

HENRY LOUIS GATES' CONTEMPT OF COP

At last night's nationally televised press conference, a reporter, Lynn Sweet, asked President Obama a question about the July 16 arrest of famed Harvard professor Henry Louis Gates. Obama gave a perfectly reasonable answer, at first a little humorous as to what would have happened to him in a similar circumstance, and then indicating that the Cambridge Massachusetts police department "acted stupidly", followed by a serious discussion of the lingering problems in the US of oppressive profiling and treatment by police of Blacks and Hispanics.

Obama's response, predictably, set the chattering press all a twitter and a tweeting. This brief interlude at the very end of the press conference didn't get as much afterglow coverage as the healthcare issues that were the reason for the press conference in the first place, but it sure seemed like it came close on cable channels such as CNN and MSNBC.

First off, let me say I agree with Josh Marshall:

But let's be honest: this is all about a black guy getting on the side of another black guy who got crosswise with the cops. Why would he touch such a powder keg? Like it's going to ignite at least one more battle in the late lamented Culture War.

That really is it, isn't it? What set the twits a twittering was the first black President had the audacity to stand up for another black man and call the overzealous and oppressive police response in the case stupid. Well, the police response was stupid.

That said, before I go further, I would like to point out one thing. Barack Obama may have shown himself to be a truth teller and friend to Henry

Gates last night, but he may have done Gates a disservice in one regard. The famed "Blue Line" of police in situations like this is a strong factor far greater than most people realize, and Obama's comment will surely stiffen the police line in Gates' case. It was a line already forming:

The union representing the police sergeant who arrested a prominent black Harvard professor last week at his home in Cambridge, Mass., said it was standing behind the officer. The union, the Cambridge Police Superior Officers Association, said in a statement that Sergeant James Crowley was a "highly respected veteran supervisor" who had its "full and unqualified support." "His actions at the scene of this matter were consistent with his training, with the informed policies and practices of the department, and with applicable legal standards," the statement said. The professor, Henry Louis Gates Jr., has asked for an apology from Sergeant Crowley, who was investigating a report of a possible break-in at the Gates residence. He arrested Professor Gates on disorderly conduct charges, but the charges have since been dropped. Sergeant Crowley told The Associated Press that he had followed proper procedures and would not apologize.

The Blue Line is no joke and it is not thin, cops stick together and stick up for each other right or wrong. I have been involved in numerous false arrest cases, and I am here to tell you that is a fact and chances are Obama's comment will only further cement it in Gates' case.

There is one other potential way that Obama's comment may have been deleterious to Gates' case. Although the authorities have wisely dismissed the criminal charge of disorderly conduct (hard to figure how Gates could have been "disorderly" in his own home and front

stoop, the charge generally requires public disturbance), there is a real likelihood Gates may pursue a civil case, especially since the Cambridge PD has taken the stand of no apology. Professor Gates has already indicated in public forums that he wants to create a teaching and transformational moment out of the incident, and he certainly has the resources and profile to do so.

The obvious outlet for Gates is a civil rights false arrest claim, likely under state law, Constitutional protections and 42 USC §1983. That means the real possibility of a jury trial. But, thanks to President Obama declaring the actions of the Cambridge Police Department "stupid" and wrong, the attorney defending the Police Department now has a lever in his favor should the case go to a jury. You can expect said defense attorney to move the court for a jury questionnaire to survey the jury pool as to who saw or heard said comment by the President of the United States, and in that local pool, the people who saw and/or heard of it are going to be the jurors Plaintiff Gates wants in the jury box the most.

However, the defendants are going to move to exclude those jurors for potential bias because they are arguably tainted and influenced by the words and declaration of the President. If there is a sufficiently large jury pool available, such a move may well be successful. The governmental entity will scream about its right to a fair and impartial trial, and judges are very inclined to listen to such arguments in these types of trials. That leaves a tilted jury pool without a whole swath of the jurors that would be most inclined to be sympathetic to Gates. It is a small point and thought this early in the process but, trust me, somewhere there are already lawyers (yes there will already be lawyers working it for them) for Cambridge and its Police Department making notes on this very subject.

