Fordham Law Review Online

Volume 88 Article 3

2019

Novel Perspectives on Due Process Symposium: Uncoupling Habeas Corpus and Due Process

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UNCOUPLING HABEAS CORPUS AND DUE PROCESS

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Isn't there a pretty good argument that a suspension of the writ . . . is just about the most stupendously significant act that the Congress of the United States can take?

—Justice Souter[1]

INTRODUCTION

The writ of habeas corpus, befittingly coined the Great Writ,[2] stands as one of the Constitution's preeminent safeguards of individual liberty. At its core, the Great Writ enables a prisoner to challenge the legality of his or her detention before a neutral decision-maker.[3] In turn, habeas corpus serves as a critical means for the judiciary to examine the legality of Executive detention, thereby enabling "the Judicial Branch to play a necessary role in maintaining this delicate balance of governance."[4]

However, the Great Writ is not a guaranteed constant. In limited circumstances, Congress can undertake the "stupendously significant"[5] act

* J.D., 2019, Fordham University School of Law; B.M., 2013, New York University. I am very grateful for the scholarly contributions put forth by Professor Trevor W. Morrison and Professor Richard H. Fallon, Jr., which greatly informed this work. Great thanks are due the editors and members of Volume 88 of the *Fordham Law Review*, with special gratitude to the *Fordham Law Review Online* editors, Nora Stewart and Lena Bruce, for making this Article a reality.

1. Transcript of Oral Argument at 57–58, Hamdan v. Rumsfeld, 548 U.S. 557 (2007) (No. 05-184).

2. This moniker seemingly stems from William Blackstone's reference to habeas corpus as "the great and efficacious writ, in all manner of illegal confinement." WILLIAM BLACKSTONE, 3 COMMENTARIES *131. Blackstone viewed the writ as a critical element in securing "the glory of the English law." *Id.* at *133. Both his nickname and reverence for the writ have heartily persisted through modern iterations of the Supreme Court. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 649 (2010); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

3. I.N.S. v. St. Cyr, 533 U.S. 289, 301–03 (2001).

4. *Hamdi*, 542 U.S. at 536; *see also id.* at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); Swain v. Pressley, 430 U.S. 372, 380 n. 13 (1977); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

5. Transcript of Oral Argument at 58, Hamdan v. Rumsfeld, 548 U.S. 557 (2007) (No. 05-184).

of suspending the writ and thereby temporarily prevent prisoners from invoking its review-based protection.[6] This Article examines whether the suspension of habeas corpus discharges the Executive from the legal constraints on detention imposed by the Due Process Clause.[7] This exploration concludes by finding that select elements of the Due Process Clause persist even during suspension and thus restrict otherwise forbidden Executive action. Part I overviews the scope of the Great Writ and the effect of its suspension. Part II details two conflicting views of the writ's relationship with the constitutional demands of due process. Finally, Part III asserts that suspension quiets some facets of the Due Process Clause but does not entirely extinguish the right to procedural due process.

I. THE SILHOUETTE OF THE GREAT WRIT

Although the Great Writ has persisted across legal systems for hundreds of years, hammering out the precise scope of habeas corpus, along with its proper place in our constitutional system, presents a surprising amount of uncertainty and disagreement.[8] Habeas corpus only appears in the Constitution by brief implication in the Suspension Clause: "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[9] Although the history of the Suspension Clause is somewhat muddled,[10] the Supreme Court has asserted that, at a minimum, the Suspension Clause encompasses and protects the writ of habeas corpus as it existed in 1789.[11] Habeas stands alone as the only common law writ referenced in the Constitution.[12]

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6. *See infra* notes 21–22.

7. Academic discourse has provided two opposing views on this issue. Perhaps two of the most poignant views are delivered, in much fuller form than this Article, by Professor Morrison and Professor Shapiro. *See generally* Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006). Further discussion of these viewpoints can be found *infra* accompanying notes 28-38.

