

# **DOD REASSERTS ITS RIGHT TO FORCE FEED WHILE NOT DENYING FORCE FEEDING IS TORTURE**

Last Thursday, as a number of outlets reported, Judge Gladys Kessler declined to renew her own Temporary Restraining Order prohibiting the government from force feeding Abu Wa'el Dhiab. As she wrote, Dhiab was willing to be force fed without withdrawing his feeding tube each session and without use of the restraining chair. But the government refused, and so, "faced with an anguishing Hobson's choice," in the face of the "intransigence of the Department of Defense," Kessler did not renew her TRO and ordered DOD to, "abide by their own Standard Operating Protocols, and that the standard for enteral feeding is whether Mr. Dhiab is actually facing an 'imminent risk of death or great bodily injury.'"

Only, it's not clear that's the standard. In fact, the government itself says the standard may be simply body weight of less than 85% of ideal body weight.

A slew of filings have been released in Dhiab's case in the last month (see below). But key among them are some filings submitted in April and early May, which were just released Friday.

Effectively, the delayed release of these documents reveals that back on May 7, one of the government's primary rebuttals to claims about the conditions under which Dhiab was force fed last year was not to refute those claims, but rather to claim he had no standing to complain because he was not – at that point – being force fed. Only 6 days later Gitmo cleared Dhiab to be force fed.

Underlying this discussion is Dhiab's claim that

the government has made the standards for force feeding arbitrary so as to be able to subject those detainees leading force feeding campaigns to painful treatment to get them to stop.

To substantiate that argument, the memorandum unsealed on Friday lays out the changes made to Gitmo's force feeding protocol in November and December. Those changes include:

- Deletion of limits on the speed at which detainees could be force fed
- Elimination of guidelines on responding to complaints about speed of force feeding
- Change of weight monitoring from daily to weekly
- Deletion of chair restraint guidelines (DOD made a special SOP to cover restraint chair they have thus far refused to turn over)
- Expansion of scenarios in which prisoners can be force fed, including those at 85% of ideal body weight (IBW)
- Deletion of provisions against on-off force feeding
- Discontinuation of use of Reglan (this has to do with potentially permanent side effects from the drug)
- Replacement of phrase "hunger strike" with phrase "medical management of detainees with weight loss"

In response, the government argued (at a time

Dhiab was not eating but before they put him on the force feeding list) that he didn't have standing because he had not been force fed for 2 months. It also made a sustained defense of the 85% of IBW. Much of the rest of the response described how prisoners are currently force fed.

Dhiab's lawyers responded by parsing the language of the government response closely. They point out that:

- No one actually involved in the force feeding of detainees submitted a declaration in the case
- The Senior Medical Officer whose declaration forms the basis of much of the response didn't arrive in Gitmo until this February, and so has no first hand knowledge of last year's force feeding
- The guy who preceded him did not submit a declaration even though he remains in the Navy, stationed at Jacksonville NAS
- The government relies on a 2006 DOD Standard Operating Procedure document rather than the specific Gitmo SOPs written last year

Ultimately, Dhiab argues that the government has stopped some of the most abusive practices associated with force feeding – which they compare (with a doctor's declaration in support) to water torture – while being sued.

Respondents state that the force-feeding "is" conducted humanely, and that

detainees “are” not being force-fed at quantities and speeds amounting to water torture. That might be partially true *today*, to the extent respondents have suspended some (but not all) of their abusive practices during the pendency of litigation challenging those practices. But Respondents utterly fail to rebut Petitioner’s showing of *past* abusive practices.

And of course, they’re making this argument as the government claims they shouldn’t have to turn over videos *or Dhiab’s medical records* from last year, the latter because they couldn’t be relevant to this suit because they couldn’t affect what might happen to Dhiab going forward – in spite of the fact that the SOPs remain unchanged.

This is all cross-allegation at this point; we may find out more when the government has to start turning over this stuff in June.

But it seems remarkable, the way the government has hidden details from last year, even while controlling Dhiab’s force feeding status and with it their legal argument.

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April 18, 2014: Motion for preliminary injunction, with sealed supplemental memorandum

April 22, 2014: Dhiab speaks to lawyers

April 23, 2014: Dhiab resumes skipping meals

April 24, 2014 Status report

May 7, 2014: Sealed opposition to preliminary injunction

May 12, 2014: Sealed reply to opposition; government refuses to provide 2013 medical records, videos, restraint chair SOP

May 13, 2014: Emergency motion to preserve evidence; Dhiab placed back on force feeding list; nurses start cajoling him about eating

May 14, 2014: Order to reply to emergency motion; according to his lawyer, Jon Eisenberg, Dhiab force fed (all other force feeding details come from Eisenberg)

May 15, 2014: Opposition to emergency motion; according to filing, Dhiab had not yet been force fed; Dhiab force fed in afternoon

May 16, 2014: Reply to opposition to emergency motion; Kessler issues TRO; Dhiab claims Sergeant harasses him about a FCE

May 21, 2014: Status report hearing

May 22, 2014: Kessler does not reissue TRO

May 23, Kessler orders partial disclosure; documents unsealed; Dhiab force fed

May 24: Dhiab force fed twice

May 25: Dhiab force fed twice

May 26: Dhiab voluntarily takes food and nutrient