Note

The Constitutional Choices Afforded to a Prisoner on Hunger Strike: Guantánamo

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I. Introduction

When a prisoner stops eating and declares a hunger strike, the government is faced with two choices: either let the prisoner die from starvation or intervene in the hunger strike by force-feeding the prisoner. This paper will address whether the United States Constitution guarantees a competent incarcerated adult the right to die as a result of hunger strike without intrusion by the government. Further, assuming the right to die is a fundamental personal liberty interest, does this right extend to detainees held within the United States jurisdiction?

State and federal facilities enforce different administrative policies concerning the right of a prisoner to challenge his conditions of confinement relating to medical decisions. State courts are split on whether incarcerated adults have a constitutional right to die or right to refuse medical treatment while on hunger strike. Even though three state courts have upheld a prisoner’s right to refuse medical treatment, unfortunately this right has been categorically denied in federal court. When addressing whether the government should intervene in an inmate hunger strike, courts should balance the prisoner’s right to autonomy and privacy against the state’s interests in the preservation of life, the orderly administration of the prison system, and the interests of innocent third parties. However, on balance, the majority of state and federal courts use this test as a means to rule in the favor of state interests and authorize the force-feeding of a prisoner. Notably, there is no international consensus as to the ethics involved in allowing prison officials to force nutrition.

The legal rights of prisoners classified as “enemy combatants” held in the U.S. detention facility in Guantánamo Bay, Cuba are substantially different than the rights of mainland prisoners. Guantánamo detainees have only recently gained access to federal courts to

2. See generally Arlene McCarthy, Annotation, Prisoner’s Right to Die or Refuse Medical Treatment, 66 A.L.R. 5th 111 (2010).
3. Id.
4. See infra pp. 17–20 for a discussion on state and federal cases denying the right to refuse medical treatment.
5. See, e.g., Lantz v. Coleman, No. HHDCV084034912, 2010 Conn. Super. LEXIS 621, at *46 (Conn. Super. Ct. Mar. 9, 2010) (explaining that the weight of authority under international law supports a state’s right to administer force-feeding over a prisoner’s right to conduct a hunger strike in cases where the procedure is necessary to preserve the prisoner’s life). But see, e.g., Declaration of Malta on Hunger Strikers, WORLD MED. ASS’N (Oct. 14, 2006), available at http://www.wma.net/en/30publications/10policies/h31/index.html (explicitly forbidding force-feeding: “Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger strikers explicit or implied consent is ethically acceptable.”). Further support is found in United Kingdom where the right to self-determination and autonomy in medical decisions is extensive, such that “[e]ven a detained prisoner, providing always he is of sound mind, can be allowed to starve himself to death.” John Williams, Hunger-Strikes: A Prisoner’s Right or a ‘Wicked Folly’?, 40 HOWARD J. CRIM. JUST. 285 (2001).
contest their continued incarceration and it is still unclear which constitutional rights non-citizens outside of the United States mainland enjoy. Since 2002, detainees at Guantánamo have initiated several mass hunger strikes to protest various political and religious concerns. Given the prevalence of hunger strikes at Guantánamo, the military's procedures used to determine whether to force-feed a detainee should face judicial review as the techniques used are invasive, dehumanizing, and often amount to further injury. Nevertheless, because of Congress' repeated attempts to ban federal courts' jurisdiction over Guantánamo, these stories rarely reach the court. This comment examines the use of force-feeding at Guantánamo, the international and national policy on nonconsensual medical care during hunger strikes, and federal courts' role in affirming the use of force-feeding as an appropriate remedy.

To place the concern over hunger strikes at Guantánamo in context, Part II of this comment will examine the history of prison hunger strikes and force-feeding at prisons. Part III will describe the causes of action a prisoner may use in federal and state court to protest unwanted medical treatment and the Constitutional arguments involved in his claim. Additionally, Part III will examine the viability of habeas corpus petitions to contest medical treatment at Guantánamo as well as address the position of international law on force-feeding. Part IV proposes a policy recommendation to evaluate claims of the remaining detainees held in Guantánamo.

II. History of Hunger Strikes

A. What is a Hunger Strike?

The World Medical Association defines a hunger striker as "a mentally competent person who has indicated that he has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval." More colloquial definitions refer to a
hunger strike as a choice to voluntarily fast or refuse intake of food. Medical documentation indicates that a hunger strike will result in death if sustained for forty-two to seventy-nine days of a fast. In United States federal prisons, a prisoner is on hunger strike if he refrains from eating for a period of time in excess of seventy-two hours. In Guantánamo, a detainee is classified as being on a hunger strike if he refuses to eat for nine consecutive meals. Regardless of the location of an inmate, if an inmate's hunger strike progresses past a certain stage, prison officials in state, federal, and detention facilities must determine whether to intervene by force-feeding.

1. Why do Prisoners Go on a Hunger Strike?

Since the nineteenth century, prisoners incarcerated in the United States and throughout the world have utilized hunger strikes to protest conditions of confinement, to make political statements, and to commit suicide. Hunger strikes were first recognized in the United States in the early 1900's as prisoners used them to express political views on child starvation, animal rights, and female suffrage. Internationally, hunger strikes have been recognized as a form of political speech since 1889 when Vera Figner, a social revolutionary in tsarist Russia, protested against authority methods used by the prison director.

The twentieth century has also witnessed several famous prison hunger strikes including the 1918 Irish Republican Army hunger strike (the second of such strikes) in which ten prisoners starved to death in an effort to force the government to recognize 'political' status for Republican prisoners and the 1993 Haitian hunger strike in the United States.

13. 28 C.F.R. § 549.61 (2006) (as defined in this rule, an inmate is on a hunger strike: (a) When he or she 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; or (b) When staff observe the inmate to be refraining from eating for a period in excess of 72 hours. When staff consider it prudent to do so, a referral for medical evaluation may be made without waiting 72 hours).
16. Id. at 167.
Guantánamo HIV detention camp which successfully pressured the Clinton administration to overturn the HIV exclusion rule. The examples highlight attempts to achieve political goals through hunger strike. However, it is possible that the motivation for initiating a hunger strike in prison shifts to suicide as he or she faces indefinite incarceration. While the effort may begin as an attempt to manipulate the institution, in the end, when all other resources have been exhausted, prisoners on hunger strike may simply wish to die. Other scholars propose that suicide is the only motivating factor for starting a hunger strike because fasting is presumably the only control a prisoner can exercise to intentionally bring about his own death.

2. Hunger strikes in Guantánamo

The U.S. Naval Base at Guantánamo Bay, Cuba is the United States' oldest overseas military base. In 2002, the first of nearly 800 Guantánamo detainees arrived in Cuba. As of April 2011, 172 detainees remain at Guantánamo. Some of these men have been detained for eight years without being formally charged for any crime and are housed in facilities similar to maximum-security prisons on the United States mainland.

Hunger strikes became prevalent in Guantánamo shortly after the detention center opened and since 2005 there have been at least four reported mass hunger strikes. While many of the hunger strikes have been short-lived, other detainees have been forced to end their strikes by the United States military policy of forced-feeding. Numerous detainees have turned to hunger strikes to protest the conditions of their confinement, the lack of a fair judicial trial, and the perceived abuse of their Islamic religious freedom. Due to the embargo on communication imposed by the Bush administration, the exact motivation for these hunger strikes remains unknown. However, one commentator suggests that prisoners at Guantánamo could be motivated to hunger strike so as to build solidarity, de-
mand improved treatment, and to draw attention to their plight. The first well-publicized detainee hunger strike began in August of 2005 when over one hundred detainees went on hunger strike. During this strike, several attorneys petitioned for emergency injunctive relief for detainees including Majid Abdullah Al Joudi, Yousif Mohammad Mubarak Al-Shehri, Abdulla Mohammad Al Ghanmi and Abdul-Hakim Abdul-Rahman Al-Moosa. The petitioner’s brief cited detainee motivations for starvation including:

(1) military authorities had failed to meet the obligations agreed to in an agreement between detainees and the military that had ended a prior hunger strike just two months ago; (2) detainees continue to be subject to physical, psychological and religious abuses; and (3) detainees continue to be held without charge or adequate process.