8. George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2d 397, 398 (2002) ("After more than two hundred years, we still do not know the scope and dimensions of the protection that [habeas corpus] affords against executive detention."). To further affirm the cloudy nature of the Great Writ, one need look no further than the wildly differing understandings of habeas from Justices O'Connor and Scalia in *Hamdi*. 542 U.S. at 509–39, 554–79. Indeed, "the history of the writ has always been marked by a considerable degree of discretion." Shapiro, *supra* note 7, at 66.

9. U.S. CONST. art. I, § 9, cl. 2.

10. For further reading, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1289-93 (5th ed. 2003) [hereinafter HART AND WECHSLER].

11. I.N.S. v. St. Cyr, 533 U.S. 289, 300–02 (2001); Felker v. Turpin, 518 U.S. 651, 662–64 (1996); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) ("Acting under the immediate influence of [the Suspension Clause], [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.").

12. Holland v. Florida, 560 U.S. 631, 649 (2010).

However, the Constitution's language does little to elucidate the actual nature of the writ. At its core, the Great Writ is a safeguard of individual liberty.[13] Generally, the writ can be characterized as a means to determine the lawfulness of a prisoner's custody: once properly invoked by a prisoner, the custodian is required to produce the prisoner, along with a statement describing the circumstances of the prisoner's detention, before a neutral decision-maker.[14] If the decision-maker finds that the reason for the prisoner's detainment fails to pass legal muster, the appropriate remedy typically is discharge from custody.[15] By providing prisoners with a means to challenge unlawful custody, the Court has found that the writ "plays a vital role in protecting constitutional rights"[16]—especially in the context of Executive detention.[17]

As evidenced by the plain text of the Suspension Clause, a prisoner's right to invoke the writ may be barred in times of national crisis or great emergency.[18] As largely supported by historical practice, the prevailing view is that Congress alone holds the power to authorize the suspension of the Great Writ.[19] There have been three such suspensions since the Civil War, the most recent of which was in response to the attacks on Pearl Harbor in 1941.[20] A valid suspension[21] requires dismissal of a habeas petition, provided the particular prisoner's custody falls within the scope of the suspension.[22] Whether suspension also frees the Executive from the restraints otherwise imposed by the Due Process Clause is the subject of the remainder of this Article.

II. DUE PROCESS AND SUSPENSION

The right to invoke the writ of habeas corpus has long been viewed as a critical vehicle to secure the due process rights of those in custody.[23] While the Due Process Clause is home to numerous constitutional liberties, one of the foremost is the right of a detainee to not be deprived of liberty absent

13. *See St. Cyr*, 533 U.S. at 301; *Ex parte* Milligan, 71 U.S. 2, 106–07, 130–31 (1866); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

14. HART & WECHSLER, supra note 10, at 1284.

15. HART & WECHSLER, supra note 10, at 1284–85.

16. Slack v. McDaniel, 529 U.S. 473, 483 (2000).

17. *St. Cyr*, 533 U.S. at 301.

18. *See* U.S. CONST. art. I, § 9, cl. 2.

19. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte* Merryman, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (famously rejecting President Lincoln's unilateral suspension of habeas during the Civil War); Morrison, *supra* note 7, at 428–29.

20. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 344-46 (2006).

21. Congress must act affirmatively and explicitly to suspend habeas; the writ cannot be suspended by inaction or implication. *St. Cyr*, 533 U.S. 289, 311–12.

22. *See e.g.*, *Ex parte* Milligan, 71 U.S. 2, 130–31 (1866) ("The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.").

23. BLACKSTONE, *supra* note 2, at *133–38 (detailing the birth of the writ of habeas corpus as essential to maintaining the "true [s]tandard of law and liberty").

sufficient procedural due process.[24] Typically, there are three elements to such process: judicial review,[25] entitlement (in principle) to a judicial remedy,[26] and fair process.[27] By requiring the Executive to provide an impartial decision-maker with a valid cause for depriving a prisoner of his or her liberty, the Great Writ is largely the most important vehicle for enforcing the procedural promises of the Due Process Clause for prisoners under Executive custody. But what, then, of times of national crisis when the writ is suspended? Do these procedural constraints on Executive detention vanish along with the prisoner's right to employ the writ of habeas corpus?

