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A Practical, Defensible One-Off Solution To The Problem Of True Terrorists At Gitmo

National Affairs

By Lawrence R. Velvel, JD
Black**C**ommentator.com **Columnist**

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Early on, it was made plain here, on five occasions from May through July of 2004, that the reason the Bush administration wanted to use military tribunals to try prisoners was that evidence against them had been obtained by torture and therefore could not be used against them in federal courts. At the time, this was *completely* unrecognized, and not even covered, by the news media. Subsequently, of course, the point became widely known and, indeed, conceded. (These commentaries were are reprinted in *Blogs From the Liberal Standpoint: 2004-2005* (Doukathsan Press, 2006).)

Now, because of the failure of military tribunals, the new Obama administration will be faced with a major problem: what to do about longstanding detainees who were responsible for 9/11 or other horrors. It is widely assumed that, as was said here four and one-half years ago, the detainees cannot be successfully tried because, as was said here in 2004 and is now long conceded, the evidence against them is deeply tainted by torture. On the other hand, they surely cannot be set free. So, how to proceed?

There is a simple answer that, once again, as almost always true of the MSM, has not been considered by the media. It turns on the reason why the Supreme Court initially decreed in 1961 that evidence obtained illegally cannot be used in court to prosecute a person - a rule now so deeply embedded in the public and professional psyches that the original reasons for it tend to be forgotten or ignored.

Before the Supreme Court's 1961 ruling (in *Mapp v. Ohio*), evidence obtained illegally was admissible in court if it seemed to be reliable. To stop the cops from obtaining evidence illegally, as by beating prisoners with the proverbial rubber hose, we relied on

civil suits, internal police discipline and even prosecutions against cops. The matter was once expressed by Justice Frankfurter - one of the worst Justices in American history but beloved of the Harvard Law School for decades - in the pithy question of "Shall the criminal go free because the constable has blundered?" To put this question was to answer it, so the rule was, as said, that reliable evidence could be admitted, while we would rely on suits against the cops to stop them from gathering evidence illegally in future.

Well, as you have likely guessed since you know about the long prevailing corruption of our criminal justice system now so powerfully exemplified by the Bush administration, the idea that civil suits, internal police discipline or even prosecutions would stop police misconduct was simply hopeless. Police station beatings and illegal seizure of evidence continued apace. So finally the Supreme Court had to say that, to stop this police misconduct, evidence that was seized unlawfully would be inadmissible at trial, would be excluded at trial. There would then be no point in beating the evidence out of suspects, or seizing it illegally, because if such conduct were shown, the evidence would be inadmissible for purposes of a prosecution - it would be "excluded."

This ruling in *Mapp*, called the exclusionary rule, was absolutely necessary at the time - and afterwards, too, because police misconduct did not wholly stop, so a rule making it self defeating continued to be essential. But, because of the rule's origin, there has long been a debate over whether the exclusionary rule is constitutional in nature or merely preventive in nature (i.e., is only to prevent violations of the Constitution), and, correlatively, over whether it can be altered by Congress or otherwise suffer inroads. Passing the details of the debate, however - or perhaps "deliberately ignoring" them would be a more apt phrase - the origins of the exclusionary rule provide an answer to the question of how to deal with those prisoners at Guantanamo who simply cannot be set free, but must instead be tried and punished if found guilty (actually, *when* found guilty, not *if* found guilty, because of overwhelming proof of their culpability).

The solution is to create a one-off exception to the exclusionary rule for terrorists who attacked the United States in the past, a one-off return to the rule which prevailed prior to *Mapp v. Ohio*. Under this one-off exception, (1) evidence obtained against the prior terrorists by illegal torture or abuse would be admitted if it appears reliable (e.g., if it is corroborated by other evidence that was learned from the terrorist, from his fellows, or from the "fruit of the poisonous tree" obtained by following up on what he admitted under torture), while (2) further illegal obtaining of evidence via torture and abuse is deterred by bringing prosecutions against, and in the case of prisoners who were innocent, allowing civil suits against the persons responsible for the torture, from Bush on down to the CIA and military guys who did the beatings, waterboardings, etc.

It likely would also be helpful, though perhaps not essential, if, in recognition of the horrible nature of the Bush administration's misconduct in torturing people into confessions, a horrible character made even worse because so many FBI and other criminal investigation types were able to get pertinent information through normal techniques of interrogation before they were shoved aside by the torturers, the penalty was restricted to life in prison without parole, instead of being death, for terrorists found guilty (as they will be) due to evidence obtained wholly or partly through torture.

This solution could be adopted by the new Obama administration whether by itself or in

conjunction with an appropriate congressional law or resolution. The solution, one is sure, could and would be successfully defended in the courts. The courts don't want to see freedom given to the terrorists who attacked America, and the one-off solution confined to the extraordinary fact of years of prior illegal torture will enable courts to be assured that the dreadful enemies will not go free. (One notes that in the past there have been various kinds of cases in which, obviously due to the hydraulic pressure of circumstances, courts have occasionally declined to apply the exclusionary rule in situations where it would seem applicable.) For the same reason that move the courts, the solution will be acceptable to Congress and the public.

It also is likely to be quite acceptable to foreign governments which have been deeply upset with America and will be further upset if even terrorists are executed because of torture, but will understand that the men who planned 9/11 cannot be set free. The one-off solution will be acceptable to persons of my own persuasion, who abhor what the Bush administration has done, want its personnel to be prosecuted for their terrible crimes, but do not want the major terrorists set free.

In fact, the only people who will object to the one-off solution are likely to be those complicit in torture who will be prosecuted (as they should be - which would equally upset them regardless of whether or not a one-off solution is adopted), and their right wing supporters who believe it was perfectly all right to torture people. But all those people have already caused us an immense amount of trouble (and were rejected by the nation at large on November 4th, one would venture). You can never satisfy everyone, and it is no bad thing if those who are dissatisfied are - ironically in view of Rumsfeld's largely untrue comment about Guantanamo detainees several years ago - the worst of the worst that America has to offer.

The short of the matter is that the one-off solution - allowing unlawfully obtained evidence to be used because of the dreadful situation we find ourselves in due to years of Bushian misconduct, while deterring future misconduct by punishing prior misconduct via prosecutions and suits by innocents who were tortured - provides the Obama administration with a legitimate and likely widely acceptable solution to one of the serious problems bequeathed it by the rotten people whom it is succeeding.

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BlackCommentator.com *Columnist, Lawrence R. Velvel, JD, is the Dean of Massachusetts School of Law. He is the author of* Blogs From the Liberal Standpoint: 2004-2005 *(Doukathsan Press, 2006). Click here to contact Dean Velvel, or you may, post your comment on his website, VelvelOnNationalAffairs.com.*

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