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Procedural Due Process: The Missing Casebook Chapter

Paul A. Gowder Jr.

University of Iowa, College of Law

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Procedural Due Process: The Missing Casebook Chapter

Paul Gowder
The University of Iowa

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To instructors: if you use this in your courses, I would appreciate (but do not demand) a note at paul-gowder@uiowa.edu.

Introduction for Instructors

In searching for a text for a second-year Constitutional Law II course, I found that almost all casebooks, including some otherwise quite excellent choices, paid very little attention to procedural due process. Ordinarily, the topic is consigned to a very short section tacked onto the end of a much more substantial discussion of substantive due process, *Lochner*, etc.

This neglect misses the practical, theoretical, doctrinal, and pedagogical importance of procedural due process. *Practically*, my experience in both civil rights litigation and low-income legal services has led me to believe that the procedural due process claim is an important tool for litigants, particularly litigants who are not members of the dominant socioeconomic groups in the American political community, to have their legitimate interests vindicated by the legal system. *Theoretically*, procedural due process is an element of the normative ideal of the rule of law, and, accordingly, is an important guardian of important moral interests in a political community.¹ *Doctrinally*, procedural due process is important particularly for the light it sheds on the separation between legislative and judicial power, as well as on equal protection, through the Londoner/Bi-Metallic distinction between general law and the application of law to particular people. *Pedagogically*, procedural due process provides an important link between the classic second-year individual-rights focused constitutional law II course and several first year courses, including civil procedure, criminal law/procedure, and (via the separation of powers role of procedural due process), constitutional law I. It also can help provide a grounding for other upper-level courses, particularly federal courts and administrative law.

In an attempt to remedy this situation, I am making this supplementary material free of charge to all comers, not only for my own students, but for other faculty as well. For the latter, I encourage you to make use of it in your own courses, or even modify or distribute it, if you would like, in other materials. I only ask that you provide appropriate attribution and drop me an e-mail to let me know how it's been useful to you. I would also greatly appreciate any feedback.

This is an experimental document. At the moment, it consists of very lightly edited cases, and very few notes; it is meant to be suitable for use in any course covering procedural due process, regardless of the casebook or official title of the course (e.g., constitutional law, public benefits law, constitutional criminal procedure, civil procedure).² Because I intend the supplement to be useful in a wide variety of courses and with numerous casebooks, I have erred on the side of length; this supplement is not intended to be assigned in its entirety. Future versions—if I create any—may operate from different premises.

Introduction for Students

The Due Process Clauses of the Fifth and Fourteenth Amendments, applying to the federal and state governments, respectively, forbid the government in nearly identical language from “depriv[ing]...any person... of life, liberty, or property, without due process of law.” The doctrine of procedural due process takes the fairly literal interpretation of this text and applies it, requiring states and the federal government to provide legal process (typically some variant of notice and an opportunity to be heard) before depriving them of, life, liberty, or property.

The two key questions in procedural due process analysis are thus, unsurprisingly, 1) is the government depriving someone of life, liberty, or property?; and 2) how much process is due? The answers to the first question are sometimes easy, e.g., if the government is putting someone in prison or taking his or her land. Sometimes, however, they are quite difficult—is terminating income assistance benefits a deprivation of property?

The second question is also often difficult, because there is a broad menu of potential process that citizens may be given. They may, for example, be given a hearing *before* or *after* the

¹ See generally, Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHILOSOPHY 565 (2013).

² Significant pruning in the text of cases are indicated by bracketed asterisks; minor pruning and removal of citations are not indicated.

deprivation is carried out. They may be given a hearing *in person* or *by written submission*. They may not be allowed to have *counsel*, may be allowed to have counsel at their own expense, or may be provided counsel at government expense. They may be allowed to *cross-examine* witnesses or not. Many other options are available, only some of which will be acceptable in any given case. The Supreme Court has established a test, in *Matthews v. Eldridge* (given below), which balances 1) the importance of the private interest, 2) the risk of erroneous deprivation, and 3) the importance of the government interest.

As with all balancing tests, the *Matthews* test often gives quite inadequate guidance. Pay attention to this problem: you will see it in many other doctrinal areas in constitutional law (e.g. the *Lemon* test in the Establishment Clause context). Often, with these balancing texts, the Court is criticized for doing little more than reading justices' own beliefs about political morality into the Constitution, and in doing so, infringing on the legislative role. However, is the *Matthews* test special because procedural propriety is within the special purview of the judicial branch?

The historical origins of due process begin with Magna Carta, which the King of England was forced at swordpoint to sign in 1215. Chapter 39, which is still law (as chapter 29) in Britain today, provides:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

For historical interest, the earliest use of the exact term “due process” that the undersigned has been able to find (historians may know of earlier uses) was in a statute of Edward III, from 1354, which reaffirmed Magna Carta and then stated: “That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”³ We can see, in this passage, a clear forbear of our due process clause, including the specific reference to life, liberty, and property interests as well as the reference to due process; it’s also clear from this statute that a *procedural* notion of due process is meant: the citizen is to be “brought in answer,” that is, called to some kind of hearing to explain his or her side of things.

That last sentence may seem mystifying. How could due process be other than procedural? It has the word “process” right in the name. Yet, as you will shortly learn (if you haven’t already), there’s also a thing called “substantive due process,” which protects fundamental rights from infringement with or without procedural protections. Many scholars as well as judges have questioned the coherence of such an idea; this debate, as well as the content of substantive due process, are beyond the scope of this document. Be careful, however, to clearly distinguish, in your mind and on your exams, the two doctrines of *procedural* due process and *substantive* due process. They are very different things.

³ 28 Edward III, cap. 3; *Statutes of the Realm* I, 345.

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Procedural Due Process, Separation of Powers, and Equality

Londoner v. City and County of Denver, 210 U.S. 573 (1908)

Mr. Justice Moody delivered the opinion of the court:

The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited.

[* * *]

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated: 1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing. In the case before us the board took the first step by transmitting to the council the resolution to do the work and the form of an ordinance authorizing it. It is contended, however, that there was wanting an essential condition of the jurisdiction of the board; namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council the authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. That ordinance, after reciting a compliance by the board with the charter in other respects, and that 'certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the city charter required,' enacted 'That, upon consideration of the premises, by city council doth find that, in their action and proceedings in relation to said Eighth avenue paving district Number 1, the said board of public works has fully complied with the requirements of the city charter relating thereto.' The state supreme court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the state. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. The legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action, it could, so far as the Federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed. THIS is a bitter w/sweet idea

[Omitted: details of objections that plaintiffs tried to make in the course of the assessment process.]

Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated, but in a specially called, session, and, without any hearing, adopted the following resolution:

'Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth avenue paving district No. 1, of the city of Denver, against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

'Whereas, no complaint or objection has been filed or made against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

'Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved.'

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts, was there a denial by the state of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States?

In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief: and, if need be, by proof, however informal.

It is apparent that such a hearing was denied to the plaintiffs in error.

The CHIEF JUSTICE and Mr. Justice Holmes dissent.

Bi-Metallic Investment Co v. State Board of Equalization, 239 U.S. 441 (1915)

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force and the defendant Pitcher, as assessor of Denver, from obeying, an order of the boards, increasing the valuation of all taxable property in Denver 40 per cent. The order was

sustained and the suit directed to be dismissed by the supreme court of the state. The plaintiff is the owner of real estate in Denver, and brings the case here on the ground that it was given no opportunity to be heard, and that therefore its property will be taken without due process of law, contrary to the 14th Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the state Constitution and laws was an unwarranted surprise, and on the other, that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the supreme court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way,—that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county, the owner has had his opportunity to protest and appeal as usual in our system of taxation, so that **it must be assumed that the property owners in the county all stand alike. The question, then, is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,** here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the State R. Tax Cases, , at least, as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state Constitution had declared that Denver had been undervalued as compared with the rest of the state, and had decreed that for the current year the valuation should be 40 per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In *Londoner v. Denver*, a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed

Notes on *Londoner & Bi-Metallic*

1. *Procedural due Process and Separation of Powers.* Ordinarily, we think that the role of the legislature is to enact general law, while the role of the judiciary is to apply law to specific

cases. This division of responsibility is reflected across other constitutional provisions, most prominently the prohibition on bills of attainder. However, it is not uniformly maintained: consider, *inter alia*, the power of impeachment and the occasional enactment of private bills. The latter are rarely used, but are not completely extinct. As recently as 2012, Congress enacted, and the President signed, a private bill granting an exception to U.S. residency requirements to Victor Chukwueke, a Nigerian medical student.

These non-general uses of the legislative power raise procedural due process issues. We can read *Londoner* and *Bi-Metallic* together to suggest that when a legislative body moves from enacting general laws to directly regulating identifiable individuals, it is subject to procedural due process scrutiny. In the case of punitive law, the bill of attainder clause provides even stronger protection than due process, banning legislative action altogether. However, *Londoner* demonstrates that legislature might impair specific people's life, liberty, or property interests in non-punitive ways.

2. *General Law and Equal Protection.* Why might we worry about legislatures making non-general enactments? One version of the concern is that legislatures might lash out against disfavored individuals or classes. In that way, the application of procedural due process to legislative acts appears to be a way of enforcing the ideals also expressed in the Equal Protection Clause. Should the courts give greater procedural due process scrutiny to enactments targeting members of unpopular groups or political minorities?

3. *An appearance in the takings context?* Consider the following text from Justice Rehnquist's dissent in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). At the broadest level of abstraction, the same idea seems to be in play: legislative action targeting specific individuals really isn't an exercise of the legislative power at all; even though a legislature has the power to modify *all* property rights, *acting legislatively through general law*, it does not have the power to modify *an individual's* property rights without compensation:

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross-section of land, and thereby "secure[s] an average reciprocity of advantage." It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly, and it is reasonable to conclude that, on the whole, an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt, and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co. v. United States*. Less than 20 years ago, this Court reiterated that the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

4. *Federalism Constraints on Procedural Due Process.* We've seen what happens when the federal courts are asked to review decisions of state and local legislative bodies. What happens when they're asked to review, for their procedural legitimacy, decisions of the state courts? The simple answer is nothing: the Rooker-Feldman doctrine prohibits collateral attack in the federal courts for state court judgments (absent particular Congressional authorization, as in *habeas corpus*), even when the state court judgments are alleged to be procedurally deficient. For an example, see *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F.Supp.2d 1247 (N.D. Fla. 1999), in which the court rejected a procedural due process challenge to a state court-ordered medical procedure, and told the petitioner that her only remedy was an appeal through the state court system, and, ultimately, to the U.S. Supreme Court. However, Rooker-Feldman is generally understood to be statutory, not constitutional: Congress could grant the district courts jurisdiction over such cases.

