

DUE PROCESS

–. *WOODHAM v. STATE*, 28 Ala. App. 62, 64 (1938)

The manifest purpose of this provision is to accord to every citizen security against the arbitrary action of those in authority, and to place him under the protection of the "law of the land," which is synonymous with the expression, "due process of law."

–. *HECKLER v. CAMPBELL*, 461 U.S. 458 (1983)

Inherent in the concept of a due process hearing is the decision maker's obligation to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts. *Goss v. Lopez*, 419 U.S. 565, 580 (1975).

–. *DEGEN v. UNITED STATES*, 517 U.S. 820 (1996)

In an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property [ADMINISTRATIVE HEARING SEC. 6330 DOESN'T ALLOW FOR CHALLENGES TO JURISDICTION - OR DOES IT?], a right secured by the Due Process Clause, *United States v. James Daniel Good Real Property*, [510 U.S. 43, 48-62](#) (1993); *Fuentes v. Shevin*, [407 U.S. 67, 80](#) (1972); *McVeigh v. United States*, 11 Wall. 259, 266-267 (1871), and implemented by federal rule, Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

–. *MATHEWS v. ELDRIDGE*, 424 U.S. 319 (1976)

(a) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481.

We conclude that the denial of Eldridge's request for benefits constitutes a **final decision** for purposes of § 405(g) **jurisdiction over his constitutional claim**. We now proceed to the merits of that claim. [fn12]

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. [USE IN PETITION]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). See, e. g., *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). See also *Dent*

v. *West Virginia*, 129 U.S. 114, 124-125 (1889). 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." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)."

MATHEWS v. ELDRIDGE, 424 U.S. 319, 332-3 (1976)

–. *McKESSON CORP. v. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18 (1990)

These cases demonstrate the traditional legal analysis appropriate for determining Florida's **constitutional duty to provide relief to petitioner** [IRS HEARING CANNOT PROVIDE RELIEF DUE TO LACK OF JURISDICTION, ETC.] McKesson for its payment of an unlawful tax. Because exaction of a tax constitutes a deprivation of property, the State **must provide procedural safeguards against unlawful exactions** [NO PROCEDURAL SAFEGUARDS IN THE IRC - ONLY FOR TAXPAYERS][AS A NON-TAXPAYER, GEORGE CAN FIND NO PROCEDURAL SAFEGUARDS FOR AN UNLAWFUL EXACTION OF TAX BY LEVY OF PRIVATE PROPERTY] in order to satisfy the commands of the Due Process Clause.^[fn17] The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to **bring suit to enjoin imposition** of a Page 37 tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State. However, whereas "[w]e 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,'" *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes.^[fn18] Allowing taxpayers [NOTHING TO PROTECT THE NON-TAXPAYER] to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate **collection of validly imposed taxes** [WHAT'S THE SUBJECT OF THE TAX AND THE STATUTE THAT IMPOSES A TAX ON THAT SUBJECT?] more difficult.^[fn19] To protect government's **exceedingly strong interest** in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the **validity of the tax assessment** [MAKE IT CLEAR THAT GEORGE IS NOT CHALLENGING THE VALIDITY OF THE ASSESSMENT BUT THE ERRONEOUS EXACTION OF A TAX UPON A NON-TAXPAYER]. Page 38

In contrast, if a State chooses not to secure payments under duress and instead offers a **meaningful opportunity** for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." **The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure** [ACKNOWLEDGE THAT THE IRS HEARING IS A

SAFEGUARD BUT THAT IT CANNOT BE MEANINGFUL SINCE THE IRS HAS NO JURISDICTION OVER NON-TAXPAYERS][ALSO, THAT GEORGE WANTS TO AVAIL HIMSELF OF THE HEARING BUT IS BARRED BY STATUTE FROM RAISING ISSUES OF LAW NECESSARY TO PROTECT HIS PROPERTY]. See *Mississippi Tax Comm'n, supra*, at 368, n. 11 ("[W]here voluntary payment [of a tax] is knowingly made pursuant to an illegal demand recovery of that payment may be denied").

—("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest'");

–. *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*, 470 U.S. 532 (1985)

(b) The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires "some kind of hearing" prior to the discharge of an employee [GEORGE] who has a constitutionally protected property interest in his [PRIVATE PROPERTY] employment. The need for some form of pretermination hearing is evident from a balancing of the competing interests at stake: the private interest in retaining[GEORGE'S PRIVATE PROPERTY] employment, the governmental interests in expeditious [COLLECTION OF TAXES] removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous [EXACTION FROM A NON-TAXPAYER] termination. Pp. 542-545. (c) The pretermination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions — **essentially a determination of whether there are reasonable grounds to believe that the charges against the [NON-TAXPAYER] employee are true and support the proposed action.** The essential requirements of due process are notice and an opportunity to respond. Pp. 545-546. [NOTICE GIVEN BUT BARRED FROM RESPONDING TO FUNDAMENTAL QUESTIONS OF LAW]

The Due Process Clause Page 534 requires provision of a hearing "at a meaningful time,"[AFTER AN OPPORTUNITY FOR DISCOVERY TO OBTAIN ALL THE FACTS] and here the delay stemmed in part from the thoroughness of the procedures.

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.**"[USE IN PETITION - IRS ADMIN. HEARING IS NOT APPROPRIATE TO THE NATURE OF THE CASE INVOLVING A NON-TAXPAYER] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). 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."^[fn7] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent

proceedings." [NO SUBSEQUENT PROCEEDINGS IN IRC EXCEPT FINAL LEVY OF PRIVATE PROPERTY] *Boddie v. Connecticut*, 401 U.S., at 378. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894-895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action [YES, FOR TAXPAYERS, BUT NO, FOR NON-TAXPAYERS NOT SUBJECT TO THE TAX CODE]. *Mathews v. Eldridge*, 424 U.S., at 343. Under state law, respondents were later **entitled to a full administrative hearing and judicial review.** [NOT GIVEN TO NON-TAXPAYERS BY THE IRC - CONGRESS GAVE NO REMEDY TO NON-TAXPAYERS] The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly*, 397 U.S. 254 (1970), has **the Court required a full adversarial evidentiary hearing prior to adverse governmental action.** [THIS IS NEEDED FOR GEORGE BECAUSE OF ESTOPPEL] However, as the *Goldberg* Court itself pointed out, see *id.*, at 264, 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 —/[USE IN PETITION, I.E., AVOIDANCE OF MISTAKEN DECISION BY IRS] essentially, a determination of whether Page 546 there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.** See *Bell v. Burson*, 402 U.S., at 540.

The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. [NO MEANINGFUL FORUM FOR GEORGE AS TAXPAYER - IS AT DISADVANTAGE SINCE HE HAS NO IRS EVIDENCE FOR THEIR ACTION]

The tenured public employee is entitled to oral or **written notice** of the charges against him, an **explanation of the employer's evidence [UNEQUALITY IN THE LAW SINCE GEORGE HAS NOT BEEN GIVEN ANY IRS EVIDENCE FOR THEIR ACTIONS] [ARNETT CASE HOLDS THAT EVIDENCE BE GIVEN, IRC HAS NO SUCH PROVISION IN TAX COLLECTION]**, and an opportunity to present his side of the story. See *Arnett v. Kennedy*, 416 U.S., at 170-171 (opinion of POWELL, J.); *id.*, at 195-196 (opinion of WHITE, J.); see also *Goss v. Lopez*, 419 U.S., at 581.

