# Introduction to Due Process

# Learning Objectives for this Module

## Learn the difference between substantive and procedural due process.

## Learn the history of procedural due process.

## Learn the high water mark of Goldberg

# Reading Assignment

## Chapter 4 to p. 118, b. Liberty and Correctional Facilities and the Ivor van Heerden cases.

# Issues to be addressed

## Substantive Due Process

### Substantive Due Process refers to the limits on what government can regulate

### Federal - commerce clause, national security powers, foreign affairs,

### State - police powers v. privacy (abortion)

### Important in the early days of the court before the modern expansive reading of the commerce clause

### Might be important again, depending on the whims of the United States Supreme Court judges.

### Substantive due process is studied in constitutional law.

## Procedural Due Process

### Procedural due process refers to the procedures by which government may affect the rights of an individual in a specific situation

### Procedural due process is required in adjudications and other proceeding that affect individuals or a small group of persons based on the specific factual determinations

### We study procedural due process in administrative law.

#### It is usually on the Louisiana bar.

## Why Procedural Due Process is Not Liberal or Conservative

### Conservatives

#### Want the little man (and the rich man) to be fairly treated by the government, i.e., to be able to resist regulation

### Liberals

#### Want the individual to get lots of due process, and cannot exclude corporations.

### Both think the government losing against individuals is good in individual cases.

## Rule or Adjudication?

### Londoner v. City and County of Denver, 210 U.S. 373 (1908)

#### The City of Denver paved the road in front of plaintiff’s property. Under the law at that time, property owners were liable for the cost of such improvements.

#### Plaintiff’s individual assessment was based on specific factors about this property.

#### The court found that plaintiff was entitled to present evidence and be heard on his objections to facts on which his assessment was based.

#### This hearing is an adjudication.

### Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915)

#### The State Board of Equalization determined that property was undervalued in Colorado and imposed a rule that all evaluations be increased by 40%.

#### This was not a reevaluation of each piece of property, but a uniform and mechanical increase in the individually determined valuations.

#### The court found that there is no right to a hearing for rules of general applicability.

## History of Procedural Due Process

### Real Property Takings Review

#### This is an administrative due process requirement that is the constitution.

#### What is a traditional property "taking"?

#### What due process is involved?

#### What about compensation?

#### How is compensation measured?

### Non-real property procedural due process

#### The constitution mostly did not apply to the states

#### The 14th amendment was eventually used to apply the constitution to the states

#### Criminal due process protections outside of the trial developed in the federal system in the early 1900s, but was not applied to the states until the Warren Court cases decided in the 1950s and 1960s.

#### The late 1960s and early 1970s were the high point of administrative due process.

#### Modern due process comes from Matthews v Eldridge in 1976

#### The current cutting edge of due process is transforming criminal due process into administrative, as with terrorist detainees.

## Do you get any due process at all?

### Accidental Deprivations

#### Assume the postman runs over your dog or the forest service accidentally burns down your home

##### Have you suffered a taking?

##### Are these due process deprivations?

##### If so, how could the government provide due process?

##### (We cover these in the tort claims act section.)

#### What if the government repeatedly “forgets” to give mental patients a hearing before committing them?

##### How is this different?

### Rights v. Privileges - History

#### In 1940 a city fires a policeman because the police chief heard a rumor that the policeman had accepted free coffee and doughnuts from a shop on his beat.

##### Was a job a right or a privilege?

##### Was this a due process violation?

#### Government privileges were construed broadly - going to a state college, for example.

##### You could condition these with restrictions that would otherwise be impermissible

##### Bitter with the Sweet Doctrine

### Client counseling: Why are you fighting for a hearing?

#### Convincing the court that you get a hearing does not mean you win at the hearing

##### Getting a hearing means that the agency has to show on the record why it wants to rule against you.

##### You will have a chance to rebut the record.

##### If the agency has built the record, you are likely to lose.

#### However, many agencies, especially state and local government agencies, do not do a great job at building records, so the agency will not be able to show in the record their justification for the action.

##### This may get your client a second chance or a settlement.

## Predicates to a Hearing

### Who is constitutionally eligible for a hearing?

#### Due process only applies to actions by the government.

#### Only government employees have a constitutional right to a hearing and due process.

##### State rights are defined by the state laws and constitutions, not the US constitution, and can be broader than the US rights.

