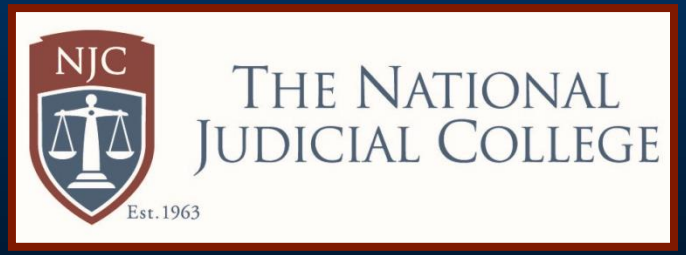
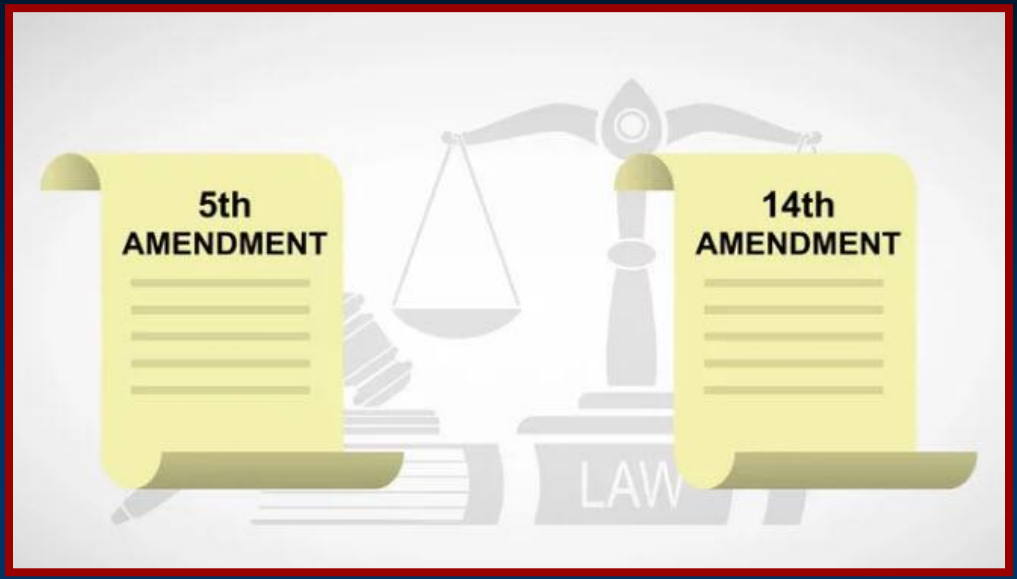
Due Process and Beyond: Procedural Fairness



Justice W. Michael Gillette
Oregon Supreme Court (retired)
Appellate & Administrative Law Specialist,
Schwabe, Williamson & Wyatt Portland, OR



A person may not be deprived of "life, liberty or property without **due process** of law…"

Substantive Due Process

- Looks at the *substance* of a law.
- Does it exceed the govt's authority?
- Does it interfere with a fundamental personal liberty named in the constitution or "deeply rooted" in our history?

"You can't do that to me at all!"

But comes the revolution…

- *Dobbs v. Jackson Womens' Health Org*
- Right to abortion is not "deeply rooted"
- What about, for example, same sex marriage?

Procedural Due Process

- Looks at how the law is implemented and enforced.
- Involves restrictions places on the legal process.

"You can't do this to me this way!"

Duties of the Branches

Legislative

- ★Makes laws
- ★Approves presidential appointments
- ★Two senators from each state
- ★The number of congressmen is based on population

Executive

- ★Signs laws
- ★Vetoes laws
- ★Pardons people
- ★Appoints federal judges
- ★Elected every four years

Judicial

- ★Decides if laws are constitutional
- ★Are appointed by the president
- ★There are 9 justices
- ★Can overturn rulings by other judges

Delegation Doctrine

Powers delegated to administrative agency

- Legislative: drafts statutes & make rules
- Executive: implement and enforce laws
- Judicial: adjudicate disputes

If agency acts outside the scope of its delegated powers, it is acting *ultra vires* (without authorization).

Agency Rulemaking Limits

- Must be exercised pursuant to clear legislative authorization. West Virginia v. EPA
- Must not give agency uncontained discretion. New York State Rifle and Pistol Assocation v. Bruen

Jarkesy v. SEC

In-house SEC courts unconstitutional because:

- The accused was not given the opportunity to have a jury trial; and
- ALJs had at least 2 layers of "for cause" protection from removal, blocking the ability to "take care that the laws be faithfully executed."

Evolution of Due Process

In the beginning, benefits and licenses weren't "property." They were "privileges" which the government could limit or remove at will.

McAuliffe v. City of New Bedford (1892)

Evolution of Procedural Due Process

Persons deprived of government benefits are entitled to:

- ✓ Fair notice of allegations; and
- ✓ Opportunity to be heard.

Londoner v. Denver (1908)

Bi-Metallic v. State Bd. of Equalization (1915)

Evolution of Procedural Due Process

Late 30s: SCOTUS began the trend of ruling in favor of Congress's ability to delegate quasi-judicial authority to agencies if standards were provided to direct agencies in executing policies (*e.g.* APA)

Goldberg v. Kelly (1970)

Privileges had a property interest that warranted trial-like procedures.

