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Due Process

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§9.1 The Significance of Due Process

Courts invoke the Due Process Clause to determine the procedures an agency must use to make a decision in only a tiny fraction of the millions of proceedings agencies conduct each year. In the largest proportion of cases, the procedures used by an agency are determined solely by reference to the agency's own rules of procedure. In the next largest proportion of cases, the procedures used are determined by reference to the statutes that govern the agency's actions.

Judicial decisions applying the Due Process Clause are far more important determinants of agency decisionmaking procedures than a simple counting of cases might suggest, however. A mere three dozen or so Supreme Court opinions that apply the Due Process Clause to a variety of agency decisionmaking contexts have an enormous impact on the procedures used in each of the millions of agency proceedings each year. Those opinions eventually become major determinants of administrative procedure through their effects on (1) legislatures engaged in drafting the procedural provisions of statutes, (2) courts engaged in interpreting the often ambiguous procedural provisions of statutes,

Due process rarely applied

Due process reasoning influences procedural choices of legislatures and agencies

and (3) agencies engaged in drafting the procedural rules that govern various types of proceedings. Legislatures and agencies can, of course, choose procedures more demanding than those dictated by due process, but their choice of procedures is influenced heavily by their beliefs concerning the procedures required by due process. Once an agency adopts a set of procedures by rule, the agency must comply with its own procedural rules even if the procedures adopted by the agency exceed those independently required by due process. See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Due process reasoning influences judicial interpretation of statutes

The Supreme Court's opinions in *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973), illustrate the powerful effect of due process reasoning on judicial interpretations of the procedural provisions of statutes. Congress authorized the agency to take a particular action "after hearing." Thus, the question before the Court was what procedure Congress intended by its reference to a "hearing." The agency argued that it was required only to provide an opportunity for a written exchange of views; *Florida East Coast* argued that the agency was required to provide an oral evidentiary hearing. A seven-Justice majority of the Court agreed with the agency's interpretation of the statute. All nine Justices agreed that the statutory term "hearing" was broad enough to bear either interpretation. Both the majority opinion and the dissenting opinion relied heavily on due process reasoning and cases decided under the Due Process Clause as the basis for their different interpretations of the ambiguous statutory requirement of a "hearing."

Empirical support for influence of due process reasoning

An empirical study of informal adjudication procedures illustrates the powerful effect of due process reasoning on agencies' choice of procedures. The "vast bulk" of agency actions are taken through use of informal adjudication. Attorney General's Committee on Administrative Procedure 35 (1941). Yet, the Administrative Procedure Act (APA) explicitly requires an agency to provide few procedural safeguards when the agency acts through use of informal adjudication. (See Chapter 8.) APA §555 requires only that an agency (1) permit a party to be represented by an attorney or other authorized representative, (2) permit a person to obtain a copy of any data or evidence she provides, and (3) provide a brief statement of the grounds for denying an application or petition. The Court has also derived from APA §706(2)(A) the implicit requirement that an agency provide an explanation for any action it takes through informal adjudication if the adversely affected party petitions for judicial review of the action. *PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Agencies almost invariably provide procedures greater than those required by the APA when they engage in informal adjudication. An

empirical study of 42 agency programs administered through use of informal adjudication found that most agencies use procedures that include four procedural safeguards: (1) notice of issues presented; (2) an opportunity to present data and arguments either in written or oral form; (3) a decision by a neutral decisionmaker; and (4) a statement of reasons for the decision. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976). That combination of procedures can best be explained as the product of agency applications of due process criteria. The few programs that did not incorporate these basic procedural safeguards relied principally on physical inspection of products or premises as the basis for action. In appropriate circumstances, physical inspection has always been considered an adequate substitute for more formal procedures. See, e.g., *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

§9.2 Due Process Applies Only to Individualized Decisionmaking

The Due Process Clause requires a hearing of some kind only when government deprives an individual of “life, liberty, or property” based on resolution of contested factual issues concerning that individual. Procedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals or firms, e.g., all railroads or all recipients of social security benefits, even if the decision has the same adverse effect on the interests of the members of the group as would an individualized deprivation. The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system. At least as a first approximation, it underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication. The critical distinction between individualized fact-based deprivations and policy-based deprivations is illustrated well by a pair of Supreme Court opinions issued near the beginning of the century.

Both *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), concerned property tax assessments by the city of Denver. In *Londoner*, the Court held that an individual property owner was denied due

Due process does not apply to broad policy decisions

***Londoner/Bi-Metallic* distinction**