NO EVIDENCE GIVEN BY IRS IN NOTICES AND IN CP 90
*** NO EVIDENCE ALLOWED IN SEC. 6330 HEARING**

The Due Process Clause requires provision of a hearing "at a meaningful time." [AFTER FULL DISCLOSURE OF FACTS AND DISCOVERY IS COMPLETED, NOT BEFORE A CHANCE TO OBTAIN AND REVIEW ALL EVIDENCE AGAINST GEORGE] E.g., *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

—. *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422 (1982)

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the **opportunity to present his case and have its merits fairly judged.** Thus it has become a truism that

"some form of hearing" is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571, n. 8 (emphasis in original).

IRS APPEALS OFFICER CANNOT JUDGE FAIRLY SINCE THEY HAVE NO JURISDICTION OVER NON-TAXPAYER ISSUES AND CANNOT MAKE JUDICIAL DETERMINATIONS IN QUESTIONS OF LAW, AND ARE ESTOPPED FROM HEARING SINCE IRS DIDN'T RESPOND TO NOTICES AND DEMANDS

On the other hand, the Court has acknowledged that the **timing and nature** of the required hearing [fn8] "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S., at 579. These include the **importance of the private interest** and the **length or finality of the deprivation** [SEIZING PROPERTY IS PERMANENT, FINAL], see *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S., at 19, and *Mathews v. Eldridge*, 424 U.S., at 334-335; **the likelihood of governmental error**, [WRONGFUL EXACTIONS FROM A NON-TAXPAYER] see *id.*, at 335; and the **magnitude of the governmental interests involved** [RELATIVELY SMALL SUM], see *ibid.*, and *Wolff v. McDonnell*, 418 U.S., at 561-563.

Each of these factors leads us to conclude that appellant Logan is entitled to have the Commission consider the merits of his charge, based upon the **substantiality of the available evidence**, before deciding whether to terminate his claim.

—administrative action resulting in deprivation of a **significant property interest** [USE IN PETITION]

__Having rejected respondent's statutory argument, we turn to his constitutional challenge. He contends that the review procedures established by [IRC Sec. 6330 in George's case] § 636(b)(1) permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violate the Due Process Clause of the Fifth Amendment and Art. III of the United States Constitution.

__**The guarantees of due process call for a "hearing appropriate to the nature of the case."** *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), we emphasized that **three factors** should be considered in determining whether the **flexible concepts of due process have been satisfied: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve.** [USE IN PETITION] In providing the fullest measure of due process protection, the Court of Appeals stressed that in this particular case the success or failure of the motion to suppress would, as a practical matter, determine the outcome of the prosecution.

In my view, the Due Process Clause requires that a judicial officer entrusted with finding the facts in a criminal case must hear the testimony whenever a **fair resolution of disputed issues** cannot be made on the basis of a review of the cold Page 695 record.

A rule that would allow a criminal defendant to face a jail sentence [**LOSS OF PROPERTY**] on the

basis of factual findings made by one who has not heard [IGNORED THE EVIDENCE] the evidence is, in my view, **foreign to notions of fair adjudicative procedure embodied in the Due Process Clause.**^[fn3] Page 698

the requirements of **fair adjudicative procedure** that the Due Process Clause reflects

there may be **no settings** in which the **principle that "[t]he one who decides must hear"** will carry force.

__I see no reason to second-guess that determination^[fn9] As a result, it is **axiomatic** that **some procedural protections are required by the Due Process Clause** [NONE ARE AVAILABLE TO NON-TAXPAYERS]. The extent of those protections is a difficult question, and I think the Court of Appeals may have gone too far when it ordered an **adjudicative hearing**.

MEMPHIS LIGHT, GAS & WATER DIV. v. CRAFT, 436 U.S. 1 (1978)

The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for [NO EVIDENCE PROVIDED TO GEORGE IN PREPARATION - NO DISCOVERY, NO WITNESS LIST, NO SUBPEONA POWER TO COMPEL WITNESSES TO APPEAR AT SAID HEARING, ETC.], an impending "hearing."^[fn15] Notice in a case of this kind Page 15 **does not comport with constitutional requirements** when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents — despite "good faith efforts" on their part

they were deprived of the notice which was their due.^[fn16] Page 16

This Court consistently has held that "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974).

Our decision in *Mathews v. Eldridge*,^{424 U.S. 319} (1976), provides a framework of analysis for determining the "specific dictates of due process" in this case. **"[O]ur 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 Page 18 or substitute procedural requirement would entail** [USE IN PETITION]." *Id.*, at 334-335.

Under the balancing approach outlined in *Mathews*, some administrative procedure for entertaining customer complaints prior to termination is required to **afford reasonable assurance against erroneous or arbitrary [LEVY OF PERSONAL PROPERTY]** withholding of essential services. **The customer's interest is self-evident.** Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And

the **risk of an erroneous deprivation** [OF GEORGE'S PRIVATE PROPERTY], given the necessary reliance on computers,^[fn20] **is not insubstantial.**^[fn21]

Petitioners contend that the available **common-law remedies of a pretermination injunction**, a post-termination suit for damages, and post-payment action for a refund are sufficient to cure any perceived inadequacy in MLG&W's procedures.^[fn23]

Ordinarily, **due process of law requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest.** See *Boddie v. Connecticut*, **401 U.S. 371, 379** (1971).

The **injunction remedy** referred to by petitioners would not be an adequate substitute for a pretermination review of the disputed bill

availability of **injunctive relief**

–. *ARNETT v. KENNEDY*, 416 U.S. 134 (1974)

Here **appellee chose not to rely on his administrative appeal** [SAME AS GEORGE] - **USE AS REASON FOR REQUESTING A JUDICIAL HEARING**], which, if his factual contentions are correct, might well have vindicated his reputation and removed any wrongful stigma from his reputation.

In my view, **three issues** must be addressed in this case. **First, does the Due Process Clause require that there be a full trial-type hearing at some time** when a Federal Government employee in the competitive service is terminated? **Secondly, if such be the case, must this hearing be held prior to the discharge of the employee**, and, if so, was the process afforded in this case adequate? **Third, and as an entirely separate matter, are the Lloyd-La Follette Act and its attendant regulations void for vagueness or overbreadth?** I join the Court as to the third issue.

The past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests.^[fn6] The principles of due process "come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." *Dent v. West Virginia*, **129 U.S. 114, 123** (1889). 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." *Anti-Fascist Committee v. McGrath*, **341 U.S. 123, 168** (1951) (Frankfurter, J., concurring).

