

Force-Feeding at Guantánamo: Medical, Legal and Ethical Analysis

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Abstract

INTRODUCTION

A hunger strike is a form of speech that prisoners or detainees can use to communicate their concerns about some particular issue. Over the decades, whether in Ireland or Israel, the hunger strike has been viewed as a political weapon used by prisoners or the powerless. At the military detention center at Guantánamo Bay, Cuba, it is being used by detainees to protest their confinement and to protest the fact that guards improperly handled Korans during searches, charges that are denied by the United States military. According to sources, twice a day guards at Guantánamo take a number of detainees from their cells, one at a time to a camp clinic. The detainees are offered a hot meal or a liquid supplement and, if they refuse, they are strapped into a chair and are force-fed. A medical professional passes a nasogastric tube down their noses and down into their stomachs. They are fed a liquid supplement of Ensure for one to two hours.

The hunger strikes at Guantánamo have reignited the debate nationally and internationally about whether it is ethical to force-feed competent detainees. The International Red Cross, the World Medical Association, and the United Nations recognize the right of competent prisoners to go on a hunger strike. All three organizations have labeled force-feeding a violation on the ban of cruel, inhumane, and degrading punishment. The World Medical Association goes so far as to state that it is unethical for physicians to participate in force-feeding because it violates international law.

To address this issue, a case study has been designed that explains the facts regarding the force-feeding of hunger strikers at Guantánamo. The case study will then be analyzed medically, legally, and ethically.

CASE STUDY

For nearly four months there has been a hunger strike occurring among the prisoners at the prison in Guantánamo Bay, Cuba. At the latest count as of June 1, 2013, 100 of the 166 prisoners are on strike, motivated in large part by their indefinite imprisonment without charge or trial. Twenty-nine of the prisoners are being forced-fed, the largest number yet during this hunger strike. The detainees claim what triggered the hunger strike at Guantánamo was the military's searching of their Korans and the institution of a series of harsh new measures—claims which are denied by the military. The underlying issue is that the detainees are in despair of ever being released. Many of them, including fifty-six men from Yemen, have been cleared to leave the prison by a committee of top national security officials. However, thanks to a combination of Congressional actions taken during the past few years and the timidity of President Obama, they remain in Guantánamo with no release in sight. The hunger strike has been their way of reminding the world of their continued imprisonment, and it has worked brilliantly.

For decades, the international community—including the International Red Cross, the World Medical Association and the United Nations—has recognized the right of prisoners of sound mind initiate hunger strikes. Force-feeding has been labeled a violation on the ban of cruel, inhuman, and degrading punishment. The World Medical Association holds that it is unethical for a doctor to participate in force-feeding. Put simply, force-feeding violates international law. The military claims that it is force-feeding the detainees in order to keep them safe and alive. At least thirty-five men, though possibly more, are being force-fed by being placed in emergency restraint chairs.

Al Jazeera managed to obtain a thirty-page document that detailed the standard operating procedures used by the military to force-feed a detainee. The document makes for gruesome reading: the detainee shackled to a special chair (which looks like the electric chair); the head restrained if he resists; the tube pushed painfully down his nose; the half-hour or so of ingestion of nutritional supplements; the transfer of the detainee to a “dry cell,” where, if he vomits, he is strapped back into the chair until the food is digested. Detainees are also apparently given an anti-nausea drug called Reglan, which has a severe potential side effect if given for more than three months: tardive dyskinesia, a disorder characterized by muscle twitching and involuntary movements.

The lawyers representing the detainees would like to file a motion in federal court to stop the force-feeding, but there is a “Catch-22.” They are unable to go to court without the consent of their clients—and thanks to another set of harsh, new protocols, including the genital and anal searches, most clients are now refusing to talk to their lawyers.

Even before the force-feeding procedures were leaked, international organizations were protesting the practice. The United Nations Office of the Commissioner for Human Rights released a statement in early May calling the continued detention in Guantánamo a “flagrant violation of international human rights law” and categorizing the force-feeding at the prison as “cruel, inhuman, and degrading.” Some within the Bioethics community believe that the manner in which the forced-feeding is done could constitute torture.

