remedy exists is extremely problematic under the Constitution. The Court need not address this issue, however, in light of the complete absence of any indication that Congress' exclusion of the President and Vice President from the Privacy Act had anything to do with precluding *Bivens* claims.

Third, the Privacy Act is a very precise, narrow and highly technical statute that cannot properly be characterized as a comprehensive remedial scheme intended to preclude all *Bivens*

actions. It shares none of the traits of the more sweeping comprehensive remedial schemes that the Supreme Court has held preclude *Bivens* claims.

2. The possible relevance of sensitive information also is not a reason to preclude a *Bivens* action.. Contrary to defendants' assertions, only the United States can raise this concern, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), and it has not done so in any of its briefs filed in the district court.

Moreover, it is purely speculative at this stage whether this case would risk the disclosure of secret or sensitive information. There has been neither discovery nor any presentation to the district court of how plaintiffs will try to prove their claims. If this problem were to manifest itself later, the district court could deal with it in an appropriate manner, including allowing the suit to go forward without use of secret information or, as a last resort, dismissing particular claims.

Defendants also allege that allowing the *Bivens* claims to proceed would intrude into some vaguely described "sensitive areas" that are "committed to another branch of government." Appellees' Br. at 31, 34. Plaintiffs here allege that defendants illegally and unconstitutionally revealed Valerie Plame Wilson's status as a covert CIA operative in retaliation for her husband exposing a falsehood in the President's State of the Union Address. This was not an action within the discretion of the executive branch, as defendants suggest, but rather the illegal and unconstitutional actions of individual high level officials.

3. The district court also erred in dismissing plaintiffs' claim for public disclosure of private facts based on the Westfall Act, 28 U.S.C. § 2679(b)(1). The parties agree that this issue

turns entirely on whether defendants' actions were within the scope of their employment as defined by District of Columbia law.

The issue here is not whether communicating with the press was within the scope of defendants' duties, as they argue, but whether it was within the scope of their duties to conspire and carry out a plot to disclose highly sensitive information in retaliation for speech criticizing the administration. As this Court has recognized, "seriously criminal" conduct -- like that at issue here -- "is generally less likely . . . within the scope of employment." *Rasul v. Myers*, 512 F.3d 644, 660 (D.C. Cir. 2006). At a minimum, discovery and an evidentiary hearing are necessary to resolve the scope of employment issue.

4. Defendant Cheney's argument that he is protected by absolute immunity is without any support in the case law and contrary to the Supreme Court's recognition that only the President is entitled to absolute immunity because of his "unique status under the Constitution [that] distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 451 U.S. 737, 750 (1982). The limited role that the Constitution carves out for the Vice President makes clear he is not the functional equivalent of the President and provides no basis to extend presidential absolute immunity to him.

5. Finally, the political question doctrine does not require dismissal of this case, as defendant Cheney argues. Disclosing the identity of a covert CIA operative is simply not a national security decision and never has been defended by the government for an instant as having been done for that reason. To the contrary, such disclosure is inimical to this nation's security. Defendant Cheney's claim that the case is non-justiciable because of the need to show respect to a coordinate branch of government is also unavailing. Plaintiffs are challenging the

individual illegal actions of government officials acting in their individual capacities for their own partisan gain. This is simply not a case involving a foreign policy or national security decision of the United States government.

The district court's decision, if affirmed, would leave the plaintiffs with no remedy for an egregious violation of their rights. This is inconsistent with the purposes of both *Bivens* and the Westfall Act. Most importantly, it is inconsistent with a Constitution that assures due process of law.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' CONSTITUTIONAL CLAIMS BASED ON "SPECIAL FACTORS COUNSELING HESITATION."

A. A Statute That Does Not Apply And Fails To Provide Any Remedy Cannot Be A "Special Factor Counseling Hesitation" Under *Bivens*.

Ultimately, the question presented by this case is whether a statute that does not apply and provides absolutely no remedy to plaintiffs-appellants can preclude a claim for relief under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971). There is no disagreement among the parties that the Privacy Act, 5 U.S.C. § 552a, does not apply to the offices of the President and Vice President. *See, e.g., Jones v. Exec. Office of President*, 167 F. Supp. 2d 10, 18 (D.D.C. 2001); *Dale v. Exec. Office of President*, 164 F. Supp. 2d 22, 26 (D.D.C. 2001); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147-48 (D.D.C. 2000). Nor is there any disagreement over the fact that no other federal statute provides plaintiffs any remedy whatsoever.