##### States cannot provide less than the US Constitutional minimum due process.

#### The US Constitution does not apply to private employers.

##### The states and congress can create statutory rights to employment due process for private employees.

## Goldberg v. Kelly, 397 U.S. 254 (1970)

### Legal questions

#### Is a pre-action hearing required?

#### What due process is required for the hearing, if it is required?

### The statutory entitlement system

#### The welfare statute/regs establishes a set of objective criteria for qualifying for welfare.

#### These could include family income, whether there are minor children, is the family a married couple with both partners caring for the children.

#### If you meet the criteria, you qualify for welfare.

#### You continue to get welfare until you are removed from the rolls for cause, i.e., a finding that you no longer meet the criteria.

#### The admistrative cost problem

##### If there is too much due process, it will be expensive to remove people from the program who are no longer qualified.

##### The cost of due process reduces the money for benefits.

##### Unqualified people who stay, reduce the number of qualified new people who can be served.

### The pre-1996 Welfare System

#### What was/is the general attitude toward people on welfare?

#### What was AFDC?

##### Aid for families with dependent children.

##### The feds never provided much welfare for adults.

#### What were the unintended consequences of the welfare system?

##### Daniel P. Moynihan’s Benign Neglect Memo to President Nixon.

### Facts of the Case

#### This was a New York case over the administration of the federal AFDC program.

#### What was the economic status of plaintiffs?

##### How does this complicate their effectively asserting their legal rights?

##### Why had the Court recently created the right of appointed counsel for indigent criminal defendants?

##### Why do you think this was key demand by plaintiffs?

#### The termination process

##### The state used an informal process involving the case worker who oversaw the claimant’s case to decide if claimant no longer met the criteria.

###### Many of these criteria were soft, i.et. they depended on testimony and observation and were subject to questions of credibility.

###### Why might the case worker be biased?

##### The state offered a full due process hearing (minus appointed counsel) after termination.

###### What might limit the plaintiffs ability to take advantage of this hearing?

###### Few did, thus it was a very low cost system.

#### Why Does Plaintiff Want a Pre-termination Hearing?

##### How would you argue that there was real bias in the process being challenged?

##### Why couldn't plaintiff file a written response to the termination letter and contest the termination through the written process?

##### What could she do at a hearing that she could not do in writing?

##### Why would you argue that a post-termination hearing was not enough due process?

##### Why didn't the state want to give everyone a pre-termination hearing?

#### As the authors of the text indicate, the Court effectively ordered a classic APA hearing:

##### 1) timely and adequate notice

##### 2) oral presentation of arguments

##### 3) oral presentation of evidence

##### 4) confronting adverse witnesses

##### 5) cross-examination of adverse witnesses

##### 6) disclosure to the claimant of opposing evidence

##### 7) the right to retain an attorney (no appointed counsel)

##### 8) a determination on the record of the hearing

##### 9) record of reasons and evidence relied on; and

##### 10) an impartial decision maker

#### The Impact of the Goldberg Decision

##### What does granting these hearings do to the cost (delay + personnel time) of removing someone from welfare?

##### What does it do to the balance of benefits costs to administration costs?

##### What does this do to the global cost of the benefits system?

##### What is the incentive for the welfare officers under the Goldberg ruling?

##### What expectation does it create for welfare recipients?

##### What long term problem did this contribute to?

#### The Subsequent History of Goldberg

##### Never overruled

##### Superseded by Matthews

##### Ultimately limited to its specific facts

##### Unfortunately, many scholars did not notice this and have argued that all deprivations that affect individuals should have pre-deprivation process.

## Fixing Welfare - The 1996 Act

### Pushed by Newt Gingrich, Republican House leader

### Signed by Bill Clinton

### Replaced AFDC with TANF - Temporary assistance for Needy Families

#### What does the name change tell you about the change in philosophy?

#### Benefits are 5 years over a lifetime.

#### Supplemental Nutrition Assistance Program (WIC) is separate, so you can still get food. (This is the only general welfare program.)

### How does this affect future Goldberg actions?

#### What is limit on the expectation of benefits?

#### When the time runs out, is there any need for a hearing?

# Evaluation Questions

## Basic Due Process

### What is substantive due process?

#### What is an example of a substantive due process question from a United States Supreme Court case?

#### How does it differ from procedural due process?

## *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 wanted to change?

#### Why was it subject to serious bias problems?

#### What did plaintiff argue could help cure this inherent bias?

#### What sort of proceeding did plaintiffs want the court to look to when it analyzed their constitutional claims?

### What are the procedural rights established in *Goldberg v. Kelly*?

#### How they differ from the rights given indigent criminal defendants?

#### 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 differ 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?