5. *Further reading.* For a skeptical discussion of the possibility of making formal distinctions between general and non-general laws, and the importance of coming up with some non-formal way of carrying out the task see Paul Gowder, *Equal Law in an Unequal World*, IOWA LAW REVIEW forthcoming (2014). For further thoughts on the relationship between due process and separation of powers, see Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE LAW JOURNAL 1672 (2012).

The Fundamental Ideas and Values of Procedural Due Process

Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951)

MR. JUSTICE FRANKFURTER, concurring.

[***] Petitioners are organizations which, on the face of the record, are engaged solely in charitable or insurance activities. They have been designated "communist" by the Attorney General of the United States. This designation imposes no legal sanction on these organizations other than that it serves as evidence in ridding the Government of persons reasonably suspected of disloyalty. It would be blindness, however, not to recognize that in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them. Potential members, contributors or beneficiaries of listed organizations may well be influenced by use of the designation, for instance, as ground for rejection of applications for commissions in the armed forces or for permits for meetings in the auditoriums of public housing projects. Yet, designation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent. It is claimed that thus to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment.

Fairness of procedure is "due process in the primary sense." It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." [***]

The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-

American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

[***]

[P]ublicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property. Weight must also be given to the fact that such designation is not made by a minor official but by the highest law officer of the Government.

[***] Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that "in the development of our liberty insistence upon procedural regularity has been a large factor." It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. [***]

It is against this background of guiding considerations that we must view the rather novel aspects of the situation at hand. It is not true that the evils against which the Loyalty Order was directed are wholly devoid of analogy in our own history. The circumstances attending the Napoleonic conflicts, which gave rise to the Sedition Act of 1798, readily come to mind. But it is true that the executive action now under scrutiny is of a sort not heretofore challenged in this Court. That of itself does not justify the ex parte summary designation procedure. It does make it necessary to consider its validity when judged by our whole experience with the Due Process Clause.

The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. Fair hearings have been held essential for rate determinations [10](#) and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness. It is in these instances that constitutional compulsion regarding fair procedure was directly in issue. Thus it has been held that the Constitution cannot be invoked to prevent Congress from authorizing disbursements on the ex parte determination of an administrative officer that prescribed conditions are met. The importation of goods is a privilege which, if Congress clearly so directs, may likewise be conditioned on ex parte findings. Only by a close division of the Court was it held that at a time of national emergency, when war has not been closed by formal peace, the Attorney General is not required to give a hearing before denying hospitality to an alien deemed dangerous to public security. Again, when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution. Finally, summary administrative procedure may be sanctioned by history or obvious necessity. But these are so rare as to be isolated instances.

This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a

criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point" It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, *The French Revolution in English History*. "The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." Appearances in the dark are apt to look different in the light of day.

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

The strength and significance of these considerations - considerations which go to the very ethos of the scheme of our society - give a ready answer to the problem before us. That a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not of itself prove that it must be found essential here. But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice.

***] The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an "adjudication" or a "regulation" in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

MR. JUSTICE DOUGLAS, concurring.

I disagree with MR. JUSTICE JACKSON that an organization - whether it be these petitioners, the American Red Cross, the Catholic Church, the Masonic Order, or the Boy Scouts - has no standing to object to being labeled "subversive" in these ex parte proceedings. The opinion of MR. JUSTICE FRANKFURTER disposes of that argument. This is not an instance of name calling by public officials. This is a determination of status - a proceeding to ascertain

whether the organization is or is not "subversive." This determination has consequences that are serious to the condemned organizations. Those consequences flow in part, of course, from public opinion. But they also flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination to penalize or police these organizations. An organization branded as "subversive" by the Attorney General is maimed and crippled. The injury is real, immediate, and incalculable.

The requirements for fair trials under our system of government need no elaboration. A party is entitled to know the charge against him; he is also entitled to notice and opportunity to be heard. Those principles were, in my opinion, violated here.

***] No one can tell from the Executive Order what meaning is intended. No one can tell from the records of the cases which one the Attorney General applied. The charge is flexible; it will mean one thing to one officer, another to someone else. It will be given meaning according to the predilections of the prosecutor: "subversive" to some will be synonymous with "radical"; "subversive" to others will be synonymous with "communist." It can be expanded to include those who depart from the orthodox party line - to those whose words and actions (though completely loyal) do not conform to the orthodox view on foreign or domestic policy. These flexible standards, which vary with the mood or political philosophy of the prosecutor, are weapons which can be made as sharp or as blunt as the occasion requires. Since they are subject to grave abuse, they have no place in our system of law. When we employ them, we plant within our body politic the virus of the totalitarian ideology which we oppose.

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him. Thus when a defendant is summoned before a federal court to answer to a claim for damages or to a demand for an injunction against him, there must be a "plain statement of the claim showing that the pleader is entitled to relief." If that is necessary for even the most minor claim asserted against a defendant, we should require no less when it comes to determinations that may well destroy the group against whom the charge of being "subversive" is directed. When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.

***]

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. ***] The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as "subversive." No more critical governmental ruling can be made against an organization these days. It condemns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing - an opportunity to appear and to rebut the charge.

The system used to condemn these organizations is bad enough. The evil is only compounded when a government employee is charged with being disloyal. Association with or membership in an organization found to be "subversive" weighs heavily against the accused. He is not allowed to prove that the charge against the organization is false. That case is closed; that line of defense is taken away. The technique is one of guilt by association - one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but

we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law. The case of Dorothy Bailey is an excellent illustration of how dangerous a departure from our constitutional standards can be. She was charged with being a Communist and with being active in a Communist "front organization." The Review Board stated that the case against her was based on reports, some of which came from "informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable."

Counsel for Dorothy Bailey asked that their names be disclosed. That was refused.

Counsel for Dorothy Bailey asked if these informants had been active in a certain union. The chairman replied, "I haven't the slightest knowledge as to who they were or how active they have been in anything."

Counsel for Dorothy Bailey asked if those statements of the informants were under oath. The chairman answered, "I don't think so."

The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. She has nothing to offer except her own word and the character testimony of her friends.

Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice.

I do not mean to imply that but for these irregularities the system of loyalty trials is constitutional. I do not see how the constitutionality of this dragnet system of loyalty trials which has been entrusted to the administrative agencies of government can be sustained. Every government employee must take an oath of loyalty. 6 If he swears falsely, he commits perjury and can be tried in court. In such a trial he gets the full protection of the Bill of Rights, including trial by jury and the presumption of innocence. I am inclined to the view that when a disloyalty charge is substituted for perjury and an administrative board substituted for the court "the spirit and the letter of the Bill of Rights" are offended.

The problem of security is real; and the Government need not be paralyzed in handling it. The security problem, however, relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage can be committed. The department heads must have leeway in handling their personnel problems in these sensitive areas. The question is one of the fitness or qualifications of an individual for a particular position. One can be transferred from those areas even when there is no more than a suspicion as to his loyalty. We meet constitutional difficulties when the Government undertakes to punish by proclaiming the disloyalty of an employee and making him ineligible for any government post. The British have avoided those difficulties by applying the loyalty procedure only in sensitive areas and in using it to test the qualifications of an employee for a particular post, not to condemn him for all public employment. When we go beyond that procedure and adopt the dragnet system now in force, we trench upon the civil rights of our people. We condemn by administrative edict, rather

than by jury trial. Of course, no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship.

MR. JUSTICE BLACK, concurring.

Without notice or hearing and under color of the President's Executive Order No. 9835, the Attorney General found petitioners guilty of harboring treasonable opinions and designs, officially branded them as Communists, and promulgated his findings and conclusions for particular use as evidence against government employees suspected of disloyalty. In the present climate of public opinion it appears certain that the Attorney General's much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence. The Government not only defends the power of the Attorney General to pronounce such deadly edicts but also argues that individuals or groups so condemned have no standing to seek redress in the courts, even though a fair judicial hearing might conclusively demonstrate their loyalty. [* * *]

More fundamentally, however, in my judgment the executive has no constitutional authority, with or without a hearing, officially to prepare and publish the lists challenged by petitioners. In the first place, the system adopted effectively punishes many organizations and their members merely because of their political beliefs and utterances, and to this extent smacks of a most evil type of censorship. This cannot be reconciled with the First Amendment as I interpret it. Moreover, officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. It is true that the classic bill of attainder was a condemnation by the legislature following investigation by that body, while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.

There is argument that executive power to issue these pseudo-bills of attainder can be implied from the undoubted power of the Government to hire and discharge employees and to protect itself against treasonable individuals or organizations. Our basic law, however, wisely withheld authority for resort to executive investigations, condemnations and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights.

Notes on McGrath:

1. Students should attend to the fact that only the concurring opinions are presented here (i.e., this is not the governing law).
2. How do Justice Black's critiques of the anti-communist "blacklist" at issue in *McGrath* bear on current anti-terrorist practices? Is it relevant to Black's objections that the list was published? Suppose a secret blacklist were created (e.g., the TSA "no-fly list") – should listees be entitled to notice and an opportunity to be heard?
3. What relationship do the opinions suggest between the First Amendment and procedural due process? (Note especially Justice Douglas's remarks about the vagueness of the standards for designating an organization as subversive, and the consequent susceptibility of abuse.)
4. Justice Douglas suggests that "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." What's the relationship between procedural propriety and equal justice?

In re Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. 2005) (Kozinski, dissenting)

Many of the facts are already public, having been discussed by the court of appeals in *In re Canter*. Canter grew out of a bankruptcy case involving Deborah Canter who, at the time, was undergoing a messy divorce from her husband Gary. During their married life, the couple had lived in a house on Highland Avenue in Los Angeles; the house was owned by Gary's parents, who transferred title to the Canter Family Trust in 1997. Gary paid rent while he and Deborah were living there. When the couple separated in 1999, Gary moved out, leaving Deborah in possession; the rent payments stopped.

The Trust brought an unlawful-detainer action against Deborah seeking eviction and back rent, and the case was set for trial on October 26, 1999. Twenty-four minutes before trial was to start, Deborah filed a bankruptcy petition, which automatically stayed the unlawful-detainer case.

