

The Right to Due Process



In the Magna Carta (1215), the great charter of English liberty, noblemen forced King John to abide by the “law of the land” in his dealings with them. Under this agreement, the king accepted the idea that his power was not absolute. He could act only as the law permitted him to act. Although English kings had far more authority to do as they pleased than do modern democratic governments, the Magna Carta introduced the idea that no man was above the law. When we say the United States is a nation of laws, we reaffirm this ancient principle called due process.

When drafting the Constitution and Bill of Rights, the framers thought of due process as central to their liberty. At first they believed the appearance of this guarantee in state constitutions offered sufficient protection, so the phrase does not appear in the U.S. Constitution as ratified in 1788. Opponents of the Constitution argued that the concept needed to restrain the federal government as well, and they succeeded in making it one of the rights guaranteed by the Bill of Rights. It appears in the Fifth Amendment (ratified in 1791) as a restraint on the central government; it also appears in the Fourteenth Amendment (ratified in 1868) as a restraint on the power of state governments.

The goal of due process is to prevent arbitrary government. It requires state and federal governments to follow fair procedures when they act to deprive an individual of life, liberty, or property. The meaning of fairness has varied over time, but historically the guarantee has referred to procedures that protected individuals against arbitrary arrest and punishment—no arrest without a warrant, the right to counsel, indictment before a grand jury, and so forth. Many of these rights also are protected separately under the Bill of Rights.

Due process in its earliest form was significant primarily in criminal procedures, although at the end of the nineteenth century, it was also used briefly to protect certain property interests against regulation by government. Under criminal due process, state governments could—and did—establish their own procedures to ensure a fair trial. These procedures varied from state to state, a result that was permitted under existing interpretations of the Constitution. For the most part, states took seriously their responsibility to ensure due process. Even crimes involving slaves required strict adherence to procedures. But people on the margins of society—the poor or ethnic minorities, for example—often found that the law on paper was not the law in practice.

The year 1931 was a hard one for many Americans. The nation was in the second year of the Great Depression. One in every four workers was unemployed, and thousands of people were abandoning their homes to look for work elsewhere. Lacking cars and money, many men became transients, or hoboes, who hitched rides on trains that would take them to California and other places where life was rumored to be easier.

“Article 39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”

—Magna Carta (1215)

“[T]he fundamental requisite of due process of law is the opportunity to be heard.”

—Justice Mahlon Pitney,
Grannis v. Ordean (1914)

On March 25, 1931, a group of white hoboes complained to a deputy sheriff near Scottsboro, Alabama, that a “bunch of negroes” on a Memphis-bound train had attacked them. The charge was a serious one, especially in the racially oppressive atmosphere of the Deep South. The matter became explosive when a hastily gathered posse discovered two white girls dressed in men’s clothing in the same railroad car as nine black youths. The teenaged girls realized they had committed a serious breach of race relations by being together, unsupervised, with black males, and to protect themselves and their reputations, they claimed that the boys, ranging in age from thirteen to nineteen, had repeatedly raped them. Word of the incident spread quickly around the rural county. By the time the youths reached the Scottsboro jail, only the judge’s promise of speedy punishment kept an angry mob from lynching them.

In the aftermath of slavery, African Americans, especially in the South, continued to suffer from discrimination and often found themselves outside the protection of the law. Southern legal officials—sheriffs, judges, and jurors—were white men. In the segregated society of the 1930s, these officials almost always believed the word of a white person, any white person, over that of a black. When blacks were charged with crimes against whites, judges and jurors discounted the testimony of black witnesses and readily convicted black defendants, even when the evidence was weak. Blacks accused of heinous crimes, such as murder or rape, often faced scores of white men who tortured and executed them before large, cheering crowds that included women and children. The horror of these grisly spectacles was deeply etched in black culture. The Scottsboro boys knew this awful history: from the 1890s to the 1930s, more than 3,000 blacks died at the hands of lynch mobs, primarily in the South and Midwest.

The trial was a sham. Under Alabama law, anyone accused of a capital crime—a crime punishable by death—had to be represented by counsel. The judge appointed all seven members of the Scottsboro bar as defense attorneys. One by one, the lawyers withdrew from the case; they knew their future practice would suffer by taking this assignment. Only an unreliable seventy-one year-old lawyer, appointed on the morning of the trial, was left to defend the nine boys. Aiding the defense was an alcoholic white attorney from Chattanooga, hired by a group of concerned black ministers because he had on occasion taken cases on behalf of African Americans. This team did not consult with the defendants—the lawyers met them for the first time a mere thirty minutes before the court opened—and they offered little resistance to the courtroom charade. They did not even give a closing statement.