Two conflicting views have arisen from academic discourse. The first view wholly "equate[s] the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right."[28] Habeas and procedural due process are "not just interdependent but inseparable."[29] As such, the legislature's decision to exercise its suspension power and render habeas relief unavailable frees the Executive from the due process restraints on

24. The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, *liberty*, or property, without due process of law . . . ." U.S. CONST. amend. V (emphasis added). The procedural protections lying within the Due Process Clause are the premier guardians against unlawful detainment. Carey v. Piphus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."); Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

25. Judicial review is the bedrock of the American legal system. Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ."); *see also* United States v. Nourse, 34 U.S. 8, 28–29 (1835) ("It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals, a ministerial officer might, at his discretion, issue this powerful process . . . leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist, this imputation cannot be cast on the legislature of the United States."). The Court has striven to avoid "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988) (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986)).

26. One of *Marbury*'s original promises was that every right must have a remedy. *See Marbury*, 5 U.S. at 163; *see, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–98 (1971); Ward v. Board of Comm'rs, 253 U.S. 17, 24 (1920); *Ex parte* Young, 209 U.S. 123, 145 (1908). Although a number of doctrines—such as sovereign immunity, official immunity, and the political question doctrine—present roadblocks to this mantra, the Court has generally "relied, either implicitly or explicitly, on the availability of injunctions or other remedies to identify and enforce the outer bounds of lawfulness." Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338–39 (1993).

27. Daniels v. Williams, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions."); Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979) ("[T]he quantum and *quality* of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.") (emphasis added); *see also* Goldberg v. Kelly, 397 U.S. 254, 266 (1970). Great credit is due Professor Richard Fallon for expertly distinguishing the aforementioned three facets of procedural due process. *See* Fallon, *supra* note 26, at 329–39.

28. Shapiro, *supra* note 7, at 87.

29. *Id.* at 88.

detention that would otherwise apply.[30] The suspension of habeas wholly extinguishes the procedural guarantees of the Due Process Clause and authorizes otherwise unlawful detention.[31] Thus, suspension operates as an "on/off" switch for "core due process safeguards."[32]

In contrast, the second view understands habeas as deeply bonded with due process, but not entirely inseparable.[33] Here, the Great Writ predominantly exists as a remedy for unlawful detention—a more limited capacity than the first view.[34] As a remedial measure, habeas review is the means by which the first two facets of procedural due process—judicial review and entitlement to a judicial remedy—are satisfied.[35] However, habeas is not found to encompass the underlying right to fair process as "[f]airness is not an exclusively judicial virtue, and judicial process is not coextensive with fair process."[36] As such, a valid suspension quenches a prisoner's right to judicial review and entitlement to a judicial remedy, but leaves untouched the procedural right to fair process.[37] Under this view, suspending the writ does not act as an absolute "on/off" switch for due process safeguards—suspension removes a prisoner's access to judicial scrutiny and redress but does not relieve the Executive from providing fair process as required by the Due Process Clause.[38] In short, fair process is effectively uncoupled from the writ of habeas corpus.

III. FIDELITY TO FAIR PROCESS

Fortunately, a variety of guideposts harken toward the most prudent understanding of due process and suspension. Equipped with the understanding that the Suspension Clause encompasses, at a minimum, the writ as it existed in 1789,[39] one readily apparent guidepost is English common law:[40] as Chief Justice Marshall instructed in 1807, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the

30. *See* Shapiro, *supra* note 7, at 88–89.

31. *See* Shapiro, *supra* note 7, at 88–89; *see also* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1610 (2007).

32. Tyler, *supra* note 20, at 387; Morrison, *supra* note 31, at 1610.

33. *See* Morrison, *supra* note 7, at 432 ("Suspending the writ does not authorize detention; a detention's illegality stands apart from whether the courts are in a position to redress it via habeas.").

34. *See* Morrison, *supra* note 7, at 427–28, 433–34.

