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Commentary

Millbrook v. US: Holding the Government Accountable for Misconduct by Law Enforcement Officials

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“A body of men holding themselves accountable to nobody ought not to be trusted by anybody.”—Thomas Paine

At a time when the courts are increasingly giving deference to the police and prioritizing security over civil liberties, the U.S. Supreme Court’s ruling in *Millbrook v. United States* is a glimmer of hope in a sea of gloom.

Handed down on the second day of the Court’s same-sex marriage arguments, *Millbrook* has been largely overshadowed by the debate over marriage equality. However, this ruling should not be overlooked—not only for what it says about the need to hold law enforcement officials accountable to abiding by the law, but more importantly for what it says about the extent to which the government has given itself free rein to abuse the law, immune from reproach.

In its ruling in *Millbrook v. United States*, a unanimous U.S. Supreme Court concluded that the U.S. government may be held liable for abuses intentionally carried out by law enforcement officers—whether they’re police officers or prison guards—in the course of their employment. Critics of the government’s tactics hope the Court’s ruling will send a strong message to the government’s various law enforcement agencies that they need to do a better job of policing their employees and holding them accountable to respecting citizens’ rights, especially while on the job.

The facts in *Millbrook* are particularly egregious.

Kim Lee Millbrook is serving a 31-year sentence, reportedly for drug and gun-related charges along with witness intimidation. On March 1, 2010, Millbrook was transferred to a high-security federal prison in Lewisburg, Pa., which specializes in dealing with inmates who are highly disruptive and difficult to manage, including gang leaders. On March 4, 2010, a few days after being installed at the Special Management Unit (SMU) in Lewisburg, Millbrook and his cellmate got into a fight and were temporarily placed in a shower area. Then, according to Millbrook, three prison guards escorted him to the basement holding-cell area, where one guard choked him until he almost lost consciousness and a second guard made Millbrook

perform oral sex on him, while a third guard stood watch by the door. Conveniently, no video cameras were monitoring the basement at the time of the alleged assault.

Although Millbrook claims the guards threatened to kill him if he reported the incident, he filed a complaint with prison officials, which then led to a formal investigation. During the course of the investigation, a prison physician determined that Millbrook did not show signs of having been choked, a prison psychologist concluded that Millbrook did not exhibit trauma consistent with a sexual assault, and the prison guards and Millbrook's cellmate all testified to having no knowledge of any such assault taking place against him. Prison officials also noted that Millbrook had filed a similar complaint against guards at his previous prison, which was eventually dismissed when the charges could not be substantiated.

A non-lawyer relatively well-versed in navigating the legal system, Millbrook turned to the courts for relief in January 2011, suing the federal government for \$1.5 million in damages for negligence, assault and battery and requesting a transfer out of the Lewisburg facility.

Neither the federal district court nor the Third Circuit Court of Appeals proved to be receptive to Millbrook's argument that the prison guards should be held liable under a provision of the Federal Torts Claim Act (FTCA), which allows individuals to sue federal law enforcement officials for misconduct. As reporter Ailsa Chang explains:

Under the law, the government allows itself to be sued when a government representative commits a tort. A tort is an act done negligently or intentionally that results in injury to someone. However, if the tort was intentional, the law does not allow the lawsuit to proceed — except in cases where the defendant is a law enforcement official. And even in those cases, the federal government can be liable only if the officer was acting “within the scope of his office or employment.”

Although both courts noted that the prison guards' alleged behavior was troubling, they ducked the issue and dismissed the case on the grounds that the federal government has sovereign immunity — that is, although an egregious wrong may have been committed by a government employee, they cannot be held liable for money damages for their behavior. Specifically, the courts reasoned that the FTCA only applies to “police officers” while they are in the process of making an arrest or seizure, or executing a search.

Undeterred, Millbrook filed a handwritten petition, in pencil no less, to the U.S. Supreme Court, and in a rare show of magnanimity, the Court agreed to hear his case and assigned a lawyer to represent him. Curiously enough, after the Court announced it could hear the case, the U.S. Justice Department—which had defended the government's actions at every level of the judicial proceedings, including asking the Supreme Court *not* to take the case—did an about-face and switched its position to argue that the FTCA *does* apply to prison guards as law-enforcement officials.

The Supreme Court's subsequent ruling, written by Justice Clarence Thomas, is a technical analysis of the FTCA, to whom it applies and in what circumstances. The bottom line, according to the nine justices in a rare show of agreement, is that the lower courts misconstrued the FTCA, which clearly provides for the government to be held accountable for wrongdoing carried out by law enforcement officials in its employ while on the job. (Although even the FTCA, it must be said, is notable for the many exceptions it provides to shield government officials from wrongdoing.)

Having been given the green light for his lawsuit to proceed, Millbrook still has an uphill battle ahead of him. Indeed, Millbrook has to prove to the lower courts that he was, in fact, sexually assaulted by the guards. Whether or not his allegations prove to be true, however, his case is a painful reminder that such kinds of abuses are not only par for the course in our nation's overcrowded prisons but are often tolerated by prison officials.

Inmate Jens Soering's insightful book *One Day in the Life of 179212: Notes from an American Prison* (Lantern Books, 2012), with its accounts of therapeutic beatings, rapes and the sense that one is in constant peril, may be the most vivid first-person portrait of the failure of America's penal system to date. As Soering writes:

Repeated anonymous surveys have determined that 20 percent of all inmates are forced to have sex each year, and 10 percent are violently raped. The overwhelming majority of these crimes are never reported: a silence maintained out of fear of retaliation from the perpetrators and because of the indifference of prison officials. In 2004, only 8,210 sexual assaults were documented, even though correctional experts testifying at a U.S. Senate hearing in 2003 estimated the actual number of cases to range from 250,000 to 600,000 *per year*.

The question that we must ask ourselves is what kind of government not only turns a blind eye to such abuses but absolves itself of any responsibility for righting such wrongs?

The answer is a government whose system of "checks and balances" has given way to a concerted effort by all branches of the government, including the courts, to maintain their acquired powers at all costs. Looked at from this perspective, while *Millbrook* was, indeed, a welcome respite from the Supreme Court's usual practice of giving law enforcement officials a "get out of jail free" card, it may prove in the long run to be little more than a bone tossed to a dog, a small concession amidst a sea of abuses.

Jeff Bucholtz, the lawyer who argued against *Millbrook* and in favor of government immunity, didn't appear to view the ruling as much of a loss. Responding to the assertion that the *Millbrook* ruling ensures that the "government now has a direct pocketbook interest in stopping this kind of behavior," Bucholtz pointed out that "FTCA judgments are paid by an unlimited fund provided by Congress, so it doesn't hurt prison guards or their supervisors when judgments are paid out under the statute."

In other words, it's just business as usual, with the taxpayer forced to pay the penalty for the government's misdeeds. In days gone by, this payment to right a wrong was called "blood money," and it was paid by the guilty party to his victim. Could it be that the government has managed to slip the noose from around its own neck, leaving us to hang for the crime—figuratively speaking, of course?

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