Now, back to the merits of Professor Gates'

claim; they are many and profound. From the New York Times:

But in the report, Sergeant Crowley said that as he told Professor Gates he was investigating a possible break-in, Professor Gates exclaimed, "Why, because I'm a black man in America?" and accused the sergeant of racism.

"While I was led to believe that Gates was lawfully in the residence," Sergeant Crowley wrote in the report, "I was quite surprised and confused with the behavior he exhibited toward me."

Professor Gates followed him outside, the report said, and yelled at him despite the sergeant's warning "that he was becoming disorderly." Sergeant Crowley then arrested and handcuffed him. Professor Gates was held at police headquarters for hours before being released on his recognizance.

There is a concept known as "driving while black" literally synonymous with unlawful racism and racial profiling in America. What appears to have occurred with Gates makes driving while black look like a legitimate and justified police practice in comparison. Professor Gates was in his own home and showed appropriate identification exhibiting the same. At that point the incident needs to end. Period. If Gates demands the responding officer's name, it is a reasonable request, the officer needs to say he is sorry, give Gates his name and badge number and leave. It is really the only reasonable action under the circumstances.

But that, of course, is not what occurred. Instead, the officer seems to have become angered and belligerent that Gates would be so forward as to demand his identification. At this point, little old Professor Gates, who walks with a cane, was in what is known in the criminal justice field as "contempt of cop".

The salient problem for the Cambridge Police Department is contempt of cop is simply not a crime, even if profanity is directed at the officer, a situation escalator not even present in Gates' case. In fact, there is a case I have argued with success many times, *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990) which, in an opinion written by now 9th Circuit Chief Judge Alex Kosinski, provides:

Duran's conduct is not totally irrelevant, however, as it suggests a possible motive for his detention, one upon which law enforcement officers may not legitimately rely. The Durans contend, and the district court held, that Aguilar stopped their car at least partly in retaliation for the insult he received from Duran. If true, this would constitute a serious First Amendment violation. "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Hill, 482 U.S. at 461, 107 S.Ct. at 2509. The freedom of individuals to oppose or challenge police action verbally without thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state. Id. at 462-63, 107 S.Ct. at 2510. Thus, while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.

...

No less well established is the principle that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of

office knows—or should know—that much.
See Hill, 482 U.S. at 462, 107 S.Ct. at 2510. Whether or not officer Aguilar was aware of the fine points of First Amendment law, to the extent he is found to have detained Duran as punishment for the latter's insults, we hold that he ought to have known that he was exercising his authority in violation of well-established constitutional rights.

Sounds pretty much on point doesn't it? It is. The City of Cambridge, Sergeant Crowley, and the other individual officers actively participating in the wrongful arrest of Professor Henry Louis Gates are in a world of hurt legally. They may want to rethink the company line of no official apology.

UPDATE: Via Rayne's link to DKos in comments, and the Boston Globe, the Statement of Facts from the official police report in the Gates arrest:

On Thursday July 16, 2009, Henry Gates, Jr. ____ of ____ Ware Street, Cambridge, MA) was placed under arrest at ____ Ware Street, after being observed exhibiting loud and tumultuous behavior, in a public place, directed at a uniformed police officer who was present investigating a report of a crime in progress. These actions on behalf of Gates served no legitimate purpose and caused citizens passing by this location to stop and take notice while appearing surprised and alarmed.

Signed: Sgt. James Crowley

And therein lies the problem for Sergeant Crowley and the Cambridge PD. It was a patently illegal and insufficient arrest from the start. Gates is arrested for disturbing the peace – *of Sergeant Crowley*. See the words "directed at a uniformed officer"? This is the epitome of

contempt of cop, and that is an illegal and unconstitutional arrest. What is *not* contained in the statement of facts is any reference to an *identifiable* citizen/member of the public being disturbed. None whatsoever. This is precisely the type of conduct castigated historically by courts as generally described in *Duran v. City of Douglas*.