

# Agencies and Due Process (1): What Triggers Due Process Protections

Administrative Law

Penn State Dickinson Law

January 27, 2026



# Due Process Clause(s): text

## 5th 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, 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 offense 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.



# Due Process Clause(s): text

## 14th amendment

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.



# Due process questions

## 1 When does due process apply?

- 1 What kinds of **decisions** trigger due process protections? (*Londoner, Bimetallic*)
- 2 What kinds of **interests** are protected by due process? (*McGrath, McElroy, Roth, Sindermann, Paul*)

## 2 How do we determine **how much** procedure is due? (*Goldberg, Eldridge*)

## 3 **When** must the process be provided? (*NACS, Phillips, General Electric*)

## 4 What kind of decision maker are you entitled to (*Cement Institute, Withrow*)?



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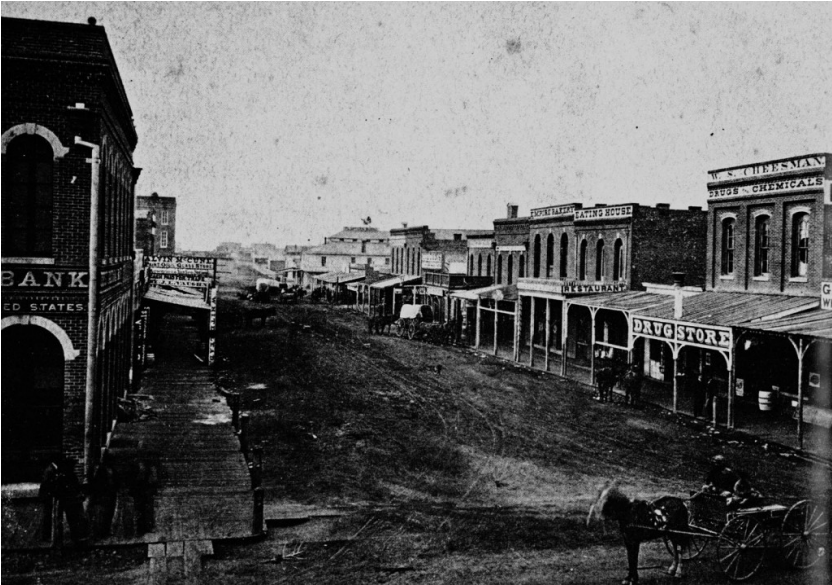


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# Denver, 1860s



State

# Denver, 1890s



# Denver, 1890s



# Londoner v. Denver

## Justice Moody:

[W]here the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.



# Bi-Metallic v. Board of Equalization

## Justice Holmes:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.



# Making sense of due process: Londoner and Bi-Metallic

	delegation to agency?	individual property?	hearing given?	DP violation?
Londoner	yes	yes	no	yes
Bi-Metallic	yes	yes	no	no



# What kinds of government actions trigger due process protections?

short answers

- Due process protections **don't** apply when legislatures pass laws.
- Due process protections **do** apply when courts decide cases.
- Whether due process protections apply against **agencies** depends, roughly, on **whether** they are acting **more like legislatures or courts**.



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# Adjudicative Facts versus Legislative Facts

## Adjudicative Facts

"[A]djudicative facts . . . usually answer the questions of who did what, where, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Facts related to an individual are intrinsically the kinds of facts that should not be resolved to the individual's detriment without giving the individual an opportunity to be heard with respect to those facts."

- Kenneth Culp Davis



# Adjudicative Facts versus Legislative Facts

## Legislative Facts

"Legislative facts do not describe the individual who is uniquely affected by the government action or that individual's past conduct. Rather, legislative facts are the general facts that help a government institution decide questions of law, policy, and discretion. An individual adversely affected by a government action is not uniquely well-positioned to contribute to the resolution of a dispute with respect to a legislative fact."

- Kenneth Culp Davis



# The ideal types of rulemaking and adjudication

<b>Rulemaking</b>	<b>Adjudication</b>
making new policy	applying existing policy
large numbers of people affected	individual interests in particular at stake
decision turns on public information	decision turns on private information of affected individual

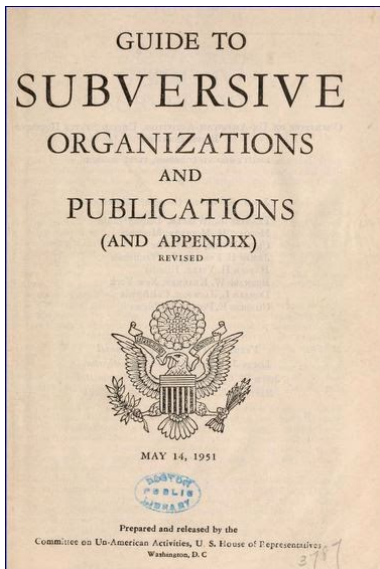


# Thinking through due process cases

- 1 What government action has been challenged?
- 2 What kind of loss did the person suffer as a result?
- 3 What kind of process did the government provide?
- 4 According to the court, was due process violated?
- 5 According to the court, why or why not?



# McGrath and the red scare



## Making sense of due process: McGrath and McElroy

	gov't action	process	DP violation?
McGrath	designation as communist	none	yes
McElroy	fired as security risk	none	no

# Agencies and Due Process (2): What Process is Due

Administrative Law

Penn State Dickinson Law

January 29, 2026



## Making sense of due process: Roth and Perry

	gov't action	hearing?	tenured?	DP violation?
Roth	K not renewed	no	no	no
Perry	K not renewed	no	no	maybe



## Wisconsin v. Constantineau



“Mrs. Norma Grace Constantineau of Horicon, Wis., Tuesday celebrates the U.S. Supreme Court ruling in her favor. Mrs. Constantineau, 39, a divorced mother of four, offers a beer toast after learning that the high court ruled as unconstitutional a Wisconsin law that permitted her name to be posted in local bars as an excessive drinker. Under the law she was prohibited from being served at the bars.” Des Moines Register, Jan. 20, 1971.



