# 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.

# Reading Assignment

## Chapter 4 to B. Modern Due Process

# 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.

# 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?