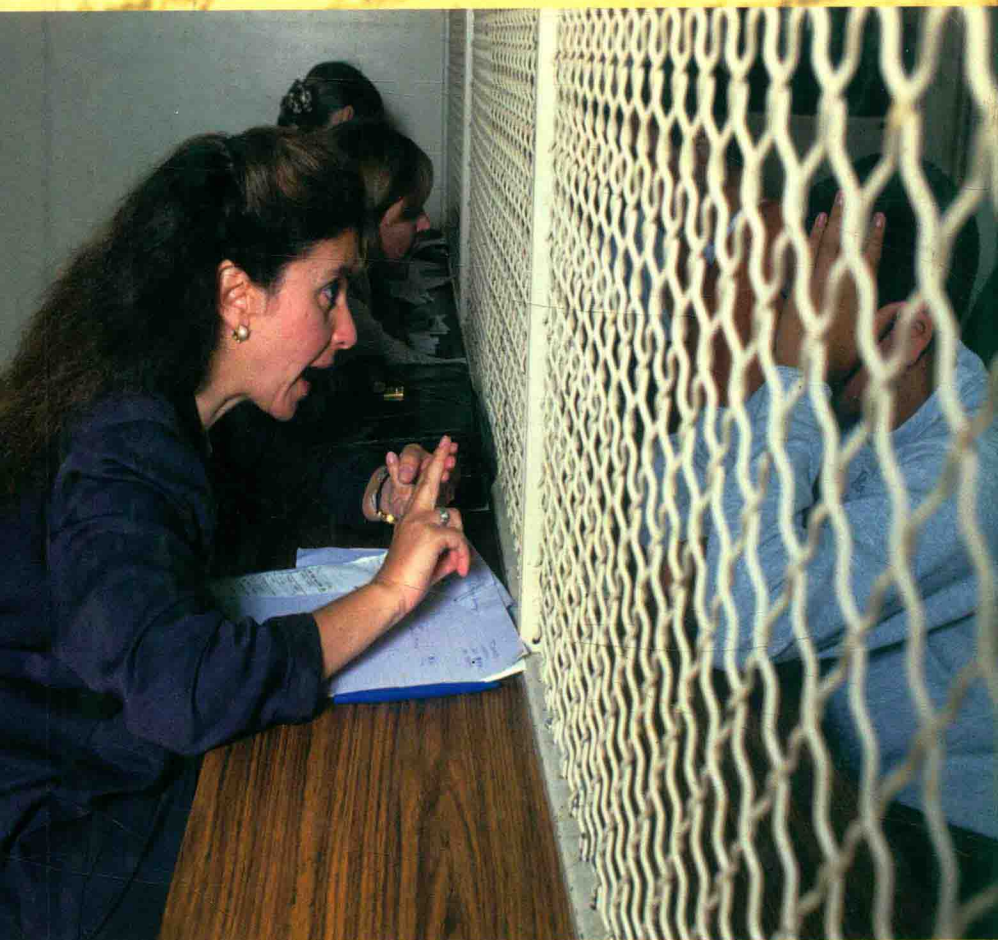


The Bill of Rights



# THE RIGHT TO DUE PROCESS

Edited by Kimberly Troisi-Paton

The Bill of Rights



# THE RIGHT TO DUE PROCESS

Edited by Kimberly Troisi-Paton

Bruce Glassman, *Vice President*

Bonnie Szumski, *Publisher*

Helen Cothran, *Managing Editor*

Scott Barbour, *Series Editor*

**GREENHAVEN PRESS**

*An imprint of Thomson Gale, a part of The Thomson Corporation*

**THOMSON**  
★  
**GALE**

Detroit • New York • San Francisco • San Diego • New Haven, Conn.  
Waterville, Maine • London • Munich



© 2005 by Greenhaven Press, a part of The Thomson Corporation.

Thomson and Star Logo are trademarks and Gale and Greenhaven Press are registered trademarks used herein under license.

*For more information, contact*

Greenhaven Press

27500 Drake Rd.

Farmington Hills, MI 48331-3535

Or you can visit our Internet site at <http://www.gale.com>

**ALL RIGHTS RESERVED.**

No part of this work covered by the copyright hereon may be reproduced or used in any form or by any means—graphic, electronic, or mechanical, including photocopying, recording, taping, Web distribution or information storage retrieval systems—without the written permission of the publisher.

Every effort has been made to trace the owners of copyrighted material.

Cover credit: © Shelley Gazin/The Image Works. In Los Angeles, California, an attorney meets with her client, a juvenile offender in jail.

**LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA**

The right to due process / Kimberly Troisi-Paton, book editor.  
p. cm. — (Bill of rights)

Includes bibliographical references and index.