Facing popular demands that white womanhood be avenged, the trial—actually four separate cases—proceeded swiftly. The testimony of the girls was contradictory, and statements from the examining physicians strongly suggested that the women had not been raped. In fact, within a year, one of the so-called victims would admit no assault had occurred. But this evidence mattered little. Four days after the trial began, the all-white jury gave its expected verdict of guilty, and eight of the nine defendants stood before the judge to hear the death sentence pronounced; the ninth, only thirteen years old, received a life term in prison. The verdict was immensely satisfying to the crowd of 3,000 that flooded the small county seat to witness the trial, a throng considered so volatile that the state National Guard mounted machine guns on the courthouse steps to control it.

The case was not over, however. Widespread newspaper coverage and the novelty of eight men sentenced to death for the same crime on the same day had attracted the attention of important national groups, including the National

Association for the Advancement of Colored People (NAACP), which appealed the verdict on behalf of the defendants. In the process, the case became the cause célèbre of the decade. The nation had entered an age of national mass media, and this case had all the elements to make a good story—sex, race, and claims of injustice.

In 1932, the Supreme Court ruled on the Scottsboro case, formally known as *Powell v. Alabama* (the case took the name of Ozie Powell, one of the defendants). The defendants sought to overturn the verdict for three reasons: the trial was not fair; there were no blacks on the jury; and they were poorly represented by their counsel. They claimed that the state had violated both the Sixth and Fourteenth Amendments to the U.S. Constitution. The Sixth Amendment, part of the Bill of Rights, guaranteed a right to counsel in criminal trials, and the Fourteenth Amendment prohibited states from depriving any person of life, liberty, or property, without due process of law.

The Court ruled only on the issue of representation of counsel. The justices agreed that the defense of the Scottsboro boys was unacceptably casual. Previous decisions (or precedents) at both state and federal levels agreed that the right to counsel was central to the meaning of due process. Any action to deny this right would also deny defendants the due process promised by the Constitution. The flabby, almost nonexistent defense presented in this case did not meet the test of fairness. In a later case arising from the same circumstances, *Norris v. Alabama* (1935), the justices ruled that it was also a denial of due process to exclude blacks from the jury that tried Clarence Norris, another Scottsboro defendant.

The two Scottsboro cases were important because they were among the first ones to declare that all states had to honor constitutional guarantees of due process in their criminal trials. In this instance, the guarantee of a right to counsel in capital cases was judged essential to a fair trial. Previous to *Powell v. Alabama*, the U.S. Supreme Court followed tradition by deciding that the Bill of Rights, including the Fifth Amendment, restricted the federal government only. It did not change its position in the Scottsboro case—this shift would come later—but it did rule that the Fourteenth Amendment’s guarantee of due process applied to the states as well as to the central government. In criminal trials, at least, all defendants charged with a capital offense now had a right to counsel, although states could decide how to honor this requirement.

The story of the Scottsboro boys had no happy ending, however. For most of them, the Supreme Court decision did not end their troubles. Their cases went back to the Alabama court for retrial, and they again were convicted. For much of the rest of the 1930s, their fate was a matter of public debate, political maneuvering, and legal wrangling. The first trials were followed by a long and confusing series of appeals, retrials, additional convictions, reduced charges, and secret negotiations for release of the boys (now men). Although advocates for the Scottsboro boys secured the release of all but one of the prisoners between 1937 and 1950, their experiences had been devastating.

Consider the case of Clarence Norris. On three occasions between 1931 and 1937, Norris was tried, convicted, and sentenced to death for rape. In 1938, his sentence was commuted to life imprisonment, but his incarceration was only marginally less depressing. Of those eight years, Norris said, “I believe if there is a God he forgot about me and my companions in the case. I don’t know about heaven but there damn sure is a hell. I lived there from 1938 until 1946.”

Although the efforts of supporters saved him from the electric chair, Norris never knew who or what to believe or trust. He was especially resentful over the

“Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase [due process of law]. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society.”

—Justice Felix Frankfurter,
Malinski v. New York (1945)

deal struck between Alabama authorities and defense lawyers in 1937 that resulted in the release of four defendants, while five others remained in prison under a sentence of death or life imprisonment. Years later he said, “I never understood it, and nobody ever explained it to me.” Paroled for a second time in 1946, he escaped to Cleveland, Ohio, where his mother lived, and he assumed the identity of his brother to avoid detection by local police. Finally, in 1976, Governor George Wallace signed a pardon for Clarence Norris, who for the first time since 1931 was truly a free man.

By the twentieth century, it was apparent that notions of fairness depended upon who you were and where you lived. The Scottsboro case is important because it marked the beginning of a movement toward national standards of due process. In a wide range of cases since the 1930s, the U.S. Supreme Court expanded the meaning of due process, sometimes to the point of raising questions about whether its guarantee of individual rights has come at the expense of government’s ability to protect public safety.