Every Supreme Court case that has precluded a *Bivens* action based on the existence of a “comprehensive remedial scheme,” including the cases cited by defendants-appellees, has involved a situation where there was a comprehensive statute that provided some potential remedy for the plaintiffs. In *Bush v. Lucas*, 462 U.S. 367 (1983) (cited in Appellees’ Br. at 16, 19, 20), the Court found there were adequate remedies available under the civil service process to preclude a *Bivens* suit by a federal employee arising from an adverse employment action. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (cited in Appellees’ Br. at 19, 20, 21), the Court concluded that there were sufficient remedies under the Social Security Act to preclude a *Bivens* suit for wrongful termination of disability benefits. And in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007) (cited in Appellees’ Br. at 17), the Court found that outside of the *Bivens* context the plaintiff “had an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.” 127 S. Ct. at 2600.

The Supreme Court has also made clear that this alternative remedy must be “equally effective.” *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Defendants’ attempt to discount this proscription (Appellees’ Br. at 22 n. 2) ignores the fact that neither *Carlson* nor this language has ever been overruled or repudiated by the Supreme Court. In any event, this case does not require this Court to decide whether the remedy must be “equally effective.” Rather, the issue presented here is whether plaintiffs’ *Bivens* claims can be precluded by a statute, the Privacy Act, that provides plaintiffs *no* remedies whatsoever and where there is otherwise *no* other federal statute that would provide any remedy.

There are three key reasons why the Privacy Act does not preclude plaintiffs’ *Bivens* claims here. First, at most, the Privacy Act would constitute a special factor counseling

hesitation as to only one of plaintiffs' four constitutional claims: the cause of action for invasion of privacy in violation of the Fifth Amendment. Plaintiffs' other three causes of action, as explicitly stated in the Amended Complaint, are for violations of freedom of speech, denial of equal protection and deprivation of property without due process of law. The Privacy Act has no relevance whatsoever to these claims.

Nevertheless, defendants contend that the "Privacy Act is a comprehensive scheme that precludes implication of a damages remedy regardless of the constitutional rubric invoked by a particular plaintiff." Appellees' Br. at 27. At most, the Privacy Act governs how Congress wanted to protect the privacy of information. It has no relevance to claims for violations of freedom of speech, denial of equal protection and deprivation of property without due process of law that are brought to redress actions by defendants independent of invasions of plaintiffs' privacy. There is simply no basis for defendants' assertion that a statute that does not apply *ab initio* can be used to preclude *Bivens* claims that have nothing to do with the focus or purpose of that statute.

Nor do the cases defendants cite support their position. In *Chung v. U.S. Dep't of Justice*, 333 F.3d 273 (D.C. Cir. 2003), (Appellees' Br. at 27), there is no discussion whatsoever as to whether the Privacy Act bars constitutional claims other than those for invasion of privacy. With the exception of one sentence in which this Court said it was affirming the district court's dismissal of the constitutional claims based on the Privacy Act, the opinion focuses entirely on whether there is equitable tolling of the two-year period of limitations in the Privacy Act. 333 F.3d at 274. And most critically, the defendant in *Chung*, unlike this case, had a remedy against the Department of Justice under the Privacy Act.

Defendants argue nevertheless that “this Court’s decision in *Chung* did not turn on the availability of relief under the Privacy Act.” Appellees’ Br. at 29. Quite the contrary, in *Chung* the sole issue before this Court was whether the cause of action was time-barred. There was no dispute that a cause of action existed to at least potentially remedy the harms Chung suffered. In this case, however, the parties agree that plaintiffs would have no remedy whatsoever except for a *Bivens* action.

Defendants also cite to the Sixth Circuit’s decision in *Downie v. City of Middleburg Heights*, 301 F.3d 688 (6th Cir. 2002), in which a former undercover agent sued federal law enforcement officials for retaliating against him for resigning from the Customs Service. The Court concluded that the Privacy Act foreclosed the *Bivens* suit because it provides “a comprehensive legislative scheme that provides a meaningful remedy for the wrong Downie alleges.” *Id.* at 699. Again, that scenario is quite different from this case where the Privacy Act provides these plaintiffs with no remedy. Moreover, the only constitutional claim in *Downie* was for the release of the information. In this case, by contrast, the plaintiffs also present claims for violations of freedom of speech, denial of equal protection and deprivation of property without due process. Nowhere does the Sixth Circuit in *Downie* consider whether the Privacy Act extends so far as to preclude such claims.

