

LESSON FOUR: DUE PROCESS

INTRODUCTION TO LESSON (2 MINUTES):

Captain: “Today’s lesson is about due process, one of our most important constitutional rights. As we have with our prior visits, we will break into small groups to discuss the lesson.” [Break into small groups.]

SMALL GROUP DISCUSSION – DUE PROCESS (33 MINUTES):

Attorney in Small Group: “I am handing you your Student Worksheets for today’s lesson [pass worksheets out]. Now let’s read the selected text of the Fifth Amendment to the U.S. Constitution that is reprinted on the first page of your Worksheet [have a student read it out loud].

The Fifth Amendment was part of the Bill of Rights (first ten amendments to the Constitution) that became part of the Constitution in 1791.

Now let’s look at the 14th Amendment, which as we will also discuss in the next lesson was a post-Civil War amendment. We will spend more time on it next month, but you should know for now that the Equal Protection Clause addresses issues related to treating groups differently based on race and other factors. The 14th Amendment also contains a Due Process Clause which is also reprinted on page one of your Worksheet [have a student read the selected portion of the 14th Amendment].

Why did the 14th Amendment guarantee Due Process when the Fifth Amendment had already done so almost a century earlier? Answer: Look at the difference in the language of both amendments. The 14th Amendment says ‘no state shall’ deny due process. It was intended to prevent state governments from denying this right. The Fifth Amendment had only applied to the federal (national) government.

So, what is ‘Due Process?’ There are two types listed in your Student Worksheet: Procedural and Substantive. Let’s read them [have a student read them out loud].

There is great debate today about procedural and substantive due process. Some believe these due process rights should be expanded and others believe they should be narrowed. This issue was important in last November’s presidential election because the candidates’ viewpoints differed. Their opinions matter because the newly elected president will nominate judges to the federal courts who will likely share that president’s views on due process.

The remainder of today’s lesson will focus on procedural due process. There is a case in your Student Worksheet. Let’s read it [have one or more students read it out loud].

You are the judge assigned to decide this case. How would you rule and why? [Have the students state how they would rule and why.] Which Amendment is at issue?

This was in fact a real case heard by the U.S. Supreme Court: *Goss v. Lopez* (1975). In *Goss*, the Court held that students are required by law to attend school, and as a result, they have a ‘property interest’ in school. Because there is ‘property interest’ as issue (remember that ‘life, liberty, and property’ are the protected due process rights), suspension from school

without any due process violates the 14th Amendment's due process clause. The Court held that at the very least students must be notified of the charges against them and provided the opportunity to contest them before they are punished (with some exception for the timing of that process where the student presents an immediate danger to other). The hearing may be simply an informal one with a school administrator. Also note that *Goss* applies only to public schools: the Constitution only protects against government action.

What if the suspensions in *Goss* were in-school rather than out-of-school? Would that be considered a denial of a 'property interest' such that procedural due process is required? Recently in *Laney v. Farley*, the Sixth Circuit Court of Appeals held that a student who was given and served a one day in-school suspension for possession of a cell phone in class was not deprived of her procedural due process rights even though she was provided no hearing prior to the suspension. The court held that the in-school suspension, unlike the out-of-school suspension in *Goss*, did not result in the student missing any school. Thus, there was not denial of any 'property interest.'

Before we conclude with Jeopardy Review, I want to encourage you to look at the optional activities in your Student Worksheet. Doing them will help you better understand what we discussed today and you may be able to get extra credit if you ask your teacher."

LARGE GROUP JEOPARDY REVIEW (5 MINUTES):

Captain: "Let's play Jeopardy Review in the time remaining." [Ask the questions in the Due Process Jeopardy Review section of the Instructor's Notebook. If additional time is left, feel free to discuss any topic covered or any of the materials in the Optional Activities section for this lesson.]



JEOPARDY!

10	10	10
The two types of due process are procedural and _____ due process.	The two amendments that set forth due process rights are _____.	Due Process protects against deprivation of life, liberty, and _____.
[Substantive]	[The Fifth and the 14th]	[Property]
20	20	20
The 14th Amendment was enacted after the _____.	The Fifth Amendment applies due process rights to the _____ government.	The amendment that applies due process rights to the states is _____.
[Civil War]	[Federal]	[The 14th Amendment]
30	30	30
In the <i>Laney</i> case, the appeals court held that this type of suspension is not a sufficient denial of a property interest to be protected by the due process clause of the 14th Amendment.	Substantive Due Process rights aren't listed but can be _____ from other rights in the Constitution	The Supreme Court has determined that students have the right at least to a _____ before being suspended or expelled.
[In-school]	[Inferred]	[Hearing]
40	40	40
The right to privacy is an example of this type of due process.	Hearings, trials, and appeals are examples of _____ due process.	The Supreme Court case establishing students' due process rights is called _____.
[Substantive]	[Procedural]	[<i>Goss v. Lopez</i>]
50	50	50
Procedural due process for an out-of-school suspension from a public school requires, at a minimum, a student be provided notice of the charges and an opportunity to _____ them.	In this case, the U.S. Supreme Court held that states cannot outlaw all abortions.	Substantive Due Process infers certain _____ not specifically written in the Constitution.
[Challenge or dispute]	[<i>Roe or Roe v. Wade</i>]	[Rights or liberties]

LESSON FOUR: STUDENT WORKSHEET

LESSONS FACTS/TERMS/CONCEPTS:

Fifth Amendment; 14th Amendment; Procedural Due Process; Substantive Due Process; Fundamental Rights; Right to Privacy; Life, Liberty or Property; *Goss v. Lopez*; *Roe v. Wade*; *Griswold v. Connecticut*; Right to Notice; Right to Hearing/Contest Charges; Private v. Public; National v. State Governments; In-School v. Out-of-School Suspensions; Infer; *Laney v. Farley*; Nomination of Judges.