Ethically, does the United States government have the right to force-feed prisoners on a hunger strike to avoid causing harm to the prisoner? The decision whether or not to force-feed a detainee at Guantánamo is a military one to be made by the base commander; the decision about how to actually force-feed a prisoner is a medical one to be made by military physicians. Should physicians be involved in this procedure?

MEDICAL ANALYSIS

Enteral feeding is an effective means of providing nutritional support in cases where an individual is at risk for malnourishment due to a disruption of typical alimentary mechanisms. Significant medical and ethical attention has focused on the use of percutaneous endoscopic gastrostomy (PEG) tubes and other means of delivery of enteral nutrition as it relates to individuals with dementia and persistent

vegetative states, as in the Schiavo or Cruzan cases. Force-feeding individuals on hunger strike, however, is quite different. The processes of force-feeding used in Guantánamo must be analyzed on their own merits in order to comprehend the legal and ethical implications of these procedures.

Artificial nutrition and hydration dates back to ancient Egypt and Greece. Strategies for enteral feeding have largely remained unchanged through the centuries. Typically, this type of nutritional support involves the delivery of thick compound to the upper gastrointestinal tract. The most frequent short-term delivery mechanism is an orogastric (OG) or nasogastric (NG) tube. These semi-flexible plastic tubes are used routinely for a number of indications as the procedure for placement is fairly straightforward.

NG tubes are placed in one nostril (naris) and advanced through the back of the nose (nasopharynx), down the throat passing the sensitive tissues that trigger the gag reflex, then through the esophagus into the stomach or the first part of the small intestine, known as the duodenum. This procedure is frequently assisted with a water-based lubricant to ease the passage of the plastic tubing across the fragile mucosal tissues. Despite these measures, tears of the nasopharyngeal mucosa resulting in pain, bleeding, and erosions regularly occur. Discomfort and retching can be reduced by encouraging small sips of water to generate the movement of the esophagus and help propel the tube into the stomach.

While uncomfortable even under ideal circumstances, NG tube placement is particularly difficult in those patients resisting placement. The exact indications for the use of restraints in the individual cases of Guantánamo detainees remain unclear; however, it is reasonable to assume that an individual experiencing critical illness due to malnourishment might experience severe electrolyte abnormalities contributing to delirium requiring restraint. Alternatively, individuals with certain underlying psychiatric conditions potentially exacerbated by the stress of detention may have an increased proclivity for participating in activity such as a refusal of or resistance to nutrition. Regardless of the particular indication for restraints, any active resistance to this procedure increases the risk of complications. These risks are further compounded by the serial application of this procedure, which can worsen previous nasopharyngeal injuries and increase the risk for more severe esophageal trauma including perforation. Furthermore, this procedure is often performed “blind” or without direct visualization, resulting in an inability to confirm the precise location of the

NG tube. Plain film radiographs (X-rays) are used in hospital settings as a standard means to confirm the termination point.

The nutritional milkshake-like mixture is injected through the use of a pump or gravity with or without manual pressure. Typically, the volumes required to provide adequate nutrition are 1-2 liters, depending on the formulation and concentration of enteral feeds. Enteral feeding is often initiated at a very slow “trickle rate” at upwards of twenty milliliters per hour in the hospital setting to avoid abdominal distension, reflux, nausea, cramps, regurgitation, and pain. This rate is then increased based on weight, height, body mass index, and disease process to reach a goal rate at which designated volume of enteral feeding is delivered over a full day. Bolus feeding accompanied by pro-motility medications may be pursued in some patients who are tolerant of the tube feeding.