Following these cases, in 2006 the Department of Defense adopted strict protocols based loosely on federal prison policy to evade obtaining medical consent during hunger strikes. The military introduced a six-point restraint feeding chair and a policy of segregation and isolation for the detainees who participated in hunger strikes and eventual banishment of the strikers from communal camps where detainees would pray together. The use of this chair dramatically reduced the number of detainees who went on hunger strike. By February of 2006 only three of the detainees were being force-fed in a restraint chair.

31. See Ahmad, supra note 29, at 1757.
32. See generally Annas, supra note 11, at 1377–78.

On September 11, 2005, 131 prisoners at Guantánamo were on hunger strikes. At the end of 2005, that number was 84. This strike was a protest on the living conditions and lack of due process of law. Some specific demands included being able to write and receive letters from their families, being able to see the sun, have a neutral body report their findings to the public, and have all the detainees treated equally.

Id.; see also Guantánamo Bay, supra note 23.
34. Id.
35. DETAINEE MEDICAL PROGRAM, supra note 14, § 4.7.1.

In the case of a hunger strike, attempted suicide, or other attempted serious self harm, medical treatment or intervention may be directed without the consent of the detainee to prevent death or serious harm. Such action must be based on a medical determination that immediate treatment or intervention is necessary to prevent death or serious harm, and, in addition, must be approved by the commanding officer of the detention facility or other designated senior officer responsible for detainee operations.

Id.

In recent weeks, the officials said, guards have begun strapping recalcitrant detainees into “restraint chairs,” sometimes for hours a day, to feed them through tubes and prevent them from deliberately vomiting afterward. Detainees who refuse to eat have also been placed in isolation for extended periods in what the officials said were an effort to keep them from being encouraged by other hunger strikers.

Id.
38. Annas, supra note 11, at 1377. See also George J. Annas, Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror, 87 B.U. L. REV. 427, 455 (2007) (explaining that the “primary justification for use of this device seems to be to use force-feeding as punishment and intimidation...
Despite the initial success of the restraint chairs as a deterrent, the reduction in hunger strikers was only temporary. The Department of Defense has yet to publicize the records of which prisoners are on hunger strike without a forced court order. However, by 2007 another mass hunger strike broke out. Additional news has leaked from Guantánamo about recent strikes. On January 15, 2009, the New York Times reported that “of the 248 inmates inside the detention facility, 44 are refusing food—but 33 of those are receiving nutrition with tubes that are forced up their noses and into their stomachs.” Finally, as recently as August 2010, news surfaced about a change in the force-feeding schedule due to the religious fast of Ramadan.

B. What is force-feeding?

Justice Douglas once commented in a dissent that “it is difficult to imagine a greater intrusion upon one’s right to bodily integrity and self determination than force-feeding.” Generally, most prison officials only intervene in a hunger strike when it becomes life threatening. The medical procedure used to force-feed a patient is invasive. When a prisoner refuses food and water, officials try to persuade the prisoner to eat or drink by offering solid food and liquids. However, if the prisoner refuses nourishment, officials take him to a medical facility and feed him intravenously; if the prisoner refuses intravenous fluids or pulls the tube out, then medical staff may use restraints.

Prisoners can be force-fed through either nasogastric feeding or intravenous treatment. Nasogastric feeding, commonly known as ‘tube feeding’ or enteral feeding, is accomplished by inserting a tube through the nose, which is then run through the esophagus directly into the stomach. After inserting the tube, medical personnel and prison guards administer 1.5 liters of liquid food, such as Ensure Plus, into the device.

Intravenous feeding is accomplished by prison medical staff penetrating a person’s ma-
or blood vessel and inserting a catheter to deliver nutrients directly to the bloodstream.\textsuperscript{50} This procedure is dangerous and requires daily cleaning of the catheter to prevent infection.\textsuperscript{51} Inmates who resist insertion of the tube or catheter must be either physically restrained or sedated since these devices can be pulled out by an alert inmate.\textsuperscript{52}

Nasogastric feeding is a potentially lethal procedure. If a patient resists the insertion of a tube there are significant medical risks such as suffocating and aspiration.\textsuperscript{53} Medically unsafe force-feeding by tubes have been reported featuring untrained guards forcing greased tubes down the throat into the stomach.\textsuperscript{54} For instance, there are accounts that the military medics have forced "finger-thick" tubes into prisoner's noses without anesthetic.\textsuperscript{55}

1. Force-Feeding at Guantánamo

The procedural steps used to force-feed at Guantánamo are analogous to state and federal prisons but the process has its own nuances. In Guantánamo, if there has been a determination that a detainee has stopped eating for at least twenty five percent of the last nine meals, the prison camp's military commander and doctor sign off on a force-feeding without asking for medical consent.\textsuperscript{56} There has been inconsistent information on whether doctors investigate the motivations of the detainee, however one account suggests that a psychologist will meet with the detainee and investigate as to why the detainee is not eating.\textsuperscript{57} Once the feeding is complete, the detainees are forced to remain in the six-point restraint chairs for up to an hour after the feeding to prevent them from regurgitating the food.\textsuperscript{58} The process in Guantánamo differs from federal and state prisons in that the military determines whether to force-feed a prisoner, there is little investigation as to why the detainees have stopped eating, the use of six-point chairs, and the reports of extreme vi-

\begin{itemize}
\item \textsuperscript{50} Mara Silver, \textit{Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation}, 58 \textit{STAN. L. REV.} 631, 638 (2005).
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 726.
\item \textsuperscript{55} Silver, \textit{supra} note 50, at 633.
\item \textsuperscript{56} DETAINEE MEDICAL PROGRAM, \textit{supra} note 14, \S 4.7.2. According to the manual, involuntary treatment or intervention under \S 4.7.1 in a detention facility must be preceded by a thorough medical and mental health evaluation of the detainee and counseling concerning the risks of refusing consent. Such treatment or intervention shall be carried out in a medically appropriate manner, under standards similar to those applied to personnel of the U.S. Armed Forces. \textit{See also} REVIEW OF DEPARTMENT COMPLIANCE, \textit{supra} note 14, at 2. The Review Team conducted 13 days of investigation on site that included more than 100 interviews with JTF-Guantánamo leadership, support staff, interrogators, and guards, multiple announced and unannounced inspections of all camps during daylight and night operations, reviewed numerous reports, video, discipline records, and observed many aspects of daily operations. "When a detainee begins refusing water or when he has eaten less than 25 percent of nine consecutive meals, medical personnel are notified and begin medical assessment and monitoring, which includes a thorough review of medical history, physical examination and mental health assessment." \textit{Id.}
\item \textsuperscript{57} See Hoingsberg, \textit{supra} note 27, at 107.
\item \textsuperscript{58} \textit{VAN SCHAACK & SLYE, supra} note 49, at 611. \textit{See also} Annas, \textit{supra} note 38, at 445 ("[t]he chair's inventor, a former sheriff who had one of his jailers injured by a prisoner, describes it as a "padded cell 'on[ wiheels' ").
\end{itemize}
The Constitutional Choices Afforded to a Prisoner on Hunger Strike: Guantánamo

Despite the fact that no two cases of force-feeding are alike, one salient example highlights the medical procedures used at Guantánamo. In the case of detainee Al Shehri, whose lawyers petitioned the D.C. federal court for access to the detainee’s medical records, the court opinion recounts that the detainee was given no anesthesia or sedative for the procedure; instead, two soldiers restrained him—one holding his chin while the other held him back by his hair, and a medical staff member forcefully inserted the tube in his nose and down his throat. Much blood came out of his nose . . . he could not speak for two days . . . [and] he could not sleep because of the severe pain.