Today, we are much more aware of our procedural rights in criminal trials, in large measure because of the popularity of police and courtroom dramas on television. We are not as alert to the wide array of other procedural guarantees in other areas of our lives, but we expect people in authority to follow established procedures before imposing a burden or penalty on us. We require notices to be given before officials seize property—a car, for example—for non-payment of debts; schools must follow established procedures if they act to expel a student; and so forth.

“The history of American freedom is, in no small measure, the history of procedure.” Justice Felix Frankfurter’s telling comment expresses a fundamental article of faith about our constitutional heritage: liberty and rights cannot exist without due process of law. Procedural fairness and consistency are essential elements of due process, a concept that has long been the touchstone of our law. Whatever else due process might mean, procedural fairness, in the words of Justice Robert Jackson, “is what it most uncompromisingly requires.”

In the criminal law of a free society, a proper concern for due process is crucial. Without it, individual liberty is especially vulnerable to arbitrary governmental power. Freedom from official capriciousness is essential to all other human rights. This ideal is an old one, and its significance in Western thought can scarcely be overstated. Government holds enormous power. It alone has the legitimate authority to accuse, prosecute, and punish individuals. As a result, any criminal trial between the government and the citizen is inherently unequal. Our conception of justice balances the contest between government and the individual by restraining official power.

Many of the requirements of modern due process are controversial because they appear to make government inefficient. They delay actions that most people agree are the right ones to take. The most difficult issues arise whenever we perceive the nation’s security is at risk, and historically we have not been so insistent on following due process during these times, sometimes to our regret. More often, however, we as a society have usually decided that the individual’s right to fair treatment generally outweighs the government’s need to act quickly. Achieving the right balance is never easy, of course, yet the debate itself is evidence of a vibrant democracy. It is also testimony to a central belief of the nation’s founders: the protection of liberty requires limits on the power of government. In a democratic society, these limits are embodied in law, which government must obey, and without a commitment to due process of law, our freedom itself is at risk.

Denial of Due Process

*Four years after the Scottsboro case, the U.S. Supreme Court again considered the meaning of due process in *Brown v. Mississippi* (1936). Three African American tenant farmers, including Ed Brown, were convicted of the murder of a white planter. During the trial, prosecution witnesses freely admitted using force to extract confessions from the defendants. Despite their testimony, the trial court admitted the evidence, and an all-white jury convicted the men and sentenced them to death by hanging. Declaring that “the rack and torture chamber may not be substituted for the witness stand,” the Supreme Court reversed the conviction “for want of essential elements of due process.” Following its decision in *Brown*, written by Chief Justice Charles Evans Hughes, the Court decided a line of cases that expanded the requirements of due process that states must follow in their administration of criminal justice.*

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. . . .

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” . . . The state may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. . . . But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. . . . Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is “but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.” . . . And the trial equally is a mere pretense where the state authori-

ties have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process. . . .

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. . . . It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners’ constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

Preventing Oppressive Practices

*In 1948, the United States and its Western allies were in the early years of a decades-long Cold War with the Soviet Union and nations under its control. Fears of spying and infiltration of the government by communist agents led federal officials to monitor and restrict access to the United States by foreign nationals. In 1948, a Hungarian immigrant (Ignatz Mezei) who had lived in the United States since 1923 traveled to Europe on personal business. Upon his return, he was denied reentry based on the tip of an informant who evidently accused him of spying, although the government would not confirm the accusation. He was held on Ellis Island, a port of entry into the United States, without a hearing for two years before he could appeal his detention to the Supreme Court. The majority opinion upheld the government's action in *Shaughnessy v. Mezei* (1953), but Justice Hugo Black, along with William Douglas and Robert Jackson, objected in dissent and claimed that the failure to provide a hearing was a denial of due process.*

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting. Mezei came to this country in 1923 and lived as a resident alien in Buffalo, New York, for twenty-five years. He made a trip to Europe in 1948 and was stopped at our shore on his return in 1950. Without charge of or conviction for any crime, he was for two years held a prisoner on Ellis Island by order of the Attorney General. Mezei sought habeas corpus in the District Court. He wanted to go to his wife and home in Buffalo. The Attorney General defended the imprisonment by alleging that it would be dangerous to the Nation's security to let Mezei go home even temporarily on bail. Asked for proof of this, the Attorney General answered the judge that all his information was "of a confidential nature" so much so that telling any of it or even telling the names of any of his secret informers would jeopardize the safety of the Nation. Finding that Mezei's life as a resident alien in Buffalo had been "unexceptionable" and that no facts had been proven to justify his continued imprisonment, the District Court granted bail. The Court of Appeals approved. Now this Court orders Mezei to leave his home and go back to his island prison to stay indefinitely, maybe for life.

MR. JUSTICE JACKSON forcefully points out the danger in the Court's holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General. I join MR. JUS-

TICE JACKSON in the belief that Mezei's continued imprisonment without a hearing violates due process of law.

No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous." . . . Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken "without due process of law." This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.