# Administrative Law - Richards

# Study Guide – Chapter 4

# Learning Objectives for this Module

## Learn the evolution of procedural due process from the Bitter and the Sweet to modern due process rights.

## Learn how statutory entitlements create due process rights.

## Learn why the Goldberg court required a hearing before benefits were removed and the impact of that ruling on the agency.

## Learn how prisons fit in the administrative due process world.

## Learn why hearings are important to clients.

## Learn how the status of the affected persons can change the nature of the due process needed for fundamental fairness

## Learn the analysis to determine if there must be a hearing before an agency can act.

## Learn the implications of making due process rights a cost-benefit analysis.

## Learn the limits on challenging agency decisionmaking on bias.

## Learn how the Doctrine of Necessity reflects the problem of disqualifying agencies for bias.

## Learn the limits of congressional meddling in agency practice.

# Evaluation Questions

## 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?

## What employers or actors are subject to constitutional due process claims?

## What do Londoner v. City and County of Denver, 210 U.S. 373 (1908) and Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915) tell us about the difference between the due process for an adjudication versus a rule?

## Takings (property)

### What is a "taking" under the Takings Clause of the Constitution?

### What due process is required?

### What about compensation?

## What is a regulatory taking?

## Explain the “facts at issue” predicate for a hearing.

### Why do we have hearings?

### Are you entitled to a hearing just to tell your story?

### Why didn’t the suicidal policeman get a hearing?

### Is an accidental deprivation a constitutional violation?

## Even if the basic facts are not in issue, what does *Loudermill* tell us about facts in mitigation and explanation?

### When are mitigation and explanation relevant?

### Why weren’t they relevant for the suicidal policeman?

## 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 the right to hearing on the termination of welfare benefits?

## New Property

### What is the "bitter with the sweet" doctrine?

#### Why did the court find that it was unconstitutional for government employment?

#### How did this create the "new property"?

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

#### As a matter of constitutional law, as opposed to potential statutory protections and contracts, what are you entitled to if the legislature abolishes your government job or your welfare entitlement?

#### Assume that governor and legislature of Louisiana, following the philosophy of Milton Freedman (a noted free market economist) decide to abolish law licenses and allow anyone to practice law.

##### Do you have any constitutional entitlement to compensation as a licensed lawyer?

##### Think carefully and explain the constitutional basis for this being different from welfare or a job at governmental agency, if it is.

## The Employment Cases

### Do private employers owe employees constitutional due process?

### What should a public university learn from *Roth* and *Sinderman*?

#### What is de facto tenure?

#### How can universities avoid creating it?

#### What problems might this cause for the university?

#### What is stigma+?

#### What do these cases tell us about why a university should not comment on the failure to renew the contract of a professor?

#### How can you screw up a proper firing and end up paying damages for injuring the employee?

### Recommendation letters

#### Why did the court find that putting reasons for dismissal in the suicidal policeman’s employment file meant that the reasons were public?

#### Was it defamation?

#### What if government employer gives an employee a bad recommendation that causes him to lose a subsequent job?

#### Is this stigma+?

#### What would the employee have to show to get stigma+?

#### What do you tell your employer client about what goes in recommendation letters? (Assume it wants to give as much information to the next employer as they can, without violating the employee’s rights.)

## Liberty Interests

### What are examples of liberty interests?

### Privacy as a protected liberty interest:

#### How did the court change its analysis between the drunkard and the shoplifter cases?

### 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 are the liberty interests in the prison cases?

## Cost Benefit Analysis and Due Process

### *Matthews v. Eldridge*

#### 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 and how the test works.

##### C < P x V

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

#### Why is *Matthews* a break from the Warren Court?

##### How is it a response to the effect of *Goldberg*?

#### 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.)

## The School Cases

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

#### Use these cases to show how the rights diminish as the injury caused by the punishment decreases.

### Melissa

#### 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 convicted?

#### 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. She does not claim that the anonymous grading system failed – 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?

### Matters of academic expertise versus matters of general knowledge

#### Why are the courts more deferential when universities are resolving academic matters than matters that are common to all business?

#### What is the law to apply problem with reviewing academic matters?

#### How would Mathews come in?

## 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?

## What are the expectations for technical expertise for Article III judges?

### How is expert evidence introduced in Article III trials?

### How are the expectations for ALJs different?

### How is this related to judicial deference to agency decisionmaking?

### How does expertise complicate bias issues?

## How does the nature of the regulatory process affect bias?

### What contacts do agencies have with regulated parties that Article III judges do not have with litigants?

### How does the ongoing nature of things such as environmental regulation affect the relationship between the agency and regulated parties?

### Why is bias a bigger problem in a small state agency proceeding than in a social security administration disability determination?

## What is the standard for disqualifying an administrative decisionmaker for bias?

### How will this be this harder or easier than disqualifying an Article III judge?

## Why is separation of functions a problem for agencies such as the FCC where decisions are made by the commissioners themselves?

### What does APA section 554(d) provide in these circumstances?

### Does this mean that there are no separation of function requirements in these hearings?

### What if the commissioners rely on case prosecutor to write their opinion?

## What happened in *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964) that allowed defendants to challenge the decisionmaker?

### How might this have affected the comments by the EPA Secretary about the BP spill?

### What if the EPA Secretary says that she thinks fracking poses real risks to the environment and should be limited?

#### Would this disqualify her making decisions in environmental adjudications?

### What is the Doctrine of Necessity and how does it drive the court’s broad acceptance of seeming bias by agency heads?

## 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?

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