



Due Process of Law

WHAT IS DUE PROCESS OF LAW?

Due process is a legal principle that requires the government to respect all of a person's rights. It means that the government must obey the law, act in a reasonable manner, and use fair procedures when it acts to limit a person's life, liberty, or property.

ORIGINS OF THE DUE PROCESS IDEA

Many historians believe that the common peoples' need for justice and a fair say in their government began to be met about 800 years ago. In 1215, the nobles—the privileged, ruling class—in England forced King John to sign the Magna Carta (Latin for “Great Charter”), in which the king promised to honor their rights to property and to treat them justly. The nobles also demanded and won the right to be judged only by their peers (meaning other nobles). That promise eventually became the basis for a trial by a jury of equals, which is one of the core principles of procedural due process. Here's the actual language from the Magna Carta: “No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by legal judgment of his peers or by the law of the land.”

Later British kings and nobles lost more and more power to the common person. In 1628, King Charles I was forced to sign another famous agreement, the Petition of Right, that required the king to respect personal and property rights. When he later broke his promise, war broke out. Charles lost that war and was brought to trial, where he was found guilty. He

was beheaded. The people were gaining more and more power over their rulers.

William and Mary, the next rulers, were forced to sign several documents before they could reign. Signed in 1689, the Bill of Rights accepted the absolute power of Parliament, the British legislature, and outlined British citizens' rights to own property, to write and say what they wanted, and to expect fair treatment when accused of a crime.

THE UNITED STATES CONSTITUTION AND THE BILL OF RIGHTS

America's founders were well aware of this history when, almost 100 years later, they met to draw up our constitution. They knew the new country needed a strong government to protect its citizens, but they also knew the rights of individuals needed to be protected from abuses of power by that government. The U.S. Constitution, ratified by the states in 1789, made it clear that no citizen could be put in jail without an explanation. Anyone put in jail had to be brought before a judge to determine whether the evidence justified a trial or whether the prisoner had to be released. These two provisions, requiring notice and hearing, constitute the core of due process: the government must tell a person why he or she is being taken into custody and must allow the person a chance to be heard.

Other sections of the Constitution prohibited the government from passing any law that took away a citizen's property, freedom, or life

until after the person had a fair trial; prohibited the government from punishing a person for committing a crime that was not a crime when it was committed; and prohibited the government from changing the penalty for a crime after it was committed or altering laws to make it easier to convict someone accused of a crime.

The Bill of Rights was ratified in 1791, adding ten amendments to the Constitution. These included the rights to freedom of religion, freedom of speech, freedom of the press, freedom to peacefully assemble, freedom from unreasonable searches and seizures, and the right to keep and bear arms. In the Fifth Amendment, citizens were guaranteed basic due process of law. The amendment reads, “No person shall be...deprived of life, liberty, or property without due process of law.”

THE FOURTEENTH AMENDMENT

Because the main concern of the founders was to ensure that the national government did not overshadow the freedom of the states, all of the protections in the Bill of Rights, even the guarantee of due process in the Fifth Amendment, applied only to actions of the United States government. But what about actions of a state or local government? After all, most people come into contact with various state and local officials much more often than with federal officials. The founders may have assumed that individual state constitutions would provide adequate protection from abuses of power by state and local officials. But this was not the case, and many lawmakers came to believe that the freedoms protected by the Bill of Rights against the actions of federal officials should also be protected

against state and local officials. In particular, after the Civil War (1861-1865), the lawmakers wanted to provide protection for the newly won rights of African Americans against their abuse by the southern states, which had seceded from the Union and instigated the Civil War.

The Fourteenth Amendment to the Constitution, ratified by the states in 1868 (Congress required each southern state that had seceded from the Union to ratify the amendment in order to be readmitted to the Union), permanently changed the American legal system because it extended all of the protections of the Bill of Rights, including the guarantee of due process in the Fifth Amendment, to possible abuses by state and local officials. The heart of the amendment is its first section, which contains two of the most important phrases in American constitutional law: due process and equal protection. The last two clauses of the first section read, "...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person...the equal protection of the laws."

Equal protection means that the government may not pass a law that discriminates against an individual or group. For example, a law prohibiting interracial marriages treats people differently based on race and thus violates the equal protection clause.