35. Morrison, *supra* note 31, at 1610; *see also* Morrison, *supra* note 7, at 433–34.

36. Morrison, *supra* note 31, at 1610.

37. Morrison, *supra* note 31, at 1610–11.

38. This view supports the notion that constitutional and legal constraints outside the realm of procedural due process could further constrain Executive detention authority, however, this is beyond the limited purview of this Article. For further reading, see Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1312 (2000) and see also Morrison, *supra* note 7, at 415, 436–37.

39. *See* sources cited *supra* note 11.

40. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

common law."[41] A review of traditional English practice reveals that the suspension of habeas corpus simply removed a specific judicial remedy for unlawful custody.[42] Suspension did not otherwise authorize detention nor insulate the Crown from later-imposed liability.[43] If such results were desired, Parliament would accompany an act of suspension with additional "acts of indemnity," which specifically shielded the Crown from claims alleging unlawful detention.[44] If suspension alone sanctioned otherwise unlawful detention, there would be no need for such acts. The existence of indemnity acts indicates that, under English common law, suspension removed a remedy but did not nullify a detainee's other substantive rights, which were capable of redress.

Critics have pointed out that Parliamentary supremacy—Parliament was traditionally empowered "to make or unmake any law whatever"[45]—hamstrings the usefulness of analogizing the English experience to understand the Great Writ as it exists in the United States, a legal system premised upon constitutional supremacy.[46] However, such critiques are missing the forest for the trees. It is true that, historically, the English Parliament was empowered to affect (and even nullify) individual rights absent legal restraint.[47] However, here, the focus is not on the power of the legislature, but rather on the nature of habeas and its suspension. Differing notions of legislative primacy do not negate the traditional understanding of habeas that passed from English common law into the American Constitution; the varying authorities of Parliament and Congress stands as a related but distinct facet of this issue.[48] The English common law understanding of habeas—wherein individual safeguards persist even after suspension of the writ—remains a critical guidepost for understanding the interaction between American habeas and the Due Process Clause.

But what of the American understanding of suspension? Early case law proves a fickle read. In the landmark Civil War case *Ex parte Milligan*,[49] which arose out of a habeas challenge to Milligan's detention and eventual conviction by a military tribunal, the Court found that Milligan was outside the scope of a then current suspension, and, as such, Congress could not

41. *Id.* Chief Justice Marshall also noted that, with regard to habeas, "[t]he term is used in the constitution, as one which was well understood" and "known to the common law." *Ex parte* Watkins, 28 U.S. 193, 201–02 (1830).

42. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 171 n. 118 (1980) ("[S]uspension did not legalize arrest and detention. It merely suspended the benefit of a particular remedy in the specified cases."); *see also* R.J. SHARPE, THE LAW OF HABEAS CORPUS 94–95 (2d ed. 1989). For a more detailed exploration of this point, including legislative history and English scholarship, see Morrison, *supra* note 31, at 1543–51.

43. DUKER, *supra* note 42, at 171 n. 118; SHARPE, *supra* note 42, at 95.

44. *See, e.g.*, Indemnity Act 41 Geo. 3, c. 66 (1801); *see also* DUKER, *supra* note 42, at 171 n. 118; SHARPE, *supra* note 42, at 95.

45. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3 (10th ed. 1959).

46. Shapiro, *supra* note 7, at 83–84.

47. Shapiro, *supra* note 7, at 83.

48. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

49. 71 U.S. (4 Wall.) 2 (1866).

authorize his trial by military tribunal.[50] In dictum, the issue of whether a valid suspension could authorize otherwise unlawful arrest divided the majority and a concurrence comprised of four Justices.[51] Proponents of both the "on/off switch" and "uncoupled" views of suspension have needled out implications from *Ex parte Milligan* in support of their opposing arguments.[52] However, to draw such weighty conclusions from dicta and undertones seems unwise. The waters remain muddy.