Three months later, on January 26, 2000, the bankruptcy court lifted the automatic stay on a motion filed by the Trust. Deborah, represented by attorney Andrew Smyth, did not file an opposition. Thereafter, the Trust and Deborah--again represented by counsel--signed a stipulation. Based on that stipulation, the state unlawful-detainer court on February 7, 2000, ordered Deborah to vacate the Highland Avenue premises.

At that point, lightning struck. Without notice, without warning, without giving the Trust an opportunity to oppose, without so much as a motion, the district judge who is now the subject of this disciplinary complaint withdrew the case from the bankruptcy court. Twelve days later, the same judge entered a second order, enjoining the state-court judgment evicting Deborah. Like the withdrawal order, the injunction was not preceded by the usual processes to which we are accustomed in American courts, such as a petition from the party seeking the relief or a response from the opposing side. In fact, no one knew why the district judge had done what he did--the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two orders were a raw exercise of judicial power, the net effect of which was to let Deborah Canter live in the Highland Avenue property rent-free. Just how raw this exercise of power was became clear--if it was not already--when the Trust twice asked the judge to lift the stay, and was twice met by summary denials.

The so-called hearing on the second of these motions gives a pretty good flavor of the judge's attitude in this matter. The motion (and an unrelated motion) were argued together on June 18, 2001--after Deborah Canter had occupied the property for some 15 months past the eviction judgment. Deborah was present (apparently pro se), but said nothing of substance. After counsel for the Trust soliloquized for about a page of transcript, we find the following unilluminating exchange:

THE COURT: Defendants' motion to dismiss is denied, and the motion for lifting of the stay is denied--I'm sorry. The motion to dismiss is granted with ten days to amend.

MR. KATZ: And the motion to lift the stay is denied?

THE COURT: Denied; that's right.

MR. KATZ: May I ask the reasons, your Honor?

THE COURT: Just because I said it, Counsel.

I could stop right here and have no trouble concluding that the judge committed misconduct. It is wrong and highly abusive for a judge to exercise his power without the normal procedures and trappings of the adversary system--a motion, an opportunity for the other side to respond, a statement of reasons for the decision, reliance on legal authority. These niceties of orderly procedure are not designed merely to ensure fairness to the litigants and a correct application of the law, though they surely serve those purposes as well. More fundamentally, they lend legitimacy to the judicial process by ensuring that judicial action is--and is seen to be--based on law, not the judge's caprice. The district judge surely had the power to enjoin enforcement of the state-court eviction judgment once he assumed jurisdiction over the bankruptcy case, but he could legitimately exercise that power only if he had sufficient legal cause to do so. Here, the

judge gave no indication of why he did what he did, and stonewalled all the Trust's efforts to find out.

Nor is there anything in the record that would suggest a legal basis for the judge's action. Canter might have appealed the bankruptcy court's order lifting the stay, but she didn't. She might also have filed a motion asking the district court to withdraw the reference and enjoin the state-court judgment. Had she done so, we could have gleaned from her motion some legal theory supporting the injunction. But Canter didn't do that either, so we're left in the dark as to what legal basis the judge might have had for enjoining the state's lawful processes. Judicial action taken without any arguable legal basis--and without giving notice and an opportunity to be heard to the party adversely affected--is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." [* * *]

The fact of the matter is that the judge's conduct here caused real harm. It certainly harmed innocent creditors to the tune of \$ 50,000 or more. Worse, it harmed public confidence in the fair administration of justice in the courts of this circuit. The prohibition against ex parte communications, rules of procedure, principles of law--all of these are not trinkets that judges may discard whenever they become a nuisance. Rather, they are the mainstays of our judicial system, our guarantee to every litigant that we will administer justice, as our oath requires, "without respect to persons." 28 U.S.C. § 453

Notes on Values Underlying Procedural Due Process

So why do we care about procedural due process, anyway? *McGrath* gives us one idea. Procedural legitimacy is one way of treating citizens like autonomous agents with dignity and worth, entitled to have reasons given to them for their actions. In famous constitutional law scholar Lawrence Tribe's words, "the right to be heard from, and the right to be told why... express the elementary idea that to be a *person*, rather than a thing, is at least to be consulted about what is done with one."⁴ For the consequence of abandoning procedural legitimacy, consider Franz Kafka's *The Trial*.

Moreover, procedural legitimacy protects the value of equal justice. The demand, captured in the Equal Protection Clause, that there should be one law for all citizens, and all citizens should be treated equally under the law, seems to require some sort of procedural regularity: only if citizens have notice and an opportunity to be heard and receive reasons for the actions done to them under the law can we be sure that the law is really being applied evenhandedly. This seems to be Kozinski's essential point in *In re Complaint of Judicial Misconduct*: by abandoning the procedures of law, the accused judge made it impossible for the litigants or the community at large to verify that his rulings were genuinely impartial.

More broadly, legal philosophers speak of an idea that goes by the name "the rule of law." The rule of law, loosely speaking, is that collection of principles that ensures that we have "a government of law, not of men," that is, that state power is constrained by public, general, prospective laws. Conventionally, it is said that the rule of law protects citizens' liberty, although the undersigned author has argued that, actually, it protects the equality of all subjects of law in a political community.⁵ Due process guarantees like notice and the opportunity to be heard are widely understood to be elements of the rule of law.⁶

⁴ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2nd ed., 1988) (emphasis in original)

⁵ Paul Gowder, *The Rule of Law and Equality*, 32 *LAW & PHILOSOPHY* 565 (2013).

⁶ See, generally, Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James Fleming, ed., *NOMOS L: GETTING TO THE RULE OF LAW* 3 (2011).

Public Benefits and the Two Standard Questions

The two standard questions of procedural due process analysis are “is there a protected interest,” and, if so, “how much process is due?” As is traditional, these are presented through the two leading cases considering due process rights in the public benefits context.

Goldberg v. Kelly, 397 U.S. 254 (1970)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

[* * *]

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination “fair hearing” with the informal pre-termination review disposed of all due process claims.

[* * *]

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are “a ‘privilege,’ and not a ‘right.’” Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, or to denial of a tax exemption, or to discharge from public employment. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be “condemned to suffer grievous loss,” *Joint Anti-Fascist Refugee Committee v. McGrath*, and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved, as well as of the private interest that has been affected by governmental action.”

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that, when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus, the crucial factor in this context -- a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding, the Nation’s basic commitment has been to foster the dignity and wellbeing of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary

public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations, and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or *quasi*-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." The hearing must be "at a meaningful time and in a meaningful manner." In the present context, these

principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient *per se*, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally, with or without counsel, before the official who finally determines continued eligibility. Thus, a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decisionmaker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context, due process does not require a particular order of proof or mode of offering evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. What we said in [p270] *Greene v. McElroy*, is particularly pertinent here:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-

examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently, HEW has reached the same conclusion.

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion, or even formal findings of fact and conclusions of law. And, of course, an impartial decisionmaker is essential. We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decisionmaker. He should not, however, have participated in making the determination under review.

Footnote 8:

It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property. It has been aptly noted that

[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long-term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients, they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *Yale L.J.* 1245, 1255 (1965). *See also* Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

From Justice Black's dissent:

The more than a million names on the relief rolls in New York, and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably, in the officials' haste to make out the lists, many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing," even though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless, and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. The Court, however, relies upon the Fourteenth Amendment, and, in effect, says that failure of the government to pay a promised charitable installment to an individual deprives that individual of *his own property* in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

[* * *]

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and, in all "fairness," it could not do so. These recipients are, by definition, too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment, the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case, the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one, since these people are too poor to hire their own advocates. *Cf. Gideon v. Wainwright*. Thus, the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and Judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

Note on Goldberg

The government gives out income benefits under numerous substantive conditions all the time: recipients must have under a certain income, must look for work, etc. Generally, the government gets an extremely broad scope of discretion in where it spends its money (Compare *Rust v. Sullivan*, 500 U.S. 173 (1991), holding that the government may selectively subsidize private speakers on a viewpoint-discriminatory basis.) Why can it not also give income benefits under *procedural* conditions? Does it matter whether recipients may come to reasonably rely on the benefits? Those who oppose the *Goldberg* rule might argue that since the state can abolish income assistance benefits altogether—as it undoubtedly can—it ought to be able to do *less* than abolish them altogether, i.e., grant them only to those specific people whom it chooses, and take them away from others, without offering the latter a hearing. (Some element of the individualized/general distinction from *Londoner* and *Bi-Metallic* appears to be at play here, albeit transposed to the individual context: New York probably could have shut off public benefits altogether, i.e., by gubernatorial impoundment of the funds, without triggering an obligation to give notice and a hearing to each individual affected. The transposition of this idea to the administrative context is somewhat uncomfortable, however, because administrative agencies typically exercise both quasi-legislative and quasi-judicial functions.)

On the other hand, some political philosophers argue that the state creates all property rights. At the very least, even those who believe that there are natural law property rights must concede that state law defines many of the details of those rights, and could define them otherwise. For example, the rule against perpetuities constrains the right to transfer property; states could (and most states have) made that rule more or less strict. But given that all property interests are (at least partly) defined by the state, and the due process clause specifically protects property interests, it follows that state legislative discretion over the contours of some interest does not give a conclusive objection to applying procedural due process protections to the individualized deprivation of that interest. For more on which state-created interests are covered by the concept of “property” and which are not, see *Board of Regents v. Roth*, presented below.

Mathews v. Eldridge, 424 U.S. 319 (1976)

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that, prior to the termination of Social Security disability benefit payments, the recipient be afforded an opportunity for an evidentiary hearing.

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. [***] Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pre-termination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg v. Kelly*, which established a right to an "evidentiary hearing" prior to termination of welfare benefits. The Secretary contended that *Goldberg* was not controlling, since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need, and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

[***] [T]he Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The right to be heard before being condemned to suffer **grievous loss of any kind**, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

***] These decisions underscore the truism that "[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. ***] The continuing eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. ***] Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. If, as is usually the case, the SSA accepts the agency determination, it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred.

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. ***]

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires

an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, the nonprobationary federal employee in *Arnett*, and the wage earner in *Sniadach*.

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence: ["]The crucial factor in this context -- a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.["]

Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, sayings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the workforce.

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits, a recipient must be "unable to engage in substantial gainful activity." Thus, in contrast to the discharged federal employee in *Arnett*, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

[T]he possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests. The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

An additional factor to be considered here is the fairness and reliability of the existing pre-termination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. In order to remain eligible for benefits, the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques" that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . ." In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be

deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. Goldberg noted that, in such circumstances "written submissions are a wholly unsatisfactory basis for decision."