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

The language of the Fourteenth Amendment has come to dominate American constitutional law in the twentieth century. Over the years, the United States Supreme Court has interpreted the Due Process clause to have both procedural and substantive elements. In other words, the clause imposes restrictions on the ways in which laws may operate as well as on what laws may attempt to do or prohibit. Procedural due process is

essentially based on the concept of fundamental fairness. It includes the individual's right to be adequately notified of charges or proceedings against him or her (notice), and the

WISCONSIN'S DUE PROCESS CLAUSE

Wisconsin's Constitution, adopted in 1848, has its own due process clause, which is quite different from the one in the Fourteenth Amendment. Article I, section 1, reads, "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." The Wisconsin Supreme Court has stated, however, that "While the language used in the two constitutions [Wisconsin's and the United States] is not identical...the two provide identical procedural due process protections." *County of Kenosha v. C & S Management, Inc.*, 223 Wis. 2d 372, 393 (1999)

opportunity to be heard at the proceedings (hearing). In criminal cases, it ensures that an accused person will not be subjected to cruel and unusual punishment. It provides a minimum floor of protection that a law or proceeding must meet to ensure that no one is deprived of life, liberty, or property arbitrarily or without an opportunity to affect the result.

Courts have also viewed the due process clause as embracing certain fundamental rights. These include life, property, and freedom from imprisonment, as well as the right to vote, the right to travel, and the right to privacy. Under the substantive due process doctrine, if a right is considered fundamental, the government may not infringe that right unless the infringement is narrowly drawn to serve a compelling interest; i.e., something necessary or crucial, not merely preferred.

REVOLUTION AND EVOLUTION

While the adoption of the Fourteenth Amendment revolutionized American constitutional law by extending the protections of the Bill of Rights to state and local government officials, it would be a mistake to conclude that it is only of historical interest. The Fourteenth Amendment continues to provide us with the constitutional means to achieve social progress. Many of today's issues, such as abortion rights, the right to die, intelligent design, locker searches, and sexual harassment, have been argued in the courts and will continue to be argued in the courts with legal arguments that involve the Fourteenth Amendment. In fact, the revolutionary Fourteenth Amendment has become the single most important reason why our system of justice continues to evolve.

FURTHER READING

The Commission on the Bicentennial of the United States Constitution. *1791-1991: The Bill of Rights and Beyond*. Washington, D.C.: U.S. Congress, 1991.

Dudley, William, ed. *The Creation of the Constitution: Opposing Viewpoints*. San Diego, Calif.: Greenhaven Press, Inc., 1995.

Faber, Doris and Harold Faber. *We the People: The Story of the United States Constitution Since 1787*. New York: Charles Scribner's Sons, 1987.

Foner, Eric. *The Story of American Freedom*. New York: W.W. Norton & Company, 1998.

James, Joseph B. *The Framing of the Fourteenth Amendment*. Urbana, Ill.: The University of Illinois Press, 1956.

By Peter Grant, Managing Attorney
Published by the LRB, Madison WI
<http://www.legis.state.wi.us/lrb/GW>
No. 18, November 2006

Governing Wisconsin: "Due Process of Law"

Study Questions

1	What are the two essential elements of due process of law?	
2	Why is due process of law essential to a free society?	
3	By what mechanism can a person require the government to follow the due process of law?	
4	How might governmental actions based on due process of law and those based on the personal preferences of a government official differ?	
5	If there was no due process of law requirement in our constitution, what could citizens do to force the government to base its actions on reasonable grounds?	
6	Why do people in the modern era need the same kind of due process protection that people needed from the king 800 years ago?	

Governing Wisconsin: “Due Process of Law”

Study Questions in the Cognitive Domain

1	What are the two essential elements of due process of law?	The government must give notice to any person before taking action that will adversely affect life, liberty, or property, and must allow that person to have a hearing on the pending governmental action.	Cognition
2	Why is due process of law essential to a free society?	Because only the government has the power to imprison people, end their lives, or take their property. The requirement of due process prevents the government from taking such actions without demonstrating good reasons for doing so.	Comprehension
3	By what mechanism can a person require the government to follow the due process of law?	The courts enforce due process of law; therefore, the judicial branch limits the arbitrary exercise of power by the executive branch of government.	Application
4	How might governmental actions based on due process of law and those based on the personal preferences of a government official differ?	Due process of law makes it more likely that governmental actions will have a rational basis, and will not be just the arbitrary or capricious result of the whim of some powerful government official.	Analysis
5	If there was no due process of law requirement in our constitution, what could citizens do to force the government to base its actions on reasonable grounds?	The available options—public demonstrations, petitioning the government, using the press to exert pressure, or electing new leaders—might be effective, but probably only temporarily. The only real solution would be to amend the constitution to add a due process requirement.	Synthesis
6	Why do people in the modern era need the same kind of due process protection that people needed from the king 800 years ago?	Modern day presidents and governors (and even the local police) wield tremendous power that no average citizen can match. Due process of law helps prevent abuse of that power.	Evaluation