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### Due Process and Individuals Rights

During the crafting of the 14<sup>th</sup> amendment two primary authors, Congressman John A. Bingham, of Ohio, and Senator Jacob Howard, of Michigan ensured to nationalize the bill of rights by mandating them upon states. They later stated the reason was to insure, “the personal rights guaranteed and supported by the first eight amendments.” This is an extraordinarily influential moment. The 14<sup>th</sup> amendment is best known for its contribution to civil right, and justifiably so, however what many don’t understand is how it revolutionized due process. While the 14<sup>th</sup> amendment failed to extend the bill of rights to the states and to black citizens at the begging of the 20<sup>th</sup> century. Due process has been a heavily discussed topic throughout the course of our nation’s history. Ben Franklin, James Madison and others all spoke volumes about due process and its necessity. They have famous idioms such as, “it is better one hundred guilty persons should escape than that one innocent person should suffer” and others however I would say the most important one is when John Jay said, “Know then, that we consider ourselves, and do insist, that we are and ought to be as free as our fellow-subjects in Britain, and that no power on earth has a right to take our property from us without our consent.” This quote is precisely at the intersection of due process and civil forfeiture. State and local governments are required by law to provide due process and

fair treatment to all arrested people, and civil forfeiture is in direct conflict to the objective of providing due process.

This will have a mixed methodological approach with the use of primary and secondary sources. For qualitative primary sources I will be using the New York, South Carolina, Arizona and West Virginia's state constitutions, the United States Constitutions and several court cases including, *Travis Lee Green v. South Carolina*, *Caperton v. A. T. Massey, Coal Co.*, and *Marshall v. Jerrico, Inc.* For quantitative primary sources I will be using the actual laws of each state. For Qualitative secondary source wise I will be using a review of the aforementioned court cases and their transcripts and articles related to the 5<sup>th</sup> and 14<sup>th</sup> amendment. Then for quantitative secondary sources I will be using data on pollical action being taken.

This is an extremely complicated topic that many people do not now a significant about even though due process has been a discussion since the formation of the union. Due process is the fair treatment through the normal judicial system, especially as a citizen's entitlement. While civil forfeiture is a law that allows the government to take cash, cars, homes and other property suspected of being involved in criminal activity. Unlike criminal forfeiture, with civil forfeiture, the property owner doesn't have to be charged with, let alone convicted of, a crime to permanently lose his property. While historically the supreme court's interpretation has varied the supreme court of the united states current interpretation is the clauses as providing four protections: procedural due process, substantive due process, a prohibition against vague law, and as the vehicle for the incorporation of the bill of rights. Procedural due process, in civil and criminal proceedings, is the constitutional requirement where the government must not deny a

citizen life, liberty, or property. This is where your Maranda Rights or Maranda Warning comes from because the government is required to inform you of your rights.

Another more argued protection is substantive due process. This first appeared in writing when Justice Stephen J. Field dissented in the Slaughterhouse Cases which were a series of cases where the supreme court conveyed its interpretation of the privileges and immunities clause of the Fourteenth Amendment. Here he wrote that, "the Due Process Clause protected individuals from state legislation that infringed upon their 'privileges and immunities' under the federal Constitution. Field's dissenting opinion is often seen as an important step toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not mentioned in the Constitution." (Cornell Law)

The third protection is over vague law. This is a protection that states if a law is found to be too vague it will be declared void. Vague in this case is defined as a law that fail to specify what action or conduct is considered punishable.

The fourth is as the vehicle for the incorporation of the bill of rights. As Justice Black stated in both *Giswold v. Connecticut* and *In the Matter of Samuel Winship* the Fourteenth Amendment, by the Privileges and Immunities Clause and the Due Process Clause, made the specific provisions of the Bill of Rights enforceable against the states. In the federal constitution due process is mentioned twice. While it is essential verbatim both time there is the subtle difference in who each pertains to. For example, the 5<sup>th</sup> amendment states,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; 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; nor shall private property be taken for public use, without just compensation. (US Constitution, 5<sup>th</sup> Amendment)

The line stating, “nor be deprived of life, liberty, or property, without due process of law” (US Constitution, 5<sup>th</sup> Amendment) clearly grants the fair treatment from the federal government making it unconstitutional, and therefore illegal, to dispossess someone of their life, freedom or possessions without either due process or compensation allowing for things like eminent domain. The fourteenth amendment on the other hand states that,

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (US Constitution, 14<sup>th</sup> Amendment)

The key line in this being, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” (US Constitution, 14<sup>th</sup> Amendment) This establishes the same rules as the 5<sup>th</sup> does except instead of establishing them for the federal government it establishes them for the States.