Al Shehri’s statement to the court also recounted that in front of Guantánamo physicians—including the head of the detainee hospital—the guards took NG tubes from one detainee, and with no sanitization whatsoever, re-inserted it into the nose of a different detainee . . . . The detainees could see the blood and stomach bile from other detainees remaining on the tubes.

The government denied these claims and Guantánamo physician Dr. Edmondson even stated on record that “[c]urrent protocols require that a new sterile nasogastric tube be utilized for every insertion . . . . Nasogastric tubes are not . . . ever inserted in one patient and then used again in another patient.” Additionally, in 2006, U.S. Department of Defense spokesman Bryan Whitman stated that the feeding was administered by medical professionals in “a humane and compassionate manner” and only when necessary. Today, the military continues to justify their medical procedures though news reports and Department of Defense statements. The lack of procedural oversight of the proper medical protocol to force-feed detainees is crucial to understanding the detainees’ struggle for adequate medical care.

C. What are the Government’s Interests in Force-feeding?

Federal courts almost always hold that authority figures may compel a prisoner to accept treatment when prison officials deem it necessary to carry out a valid medical or penological objective. State courts, however, have weighed the prisoner’s interests against those of the state when deciding whether to force-feed and have ruled in favor of prisoners. This comment proposes that the federal court and Federal Bureau of Prison Regulations (BOP) should adopt a more deferential policy to prisoners’ interests with procedural safeguards to ensure protection of the fundamental liberty interests of those incarcerated.

The BOP authorizes medical officers to force-feed an inmate if they determine an in-

61. Id.
62. Id.
64. Rosenberg, supra note 37. See also REVIEW OF DEPARTMENT COMPLIANCE, supra note 14, 256–58.
65. White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990) (holding that “prisoners, like involuntarily committed mental patients, retain a limited right to refuse treatment and a related right to be informed of the proposed treatment and viable alternatives”).
mate’s life or permanent health is in danger. However, even with this seemingly limitless discretion, due to the invasive nature of force-feeding, government officials are sometimes required to justify to the court their decision to force-feed a prisoner. In this circumstance, the government prevails when they establish one of the following five justifications: a sufficient interest in the preservation of life, the prevention of suicide, the need for effective prison administration, the sanctity of medical ethics, or the necessity to combat the manipulation of the institutional system to overcome any prisoner’s right to refuse the treatment. Finally, as the interests of preservation of life and prevention of suicide are tantamount, many state courts (and all federal courts) even uphold the misnomer that “the right to privacy does not include the right to commit suicide.”

1. National Security Interests in Force-Feeding at Guantánamo

In 2006, the U.S. Department of Defense issued instructions on the medical treatment of detainees in Guantánamo. These instructions excused requiring consent for medical treatment in the event of a hunger strike. As force-feeding is routine prison policy, officials at Guantánamo Bay defend their position to force-feed without consent by arguing that the government has a vested interest in the preservation of life and national security. Because the world has become so hyper-focused on Guantánamo detainees and their treatment, allowing a detainee to die would be viewed by the public as an international crime rather than an act of humanitarian compassion. The military is so committed to force-feeding that the Department of Defense began screening Guantánamo doctors to ensure they would be willing to participate in force-feeding after some U.S. Navy physicians refused to force-feed detainees.

The case of Al Shehri highlights these rationales. In 2005, after learning of a second hunger strike at the facility, lawyers for several detainees on hunger strike filed a joint Emergency Motion to Compel Access to Counsel and Information Related to Petitioners'

67. See 28 C.F.R. §§ 549.60–66 (2011). The Bureau of Prisons regulations govern the treatment of prisoners engaging in hunger strikes and provide for “forced medical treatment” of an inmate if a medical officer determines that the inmate’s life or permanent health will be threatened if treatment is not initiated immediately.

68. McCarthy, supra note 2.

69. Silver, supra note 50, at 648. See also Bell v. Wolfish, 441 U.S. 520, 536 (1979) (explaining that the Court has stated, in broad terms, “maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees”).


71. DETAINEE MEDICAL PROGRAM, supra note 14, § 4.7.1 (stating that in the case of a hunger strike, attempted suicide, or other attempted serious self-harm, medical treatment or intervention may be directed without the consent of the detainee to prevent death or serious harm).

72. Id.

73. Marlynn Wei, Psychiatry and Hunger Strikes, 23 HARV. HUM. RTS. J. 75 (2010). See also U.S. DEP’T OF DEF., MEDIA ROUNDTABLE WITH ASSISTANT SECRETARY WINKENWERDER (June 7, 2006), available at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=33. (“Dr. Winkenwerder: We have a policy that is to preserve life. That policy is an ethical policy. It’s in the best interests of the individual who is a hunger striker, for his life to be preserved, in our judgment.”).


Medical Treatment. The court opined “Yousef Al Shehri . . . was ‘emaciated and had lost a disturbing amount of weight’ since counsel’s last visit in July 2005.”76 In a small victory for detainees, the court granted the detainees access to their lawyers such that:

(1) the Government would provide notice to counsel within 24 hours of the commencement of any forced feeding of their clients; and (2) the Government would provide counsel with medical records spanning the period beginning one week prior to the date forced feeding commenced; and the provision of medical records shall continue, at a minimum, on a weekly basis until forced feeding concludes.77

Despite this small victory, the court upheld the policy of force-feeding, as Guantánamo policy is to “prevent unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to overcome a detainee’s desire to commit suicide, using means that are clinically appropriate.”78 This policy is intact because “[i]t can hardly serve either the national security interests of this country or enhance its image throughout the world to contribute in any way to the death of a detainee in its custody.”79

III. The Nature of a Prisoner’s Cause of Action Against Unwanted Medical Treatment

Federal and state courts review three types of claims relating to the force-feeding of prisoners: (1) Prison officials may petition the court for an order authorizing the force-feeding; (2) prisoners may assert a claim relating to a violation of their constitutional rights; and (3) a prisoner may sue for damages resulting from force-feeding.80 A prisoner’s demand for relief can vary between injunctive relief, declaratory relief, and monetary damages.81 The process a prisoner must follow to initiate a cause of action differs for state prisoners asserting state law, state prisoners asserting federal constitutional claims, and federal prisoners under federal regulations.

Additionally, the Supreme Court has left open the possibility that a conditions-of-confinement claim based in a violation of due process rights can be brought as a habeas corpus action under 28 U.S.C. section 2241.82 Habeas relief is an equitable remedy which grants judges discretion to adjust an appropriate remedy depending on each case.83 In the context of prisons, habeas corpus writs are most often used as a post-conviction remedy to challenge the lawfulness of a conviction.84 However, the right to use habeas corpus as a

76. Id. at 17.
77. Id. at 23.
78. Id. at 18.
79. Id. at 20.
84. The statutory power to grant a writ of habeas corpus is codified in 28 U.S.C. § 2241 (2006). See also Tamara L. Huckert, The Undetermined Fate of the Guantánamo Bay Detainees’ Habeas Corpus Petitions, 9 Gonz. J. Int’l L. 236, 239 (2006) (explaining that in order for the petition to be properly filed, the alien must file the petition in the “district court that has jurisdiction over his custodian” and name the
mechanism for judicial review is not absolute and for most conditions of confinement claims and particularly for those involving inadequate medical treatment, courts usually hold that habeas relief is not available.85

A. Fundamental Constitutional Right To Die

The Supreme Court has distinguished between the constitutional rights of free citizens and those afforded to inmates.86 Inmates at state and federal prisons argue that force-feeding violates their federal constitutional liberty rights such as their First Amendment rights to freedom of expression and religion, their Eighth Amendment rights against cruel and unusual punishment, and finally their rights to privacy and their freedom from bodily intrusion grounded in the Due Process Clause of the Fourteenth Amendment.87

In Turner v. Safley, the Supreme Court examined whether prison officials have the right to infringe on an inmates’ constitutional rights, explaining: “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”88 The Turner Court held that “when a prison regulation impinges on inmate’s constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”89 The Turner standard applies to all circumstances in which regulations enforced by prison administration involve constitutional rights.90

85. Dickerson v. Walsh, 750 F.2d 150, 153 (1st Cir. 1984).

[A]lthough there is no definitive list of the situations which are appropriate for habeas relief, the Advisory Committee on the Supreme Court Rules has suggested that claims not related to the propriety of the custody itself might be better handled by other means such as 42 U.S.C. § 1983 and other related statutes.