Finally, defendants cite *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104 (D.D.C. 2005), as having dismissed *Bivens* claims based on the Privacy Act. The *Hatfill* plaintiff presented two due process claims arising from the government falsely leaking information that he was responsible for anthrax attacks. One claim was essentially for defamation, which the court dismissed for failing to meet pleading requirements. The court stated:

In this case, although Dr. Hatfill sustained the loss of employment, as defendants correctly note, the statements concerning Dr. Hatfill cannot be considered defamatory, as he has not alleged that the statements were false when they were made. . . . Although Dr. Hatfill maintains that he was not responsible for the anthrax attacks, he cannot demonstrate that the defendants did not consider him ‘a person of interest’ in the anthrax mailings. Thus, Dr. Hatfill cannot pursue a claim based on the first theory of Fifth Amendment due process liability.

Id. at 116.

Dr. Hatfill’s other claim was for stigmatization that caused a harm to his reputation, for which the Court found that the Privacy Act provided an adequate remedy. The court said: “[T]his Fifth Amendment claim . . . can be redressed under the Privacy Act. . . . [T]he Privacy Act, being a comprehensive legislative scheme . . . provides a meaningful remedy *for the kinds of harm Dr. Hatfill alleges he has suffered.*” *Id.* (emphasis added). Again, *Hatfill* involves a situation where there was a remedy under the Privacy Act. And unlike here, *Hatfill* did not present claims unrelated to invasion of privacy, such as a violation of freedom of speech, denial of equal protection and deprivation of property without due process.

Second, the Privacy Act does not apply to the President or Vice President and thus cannot be considered a comprehensive remedial statute that bars *Bivens* actions as to claims against them. Defendants argue that Congress’s choice to exclude the President and Vice President from the Privacy Act also precludes a *Bivens* action. One simply does not follow from the other. Congress chose to exempt the President and Vice President from the burdens of record-keeping and disclosure imposed by the Privacy Act. There is nothing -- not a word in the statute or legislative history -- that by doing so Congress was making a judgment that the President and Vice President also should be immune from any damage action stemming from constitutional

violations. There is no basis whatsoever for believing that Congress ever intended to immunize the President and Vice President from suits for constitutional violations.

Whether Congress even could preclude a remedy for constitutional violations where no other remedy exists is extremely problematic under the Constitution. *See, e.g., Oestereich v. Selective Service System Local Board No. 1*, 393 U.S. 233, 243-44 n.6 (1968) (it “is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims.”). The Court need not face that constitutional issue, however, because there is nothing in the Privacy Act indicating that its exclusion of the Offices of the President and Vice President had anything to do with precluding *Bivens* suits.

Third, the Privacy Act is not properly characterized as a comprehensive remedial scheme that precludes all *Bivens* actions. By its very terms, the Privacy Act covers the collection, maintenance, use and dissemination only of information stored in executive branch agencies that meets certain criteria. *See, e.g., Doe v. U.S. Postal Service*, 317 F.3d 339, 342 (D.C. Cir. 2003) (“the Privacy Act generally prohibits ‘nonconsensual disclosure of any information that has been retrieved from a *protected record*.’” *quoting Bartel v. FAA*, 725 F.2d 339, 342 (D.C. Cir. 1984)) (emphasis added).

More specifically, the Privacy Act applies only to information that is “about an individual,” 5 U.S.C. § 552a(a)(4), that is stored in a system of records “under the control of any agency” and that is “retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” *Id.* at § 552a(a)(5). The legislative history of the Privacy Act confirms that the statute’s focus is on protecting “the

privacy of individuals identified *in information systems maintained by federal agencies.*”

Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896 (Dec. 31, 1974) (emphasis added).

Unlike the more sweeping comprehensive remedial schemes encompassed in the Civil Service Reform Act or the Social Security Act -- two statutes the Supreme Court has held preclude *Bivens* claims -- the Privacy Act is a very precise, narrow and highly technical statute; consequently its mere existence should not be construed as precluding *Bivens* claims like those presented by plaintiffs here.

B. The Possible Relevance of Sensitive Information Is Not A Special Factor Counseling Hesitation In This Case.

Defendants also argue that the potential disclosure of secret information is a special factor counseling hesitation in the creation of a *Bivens* remedy. First, contrary to defendants’ assertions, only the United States can raise this concern, and the government did not do so in any of its briefs filed in the district court. The same reasoning that permits only the United States to invoke the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1 (1953), would apply to any concern over the release of secret or sensitive information. The government, and only the government, is in the position to decide if it might be injured by the disclosure of information. Although the United States intervened in the district court to seek dismissal of the tort claim based on the Westfall Act, it never invoked the state secrets doctrine or made any argument that the case should be dismissed because of the possibility that it might implicate sensitive information.