Due to this mandate each state is now required to establish due process among other rights. To confirm that this was the case I reviewed four different states constitutions. The four states I chose were West Virginia, South Carolina, Arizona, and New York. West Virginia has it enshrined into its state constitution in article 3 section 3-10 under Safeguards for life, liberty and property. It states, “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” (West Virginia State Constitution, Article 3 section 10) This establishes due process for its citizens as a right and as demanded by the federal constitution.

South Carolina enshrines due process into its constitution however, unlike the other states which I looked at, they reiterate this right throughout the document. The first mention doesn't differ tremendously from the states constitutions stating, “Privileges and immunities; due process; equal protection of laws. The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” (South Carolina State Constitution article 1 section 3) This, while worded slightly different than the other state constitutions, still guaranties due process for its citizens as a right and as demanded by the federal constitution. However, the second mention is extremely

different from the others giving an excellent explanation of applicable situations. The second mention is in article 24 of the state constitution. This is called the 'Victims Bill of Rights' and specifically affirms the rights of victims. It starts as follows,

To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to:  
(South Carolina State Constitution article 1 section 24)

It then goes on to assert 12 rights and specify who they apply to and what rules affect them. This is a very interesting article and it has interesting implications but as due process is concerned it only further enforces the right of due process.

Arizona also enshrines due process into its state constitution. The article is written the same way as in the other states however the location within the constitution is slightly different. Unlike most of the other constitutions Arizona placed their due process clause in article 2 rather than in article 1. The constitution states, "No person shall be deprived of life, liberty, or property without due process of law." (Arizona State Constitution article 2 section 4) This establishes due process for its citizens as a right and as demanded by the federal constitution. Unlike the other states Arizona chose to repeat the clause verbatim in their list of amendments. This only furthers the right of due process guaranteed by the state of Arizona.

New York's execution of involving due process was also very interesting. While constitutionally this is very generic language the fact that they have a law in addition is extremely unique. In the state constitution it says, "No person shall be deprived of life,

liberty or property without due process of law.” (New York State Constitution article 1 section 6) This guarantees the right to due proceeds to all citizens and people of New York. In addition to this they have a specific law discussing due process. The law which is sometimes called the New York Bill of Rights has due process as a critical part of three of the thirteen enumerations. While this does not expressly guarantee these rights, it does further cement and guarantee them.

There is extremely little variation with all four states clauses essentially boiling down to ‘No person shall be deprived of life, liberty, or property, without due process of law’. Further the small amount of variation there is can be chalked up to difference in state culture, experiences the founders had with due process and by the fact that the same person did not write all four of them. Due to this I can state that all of the due processes are republican in nature which is defined as having a similar governmental structure and similar goals.

The courts have also ruled in on due process and are now ruling in on civil forfeiture. One of the original ruling on due process was in 1856. This was *Wynehamer v. People*. In this case the plaintiff was a bar owner, and was arrested for selling liquor, in violation of a newly passed prohibition statute. The plaintiff claimed that he was being denied his right to dispose of his property as he saw fit, because he had bought the liquor before the statute was passed. The lower courts ruled against plaintiff, and the plaintiff appealed his conviction to the Court of Appeals. The question was whether the plaintiff had been deprived of his right to dispose of his property as he saw fit. The answer was yes, the plaintiff had been deprived of his right to dispose of his property as he saw fit. The court held that New York State could not declare property that previously

held value worthless and illegal and that doing so was a violation of the plaintiff's constitutional rights.

The supreme court, in 2009, ruled on due process in *Caperton v. A. T. Massey Coal Co.* The case was about a judge who oversaw a case involving someone who donate to his reelection campaign. The question of this case was did Justice Brent Benjamin's failure to recuse himself from participation in a case where one of the parties donated \$3 million to his election campaign violate the Due Process Clause of the 14th Amendment? The answer was yes. The Supreme Court held that due process required that Justice Brent Benjamin recuse himself from participation in the case in question.

The Arizona Supreme Court, in 2017, ruled on due process in *Horne v Polk*. In this case, the Secretary of State notified the Solicitor General that there was reasonable cause to believe that Attorney General Horne and others had violated campaign finance laws. The Solicitor General appointed a Special Arizona Attorney General, Sheila Polk, to handle the case. Polk investigated and issued a 25-page order finding violations, including illegal coordination. Horne requested an administrative hearing. After the hearing the American Law Journal found that Polk failed to prove illegal coordination and recommended that the compliance order be vacated. Polk then issued a final administrative decision that affirmed her own compliance order. The question was whether Polk's involvement in the case violated due process? The state supreme court ruled the attorney general violated campaign finance law but due to Polk's extensive involvement in the case the Arizona Supreme court rule due process was violated.