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," concerning a subject whom they have personally examined. In *Richardson*, the Court recognized the "reliability and probative worth of written medical reports," emphasizing that, while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively," and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important." In the context of the disability benefits entitlement assessment, the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation.

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits, the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file, as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%. Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here, since the administrative review system is operated on an open file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pre-termination

process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

In striking the appropriate due process balance, the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point, the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may, in the end, come out of the pockets of the deserving, since resources available for any particular program of social welfare are not unlimited.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. We conclude that an evidentiary hearing is not required prior to the termination of disability benefits, and that the present administrative procedures fully comport with due process.

Note on Matthews

The court in *Matthews* considered a wide variety of factors in a seemingly ad hoc fashion. What guidance can we draw as to how they may be weighed against one another?

National Security

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion)

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ("the AUMF"), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

[* * *]

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter "Mobbs Declaration"), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. [* * *]

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups

“were and continue to be enemy combatants.” Mobbs states that Hamdi was labeled an enemy combatant “[b]ased upon his interviews and in light of his association with the Taliban.” *Ibid.* According to the declaration, a series of “U.S. military screening team[s]” determined that Hamdi met “the criteria for enemy combatants,” and “a subsequent interview of Hamdi has confirmed that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant.”

[* * *]

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that “extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay” does not comport with the Fifth and Fourteenth Amendments. The Government counters that any more process than was provided below would be both unworkable and “constitutionally intolerable.” Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. [* * *] All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. Further, all agree that §2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, §2243 provides that “the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,” and §2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of §2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

First, the Government urges the adoption of the Fourth Circuit’s holding below—that because it is “undisputed” that Hamdi’s seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi’s seizure cannot in any way be characterized as “undisputed,” as “those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.” Further, the “facts” that constitute the alleged concession are insufficient to support Hamdi’s detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress’ authorization, Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict. The habeas petition states only that “[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan.” An assertion that one resided in a country in which combat operations are taking place is not a concession that one was “captured in a zone of active combat operations in a foreign theater of war,” and certainly is not a concession that one was “part of or supporting forces hostile to the United States or coalition partners” and “engaged

in an armed conflict against the United States.” Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

The Government’s second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government’s most extreme rendition of this argument, “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential “some evidence” standard. Under this review, a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one.

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law. He argues that the Fourth Circuit inappropriately “ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely,” and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be “meaningful judicial review.”

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not “deprived of life, liberty, or property, without due process of law,” is the test that we articulated in *Mathews v. Eldridge*. *Mathews* dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute safeguards.” *Ibid*. We take each of these steps in turn.

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest ... affected by the official action,” is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. “In our society liberty is the norm,” and detention without trial “is the carefully limited exception.” “We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty,” and we will not do so today.

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for “[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,” and at this stage in the *Mathews* calculus, we consider the interest of the erroneously detained individual. Indeed, as amicus briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real. Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate

threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan*, 4 Wall., at 125 (“[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen”). Because we live in a society in which “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty,” our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, “the risk of erroneous deprivation” of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule, while some of the “additional or substitute procedural safeguards” suggested by the District Court are unwarranted in light of their limited “probable value” and the burdens they may impose on the military in such cases.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the

Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of Mathews, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

We think it unlikely that this basic process will have the dire impact on the central functions of warring that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed “some evidence” standard is inadequate. Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the “some evidence” standard in the past as a standard of review, not as a standard of proof. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker.

[* * *]

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government’s case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government’s return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

Notes on Hamdi

1. The dissenting opinions in this case are of particular interest, and are also worth a read to those students interested in the different ways in which the balance between individual liberty and national security may be struck in a time of war.

2. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court revisited the *habeas* issue, finding that a Congressional jurisdiction-stripping act covering Guantanamo detainees was an unconstitutional suspension of the writ, in part because military commission procedural protections were an “inadequate substitute” for the writ. Those interested in the interactions of *habeas* and due process are advised to review this case.

National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir., 2001)

Sentelle, Circuit Judge:

Two organizations, the National Council of Resistance of Iran and the People's Mojahedin of Iran, petition for review of the Secretary's designation of the two as constituting a "foreign terrorist organization" under the Anti-Terrorism and Effective Death Penalty Act of 1996, raising both statutory and constitutional arguments. While we determine that the designation was in compliance with the statute, we further determine that the designation does violate the due process rights of the petitioners under the Fifth Amendment, and we therefore remand the case for further proceedings consistent with this opinion.

The Statute

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("Anti-Terrorism Act" or "AEDPA"), 8 U.S.C. 1189, the Secretary of State is empowered to designate an entity as a "foreign terrorist organization." The consequences of that designation are dire. The designation by the Secretary results in blocking any funds which the organization has on deposit with any financial institution in the United States. Representatives and certain members of the organization are barred from entry into the United States. Perhaps most importantly, all persons within or subject to jurisdiction of the United States are forbidden from "knowingly providing material support or resources" to the organization.

Despite the seriousness of the consequences of the determination, the administrative process by which the Secretary makes it is a truncated one. In part, the AEDPA imposes the Secretary's duties in "APA-like language." The Secretary compiles an "administrative record" and based upon that record makes "findings." If the Secretary makes the critical findings that "an entity is a foreign organization engaging in terrorist activities that threaten the national security of the United States," that entity then suffers the consequences listed above.

Following the administrative designation there is judicial review. While that statutory procedure, so far as it goes, sounds like the familiar procedure normally employed by the Congress to afford due process in administrative proceedings, the similarity to process afforded in other administrative proceedings ends there. As we have observed before, this "statute ... is unique, procedurally and substantively." The unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record. Nothing in the statute forbids the use of "third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities...." The Secretary may base the findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as terrorist.

The entity may obtain judicial review by application to this court not later than thirty days after the publication of the designation in the Federal Register. But that review is quite limited. Review is based solely upon the administrative record. Granted this is not in itself an unusual limitation, but one common to many administrative reviews. However, under the AEDPA the aggrieved party has had no opportunity to either add to or comment on the contents of that administrative record; and the record can, and in our experience generally does, encompass "classified information used in making the designation," as to which the alleged terrorist organization never has any access, and which the statute expressly provides the government may submit to the court *ex parte* and *in camera*.

The scope of judicial review is limited as well. We are to hold unlawful and set aside designations that we find to be

- (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
- (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or
- (E) not in accord with the procedures required by law.

Again, this limited scope is reminiscent of other administrative review, but again, it has the unique feature that the affected entity is unable to access, comment on, or contest the critical material. Thus the entity does not have the benefit of meaningful adversary proceedings on any of the statutory grounds, other than procedural shortfalls so obvious a Secretary of State is not likely to commit them.

In the decisions now under review, we consider two petitions under 1189(b).

The Petitions

By notice of October 8, 1999, the Secretary of State, inter alia, redesignated petitioner People's Mojahedin of Iran ("PMOI") as a foreign terrorist organization). In the 1999 designation, then Secretary Madeleine Albright for the first time included the designation of the second petitioner before us, the National Council of Resistance of Iran ("NCRI"). The Secretary found that the NCRI is an alter ego or alias of the PMOI. Both petitioners argue that the Secretary's designation deprives them of constitutionally protected rights without due process of law.

[***]

Both petitioners assert that by designating them without notice or hearing as a foreign terrorist organization, with the resultant interference with their rights to obtain and possess property and the rights of their members to enter the United States, the Secretary deprived them of "liberty, or property, without due process of law," in violation of the Fifth Amendment of the United States Constitution. We agree. The United States's defense against the constitutional claims of the petitioners is two-fold: (1) that the petitioners have no protected constitutional rights and (2) that even if they have such rights, none are violated. Both lines of defense fail.

We consider first the eligibility of the petitioners for constitutional protection. In resisting the claims of the PMOI to due process protection, the government asserts that "nearly all of these arguments are foreclosed by the binding precedent of this Court in the People's Mojahedin published decision, where this Court rejected those same arguments." In fact, in that decision this court rejected only the statutory arguments. We did so after concluding that the petitioners in that case had established no constitutional entitlement because "a foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise." We left the constitutional questions for such time as a designated foreign terrorist organization might be able to establish its constitutional presence in the United States.

[Omitted: holding that the organizations had established constitutional presence]

The Secretary offers one further argument for the proposition that petitioners are not entitled to the protection of the Due Process Clause. The Secretary asserts that the United States exercises the powers of external sovereignty independent of the affirmative grants of the Constitution as an inherent attribute of sovereignty under international law. As a result of that sovereignty, the Secretary contends, the government interacts with foreign entities not within the constitutional framework, but through the system of international law and diplomacy. Specifically, the Secretary asserts that "foreign governmental entities therefore 'lie[] outside the structure of the union.' This argument need not detain us long.

It is certainly true that sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections such as the Due Process Clause. However, since neither the PMOI nor the NCRI is a government, none of the authorities offered by the Secretary have any force.

[* * *]

The government argues that even accepting the proposition that petitioners are entitled to the protection of the Due Process Clause of the Fifth Amendment, the designation process and its consequences do not deprive them of life, liberty, or property. The Secretary contends that this question is settled by *Paul v. Davis*, 424 U.S. 693 (1976), in which the Supreme Court held that the government does not, simply by the act of defaming a person, deprive him of liberty or property rights protected by the Due Process Clause. However, *Paul v. Davis* held much more than the point for which the government asserts it.

That case concerned the stigmatizing of plaintiffs by police officers distributing a flyer listing them among "active shoplifters." In reversing a circuit decision that the dissemination of such information implicated the Due Process Clause, the High Court entered the holding upon which the government relies. But in doing so, it analyzed and distinguished its earlier decision in *Wisconsin v. Constantineau*. In *Constantineau*, a state statute empowered a local police chief, without notice or hearing to a citizen, to cause a notice to be posted in all retail outlets that that person was one who "by excessive drinking" exhibited specified undesirable "traits, such as

exposing himself or family 'to want' or becoming 'dangerous to the peace' of the community." The Constantineau Court held that this stigmatizing posting without notice or hearing constituted a violation of the Fifth Amendment Due Process Clause. In explaining its refusal to follow Constantineau, the Paul Court noted specific language from the Constantineau holding: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential."