The process described in news reports describes the administration of the tube feeds over the course of thirty minutes. This would likely result in significant gastric distention and discomfort that could trigger regurgitation or vomiting. A pro-motility medication with anti-nausea effects, called metoclopramide (Reglan ©) is administered to mitigate this effect. The anti-nausea and anti-emetic effects are the result of stimulation of dopamine receptors in the central nervous system, which are also the targets of antipsychotic medications such as haloperidol (Haldol ©). With related mechanisms of action, metoclopramide is known to cause adverse effects that are similar to those of haloperidol, the worst of which is tardive dyskinesia (TD). Tardive Dyskinesia is a movement disorder characterized by uncontrollable rapid, darting movements. Although rare, it can be irreversible. Because this side effect is dose dependent, close monitoring with prolonged and recurrent administration is critical.

While relatively simple by conception, NG tube placement tends to be more challenging to complete than other more technically complex bedside procedures. This is in large part due to the apparent discomfort and perception of suffering often observed while performing this procedure. It is likely due to this reason that international bodies view the forced feeding of prisoners as unethical or as a violation of human rights.

LEGAL ANALYSIS

In analyzing the legality of forced feeding of hunger-striking detainees, one must begin with the premise set forth

by the United States Supreme Court over two decades ago that a competent individual has the Constitutional right to decline medical treatment.[1] The Supreme Court’s use of the word “competent” in that case, commonly known as *Cruzan*, was not accidental. Specifically, in *Cruzan*, the Supreme Court upheld the State of Missouri’s refusal to terminate hydration and nutrition of an individual, Nancy *Cruzan*, who had been in a permanent vegetative state for over seven years, on the basis that Ms. *Cruzan* was not competent and her family had failed to meet the State’s required burden of proof to decline medical treatment.[2] Thus, the government will not typically interfere with the autonomous medical determination of an individual unless that individual is not fully competent.[3]

With that foundation, the issue then becomes whether an individual who is in the custody and control of the government, such as a Guantánamo detainee, may contest forced feeding by arguing a Constitutional violation of the right to decline medical treatment. While this issue may be relatively new in the context of post-September 11, 2001 detainees, it is not a legal issue of first impression. In fact, less than two months after *Cruzan* was decided, the Commonwealth Court of Pennsylvania determined whether a convicted murderer serving two life sentences in a Pennsylvania prison could legally starve himself to death.[4] There, the Court permitted forced feeding, stating that unlike *Cruzan*, “this is not a ‘right to die’ case in the usual sense.”[5] The Court explained that once an individual becomes a convict, any Constitutional rights that he may have are extremely limited due to the unique nature and requirements of prison custody.[6] Although conceding that the prisoner in question was competent, the Court applied a Constitutional balancing test and concluded that the Commonwealth’s interest in maintaining the security, order, and discipline in its prisons outweighed the prisoner’s desire to starve to death.[7] Other courts, including a New York case decided this year, further support the right to force feed prisoners, noting that the nature and condition of prisons may undermine sound judgment and thus raise questions as to whether a prisoner is truly competent as set forth in *Cruzan*. [8]

It should not come as a surprise that, with respect to force-feeding of suspected terrorists, the federal government’s interest in maintaining security, order, and discipline in its prisons even more heavily outweighs the detainee’s individual rights. Challenges to government force-feeding at Guantánamo Bay first began to reach the Federal Circuit

courts in Washington, D.C. around 2005. At that time, perhaps with the aftereffects of the September 11, 2001 attacks still playing a role, the courts denied simple requests of the detainees and their counsel for notice prior to commencing forced feeding or an opportunity for independent medical review.[9]

As issues related to the continued detention of individuals at Guantánamo Bay without trial and issues of prison torture have permeated the media and courts since 2005, however, the courts have begun to apply more procedural safeguards to protect the rights of detainees from abusive forced feeding. For example, in *Zuhair v. Bush*, a detainee sought the Court's intervention after repeated episodes of vomiting from forced feeding due to the government's use of a restraint chair and a feeding solution to which the detainee was allergic.[10] In a significant move, the Court ordered the parties to agree on an independent medical expert to examine the detainee's medical and mental health condition.[11] Pending the expert's report, the Court would revisit the other issues raised by the detainee. Similarly, in *Al-Olshan v. Obama*, the Court, finding that the detainee's hunger strike caused his health to deteriorate to the point where he could not effectively interact with his counsel, ordered an independent medical examination.[12]