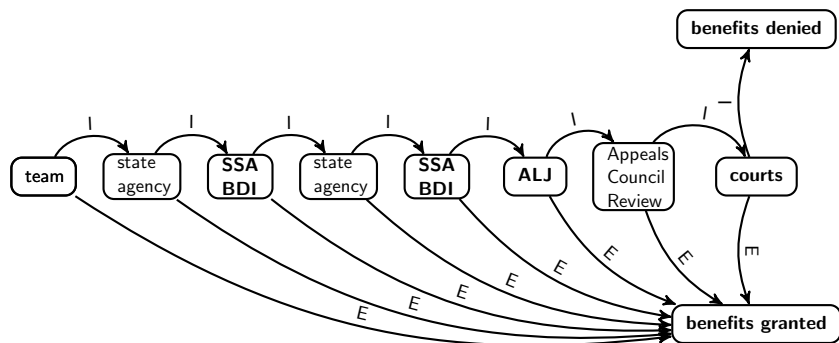
# Paul v. Davis

## Active Shoplifters



# Social Security Administration

## Disability Insurance Benefit Termination Process



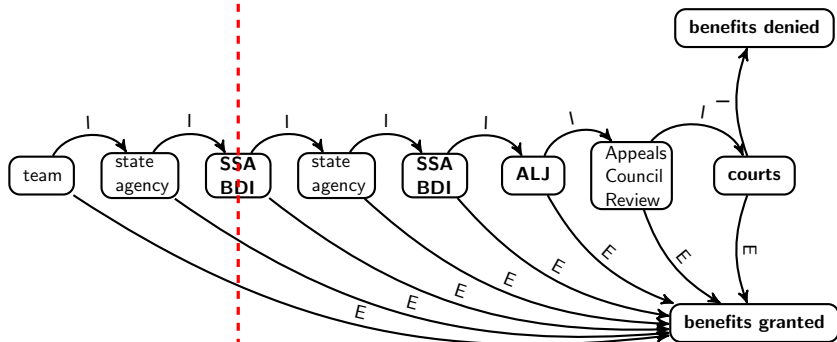
I: ineligible

E: eligible



# Social Security Administration

## Disability Insurance Benefit Termination Process



I: ineligible  
E: eligible



# Mathews v. Eldridge

How much process is due?

“[I]dentification 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 erroneous deprivation** of such interest through the procedures used, and **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 or substitute procedural requirements would entail.”



# the Mathews v. Eldridge due process calculator



# Agencies and Due Process (2): When Process Is Due; Right to an Unbiased Decisionmaker

Administrative Law

Penn State Dickinson Law

February 3, 2026



# Appeal and Reversal Rates of SSA Continuing Disability Review Decisions

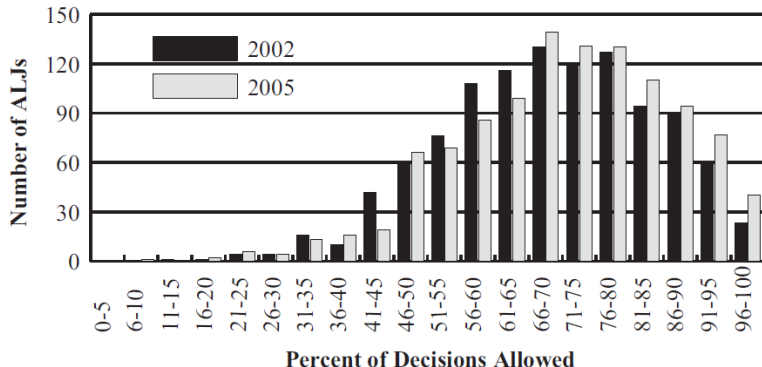
Calendar Year 1973		
	Amount	Percent of A.
A. Initial determinations that disability had ceased	33,595	100.
B. Adverse initial determinations accepted without challenge	24,843	73.9.
C. Requests for reconsiderations	8,752	26.1.
D. Reconsiderations favorable to worker	2,987	8.9(34.1 percent of C.)
E. Reconsiderations unfavorable to worker	5,765	17.2 (65.9 percent of C.).
F. Adverse reconsiderations accepted without challenge	3,887	11.6 (67.4 percent of E.).
G. Requests for evidentiary hearing by ALJ	1,878	5.6 (32.6 percent of E.).
H. ALJ decisions favorable to worker	1,101	3.3 (58.6 percent of G.).
I. ALJ decisions unfavorable to worker	777	2.3 (41.4 percent of G.).
J. Total adverse initial determinations subsequently reversed (D. plus H.)	4,088	12.2 (46.7 percent of C.).

Figures based on HEW's answers to interrogatories in *Green v. Weinberger*, No. 2219-73, D.D.C., set forth in part by *amicus* AFL-CIO (AFL-CIO Br. 1a-2a), and in part as an Appendix to this brief (App., *infra*, pp. 21-22).



# the dark secret of mass claim adjudication

**Chart 2** Frequency Distribution of ALJ Allowance Rates  
SSA Decisions, FY 2002 - 2005



(“Improving the Social Security Administration’s Hearing Process” PennState (2006)).





# General Electric v. Jackson

Superfund sites