Contemporary developments provide greater elucidation. The modern Court has repeatedly characterized habeas as "an adaptable *remedy*" whose "precise application and scope change[] depending upon the circumstances."[53] Habeas, thusly characterized as a remedial measure, is found to vindicate the due process rights to judicial review[54] and entitlement to a judicial remedy.[55] However, there is a seeming dearth of modern jurisprudence suggesting that suspension confers any substantive legal authority which sanctions otherwise unlawful detention—perhaps to avoid direct antagonism to English common law.[56] Justice Scalia's dissent in *Hamdi v. Rumsfeld*[57] advocated for such a "suspension as authorization" model; however, he was only joined by one other Justice.[58] Together with the common law foundations, this congeals nicely—removing the remedy of habeas extinguishes certain avenues to redress (judicial review and entitlement to a judicial remedy) but does not necessitate ousting the remainder of the Due Process Clause. Modern jurisprudence suggests that there is room for the right to fair process to persist during suspension.

Fortunately, the Court has sketched out its expectations of what actually constitutes fair process, further clarifying that it does not depend upon habeas for its existence. Fair process protects against the "unjustified deprivation of

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50. *Id.* at 6–8, 115–16, 121–22 (1866).

51. *Id.* at 115 (majority), 137 (concurrence).

52. *See* Morrison, *supra* note 7, at 430–31, 443–45; Shapiro, *supra* note 7, at 83–85.

53. Boumediene v. Bush, 553 U.S. 723, 779 (2008) (emphasis added); *see also* Schlup v. Delo, 513 U.S. 298, 319 (1995) (finding that habeas "is, at its core, an equitable remedy"); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (describing how habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose").

54. Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (noting that the Due Process Clause "informs the procedural contours" of the judicial review prompted by a detainee's invocation of the writ of habeas corpus); I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001).

55. HART & WECHSLER, *supra* note 10, at 1284–85; *see, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (noting that the remedial function accomplished by the writ is "to secure release from illegal custody.").

56. McNally v. Hill, 293 U.S. 131, 136 (1934) ("To ascertain its [habeas] meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn . . . .") (overruled on other grounds); *see Preiser*, 411 U.S. at 485 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."). Although the scope of the habeas remedy greatly expanded in the nineteenth and twentieth centuries, its suspension never entered the realm of conferring substantive authority. *Id.* at 485–86 (tracing the expansion of the habeas remedy).

57. 542 U.S. 507 (2004).

58. *See id.* at 554, 561, 577–78; Morrison, *supra* note 7, at 423–24 (coining the phrase "suspension as authorization" to describe Justice Scalia's understanding of the Suspension Clause as articulated in *Hamdi*).

life, liberty, or property,"[59] regardless of "the merits of a claimant's substantive assertions."[60] The Court has found that three elements generally comprise the fair process necessary to avoid an unjustified deprivation. First, there must be a "neutral and detached" decision-maker.[61] Additionally, "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[62] This fair process calculus is flexible. For instance, in *Hamdi*, the Court concluded that an enemy combatant was entitled to notice and a hearing before a neutral decision-maker ("an appropriately authorized and properly constituted military tribunal") but that the government need only meet the "some evidence" threshold in order to justify detention.[63] The three elements of fair process can bend to the nature of the exigency and are capable of satisfaction outside the judicial process.

The Court's implications for fair process during suspension thus rise to the surface. To comply with fair process during suspension, detainees must be provided with an explanation for the Executive custody and an opportunity to rebut such an explanation before a detached decision-maker.[64] The Court's approach in *Hamdi* suggests that the Executive will need to create its own decision rules "flexible enough to accommodate the nature of the national emergency at hand."[65]

The plain language of the Constitution seemingly endorses such self-regulation. The President is bound by oath to "preserve, protect and defend"[66] the Constitution and to faithfully carry out the duties of the Executive office.[67] In addition, the Executive must "take Care that the Laws be faithfully executed."[68] Taken together, the Executive is charged with an independent duty of constitutional fidelity.[69] As described above, the fair

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59. Carey v. Piphus, 435 U.S. 247, 259 (1978).

60. *Id.* at 266.

61. Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617 (1993) (["D]ue process requires a 'neutral and detached judge in the first instance.'") (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972)). Of significant note is that the neutral decision-maker does not necessarily need to be a judge. *See* Morrison, *supra* note 31, at 612–13 (citing administrative officials and military tribunals to illustrate that "fair process is not confined to judicial process").

62. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863)).

63. *Hamdi*, 542 U.S. at 537–38.

64. *See* Morrison, *supra* note 31, at 1614.

65. *See id.*

66. U.S. CONST. art. II, § 1, cl. 8.

67. *Id.*; *see also id.* art. VI, cl. 3 ("The Senators and Representatives . . . and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .").

68. *Id.* art. II, § 3.

69. In the analogous context of the political question doctrine, when presented with a nonjusticiable political question, "a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution." U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992); *see also* Morrison, *supra* note 7, at 437 n.145.

process element of the Due Process Clause discernibly persists even during times of suspension.[70] Thus, in order to faithfully discharge its textually prescribed duty of independent constitutional fidelity, the Executive must self-regulate to ensure it provides fair process during suspension.

Of course, as a matter of necessity, the Executive will likely under-enforce any such rules during national exigency. Skeptics may thusly question the significance of an underlying due process right when its two primary facets—here, judicial review and remedy—are ousted and there is little motivation for vigorous enforcement. Indeed, "the cash value of a right is often nothing more than what the courts (or some other institution with enforcement authority, for example, Congress) will do if the right is violated."[71]

However, there are, in fact, potential remedies outside habeas to enforce the Due Process Clause's guarantee of fair process. Such remedies might include a *Bivens* action for damages[72] or prosecution under the Non-Detention Act.[73] While the Supreme Court has been remarkably loathe to expand the breadth of *Bivens* suits,[74] there may be some promise for a "fair process suit" given that the Court has already permitted *Bivens* suits to provide redress for other violations of the Due Process Clause.[75] The Non-Detention Act may also offer some hope to enforce a violation of fair process. The Non-Detention Act provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[76] Justice Souter asserted that this Act was passed to prevent another *Korematsu* and "intended to preclude reliance on vague congressional authority . . . for detention or imprisonment at the discretion of the Executive."[77] Such a backdrop certainly seems apt to preserve the right to free process during times of national crisis where access to the Great Writ is suspended. Although political obstacles could impede this remedy—it would entail the Executive prosecuting its own officials—it is certainly feasible that "a new President might take office motivated to punish the misdeeds of the old."[78] Although these remedies are not without legal and

70. *See supra* notes 39–58 and accompanying discussion.

71. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 (1999).

72. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing an implied cause of action for damages as appropriate recourse for a violation of the Fourth Amendment).

73. 18 U.S.C. § 4001(a).

74. The Court has been steadfastly unwilling to extend *Bivens* to new contexts if there are any "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396; *see, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–61 (2017); Minneci v. Pollard, 565 U.S. 118, 120 (2012); Wilkie v. Robbins, 551 U.S. 537, 547–548, 562 (2007); FDIC v. Meyer, 510 U.S. 471, 473–474 (1994). Another obstacle is the doctrine of qualified immunity, which often shields officials from damages liability. For further reading, see Morrison, *supra* note 7, at n. 139.

75. *See* Davis v. Passman, 442 U.S. 228, 248–49 (1979) (allowing a *Bivens* action to remedy equal protection violations of the Fifth Amendment Due Process Clause).

76. 18 U.S.C. § 4001(a).

77. Hamdi v. Rumsfeld, 542 U.S. 507, 543–44 (2004).

78. Morrison, *supra* note 7, at 435–36.

practical hurdles, "unlawful detention during a suspension is not necessarily consequence-free."[79] The underlying right to fair process retains at least a modicum of "cash value" during suspension.[80]

CONCLUSION

In sum, the procedural elements of the Due Process Clause do not entirely depend upon the Great Writ for their existence. Even during suspension, essential promises of the Due Process Clause live on in the detainee's right to fair process. The Executive should strive to uphold such constitutional norms, even in the absence of judicial review during a national crisis, for exigency does not trump constitutional fidelity.

79. *Id.* at 436.
80. *See* Levinson, *supra* note 71, at 887.