

## Media fail primary First Amendment mission

By: Nat Hentoff – April 10, 2013

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James Madison, who introduced the Bill of Rights into Congress, later said: “The press has been the beneficent source to which the United States owes much of the light which conducted us to the ranks of a free and independent nation” (my book, “The War on the Bill of Rights and the Gathering Resistance,” Seven Stories Press, 2004).

But now, with the continuous, instantly accessible flood of information on the web, in print, on blogs, in social media, et al, crucial developments concerning our most basic personal rights and liberties are often covered minutely, if at all.

For example, how many of you are aware of the unanimous March 27 Supreme Court decision in *Millbrook v. United States*, written by Justice Clarence Thomas? It got lost in the enormous, sustained media coverage of the same-sex marriage arguments that were made before the court that week.

The court’s judgment in *Millbrook* could start to end the immunity of many law enforcement officials who permit the violations of citizens’ constitutional rights. These violations may include assault and other harsh treatment of people in the custody of government enforcement agents, such as prison guards.

Herewith are the brutal facts of Kim Lee Millbrook’s case as retold by John W. Whitehead, who directs the Charlottesville, Va.-based Rutherford Institute. Whitehead submitted an amicus brief supporting Millbrook before the Supreme Court. (If President Madison were still with us, Whitehead would be receiving the Medal of Freedom.)

Whitehead notes that while Millbrook was “serving a 31-year sentence, reportedly for drug and gun-related charges along with witness intimidation,” he was “transferred to a high-security federal prison in Lewisburg, Pa.” (“*Millbrook v. U.S.: Holding the Government Accountable for Misconduct by Law Enforcement Officials*,” John W. Whitehead, [rutherford.org](http://rutherford.org), April 1)

A few days after his arrival to Lewisburg, Millbrook got into a fight with his cellmate, and they were both put 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.”

Whitehead continues: “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.”

When his case came to federal district court and the 3rd Circuit Court of Appeals, it was decidedly not received sympathetically. The courts decided that the prison guards could not — as Millbrook claimed — “be held liable under a provision of the Federal Torts Claim Act (FTCA), which allows individuals to sue federal law enforcement officials for misconduct.”

Here we come to the core of this case and why the Supreme Court’s unanimous decision for Millbrook should have been at the top of the news media around the country. Whitehead cites WNYC reporter Ailsa Chang, who explains why the Supreme Court stood up for Millbrook as an American citizen:

“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.”

What?

“And even in those cases,” she goes on, “the federal government can be liable only if the officer was acting ‘within the scope of his office or employment’” (“High Court Rules U.S. Government Can Be Sued Over Actions of Prison Guards,” Ailsa Chang, npr.org, March 27).

When a prison guard forces a prisoner to commit oral sex on him, is that within the scope of his employment? If not, what else can the guard do without punishment?

The federal district court and the 3rd Circuit, explains Whitehead, dismissed Millbrook’s case on the grounds that “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.”

Because those three prison guards were doing none of those things, Millbrook was told, in effect, he had no case. But he disagreed. Adding to the uniqueness of this case, Millbrook, Whitehead reports, “filed a handwritten petition, in pencil no less, to the U.S. Supreme Court.”

And on March 27, the Supreme Court, remanding the case, made Millbrook a citizen again, declaring that the law extends to “acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence or making an arrest.”

It should be noted that Justice Thomas has a fair civil liberties record, except when it comes to prisons; but he did a somersault in this case.

Whitehead summarizes: “Hopefully, the Supreme 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 -- whether they’re police officers or prison guards” (“Victory: Unanimous Supreme Court Rules That Citizens Can Hold Federal Government Liable for Abuse by Law Enforcement Officers (Police, Prison Guards),” [www.rutherford.org](http://www.rutherford.org) [1], March 28).

The media could help if they’d wake up and tell Americans what happened in the case of citizen Millbrook.

Meanwhile, now that the Supreme Court has permitted Millbrook to resume his case against the government for damages, I wish him well. Of course, it would also help if former constitutional law professor Barack Obama spoke out about this case.