

DIANNE FEINSTEIN SUGGESTS PRESIDENT OBAMA PERSONALLY VIOLATING OUR TREATY OBLIGATIONS

As I noted the other day, in her ruling that she could not halt the force-feeding at Gitmo, Gladys Kessler described the treatment as “degrading,” potentially invoking our obligations under Article 16 of the Convention against Torture to prevent degrading treatment. Kessler actually explicitly invoked International Covenant on Civil and Political Rights, which includes a similar prohibition on degrading treatment.

Dianne Feinstein and Dick Durbin sent Obama a letter yesterday, using Kessler’s ruling to connect the two explicitly.

U.S. District Court for the District of Columbia Judge Gladys Kessler also expressed concern about the force-feeding of Guantanamo Bay detainees. The Court denied detainee Jihad Dhiab’s motion for a preliminary injunction to stop force-feeding due to lack of jurisdiction, but in her order, Judge Kessler noted that Dhiab has set out in great detail in his court filings “what appears to be a consensus that force-feeding of prisoners violates Article 7 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits torture or cruel, inhumane, and degrading treatment.” The United States has ratified the ICCPR and is obligated to comply with its provisions. Judge Kessler also wrote, “it is perfectly clear from the statements of detainees, as well as the statements from the [medical] organizations just

cited, that *force-feeding is a painful, humiliating, and degrading process.*" (emphasis added).

The judge concluded by correctly pointing out that you, as Commander in Chief, have the authority to intercede on behalf of Dhiab, and other similarly-situated detainees at Guantanamo. The court wrote: "Article II, Section 2 of the Constitution provides that '[t]he President shall be the Commander in Chief of the Army and Navy of the United States. ...' It would seem to follow, therefore, that the President of the United States, as Commander-in-Chief, has the authority—and power—to directly address the issue of force-feeding of the detainees at Guantanamo Bay."

Feinstein only by association makes the next part of her argument. We comply with these treaties by complying with our Eighth Amendment prohibition on cruel or unusual punishment. And the government has long said that if we can do something elsewhere in a our gulag system, we can do it in Gitmo.

In a letter to Chuck Hagel last month – which Feinstein noted in yesterday's letter but did not quote from – she laid out how our force-feeding at Gitmo differs from that used in the Bureau of Prisons.

In addition to the allegation that the Department of Defense's force-feeding practices are out of sync with international norms, they also appear to deviate significantly from U.S. Bureau of Prison practices. Based on a review by Intelligence Committee staff, the significant differences between force-feedings at Guantanamo Bay and within the U.S. Bureau of Prisons relate to the manner in which the detainees are force-fed, how often detainees are force-fed, and the safeguards and oversight in

place during force-feedings.

Within the Bureau of Prisons, force-feeding is exceedingly rare. The Intelligence Committee staff has been told that no inmate within the Bureau of Prisons has been force-fed in more than six months. When force-feedings do occur within the Bureau of Prisons, we have been told that nearly 95% of the time they are conducted with a fully compliant inmate requiring no restraints. At Guantanamo Bay, on the other hand, all detainees being force-fed—regardless of their level of cooperation—are placed in chairs where they are forcibly restrained. The visual impression is one of restraint: of arms, legs, and body. Further, at Guantanamo Bay, detainees are fed twice a day in this manner, potentially over a substantial period of time. This also is inconsistent with the practice of the U.S. Bureau of Prisons.

Additionally, the U.S. federal prison guidelines for force-feedings include several safeguards and oversight mechanisms that are not in place at Guantanamo Bay. These guidelines require the warden to notify a sentencing judge of the involuntary feeding, with background and an explanation of the reasons for involuntary feeding. Further, the Bureau of Prisons requires an individualized assessment of an inmate's situation to guide how force-feedings are administered, a practice that I found largely absent at Guantanamo Bay. Finally, all force-feedings must be videotaped within the Bureau of Prisons.

It's almost as if DiFi knows or suspects there's an OLC memo that – parallel to the ones that found torture to be legal because it vaguely resembled practices elsewhere (as when they

noted that members of the military undergo SERE training, so reverse-engineered SERE techniques used in different situations were legal) – finds our force-feeding at Gitmo to be legal because judges have approved the way we force-feed people in federal prisons. In any case, Gitmo officials have said their treatment is similar with BOP treatment.

Between these two letters, she has laid out why that is not the case. Indeed, that's the import of Kessler's language, a federal judge finding the treatment we use in Gitmo to violate our obligations under ICCPR.

Say what you will about DiFi (lord knows I've often said the same, where I thought it appropriate), but she has just told a President from her own party that he's breaking the law.