This basic principle has unwaveringly been applied when **private property** has been taken by the State. A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, **234 U.S. 385, 394** (1914). **"It is an opportunity which must be granted at a meaningful time and in a meaningful manner."** *Armstrong v. Manzo*, **380 U.S. 545, 552** (1965). Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co. v. Chicago*, **211 U.S. 306** (1908) (seizure of food unfit for consumption); *Central Trust Co. v.*

Garvan, [254 U.S. 554](#) (1921) (seizure of property under Trading with the Page 179 Enemy Act); *Corn Exchange Bank v. Coler*, [280 U.S. 218](#) (1930) (seizure of assets of an absconding husband); *Phillips v. Commissioner*, [283 U.S. 589](#) (1931) (collection of a tax); *Bowles v. Willingham*, [321 U.S. 503](#) (1944) (setting of price regulations); *Fahey v. Mallonee*, [332 U.S. 245](#) (1947) (appointment of conservator of assets of savings and loan association); *Ewing v. Mytinger & Casselberry*, [339 U.S. 594](#) (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also **reaffirm the principle that property may not be taken without a hearing at some time.**

Since there is a need for some kind of hearing before a person is finally deprived of his property, the argument in the instant case, and that adopted in the plurality opinion, is that **there is something different about a final taking from an individual of property rights which have their origin in the public rather than the private sector of the economy [GOOD POINT UT USE IN PETITION]**, and, as applied here, that there is no need for any hearing at any time when the Government Page 181 discharges a person from his job, even though good cause for the discharge is required.

"Where administrative action has raised serious constitutional problems

In the *Roth* and *Sindermann* cases, MR. JUSTICE STEWART established the framework for analysis to determine in what circumstances the Due Process Clause demands a hearing. He observed that although due process is a flexible concept, it is not unlimited in application. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Roth, supra*, at 569. Thus the first issue to be decided is whether appellee had an interest in his tenured Government employment such that his discharge amounts to a deprivation of liberty or property.

The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore Page 227 **the right to an evidentiary hearing before an impartial decisionmaker prior to [SEIZURE BY THE IRS] dismissal. Accordingly, I would affirm the decision of the court below that appellee had been discharged in violation of his procedural due process rights. [IRS SEC. 6330 DOESN'T ALLOW FOR EVIDENTIARY HEARING SO PETITION IS JUSTIFIED IN USDC]**

–. *U.S. DEPT. OF AGRICULTURE v. MURRY*, 413 U.S. 508 (1973)

In short, where the **private interests affected** are very important and the **governmental interest can be promoted without much difficulty by a well-designed hearing procedure [GEORGE'S JUDICIAL HEARING]**, the **Due Process Clause requires the Government to act on an individualized basis [NON-TAXPAYER HEARING NOT PROVIDED FOR BY CONGRESS]**, with general propositions serving only as **rebuttable presumptions** or other burden-shifting devices. That, I think, is the import of *Stanley v. Illinois*, 405 U.S. 645 (1972).

–. *CITY OF KENOSHA v. BRUNO*, 412 U.S. 507 (1973)

adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial [of renewal of his license] and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript." [REQUEST THIS IN PETITION] 346 F. Supp. 43, [51](#).

–. *FUENTES v. SHEVIN*, 407 U.S. 67 (1972)

The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. **While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing**, it is not decisive of the basic right to a prior hearing of some kind.

The Court relies on prior cases, particularly *Goldberg v. Kelly*, [397 U.S. 254](#) (1970); *Bell v. Burson*, [402 U.S. 535](#) (1971); and *Stanley v. Illinois*, [405 U.S. 645](#) (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . ." "[W]hat procedures due process may require under any given set of circumstances must begin Page 102 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." *Cafeteria Workers v. McElroy*, [367 U.S. 886, 895](#) (1961). [MAKE CLEAR THAT NO CHALLENGE IS MADE TO THE GOVERNMENT'S RIGHT TO TAX OR COLLECT, ETC. ONLY TO ERRONEOUS DEPRIVATION FROM A NON-TAXPAYER - IRS BEING ESTOPPED FROM COLLECTION AS IF GEORGE WAS A TAXPAYER] See also *Stanley v. Illinois*, *supra*, at 650; *Goldberg v. Kelly*, *supra*, at 263. Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing.

** [USE IN PETITION]

–. *FEIN v. SELECTIVE SERVICE SYSTEM*, 405 U.S. 365 (1972)

We explained the nature of the "hearing" required by the Due Process Clause of the Fifth Amendment in *Morgan v. United States*, 304 U.S. 1, 18-19: "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313; *Jenkins v. McKeithen*, 395 U.S. 411; *Greene* Page 383 v. *McElroy*, 360 U.S. 474, 493; *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368-369.

When administrative orders deprive a person of property without a **full and fair opportunity to object**, this Court has been most reluctant to defer judicial review until after those orders have taken effect. See *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385. Judicial scrutiny has been particularly close where, as here, review is conditioned upon submitting to the risk of substantial penalties should the order prove to have been validly made. See *Oklahoma Operating Co. v. Love*, 252 U.S. 331; *Ex parte Young*, 209 U.S. 123. Cf. *Reisman v. Caplin*, 375 U.S. 440, 446-450. **We should require no less when personal liberty is at stake.[fn3]**

–. *BELL v. BURSON*, 402 U.S. 535 (1971)

The same is true if prior to suspension there is an adjudication of nonliability. *Ibid.* Even after suspension has been declared, **a release from liability or an adjudication of nonliability** [IRS HEARING WILL NOT PROVIDE RELEASE FROM LIABILITY - IS BARRED BY SEC. 6330] will lift the suspension. Ga. Code Ann. § 92A-607 (Supp. 1970). Moreover, other of the Act's exceptions are developed around **liability-related concepts**. [USE] Thus, we are not dealing here with a no-fault scheme. Since the statutory scheme makes **liability an important factor in the State's** [IRS'S]determination to deprive an individual of his[PRIVATE PROPERTY WITH LIENS AND LEVIES] licenses, **the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing**[IRC Sec. 6330 PRECLUDES ANY ISSUES OF LIABILITY BEING RAISED]. The hearing required by the Due Process Clause must be "meaningful," *Armstrong v. Manzo*, **380 U.S. 545**, Page 542

question of liability, that determination

While "[m]any controversies have raged about . . . the Due Process Clause," *ibid.*, it is fundamental that except in emergency situations (and this is not one)[fn5] due process requires that when a State seeks to terminate an interest such as that here involved, **it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.** *Ibid.* *Opp Cotton Mills v. Administrator*, **312 U.S., at 152-156**; *Sniadach v. Family Finance Corp.*, *supra*; *Goldberg v. Kelly*, *supra*; *Wisconsin v. Constantineau*, **400 U.S. 433** (1971).

—an **adversary hearing at which the defendant could cross-examine the sources of the information**

–. *JENKINS v. McKEITHEN*, 395 U.S. 411 (1969)

The **right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause.** [GEORGE SHOULD ASK FOR EVIDENCE IN PREPARATION FOR HEARING] See, e. g., *Morgan v. United States*, *supra*, at 18; *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, **368-369** (1936). And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly **results in a finding that a particular individual was** [LIABLE FOR ERRONEOUS INCOME TAX PAYMENTS]guilty of a crime. Cf. *Washington v. Texas*, **388 U.S.**

[14](#) (1967); *In re Oliver*, [333 U.S. 257](#), [273](#) (1948).

–. *NOSTRAND v. LITTLE*, 362 U.S. 474 (1960)

... appellants contended that no hearing is afforded at which an [NON-TAXPAYER] employee **can explain or defend his refusal** to [PAY ERRONEOUS TAX PAYMENTS / EXACTIONS] take the oath and that this violates the Due Process Clause of the Fourteenth Amendment; but ... not passed on the question whether such a hearing is afforded. Held: The judgment is vacated and the case is remanded to the State Supreme Court for further consideration. Pp. 474-476. 53 Wn.2d 460 ...