86. See MUSHLIN, supra note 45, at 234.

87. Compare White v. Suneja, No. 10-cv-332-JPJ, 2010 U.S. Dist. LEXIS 120496, at *3 (S.D. Ill. Nov. 15, 2010) ("the Court is not aware of any specific guarantee under the First Amendment, or any other constitutional provision, that protects inmate hunger strikes"), with In re Fattah, No. 3:08-MC-164 (M.D. Pa. July 8, 2008) (determining that force-feeding is not an Eighth Amendment violation), and Zant v. Prevatte, 286 S.E.2d 715 (Ga. 1982) (determining that by virtue of his right of privacy, a prisoner can refuse to allow intrusions on his person, even though calculated to preserve his life).

88. Turner v. Safley, 482 U.S. 78, 84 (1987) (addressing regulations at the Missouri Division of Corrections that permitted inmates to marry only with the permission of the superintendent of the prison).

89. Turner, 482 U.S. at 89 (This decision set out a four-part test to determine whether the prison regulations were reasonably related to legitimate penological goals).

The Court looked to four factors: (1) a "valid rational connection" between the regulation and the governmental interest put forth to justify it; (2) an "alternative means of exercising the right" available to the prisoner; (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the "absence [or presence] of ready alternatives" for prison administrators.

86. See Russell v. Richards, 384 F.3d 44 (7th Cir. 2004) for a discussion of the Turner standard. In Russell, Indiana inmates brought an action contending that the jail’s delousing shampoo policy violated their due process right to be free from unwanted medical treatment. Applying Turner, the court concluded that there was a satisfactory connection between the jail’s policy and the interest put forward to justify the policy.
1. Eighth Amendment Claims

When considering how a prisoner can protest unwanted force-feeding, the Eighth Amendment ban on the use of cruel and unusual punishment seems to be a viable constitutional claim. Unfortunately, this approach is incorrect. The court has actually systematically eroded the weight of the Eighth Amendment related to medical care decisions.

In Estelle v. Gamble, the Supreme Court ruled that the government is obligated to provide inmates in their custody with medical care. While this holding could be interpreted as a windfall for prisoners, the courts have since interpreted the case to stand for the position that only when prison officials are deliberately indifferent to the serious medical needs of those under their control is the Eighth Amendment violated. A determination of deliberate indifference requires an examination of two elements: (1) the seriousness of the prisoner's medical concern; and (2) the nature of the defendant's response. Therefore, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.

Significantly, in a recent federal prisoner cause of action alleging excessive force used by prison guards during force-feeding, the court reasoned that restraint-chairs are not per se violations of Eighth Amendment, but can rise to that level if used with "sufficiently culpable state of mind."

2. Fourteenth Amendment Claims

In 1914, Justice Cardozo held that an individual has the right to determine when bodily intrusions to their person will occur. This decision ingrained the principle of the right to refuse medical care in our legal system and, since then, the Supreme Court has held that inmates have the right to refuse medical treatment under the Due Process Clause of the Fifth and Fourteenth Amendment.

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91. Lilly v. Torhorst, No. 06-C-08-C, 2006 U.S. Dist. LEXIS 5670 (W.D. Wis. Feb. 13, 2006) (holding that a voluntary hunger strike alone does not rise to the level of a serious medical need for Eighth Amendment long as it remains within petioner's power to end the strike. However, "if a prisoner were to fall into a coma as the result of a hunger strike and prison officials were to refuse medical attention recommended to save the prisoner's life, this might constitute deliberate indifference to a serious medical condition"). See also Fuentes v. Wagner, 206 F.3d 335, 345 (3d Cir. 2000) (reasoning that restraint-chair is a not per se violation of Eighth Amendment); Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977) (disagreement as to the proper medical treatment is insufficient to establish deliberate indifference for purposes of an Eighth Amendment violation).
95. See sources cited supra note 91 for examples where the court has not found Eighth Amendment violations.
97. Schloendorff v. Soc'y of N.Y. Hospital, 211 N.Y. 125 (N.Y. 1914). The right to privacy from unwanted medical treatment was first discussed in the context of a tortious battery when Judge Cardozo ruled that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body ... ."
A patient's refusal to consent to medical treatment is an expansion of the right to privacy under the Due Process Clause of the Fourteenth Amendment. In *Cruzan v. Director, Missouri Department of Health*, the Court found that competent individuals have the right to refuse medical treatment in the form of lifesaving nutrition and hydration. Justice O'Connor in her concurrence grounded this decision on the assumption that the Constitution protects a fundamental liberty interest of a patient, stating "the liberty guaranteed by the due process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." Following this decision, the doctrine of medical consent evolved into a spectrum where "the more invasive the procedure or practice, the more critical an individual's liberty interest becomes."

Therefore, in prisons, the "forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty." Nevertheless, even if competent prisoners have a right to refuse treatment in the form of force-feeding nutrients, prison officials can overrule this right under the *Turner* standard when they have a "legitimate penological interest," such as the prevention of suicide and maintaining order in the prison.

**B. State Cases of Prisoners Asking for Relief Based on a Due Process Privacy Right**

State courts addressing the issue of whether the state may intervene in prison hunger strikes balance the prisoner's right to privacy against the state's interest in the preservation of life and the orderly administration of the prison system. Even though prisoners have limited rights by virtue of their detention, prisoners do not lose all constitutional rights while incarcerated. Three state courts have ruled in favor of prisoners' autonomy.

In 1982, the Georgia Supreme Court ruled that an inmate could starve himself by a hunger strike: An inmate "can refuse to allow intrusions on his person, even though calculated in a manner calculated to produce his death". (Compare *Cruzan*, 497 U.S. at 278-79, *Harper*, 494 U.S. at 221-22, and *Russell*, 384 F.3d at 44, with *Bell*, 441 U.S. at 545.) Even though prisoners have limited rights by virtue of their detention, prisoners do not lose all constitutional rights while incarcerated. *Three state courts have ruled in favor of prisoners' autonomy.***

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*Silver, supra note 50, at 637.*

*Harper, 494 U.S. at 229.*

*Russell, 384 F.3d at 447.*


*106. A detainee simply does not possess the full range of freedoms of an unincarcerated individual. Greenberg, supra note 54.*

to preserve his life."\(^{108}\) The prisoner, Ted Anthony Prevatte, initially went on hunger strike to protest the Department of Corrections' refusal to transfer him to another state prison.\(^{109}\) After refusing food for almost a month, Georgia prison officials brought a cause of action to obtain a court order allowing the prison to medically intervene.\(^{110}\) In response, Prevatte argued that he had "the right to control his own body" while the state maintained its interest in protecting the lives of other inmates.\(^{111}\) The court held the prisoner was competent and the state offered no compelling interest that would override Prevatte's right of privacy to refuse medical care.\(^{112}\)

In 1993, the California Supreme Court held in *Thor v. Superior Court* that "in the absence of evidence demonstrating a threat to institutional security or public safety, prison officials . . . have no affirmative duty to administer [force-feeding]."\(^{113}\) Interestingly, in *Thor*, the prisoner Howard Andrews caused his own injury and then subsequently refused medical care for his self-inflicted paralysis.\(^{114}\) Andrews jumped from a wall, rendering him a quadriplegic, which required medical staff to assist with all of his daily functions.\(^{115}\) Dr. Thor asked the court in an *ex parte* proceeding for an order to force-feed Andrews, which the court denied.\(^{116}\) The California Supreme Court held that "under California law a competent, informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment of any form irrespective of the personal consequences."\(^{117}\)

Finally, in 1996, a Florida inmate went on a hunger strike to protest his transfer to a different prison and to protest the lodging of complaints against a prison chaplain.\(^{118}\) The prisoner, Costello, filed a pro se complaint against the prison for declaratory relief and injunctive relief against the actions of the Department of Corrections.\(^{119}\) Applying Article 1, Section 23 of the Florida Constitution, the court determined that under Florida law Costello was a competent adult who made a voluntary, conscious choice concerning his medical options.\(^{120}\) The Florida Court of Appeal held that a hunger-striking prisoner's right to refuse to be force-fed outweighed the state's interest in preserving life because an individual's de-

\(^{108}\) *Zant*, 286 S.E.2d at 716-17 ("the State has no right to monitor this man's physical condition against his will; neither does it have the right to feed him to prevent his death from starvation if that is his wish").

