# Chapter 4

## Due Process

### What is the difference between substantive and procedural due process?

### Takings (property)

#### What is a "taking"?

#### What due process is involved?

#### What about compensation?

#### How is compensation measured?

#### What is a regulatory taking?

### New Property

#### What is the "new property"? (Examples?)

#### What is the "bitter with the sweet" doctrine (*Loudermill*)? Is it still good law?

#### How are the rights different for new property versus old property?

##### What if I take your medical license, versus taking your land?

##### What if I abolish your government job or your welfare entitlement?

#### What do *Roth* and *Sinderman* tell us about the due process rights of public employees?

##### What do they tell us about why LSU has not commented or explained its position on the merits of the *Van Heerden* case?

#### Why did the suicidal policeman not get a hearing?

##### Why did the court find that putting his dismissal in his employment file meant that it was public?

### *Goldberg*

#### What makes a benefit an entitlement?

#### What is a matrix regulation?

#### What was the fight in *Goldberg* over the timing of the hearing, i.e., what was plaintiff's argument for a pre-termination versus post-termination hearing?

#### What was the informal process for terminating benefits that the plaintiffs want to change? Why was it subject to serious bias claims?

#### What were the allegations about the problems with the informal process that would be cured by a pre-termination hearing?

#### Explain the procedural rights established in *Goldberg v. Kelly*, how they differ from the rights given indigent criminal defendants, and how the rights are specifically tailored to the special problems posed in providing due process to an indigent welfare population.

#### In general, how does right to counsel different in agency and criminal cases?

#### What was the impact on the state welfare system of creating the *Goldberg* rights?

#### How did the Welfare Reform Act of 1996 eliminate welfare as an entitlement?

##### What does TANF stand for?

##### This ended the benefits for all welfare recipients under the old program – did they have a right to any due process?

### Cost Benefit Analysis and Due Process

#### How does *Matthews v. Eldridge* modify *Goldberg*?

##### What benefit was at issue in *Matthews*?

##### How were the facts determined for making the benefits determination in *Matthews*?

###### How is this different from *Goldberg*?

##### What is the role of the claimant’s testimony in *Matthews*?

###### How is this different from *Goldberg*?

##### Why does it not matter whether the claimant can personally present the case in writing?

###### How is this different from *Goldberg*?

##### Why did the court believe that a post-termination hearing was OK in *Matthews* and not in *Goldberg*?

##### Did the *Matthews* court overrule *Goldberg*?

##### Has *Goldberg* been applied in cases after *Matthews*?

#### The *Matthews* balancing test

##### Explain each of the three *Matthews* factors.

##### How is this analysis different from the due process analysis in criminal cases?

##### How did the courts apply *Matthews* in later cases?

##### How does the *Matthews* analysis dovetail with discretionary decisionmaking as a defense to tort claims against the agency? (You will not be able to answer this until we finish the last part of the course on suing agencies.)

#### Post-*Matthews* due process

##### What is the *Matthews* analysis in the school suspension and paddling cases?

##### What do you have to show to get a hearing?

##### If Melissa, an LSU student, admits to plagiarism, does she still get a hearing on whether she plagiarized?

##### What if she says that she copied the work, but she thought it was properly cited?

##### What if she is suspended from school after being arrested by the Baton Rouge police for attempted murder?

##### What if she is suspended from school because someone posts on Facebook that she was cheating?

##### Melissa fails administrative law and thus flunks out of law school. She thinks she did a good job on the exam – does she get a hearing?

##### Melissa is accused of stealing from another student’s locker and is expelled from law school – does she get a hearing?

##### Is the analysis different for flunking out versus being expelled for stealing?

#### What is congressional casework? (Think of examples.)

##### What did the *Pillsbury* case tell us about the limits on Congressional meddling in adjudications?

##### What does *Pillsbury* tell us about the allowable limits of congressional case work?

## Building the Record

### What does it mean for an agency to official notice of information?

### How this can influence the defendant's due process rights?

### What must be in the record to resolve these problems?

#### For example, what if the physician members of a medical licensing board use their own expertise and determine that the physician whose license they are reviewing was engaging in substandard practice.

#### What do they need to put in the record?

## Liberty Interests

### What are examples of liberty interests?

### Privacy as a protected liberty interest: What do the cases of the drunkard and the shoplifter tell us?

### How do the "perverts R us" WWW site cases modify this? (*Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160, (2003); *Smith v. Doe*, 123 S.Ct. 1140 (2003)

#### How were the facts determined in the perverts R us cases?

#### Why does this undermine the basis for demanding a hearing?

#### Why isn't this an ex post facto law situation?

### What rights does a prisoner retain and why should we care?

#### When does prison disciple trigger a hearing?

#### What is the most important consideration in whether the prisoner gets a hearing?

#### Assume you have been hired to develop a new set of prison regulations for Angola.

##### What are the tradeoffs you must deal with?

##### What happens if prisoners have lots of rights?

##### What is the risk if prisoners have no rights?

## Alternative Remedies

### What are alternative remedies to due process claims?

### What does the United States Supreme Court tell us is the remedy if your client believes she has been wrongly put on the "perverts R us" WWW site?

### Why are these alternatives sometimes better for you client?

### What are the disadvantages of an alternative remedy?

### For example, the case of the medical student who did not get the internship she bargained for - what was her alternative remedy, and why might it better than a due process right?

### If you win the right to a hearing, does this mean you will prevail in the hearing?

## *Wooley and State Separation of Powers*

### State Separation of Powers

#### How does separation of powers differ in the states as compared to the federal government?

#### How does the position of Attorney General of Louisiana differ from the Attorney General of the United States as relates to separation of powers?

#### What is a central panel model for ALJs?

#### What are pros and cons of a central panel model?

#### How does the DAL legislation change the relationship between the agency and the ALJ, i.e., how is the LA system now different from the Federal system?

#### How does this change the policy making process for LA agencies?

### *Wooley*

#### Before the DAL legislation, the ALJs were part of their constitute agencies.

##### Who do they report to after the DAL legislation?

##### Does this raise separation of powers issues?

#### Louisiana created the central panel ALJs to reduce bias – what is the theory for why they would be less biased than agency ALJ?

#### Louisiana is concerned about fairness to the regulated party – which party does this ignore?

#### Why does allowing the regulated party, but not the agency, to appeal the central panel ALJ’s decision reduce regulation?

#### How are LA central panel ALJs more like judges than are ALJs in the federal system?

#### How does having a central panel of ALJs, as in Louisiana, address separation of functions?

#### What is the separation of powers issue in the *Wooley* case?

#### What does the court say is the key attribute of an Article V judge?

#### How did the LA SC explain why LA ALJs are not Article V judges and thus do not need to be elected?

#### Why is the LA SC's definition of a judge and an ALJ circular?

### *Bonvillian*

#### What did issue *Wooley* leave unresolved that lead to the *Bonvillian* cases?

#### Why would State Farm hesitate to sell an insurance policy approved by an ALJ but not by the agency?

#### What is an action for mandamus and what its limitations?

#### Why was mandamus denied in *Bonvillian* *I*?

#### What legal action did petitioners successfully use to get his license in *Bonvillian* *II*?

#### How does the *Bonvillian II* undermine the LA SC's resolution of *Wooley*?