Defendants argue that “individual defendants properly raised the sensitivity of the disclosures concerning intelligence activities as an additional reason to decline to allow

plaintiffs' *Bivens* claims." Appellees' Br. at 35. They point to no authority, however, allowing this issue to be raised by any other than the government.

Defendants also argue that the lawyer for the government raised this issue at oral argument before the district court. Appellees' Br. at 34. But pointedly nowhere, not once, in the briefs filed in the district court did the government raise any concern that this litigation should be dismissed because of a risk that secret information might be disclosed.

Second, it is purely speculative at this stage whether this case would risk disclosure of secret or sensitive information. Because of the procedural posture of the case no discovery requests have been made. Nor has the district court seen how plaintiffs will try to prove their claims, at least some of which do not implicate secret information at all. For example, whether Joseph Wilson's First Amendment rights were violated in retaliation for his exposing falsehoods has no relation to any secret information. Nor is it apparent that plaintiffs' equal protection, due process, or constitutional privacy claims will require disclosure of confidential information. Appellees quote the district court's suggestion that the due process claim might require looking at how Valerie Plame Wilson was impaired in carrying out her duties and the equal protection claim might entail an investigation into broader CIA practices. Appellees' Br. at 33. At this stage, however, this is purely speculative providing no basis to deny all of plaintiffs' causes of action and all of plaintiffs' avenues for proof.

If this problem were to manifest itself later, the district court could deal with it in an appropriate manner by allowing the suit to go forward without use of secret information or, as a last resort, by dismissing particular claims. There is no basis at this juncture, however, to dismiss the entire lawsuit.

In arguing to the contrary, defendants rely heavily on the Supreme Court's decision in *Wilkie v. Robbins*. Appellees' Br. at 32-33. A careful reading of *Wilkie* shows that it actually supports plaintiffs' position, not that of defendants. In *Wilkie*, the Supreme Court said that courts are to engage in a balancing analysis in deciding whether to allow claims under *Bivens*. The Court emphasized that in the case before it the plaintiff "had an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." 127 S. Ct. at 2600. Here, however, there is no other remedy.

In addition, the *Wilkie* Court was concerned that allowing the *Bivens* claim would lead to a large number of such suits for interference with property rights that would disrupt the government. In contrast, the *Bivens* claims here carry no such risks, as the egregious constitutional violations committed by the highest level government officials that plaintiffs allege are far from common-place.

Defendants also make vague allusions to the risk that allowing a *Bivens* suit here would intrude "into sensitive areas committed to another branch of government." Appellees' Br. at 31, 34. Defendants, however, never explain what this alleged sensitive area committed to another branch of government is in the context of this case. Moreover, the fact that the United States has already brought a successful criminal prosecution arising from these same facts without encountering such obstacles is a strong indication that this case also can proceed without intruding unduly on the legitimate prerogatives of the executive branch of government.

Plaintiffs here allege that defendants illegally and unconstitutionally revealed Valerie Plame Wilson's status as a secret operative in retaliation for her husband exposing a falsehood in the President's State of the Union Address. Plaintiffs maintain that this was an egregious abuse

of power and such an action was in no way committed to the discretion of the executive branch. Accepting defendants' argument requires accepting that this was an action within the discretion of the executive branch, but there is no basis for such a conclusion.

Similarly, *United States v. Stanley*, 483 U.S. 669 (1987), also relied upon by defendants, provides no support for their position. Appellees' Br. at 31, 34. *Stanley* followed the Supreme Court's earlier decision in *Chappell v. Wallace*, 462 U.S. 296 (1983), that there cannot be a *Bivens* claim by those in the military against superior officers. The Court concluded that such civil suits are inconsistent with the military's command structure. Neither the reasoning nor the holding of these cases supports precluding *Bivens* claims against top civilian government leaders for their illegal actions.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM FOR PUBLIC DISCLOSURE OF PRIVATE FACTS BASED ON THE WESTFALL ACT.