\(^{109}\) *Id*.

\(^{110}\) McCarthy, *supra* note 2 ("The prisoner had refused food from October 29, 1981 until November 21, 1981.").

\(^{111}\) *Zant*, 286 S.E.2d at 716-17.

\(^{112}\) *Id*.

\(^{113}\) *Thor v. Superior Court*, 5 Cal. 4th 725, 732 (1993) (holding that there was "no duty on the part of petitioner as his physician to provide further life-sustaining procedures and therefore decline to authorize him to take any action inconsistent with or contrary to Andrews's express choice regarding the course of his medical treatment").

\(^{114}\) *Id* at 733.

\(^{115}\) *Id*.

\(^{116}\) *Id* at 733.

\(^{117}\) *Id*. The court focused on the lack of California criminal or civil sanctions for an individual's intentional act of self-destruction (including suicide) to limit the state's argument that there was a valid interest in the preservation of the prisoner's life. *Id*.


\(^{119}\) *Id* at 1102.

\(^{120}\) *Id*.
termination to cease medical treatment pursuant to his right of privacy does not constitute suicide.\textsuperscript{121}

Notwithstanding the cases cited above, most state courts have denied prisoners' rights to refuse force-feeding.\textsuperscript{122} While some recent cases rely on Turner to invalidate prisoners' privacy interests, most state courts simply rely on the presumption that prison officials' interests in preserving life and maintaining an orderly and disciplined prison system outweigh prisoners' rights to privacy.\textsuperscript{123} In one notable case, In re Caulk, the court explained "[p]risoners are not permitted to live in accordance with their own desires, nor may they be permitted to die on their own terms without adversely and impermissibly affecting the state's legitimate authority over inmates."\textsuperscript{124}

C. Federal Prisoners: Cases Concerning a Prisoner's Right to Die—A Categorical Denial of a Liberty Interest

Federal courts have consistently denied the claims of hunger-striking inmates, regardless of whether the person was a convicted prisoner, a pre-trial detainee, or a person held due to a civil contempt order.\textsuperscript{125} In 1980, the Bureau of Prisons (BOP) implemented regulations for "the medical and administrative management of inmates who engage in hunger strikes."\textsuperscript{126} The U.S. Department of Justice regulation BOP section 549.60 establishes the medical procedure for force-feeding hunger striking inmates when necessary to prevent an imminent threat of death or permanent impairment.\textsuperscript{127}

Federal prisoners are required to follow complex administrative procedures when seeking a formal review of a complaint relating to their confinement.\textsuperscript{128} Some courts have in-

\textsuperscript{121.} Id. at 1110.
\textsuperscript{122.} Laurie v. Senecal, 666 A.2d 806, 808–10 (R.I. 1995) (authorizing force-feeding of a hunger-striking prisoner and finding there was no right under the state or federal Constitution to override the state's interest in preserving life and preventing suicide); In re Caulk, 480 A.2d 93, 97 (N.H. 1984) (holding that force-feeding of an otherwise healthy inmate did not violate state privacy rights); State ex rel. White v. Narick, 292 S.E.2d 54 (W. Va. 1982) (ruling the state was not permitted to allow a prisoner in its custody to die from fasting); Von Holden v. Chapman, 450 N.Y.S.2d 623 (N.Y. App. Div. 1982) (utilizing the preservation of life and prevention of suicide, coupled with evidence that hunger strike disrupted prison order, to determine prison inmate did not have right to starve himself to death).
\textsuperscript{123.} See Laurie, 666 A.2d at 808–10; Caulk, 480 A.2d at 97; White, 292 S.E.2d 54; Von Holden, 450 N.Y.S.2d 623.
\textsuperscript{124.} Caulk, 480 A.2d at 96.
\textsuperscript{125.} In re Soliman, 296 F.3d 1237, 1255 (11th Cir. 2002); In re Sanchez, 577 F. Supp. 7 (S.D.N.Y. 1983).
\textsuperscript{127.} § 549.60. The regulations provide that inmates are observed by prison staff for a period of seventy-two hours before the inmate meets the definition of a hunger strike. After that period, the prison staff must defer to the discretion of the prison physician to determine if the prisoner should be forcibly fed. Id.

Pursuant to 28 C.F.R. 542.10, et seq., the BOP has established an if an inmate is unable to resolve his complaint informally, he may file a formal written complaint on the proper form within twenty calendar days of the date of the occurrence on which the complaint is based. See 28 C.F.R. 542.14(a). If an inmate is not satisfied with the Warden's response to the formal complaint, he may appeal, using the appropriate form, to the Regional Director within twenty calendar days of the Warden's response. See 28 C.F.R. 542.15(a). If the inmate is still dissatisfied, he may appeal the Regional Director's response to the Office of the General Counsel, located in the BOP Central Office in Washington, DC, using the appropriate forms. The inmate must file this final appeal within thirty calendar days of the date the Regional Director signed the response. See id. An inmate is not deemed
terpreted the BOP regulations as granting prison officials the authority to force-feed an inmate without much in the way of justification.\textsuperscript{129} Significantly, no federal prisoner has been successful at retaining the right to die from \textit{initiating} his own cause of action under a habeas claim.

When there is a substantial deviation from the procedural requirements of section 549.60, the court will still uphold the prison official's decision to force-feed a prisoner.\textsuperscript{130} For example, in \textit{McNabb v. Department of Corrections}, a United States district court in Washington reviewed a prisoner's civil action for injunctive and monetary relief brought under 42 U.S.C. section 1893.\textsuperscript{131} In \textit{McNabb} the prison officials did not follow the Department of Corrections rules governing force-feeding of inmates on hunger strike.\textsuperscript{132} The prisoner alleged that the respondents never obtained a valid court order to force-feed the prisoner.\textsuperscript{133} Despite this procedural deviation, the court found that the prisoner's privacy rights were not violated by force-feeding because he was not in an advanced stage of a terminal or incurable illness, nor did he suffer from a severe and permanent mental and physical deterioration.\textsuperscript{134}

\textbf{D. Guantánamo Detention Procedures and Habeas Corpus}

The Supreme Court has never directly addressed whether the Constitution requires that the Court create a forum for aliens to assert constitutional rights.\textsuperscript{135} Guantánamo detainees have spent the last eight years fighting for legal rights in the federal courts.\textsuperscript{136} In addition to basic jurisdictional concerns, these legal battles include adjudicating questions of torture, interrogation, and violations of separation of powers within the branches of the United States government.\textsuperscript{137} Since many of the detainees in Guantánamo have yet to even be charged with a crime, one of the only legal vehicles detainees can use is a habeas corpus petition.\textsuperscript{138} Even so, there are numerous challenges faced by detainees in obtaining a writ

\textsuperscript{129} Hurrey v. Unknown Tex. Tech Med. Person "A", 2010 U.S. Dist. LEXIS 106035 (N.D. Tex. Sept. 15, 2010) (forced catheterization for a urine sample of a prisoner on a hunger strike was not an unreasonable search where it was clearly medically necessary); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) (rejecting claim that force-feeding an inmate after seven days on a hunger strike was unconstitutional); Haynes v. Harris, 344 F.2d 463 (8th Cir. 1965) (administering medical treatment without an inmate's consent is within the proper administrative authorities in which federal courts would not interfere in the absence of unusual or exceptional circumstances).

