

## DUE PROCESS: PROCEDURAL AND SUSTENTATIVE

BY DANIEL MARTINEZ

*...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of **life, liberty, or property**, without due process of law... 5<sup>TH</sup> Amendment*

*...nor shall any State deprive any person of **life, liberty, or property**, without due process of law... 14<sup>th</sup> Amendment*

It is important to notice that the 14<sup>TH</sup> Amendment is directed to the State governments, this was for the protection of the newly established class of “U.S. citizens,” living within the sovereign states of the union and within the territories. Due process, or due process of law, requires the government to respect all of the constitutional rights of an individual citizen per the “law of the land” (The U.S. Constitution).

The Due Process Clause appears in the Constitution of the United States of America of 1789 in the 5<sup>TH</sup> and 14<sup>TH</sup> Amendment (the 14<sup>TH</sup> Amendment was added July 9, 1868 after the Civil War to provide a vehicle for slaves to become U.S. citizens, prior to that time slaves were not Citizens of the states and had no constitutional protections. **Dred Scott v. Sanford** 60 U.S. 393 (1856))

Scott was not a citizen of Missouri, and the federal courts therefore lacked jurisdiction to hear the dispute. The Supreme Court is a court of limited jurisdiction restricted by the restraints of the Constitution. If the Supreme Court is a court of limited jurisdiction, how limited is the jurisdiction of the courts created by Congress?

**Federal courts are courts of limited jurisdiction.** They possess only that power authorized by the Constitution and statute, see *Willy v. Coastal Corp.*, 503 U.S. 131, 7 (1992) (slip op., at 4-5); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), **which is not to be expanded by judicial decree**, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. President of Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). *Kokkonen v. Guardian Life Ins.* (93-263), 511 U.S. 375 (1994). (Emphasis added)

Despite the conclusion that the Court lacked jurisdiction, however, it went on to hold that Scott was not a free man, even though he had resided for a time in Minnesota (a state that prohibited slavery), because the provisions of the Missouri Compromise declaring it to be a free territory were beyond Congress’ power to enact. The Court rested its decision on the grounds that Congress’ power to acquire territories and create governments within those territories was limited, and that the Fifth Amendment barred any law that would deprive a slaveholder of his property, such as his slaves, just because he had brought them into a free territory. The Court went on to state — although the issue was not before the Court — that the territorial legislatures had no power to ban slavery.

The importance of *Dred Scott v. Sanford* is that Congress has no authority to pass laws that would interfere with our substantive rights as protected by the Fifth Amendment Due Process Clause. This was confirmed in *Miranda v. Arizona*, 384 U.S. 436 (1966). “*Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.*” In the *Miranda* case, the Supreme Court said that his due process rights had been violated because he was not given notice that he was entitled to counsel and that anything he said or did could be used against him in a court of law. This is the case that created the “Miranda Rights” that every law enforcement officer has to read to the suspect before being arrested. This is a procedural due process requirement prior to deprivation of life, liberty or property.

Black’s Law Dictionary 6<sup>TH</sup> Edition, page 500-501, defines Due Process of Law as:

Law in its regular course of administration through courts of justice. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. **A course of legal proceedings according to those rules and principles**

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**which have been established in our systems of jurisprudence for the enforcement and protection of private rights.** To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of the creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, **he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.** *Pennoyer v. Neff*, 96 U.S. 733, 24 L.Ed. 565. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. **If any question of fact or liability be conclusively be presumed [rather than proven] against him, this is not due process of law.**

Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by Supreme Court decisions and include, timely notice of a hearing or trial which informs the accused of the charges against him or her; the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which **guilt must be proven by legally obtained evidence** and the verdict must be supported by the evidence presented; rights at the earliest stage of the criminal process; and the guarantee that an individual will not be tried more than once for the same offence (double jeopardy).

Black's Law Dictionary 6<sup>TH</sup> Edition, page 1429, defines Substantive Due Process:

Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property. The essence of substantive due process is protection from arbitrary and unreasonable action.

Black's Law Dictionary 6<sup>TH</sup> Edition, page 1203, defines Procedural Due Process:

The guarantee of procedural fairness which flows from both the Fifth and Fourteenth Amendment due process clause of the Constitution. For guarantees of procedural due process to apply, it must first be shown that a deprivation of a significant life, liberty, or property interest has occurred. This is necessary to bring the Due Process Clause into Play.

Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right, they must be notified. *Fuentes v. Shevin*, 407 U.S. 67, 79, 92S.Ct 1983, 1994 32 L.Ed.2d 556 Procedures which due process requires beyond that minimum must be determined by a balancing analysis based on the specific factual context. *Goldberg v. Kelly* 397 U.S. 254, 90 S.Ct 1011, 25 L.Ed.2d 287.

Before the 14<sup>TH</sup> Amendment passed after the Civil War, the 5<sup>TH</sup> Amendment restrained only the federal government, not the states (See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1858); *Twining v. New Jersey*, 211 U.S. 78 (1908) ), so it did not inhibit the state courts from rendering judgments against defendants that had not been personally served with process of service or otherwise brought within the state courts jurisdiction. Since the states retained sovereignty, they were treated as independent governments at liberty to prescribe their own judicial process without control from the federal Constitution. (See *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873)

In 1884, the Supreme Court, in *Hurtado v. California*, 110 U.S. 516 (1884), decided that the state of California had violated Joseph Hurtado's due process rights when they charged and convicted him with murder by information from the district attorney rather than convening a grand jury to indict him.

In addition to resolving the issue before the Court, the *Hurtado* Court offered further insight into the general meaning of due process. The Court clarified new procedures that were not part of the common law substantive rights, that qualify as due process.

The Supreme Court of the United States has promulgated rules of Criminal, Civil and Evidence that has been enacted into law by the legislature to protect the due process rights of the sovereign Citizens. Most states of the union have adopted these rules or have patterned their state rules to conform to these due process requirements.

In the United States Constitution Annotated under the Fifth and Fourteenth Amendments Due Process, it lists numerous categories that require due process to be followed to the letter of the law. When a Court or Administrative Agency does not follow the prescribed process mandated by the Constitution or the Law, such as the Administrative Procedures Act and the rules of the Court, it loses jurisdiction over the subject matter and any adverse decision can be collaterally attacked for being VOID.

**To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363**

As you can see, the due process clause in the Fifth and Fourteenth Amendments are a very important part of this nation's *juris prudence*. If readers are interested in addressing this further, please contact PARAGON and we will gladly continue the subject matter under "YOUR RIGHTS."

