

HURTADO v. CALIFORNIA

Writ of Error to the Supreme Court of California
110 U.S. 516 (1884)

MR. JUSTICE MATTHEWS delivered the opinion of the Court. [Hurtado was charged and convicted of first-degree murder. He was charged by information, not indictment; that is, no grand jury ever considered his case. He argued that the absence of grand jury indictment for a serious crime violated the Fourteenth Amendment's guarantee of due process.]

... The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is

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secured and guaranteed by [the Fourteenth Amendment to] the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . .

. . . [I]t is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles. . . .

This, it is argued, *total incorporation argument* furnishes an indispensable test of what constitutes "due process of law"; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real [principle] is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. . . . [T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. . . .

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. . . .

We are to construe this phrase in the Fourteenth Amendment by the [usage] of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself." [It then immediately adds]: "Nor be deprived of life, liberty, or property, without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume,

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without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include . . . the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . .

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. . . . The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . .

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. . . .

A. Defining Due Process

MR. JUSTICE HARLAN, dissenting. . . . [I]t is said that the process of law necessarily includes the procedure of a grand jury, else the deprivation of life, liberty, and property without specific and express provision would be infamous. . . .

This line of argument, inconsistent with the vital principle of the Fifth Amendment of a specific provision for due process, did not . . . require a grand jury. It has, likewise, been held that the same offence, nor corresponding rights and immunities also not protected by that [same] amendments of the Constitution of persons to just compensation, when accused of crime, and to a grand jury and district wherein the crime was committed, and to have a fair trial, and to have a fair trial in favor. Will it be claimed that "due process of law" or by "due process of law" of our government? Are the fundamental principles of liberty and justice "due process of law"? If the argument is universally recognized at the time, due process of law which includes liberty—were not deemed to be prescribed by our Constitution had they been regarded as being specifically and expressly prescribed.

Still further, it results in the apprehension of its scope—that the deprivation of life or liberty by State regulation, dispensing with a person charged with a crime, a justice of the peace, upon a writ of habeas corpus.

. . . My sense of duty to the supreme law of the land.

MR. JUSTICE FIELD, dissenting.

NOTES ON THE MEANING OF DUE PROCESS OF LAW IN CRIMINAL CASES

1. *Hurtado* was the first case in which the phrase "due process of law" means the

MR. JUSTICE HARLAN, dissenting.

... [I]t is said that the framers of the Constitution did not suppose that due process of law necessarily required for a capital offence the institution and procedure of a grand jury, else they would not in the same amendment prohibiting the deprivation of life, liberty, or property, without due process of law, have made specific and express provision for a grand jury where the crime is capital or otherwise infamous. ...

This line of argument, it seems to me, would lead to results which are inconsistent with the vital principles of republican government. If the presence in the Fifth Amendment of a specific provision for grand juries in capital cases, alongside the provision for due process of law ... is held to prove that "due process of law" did not ... require a grand jury in capital cases, inexorable logic would require it to be, likewise, held that the right not to be put twice in jeopardy of life and limb for the same offence, nor compelled in a criminal case to testify against one's self—rights and immunities also specifically recognized in the Fifth Amendment—were not protected by that [same] due process of law. ... More than that, other amendments of the Constitution proposed at the same time, expressly recognize the right of persons to just compensation for private property taken for public use; their right, when accused of crime, to be informed of the nature and cause of the accusation against them, and to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed; to be confronted by the witnesses against them; and to have compulsory process for obtaining witnesses in their favor. Will it be claimed that these rights were not secured by the "law of the land" or by "due process of law," as declared and established at the foundation of our government? Are they to be excluded from the enumeration of the fundamental principles of liberty and justice, and, therefore, not embraced by "due process of law"? If the argument of my brethren be sound, those rights—although universally recognized at the establishment of our institutions as secured by that due process of law which for centuries had been the foundation of Anglo-Saxon liberty—were not deemed by our fathers as essential in the due process of law prescribed by our Constitution; because,—such seems to be the argument—had they been regarded as involved in due process of law they would not have been specifically and expressly provided for. ...

Still further, it results from the doctrines of the opinion—if I do not misapprehend its scope—that the clause of the Fourteenth Amendment forbidding the deprivation of life or liberty without due process of law, would not be violated by a State regulation, dispensing with petit juries in criminal cases, and permitting a person charged with a crime involving life to be tried before a single judge, or even a justice of the peace, upon a rule to show cause why he should not be hanged. ...

... My sense of duty constrains me to dissent from this interpretation of the supreme law of the land.

MR. JUSTICE FIELD did not take part in the decision of this case.

NOTES ON THE MEANING OF "DUE PROCESS OF LAW" IN CRIMINAL CASES

1. *Hurtado* was the Supreme Court's first extended discussion of what "due process of law" means for criminal procedure. How well did the Court do? Do