\textsuperscript{130} McNabb v. Dep't of Corr., 180 P.3d 1257 (Wash. 2008).

\textsuperscript{131} Id. at 1270.

\textsuperscript{132} Id. at 1261.

\textsuperscript{133} Id.

\textsuperscript{134} Id. at 1264.

\textsuperscript{135} ELSEA & GARCIA, supra note 81, at 50–52. There are certain notable exemptions from judicial review for constitutional issues such as the political question doctrine and sovereign immunity.

\textsuperscript{136} Ahmad, supra note 29, at 1683.


of habeas corpus as acquiring the right to habeas is just the beginning of the process to ask the Court to establish a detainee's liberty interest to refuse medical treatment.

Since 2002, Congress has systematically stripped federal courts' jurisdiction over cases arising from Guantánamo through the Detainee Treatment Act and the Military Commissions Act. Even today, a detainee's right to a judicial trial and a legal remedy under habeas remains uncertain. The Court has not issued a decision on habeas in Guantánamo since Boumediene v. Bush. This term, the Court is scheduled to examine four Guantánamo cases with only eight justices (as justice Kagan has recused herself as former Solicitor General). One of these petitions, Kiyemba v. Obama (Kimyeba III), addresses whether federal judges in Guantánamo have power to order actual release of an individual. The practical implication of Kiyemba III is that even if Guantánamo detainees enjoy the right of habeas corpus none can obtain a judicial remedy.

1. Jurisdictional Restrictions on Habeas Corpus Review for Guantánamo Detainees

The first notable Guantánamo detainee decision that addressed the scope of habeas jurisdiction was Rasul v. Bush. In 2004, the Court held that United States courts have federal jurisdiction over Guantánamo because the federal habeas statute extends "within [federal courts'] respective jurisdictions." Despite this short victory, Congress quickly responded by passing the Detainee Treatment Act of 2005 (DTA) and created Combatant Status Review Tribunals to examine the legality of the detentions.

One of the implications of the DTA was the near complete removal of federal courts' jurisdiction over detainees (it stated that "no court, justice or judge shall have jurisdiction to hear or consider" applications on behalf of Guantánamo detainees). However, limited

141. Boumediene, 553 U.S. 723.
142. Denniston, supra note 140.
144. Kiyemba III, 555 F.3d at 1026–27. (The Fifth Amendment Due Process Clause, the majority held, "cannot support the court's order of release" because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.")
145. Id.
146. Rasul v. Bush, 542 U.S. 466 (2004). Notably, Rasul is the appeal of Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003),reh'g denied, (two orders) (Jun 02, 2003),reh'g en banc denied, (two orders) (Jun 02, 2003) a case which included conditions of confinement claims that were not presented on appeal to the Supreme Court.
147. Rasul, 542 U.S. at 478–79. In response to the concerns of Eisentrager, Justice Kennedy's concurrence insisted that "Guantánamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities." Id. at 487 (Kennedy, J., concurring).
149. Id.
avenues of relief still remain under the DTA as federal courts have jurisdiction to review a final decision made by a Combatant Status Review Tribunal on status as an enemy combatant.\(^{150}\)

In 2006, detainees in *Hamdan v. Rumsfeld*\(^{151}\) challenged the procedural hurdles of the DTA. The Court reviewed the validity of military commissions and the application of the Geneva Convention and Common Article 3 to the situation in Guantánamo.\(^{152}\) Once again, the Court ruled in favor of the detainees.\(^{153}\) However, quickly following *Hamdan*, Congress enacted the Military Commissions Act (MCA) in 2006.\(^{154}\) The MCA authorized the President to create a military commission to try 'unlawful alien combatants' for war crimes.\(^{155}\) Importantly, Section 7 of the 2006 MCA eliminated the federal courts' jurisdiction over any habeas corpus review.\(^{156}\)

In 2008, the Court addressed the scope of the habeas in *Boumediene* and determined that detainees have a constitutional privilege to habeas corpus.\(^{157}\) The Court narrowly held that Section 7 of the MCA was an unconstitutional suspension of the writ of habeas corpus and that judicial review provided by the DTA was not an adequate substitute for habeas relief under 28 U.S.C. section 2241.\(^{158}\) Significantly, while the DTA requires that habeas review could not be pursued in federal court until all other remedies were exhausted, the Court in *Boumediene* found that detainees were entitled to a prompt habeas hearing given the duration of their detention.\(^{159}\)

### 2. Habeas Corpus Claims Related to Conditions of Confinement and Medical Treatment

While the traditional scope of habeas relief does not include claims relating to the conditions of confinement, some scholars have suggested the possibility that a prisoner may bring 28 U.S.C. section 2241 claims based on inadequate medical treatment.\(^{160}\) Unfortu-
nately, the *Boumediene* Court declined to address the scope of conditions of confinement claims and the District Court in the District of Columbia court has interpreted the Supreme Court's silence as indication that the MCA prohibits habeas review of any conditions of confinement claim.\(^{161}\)

Illustrative is the 2009 case of five Guantánamo detainees (who were participating in voluntary hunger strikes) a habeas petition to enjoin the use of restraint chairs during their force-feeding.\(^{162}\) Judge Gladys Kessler in the District Court of the District of Columbia denied Al-Adahi's petition on the grounds that the court lacked jurisdiction and could not grant the relief requested.\(^{163}\) The judge found that even though Section 7 of the MCA is unconstitutional after *Boumediene*, that decision did not invalidate the MCA's provision restricting review of conditions of confinement claims.\(^{164}\) Additionally, on the merits, the government's procedure during force-feeding did not amount to deliberate indifference as the detainees did not show they would suffer irreparable harm if an injunction was not granted.\(^{165}\) Regarding the use of restraint chairs, the Government's brief argued that restraint chairs are in place as a policy to protect staff and detainees from significant harm which could befall medical and security staff.\(^{166}\) The Court agreed and stated that the "[u]se of the chair [in Guantánamo] has been vetted by officials from the Bureau of Prisons, is overseen by professional medical staff, and was initiated by Respondents only after using less restrictive measures that were met with resistance."\(^{167}\) Since *Al-Adahi*, the Government has gone so far in recent motions against detainee claims to state that "using restraint chairs to force-feed hunger-striking detainees is constitutional."\(^{168}\)

Given this ruling, it is unlikely that the current Court will intervene in force-feeding of

http://www.jameshfeldman.com/documents/A%202241%20and%202255%20Primer,%20The%20Champion,%20April%202002.pdf (explaining that courts have seen a rise in the use of 28 U.S.C. § 2241 to protest conditions of confinement to duration, transfer, and bail).

161. *Boumediene*, 553 U.S. 723. Boumediene did not specify which portion of § 2241(e) survived its holding; however, it declined to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." *Id.* at 792.

162. Mohammad Al-Adahi v. Obama, 596 F. Supp. 2d. 111 (D.D.C. 2009) (The detainees brought this petition "in order to enjoin certain treatment that they are undergoing as a result of the voluntary hunger strikes they have undertaken to protest their lengthy detentions without judicial scrutiny of the legality of such detentions"). *Id.* at 114.

163. *Id.*

164. *Id.* Section 2241(e)(2) of the MCA bars claims relating to the conditions of detention of any alien who "has been determined by the United States to have been properly detained as an enemy combatant." *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (codified as amended at 18 U.S.C.A. § 2241(e)(1)–(2) (2006)).

\[(2)\] Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained.