In sum, prison hunger strikers, whether in a state prison or Guantánamo Bay, do not fall into the purview of *Cruzan*, as questions of competency and prison safety and administration trump the already-limited Constitutional rights of prisoners or detainees. Lately, however, there has been a trend in courts requiring the appointment of an independent medical expert to neutrally evaluate the interests of the hunger striker. While the government's right to force feed is legally protected, small steps like these ensure that the government cannot blindly hide behind the guise of prison safety and administration.

[1] See *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990).

[2] *Id.* at 265, 285.

[3] This exception is avoidable by providing an advanced medical directive while one is still competent. This analysis does not consider the effect of such a directive.

[4] *Com., Dep't of Pub. Welfare, Farview State Hosp. v. Kallinger*, 580 A.2d 887, 888 (1990).

[5] *Id.* at 889.

[6] *Id.*

[7] *Id.*

[8] *Bezio v. Dorsey*, 21 N.Y.3d 93 (N.Y. 2013).

[9] See, e.g., *Al Odah v. Unites States*, 406 F. Supp. 2d 37 (D.D.C. 2005) (denying access to medical records and reports n medical condition); *Al Shabany v. Bush*, 2005 WL 3211407 (D.D.C. Nov. 17, 2005) (denying 24 hour notice of commencement of forced feeding).

[10] *Zuhair v. Bush*, 592 F. Supp. 2d 16 (D.D.C. 2008).

[11] *Id.*

[12] *Al-Oshan v. Obama*, 753 F. Supp. 2d 1 (D.D.C. 2010)

ETHICAL ANALYSIS

Military medical personnel are often faced with the ethically difficult dual loyalty of pursuing the best interests of their patient on one hand and the best interests of their government and fellow soldiers on the other. This conflict has existed for as long as we have fought wars. It is the most difficult because it is the state or the military exerting the pressure on the medical professional. Recently, the military medical personnel at Guantánamo Bay Prison have been confronted by the issues of "dual loyalty" and moral complicity by being accused of violating human rights, medical ethics, and the basic tenets of the medical profession in regards to the forced-feeding of detainees who are on a hunger strike. The number of hunger-strikers has fluctuated during Ramadan. As of August 2013, there are 81 out of 166 detainees taking part in a hunger strike. The strike was initiated in February 2013 when the Korans of the detainees were searched for contraband. However, many outside observers believe that the underlying cause of the protest may be the men's growing despair that they may never be released. The majority of these men have been detained for more than a decade without a trial. Eighty-six have been recommended for transfer since early 2010, if security conditions could be met. But they remain in political limbo.

Ethically, all military medical personnel receive basic training on human rights and those in charge of detainees or prisoners should be even more familiar with the Geneva Convention or Army Regulations regarding abuses. Understanding the importance of human rights and how they can be abused should make these medical professionals more aware of the problem of the "dual loyalty" conflict. As a result, when situations arise regarding a conflict in "dual

loyalty” these medical professionals should be trained to recognize these situations and respond appropriately. However, at times there is a fine line that separates these loyalties.

The dual loyalty stems from the fact that it is the policy of the Department of Defense that the decision whether or not to force-feed detainees be a military one made by the base commander; the decision as to how to actually proceed in the forced-feeding of these detainees is a medical decision made by military physicians. Besides the medical-ethical question there also lies a fundamental moral question: do you allow a person to commit suicide, or do you take steps to protect his or her health and life?