DUE PROCESS CLAUSES:

The Fifth Amendment: "No person shall... be deprived of life, liberty, or property, without due process of the law"

The 14th Amendment: "No State shall... deprive any person of life, liberty, or property, without due process of law"

TWO TYPES OF DUE PROCESS:

1) **Procedural Due Process** -- The protections provided to those accused of a crime or other offense are procedural due process. At a minimum, it means the accused is to be provided notice of the charges and a right to contest or challenge them. The amount of procedural due process to be provided depends on the seriousness of the offense (the degree to which "life, liberty, or property" may be denied if the accused is found guilty). More due process (hearings, right to appeal, etc.) is required for someone accused of murder than for a minor offense such as jaywalking.

2) **Substantive Due Process** -- The U.S. Supreme Court has determined that there are some individual rights that are not specifically identified/referenced in the Constitution, but exist as **fundamental rights** because they can be inferred from other rights stated in the Constitution. One example is the "**right to privacy**." In *Griswold v. Connecticut* (1965) the Court held that state laws that ban the sale of contraceptive devices violate this right, and in *Roe v. Wade* (1973) the Court held that state laws that ban all abortions violate this right.

SCHOOL SUSPENSION CASE:

Ann Instigator and Billy Bystander, students at George Washington High School, are in the school cafeteria when there is a disturbance. Food is thrown, students start fighting, and school property is ultimately damaged before the situation is brought to an end by some teachers. Following the incident several students, including Ann and Billy, are taken to the principal's office by one of the teachers on lunch duty. The teacher informs the principal that the students, including Ann and Billy, were involved in the disturbance. The principal suspends all of the students for ten days. Ann was in fact involved in a small part of the disturbance, but Billy was not involved at all. The students were not permitted to explain this to the principal. The students sued, challenging their suspension and claiming that their due process rights were violated because they were not given a chance to present their side of the situation. The school argued that it must have broad authority over student behavior and that it would be too much of a burden to require a hearing each time a student is suspended.



LESSON FOUR: OPTIONAL STUDENT ACTIVITIES

ROE V. WADE:

The Supreme Court's holding that there are certain "fundamental rights" that are not specifically set forth in the Constitution (such as freedom of speech) but nevertheless are granted protection as if they were, is controversial. In fact, much of the debate between the political left and right has been over such rulings, particularly the 1973 *Roe v. Wade* decision that ruled that certain state laws prohibiting abortion violated the "fundamental right" of a woman's right to privacy. While many people support the Court's decision, many would like to see the decision overruled or restricted.

Research the *Roe* decision, and state whether you agree or disagree with the Court's ruling.

Research the major Supreme Court rulings on abortion since *Roe* and state whether you agree or disagree, including the Court's recent ruling in *Gonzales v. Carhart* (2007) that allowed a federal ban on partial birth abortion. Do you believe there is a fundamental right to privacy? If so, do you believe it includes the right to an abortion?

PROCEDURAL DUE PROCESS IN THE NEWS: ESSAY

In June of 2008, the Supreme Court ruled that foreign terrorism suspects held at the U.S. prison at Guantánamo Bay in Cuba have the right to challenge their imprisonment in civilian (non-military) courts (*Boumediene v. Bush*). The Court ruled in 2004 that a U.S. citizen captured in Afghanistan during a military conflict with the Taliban was entitled to a hearing in court, reasoning that although Congress authorized the detention (imprisonment) of combatants in the circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given the opportunity to present his case at a hearing to challenge his confinement (*Hamdi v. Rumsfeld*). Do you think there should be a difference made between U.S. citizens' and non-citizens' rights to challenge their imprisonment by U.S. agencies? Should it make a difference whether they are accused of terrorist activities during a time of war? What interests do you think should be balanced when determining what sort of process detainees have a right to? Others have said that civil liberties such as due process rights are even more important during times of war – do you agree? Why or why not?

SUBSTANTIVE DUE PROCESS: ESSAY

In *Meyer v. Nebraska* (1923), the Supreme Court wrote that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

State whether you agree or disagree with this statement and why. Consider the balance courts try to reach between individual rights, the rights of others, and the responsibility of the law to govern society and provide order. If too many activities are considered fundamental and constitutionally protected, where should the law draw the line between protected activities and actions that should be made illegal?

What other controversial "hot button" topics related to individual liberty are currently being debated in society today? Do you feel they should be included with this list from *Meyer*? Why or why not?