–. *CARITATIVO v. CALIFORNIA*, 357 U.S. 549 (1958)

Audi alteram partem — hear the other side! — a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and **every branch of them** — executive, legislative, and judicial — whenever any individual, however lowly and unfortunate, **asserts a legal claim**. It is beside the point that the claim may turn out not to be meritorious. It is beside the point that delay in the enforcement of the law may be entailed. The protection of a constitutional right to life ought not be subordinated to the fear that some lawyers will be wanting in the observance of their professional responsibilities. The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the sad history of its denial, than inconvenience in the execution of the law. If this is true when mere property interests are at stake, see *Walker v. City of Hutchinson*, [352 U.S. 112](#); *Covey v. Town of Somers*, [351 U.S. 141](#); *Mullane v. Central Hanover Bank & Trust Co.*, [339 U.S. 306](#), how much more so when the difference is between life and death. As Mr. Justice Holmes said, happily speaking for the Court, in *United States v. Oppenheimer*, [242 U.S. 85](#), [87](#), "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."

–. *MOORE v. MICHIGAN*, 355 U.S. 155 (1957)

We may reasonably infer from the record that neither the trial judge nor the Michigan courts which considered the delayed motion thought that the petitioner's plight required **the assistance of counsel to satisfy the requisites of the fair hearing secured by the Due Process Clause** [USE IN HEARING PETITION] of the Fourteenth Amendment in a state prosecution. The principles determining the extent to which this constitutional right to counsel is secured in a state prosecution have been discussed in a long series of decisions of this Court.^[fn7] We hold that the petitioner's case falls within that class in which the **intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing** [GEORGE CAN USE THIS TO HIS ADVANTAGE FOR A FAIR HEARING].

This Court held in *Johnson v. Zerbst*, *supra*, that when a judgment of conviction entered in a federal

court is collaterally attacked upon the ground that the defendant did not have the benefit of counsel, **he has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel.** We have found that the petitioner was entitled to the benefit of counsel to secure the fair hearing guaranteed to him by the Due Process Clause of the Fourteenth Amendment. Whatever may be the differences in the substantive right to counsel in federal and state cases, when the defendant in a state case has established his constitutional right to the benefit of counsel, **he should carry the same burden of proving nonwaiver as is required of a defendant in a federal case.** We therefore hold that the rule of *Johnson v. Zerbst* applies in this case and that **the petitioner had the burden of showing, by a Page 162 preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel.**

–. *MARCELLO v. BONDS*, 349 U.S. 302 (1955)

A fair hearing necessarily includes an **impartial tribunal**. Petitioner claims that the circumstances here deprived him of that kind of tribunal. The officer who conducted the hearings, decided the case and made recommendations for deportation was connected with the Immigration and Naturalization Service. **[IRS APPEALS OFFICER HAS CONFLICT OF INTEREST ESPECIALLY WITH REGARDS TO CASH INCENTIVE AWARDS]** This hearing officer was subject to the supervision, direction and control of the Attorney General and his subordinate supervisory officers of the Immigration Service who perform investigative and prosecutorial functions. **Thus the hearing officer adjudicated the very case against petitioner which the hearing officer's superiors initiated and prosecuted [SAME THING WITH IRS APPEALS OFFICER!]** Petitioner's argument is that requiring him to have his cause adjudicated by such a subordinate of the prosecutors deprives him of due process. This due process challenge cannot be lightly dismissed, but I find it unnecessary to rest my dissent on a determination of that question. For Congress in the Administrative Procedure Act [fn2] has barred hearing officers from adjudicating cases under the circumstances here, and I think that Act is applicable to this case.

–. *B. & O.R. Co., v. UNITED STATES*, 298 U.S. 349 (1936)

But, when he appropriately invokes the just compensation clause, he is entitled to a **judicial determination** of the amount. **The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function Page 369 involved. That includes the right to introduce evidence [fn28] and have judicial findings based upon it.[fn29]** [USE IN PETITION]

–. *GEORGIA RY. & EL. CO. v. DECATUR*, 297 U.S. 620 (1936)

In the previous litigation no claim was made by the municipality that appellants were **estopped from contesting their liability therefor** [USE IN PETITION - IMPORTANT ISSUE TO BE RAISED]. No issue or claim of estoppel was raised or made by the municipality in the present litigation. The municipality is judicially estopped from claiming an estoppel. **Appellants were given no hearing**

and no opportunity to be heard on the question of estoppel. [GREAT ARGUMENT TO USE IN GEORGE'S CASE ALONG WITH ASSISTANCE OF COUNSEL]The issue of estoppel was not raised by the pleadings. Under the due process clause of the Federal Constitution, appellants are entitled to a notice and a hearing on material issues. [USE IN PETITION]

–. *SNYDER v. MASSACHUSETTS*, 291 U.S. 97 (1934)

–. *CROWELL v. BENSON*, 285 U.S. 22 (1932)

The due process clause of the Fifth Amendment is fully satisfied by the provision[ACT] for a hearing before an administrative tribunal and for a judicial review of the administrative determination if that determination is "not in accordance with law." *Reetz v. Michigan*, 188 U.S. 505, 507; *Weimer v. Bunbury*, 30 Mich. 201, 211; *Long Island Water Co. v. Brooklyn*, 166 U.S. 685, 695; *Phillips v. Commissioner*, 283 U.S. 589, 600. In numerous instances Congress has expressly provided that administrative findings of fact when supported by evidence shall be conclusive. Fed. Tr. Comm. Act, U.S.C. Tit. 15, § 45; Clayton Act, *id.* § 21; Tariff Act, 1922, U.S.C. Tit. 19, § 176; Tariff Act, 1930, U.S.C. Supp. IV, Tit. 19, § 1337(c); Radio Act, *id.* Tit. 47, § 96.

The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.[fn11]

–. *TRUAX v. CORRIGAN*, 257 U.S. 312 (1921)

The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. "All men are equal before the law," [THIS INCLUDES NON-TAXPAYERS AND THEIR RIGHT TO A MEANINGFUL HEARING] "This is a government of laws and not of men," "No man is above the law," are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class. [EX. NON-TAXPAYER VS. TAXPAYER DUE PROCESS HEARINGS]

The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination Page 333 or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

— *RIVERSIDE MILLS v. MENEFE*, 237 U.S. 189 (1915)

Equally well settled is it that the [IRS APPEALS OFFICERS] courts of one State cannot without a violation of the due ... process clause, extend their authority [TO NON-TAXPAYERS] beyond their jurisdiction so as to condemn [THOSE NOT SUBJECT TO OR LIABLE FOR THE INCOME TAX] the resident of another State when neither his person nor his property is within the jurisdiction of the court

—temporary injunction was allowed

— *HIBBS v. WINN*, 542 U.S. 88 (2004)

That this Court and other federal courts have Page 120 allowed nontaxpayer suits challenging tax credits to proceed in the face of the anti-injunction provision is not at all controlling. Those cases are quite distinguishable. Had the plaintiffs in those cases been barred from suit, there would have been no available forum at all for their claims. [NON-TAXPAYER CONSTITUTIONAL CLAIMS] See *McGlotten v. Connally*, 338 F. Supp. 448, 453-454 (DC 1972) (three-judge court)

Taking the federal anti-injunction provision first, as has been noted before, "[its] history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited." *Regan*, 465 U. S., at 387 (O'CONNOR, J., concurring in judgment). The provision responded to "the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue." *Id.*, at 388. It "generally precludes judicial resolution of all abstract tax controversies," whether brought by a taxpayer or a nontaxpayer. *Id.*, at 392; see also *id.*, at 387-392 (reviewing the legislative history of the anti-injunction provision, its various amendments, and related enactments). Thus, the provision's object is not just to bar suits that might "interrupt `the process of collecting . . . taxes,'" but "[s]imilarly, the language and history evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration." *Id.*, at 399. Page 123

After today's decision, "[n]ontaxpaying associations of tax-payers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against [federal] judicial resolution of abstract [state] tax controversies." *Regan*, 465 U. S., at 394 (O'CONNOR, J., concurring in judgment). This

unfortunate result deprives state courts of the first opportunity to hear such cases and to grant the relief the Constitution requires.