*Id.*

165. Mohammad Al-Adahi, 596 F. Supp. 2d 111. Interestingly, the interests of the government in Al-Adahi were not couched in terms of national security but rather institutional safety. *Id.* at 123.

166. *Id.*

167. *Id.* at 121.

prisoners through injunctive relief. Even if constitutional rights are violated in the process, the Court seems unwilling to address the merits of detainees’ claims relating to conditions of confinement. Instead of turning to the courts, advocates could find a solution in Congress. It appears that detainee claims on conditions of confinement will only be heard if the MCA is amended or new legislation is created.

E. International Law Applied to Hunger Strikers

In addition to reviewing the constitutional rights afforded to Guantánamo detainees, it is valuable to examine whether international law extends to detainees held in Guantánamo. The United States is party to several international humanitarian law treaties, human rights treaties, and is subject to customary international law. Given the detention structure of Guantánamo, the deficiency of legal rights afforded to detainees may undermine numerous fundamental international human rights. However, the question of whether an individual may invoke a human rights treaty within a state is unsettled. Moreover, the United States has not publicly recognized any violations of international law even though the United States’ policy of medical consent differs substantially from the United Nations’ view on force-feeding.

1. International Human Rights Law

A recent report by the European Center for Constitutional and Human Rights suggested that the United States policy on force-feeding may be “a serious violation of the Universal Declaration of Human Rights (Art. 5), the International Covenant of Civil and Political Rights (Art. 7) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) (Art. 1)." However, the United States does not acknowledge any vi-


170. Situation of Detainees at Guantánamo Bay, supra note 6 (explaining that Guantánamo detention procedures and the absence of a guaranteed right to challenge the legality of detention before a judicial body violate basic human rights standards).

171. Here, the question is whether Guantánamo detainees have a private cause of action to invoke international human rights obligations in federal court. A textual interpretation of 28 U.S.C. § 2241(c)(3), the federal habeas statute, entitles an individual to relief if “[h]e is in custody in violation of the Constitution or laws or treaties of the United States” (emphasis added). This phrasing suggesting that a detainee could invoke these rights as the U.S. is a party to treaty obligations of the Geneva Conventions. See Klein, supra note 169.


173. Formal Communication Filed to the UN Against NATO Supreme Commander General Craddock, EUROPEAN CTR. FOR CONSTITUTIONAL & HUMAN RIGHTS, http://www.ecchr.eu/us_accountability/articles/craddock.html (last accessed Apr. 13, 2011). See also Situation of Detainees at Guantánamo Bay, supra note 6, at 6; John Crone, Secrets of Detention, in 1 INTRODUCTORY LECTURES AND THEMATIC COURSES: EDUCATION AND INTERNATIONAL HUMAN RIGHTS LAW 171 (2009) (on file with author) (The ICCPR dictates that detainees should “not be subject to torture or
olation of international human rights treaties because of the practice used during force-feeding in Guantánamo.\textsuperscript{174}

In a 2006 letter addressed to the Office of the High Commissioner for Human Rights, United States ambassador Kevin Moley stated that “it is bewildering to the United States Government that its practice of preserving the life and health of detainees is roundly condemned by the Special Rapportuers and is presented as a violation of their human rights and medical ethics.”\textsuperscript{175} However, the United Nations Commission on Human Rights argues that the obligations under the Convention extend to persons detained at Guantánamo.\textsuperscript{176} Specifically, the UN Commission argues that the United States is in violation of Articles 7, 9, and 14 of the ICCPR which protect the fundamental liberty interests of detainees.\textsuperscript{177} In 2006, the UN Commission maintained the ICCPR protect a “right to health” and freedom from unwanted medical treatment.\textsuperscript{178} Treating a detainee without his informed consent therefore may amount to a violation.

Other United Nations positions offer similar guidance with respect to force-feeding a prisoner on hunger strike.\textsuperscript{179} For instance, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment outlines the ideal of protecting the rights of prisoners in making medical decisions.\textsuperscript{180} Even if the United States is found to violate these provisions, the question of extraterritorial application is still undecided.\textsuperscript{181}

2. International Humanitarian Law

The United States has also ratified international humanitarian law treaties that have pertinent application in Guantánamo. Significantly, the Geneva Convention related to the Treatment of Prisoners of War (Third Convention) has special application in Guantána-

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\textsuperscript{174} Situation of Detainees at Guantanamo Bay, supra note 6, at 43.

\textsuperscript{175} Id. at 6.

\textsuperscript{176} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136 (July 9), ¶ 111. The International Court of Justice (ICJ) recognized that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory.” Id.

\textsuperscript{177} Article 7 states “no one shall be subjected without his free consent to medical or scientific experimentation”; Article 9 pertains to the right to liberty and the procedural safeguards that accompany it; Article 14 encompasses the right to habeas corpus and a detention hearing. International Covenant for Civil and Political Rights arts. 7 9, 14, Mar. 23, 1976, 99 U.N.T.S. 999, available at http://www2.ohchr.org/english/law/ccpr.htm [hereinafter ICCPR].

\textsuperscript{178} Situation of Detainees at Guantanamo Bay, supra note 6, at 10.


\textsuperscript{180} Convention Against Torture, supra note 179. See VAN SCHAACK & SLYE, supra note 49, at 605 (explaining that parties to the Torture Convention must periodically submit reports to the Committee Against Torture, a body of experts charged with enforcing the treaty).

\textsuperscript{181} ACLU, ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD: A SHADOW REPORT BY THE ACLU PREPARED FOR THE UNITED NATIONS COMMITTEE AGAINST TORTURE 89 (2006), available at http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad (stating that after September 11, 2001, the U.S. government has selectively interpreted which human rights laws are applicable extraterritorially. For example, the U.S. has consistently maintained that the ICCPR is inapplicable outside the United States or its special maritime and territorial jurisdiction).
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mo. The Third Geneva Convention covers the treatment of prisoners detained in an international armed conflict and the additional protocols "specifically prohibit interference with actions by physicians that are consistent with medical ethics." Scholar George Annas argues that "[a]ny reasonable reading of Common Article 3 [of the Geneva Conventions] would absolutely prohibit the use of emergency restraint chairs to force-feed prisoners, competent or not." Notably, the United States has not ratified the two Additional Protocols to the Geneva Convention which extended the rights of victims in international and internal armed conflicts.

Shortly after he issued his January 2009 executive order, President Obama requested a department compliance review of Guantánamo to ensure that the camp’s conditions were "in conformity with all applicable laws governing the conditions of confinement, including Common Article 3 of the Geneva Conventions." After a thirteen-day investigation, the task force determined that the conditions of confinement in Guantánamo were in "conformity with Article 3 of the Geneva Conventions." The report concluded that the health care procedure for force-feeding hunger striking detainees was lawful and administered in a humane manner. Even with testimonial evidence to the contrary, this report indicates that the United States government is making an effort, at least on paper, to conform to the requirements of Article 3 of the Geneva Conventions.

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182. For a discussion of the four Geneva Conventions, see The Geneva Conventions of 1949 and Their Additional Protocols, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/eng/war-and-law/treaties/customary-law/geneva-conventions/index.jsp (last accessed Apr. 13, 2011). See also Situation of Detainees at Guantánamo Bay, supra note 6, at 6. The Third Geneva Convention provides that, in the context of international armed conflict, "a person having committed a belligerent act and having fallen into the hands of the enemy" may be detained as a prisoner of war until the end of the hostilities. Id.

183. Annas, supra note 38, at 458.

184. Id. at 457. See INT'L COMM. OF THE RED CROSS, supra note 182. Article 10 of Additional Protocol II to the Geneva Conventions provides that "[p]ersons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol." Id.


186. REVIEW OF DEPARTMENT COMPLIANCE, supra note 14, at 4 ("The Secretary of Defense tasked a special DoD team to review the conditions of confinement at Guantánamo Bay Naval Base, to ensure all detainees there are being held ‘in conformity with all applicable laws governing the conditions of confinement, including Common Article 3 of the Geneva Conventions’ . . . .”).