In South Carolina a 15th Circuit Court Judge ruled on due process in *South Carolina v. Travis Lee Green*. This is a ongoing case that has been appealed. In this



case, law enforcement made three controlled buys of drugs from Green. They later arrested and charged him with distribution and trafficking cocaine. A search warrant was executed, and agents found and seized a backpack with more drugs, 19,800 dollars in a closet, and 971 dollars on Green when he was arrested. The question is was the seized amount too much. The judge found that the amount seized by agents to be a violation of a constitutional prohibition on excessive fines.

Due to these cases and a general lack of legislation on this issue civil forfeiture is in the policy agenda phase. It is currently sitting with legislators who realize this is a problem but aren't quite sure what to do about it yet.

A political agenda is a list of subjects or problems to which government officials as well as individuals outside the government are paying serious attention at any given time. They are not the only ones though. Groups like the Heritage Foundation, the ACLU and the Institute for Justice are actively pushing for action on the part of the government. Other organizations like the Fraternal Order of Police and the National Police Union are pushing for the status quo to remain. These extra constitutional actors are a significant reason why this is still in the policy agenda phase. It is extraordinarily clear that, "if interest groups play a large role in the political process, they arguably have even more influence when it comes to actual governance." (Smith 178)

These organizations look towards states like South Carolina to prove their point. For example, a documentary style tv show was made in South Carolina where they show how agencies have seized more than \$17 million from people over the course of the three years. Proponents of civil forfeiture argue that since the bulk of that money ended up in the hands of law enforcement it is used to pay for drug and crime fighting

measures and initiatives. However, opponents will point out how this is often abused. For example, in this study, “nearly 800 times when police seized money or property, no related criminal charge was filed. In another 800 cases, someone was charged with a crime but not convicted.” (GreenvilleOnline) It is further disincentivized when, “On average, when a person petitions to have money or property returned, the case takes 17 months from the time of the seizure to be resolved, regardless of the outcome of any related criminal charges.” (GreenvilleOnline) According to these organizations this has been a difficult issue to solve but one that we must.

Recently some states have been trying to take action but more still needs to be done. In the last two years, Arizona, Iowa and Virginia enacted laws changing the government’s burden of proof from a preponderance to clear and convincing evidence, making it more difficult to seize property. Currently eleven states – California, Connecticut, Iowa, Minnesota, Missouri, Montana, Nevada, New Hampshire, Ohio, Oregon and Vermont – require proof beyond a reasonable doubt, meaning a criminal conviction, to engage in some or all forfeiture proceedings. California, Iowa and Ohio exclude property valued under a certain amount from the criminal conviction requirement. Other states have gone even further by outright abolishing civil forfeiture. These would be North Carolina, New Mexico and Nebraska. There is a clear and obvious need for more states to take action with states like South Carolina attempting to bring legislation to the floor however even a bill like this gets caught up and delayed and has been unable to make it to the floor before the end of the session. If states like these are able to pass legislation on this it will encourage states like West Virginia, who

has been sedentary on this issue, to act and follow the path laid out by these other states.

Currently these bills against civil forfeiture have had bipartisan support. However, the support has been more centralized. The few politicians who have spoken about have shown it is more of a libertarian to centrist position. Meaning blue-dog democrats and libertarian right republicans generally support this. For both parties the farther from the center you are the less likely you are to support this.

In the near future I would expect that the supreme court continues to roll back civil forfeiture with more ruling like in *Timbs v. Indiana*. However, I would not expect the supreme court to be the ones who outlaw civil forfeiture. I believe it will be the state to first outlaw civil forfeiture and the eventually I think that the federal government will be forced due to popular support to outlaw civil forfeiture. Fr now however civil forfeiture is still a potentially life-altering consequence of being charged with a criminal offense.

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The critique I was given were extremely helpful. I was able to use them to edit my paper and hone my skills as a presenter. The critiques were mostly focused around my presentation skills and the structure of my presentation. This resulted in me changing the presentation to make my point more clearly so that there is very little confusion of what I am covering. While I do continue to make the same points with subtle differences, they have been reorganized to make reinforce the point with the goal of being driving it home more so than I did during the presentation. In addition to organizational changes I expounded on the quantitative element of my paper. Beyond that most of my comments were presentation based. The visual element was brought up multiple times however the main thing that was brought up was people saying I looked nervous and was reading off of the slides at the beginning. This is because in addition to being unusually tense I wrote too many presenter notes. I should have included less structure and focused more on key ideas. Further, I was unsure on how to explicate my terms in the presentation and should have summarized the definitions and instead read directly off of the slides for both this and the background. This clearly set me back extensively and in some cases I clearly never came back from this. It took me too long to settle in and frankly didn't feel comfortable till the question section. This was clearly very noticeable, and I should have not been as nervous or have been able to hide it better.