The ethical argument comes down to a conflict between the principles of respect for person versus beneficence and justice. The American Medical Association and the International Committee of the Red Cross have both opposed forced-feeding of prisoners/detainees on a hunger strike. They cite the World Medical Association’s Declaration of Tokyo, which states that, “[W]here a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.”[1] The Department of Defense contends that a military physician must force-feed the detainees because it is in their best medical interest and it is done in accordance with regulations issued by the Department of Justice’s Bureau of Prisons regarding hunger strikes in federal prisoners. Opponents concede that the first argument is acceptable if the prisoner or detainee is declared incompetent to refuse medical treatment, in which case it may indeed be in their best interest. However, it appears that all the detainees are competent and are refusing to eat as a form of political protest. The second argument is based on the regulations of the Bureau of Prisons regarding hunger strikes:

“The regulations are triggered when the person on a hunger strike communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours. On referral for medical evaluation, the inmate shall undergo a medical and psychiatric examination and be placed in a medically

appropriate locked room for close monitoring. There, his or her weight and vital signs are to be checked at least every 24 hours. If and when the physician determines that the inmate’s life or health will be threatened if treatment is not initiated immediately, the physician shall make reasonable efforts to convince the inmate to voluntarily accept treatment, including explaining the risks of refusing, and shall document these efforts. After such efforts (or in an emergency), if a medical necessity for immediate treatment of a life- or health-threatening situation exists, the physician may order the treatment be administered without the consent of the inmate.”[2]

It appears these regulations are not being upheld at Guantánamo. To force-feed these competent detainees violates the principle of respect for person. “Respect for persons” refers to the right of a person to exercise self-determination and to be treated with dignity and respect. The principle of respect for persons divides into two separate moral requirements: the requirement to acknowledge autonomy and the requirement to protect those with diminished autonomy.[3] The detainees are competent and have a right to exercise their autonomy. In addition, one can also argue that the detainees are “vulnerable persons” because of the significant psychological strain they are under. Finally, it should be emphasized that the physician-patient relationship is the primary focus of ethics in medicine. Trust is the bridge to the physician-patient relationship, and the burden is on the physician not only to expect the patient’s trust but also to build a solid foundation upon which the patient can place his or her trust. If this relationship becomes fractured, a loss of confidence will result, and the effect on the patient could be devastating making them become even more vulnerable. There is a definite conflict between the military medical personnel’s duty to his/her patient and the medical professional’s duty to his/her employer. Participation in the blatant breaches of patient autonomy not only violates the fiduciary relationship between physician and patient, but shows a clear conflict between a physician who serves the interests of the state and not those of his/her patient. This violation of respect for persons may also prevent some detainees from seeking needed medical care because of the lack of trust they now have of their physician. A basic tenet of the principle of respect for persons is that one must never use another person as a means to an end. Opponents argue the detainees are being used as means to an end in an attempt to gain results that would help win the war against terrorism. Human rights and the basic dignity and respect that every person deserves

become the casualty.

The Department of Defense contends that they have the obligation to protect these individuals expressed in the injunction of the Hippocratic Oath: “First, do no harm.” “Beneficence” is the obligation to prevent and remove harms and to promote the good of the person by minimizing the risks incurred to the patient and maximizing the benefits to them and others. Beneficence includes nonmaleficence, which prohibits the infliction of harm, injury, or death upon others. The military argue that they are force-feeding these men to keep them safe and alive. They have a moral obligation not to see them harmed or to allow them to commit suicide. Opponents argue that the process of force-feeding is a violation of nonmaleficence and tantamount to torture. As of January 2006, the military introduced the use of an “emergency restraint chair” for use in the force-feeding of detainees. The detainee is strapped into the chair and placed in six-point restraints, including not just the hands and feet, but also the head and torso. This chair is being used to immobilize the hunger strikers so that the feeding tube can be inserted into their nose for the thirty minute ingestion of nutritional supplements. The detainees are also given an anti-nausea drug called Reglan, which can have potential side-effects if given for more than three months: a disease called tardive dyskinesia, which causes twitching and other uncontrollable movements. One would presume this drug is given without the consent of the detainee. Opponents argue this is a flagrant violation of international human rights law and they categorize the forced-feeding as cruel, inhumane and degrading. One can question whether any individual who has to be forcibly restrained in this chair is in any health danger from fasting. Some could argue that the primary justification for the use of this device for force-feeding seems to be punishment rather than medical care.[4]