187. Id.

188. Id. at 57. The report noted that medical care was provided with the consent of the detainee, the guards weighed the hunger strikers daily, and the guards offered regular meals to hunger-striking detainees at each meal time and provided information to medical personnel about quantities of food and water the detainee has taken. Notably, this report claimed that “[m]any of the feeding chairs observed had been customized with pillows and padding for comfort. None of the feedings observed involved use of head restraints.” But see Report of Dr. Emily A. Keram at 10, Zuhair v. Obama, No. 08-0864, (D.D.C. Mar. 13, 2009), available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-other-physicians/medical-and-psychiatric-evaluation-of-ahmed-zair-salim-zuhair/?searchterm=keram%20report ("Once Mr. Zuhair was in chair, restraints at the ankles, waist, wrists, and a shoulder harness were placed by guards. The restraints were made of materials similar to an airline seat belt.").

189. Id. at 11. (Testimony from detainee Zuhair revealed that as of January 2009, the restraint chairs were fastened too tight, the guards intentionally bumped his chair while he was fed, and the use of the
3. International Health Norms

Most countries find a fundamental right to health for all persons. The World Health Organization proposes that "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being." Additionally, in the context of hunger strikes, the World Medical Association (WMA) established guidelines for a medical standard on force-feeding of competent prisoners in the Tokyo and Malta Declarations. In the Declaration of Tokyo the WMA stated that:

Where 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.

To further distinguish the policy in the United States in comparison with international opinion, a recent Amicus brief filed in support of a Connecticut prisoner on hunger strike recognized numerous international norms that reject the use of force-feeding. This brief highlights the United Kingdom's use of United States' decisions such as Thor to reject the government's interest in force-feeding competent prisoners.

On balance, the majority of international laws do not endorse the use of force-feeding of incarcerated prisoners without medical consent. For example, the Netherlands, Italy, and Finland all support policies in which a competent prisoner is informed of their right to refuse medical treatment and Canada follows the Commissioner's Directive No. 825, which bars force-feeding of competent prisoners. In England, the High Court of Justice's Family Division officially recognized a competent prisoner's right to die. However, some countries, including Australia, mirror the United States' policy of focusing on the government interest in the safety of the penal institution to justify force-feeding detainees. As the procedures at Guantánamo continue to find international attention, international ho...
man rights law and the international view on force-feeding without medical consent should impact Congress and the federal judicial process.

IV. Policy Recommendations

Hunger strikes are still prevalent in Guantánamo. Even with the recent challenges surrounding the scope of habeas, the medical care issues underlying hunger strikes remain crucial to understanding the struggle of detainees in Guantánamo to gain any sense of control over their surroundings.

As of April 2011, there are 172 detainees remaining in Guantánamo, many of whom are still on hunger strike. Some practitioners believe there is a group of forty-seven men in the remaining detainees whose combatant status may never be reviewed by a tribunal. These forty-seven detainees should be given special consideration regarding their conditions of confinement claims. As these men’s detention is likely indefinite, their situation is analogous to mainland prisoners sentenced to life without parole. If the current Court entertains a habeas claim based on a constitutional violation of the detainee’s right to refuse care, the Court should address the merits of these forty-seven detainees’ claims.

While this inquiry would be unprecedented, the Court should inquire into the consent requirements of the medical treatment system in Guantánamo and attempt to balance alien detainees’ constitutional right to refuse medical treatment against the interests of the government. Presumably, during the inquiry, the Court may rule in favor of the government’s interest of national security, safety, and prison administration. Additionally, the Court will likely give deference to the military’s administrative instructions on force-feeding. Nevertheless, the interests of the detainees should be viewed as a substantive due process right to refuse medical care. The Court should review the motivations of the detainees to initiate a hunger strike with care before concluding without any investigation that a detainee is using a hunger strike to manipulate the institutional system. If the Court balances the liberty interests of a prisoner to refuse unwanted medical treatment against the government’s interests, perhaps then the prisoner will have a decision made on the merits of his condition rather than suffer the blind deference to the military’s institutional protocol that is the current status quo.

200. There is a group of forty-seven detainees who the government believes to be dangerous but the evidence against them is so tainted that their cases will never reach the court. Warren, supra note 25.

In all, 775 men have been held at Guantánamo since Jan. 11, 2002; 172 remain today. Of that group, 89 have been cleared for release, with the problem being where to send them. Thirty-six are designated for prosecution. Forty-seven will be held indefinitely with no trials because the government doesn’t believe there’s actual evidence that can be used against them.

201. Id.

202. Similar to the detainees’ plight, the prisoner in Singletary v. Costello was sentenced to life without parole and one scholar has suggested his status played into the Florida court’s calculus when affirming the prisoner’s constitutional right to refuse forced-feeding. See Silver, supra note 50, at 659.
V. Conclusion

In 2009, President Obama declared that he would close the Guantánamo detainee camps. Yet, as congressional roadblocks continue to grow, the feasibility of closure has sunk so far below the horizon that it is now barely in view. On March 7, 2011, President Obama issued an executive order acknowledging that Guantánamo may remain open indefinitely. Because of this, there is a likely chance that some detainees will live out the rest of their natural lives on the island prison. As it is no longer reasonable to see the detainees' presence on the island as merely temporary, it is now necessary for the government to revise its detainee policy to promote conditions of confinement that comply with international law and the due process guarantees of the Constitution.

Lower federal courts continue to pass on the responsibility of asserting jurisdiction to review detainee conditions of confinement claims, revealing that the federal court system may not hold the solution to the problem. The solution may be left to Congress. To address the concern of hunger strikes, Congress could enact amendments to the MCA or create new legislation that would permit prisoners to raise conditions of confinement claims. Additionally, while enforcement of international humanitarian law in United States courts may be unlikely, the knowledge that the United States' force-feeding procedures in Guantánamo may violate international human rights norms should not be taken nonchalantly. To ensure compliance with international ethical standards, the United States should revise the DoD Medical protocol to mirror the procedural safeguards in federal prisons where force-feeding is videotaped and restraint chairs are not used.

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206. For example, in 2010, a judge in the United States District Court of the District of Columbia once again found Boumediene did not invalidate the MCA conditions of confinement claims in § 2241(e)(2). Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 109 (D.D.C. 2010) (Al-Zahrani addressed the claims of detainees' survivors, who sued under the Alien Tort Statute and the court refused to apply Bivens remedy for alleged Fifth and Eighth Amendment violations).

207. Dinah Shelton, Historical Development of International Protection of Human Rights: Results and Perspectives, in 1 INTRODUCTORY LECTURES, supra note 173, at 29 (arguing that there are many reasons human rights law has not been enforced in States even when there are massive human rights abuses. She cites rationales such as “traditional concepts of state sovereignty and domestic jurisdiction as well as the consent based nature of international obligations that prevents enforcement of norms”).

208. For a discussion of proposed changes in force-feeding prisoners at Guantánamo, see Report of Dr.
The right of a competent prisoner to refuse unwanted medical treatment is grounded in a fundamental constitutional privilege and protected by international law. By consistently refusing to balance the interests of a hunger-striking detainee against the interests of the government, the federal court is denying an avenue for detainees to assert a fundamental due process protection. If the administration views hunger strikes as simply a nuisance and as a barrier to their effective control of an institution, the humanitarian rights of prisoners will remain in severe danger. The act of refusing food should not be viewed as a form of disruptive behavior that allows the government to effectively punish a detainee through forced medical treatment. In the interest of the justice so essential to the values of the United States, Congress must create an avenue for detainees’ voices to be heard by the courts. Without a forum to raise their concerns, unnecessary hunger strikes may persist, creating a climate of desperation that runs counter to the very foundation of the United States Constitution.

Emily A. Keram, *supra* note 188, at 3 (explaining that consideration should be given to video-taping the feedings which could provide an objective record of the conduct of those involved in the feedings).