Defendants argue that plaintiffs' tort claim for public disclosure of private facts is precluded by the Westfall Act. 28 U.S.C. § 2679(b)(1). Plaintiffs and defendants agree that this turns entirely on whether defendants' actions were within the scope of their employment as defined by District of Columbia law. Plaintiffs argue that under District of Columbia law revealing Mrs. Wilson's covert identity was not within the scope of defendants' duties because the revelations were illegally and unconstitutionally made for defendants' personal political gain. At the very least, under the precedents of this Circuit, the claims should not be dismissed until there has been the opportunity for discovery as to the scope of employment.

Although defendants argue that it was within the scope of their duties to communicate with the press, this states the inquiry at too abstract a level. No one disputes that defendants'

duties include talking to reporters, but that does not establish that it was within the scope of their duties to hatch and carry out a plot to disclose highly sensitive information as is alleged here.

Nor do the cases relied upon by defendants support their position. In *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006), this Court found that defamatory statements were “incidental” to defendants’ duties in speaking to the press.

Intentionally revealing the secret status of a CIA operative -- the conduct at issue here -- is not incidental to, or part, of any duty of any government official. Unlike in *Ballenger*, doing so was illegal, unconstitutional and plainly not within the scope of defendants’ duties. This case is not simply about whether government officials can speak to the press; it is about whether high level government officials are acting within the scope of their duties when they conspire to reveal highly secret information in retaliation for speech criticizing their administration.

This Court’s decision in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2006), also provides no basis for finding that defendants’ actions here were within the scope of their duties. In *Rasul*, this Court noted that “the District of Columbia courts have held that tortious conduct is not ‘incidental’ to the performance of authorized duties if the conduct underlying the tort is unrelated to the employee’s instructions or job assignment.” *Id.* at 658. Here, plaintiffs maintain that revealing the identity of a secret operative was directly against the instructions given by the President of the United States and not part of any of the defendants’ job instructions. Indeed, this Court in *Rasul* explained that “[i]f conduct is seriously criminal, the Restatement explains that it is generally less likely that the conduct comes within the scope of employment.” *Id.* at 660.

Finally, although the *Rasul* Court found that alleged torture was within the scope of employment, the Court did so because it “was foreseeable that conduct that would ordinarily be

indisputably ‘seriously criminal’ would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants.” *Id.* In contrast here, it certainly was not foreseeable that defendants would conspire to reveal the identity of a secret operative in retaliation for her husband’s speech.

At the very least, *Rasul* shows why discovery and an evidentiary hearing are necessary in this case. *Rasul* makes clear that determining whether an action is within the scope of employment requires an assessment of instructions for superiors, job assignments and foreseeability. None of that can be determined without according plaintiffs discovery.

III. DEFENDANT CHENEY IS NOT PROTECTED BY ABSOLUTE IMMUNITY.

Although the district court did not reach the issue, Vice President Cheney argues that the dismissal as to him should be affirmed based on the Vice President having absolute immunity to civil suits for money damages. No case ever has accorded the Vice President absolute immunity. The Supreme Court has declared that “[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been ‘quite sparing’ in our recognition of absolute immunity, and have refused to extend it any ‘further than its justification would warrant.’” *Burns v. Reed*, 500 U.S. 478, 487 (1991) (citations omitted).

The mere fact that the Vice President is a part of the executive branch does not warrant according him absolute immunity. The Supreme Court has explained that “a qualified immunity is available to officers of the executive branch of government.” *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Thus, the Court has held that “the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his

national security functions.” *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). Similarly, the Court has held that other Cabinet secretaries, *Butz v. Economou*, 438 U.S. 478 (1978), and top level executive officials acting at the direction of the President are protected only by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Defendant Cheney essentially argues that he is entitled to absolute immunity because the President of the United States has absolute immunity. Appellee Cheney’s Br. at 4. This argument ignores “the unique position in the constitutional scheme” that underlies the Supreme Court decision creating absolute immunity for the President, *Nixon v. Fitzgerald*, 451 U.S. 737, 749. The Vice President does not occupy a similarly unique position, a fact that the *Nixon* Court recognized explicitly: “The President’s unique status under the Constitution distinguishes him from other executive officials.” *Id.* at 750.

The Court justified absolute immunity for the President on functional considerations, not one of which applies to the Vice President. For example, the Court said that “[b]ecause of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.” *Id.* at 751. The Court noted that the President “must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.” *Id.* at 752.

