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Loughner case shines spotlight on forced meds practices

Under what circumstances may the U.S. government drug a captive against his will?

A round of high-profile court skirmishes over the forcible medication of attempted assassination suspect Jared Loughner may help resolve legal ambiguities on this issue.

Two decades ago, in the landmark case of Washington v. Harper, the U.S. Supreme Court ruled that convicted prisoners may be forcibly medicated without a judicial hearing, if prison officials deem them dangerous to themselves or others. All that is needed is an informal administrative hearing behind the walls, a proceeding that many liken to a kangaroo court.

But pretrial detainees – who are presumed innocent – have greater rights when it comes to forced medications to restore their competency to stand trial. In the 2003 case of U.S. v. Sell, the high court specified certain conditions that must be met before someone may be forced to take medications designed to render him or her trial competent:

> The Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Government "end run"?

In the Loughner case, defense attorneys accused the government of trying to make an end run around these legal requirements by claiming that Loughner was dangerous. The incidents of alleged dangerousness claimed by the government included cursing and throwing a plastic chair on March 14, spitting and lunging at his lawyer, Judy Clarke, on April 4, and throwing chairs in his cell on May 28.

All of these incidents took place at the prison hospital in Springfield, Missouri where Loughner was sent after being diagnosed with paranoid schizophrenia and determined to be incompetent to stand trial. Loughner's attorneys said they were denied access to their client, and only found out after the fact that the prison had held a hearing on June 14 and unilaterally decided to forcibly administering antipsychotic medication. Loughner is taking the oral antipsychotic Risperidone under threat that if he refuses, he will be forcibly injected with the potent drug Haldol.

In an emergency motion filed June 24 seeking to force a halt to the medications, the defense team said three isolated instances of misconduct during five months in custody are hardly sufficient to show present dangerousness. They accused prison staff of administering the antipsychotic not to reduce Loughner's danger, but to restore him to competency, in violation of

Sell. They asked that the prison be ordered to use other means of reducing Loughner's danger if necessary, such as restraints, isolation, or minor tranquilizing drugs.

Courts must remain mindful that the dangerousness rationale and its purported justifications don't become muddled with the attempt to administer psychotropic medications for purposes of treatment and restoration of competency…. To permit the prison to make these treatment decisions without Sell's guidance and protections not only jeopardizes a significant liberty interest, it jeopardizes a fair trial.

They cited the landmark case of Riggins v. Nevada. In that case, the U.S. Supreme Court held that a Nevada man was deprived of a fair trial by being forcibly medicated to keep him competent during trial. The medications interfered with the content of his testimony and his ability to follow proceedings and communicate with counsel; they also impacted his outward appearance such that he no longer appeared insane, despite the fact that he was claiming insanity at the time of his crime.

"I didn't go to medical school"

A federal judge summarily denied the defense motion, saying he did not want to second-guess the prison clinicians.

"I defer to medical doctors," U.S. District Judge Larry A. Burns said at an emergency hearing requested by the defense. "I have no reason to disagree with doctors. I didn't go to medical school."

But because the issue of whether forced drugging is permissible is a legal issue, not a clinical one, this seems like improper deference.

Luckily, the 9th Circuit Court of Appeals had more sense, issuing an emergency order July 2 to halt the medications until the issue could be fully litigated.

The appellate court pointed to its 2005 ruling in of United States v. Rivera-Guerrero, holding that forced administration of medications to pretrial detainees is of "clear constitutional importance." In that case, the 9th Circuit ruled that in federal cases that such orders are too important even to be issued by lower magistrate judges, as opposed to district court judges.

Should pretrial detainees get greater deference?

At a hearing before a three-judge panel on Thursday, the appellate justices focused on the distinction raised by Loughner's defense team between forcibly medicating a convicted prisoner and medicating a pretrial detainee.

"Why should someone presumptively innocent not be treated with greater personal deference" than a convicted prisoner, asked Judge Alex Kozinski, chief judge of the 9th Circuit, according to the Wall Street Journal.

"Is the goal of rendering the defendant competent different from medicating him for dangerousness?" asked Judge Kim McLane Wardlaw, touching on another area of murkiness. "Are these different goals? How do you separate them out?"

Loughner's attorneys argue that not only will their client's fair-trial rights be affected, but he could also suffer irreparable harm from the strong drugs because they alter the chemical balance in the brain and can have serious, even fatal, side effects.

With the immediate urgency out of the way, the appellate panel did not give a date for their ruling on the medication issue.

Where is this heading?

This skirmish holds the promise of clearing up confusion over when the government may forcibly drug a captive without a formal court hearing. But, no matter which way this skirmish ends, Loughner will likely never be released from custody. His case may take one of several directions.

One likely next step is that he will be granted a Sell hearing, as his attorneys seek. If so, it seems likely that forced medications will be authorized. After all, if ever there was a compelling government interest in seeing that a defendant goes to trial, it is here. The 22-year-old Arizona man faces 49 felony charges in a Jan. 8 shooting rampage that killed six people and wounded 13, including U.S. Representative Gabrielle Giffords.

If he is given antipsychotic medications, Loughner will most likely be rendered competent to stand trial, probably within a year. The standard for competency to stand trial requires only that a defendant have a factual and rational understanding of the proceedings and an ability to rationally assist his attorney in his own defense.

Once Loughner is found mentally competent, his attorneys will likely raise the defense of insanity. In order to be found insane, his mental disorder must have prevented him from knowing that his actions were wrong at the time he committed them. If he is found insane, he will be committed to a locked psychiatric hospital.

In contrast, if he is found guilty he faces the death penalty. However, there is a good chance that attorneys will negotiate a plea deal that spares his life. This is what happened in the case of Ted Kaczynski, the Unabomber. Such a resolution has the advantage of avoiding the internationally embarrassing spectacle of the U.S. government trying and executing someone who was floridly psychotic at the time of his crimes.

There is also the remote possibility that Loughner will not be restored to competency and so will never face trial. This could happen either if his attorneys succeed in fighting forced medications (a highly unlikely event), or in the event that medications do not work to restore his sanity. In either of these circumstances, prosecutors could seek to have him civilly committed to a psychiatric hospital.

Bottom line, he will never be released back into the community.