The Paul Court then went on to note the effects of the excessive drinking posting beyond stigmatization: That is, the posted individual could not purchase or even receive by gift alcoholic beverages within the city limits for one year. Thus, the Paul Court held, the appropriate rule of law is that where the government issues a stigmatizing posting (or designation) as a result of which the stigmatized individual is "deprived ... of a right previously held under state law," due process is required. The deprivation under the Wisconsin statute as described in *Paul v. Davis* was "the right to purchase or obtain liquor in common with the rest of the citizens."

Like the parties in *Constantineau*, and unlike the parties in *Paul*, petitioners here have suffered more than mere stigmatization. Rather than being posted as drunkards, the petitioners have been designated as foreign terrorist organizations under the AEDPA. Rather than being deprived of the previously held right to purchase liquor, they have been deprived of the previously held right to--for example--hold bank accounts, and to receive material support or resources from anyone within the jurisdiction of the United States. Many people, presumably including the members of the Council and the PMOI, would consider these to be rights more important than the right to purchase liquor. We consider at least one of them equally entitled to constitutional protection.

The most obvious rights to be impaired by the Secretary's designation are the petitioners' property rights. Specifically, there is before us at least a colorable allegation that at least one of the petitioners has an interest in a bank account in the United States. [* * *]

The other two consequences of the designation less clearly implicate interests protected by the Due Process Clause. As to the right of the members of the organizations to enter the United States, the Secretary argues with some convincing force that aliens have no right of entry and that the organization has no standing to judicially assert rights which its members could not bring to court. The organizations counter that the present act limits the ability to travel abroad of its members who are already in the United States as they know they would be denied readmission.

As to the third consequence of the designation--that is the banning of the provision of material support or resources to the organizations--both parties again raise colorable arguments. The petitioners assert that this limitation deprives their members of First Amendment associational and expressive rights. The government asserts that the limitation does not affect the ability of anyone to engage in advocacy of the goals of the organizations, but only from providing material support which might likely be employed in the pursuit of unlawful terrorist purposes as of First Amendment protected advocacy.

On each of the second and third consequences, each side offers plausible arguments. But we need not decide as an initial matter whether those consequences invade Fifth Amendment protected rights of liberty, because the invasion of the Fifth Amendment protected property right in the first consequence is sufficient to entitle petitioners to the due process of law.

When process is due.

As petitioners argue, the fundamental norm of due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing. Therefore, petitioners argue that the Secretary was obligated to give them notice of her intent to make the declarations of terrorist status and previous nature, and afford them the opportunity to respond to the evidence upon which she proposed to make those declarations and to be heard on the proper resolution of the questions. Indeed, "[the Supreme] Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."

At the same time, the Supreme Court has made clear that "[i]t is by now well established that 'due process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Otherwise put, "due process is flexible and calls for such procedural protections as the particular situation demands." Citing *Homar*, and *Morrissey*, *inter alia*, the United States contends that since due process consists only of that process which is due under the circumstances, even given our holding that petitioners are protected by the due process clause, they are not due any procedural protection that they have not already received.

[* * *] The government rightly reminds us that the Supreme Court established in *Mathews v. Eldridge* and indeed even before that decision, that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest of the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Unlike the advocates before us, we do not have the luxury of blurring the question of what and when. We must determine what process is sufficient to afford petitioners the protection of the Fifth Amendment, and when--in terms of pre-deprivation or post-deprivation--that process must be available.

As to the private interest, the government compares the interests asserted by petitioners in this case with that asserted in *United States v. James Daniel Good Real Property*. In that case, the Supreme Court considered "whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." The Court expressly held "that it does." The government argues from the facts of *James Daniel Good Real Property* that the importance of the real estate forfeited in that case dwarfs the importance of the interests of an organization in, for example, a bank account, and concludes that somehow that case supports the proposition that the interest to be protected here is not sufficiently important to warrant due process.

This strikes us as a non sequitur. The fact that the Supreme Court has held that the Fifth Amendment provides protection for a highly important property interest is at most neutral on the question of whether that Amendment provides protection to an arguably less important property interest, or even a concededly less important one. If anything, the decision would seem to weigh in favor of affording due process protection to the interest asserted by petitioners--it being a property interest as was the interest before the Supreme Court in *James Daniel Good Real Property*.

As to the second factor, that is, the risk of erroneous deprivation, the Secretary again offers an analysis of questionable relevance. The government reminds us that the Secretary must, under the statute, consult with the Attorney General and the Secretary of Treasury before designating a foreign terrorist organization, and must notify congressional leaders seven days before designating such an organization, *id.* While we understand the Secretary's point that more heads are likely to reach a sounder result, the application of that facially commonsensical notion to due process questions is, to put it charitably, unclear. The United States functions with a unitary executive, created in Article II of the Constitution and constrained by the Fifth Amendment from depriving anyone protected by that Amendment of life, liberty or property without due process of law. The involvement of more than one of the servants of that unitary executive in commencing a deprivation does not create an apparent substitute for the notice requirement inherent in the constitutional norm. Neither is it apparent how notice by the Article II branch of government to representatives of the Article I branch can substitute for notice to the person deprived. Again, the government has offered nothing that apparently weighs in favor of a post-deprivational as opposed to predeprivational compliance with due process requirements of the Constitution.

As to the third *Mathews v. Eldridge* factor--"the government's interest, including the

function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail,"--the Secretary rightly reminds us that "no governmental interest is more compelling than the security of the nation." It is on this very point that the Secretary most clearly has failed to distinguish between the what of the Due Process Clause and the when. Certainly the United States enjoys a privilege in classified information affecting national security so strong that even a criminal defendant to whose defense such information is relevant cannot pierce that privilege absent a specific showing of materiality. As we will discuss further infra, that strong interest of the government clearly affects the nature--the "what" of the due process which must be afforded petitioners. It is not immediately apparent how that affects the "when" of the process--that is, whether due process may be effectively provided post-deprivation as opposed to pre-deprivation.

In support of the argument that the foreign-policy/national security nature of the evidence supports the constitutional adequacy of a post-deprivation remedy, the Secretary offers our decision in *Palestine Information Office v. Shultz*. The Secretary is correct that in that case, we held that where the Secretary of State had ordered the closing of an office (arguably, a foreign ministry) in this country in response to and in an attempt to curb alleged terrorist activities, the "burden on the government of requiring a hearing before the closing of [the] foreign mission" was sufficient to warrant dispensing with any otherwise available pre-deprivation hearing. We did so recognizing the " 'changeable and explosive nature of contemporary international relations, and the fact that the executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature....' "

We remain committed to, and indeed bound by, that same reasoning. It is simply not the case, however, that the Secretary has shown how affording the organizations whatever due process they are due before their designation as foreign terrorist organizations and the resulting deprivation of right would interfere with the Secretary's duty to carry out foreign policy.

To oversimplify, assume the Secretary gives notice to one of the entities that:

"We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization."

It is not immediately apparent how the foreign policy goals of the government in general and the Secretary in particular would be inherently impaired by that notice. It is particularly difficult to discern how such a notice could interfere with the Secretary's legitimate goals were it presented to an entity such as the PMOI concerning its redesignation. We recognize, as we have recognized before, that items of classified information which do not appear dangerous or perhaps even important to judges might "make all too much sense to a foreign counterintelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods." We extend that recognition to the possibility that alerting a previously undesignated organization to the impending designation as a foreign terrorist organization might work harm to this country's foreign policy goals in ways that the court would not immediately perceive. We therefore wish to make plain that we do not foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made. The difficulty with that in the present case is that the Secretary has made no attempt at such a showing.

We therefore hold that the Secretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of particularized need.

What process is due

We have no doubt foreshadowed our conclusion as to what process the Secretary must afford by our discussion of when the Secretary must afford it. That is, consistent with the full

history of due process jurisprudence, as reflected in *Mathews v. Eldridge*, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' To make plain what we have assumed above, those procedures which have been held to satisfy the Due Process Clause have "included notice of the action sought," along with the opportunity to effectively be heard. This, we hold, is what the Constitution requires of the Secretary in designating organizations as foreign terrorist organizations under the statute. The Secretary must afford to the entities under consideration notice that the designation is impending. Upon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States.

The notice must include the action sought, but need not disclose the classified information to be presented in camera and ex parte to the court under the statute. This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect. However, the Secretary has shown no reason not to offer the designated entities notice of the administrative record which will in any event be filed publicly, at the very latest at the time of the court's review. We therefore require that as soon as the Secretary has reached a tentative determination that the designation is impending, the Secretary must provide notice of those unclassified items upon which he proposes to rely to the entity to be designated. There must then be some compliance with the hearing requirement of due process jurisprudence--that is, the opportunity to be heard at a meaningful time and in a meaningful manner recognized in *Mathews*, *Armstrong*, and a plethora of other cases. We do not suggest "that a hearing closely approximating a judicial trial is necessary." We do, however, require that the Secretary afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.

It is for this reason that even in those instances when postdeprivation due process is sufficient, our review under 1189(b) is not sufficient to supply the otherwise absent due process protection. The statutory judicial review is limited to the adequacy of the record before the court to support the Secretary's executive decision. That record is currently compiled by the Secretary without notice or opportunity for any meaningful hearing. We have no reason to presume that the petitioners in this particular case could have offered evidence which might have either changed the Secretary's mind or affected the adequacy of the record. However, without the due process protections which we have outlined, we cannot presume the contrary either.

Remedy

We recognize that a strict and immediate application of the principles of law which we have set forth herein could be taken to require a revocation of the designations before us. However, we also recognize the realities of the foreign policy and national security concerns asserted by the Secretary in support of those designations. We further recognize the timeline against which all are operating: the two-year designations before us expire in October of this year. We therefore do not order the vacation of the existing designations, but rather remand the questions to the Secretary with instructions that the petitioners be afforded the opportunity to file responses to the nonclassified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations, and that they be afforded an opportunity to be meaningfully heard by the Secretary upon the relevant findings.

Note on the National Security Cases

The State Secrets Privilege. Post-deprivation remedies in the national security context may be hampered by continued inability of private citizens to access classified information pertaining to their treatment. Post-deprivation civil suits may be dismissed entirely to the extent they risk the revealing of classified information, under the "state secrets privilege." For a recent

example, see *Khaled el-Masri v. United States*, 479 F.3d 296 (4th Cir. 2006) (dismissing suit brought by alleged victim of “extraordinary rendition” program on grounds of state secrets privilege). Is this consistent with procedural due process?