ISBN 0-7377-1941-9 (lib. : alk. paper)

1. Due process of law—United States—History. I. Troisi-Paton, Kimberly.  
II. Bill of Rights (San Diego, Calif.)

KF4765.R544 2005

347.73'5—dc22

2005040253



|                 |    |
|-----------------|----|
| <b>Foreword</b> | 11 |
|-----------------|----|

|                     |    |
|---------------------|----|
| <b>Introduction</b> | 14 |
|---------------------|----|

## **Chapter 1: The History of the Right to Due Process**

|  |    |
|--|----|
| <b>1. The Origins and Evolution of Due Process</b> | 21 |
| <i>BY JOHN V. ORTH</i>                             |    |

A law professor summarizes the history of the right to due process and its evolution into two doctrines—procedural due process and substantive due process.

|   |    |
|---|----|
| <b>2. A Colonial Law Guaranteeing Due Process</b> | 27 |
| <i>BY THE GENERAL ASSEMBLY OF MARYLAND</i>        |    |

The text of an early law demonstrates how important the concept of due process was to the colonists.

## **Chapter 2: Due Process and the Rights of Accused Criminals**

|   |    |
|---|----|
| <b>1. Protection Against Double Jeopardy Is Not a Fundamental Right</b> | 30 |
| <i>BY BENJAMIN N. CARDOZO</i>   |    |

In *Palko v. Connecticut* (1937) the Supreme Court decided that the protection against double jeopardy was not among the rights that are guaranteed against state infringement by virtue of the Fourteenth Amendment.

|  |    |
|--|----|
| <b>2. The Court Expands the Right to Counsel</b> | 36 |
| <i>BY ANTHONY LEWIS</i>                          |    |

A Pulitzer prize-winning journalist writes about *Gideon v. Wainwright* (1963), the landmark

Supreme Court case that guaranteed the right to counsel.

### **3. The Court Establishes the Miranda Rights**

BY EARL WARREN

43

In *Miranda v. Arizona* (1966) the Supreme Court protected the rights of accused criminals who are under interrogation.

### **4. Due Process Protects the Rights of Juveniles**

BY ABE FORTAS

56

In *re Gault* (1967) applied basic due process protections to children for the first time.

## **Chapter 3: Due Process and Civil Liberties**

### **1. Due Process Protects the Liberty of Contract**

BY RUFUS PECKHAM

68

In *Lochner v. New York* (1905) the Supreme Court decided that the Fourteenth Amendment protected the right of employers and workers to establish working conditions without legal interference.

### **2. Due Process Prohibits Racial Segregation in Schools**

BY EARL WARREN

78

In *Bolling v. Sharpe* (1954), a companion case to *Brown v. Board of Education*, the Supreme Court ruled against racial segregation in the Washington, D.C., schools, based on the Fifth Amendment's due process clause.

### **3. The Court Infers a Right to Privacy in the Fourteenth Amendment**

BY JERRY GOLDMAN

81

A political scientist comments about one of the most controversial cases in the history of Supreme Court jurisprudence, *Roe v. Wade* (1973).

The Court ruled that, based on an inferred right to privacy, a woman has the right to an abortion.

#### **4. Due Process Guarantees Fair Procedures, Not Substantive Rights**

BY JOHN HART ELY

86

A law professor criticizes the Supreme Court's doctrine of substantive due process.

#### **5. Due Process Prohibits Government Control of Personal Relationships**

BY ANTHONY KENNEDY

96

*Lawrence v. Texas* (2003) specifically overturned *Bowers v. Hardwick*, the Court's 1986 decision that the privacy interests of homosexuals were not protected by the due process clause.

### **Chapter 4: Current Issues and Perspectives**

#### **1. "Enemy Combatants" Are Entitled to Due Process Protections**

BY SANDRA DAY O'CONNOR

104

In *Hamdi v. Rumsfeld* (2004) the Supreme Court determined that a United States citizen who is detained in the United States as an "enemy combatant" is entitled to due process.

#### **2. Ensuring Due Process for Detained Terror Suspects**

BY THOMAS F. POWERS

111

A political science professor proposes a policy of preventive detention, which would allow the U.S. government to detain suspected terrorists even without enough evidence to prosecute them in a court of law.

#### **3. Even a Tyrant Is Entitled to Due Process**

BY ROBERT SCHEER

120

A journalist opines that even Saddam Hussein is entitled to more due process than he is receiving since being captured in Iraq by U.S. soldiers.