The Tax Anti-Injunction Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." [26 U.S.C. § 7421\(a\)](#). The Act's language "could scarcely be more explicit" in prohibiting nontaxpayer suits like this one, *Bob Jones University v. Simon*, [416 U.S. 725, 736](#) (1974), since the suit indisputably would have the purpose and effect of restraining taxes. See *id.*, at 738-742. The Act plainly bars not only "a taxpayer's Page 386 attempt to enjoin the collection of his own taxes, . . ." but also "a suit to enjoin the assessment or collection of anyon[e] [else's] taxes . . ." *Alexander v. "Americans United" Inc.*, [416 U.S. 752, 760](#) (1974). Though the Internal Revenue Code (Code) contains a few exceptions to this nearly complete ban,[\[fn1\]](#) for the most part Congress has restricted the judicial role to resolution of concrete disputes over specific sums of money,

either by way of a deficiency proceeding in the Tax Court, see [26 U.S.C. § 6212, 6213](#), or by way of a taxpayer's suit for refund, see [26 U.S.C. § 6532, 7422](#).

In **depriving courts of jurisdiction to resolve abstract tax controversies**, Congress has determined that the United States must be able "to assess and collect taxes alleged to be due without judicial intervention . . ." *Enochs v. Williams Packing & Navigation Co.*, [370 U.S. 1, 7](#) (1962). "[T]axes are the life-blood of government," *Bull v. United States*, [295 U.S. 247, 259](#) (1935), and the anti-injunction prohibition is Congress' recognition that "the tenacity of the American taxpayer" constantly threatens to drain the Nation of a life-sustaining infusion of revenues. See Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases*, 10 *Taxes* 446, 446 (1932). The Act's proscription literally extends to nontaxpayer as well as taxpayer suits, if only to prevent taxpayers from sidestepping the anti-injunction policy by bringing suit through nontaxpaying associations of taxpayers.[\[fn2\]](#) Page 387 Moreover, by broadly precluding both taxpayer and nontaxpayer suits, the Act serves a collateral objective of protecting "the collector from litigation pending a suit for refund." *Enochs v. Williams Packing & Navigation Co.*, *supra*, at 7-8. The tax collector is an attractive target for all kinds of litigation, see, e. g., *Simon v. Eastern Kentucky Welfare Rights Organization*, [426 U.S. 26](#) (1976), and the Act ensures that only Congress and the Treasury, not a host of private plaintiffs, will determine the focus of the collector's energies.

The Act's history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited. First enacted in 1867,[\[fn3\]](#) it apparently was designed to protect the federal tax system from being inundated with the same type of injunctive suits that were then sweeping over the state tax systems. See *State Railroad Tax Cases*, [92 U.S. 575, 613](#) (1876); *Snyder v. Marks*, [109 U.S. 189, 193-194](#) (1883). There is little contemporaneous documentation,[\[fn4\]](#) but this Court's decisions indicate that the 39th Congress acted with a ". . . sense of . . . the evils to be feared if courts of justice could, in any case, interfere with the process of collecting Page 388 the taxes on which the government depends for its continued existence." *State Railroad Tax Cases*, *supra*, at 613.

–. *GOLDBERG v. KELLY*, 397 U.S. 254 (1970)

For more than a century the central meaning of procedural due process has been clear: "**Parties whose rights are to be affected are entitled to be heard**; and in order that they may enjoy that right they must **first be notified**." *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the **right to notice** and an **opportunity to be heard** "must be granted at a **meaningful time** and in a **meaningful manner**." *Armstrong v. Manzo*, 380 U.S. 545, 552. . . So viewed, **the prohibition against the deprivation of property without due process of law** reflects the high value, embedded in our constitutional and political history, that we place on **a person's right to enjoy what is his, free of governmental interference**. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552. . It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o 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." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (Frankfurter, J., concurring). . . If the right to notice and a hearing is to serve its full purpose, then, it is clear that **it must be granted at a time when the deprivation can still be prevented**. . . This is no new principle of constitutional

–. *BALDWIN v. HALE*, 1 Wall. 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense");

United States Supreme Court Reports

–. *WINDSOR v. McVEIGH*, 93 U.S. 274 (1876) OCTOBER TERM, 1876.

... *WINDSOR v. McVEIGH*, 93 U.S. 274 (1876) *WINDSOR v. McVEIGH*. OCTOBER TERM, 1876. A sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is ... upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. 4. The doctrine, that where a ... notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were ... other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. **Until notice is given, the court has no jurisdiction** ... notice of some kind was given, and that it was just as material to the validity of a judgment in rem that constructive notice at least should appear to have been given as that actual notice should ...

–. *HELVERING v. CITY BANK CO.*, 296 U.S. 85 (1935)

The section was first introduced into the Revenue Act of 1924, and reenacted in that of 1926. Mrs. James created her trust in 1930. **She was, therefore, upon notice of the law's command**, and there

can be no claim that the statute is retroactive in its application to her transfer. Page 90

–. *HOLDEN v. HARDY*, 169 U.S. 366 (1898)

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, Page 390 as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees v. Hoboken Land Co.*, 18 How. 272, 276, as anywhere. He said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. **It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will.** To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

principle of being bound to know and take notice of the law.

under that notice of the law which all must be presumed to possess

full notice of the law, by proclamation, and publishing in Court.

–. *ANTI-FASCIST COMMITTEE v. McGRATH*, 341 U.S. 123, 161, 162 (1951)

Fairness of procedure is "due process in the primary sense." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681. 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. **"[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.** Page 162 One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard" *The Japanese Immigrant Case*, 189 U.S. 86, 100-101. "[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." *Hagar v. Reclamation District*, 111 U.S. 701, 708. "Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." *Southern R. Co. v. Virginia*, 290 U.S. 190, 199. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co. v. Hill*, *supra*, 281 U.S. at 682.

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, Page 163 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.

Post-dated complaint: That the complaint is void on its face because it shows that it was executed by the arresting officer, on July 31, 2009, five days after Plaintiff's arrest, imprisonment, and release on July 26, 2009, A void complaint renders this court without subject matter jurisdiction;

- Defect was raised in a timely manner re. No ordinance number.
- Raise constitutional bar to statute
- **"Once jurisdiction is challenged, it must be proven."** (Emphasis added.) *Hagans v. Lavine*, 415 U.S. 528, 533 (1974)

- Nolle prosequi proves that Town had no jurisdiction over alleged charge

If it didn't make any difference as to the jurisdiction whether a UTTC had a proper cite for the ordinance then why would the prosecutor dismiss the case for that very reason?

