Due Process of Law: Crash Course Government and Politics #28

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Hi I'm Craig and this is Crash Course Government and Politics, and today we're going to try to define one of the trickiest terms in government and in the Constitution, and that is certiorari, no, we've already defined that.

Due process of law. On the most basic level, due process is what it means to have a fair trial, but, as we'll see, it's a lot more than what goes on in the courtroom. Due process can refer to any type of legal action, but we're mostly concerned with criminal procedure here, mainly because it's always the government that brings criminal charges.

Last time, we looked at search warrants and probable cause, and it's fair to say that this is the beginning of due process, but search and seizure is the Fourth Amendment; in this episode we're more concerned with amendments Five and Six. And, most important, we'll be explaining some of the aspects of the legal system that you've probably heard if you've ever watched a cop show. [Intro] Before we move forward, let's look at the Fourteenth Amendment. You'll remember from episode 23 that the civil liberties enshrined in the Bill of Rights initially applied only to the federal government; state governments could violate them until the cows came home, which in 1789 was how they measured time.

This changed with the Fourteenth Amendment, which allowed the Court to incorporate the rights against the states over time. This is especially important with criminal procedural rights and liberties because most of the time criminal cases are brought by state governments. So the part of the Fourteenth Amendment that applies here is "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." You can see that it refers directly to states and that it says they can't deprive person of life -- kill them – liberty – lock them up – or property – fine them and take away their stuff, without due process of law. But what does it mean? Serious fans of jurisprudence – and you know who you are – know that there are two concepts of due process floating around out there.

The first is substantive due process, which is a blanket prohibition on government infringing on fundamental liberties. If you think that this is kind of vague, you're not alone; the courts generally don't like to uphold claims based on substantive due process because then they'd have to define what it actually means. Procedural due process, on the other hand, is a different story. Under this doctrine, the court looks at whether the government acted properly in applying its power.

Court decisions established procedural limitations on law enforcement and adjudication. If the government followed these procedural rules, then in general the courts will say that they didn't violate your due process rights. But what procedures do they have to follow, and where do they come from? When it comes to Due Process, the Fifth Amendment to the Constitution does most of the heavy lifting.

Here's what it says: "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." Notice that the second to last clause mentions due process of law in language similar to what you would find in the 14th amendment – imagine that – and the rest of the Amendment basically explains a lot of what due process is. Let's go to the Thought Bubble. The first clause basically says that if you are charged with a crime, you are entitled to a grand jury that must look at the evidence and decide that there is enough to bring you to trial. If the grand jury decides that there is enough evidence, they issue an indictment, and this means that, unless you make a plea deal, you will have a trial – which almost never happens because people usually make plea deals. We don't have to talk much about cases in the land or naval forces; this just means that soldiers and sailors who commit crimes get tried in military courts, which becomes quite important when you are talking about potential terrorists, but that's for another day. The second protection this Amendment gives us is against double jeopardy – not the good Alex Trebek kind -- the bad kind where the state tries you for a crime, loses its case and then decides to try you again for the exact same crime.

What is "Unfair"? Legal types like to say that the government only gets one bite at the apple, because legal types love fruit. In case you are wondering, the double jeopardy clause only applies to convictions; if there is a mistrial in your case and as a result you are neither convicted nor acquitted, the state can bring you to trial again. The next clause, saying that you can't be compelled to be a witness against yourself, is the most important one, at least in the way we think about due process.

This is the protection against self-incrimination, and it's what we mean when we say that someone "pleads the Fifth." The idea that you can't be compelled to confess your own guilt is the basis of the famous first sentence in every arrest you ever see on

TV: "You have the right to remain silent, anything you say may be used against you in a court of law." This warning comes from the 1966 case Miranda v. Arizona. The last clause in the 5th Amendment, is the "just compensation" clause and it only means that if the state takes away your property, say to build a freeway through your front yard, they can do it but they have to pay you for it. This is the basis of what's called eminent domain, which is fascinating but I don't have time to go into it here. I'm a busy man.

Thanks, Thought Bubble. So you can see that the 5th amendment goes a long way toward protecting us from the state using its power to put us in jail arbitrarily. Just think for a minute about what the state could do to force confessions or to keep bringing you to trial until they get a conviction, and you can see how important these rights are. The fear that the state would use its legal muscle to take away our liberties was so great, that the writers of the Bill of Rights needed two amendments to cover it all – three if you count the 7th amendment which guarantees the right to a jury trial. If the Fifth Amendment provides some general procedural protections, then the Sixth Amendment is more specific.

Here's what it says: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." So this explains what a fair trial looks like. It must be speedy, which most states define in their constitutions but usually means that you can be held for 45 days before you have to have a trial, unless you waive this right in order to prepare a stronger defense. The trial should be public – no royal courts or star chambers – because transparency is supposed to make them work better. You have the right to a jury of your peers – not a jury of policemen or government officials or people who are basically likely to convict you – although again you can waive your right to a jury. And the trial is supposed to be where

you committed the crime, although this doesn't always apply exactly. You have the right to know what you are charged with – which makes total sense because if you didn't it would be pretty hard to put up a good defense, and you must be able to cross examine the witnesses brought against you. Probably most important, you have the right to an attorney, although according to the case Gideon v.

Wainwright, this only applies in felony cases, which I suppose makes sense because these are the ones that are likely, if you lose, to result in loss of liberty or even life. Because the legal process, as I hope you're beginning to see, is kind of complicated, you really, really need a lawyer if you're ever gonna get arrested and charged with a crime. That phrase, the right to an attorney, is also part of the Miranda warning, so this seems like a good place to try to explain the Miranda case. I'll try to be brief.

Stan made that pun. Terrible. Miranda was arrested on suspicion of kidnapping and rape after being identified in a police line up. The police questioned him for two hours at the end of which he confessed to the crime.

He was never told about his due process rights, specifically the protection against self-incrimination, which is what he did in his confession. The confession was the main evidence used to convict him, and Miranda was sentenced to 20-30 years in prison. He appealed – well, his lawyers did – claiming that his 5th amendment rights were violated. The court agreed and they went a bit further, ruling that you don't really have due process protections unless you know about them.

This is why the police, when they arrest you, have to tell you about your right to remain silent – so you don't incriminate yourself – and your right to an attorney, provided by the state if you can't afford one, again because if you have been arrested you're gonna need one. If you are going to take away one thing from this case, don't make it my wallet cause that will get you arrested. It should be this: If the police take you into custody or even want to ask you a few questions, you should ask them if you are under arrest. If they say no, then you can walk away from them.

If they say yes, the very next thing you should say is, I'd like to speak with a lawyer, and don't say anything else to them until you have a lawyer there. Well, you might be able to ask for coffee. The good cop might get it for you.

The bad cop might throw it in your face. So maybe don't ask for coffee. This may seem silly, especially if you haven't done anything wrong but it's important to keep the police acting the way they are supposed to act. Court cases like Miranda and Gideon help to define how agents of the state, in this case law enforcement and judicial officers must act so that they don't unjustly infringe on our liberties.

In the case of trials, our fundamental liberty – not being in jail – and maybe even our lives are at stake. Yes it's true that sometimes guilty people go free because the police or courts don't follow the rules scrupulously, and that can be a bummer. But when you consider the alternative, a government with the power to lock you up whenever they feel like it, juries that are biased in favor of conviction, and a system where the state can bring you to trial again and again until they get a conviction, I think you'll probably agree that it's better to have these procedural protections than not to have them. Thanks for watching.

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