## **Appendix**

|   |     |
|---|-----|
| <b>The Origins of the American Bill of Rights</b>             | 123 |
| <b>Supreme Court Cases Involving the Right to Due Process</b> | 126 |
| <b>For Further Research</b>                                   | 132 |
| <b>Index</b>  | 134 |

The Bill of Rights



# **THE RIGHT TO DUE PROCESS**





Other books in this series:

Freedom from Cruel and Unusual Punishment

Freedom from Unfair Searches and Seizures

Freedom of Religion

Freedom of Speech

Freedom of the Press

The Right to a Fair Trial

The Right to a Trial by Jury

The Right to Bear Arms



The Bill of Rights



# THE RIGHT TO DUE PROCESS

Edited by Kimberly Troisi-Paton

Bruce Glassman, *Vice President*

Bonnie Szumski, *Publisher*

Helen Cothran, *Managing Editor*

Scott Barbour, *Series Editor*

**GREENHAVEN PRESS**

*An imprint of Thomson Gale, a part of The Thomson Corporation*

**THOMSON**  
—★—  
**GALE**

Detroit • New York • San Francisco • San Diego • New Haven, Conn.  
Waterville, Maine • London • Munich





|                 |    |
|-----------------|----|
| <b>Foreword</b> | 11 |
|-----------------|----|

|                     |    |
|---------------------|----|
| <b>Introduction</b> | 14 |
|---------------------|----|

## **Chapter 1: The History of the Right to Due Process**

|  |    |
|--|----|
| <b>1. The Origins and Evolution of Due Process</b> | 21 |
| <i>BY JOHN V. ORTH</i>                             |    |

A law professor summarizes the history of the right to due process and its evolution into two doctrines—procedural due process and substantive due process.

|   |    |
|---|----|
| <b>2. A Colonial Law Guaranteeing Due Process</b> | 27 |
| <i>BY THE GENERAL ASSEMBLY OF MARYLAND</i>        |    |

The text of an early law demonstrates how important the concept of due process was to the colonists.

## **Chapter 2: Due Process and the Rights of Accused Criminals**

|   |    |
|---|----|
| <b>1. Protection Against Double Jeopardy Is Not a Fundamental Right</b> | 30 |
| <i>BY BENJAMIN N. CARDOZO</i>   |    |

In *Palko v. Connecticut* (1937) the Supreme Court decided that the protection against double jeopardy was not among the rights that are guaranteed against state infringement by virtue of the Fourteenth Amendment.

|  |    |
|--|----|
| <b>2. The Court Expands the Right to Counsel</b> | 36 |
| <i>BY ANTHONY LEWIS</i>                          |    |

A Pulitzer prize-winning journalist writes about *Gideon v. Wainwright* (1963), the landmark

Supreme Court case that guaranteed the right to counsel.

### **3. The Court Establishes the Miranda Rights**

BY EARL WARREN

43

In *Miranda v. Arizona* (1966) the Supreme Court protected the rights of accused criminals who are under interrogation.

### **4. Due Process Protects the Rights of Juveniles**

BY ABE FORTAS

56

*In re Gault* (1967) applied basic due process protections to children for the first time.

## **Chapter 3: Due Process and Civil Liberties**

### **1. Due Process Protects the Liberty of Contract**

BY RUFUS PECKHAM

68

In *Lochner v. New York* (1905) the Supreme Court decided that the Fourteenth Amendment protected the right of employers and workers to establish working conditions without legal interference.

### **2. Due Process Prohibits Racial Segregation in Schools**

BY EARL WARREN

78

In *Bolling v. Sharpe* (1954), a companion case to *Brown v. Board of Education*, the Supreme Court ruled against racial segregation in the Washington, D.C., schools, based on the Fifth Amendment's due process clause.

### **3. The Court Infers a Right to Privacy in the Fourteenth Amendment**

BY JERRY GOLDMAN

81

A political scientist comments about one of the most controversial cases in the history of Supreme Court jurisprudence, *Roe v. Wade* (1973).

The Court ruled that, based on an inferred right to privacy, a woman has the right to an abortion.

#### **4. Due Process Guarantees Fair Procedures, Not Substantive Rights**

BY JOHN HART ELY

86

A law professor criticizes the Supreme Court's doctrine of substantive due process.

#### **5. Due Process Prohibits Government Control of Personal Relationships**

BY ANTHONY KENNEDY

96

*Lawrence v. Texas* (2003) specifically overturned *Bowers v. Hardwick*, the Court's 1986 decision that the privacy interests of homosexuals were not protected by the due process clause.

### **Chapter 4: Current Issues and Perspectives**

#### **1. "Enemy Combatants" Are Entitled to Due Process Protections**

BY SANDRA DAY O'CONNOR

104

In *Hamdi v. Rumsfeld* (2004) the Supreme Court determined that a United States citizen who is detained in the United States as an "enemy combatant" is entitled to due process.

#### **2. Ensuring Due Process for Detained Terror Suspects**

BY THOMAS F. POWERS

111

A political science professor proposes a policy of preventive detention, which would allow the U.S. government to detain suspected terrorists even without enough evidence to prosecute them in a court of law.

#### **3. Even a Tyrant Is Entitled to Due Process**

BY ROBERT SCHEER

120

A journalist opines that even Saddam Hussein is entitled to more due process than he is receiving since being captured in Iraq by U.S. soldiers.



## **Appendix**

|   |     |
|---|-----|
| <b>The Origins of the American Bill of Rights</b>             | 123 |
| <b>Supreme Court Cases Involving the Right to Due Process</b> | 126 |
| <b>For Further Research</b>                                   | 132 |
| <b>Index</b>  | 134 |