- Cite "lost jurisdiction" due to due process violations.
- No standing = no jurisdiction

–. *ALLEN v. WRIGHT*, 468 U.S. 737 (1984)

The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the Page 751 court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, *supra*, at 498. Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. See *Valley Forge*, *supra*, at 474-475. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

454 U.S., at 472. Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "distinct and palpable," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, *supra*, at 501), and not "abstract" or "conjectural" or "hypothetical," *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S., at 38, 41. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise. The absence of precise definitions, however, as this Court's extensive body of case law on standing illustrates, see generally *Valley Forge*, *supra*, at 471-476, hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law. In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing Page 752 cases. See, e. g., *Los Angeles v. Lyons*, *supra*, at 102-105.

–. *United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982)

The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. 454 U.S., at 472.

Appellant further argues that the trial court erred in denying his pre-trial motion to dismiss, grounded on the allegation that the court lacked jurisdiction to hear the *de novo* appeal because the Municipal Court of Trussville lacked jurisdiction initially. The lack-of-jurisdiction claim arose from the Uniform Traffic Ticket and Complaint (hereinafter "U.T.T.C."), which cited the violation of § 32-5A-191, Code of Alabama 1975, but failed to designate whether the violation was under the state code or a municipal ordinance. Appellant contends that, in order for a municipal court to have jurisdiction, the charge must arise from a city ordinance or from an adopting ordinance making the state statute applicable. See §§ 12-14-1(b) and (c). Furthermore, appellant argues that this

requirement pertains to subject matter jurisdiction and is, therefore, not waived if not raised in the lower court. In *City of Dothan v. Holloway*, 501 So.2d 1136 (Ala. 1986), our supreme court held Page 1085 that any irregularity in the U.T.T.C. affects only the court's obtaining personal jurisdiction over the defendant and, as a result, the failure to raise the issue of such a defect in a timely manner before the municipal court waives the defect. In applying this holding to the case at bar, we conclude that the failure to properly fill out the instant U.T.T.C. and cite a city ordinance or adopting ordinance instead of a state statute affected only the lower court's personal jurisdiction. Therefore, the failure to raise the issue in a timely manner waived the defect. There is nothing in the record before us to indicate that appellant raised this defect before the municipal court and, therefore, any subsequent allegations of error based on this issue were untimely and were not properly preserved.

A void complaint goes to the heart of jurisdiction. Without a valid complaint before Mathews he has nothing which invokes his jurisdiction and cannot proceed.

Other reasons complaint was invalid can be alleged with leave to amend including,

_____.

- . Declaration of Independence and Alabama Declaration of Rights state that only legitimate purpose of government is to protect the rights of the people, i.e., life, liberty, and property
- . Standing involves (1) the violation of a right, (2) injury; the only authority one needs is to look at the Declaration of Independence and the Alabama Declaration of Rights for the reason for the establishment of government.

WHEREFORE,. . . To deprive a citizen of his only effective remedy would not only be contrary to the "rudimentary demands of justice" [fn21] but destructive of a constitutional guaranty specifically designed to prevent injustice. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938)

Plaintiff alleged the absence of an ordinance number as one reason

1.3. The crucial issue affecting judicial immunity hinges on whether Mathews

- 1.1. The U.S. Supreme Court held in *Bradley v. Fisher*, 80 U.S. 335, 351 (1871) that judges of inferior court with limited jurisdiction are protected to a lesser extent from civil liability than judges of general jurisdiction, to wit, "[T]hat with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction" (quoting from *Randall v. Brigham*, 74 U.S. 523,

531 (1868))

In an action against a judge of any court, whether of record or otherwise, for any act done by him or by his command, the question in every case to be determined is, *was the act done a judicial act, done within his jurisdiction?* If it was not, he can claim no immunity or exemption by virtue of his office from liability as a trespasser; "for if he has acted without jurisdiction, he has ceased to be a judge." *Randall v. Brigham*, 74 U.S. 523, 531 (1868))

It is a general principle, applicable to all magistrates, even to those of inferior jurisdiction, that they are not liable to an action for any judicial act done within their jurisdiction. In reference to inferior magistrates, it has been said that they are only protected while they act within their jurisdiction. *Randall, supra*, at p. 532

But in reference to judges of courts of general jurisdiction, the rule is not thus limited. Such judges are not liable to actions for their judicial acts, whether within or without their jurisdiction. 1. The extent of a judge's jurisdiction is often the very question which he is called on judicially to determine. To decide upon this question is as much a judicial decision as any other. And the question may be a difficult and doubtful one. Yet he is bound to decide, and to decide according to his judgment. But shall he decide in fear or peril of a lawsuit? 2. The reason applicable to inferior magistrates does not apply. There must be some point in the administration of the law where unqualified confidence is to be reposed and acknowledged; some ultimate repository of justice, so far as individuals are concerned. In England, the king's judges Page 533 occupy this position; the judges of courts of general jurisdiction. To them is delegated the whole judicial power of the sovereign; and they are responsible to the sovereign alone.^[fn*] As long ago as 1608, in *Floyd & Barker's Case*,^[fn†] it was said:

Jurisdiction when challenged should be resolved in favor of the citizen.

A fair doubt as to the extent of the jurisdiction or power of such tribunals should be resolved against them; and, second, strict regard should be had to constitutional provisions, the object and purpose of which are to secure the liberty, and to protect the rights of the citizen.

28 Ala. App. at 63, 178 So. at 465.

The court then quoted from the Alabama Constitution (1901), § 6, and stated: **"The manifest**

purpose of this provision is to accord to every citizen security against the arbitrary action of those in authority, and to place him under the protection of the 'law of the land,' which is synonymous with the expression, 'due process of law.' "

GLADDEN v. STATE, 36 Ala. App. 197 (1951)

While jurisdiction of the subject matter cannot be conferred by consent, jurisdiction of the person may, and irregularities in obtaining jurisdiction of the person may be waived. The appellant's actions in the trial below constituted such waiver. *Sanders v. State*, 16 Ala. App. 531, 79 So. 312; *James v. State*, 21 Ala. App. 295, 107 So. 727; *Booth v. State*, 21 Ala. App. 160, 105 So. 912.

two-pronged test for absolute judicial immunity is set down in *Stump v. Sparkman*, 435 U.S. 349, 362, 367 (1978), i.e., (1) did the judge act in his judicial capacity, and (2) did the judge in his judicial capacity have jurisdiction.

–. Crucial issue is whether Mathews acted within his jurisdiction

The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i. e.*, whether they dealt with the

jurisdiction in limited court is never to be presumed - Mathews was *not* a judge of general jurisdiction - more scrutiny

Plaintiff challenged jurisdiction on many counts (Exhibit A–)

“Due process of law in addition to notice and hearing also means a hearing before a tribunal authorized by law to conduct the proceedings it undertakes; **arbitrary assumption of a power by a tribunal and proceedings by it without jurisdiction are not due process of law, and where the tribunal has jurisdiction its action is not due process of law if it refuses the accused a right to put in his defense.”** (Emphasis added.) *Hovey v. Elliott*, 167 U.S. 414; *McVeigh v. United States*, 11 Wall. 259; *Windsor v. McVeigh*, 93 U.S. 277; *Dent v. West Virginia*, 129 U.S. 124. *TURNER v. FISHER*, 222 U.S. 204 (1911)

Where jurisdiction is denied and squarely challenged, jurisdiction cannot be assumed to exist "sub silentio" but must be proven. *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5; *Monell v. N.Y.*, 436 U.S. 633. Mere "good faith" assertions of power and authority (jurisdiction) have been abolished. *Owen v. Indiana*, 445 U.S. 622; *Butz v. Economou*, 438 U.S. 478; *Bivens v. 6 unknown agents*, 403 U.S. 388.