The Vice President’s duties do not and were never intended to mirror those of the President. The Constitution does not vest in the Vice President “unique” and “singular” duties that make him the functional equivalent of the President, contrary to the suggestion of defendant Cheney. Instead, the Constitution carves out two limited roles for the Vice President: (1) presiding over the Senate and breaking a tie in Senate votes (Art. I, § 3), and (2) succeeding the

President (Art. II, § 1) or taking over as acting President under certain conditions (Amend. XXV, § 3, Amend. XXV, § 4).¹ It is no wonder that John Adams, the first Vice President of the United States, lamented: “My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived.” See www.whitehouse.gov/history/presidents/ja2.html. In a recent analysis, noted historian Richard Neustadt observed that little has changed over the course of American history: “[The vice presidency] has been dolled up with real estate, assistance, name recognition (and the hazards now common to celebrity). But the essentials remain the same: the other person has all the authority.” Timothy Walch ed., At the President’s Side: The Vice Presidency in the Twentieth Century 192 (1997).

Despite defendant Cheney’s suggestion, *Cheney v. United States District Court*, 542 U.S. 367 (2004), is not to the contrary. That case involved whether the Vice President could obtain mandamus relief from discovery orders directed to him that the Court characterized as over broad and that related to his official conduct in office as chair of a presidential advisory committee. In ruling that this Court should have considered the Vice President’s petition for mandamus relief, the Supreme Court did not rule on or even mention any issue of immunity. To the contrary, the Supreme Court’s decision left intact all claims against the Vice President.

To date the Court has expressly refused to extend presidential absolute immunity to any other members of the executive branch of government. *Mitchell v. Forsyth*, 472 U.S. 511 (1985);

¹ This constitutional amendment does not afford the Vice President a basis to argue for absolute immunity because if it is triggered, the Vice President would be acting in the role of President with all the attendance powers and duties of that office.

Butz v. Economou, 438 U.S. 478 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As a result, there is no basis for according absolute immunity to the Vice President.

IV. THE POLITICAL QUESTION DOCTRINE DOES NOT REQUIRE DISMISSAL OF THIS CASE

Although the District Court did not rule on this, defendant Cheney also argues that the case presents a non-justiciable political question. First, defendant Cheney argues that this case involves “national security” and courts are not to second-guess executive determinations regarding national security. Appellee Cheney’s Br. at 9. It is impossible to understand how disclosing the identity of a covert CIA operative is a national security decision. To the contrary, such disclosure is inimical to this nation’s security.

Second, defendant Cheney argues that this matter involves sensitive information, including Mrs. Wilson’s relationship with the CIA, and thus poses a political question. Appellee Cheney Br. at 11-12 (the second and fourth reasons presented). As argued above, this is an argument that only the United States can make, not one that an individual defendant can raise. Moreover, the Amended Complaint alleges that defendant Cheney conspired to release this information for the sole purpose of embarrassing Mr. Wilson, a perceived critic of this administration. Defendant Cheney cannot now argue that the information he himself had a role in releasing is so sensitive as to preclude the lawsuit. Also as argued above, it is completely speculative at this time whether the case will entail any secret information and if it does, that can be addressed in the appropriate way at the relevant time.

Defendant Cheney cites the Supreme Court’s decision in *Tenet v. Doe*, 544 U.S. 1 (2005), in which the Supreme Court said that the state secrets privilege applies if there is a possibility

that an “espionage relationship might be revealed.” *Id.* at 11. Here, however, the espionage relationship already has been revealed by the defendants and that, of course, is the entire basis for this lawsuit.

Finally, defendant Cheney claims that the case is non-justiciable because of the need to show respect to a coordinate branch of government. Appellee Cheney’s Br. at 11. Plaintiffs, however, are challenging the individual illegal actions of government officials acting in their individual capacities. The decision by four government officials who abused their office to expose the identity of a secret operative for their own partisan gain is entitled to no respect. This was not a decision of a coordinate branch of government on “matters related to national security” (Appellee Cheney’s Br. at 12), but the individual decisions of government officials acting in their individual capacities to commit illegal and unconstitutional acts that placed the nation’s security at risk.

Simply stated, this case involves no foreign policy or national security decisions made by the United States government. Defendants do not and cannot credibly assert that they revealed Ms. Wilson’s status as a covert operative for the CIA as part of foreign policy or national security decision-making. Rather, they did so in retaliation for her husband revealing the inaccuracies in the President’s State of the Union Address. In any event, as the Supreme Court has explained, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker v. Carr*, 369 U.S. 186, 211 (1962).

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply Brief of Appellants has been prepared using:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 21, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand-delivery, the required copies of the foregoing Reply Brief of Appellants, and further certify that I served, via UPS Ground, the required copies of the same to the following:

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