Richardson v. Perales (1971)

"Undue judicialization" of the quasi-judicial process was impracticable. Impaired disbursal of benefits to those intended as beneficiaries.

Goss v. Lopez

The “process” that’s “due” depends on the competing interests involved. “Some kind of hearing” with:

- Notice of allegations
- Opportunity to hear & rebut allegations
- Opportunity to testify

Mathews v. Eldridge

1) What's at stake? What's the private interest that will be affected by government's action?
2) What's the risk the private interest will be taken erroneously using the procedures the government used or intends to use?
3) What's the cost to the agency (time, money, etc.) to add the additional procedural protection the petitioner requests?

Mathews v. Eldridge

- *Mathews v. Eldridge* is still controlling law today.
- Only exceptions: Federally-based human services & SSA hearings.
- Supplemental outline has many recent cases citing *Mathews v. Eldridge*

What are the essential elements of Procedural Due Process?

Adequate Notice of the Basis For the Action

- Factual issues: allegations, dates, places, complainants
- Substance of evidence supporting the allegations; and
- Legal issues citing applicable statutes & regulations

Opportunity to Be Heard

- Applies only if there are issues of material fact.
- It's not the *hearing* due process requires, but the *opportunity* for it.
- Hearing must be at a meaningful time and in a meaningful manner.

May Be Represented

- No constitutional right to counsel at state's expense unless liberty interest is at stake.
- Party has right to bring representation but there's no right to effective assistance of counsel.

Opportunity to Present Evidence and Argument

- Evidence may be presented by other than oral means
- Don’t limit cross-examination time
- May refuse to allow oral argument if written argument is permitted.

Opportunity to Call and Cross-Examine Witnesses

- No due process violation to present testimony by other than oral means.
- Telephonic or video testimony does not violate due process.
- Admitting declarations, affidavits, etc. doesn’t violate due process.

Reasoned Decision Based Solely on the Record

- Due process is denied when no record is made or record is destroyed.
- Partial record permissible if existing record provides meaningful review.
- Basing a decision on undisclosed (off the record) information violates due process.

Impartial Hearing Officer or Impartial Tribunal

- ALJs are presumed to be impartial.
- Party attacking impartiality must show
  - Bias was from extrajudicial source
  - ALJ decided case on something other than the record
- Evident prejudgement warrants recusal

Impartial Hearing Officer or Impartial Tribunal

- ALJ lunching with counsel and a witness for a party taints proceedings.
- Can’t later sit as an ALJ on a case you investigated or prosecuted.
- Can’t preside or vote in hearing of case having an financial impact on you

Is it possible for us to provide a hearing that comports with due process, but stgive the impression that we are biased?

GOAL:

to achieve justice with our hearing

and

be perceived as just by the parties

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- To reach that goal, we must demonstrate PROCEDURAL FAIRNESS

The "Fair Process Effect"

Primary issue shaping views about legitimacy regarding authority systems:

If authorities are seen as exercising their power in fair ways

The quality of interpersonal treatment plays a particularly strong role.

Brain Research

-- Human brains respond to being treated fairly the same way they do to winning money or eating chocolate

-- fMRIs: Procedural Fairness (fair treatment) distinct from Distributive Fairness (fair outcomes)

Foundations

Procedural fairness: When people perceive as fair the way they were treated by authorities and how those authorities made their decisions.

- They know they can’t always win but are more likely to accept losing–and voluntarily comply with any mandates that result–when they perceive the amount of procedural fairness with which they were treated was high

Procedural Fairness Key Components:

- They were treated with dignity and respect – **Respect**
- They understood the process and how decisions were made – **Understanding**
- The authority figure listened to them and considered their concerns – **Voice**
- The authority figure was trustworthy and trying to be fair – **Neutrality**

Voluntary Decision Acceptance

How important is each of the following?

1. **Outcome Favorability:** Did I get what I wanted?
2. **Outcome Fairness:** Did I get what I deserved?
3. **Procedural Fairness:** Respect, Understanding, Voice, Neutrality

Why Procedural Fairness Is Important

- More likely to cooperate and provide needed information
- More likely to accept and comply with decisions and mandates
- More positive perceptions of the system overall
- Generally accept/obey law/regulations

Communicating Fairness

The quality of interpersonal treatment plays a strong role in perceptions of how authorities are exercising their power

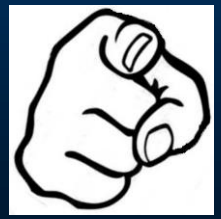
Interpersonal treatment = communication

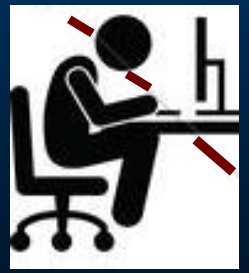
Communication: ***Any*** behavior that people assign meaning to

Communicating Fairness

Verbal communication = the words (written and oral)

Nonverbal Communication = everything that communicates other than the words





Verbal Communication Good Practices: Align With Procedural Fairness Components

A. Make effort to pronounce names correctly
B. Check understanding w/ open-ended questions, paraphrasing
C. Use plain language, simple/clear sentence structure and grammar
D. Test explanations

1. Respect
2. Understanding
3. Voice
4. Neutrality

GOAL:

Justice Perceived and Achieved

Questions?