"Jurisdiction" is a coat of many colors. I note only that the Court's finding that Judge Stump had jurisdiction to entertain Mrs. McFarlin's petition seems to me to be based upon dangerously broad Page 368 criteria.

[fn6] Page 356 In holding that a judge was immune for his judicial acts, even when such acts were performed in excess of his jurisdiction, the Court in *Bradley* stated: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Id.*, at 351-352.

Jurisdiction challenged must be answered otherwise all further proceedings may be void - not done for six months

Plaintiff alleges Mathews violated his constitutionally protected right to due process, equal protection, etc. (cite) in the counts #__, __, __

Mathews was acting the purported capacity as municipal court judge when violations occurred – passed first part of two-pronged test

Mathews had no jurisdiction when the complaint is invalid on its face - alleged in two of many ways in complaint (cite)

State law requires gun related ordinances to be adopted by the towns before they can enforce. No proof. Challenged. Will re-allege in amendment

Complaint validity goes to the heart of subject matter jurisdiction - judge has nothing to invoke the court's jurisdiction except the complaint. Invalid complaint on its face=no jurisdiction

A judge acting in his judicial capacity but without jurisdiction is liable for damages

Jurisdiction also can be lost by violating due process, etc.,

Many other reasons will be given in amendment for an invalid complaint.

Defendant did not support by case law that the complaint was valid despite all the numerous defects alleged by Plaintiff

Move to deny ground of absolute immunity on jurisdiction prong of the two-pronged test

2 – DEFENDANT MATHEWS IS *NOT* ENTITLED
TO QUALIFIED JUDICIAL IMMUNITY FROM
PLAINTIFF'S CLAIMS IN THIS ACTION UNDER
42 U.S.C. § 1983

–. Defendant’s motion by counsel selectively chronicles and skews Plaintiff’s narrative of events and allegations being careful to avoid any mention of Defendant’s violations of Plaintiff’s constitutionally protected rights to procedural and substantive due process, to equal protection, to lawful search, to speedy trial, etc. and to all allegation relative to lack of subject matter jurisdiction.

without a warrant in his above referenced motion of Plaintiff’s allegations against him for violation of Plaintiff’s constitutionally protected rights to due process and equal protection under the Fourteenth Amendment which are actionable under 42 U.S.C. § 1983, and lack of subject matter jurisdiction due to an invalid complaint for more than one reason.

–. Motion is riddled with out of context statements, half truths, incomplete, hodge-podge “review” of allegations, ignored material allegations, erroneous quotes, emphasis on minors and totally ignoring majors

–. Re. Judicial absolute immunity (p.5 fn) - improper interpretation

Pierson v. Ray, 386 U.S. 547, 555 (1967)

Few doctrines were more solidly Page 554 established at common law than the immunity of judges from liability for damages for acts committed **within their judicial jurisdiction**, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L. R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, *supra*, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. **His errors may be corrected on appeal**, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. . . .

The immunity of judges for acts **within the judicial role** is equally well established, and Page 555 we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

–. Ardmore Municipal Court is a court of limited jurisdiction. Jurisdiction in a court of limited jurisdiction is never to be presumed. It must be proven, especially upon challenge. Jurisdiction of AMC was challenged but never proven. Motion to dismiss is based upon presumption.

–. Judicial capacity is not necessarily the same as judicial jurisdiction. A judge may have the capacity but not have jurisdiction to hear a case. One characteristic does not guarantee the other. Many bona fide judges lack jurisdiction to proceed with certain cases showing that capacity is not the same as jurisdiction.

–. Plaintiff alleged in amended complaint that Mathews fails the Supreme Court two-part test, i.e.,

he lacked subject matter jurisdiction. Never proven only presumed.

–. Curiously, none of Defendant’s motion attack any points alleged as constitutional violation in the counts naming Mathews. Attempt to mislead the court and trivialize the complaint. No mention of due process, equal protection, search & seizure, open access to courts, etc.

–.

–. Due process and equal protection violations under the Fourteenth Amendment never mentioned.

–. Subject matter jurisdiction is dependent upon a valid complaint. Nolle prosequi is admission of no jurisdiction. If ordinance number is not important on complaint then prosecutor would not have used it to dismiss case.

–. Both in Defendants’ motion to dismiss and in their brief in support objection is raised to Plaintiff’s alleged “claim for civil relief under 18 U.S.C. § 242.” This objection is frivolous and moot since Plaintiff removed all references to said criminal statute in his amended complaint and is a non-issue.

“Once a party challenges the trial court's jurisdiction. . . the burden of establishing jurisdiction is on the plaintiff.” (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980) (Emphasis added.) *Crutcher v. Williams*, 1050893 (Ala. 3-14-2008) at p. 6, 7

“Once jurisdiction has been challenged, the plaintiff bears the burden of proving the existence of jurisdiction.” (Emphasis added.) *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 42 (8th Cir. 1988)

“As courts of limited jurisdiction, the court never presumes jurisdiction. *Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). The burden to demonstrate the existence of federal jurisdiction falls upon the party asserting jurisdiction.” (Emphasis added.) *Hernandez v. Esso Standard Oil Co.* (P.R. 7-10-2008), page 4

Federal Courts on Constitutional Absoluteness and Supremacy. That Federal courts have held as follows:

–. “Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.” (Emphasis added.) *Miranda v. Arizona*, 384 U.S. 436, 491 (1966)

- . “The claim and exercise of a constitutional right cannot be converted into a crime.” (Emphasis added.) *Miller v. United States*, 230 F.2d 486, 490 (5th Cir. 1956)
- . “The Constitution of these United States is the supreme law of the land. Any law that is repugnant to the Constitution is null and void of law.” (Emphasis added.) *Marbury v. Madison*, 5 U.S. 137
- . “If the state converts a liberty into a privilege, the citizen can engage in the right with impunity.” (Emphasis added.) *Shuttlesworth v. Birmingham*, 373 U.S. 262
- . “An unconstitutional act is not law; it confers no rights; it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed” (Emphasis added.) *Norton v. Shelby County*, 118 U.S. 425

“If any question of fact or liability is conclusively presumed against the accused it is not due process of law.” *Ziegler v. R.R. Co.*, 58 Ala. 594; (Emphasis added.) *Wilburn v. McCally*, 63 Ala. 436.

Due Process of Law!

Due Process of Law

by Jacob G. Hornberger

One of the most deeply rooted principles in American jurisprudence is the concept of due process of law, which is enshrined in the Fifth Amendment to the U.S. Constitution: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

Due process of law actually stretches back to the year 1215, when the great barons of England extracted an admission from their king that his powers over the citizenry were not unlimited but instead were limited by fundamental principles of fairness and justice. Included among the restrictions on power to which King John acceded in the Magna Carta – the Great Charter – was a prohibition against the exercise of arbitrary seizure of people or their property by government officials:

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

Over the centuries, that phrase – “the law of the land” – gradually evolved into the phrase “due process of law,” the same phrase our American ancestors insisted be made part of the Constitution through the adoption of the Fifth Amendment.

