GOVERNMENT INVOKES VALERIE PLAME TO ARGUE CIA ACKNOWLEDGMENT THAT BUSH AUTHORIZED TORTURE IS NOT OFFICIAL ACKNOWLEDGMENT

As you'll recall, back in April I went on a week-long rant about the great lengths—including submitting a secret declaration from the National Security Advisor—the Obama Administration had gone to hide a short reference to the September 17, 2001 "Gloves Come Off" Memorandum of Notification. In doing so, it appears the Obama Administration hid George Tenet's invocation of the Presidential MON that authorized the capture and detention of terrorists but which the Bush Administration used as its authorization to torture those alleged terrorists. (post 1, post 2, post 3, post 4, post 5, post 6, post 7)

In a classified hearing on March 9, the government claimed that releasing the reference in question would "reveal[] for the first time the existence and the scope of" what now clearly appears to be the MON. After I went on my rant, the ACLU informed the Circuit Court that the claim might be false. If the reference was indeed to the MON, ACLU wrote, then the CIA had already revealed that the September 17, 2001 MON authorized torture in this litigation.

> If true, it may be relevant to this Court's consideration that the CIA officially acknowledged the existence of that memorandum in this very litigation.
>
> In response to appellees' Freedom of

> Information Act request, the CIA identified as responsive "a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the CIA pertaining to the CIA's authorization to detain terrorists" and "to set up detention facilities outside the United States." Eighth Declaration of Marilyn A. Dorn

On Friday, the government responded, effectively saying that Marilyn Dorn's declaration doesn't count as official acknowledgement of the MON.

> For the reasons set forth in the Government's classified filings, the disclosures identified in plaintiffs' letter, including the information provided in the Dorn declaration, do not constitute an official disclosure of the information redacted from the OLC memoranda.

Notably, in its discussion of the cases which it cited to support its claim that Dorn's description of the MON doesn't count, it also included language that would address John Rizzo's extensive blabbing about the MON as well as Glenn Carle's CIA Publication Review Board-approved reference to CIA having received a Finding covering torture (neither of which the ACLU mentioned in its letter). But look what case they cited to make that argument.

> This Court applies "[a] strict test" to claims of official disclosure. Wilson v. CIA, 586 F.3d 171, 186 (2d Cir. 2009). "Classified information . . . is . . . officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." Id. (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007)). With regard to the

> requirement of "official and documented disclosure," the Court has made clear that "the law will not infer official disclosure . . . from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress." Id. at 186-87 (citations omitted). [my emphasis]

There's a lot packed in here. If Marilyn Dorn—who was the CIA's long-time Information Review Officer when she wrote this declaration—doesn't count as "a person authorized to speak for the Agency," then it seems likely that the CIA is not the agency at issue in this case (remember, rather unusually, the National Security Council directed that the torture program be made a Special Access Program; the CIA didn't do so of its own accord). Which would seem to explain why the government also emphasizes that release of information by another agency doesn't count; that's only relevant if the CIA is not the agency in question here. Note too that (as I pointed out) Dorn's declaration included details we know not to be true, such as that the MON authorized clandestine rather than covert activities.

So the content of the government's claim is interesting enough.

But then consider that the government is invoking Valerie Plame Wilson here!

In her suit, Wilson v. CIA, she unsuccessfully tried to win the right to publish details on her CIA career after Dick Cheney and friends exposed her identity. The Circuit didn't actually argue that Dick Cheney's insta-declassification of Plame's identity wasn't official acknowledgment, complete with required official record of acknowledgment, which would have been true, but political dynamite. Rather, it said that Plame

herself exposed her pre-2002 CIA employment when she let Jay Inslee publish details of her CIA employ in the Congressional Record; the CIA had given her the details but had inadvertently, they claimed, not marked the letter with proper classification marks. So the government, in citing Wilson v. CIA, is not quite equating Dick Cheney's improper insta-declassification of Plame's identity as justification for hiding George Bush's personal authorization of torture. But they're coming awfully close.

In other words, the Obama Administration is so desperate to hide this minimal reference to Bush's authorization of torture, they're citing the most cynical instance of politicized treatment of classified information as legal precedent.

Which I guess is about right.