The principle of “justice” recognizes that each person should be treated fairly and equitably, and be given his or her due. The principle of justice can be applied to the circumstances of “dual loyalty” when military medical professionals must choose between responsibility for their patients in need of care and the demands placed upon them by the United States military. The most common rationale for medical professionals’ willingness to participate in or overlook the various incidents of abuse and torture was their sense of military duty. When military physicians are called upon to force-feed detainees many believe they are acting in the best interests of the detainees, the nation and humanity. The argument is that the medical professionals have a moral

duty to ensure that medical care for the detainees is carried out in the most fair, humane and painless way possible. They argue that they cannot allow these hunger strikers to commit suicide. Furthermore, these medical professionals believe they have a duty as a citizen and as members of the military to participate because the techniques used are authorized and sanctioned as legitimate by the military and the state and are therefore just.

Opponents of the military medical professionals’ participation argue that force-feeding violates the basic tenets of human rights law and the ethical standards of the medical profession. It may be true that medical professional’s participation could add some degree of humanness to the method of forced-feeding, and possibly save the lives of these individuals...but does this outweigh their right to protest a political detention? Is this treating someone fairly and equitably? Finally, state or military approval or authorization of an act does not constitute a requirement on the part of any citizen to take action. Every medical professional has the right, with a well-formed conscience, to refuse any order that he/she believes is unjustified and personally unethical. The failure of medical professionals to recognize that military and civic duty can never trump medical ethical principles is clearly an injustice. It is an injustice not only to those who were abused but to humanity as a whole. If the principle of justice mandates that each person should be treated fairly and equitably, then the participation of military medical professionals in torture and cruel, inhumane or degrading treatment or punishment of detainees clearly violates the principle of justice.

From an ethical perspective, the more difficult ethical question is if a detainee becomes incompetent from the lack of nourishment and it appears that he may reasonably die or sustain permanent injury without food, and it appears there is no reasonable possibility that the political demands will be met, then is it ethical to force-feed the individual to save his life? At this point the physician has to decide what medical treatment is in the best interest of his patient and is it just now to force-feed the detainee. Under these conditions, it may be ethically justifiable to save the life of the detainee because it is in his or her best interest. However, until the detainee becomes incompetent, military physicians have the responsibility to respect the basic rights of their patients.

[1] World Medical Association , Declaration of Tokyo, “Guidelines for Physicians Concerning Torture and Other

Cruel, Inhumane or Degrading Treatment or Punishment in Relation To Detention and Imprisonment,” 1975, revised 2005 (accessed July 21, 2013 at <http://www.wma.net/en/30publicatuions/10policies/c18/>).

[2] George J. Annas, “Hunger Strikes at Guantanamo-Medical Ethics and Human Rights in a ‘Legal Black Hole.” *New England Journal of Medicine* 355 (September 28, 2006): 1377-1382.

[3] National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects*, (U. S. Government Printing Office, Washington, D.C. 1979): B-1.

[4] Annas, 1377-1382.

CONCLUSION

The issue of force-feeding of detainees/prisoners is a complex issue that involves medical, legal, and ethical aspects. It would be in the best interest of these individuals for some resolution to this issue to be reached sooner rather than later. The men who are chronic, long-term hunger strikers are in the process of sustaining long-term health issues that range from osteoporosis and bowel issues to the risk of severe cardiac problems. The military justifies force-feeding of detainees who are on a hunger strike in order to protect their safety and welfare. The more humane response would be for the Congress and the Obama Administration to allow the release of those detainees who have been approved for release, come to legal resolution for the remaining detainees, and finally, to close the prison at Guantánamo. Only then will we be acting in the best interests of these men medically, legally and ethically.

References

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