Why government?

In the Declaration of Independence, Thomas Jefferson set forth the rationale for the establishment of government in a society: to secure the fundamental, inherent, and preexisting rights of the people. The idea was that the monopoly force of government was needed to suppress the likes of murderers, rapists, robbers, and other violent criminals. Government’s job would be to bring such malefactors to justice and impose punishment on them.

However, as Englishmen had learned throughout the centuries, both before and after Magna Carta, the matter of criminal justice was not so easy. For history and experience had shown that when government (i.e., the king) was vested with the unlimited power to arrest, incarcerate, and punish violent offenders, always and inevitably such power had been misused against the innocent, especially those who dared to criticize or challenge government policies or practices. (Sounds familiar, DUH, Me)

For example, without restrictions on power, the king would simply send his soldiers to the home of a government critic. They would then arrest him, incarcerate him, and punish him.

The idea behind the “law of the land” provision in Magna Carta, which has been described as the cornerstone of English liberties, was to require the king to follow certain procedures as a prerequisite to seizing and punishing a person for a crime he had supposedly committed.

Thus, over the centuries English and American courts gradually defined “due process of law” as a set of procedural rights or guarantees to which every person whom the government accused of a crime is entitled.

(Beginning in the late 19th century, the U.S. Supreme Court began developing a substantive notion of due process, which blossomed during the Franklin Roosevelt regime but was finally abandoned in the late 1930s. See my series “Economic Liberties and the Constitution” in the June 2002 – May 2003 issues of Freedom Daily.)

Notice and hearing

The core procedural requirements of due process of law were “notice” and “hearing.” An accused had the right, the courts held, to be advised of the nature of the offenses for which he was being charged. That is, the government would be prohibited from simply taking a person into custody

on mere suspicion that he was a criminal type or prosecuting him without formally telling him what he was being prosecuted for. Instead, the government would have to formally advise him of the specific charges against him, so that he would then be able to prepare his defense.

That's the idea behind a grand jury indictment – to formally advise the accused of the exact nature of the offense against him. That's why our ancestors incorporated that aspect of due process in the Fifth Amendment –

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

– and the Sixth Amendment –

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation.

The other essential part of due process was “hearing” – the right of the accused to be heard, which meant, in a criminal case, a trial. Not just any trial, however, because Englishmen had learned hard lessons from, for example, Star Chamber judicial proceedings that involved secret, arbitrary, and unjust verdicts and judgments.

Other due-process guarantees

The English common law gradually developed other aspects of due-process guarantees in criminal cases.

For example, if an accused was forced to defend himself against experienced government lawyers, obviously the trial could easily degenerate into a sham proceeding – that is, one that might have the trappings of a just trial but whose ending would be practically preordained owing to the unlikelihood that a layman in court could successfully defeat experienced prosecutors.

Therefore, to provide the accused with a reasonable chance to challenge the charges against him, procedural due process came to recognize the crucial importance of allowing the accused to retain a lawyer to fight government prosecutors on his behalf. That's why the right to counsel was enshrined in the Sixth Amendment: “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”

Other due-process protections were included in the Sixth Amendment. For example, the amendment guarantees the right of trial by jury, which protects the right of the accused to be judged by ordinary people in the community rather than by the judge presiding over the case. Also, government witnesses against the accused have to be brought into court to face the accused

and subject themselves to cross-examination by the accused or his lawyer. (Oh sure, DUH) The accused also has the right to use the subpoena power of the court (i.e., “compulsory process”) to force favorable witnesses to come to court to provide evidence on his behalf.

Other procedural protections became an integral part of due process of law even though they were not specifically enumerated in either the Constitution or the Bill of Rights. For example, in every criminal case the government has the burden of proof. What that means is that in the United States, unlike many other countries around the world, the accused is not required to prove his innocence; instead the government is required to prove his guilt by furnishing sufficient, competent, and credible evidence under oath that the accused actually did commit the offense.

How much evidence is the government required to furnish to substantiate a finding of guilt? Unlike civil cases, where the burden of proof on the claimant is a “preponderance of the evidence,” criminal cases require the government to prove a person’s guilt “beyond a reasonable doubt.” Thus, at the conclusion of the trial, it is entirely possible that a jury could find a criminal defendant not guilty even if he had not introduced any evidence of his innocence whatsoever. The reason might be that the jury, after hearing and considering all the government’s evidence, might still not be convinced “beyond a reasonable doubt” of the defendant’s guilt.

A correlative due process right involves the “presumption of innocence,” which means that at the beginning of every criminal trial the accused is considered to be fully and totally innocent – and remains so until the government succeeds in convincing the jury of his guilt beyond a reasonable doubt.

A related due-process protection included in the Fifth Amendment is the right of every person to remain silent in the face of a government accusation. That was to ensure that government officials would have to build their case against a person with independent evidence – that is, evidence that was not extracted from the accused, especially through force (e.g., torture).

What’s important to recognize is the underlying rationale behind due process of law – that is, why this principle was so important to Englishmen as well as to our Founding Fathers and the Framers: Given the enormous value they placed on people’s lives and liberty and given their recognition of the enormous power of the government, they wanted to ensure that as few innocent people as possible were executed or otherwise punished, even if that meant lots of guilty people went unpunished.

The role of habeas corpus

How are due-process rights protected? That is, what if government officials proceed to arbitrarily arrest and detain people indefinitely without charges or trial, as U.S. officials today are doing to

people in Iraq? What if they attempt to punish, even execute them, in secret sham proceedings involving the denial of counsel or other due-process guarantees, as U.S. officials are today doing at their military installation in Cuba to foreigners accused of terrorism?

Our English and American ancestors understood that the only effective way to secure the release of people who were wrongfully detained was through a legal process known as habeas corpus, which stretches back to 1679, when Parliament enacted the Habeas Corpus Act and which the Framers later enshrined in the limitation on the powers of Congress in Article 1, Section 9 of the U.S. Constitution:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Habeas corpus is a process that entitles a person held in custody to file a petition in court formally requesting the court to summon the accused and his custodian to court where the custodian will be required to show the reason he is detaining the petitioner. If the court issues a “writ of habeas corpus,” a law-enforcement officer serves the writ (i.e., a formal court order) on the custodian, ordering him to bring the detainee to court and to “show cause” why he is being detained. If the custodian refuses, he is subject to a contempt citation, which means that the judge will order his arrest and detention until he complies with the order of the court. As a practical matter, the writ of habeas corpus forces government officials either to formally charge a prisoner or to release him.

Due process today

Given the government’s conduct in Iraq and Cuba, where criminal suspects have been arbitrarily arrested and detained indefinitely without charges; where detainees have been tortured, raped, sexually abused, and even murdered; and where U.S. officials have steadfastly resisted any attempt to observe the protections of due process of law in the criminal-justice process in those two countries; and given the increasingly secretive nature of judicial proceedings in the United States in the name of “national security”; and given the Pentagon’s attempt to arrest and indefinitely detain and punish American citizens accused of “terrorism,” every American should be enormously grateful that our ancestors enshrined due process of law in the Bill of Rights.

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