

What Exactly Is “Due Process?”

We hear a lot about “due process” these days. President Trump tweeted the question as to whether accused male sexual offenders are entitled to “due process.” So what exactly are Trump and others who trumpet the phrase talking about?

The concept of due process is ensconced within the Bill of Rights, more particularly the Fifth Amendment to the United States Constitution. The price for getting all the colonies on board with the Constitution in 1789 was to promise a Bill of Rights. One of the most irritable components to the British occupancy of the Colonies was the arbitrary and capricious way that the motherland treated its subjects when it came to the judicial system.

The moniker “due process” took on a greater meaning as a result of the so-called Civil War amendments to the federal Constitution. The 14th Amendment to the United States Constitution enacted in the wake of America’s nearly catastrophic civil strife was the “due process clause.”

In early constitutional law, due process only applied to that process which emanated from the States United. After the 14th Amendment, later jurisprudence extended the due process guarantee to legal process afforded by the states as well as by municipalities and smaller government units.

An excellent example of how due process came to be used is the case I handled of *Pedersen v. South Williamsport Area School District*. This case resulted in a published opinion by the United States Court of Appeals for the Third Circuit after trial before the Honorable Malcolm Muir in the Middle District of Pennsylvania, Williamsport, Pennsylvania.

Mr. Pedersen sued for damages against the South Williamsport Area School District, challenging his discharge as a violation of “due process,” among other things. The question presented to the jury was whether Mr. Pedersen’s procedural due process was violated by his termination without a hearing. Pedersen was given notice of his alleged misconduct and represented by a union official at a hearing before the School Superintendent. The Superintendent recommended Pedersen’s discharge, and in an executive session the Board voted to terminate his services.

The jury in Williamsport determined that Mr. Pedersen knew about the statute entitling him to ask for a hearing before the School Board but he did not voluntarily give up that right. As the case proceeded to damages, the Court decided to enter judgment for the School District finding that Pedersen did not ask for a hearing and therefore the Board was not required to conduct one.

The parties agreed that Mr. Pedersen’s employment by the School District was a property interest which could not be taken from him without due process. The Court of

Appeals believed that the jury's finding that Pedersen did not voluntarily waive his right to appear before the Board was "puzzling." It was decided that Pedersen should have asked for a hearing from the School Board. The jury's verdict was thrown out.

What we learn from cases like *Pedersen* is that the right to due process can be easily tossed aside by the claimant or the courts. Due process, where it is owed by a government unit in instances where the employee otherwise has a right to maintain employment, can be satisfied in a variety of ways. We use to win due process cases where the employee did not receive clear notices of charges against him and the right to contest those charges before an impartial official. However, with the passage of years, due process has been eviscerated to a great extent.

The courts also recognize the concept of "substantive" due process, which has little to do with notice and opportunity to be heard but rather involves the underlying legitimacy of the determination by the government unit. When people talk about concepts like due process and free speech, they often forget that these are rights granted in connection with government employment. Private employers do not have to provide either due process or the rights of free speech. Union contracts often give a kind of due process, through the grievance process, which is one of the reasons why people unionize. Free speech extends to the right to organize unions in the workplace. A host of other laws involving protection with respect to race, color, creed, religion, nationality, age, and other factors may protect employees.

However, what about a person who is accused of hitting on a woman in the workplace or mistreating his wife outside of the office? Is that person entitled to "due process" before his employer can fire him, lest the employer face public retribution? An even deeper question is whether the man or woman whose career is ruined by unadjudicated charges of discrimination should receive "due process"? The debate is ongoing, but the law affords little or no protection for those who are falsely accused. How about a counter-suit for defamation? Truth of course is a defense, and must in Pennsylvania be proven affirmatively, but we see very few of those. Once an individual has been tagged as sexually inappropriate, high profile employers are not about to take any chances with their business reputation. Politician employers and government units are even less likely to stand by an accused employee.

Currently, years of sexual abuse ignored by the media and powerful interests represent a wrong which is being righted. There are those who say the pendulum will swing to the opposite side and that accusers once again will be branded as whiners and complainers who are just trying to destroy the lives of the rich and powerful in return for a blackmail payment.

Civilized societies with legitimate and robust legal systems work hard to maintain a fair balance. We no longer engage in blood libels and jousting in a colosseum to determine the victor when parties are in dispute over crucial matters. The days of sweeping bad behavior under the carpet to protect societal leaders should be behind us. On the other hand, we should not abandon the rights of the accused, whether in a criminal or civil context. Everyone should have their day in court. The Sixth Amendment to the United

States Constitution requires trial by jury in criminal cases, and the Seventh Amendment in civil cases. The number of jury trials in this country has diminished alarmingly to the point where many disputes are tried in newspapers, on social media, or at best in expensive and oftentimes unfair big business-controlled arbitration panels. This is not good for America, the legal system, the accused or the accuser.

The next time you are called for jury duty, do not make excuses and retreat into the tent of false excuses. Stand up for America by demanding the right to trial by jury and serving when called. It would be great for the American legal system and those who get caught up in the web of legal intrigue if we paid jurors fairly, made jury service more efficient, and assured that the courts ran in a business-like fashion. We can do better in America than merely throwing our rights away or determining guilt and innocence based upon the latest tabloid fad.

Due process is not bad when President Trump calls for it, and accusations of sexual misconduct should not be relegated to the dust bin of media overload. Those who have been unfairly treated or abused should have a legitimate forum in which to adjudicate their disputes and those who face public or private prosecution have every right to declare their innocence.

Let us put the “due” into “process” once again.

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