Public Employment

Board of Regents v. Roth, 408 U.S. 564 (1972)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968, the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law, a state university teacher can acquire tenure as a “permanent” employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment “during efficiency and good behavior.” A relatively new teacher without tenure, however, is, under Wisconsin law, entitled to nothing beyond his one-year appointment. There are no statutory or administrative standards defining eligibility for reemployment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be “discharged except for cause upon written charges” and pursuant to certain procedures. A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher “dismissed” before the end of the year may have some opportunity for review of the “dismissal.” But the Rules provide no real protection for a nontenured teacher who simply is not reemployed for the next year. He must be informed by February 1 “concerning retention or nonretention for the ensuing year.” But “no reason for non-retention need be given. No review or appeal is provided in such case.”

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights.

[* * *]

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

[* * *] But, to determine whether due process requirements apply in the first place, we must look not to the “weight,” but to the nature, of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property.

[* * *] [T]he Court has fully and finally rejected the wooden distinction between “rights” and “privileges” that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of

procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning. "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it 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 . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*.

There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.

[* * *]

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job, but remains as free as before to seek another.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless **with a clearly implied promise of continued employment.**

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in reemployment for the next year. They supported absolutely no possible **claim of entitlement to** reemployment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in reemployment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)

Justice WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

* In 1979 the Cleveland Board of Education, petitioner in No. 83-1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Such employees can be terminated only for cause, and may obtain administrative review if discharged. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The

complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings.

[* * *]

Respondents' federal constitutional claim depends on their having had a property right in continued employment. If they did, the State could not deprive them of this property without due process.

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents v. Roth*. The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," § 124.34. 4 The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place. The procedures were adhered to in these cases. According to petitioner, "to require additional procedures would in effect expand the scope of the property interest itself."

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

"The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause . . . Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. Since then, this theory has at times seemed to gather some additional support. More recently, however, the Court has clearly rejected it. In *Vitek v. Jones*, we pointed out that "minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." The answer to that question is not to be found in the Ohio statute.

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. [* * *]

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Second, some opportunity for the employee to present his side of the case is recurrently of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

[* * *]

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly*, has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long. The Court of Appeals held otherwise, and we agree. The Due Process Clause requires provision of a hearing "at a meaningful time." At some point, a delay in the post-termination hearing would become a constitutional violation. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy per se. Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by the Ohio statute.

Justice REHNQUIST, dissenting.

In *Arnett v. Kennedy*, six Members of this Court agreed that a public employee could be dismissed for misconduct without a full hearing prior to termination. A plurality of Justices agreed that the employee was entitled to exactly what Congress gave him, and no more. The Chief Justice, Justice Stewart, and I said:

"Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of the service.' But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers v. McElroy*, we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause."

In these cases, the relevant Ohio statute provides in its first paragraph that the tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except . . . for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of

administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

The very next paragraph of this section of the Ohio Revised Code provides that in the event of suspension of more than three days or removal the appointing authority shall furnish the employee with the stated reasons for his removal. The next paragraph provides that within 10 days following the receipt of such a statement, the employee may appeal in writing to the State Personnel Board of Review or the Commission, such appeal shall be heard within 30 days from the time of its filing, and the Board may affirm, disaffirm, or modify the judgment of the appointing authority.

Thus in one legislative breath Ohio has conferred upon civil service employees such as respondents in these cases a limited form of tenure during good behavior, and prescribed the procedures by which that tenure may be terminated. Here, as in *Arnett*, "the employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which the Ohio Legislature has designated for the determination of cause." We stated in *Board of Regents v. Roth*:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

We ought to recognize the totality of the State's definition of the property right in question, and not merely seize upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the State has inexorably conferred upon a civil service employee something which it is powerless under the United States Constitution to qualify in the next paragraph of the statute. This practice ignores our duty under *Roth* to rely on state law as the source of property interests for purposes of applying the Due Process Clause of the Fourteenth Amendment. While it does not impose a federal definition of property, the Court departs from the full breadth of the holding in *Roth* by its selective choice from among the sentences the Ohio Legislature chooses to use in establishing and qualifying a right.

Having concluded by this somewhat tortured reasoning that Ohio has created a property right in the respondents in these cases, the Court naturally proceeds to inquire what process is "due" before the respondents may be divested of that right. This customary "balancing" inquiry conducted by the Court in these cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake.

Note on *Loudermill*

Once again we see the question of the extent to which procedural rights can be defined with property rights, and the Court decisively answers "no." But is Justice Rehnquist's argument totally without merit? It does seem that the Court is engaging in an unguided ad-hoc balancing procedure to apply the *Mathews* factors; if such a procedure must be undertaken, do separation of powers considerations suggest that it ought to be done by the legislature?

Blacklists, Control Orders, Reputational Harm

Wisconsin v. Constantineau, 400 U.S. 433 (1971)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee is an adult resident of Hartford, Wis. She brought suit in a federal district court in Wisconsin to have a Wisconsin statute declared unconstitutional. [* * *]

The Act provides that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who, "by excessive drinking," produces described conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community.

The chief of police of Hartford, without notice or hearing to appellee, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year. Thereupon, this suit was brought against the chief of police claiming damages and asking for injunctive relief. The State of Wisconsin intervened as a defendant on the injunctive phase of the case, and that was the only issue tried and decided, the three-judge court holding the Act unconstitutional on its face and enjoining its enforcement. The court said:

"In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that, before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter."

We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat. We reviewed in *Cafeteria Workers v. McElroy* the nature of the various "private interest[s]" that have fallen on one side or the other of the line. Generalizations are hazardous, as some state and federal administrative procedures are summary by reason of necessity or history. Yet certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play. *Wieman v. Updegraff*. [* * *]

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness; to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

[* * *]

Paul v. Davis, 424 U.S. 693 (1976)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972, they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December, petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer," which began as follows:

"TO: BUSINESS MEN IN THE METROPOLITAN AREA

The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

Only the photograph and name of the subject is shown on this flyer; if additional information is desired, please forward a request in writing. . .
.”

The flyer consisted of five pages of "mug shot" photos, arranged alphabetically. Each page was headed:

“NOVEMBER 1972

CITY OF LOUISVILLE

JEFFERSON COUNTY

POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS”

In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.

Respondent appeared on the flyer because, on June 14, 1971, he had been arrested in Louisville on a charge of shoplifting. He had been arraigned on this charge in September, 1971, and, upon his plea of not guilty, the charge had been "filed away with leave [to reinstate]," a disposition which left the charge outstanding. Thus, at the time petitioners caused the flyer to be prepared and circulated, respondent had been charged with shoplifting but his guilt or innocence of that offense had never been resolved. Shortly after circulation of the flyer, the charge against respondent was finally dismissed by a judge of the Louisville Police Court.

At the time the flyer was circulated, respondent was employed as a photographer by the Louisville Courier-Journal and Times. The flyer, and respondent's inclusion therein, soon came to the attention of respondent's supervisor, the executive director of photography for the two newspapers. This individual called respondent in to hear his version of the events leading to his appearing in the flyer. Following this discussion, the supervisor informed respondent that, although he would not be fired, he "had best not find himself in a similar situation" in the future.

Respondent thereupon brought this § 1983 action in the District Court for the Western District of Kentucky, seeking redress for the alleged violation of rights guaranteed to him by the Constitution of the United States.

[* * *]

Respondent's due process claim is grounded upon his assertion that the flyer, and in particular the phrase "Active Shoplifters" appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of some "liberty" protected by the Fourteenth Amendment. His complaint asserted that the "active shoplifter" designation would

inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. Imputing criminal behavior to an individual is generally considered defamatory per se, and actionable without proof of special damages.

Respondent brought his action, however, not in the state courts of Kentucky, but in a United States District Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly, if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are, respectively, an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.

[* * *]

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under § 1983.

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

[* * *]

The second premise upon which the result reached by the Court of Appeals could be rested -- that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law -- is equally untenable. The words "liberty" and "property," as used in the Fourteenth Amendment, do not, in terms, single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. As we have said, the Court of Appeals, in reaching a contrary conclusion, relied primarily upon *Wisconsin v. Constantineau*. We think the correct import of that decision, however, must be derived from an examination of the precedents upon which it relied, as well as consideration of the other decisions by this Court, before and after *Constantineau*, which bear upon the relationship between governmental defamation and the guarantees of the Constitution. While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

[* * *]

It was against this backdrop that the Court, in 1971, decided *Constantineau*. There, the Court held that a Wisconsin statute authorizing the practice of "posting" was unconstitutional

because it failed to provide procedural safeguards of notice and an opportunity to be heard, prior to an individual's being "posted." Under the statute, "posting" consisted of forbidding in writing the sale or delivery of alcoholic beverages to certain persons who were determined to have become hazards to themselves, to their family, or to the community by reason of their "excessive drinking." The statute also made it a misdemeanor to sell or give liquor to any person so posted.

[* * *]

"Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

[* * *]

In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where, as here, inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons, we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Respondent in this case cannot assert denial of any right vouchsafed to him by the State, and thereby protected under the Fourteenth Amendment.

Students

Goss v. Lopez, 419 U.S. 565 (1975)

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees -- various high school students in the CPSS -- were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

Ohio law provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the Board of Education, and, in connection therewith, shall be permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student. Aside from a regulation tracking the statute, at the time of the imposition of the suspensions in this case, the CPSS itself had not issued any written procedure applicable to

suspensions. Nor, so far as the record reflects, had any of the individual high schools involved in this case. Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U.S.C. § 1993 against the Columbus Board of Education and various administrators of the CPSS. The complaint sought a declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. [* * *]

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March, 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. One of these, Tyrone Washington, was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave, refused to do so, and was suspended. Rudolph Sutton, in the presence of the principal, physically attacked a police officer who was attempting to remove Tyrone Washington from the auditorium. He was immediately suspended. The other four Marion-Franklin students were suspended for similar conduct. None was given a hearing to determine the operative facts underlying the suspension, but each, together with his or her parents, was offered the opportunity to attend a conference, subsequent to the effective date of the suspension, to discuss the student's future.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property. Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct, but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that Ohio Rev.Code Ann. § 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. [Footnote 6] It was ordered that all references to plaintiffs' suspensions be removed from school files.

[* * *]

At the outset, appellants contend that, because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the

public school system. This position misconceives the nature of the issue, and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents v. Roth*. [* * *] Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so, and has required its children to attend. [* * *] The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. *Wisconsin v. Constantineau*, *Board of Regents v. Roth*. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Appellants proceed to argue that, even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. The Court's view has been that, as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. A 10-day suspension from school is not *de minimis*, in our view, and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," *Brown v. Board of Education*, and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

[* * *]

At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded *some* kind of hearing. "[* * *]

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension

is, in fact, unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences, and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order, but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammelled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. [* * *] Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, *see* n 1, *supra*, school principals in the CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational

effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that, in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's Due Process Clause, and therefore that any suspension requires notice and a hearing. [Footnote 2/3] In my view, a student's interest in education is not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory, and insubstantial to justify imposition of a *constitutional* rule.

[* * *]

In identifying property interests subject to due process protections, the Court's past opinions make clear that these interests "are created and their *dimensions are defined* by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*. The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Thus, the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio -- of which the power to suspend is one.

The Court thus disregards the basic structure of Ohio law in posturing this case as if Ohio had conferred an unqualified right to education, thereby compelling the school authorities to conform to due process procedures in imposing the most routine discipline.

Notes on Goss.

1. In Justice Powell's dissent we see here, as in the welfare cases, the debate about whether the state, when it grants a property interest which it may administratively take away, grants that interest *subject to* its power to remove it, or whether that power becomes subject to procedural due process review. And once again, the latter position prevails.

2. Could the state have drafted the education statute differently to avoid this problem? Suppose the statute guaranteed a free education to every student who has never been arrested?

Prisoners

Sandin v. Conner, 515 U.S. 472 (1995)

Chief Justice Rehnquist delivered the opinion of the Court.

We granted certiorari to reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause.

DeMont Conner was convicted of numerous state crimes, including murder, kidnaping, robbery, and burglary, for which he is currently serving an indeterminate sentence of 30 years to life in a Hawaii prison. He was confined in the Halawa Correctional Facility, a maximum security prison in central Oahu. In August 1987, a prison officer escorted him from his cell to the module program area. The officer subjected Conner to a strip search, complete with an inspection of the rectal area. Conner retorted with angry and foul language directed at the officer. Eleven days later he received notice that he had been charged with disciplinary infractions. The notice charged Conner with "high misconduct" for using physical interference to impair a correctional function, and "low moderate misconduct" for using abusive or obscene language and for harassing employees.

Conner appeared before an adjustment committee on August 28, 1987. The committee refused Conner's request to present witnesses at the hearing, stating that "[w]itnesses were unavailable due to move [sic] to the medium facility and being short staffed on the modules." At the conclusion of proceedings, the committee determined that Conner was guilty of the alleged misconduct. It sentenced him to 30 days disciplinary segregation in the Special Holding Unit for the physical obstruction charge, and four hours segregation for each of the other two charges to be served concurrent with the 30 days. Conner's segregation began August 31, 1987, and ended September 29, 1987.

Conner sought administrative review within 14 days of receiving the committee's decision. Nine months later, the deputy administrator found the high misconduct charge unsupported and expunged Conner's disciplinary record with respect to that charge. But before the Deputy Administrator decided the appeal, Conner had brought this suit against the adjustment committee chair and other prison officials in the United States District Court for the District of Hawaii based on 42 U.S.C. § 1983. His amended complaint prayed for injunctive relief, declaratory relief and damages for, among other things, a deprivation of procedural due process in connection with the disciplinary hearing.

[discussing, and rejecting, prior caselaw which tied due process analysis to the rights given in prison regulations –PG]

[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, e.g., *Vitek*, (transfer to mental hospital), and *Washington*, (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Conner asserts, incorrectly, that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation. Neither *Bell v. Wolfish* nor *Ingraham v. Wright* requires such a rule. *Bell* dealt with the interests of pretrial detainees and not convicted prisoners. The Court in *Bell* correctly noted that a detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law." The Court expressed concern that a State would attempt to punish a detainee for the crime for which he was indicted via preconviction holding conditions. Such a course would improperly extend the legitimate reasons for which such persons are detained--to ensure their presence at trial.

The same distinction applies to *Ingraham*, which addressed the rights of schoolchildren to remain free from arbitrary corporal punishment. The Court noted that the Due Process Clause

historically encompassed the notion that the state could not "physically punish an individual except in accordance with due process of law" and so found schoolchildren sheltered. Although children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State.

The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell and Ingraham*. The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitative goals. Admittedly, prisoners do not shed all constitutional rights at the prison gate, but "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law.

This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence. Although Conner points to dicta in cases implying that solitary confinement automatically triggers due process protection, this Court has not had the opportunity to address in an argued case the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests. We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. The record shows that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody. We note also that the State expunged Conner's disciplinary record with respect to the "high misconduct" charge 9 months after Conner served time in segregation. Thus, Conner's confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction. Indeed, the conditions at Halawa involve significant amounts of "lockdown time" even for inmates in the general population. Based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment.

Nor does Conner's situation present a case where the State's action will inevitably affect the duration of his sentence. Nothing in Hawaii's code requires the parole board to deny parole in the face of a misconduct record or to grant parole in its absence, even though misconduct is by regulation a relevant consideration. The decision to release a prisoner rests on a myriad of considerations. And, the prisoner is afforded procedural protection at his parole hearing in order to explain the circumstances behind his misconduct record. The chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause.

We hold, therefore, that neither the Hawaii prison regulation in question, nor the Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*. The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.

Notes on Prisoners and Due Process

1. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that the transfer of a prisoner to a mental hospital was not within the expected range of terms of confinement under his sentence, and required notice and an opportunity to be heard, in view of "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness."

2. The Prison Litigation Reform Act contains numerous procedural restrictions on lawsuits charging illegal prison conditions, including a requirement that prisoners first exhaust administrative remedies, a prohibition against suits alleging emotional injury without physical harm, and a “three strikes” provision which forbids *in forma pauperis* actions by a prisoner who has thrice been found to have brought frivolous litigation. Is this consistent with procedural due process?⁷

Emergencies

In re A.C., 573 A.2d 1235 (D.C. App. 1990)

This case comes before the court for the second time. In *In re A.C.*, 533 A.2d 611 (D.C. 1987), a three-judge motions division denied a motion to stay an order of the trial court which had authorized a hospital to perform a caesarean section on a dying woman in an effort to save the life of her unborn child. The operation was performed, but both the mother and the child died. [* * *]

We are confronted here with two profoundly difficult and complex issues. First, we must determine who has the right to decide the course of medical treatment for a patient who, although near death, is pregnant with a viable fetus. Second, we must establish how that decision should be made if the patient cannot make it for herself -- more specifically, how a court should proceed when faced with a pregnant patient, *in extremis*, who is apparently incapable of making an informed decision regarding medical care for herself and her fetus. [* * *]

[A]ny judicial proceeding in a case such as this will ordinarily take place -- like the one before us here -- under time constraints so pressing that it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of her liberty and privacy interests and bodily integrity. Any intrusion implicating such basic values ought not to be lightly undertaken when the mother not only is precluded from conducting pre-trial discovery (to which she would be entitled as a matter of course in any controversy over even a modest amount of money) but also is in no position to prepare meaningfully for trial. As one commentator has noted: “The procedural shortcomings rampant in these cases are not mere technical deficiencies. They undermine the authority of the decisions themselves, posing serious questions as to whether judges can, in the absence of genuine notice, adequate representation, explicit standards of proof, and right of appeal, realistically frame principled and useful legal responses to the dilemmas with which they are being confronted. Certainly courts dealing with other kinds of medical decision-making conflicts have insisted both upon much more rigorous procedural standards and upon significantly more information.”

In at least one case, a woman whose objection to a caesarean delivery had been overridden by a court went into hiding and gave birth to her child vaginally. In another case, “a 16-year-old pregnant girl in Wisconsin has been held in secure detention for the sake of her fetus because she tended to be on the run and to lack motivation or ability to seek prenatal care.”

In this case A.C.’s court-appointed attorney was unable even to meet with his client before the hearing. By the time the case was heard, A.C.’s condition did not allow her to be present, nor was it reasonably possible for the judge to hear from her directly. The factual record, moreover, was significantly flawed because A.C.’s medical records were not before the court and because Dr. Jeffrey Moscow, the physician who had been treating A.C. for many years, was not even contacted and hence did not testify. Finally, the time for legal preparation was so minimal that neither the court nor counsel mentioned the doctrine of substituted judgment, which -- with benefit of briefs, oral arguments, and above all, time -- we now deem critical to the outcome of this case. We cannot be at all certain that the trial judge would have reached the same decision if the testimony of Dr. Moscow and the abundant legal scholarship filed in this court had been

⁷ John Boston of the Legal Aid Society has prepared a detailed analysis of the PRLA, which as of this writing may be found online at http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf.

meaningfully available to him, and if there had been enough time for him to consider and reflect on these matters as a judge optimally should do.

Pemberton v. Tallahassee Memorial Regional Medical Center, 66 F.Supp.2d 1247 (N.D. Fla. 1999)

This action arises from a state court's order compelling plaintiff Laura L. Pemberton, who was in labor attempting vaginal delivery at home at the conclusion of a full-term pregnancy, to submit to a caesarean section that was medically necessary in order to avoid a substantial risk that her baby would die during delivery. Based on the state court's order, physicians on the medical staff of the defendant hospital performed the caesarean section, resulting in the birth of a healthy baby. Ms. Pemberton suffered no complications.

Ms. Pemberton asserts the procedure was not medically necessary. She claims the physicians who rendered opinions that the procedure *was* medically necessary (and for whose actions the hospital has accepted responsibility), as well as the hospital itself, acted under color of state law. Ms. Pemberton claims the hospital and physicians violated her substantive constitutional rights and her right to procedural due process. [* * *]

The hospital set in motion a procedure devised several years earlier (and used once previously) to deal with patients who refuse to consent to medically necessary treatment. The hospital called its long-time attorney, John D. Buchanan, Jr., who in turn called William N. Meggs, the State Attorney for Florida's Second Judicial Circuit, where Tallahassee is located. Mr. Meggs, who had the responsibility under Florida law to institute any court proceeding seeking to compel a medical procedure without a patient's consent, deputized Mr. Buchanan as a special assistant state attorney for purposes of dealing with this matter. Mr. Buchanan contacted Second Circuit Chief Judge Phillip J. Padovano, advised him of the situation and of Mr. Buchanan's intent to file a petition on behalf of the State of Florida seeking a court order requiring Ms. Pemberton to submit to a caesarean section, and requested a hearing.

Judge Padovano went to the hospital and convened a hearing in the office of hospital Senior Vice President and Chief Medical Officer Dr. Jack MacDonald. In response to the judge's questions, Drs. Thompson, Brickler and O'Bryan testified unequivocally that vaginal birth would pose a substantial risk of uterine rupture and resulting death of the baby.

Judge Padovano ordered Ms. Pemberton returned to the hospital. Mr. Meggs and a law enforcement officer went to Ms. Pemberton's home and advised her she had been ordered to return to the hospital. She returned to the hospital by ambulance against her will.

Judge Padovano then continued the hearing in Ms. Pemberton's room at the hospital. Both she and Mr. Pemberton were allowed to express their views. The judge ordered that a caesarean section be performed. [* * *]

Ms. Pemberton also claims she was denied [**22] procedural due process. This claim is unfounded on the merits and in any event would provide no basis for relief in this court.

First, the merits. The state judge afforded Ms. Pemberton notice and an opportunity to be heard prior to ordering performance of the caesarean section. She and Mr. Pemberton took the opportunity and were in fact heard by the court. Under the circumstances, this was all the process that was feasible. The baby's birth was imminent; convening a full adversary hearing with greater advance notice would have been impossible. The notice and opportunity to be heard that the Pembertons in fact received thus constituted all the process that was due. *See, e.g., Goss v. Lopez*, (recognizing that Due Process Clause does not invariably require full adversary hearing but that more limited process may be sufficient in given circumstances); *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987) (noting that "what process is due is measured by a flexible standard that depends on the practical requirements of the circumstances"); *Fed. R. Civ. P. 65* (recognizing court's ability to enter emergency order with less than full adversary hearing and even, in appropriate circumstances, without notice).

Second, this court would in any event have no authority to review the procedures followed by a state court in deciding a case within its jurisdiction. If the Pembertons were dissatisfied with the state court's procedures or decision, their remedy was to appeal. Federal review of any ultimate decision of the Florida state courts would have been available only in the United States Supreme Court by petition for writ of certiorari. Federal district courts do not have jurisdiction to hear challenges to state court rulings. [*citing Rooker-Feldman Doctrine*]

Impartial tribunals

Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009)

Justice Kennedy delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U. S. 35, 47 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

[* * *]

Don Blankenship is Massey’s chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the \$1,000 statutory maximum to Benjamin’s campaign committee, Blankenship donated almost \$2.5 million to “And For The Sake Of The Kids,” a political organization formed under 26 U. S. C. §527. The §527 organization opposed McGraw and supported Benjamin. Blankenship’s donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—“ ‘to support ... Brent Benjamin.’ ”

To provide some perspective, Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%).

In October 2005, before Massey filed its petition for appeal in West Virginia’s highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship’s campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he “carefully considered the bases and accompanying exhibits proffered by the movants.” But he found “no objective information ... to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial.” In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the \$50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that “Massey’s conduct warranted the type of judgment rendered in this case.” It reversed, nevertheless, based on two independent grounds—first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the “majority’s opinion is morally and legally wrong.” Justice Albright also dissented, accusing the majority of “misapplying the law and introducing sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton’s recusal motion. On the other side Justice Starcher granted Massey’s recusal motion, apparently based on his public criticism of Blankenship’s role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that “Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of this Court.” Justice Benjamin declined Justice Starcher’s suggestion and denied Caperton’s recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law—i.e., whether “a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin’s ability to be fair and impartial.” Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the “push poll” was “neither credible nor sufficiently reliable to serve as the basis for an elected judge’s disqualification.”

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of his prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.” The dissent also noted “genuine due process implications arising under federal law” with respect to Justice Benjamin’s failure to recuse himself.

Four months later—a month after the petition for writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton’s challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no “ ‘ direct, personal, substantial, pecuniary interest’ in this case.” Adopting “a standard merely of ‘appearances,’ ” he concluded, “seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”

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Caperton contends that Blankenship’s pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. [* * *]

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide “objective

evidence” or “objective information,” but merely “subjective belief” of bias. Nor could anyone “point to any actual conduct or activity on [his] part which could be termed ‘improper.’ ” In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

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The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee. Caperton claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Massey responds that Blankenship’s support, while significant, did not cause Benjamin’s victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship’s efforts. Massey points out that every major state newspaper, but one, endorsed Benjamin. It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage.

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Whether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” Blankenship’s campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the

risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million. Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—" "offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." ' ' On these extreme facts the probability of actual bias rises to an unconstitutional level.

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting.

I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

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Our decisions in this area have also emphasized when the Due Process Clause does not require recusal:

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

Subject to the two well-established exceptions described above, questions of judicial recusal are regulated by “common law, statute, or the professional standards of the bench and bar.”

In any given case, there are a number of factors that could give rise to a “probability” or “appearance” of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a “probability of bias.” Many state statutes require recusal based on a probability or appearance of bias, but “that alone would not be sufficient basis for imposing a *constitutional* requirement under the Due Process Clause.” [* * *]

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an “objective” standard. The majority’s analysis is “objective” in that it does not inquire into Justice Benjamin’s motives or decisionmaking process. But the standard the majority articulates—“probability of bias”—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”?
2. How do we determine whether a given expenditure is “disproportionate”? Disproportionate to what?
3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate’s campaign? What about contributions to independent outside groups supporting a candidate?
4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?
5. Does the amount at issue in the case matter? What if this case were an employment dispute with only \$10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?
6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?
7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?
9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases?
10. What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?
11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in his case, but in someone else’s?

12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (e.g., a facial challenge to an agency rulemaking or a suit seeking to limit an agency's jurisdiction)?

13. Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?

14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?

15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no "debt of gratitude" to the supporter? Does that "moot" the due process claim?

16. What if the judge voted against the supporter in many other cases?

17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly disclaims the support of this person?

18. Should we assume that elected judges feel a "debt of hostility" towards major opponents of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?

19. If there is independent review of a judge's recusal decision, e.g., by a panel of other judges, does this completely foreclose a due process claim?

20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?

21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?

22. Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?

23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?

24. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?

25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." But elsewhere in the opinion, the majority considers "the apparent effect such contribution had on the outcome of the election," and whether the litigant has been able to "choos[e] the judge in his own cause." If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent's missteps?

26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?

27. How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?

29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?

30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?

31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?

32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?

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38. If a judge erroneously fails to recuse, do we apply harmless-error review?

39. Does the judge get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?

40. What if the parties settle a Caperton claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a "judicially discernible and manageable standard" strongly counsels against the recognition of a novel constitutional right. The need to consider these and countless other questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as "probability" or "appearance" of bias.

To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an "extreme" one, so there is no need to worry about other cases. The Court repeats this point over and over.

But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the "Caperton motions" or appeals or §1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is really the most extreme thus far.

Notes on *Massey* and Impartial Tribunals

1. Is the Court really applying, as Kennedy suggests, "objective rules" in deciding this case? Is the loose balancing test the Court seems to be applying any easier to apply than a subjective inquiry into a judge's actual bias?

2. If a hearing is due, it must be before an officer or tribunal without a personal or institutional interest in the outcome. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) invalidated a statute permitting a local mayor, responsible for municipal finance, from trying traffic offenses where those proceeds would go to the village. *Gibson v. Berryhill*, 411 U.S. 564 (1973) ruled that an optometry board comprised of members of association of independent optometrists could not adjudicate a charge by that association that non-independent optometrists were violating statutory standards of professional conduct, because of the board members' financial incentive to eliminate their competitors. *Mayberry v. Pennsylvania*, 400 U. S. 455 (1971) held that a criminal contempt defendant could not be tried before the judge whom he had insulted, where those insults were the basis for the contempt charge. *Mayberry* is particularly striking, in two respects: first, the defendant's insults were largely attempts to question the judge's partiality (albeit hostile and offensive attempts), and second, the judge attempted to sentence the defendant to *11-22 years in prison* for 11 distinct insulting dialogues. Justice Harlan's concurrence seems to capture the nub of it:

[T]hese contempt convictions must be regarded as infected by the fact that the unprecedented long sentence of 22 years which they carried

was imposed by a judge who himself had been the victim of petitioner's shockingly abusive conduct. That circumstance seems to me to deprive the contempt proceeding of the appearance of evenhanded justice which is at the core of due process.

Other Issues

Notice of Civil Litigation

In *Jones v. Flowers*, 547 U.S. 220 (2006), the Court held that mailing of two certified letters which were returned undeliverable, plus a notice published in the newspaper, were insufficient to provide notice of a pending tax sale of plaintiff's real estate. In *United State Aid Funds v. Espinosa*, the Court held that a bankruptcy judgment discharging a student loan (despite its statutory non-dischargability) due to the creditor's failure to object to the plan. This holding was given despite the fact that the debtor had not served the creditor as required by the Bankruptcy Rules, because the creditor had actual notice of the claim. *Of interest*: Does the difference between litigation brought by the government and litigation brought by private parties make any difference to the amount of notice required?

"Virtual Representation" and the Application of Claim and Issue Preclusion to Nonparties

In *Taylor v. Sturgell*, 533 U.S. 880 (2008), the Court, in a 9-0 opinion, ruled that a plaintiff could not be "virtually represented," for purposes of precluding a lawsuit, because a prior plaintiff had filed suit based on the same facts with the same attorney. The Court characterized the "virtual representation" doctrine as an attempt to create a common-law class action without the procedural requirements of FRCP 23, which are "grounded in due process."

Driving

In *Mackey v. Montyrm*, 443 U.S. 1 (1979), the Court held that a driver's license is a property interest for due process purposes, but, in view of the *Matthews v. Eldridge* factors, that a post-deprivation hearing was adequate.

About the Author

Paul Gowder is an associate professor of law at the University of Iowa who teaches constitutional law, legal ethics, and similar subjects. His research occupies the nexus between jurisprudence and constitutional law, and currently focuses on the rule of law, a topic at which, over the last few years, he's been hurling a diverse array of tools and methods, including analytic philosophy, game theory, empirical data-crunching, and even ancient history—to the point that he resorted to learning Attic Greek in order to write a couple of papers about how the rule of law worked in Athens. Currently, he is at work on a book manuscript tentatively entitled *A Commitment to Equality: the Rule of Law in the Real World*. He also inserts himself into areas as diverse as the constitutionality of Obamacare, the countermajoritarian problem, the concept of race, and theories of liberty. He is a former public interest lawyer, who practiced with a private civil rights law firm in Alexandria, Virginia, and a legal aid organization in Ontario, Oregon, as well as a former New Orleans jazz band manager.

Change Log

Version 1.2, December 1, 2013: added additional text to introduction for students, added Caperton v. A.T. Massey Coal Co.